REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29378/2017

In the matter between:

A[…] U[…] Applicant

and

C[…] J[…] U[…] Respondent

JUDGMENT

MATOJANE J

Introduction

[1] The applicant brought an urgent application against the respondent, his wife, in which he sought, amongst other things, an anti-dissipation order to interdict the respondent from utilising the proceeds from the sale of her immovable property in the manner of her choice, and further to have such funds frozen, pending the outcome of the divorce proceedings.

[2] The applicant also seeks costs *de bonis propriis* against the respondent's attorney, Mr Zimerman.

[3] The urgent application was brought before Van der Linde J. On 24 July 2019, Van der Linde J made an order which directed that the respondent's attorney (Taitz & Skikne Attorneys) retain an amount of R1 430 000 in an interest-bearing trust account regulated by the provisions of s 78(2)A of the Attorneys Act 53 of 1979 (or the equivalent section contained in the Legal Practice Act 28 of 2014). This amount was to be retained until the finalisation of the present proceedings. The amount of R1 430 000 relates to a portion of the proceeds from the sale of immovable property registered in the respondent's name.

[4] Taitz & Skikne Attorneys was further ordered to retain the funds without deductions of any nature whatsoever, and from whatever cause arising. The attorney would only be permitted to disburse the funds in terms of the written agreement signed by the applicant and the respondent, or in terms of an order of the court.

[5] The applicant and respondent were married to one another on 9 February 1992. The matrimonial property regime is governed by an antenuptial contract concluded between the parties and registered at the Deeds Registry. Under the antenuptial contract, the parties are married out of community of property subject to the accrual system in terms of Chapter 1 of the Matrimonial Property Act 88 of 1984 (the 'Matrimonial Property Act').

[6] During the course of the marriage, the parties resided in the matrimonial home. This property was registered in the name of the respondent, but was paid for by the applicant. It is the proceeds from the sale of this immovable property that is the subject of the anti-dissipation application. The matrimonial home is the single biggest asset in respondent's estate and the applicant contends that it is subject to his accrual claim. In this regard, the applicant claims to have disposed of the assets in his estate to maintain the joint household.

[7] During February 2017, the respondent issued divorce summons against the applicant. The respondent contends that insofar as the applicant may have a right to a share in the accrual in the respondent's estate, given the fact that the respondent's estate may show a higher accrual than in applicant's estate, the respondent prays for a forfeiture order in terms of the provisions of s 9 of the Act.

[8] The applicant has served and filed a plea and counterclaim to the respondent's action, alleging that the respondent would unduly benefit if an order is not made in terms of which the respondent forfeits the benefit of accrual sharing.

Legal framework

[9] A spouse married out of community of property in terms of an antenuptial contract with accrual has no vested rights in any of the assets, investments or properties registered in the name of the other spouse. The Matrimonial Property Act makes it clear that it is only on dissolution of the marriage that a spouse acquires a right to claim half of the net accrual of the other spouse's estate. Before that dissolution, a spouse who has an accrual in his or her estate that is smaller than the accrual in the other spouse's estate has only a contingent right to claim half of the accrual in the estate of the other spouse – not a vested right. The applicant's claim for a share in the accrual of his spouse will only become a vested right when the contingency materialises, which may include a dissolution of the marriage by divorce or by death.[1]

[10] An application by a spouse married out of community of property for an anti-dissipation interdict *pendente lite* to protect a contingent right of accrual will only be granted in the clearest of cases.[2] The applicant will have to demonstrate the following: a well-grounded apprehension of irreparable harm; that the respondent has no bona fide defence to the contingent right which is claimed; and that the

[1] Section 3 of the Matrimonial Property Act provides as follows:

(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

(2) Subject to the provisions of section 8(1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.

[2] See *RS v MS and Others* 2014 (2) SA 511 (GJ) para 18 where the Court stated that, 'It is perhaps apposite here to point out that, because of the Draconian nature, invasiveness and conceivably inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in the clearest of cases.'

respondent intends to defeat the claim or render it hollow by dissipating or secreting the assets.[3]

The applicant's case

[11] The applicant claims that he is entitled to a portion of the accrual in the respondent's estate for two reasons. Firstly, he contends that he is the spouse showing a lower accrual; alternatively, that he is the spouse with no accrual at all. Accordingly, the applicant claims that he is entitled to share in the difference in value between the accrual in his separate estate and the separate estate of the first respondent. Secondly, the applicant claims he has a right to a share in his spouse's accrual by virtue of the fact that he is entitled to a forfeiture, particularly in light of the extent of his contribution to the estate of the respondent.

[12] The applicant submits that he is entitled to protect this contingent right by applying to this Court for an interdict *pendente lite*, to prevent and prohibit the respondent from dissipating the value of her separate estate, in a manner prejudicial to the applicant's contingent right, prior to the determination of the divorce action.

[13] The applicant further states that he is solely responsible for the accrual in the respondent's estate and that he depleted his own estate to ensure that the respondent retained the matrimonial home. He states that he sold his assets to maintain the respondent and the children, and to ensure that the matrimonial home registered in the name of the respondent is preserved. He states that he is no longer possessed of any assets.

[14] He accuses the first respondent of refusing to contribute to the financial affairs of the family, conducting extramarital affairs, being an 'advantage-taker' who did not pull her weight during the marriage, and who has failed to honour the reciprocal duty of support which the respondent owes to the children and himself.

[15] He avers that the first respondent has no bona fide defence to his claim and that the respondent intends to defeat his claim or render it hollow by the dissipation of the proceeds from the sale of the immovable property.

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[3] *RS v MS and Others* 2014 (2) SA 511 (GJ) paras 17-18.

[16] The launching of this application was precipitated by the refusal of the first respondent to provide the applicant with an undertaking to the effect that the proceeds from the sale of the matrimonial home be retained by the conveyancer in trust, and only to be disbursed in accordance with the order of the court, alternatively by agreement between the applicant and the respondent.

[17] The crux of the matter, according to the applicant, is the following—

'I respectfully state to the above Honourable Court, regard being had to particularly the emphasised portions of the above paragraphs that it is clear and unambiguous that the respondent does indeed intend to dissipate the entire net proceeds from the sale of the matrimonial home for her own benefit. This contention is exacerbated by the disingenuous and furtive statements by the respondent to the effect that no undertakings will be given until the proceeds from the sale of the matrimonial home "*are available"* followed by the contention that I have no reason to believe that the nett proceeds from the sale of the matrimonial home will "*not to be spent properly*". Clearly if this is indeed the case, then the respondent ought simply to have given the undertaking as requested. The respondent cannot be believed'.

[18] The applicant contends that he has a well-grounded apprehension of irreparable harm, because the respondent has contended that once the funds are available, the respondent will unilaterally decide how the funds will be spent. The applicant stated that should he wait for the funds to be available and for the respondent to exercise a unilateral discretion, over which he has no control, then he would effectively have lost any right to urgently approach the court for the relief that he seeks in this application.

[19] The applicant claims that he has no alternative remedy available to him, should the respondent be permitted to unilaterally determine the fate of the funds derived from the sale of the matrimonial home. He stated that he would have effectively lost all rights which he may have to share in the accrual, given the fact that the matrimonial home is the respondent's only asset. Once the funds derived from the sale of the matrimonial home have been dissipated, the respondent has no other assets of any nature whatsoever which would enable the respondent to pay to him in the sum found to be due owing and payable by the divorce court.

[20] Lastly, he contends that the balance of convenience favours him, because the disposal of the funds derived from the sale of the matrimonial home which does not take cognizance of his rights will cause him irretrievable prejudice as the respondent will not have the financial wherewithal to make payment of the sum found to be lawfully due to him.

The respondent's case

[21] The respondent denies that she intends to dissipate the proceeds of the sale of the immovable property, as she requires the funds for day-to-day living and to support the two minor children born from the marriage. The respondent states that she would possibly invest in a cheaper property, or put the money on an investment to earn interest thereon in order to supplement her income. She alleges that she does not earn enough to maintain herself and the children, and that the applicant is not maintaining his family.

[22] The respondent disputes the applicant's contention that he has a contingent right which will become a vested right in due course. She submits that the applicant fails to take the Court into his confidence by declaring his actual asset value, and claims that certain of his assets have been hidden. She submitted that the issue of forfeiture might well be determined against the applicant, having regard to the allegations of substantial misconduct set out in detail in the answering affidavit.

[23] The respondent stated that she had contributed to the marriage equally by running the matrimonial home and raising four children. She submits that she has sacrificed her career and ability to earn, while the applicant continued with his career and made a fortune.

[24] The respondent avers that applicant put his needs before those of his children, and has reneged on his obligations towards his family. She alleges that he refuses to maintain them properly as a tactic in the divorce proceedings. The respondent states that the applicant refuses to disclose certain and material essential factors necessary in considering the value of his estate namely:

24.1 The applicant appears to have funds hidden overseas to the value of approximately R2 million;

24.2 The applicant has hidden his valuable watch collection which is estimated to be in excess R1million;

24.3 The applicant is still the owner of two businesses (of which he is the registered owner) and has not disclosed the value of such businesses. The respondent further states that the applicant has not disclosed the value of the assets of such businesses, and what happened to those businesses.

24.4 A valuable art collection belonging to the applicant was stolen in that it was removed and placed with the applicant's friend, Ashley Karro ('Karro');

24.5 That the applicant is involved in illegal and illicit dealings which includes the running of a prostitution service, for which he does not account;

24.6 The applicant does not disclose his actual earnings – which, according to the respondent, are substantially higher than what he has declared.

The applicant's reply

[25] In his replying affidavit, the applicant seeks an adverse order of costs against both the respondent and her attorney of record, Mr Zimerman, jointly and severally, on the attorney and client scale *de bonis propriis*. The applicant and his attorney contend that Mr Zimerman is giving the respondent bad legal advice, violating his duty of care, and advancing his own agenda. In paragraph 7.2 of the replying affidavit the applicant states:

'The answering affidavit is an emotional, hysterical and vitriolic body of diatribe which is mulcted with *inter alia*, inadmissible hearsay evidence, irrelevant evidence which does not contribute one way or the other to a decision been made in the application, scandalous matter which is worded to be abusive and defamatory and intentionally so, vexatious matter designed for maximum effect to annoy and embarrass and material of an argumentative and superfluous nature. The respondent's *modus operanti* in this regard is to disguise the fact that no defence is set out in the answering affidavit to the application and to attempt to side-track the main issues in the application.'

[26] The applicant states that the time and place to explain the fate of his watch collection will be during the divorce action and accordingly, the contentions by the respondent are irrelevant to the issues in the application. The applicant does not deny that he removed the art collection and placed them with Karro. He states that the artwork to which the respondent refers to was not stolen by him; it belonged to him and was never given as a gift to the respondent, which is what she contends.

Legal conclusions

[27] The respondent's case throughout the matter has been that she requires the funds for day-to-day living in order to support herself and the children born of the marriage. She requires the funds to be invested so that she can earn interest which would supplement her income. She is also considering purchasing a smaller property to reside in with her children, or to rent such accommodation with these funds. There is no suggestion that the respondent is involved in a scheme, actuated by bad faith, to dissipate the proceeds of the sale of the matrimonial home in order to deny the appellant his potential share of the accrual. The dictum of the Appellate Division *Knox D'Arcy Ltd and Others v Jamieson and Others*[4] is apposite in this case, wherein Grosskopf JA stated that:

'… [T]here would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency.'

[28] The Court further elaborated on the nature of an anti-dissipation interdict and stated:

'The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require

[4] *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 372H-I.

this restriction in cases where the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim….'[5]

[29] In my view, the applicant has failed to establish that he will suffer irreparable harm if the respondent is allowed to use the proceeds of the sale of her house to provide for her living expenses and support of their children. There is no evidence that the conduct of the respondent is actuated by fraudulent intent to prejudice applicant's claim or that the respondent was intentionally secreting assets with a view to frustrating a possible subsequent judgment against her.

[30] I am of the view that the balance of convenience favours the respondent. The order that the applicant has applied for in these proceedings is drastic, in that it would limit the respondent's right to use her money to provide for herself and the children in circumstances where an order for forfeiture of the benefits would prevent the parties from participating in the accrual of the other parties' estate.

Costs

[31] The applicant in the replying affidavit and heads of arguments seeks an order of costs *de bonis propriis* against the respondent's attorney of record. He contends that the answering affidavit is drafted in an unnecessarily objectionable and abusive manner, containing defamatory allegations of fraud, lurid conduct and other incidences of illegality without proof. The applicants complains that a series of WhatsApp messages between the applicant and respondent were unnecessarily annexed to the answering affidavit.

[32] The relationship between the parties is acrimonious and there is much mud-slinging in the affidavits. Mr Zimerman points out in his Heads of Argument, that the mud-slinging commenced in the founding affidavit with scathing allegations against his client, which required and warranted a response, and he was obliged to advise his client to set out the true facts in relation to the issues in detail in the answering affidavit.

[5] Ibid at 372F-H.

[33] In *Multi-Links Telecommunications v Africa Prepaid Services Nigeria Ltd*,[6] the principles relating to costs *de bonis propriis* were set out as follows:

'Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket. It is quite correct, as was submitted, that the obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to a deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.

…

It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not however per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care.'

[34] Taking into account the particular circumstances of this case, I am not persuaded that the conduct of the respondent's attorney complained of is grossly unreasonable and negligent to warrant a punitive costs order.

In the result, I make the following order:

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[6] *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others, Telkom SA SOC Ltd and Another v Blue Label Telecoms Ltd and Others* 2014 (3) SA 265 (GP) paras 35-36.

1. The application is dismissed with costs.

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K E MATOJANE

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	14 August 2019
Date of judgment:	26 September 2019

Appearances:

Applicant's Attorneys:	Mr Howard S Woolf
Counsel for the Respondent:	Mr R Zimerman
Respondent's Attorneys:	Taitz & Skikne
Counsel for Mr Zimerman:	Mr L Marks
Attorney for Mr Zimerman:	Larry Marks Attorneys