REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
6/10/2021

Case No.: 2021/43686

In the matter between:

E.I.N	Applicant
and	
W.J.N	First Respondent
MUNICIPAL EMPLOYEE GRATUITY FUND	Second Respondent
REGISTRAR OF DEEDS, JOHANNESBURG	Third Respondent

JUDGMENT

This judgment was prepared and authored by Acting Judge Gilbert. It is handed down electronically by circulation to the parties or their legal representatives by email and uploading it to the electronic file of this matter on CaseLines.

Gilbert AJ:

1. The applicant and the first respondent are married in community of property and are in the midst of divorce proceedings. The applicant seeks urgent interim interdictory relief pending the finalisation of the divorce proceedings restraining her husband from alienating, encumbering, ceding, disposing of or selling any of the immovable, movable, incorporeal and corporeal assets in the joint estate, including from claiming, withdrawing or receiving any monies due or accruing to him from his pension fund/interests held with the second respondent and from alienating or from in any manner whatsoever encumbering immovable property registered in his name situated in Bruma without her knowledge and prior written consent.

2. There is no dispute that the interim relief relates to property falling in the joint estate, including the immovable property registered in the first respondent's name (which the parties describe as the matrimonial home) and such interest or benefit he may have in his pension fund. It is therefore also common cause between the parties that section 15 of the Matrimonial Property Act, 1984 ("the Act") applies and so that the applicant's consent as the spouse married in community of property to the first respondent is required to alienate, mortgage or otherwise deal in certain of the assets in the joint estate. Indeed, the first respondent's primary grounds of opposition is that because the applicant's consent is required in terms of section 15 of the Act, it is, to use the words of the first respondent's attorney (who argued the matter before me), legally impossible for the transactions that the applicant fears to take place and therefore that the relief sought by the applicant is unnecessary, and therefore cannot, or should not, be granted.

3. The applicant's case is that notwithstanding that her consent is required in terms of section 15 of the Act, there exists a sufficiently well-grounded apprehension that the first respondent will engage in a transaction that requires her consent, to her irreparable prejudice.

4. The describes in her founding affidavit why she so apprehends. Before turning to those averments, it is to be appreciated that the first respondent has elected not to file an answering affidavit but only to file a notice in terms of Uniform Rule 6(5)(d)(iii)

raising a question of law. This election has important consequences, all of which are trite.

5. The first is that the averments in the founding affidavit are to be taken as established facts, as there is no competing factual version.[1] Accordingly, I must accept established as fact those averments made by the applicant in her founding affidavit.

6. A second consequence is that it is impermissible for a respondent to seek to advance a factual version under the guise of a rule 6(5)(d)(iii) notice rather than under oath in an answering affidavit. In the present instance, the first respondent in his notice contends for lack of urgency and that the relief sought is incompetent because the Act, amongst other statutes, prevents any of the feared transactions from taking place.

7. But the first respondent goes further and seeks to make use of the notice to assert what withdrawals can be made from pension funds, that he does not intend to sell the Bruma property, that he does not intend to withdraw any pension fund benefits and to complain about he contends is an illegality committed by the applicant in herself previously selling immovable property which formed part of the joint estate. The applicant goes so far as to attach documents to his notice in support of the latter.

8. Of course, this is impermissible as the notice is not a place for these kinds of assertions, which, if the first respondent wished to make them, should have been made under oath. I will therefore disregard them.

9. The applicant filed a supplementary founding affidavit seeking to deal with the averments in the notice. The applicant sought leave to file this supplementary affidavit. In my view, the supplementary affidavit takes the matter no further, particularly once I disregard those averments in the notice that do not belong there.

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[1] *Boxer Superstores Mthatha and another v Mbenya* 2007 (5) SA 450 (SCA) at 452F-G.

10. I can now turn to what the applicant says in her founding affidavit as to why the relief sought remains necessary notwithstanding the protection afforded to her in section 15 of the Act.

11. The applicant describes the first respondent's historical conduct in dealing with assets falling within the joint estate notwithstanding that her consent was required and not obtained.

12. The applicant describes that she and the first respondent were married on 14 December 2017 and that at the inception of the marriage she agreed with the first respondent that a mortgage bond could be registered over the immovable property situated in Bruma for an amount of R500,000.00. This property had been acquired by the first respondent before his marriage and therefore the title deeds continue to reflect him as the unmarried registered owner of the property. The applicant continues that contrary to her consent, the first respondent attended to registered a bond of R1 161 000.00 over the Bruma property. The applicant attaches the mortgage bond, which reflects the first respondent, with an unmarried status, having bonded the property in the sum of R1 161 000.00.

13. As stated, the applicant's version in the founding affidavit must be accepted as factually correct in the absence of an answering affidavit. There is nothing so inherently implausible in the applicant's version that it must be rejected. It must therefore be accepted that notwithstanding that the applicant's consent to register a bond limited to R500 000.00, the first respondent nevertheless went ahead and attended to register the mortgage bond encumbering the Bruma property for a far greater amount. What this demonstrates is that although the parties were already married in community of property and therefore the applicant's consent was required in terms of section 15(2)(a) for the Bruma property to be mortgaged, the property was nevertheless encumbered contrary to her consent.

14. This also demonstrates that the first respondent's primary submission that it is "legally impossible" to bring about a transaction contrary to section 15 is incorrect. It is also not difficult to see how this happens. As the property was acquired by the first respondent before he was married, the records of the Deeds Office continue to reflect that unmarried status after he marries. When transactions take place in

relation to the property, it may be that neither the Registrar of Deeds nor any third party who has recourse to the records of the Deeds Office will know that the property now falls within a joint estate. Of course, the conveyancer attending to the conveyancing should make the necessary enquiries, but this does not mean that it is impossible for the transaction to take place, and to be registered in the Deeds Office. Accept as I must the applicant's factual version that she only consented to a mortgage bond of R500 000.00, whatever the conveyancer's duties may have been, the bond that was registered was for a greater amount and demonstrates that the first respondent did act contrary to section 15(2).

15. The first respondent's attorney argued that the public records of the Deeds Office show that he is now married in community of property, and so there is no prospect of a transaction taking place contrary to section 15 and to the applicant's prejudice. To this end, the first respondent's attorney referred to a "*Lexis WinDeed*" report annexed to the applicant's founding affidavit, which on one particular page shows that the first respondent is married in community of property. But the same report also shows earlier that the first respondent is unmarried. It is also not clear to me from where the compiler of this report, LexisNexis, sources this information, and whether it is exclusively from the records of the Deeds Office. Although an antenuptial contract is required to be lodged with the Registrar of Deeds, no evidence was led that there is a particular document that is lodged at a matter of course with the Registrar of Deeds when a person is married in community of property, and that would result in the first respondent's marital status being updated in the records of the Deeds Office.

16. In the circumstances, I cannot accept the first respondent's submission that it is legally impossible to sell or encumber the Bruma property without the applicant's consent. The first respondent's previous registration of a mortgage bond in excess of the amount to which the applicant consented is proof of that.

17. It also does not follow that an alienation or encumbrance of the Bruma property if alienated or encumbered without the applicant's consent will be void. To the contrary, section 15(9) provides that when a spouse enters into a transaction with a person contrary to the provisions of subsections 15(2) or (3) and that other person does not know and cannot reasonably know that the transaction is being

entered into contrary to those provisions, it is deemed that the transaction concerned has been entered into with the consent required in terms of the subsections. There is therefore a real risk that should the Bruma property or any other asset to which sections 15(2) and (3) apply be alienated or otherwise dealt with by the first respondent without the necessary consent from the applicant, and should the *bona fide* third party not know and could not reasonably have known that the transaction was entered into without that consent, that the transaction will nonetheless be valid.

18. The first respondent's attorney submits that it is not possible for a third person to *bona fide* transact in relation to the Bruma property as he or she would reasonably know or should reasonably know that the applicant's consent is required because the records of the Deeds Office shows that the first respondent is married in community of property to the applicant. But, as I have already set out, it is not clear at all that this submission is well-founded, particularly in the absence of evidence of a person with the appropriate expertise or personal knowledge as to what information is available to the public at the Deeds Office that would reasonably inform a third party that that parties are married in community of property.

19. The applicant in her founding affidavit makes the point that her attorneys have formally sought of the conveyancers who attended to register the mortgage bond to furnish the relevant conveyancing documents to see what in fact the first respondent told the conveyancers. Those conveyancers have declined to release the documents without the first respondent's consent, and the first respondent has avoided giving that consent. Although it is within the first respondent's power to be transparent on this issue, he has resisted doing so. This fortifies the applicant's apprehension that if interim interdictory relief is not granted, she may be irreparably prejudiced.

20. The applicant's cause for concern goes further. The applicant describes how during August 2021 she chanced upon an advertisement advertising the Bruma property for sale and that when she contacted the estate agent, she was informed by the estate agent that the first respondent had informed the estate agent that he was already divorced. Again, in the absence of an answering affidavit, this averment must be accepted as correct.

21. The applicant goes further and describes a further more recent attempt by the first respondent to market and sell the Bruma property without her involvement. The applicant avers that the first respondent informed a different estate agent that a divorce settlement agreement had already been finalised and that as the property is registered only in his name, he retains the property as his exclusive property. Again, absent a contrary version, the applicant's version must be accepted. Notably this misrepresentation by the first respondent to the estate agent is after undertakings were sought by the applicant on 3 September 2021 in relation to the Bruma property in order to protect her position.

22. The applicant has established three uncontested incidents which demonstrate that the first respondent has no regard for the constraints placed upon him in terms of section 15 of the Act in dealing with property that forms part of the joint estate. Notwithstanding the first respondent's attorney's submissions that there is no prospect that a transaction can take place contrary to section 15 and that the relief sought by the applicant is unnecessary and is not urgent, the uncontested evidence shows that this already took place in relation to the registering of the excessive mortgage bond and that the first respondent persists in his conduct in seeking to deal with the Bruma property without the applicant's necessary consent.

23. This is fortified by the first respondent's erstwhile attorney's response on 10 September 2021 to the applicant's attorneys request for undertakings. The response is predicated upon the basis that the first respondent can engage in selling the Bruma property provided that the proceeds thereof are held by a conveyancer in trust. But this misses the point. The first respondent cannot sell the property in the first place without the applicant's consent and it is not simply a matter of the sale proceeds, if sold, being retained in trust. For example, the applicant has a real and substantial interest in the purchase price for which the property is sold, and the terms of that sale. The response is further demonstrative of a mindset on the part of the first respondent that he is entitled to deal in the Bruma property without the applicant's consent, albeit that the proceeds are to be retained in trust. The first respondent's present attorney, perhaps realising this difficulty, in argument described this response as superfluous as it was, he submitted, legally impossible in any event

for a sale to take place contrary to the constraints in section 15 of the Act. I have already rejected this submission.

24. I also find that the applicant, in her uncontested version, has established the same well-grounded apprehension in relation to the first respondent dealing with his pension fund benefits or interests without her consent as required in terms of section 15(3)(b)(i) of the Act. Similarly, the first respondent's attorney sought to assert that it would be impossible for the first respondent to deal in his pension interests or benefits without the consent of the applicant because the applicant's attorneys had written to the second respondent's fund administrator seeking that a note be made that the first respondent be precluded from withdrawing his benefit to the detriment of the applicant and to which the fund administrator responded. But that response is ambivalent, which simply acknowledges receipt of the request, noting its contents. That the consent required in terms of section 15(3)(b)(i) is oral rather than written, also adds to the reasonable apprehension. The applicant has demonstrated that the respondent has no qualms in misrepresenting his marital status, such as estate agents.

25. On 26 August, 3 September and 13 September 2021 the applicant asked for undertakings from the first respondent that he would not deal in his pension benefits/ interests without her consent but no such undertaking was forthcoming. Such partial (and unsatisfactory) undertaking as was forthcoming, on 10 September 2021, was limited to the Bruma property, and avoided dealing with the pension benefits / interests.

26. I am persuaded that there is a well-grounded apprehension that the first respondent may conduct himself to the applicant's prejudice in relation to the joint estate's assets and that a sufficient case of urgency has been established. I also am persuaded that the truncation by the applicant of the usual periods for the exchange of affidavits and the enrolment of the application for hearing on the Tuesday chosen by the applicant is commensurate with the degree of urgency.

27. What remains to be considered is whether the applicant has established the requirements for interim relief.

28. The requirements for an ordinary interim interdict are well-known:

28.1. the existence of a *prima facie* right, although open to some doubt;[2]

28.2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

28.3. the balance of convenience favours the granting of the interdict;

28.4. the absence of a suitable alternative remedy.[3]

29. There is no dispute that the assets in respect of which the interim relief is sought are those falling within the joint estate. Accordingly, the applicant and the first respondent are co-owners of the assets falling within the joint estate, including the immovable property. It follows that the applicant is entitled to protect her proprietary right as co-owner in the joint estate's assets, including the immovable property.

30. While the position in relation to first respondent's pension benefits or interests may be more nuanced as they may have not yet vested (an aspect that the urgency of the matter does not permit to be more closely examined), the applicant nevertheless has a sufficient interest in relation to her entitlement to share in those pension benefits and interests that the *prima facie* right she seeks to protect is of a quasi-proprietary nature.

31. As the nature of the applicant's right that she seeks to protect is of a proprietary and quasi-proprietary nature, as the case may be, it is unnecessary for the applicant to demonstrate irreparable harm if the interim relief is not granted (as such harm is presumed) or that there is no other satisfactory remedy.[4]

32. In any event, as described above, the applicant has demonstrated a well-grounded apprehension of irreparable harm if the interim relief is not granted. So too is there no suitable alternative remedy. As already discussed above, it does not follow that if an impugned transaction occurs, that transaction can be set aside as against a *bona fide* third party.

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[2] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

[3] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[4] Erasmus *Superior Court Practice* RS 13, 2020, D6-21, 22 and the authorities there cited.

33. Section 15(9)(b) of the Act provides that when a spouse enters into a transaction with a person contrary to the provisions of subsections 15(2) or of the Act, and that spouse knows or ought reasonably to know that he probably will not obtain the required consent, and the joint estate suffers a loss as a result thereof, the appropriate adjustment can be made in favour of the other spouse upon the division of the joint estate. Thus remedy is cold comfort if there is insufficient property in the joint estate to make such adjustment when division is ordered. The applicant states under oath that the immovable property, together with the benefits / interest in the pension fund, are the major assets in the joint estate. If the immovable property is disposed of, particularly at a low market value or if the proceeds are dissipated by the first respondent, there may be insufficient assets in the joint estate to make the appropriate adjustment.

34. Jacqueline Heaton in *The Law of Divorce and Dissolution of Life Partnerships in South Africa*[5] writes that one of the requirements for an interdict is that a suitable alternative remedy must not be available and that for this reason the innocent spouse will have to prove that his or her right to adjustment on divorce in terms of section 15(9)(b) of the Act does not afford a suitable alternative remedy, for example, because the joint estate would be depleted if the threatened alienation took place. In my view, this may overlook that it is unnecessary to demonstrate a suitable alternative remedy when the right that the applicant seeks to protect by way of the interim interdict is of a proprietary or quasi-proprietary nature, as in the present instance case.

35. Insofar as the remaining requirement whether the balance of convenience lies in favour of granting the interim interdict, the first respondent is in any event not to act in a manner contrary to section 15(2) and (3) of the Act. The first respondent has not filed an answering affidavit setting out what prejudice he may suffer should he be restrained in the manner sought by the applicant.

36. The applicant has accordingly established the requirements for an interim interdict.

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[5] Juta (2014) at pp 110-111.

37. The form of relief sought by the applicant, particularly in prayer 2.1 of the notice of motion is not confined to assets that fall within the ambit of section 15(2) and (3). The restrictions upon a spouse in dealing with joint estate assets as provided for sections 15(2) and 15(3) do not relate to all and any assets of the joint estate. I do not understand the case as made out in the founding affidavit to be directed at all the assets of the joint estate, but rather at those assets where consent is required under section 15, including the Bruma property and the pension benefits / interests. This is to some extent borne out by the reference in the relief in prayers 2.1 and 2.2 to section 15 of the Act. I therefore intend limiting the interim relief to those assets falling within the ambit of sections 15(2) and (3).

38. The applicant seeks in prayer 2.4 of the notice of motion that the first respondent is interdicted and restrained from receiving any proceeds from the sale of the immovable property without the knowledge and prior written consent of the applicant. As stated above, this risk should not arise once the relief is granted as the immovable property cannot be sold in the first instance. Nonetheless, I will accede to granting this relief, as it is not altogether clear whether or not a sale may already have been concluded in the meanwhile in respect of the immovable property. Although the first respondent in his rule 6(5)(d)(iii) notice says that he does not intend to sell the property, this is not said under oath.

39. The question of costs remains. The applicant seeks costs on an attorney and client scale by reason *inter alia* of the first respondent's refusal to give suitable undertakings. In my discretion, a costs order on the ordinary scale will suffice. The first respondent's attorney's submissions that relief was not required as there is sufficient protection in section 15 of the Act was not entirely without merit and especially where there is at least some academic support for the view that the protections afforded by section 15 may constitute a suitable alternative remedy that might preclude the grant of interim relief. Although I have expressed my reservations on that aspect, it nonetheless exists. The applicant by launching the proceedings has also brought the first respondent to court, and so his opposition to the proceedings must not be viewed from an overly jaundiced perspective.

40. The following order is made:

40.1. The first respondent is interdicted and restrained:

40.1.1. from alienating, encumbering, ceding, disposing or selling any immovable, movable, incorporeal and corporeal assets of the joint estate that falls within the ambit of sections 15(2) and 15(3) of the Matrimonial Property Act, 1984;

40.1.2. from claiming, withdrawing or receiving any monies due or accruing to him from his pension fund/interests held with the second respondent;

40.1.3. from alienating or in any manner whatsoever encumbering the immovable property described as Sectional Title Unit 17, Scheme Number [....], SS B[....] Close, Bruma 24, City of Johannesburg, Gauteng ("the immovable property"), without the knowledge and prior written consent of the applicant;

40.1.4. from receiving any proceeds from the sale of the immovable property without the knowledge and prior written consent of the applicant.

40.2. The second respondent is directed to forthwith note the interdict against, and in respect of, the first respondent's pension interest/fund/benefits so as to reflect and give effect to the restrictions provided for in this order.

40.3. The third respondent is directed to forthwith note the interdict against the immovable property so as to reflect and give effect to the restrictions provided for in this order.

40.4. The first respondent is directed, to the extent that same may be required, to provide his full and timely co-operation for purposes of noting the interdict against the immovable property, failing which the Sheriff of the court in whose jurisdiction the immovable property is located is directed and authorised to provide such cooperation in the first respondent's place and stead.

40.5. The interdicts granted in terms of those order are to remain in force until final judgment has been granted in the divorce action proceedings or until the parties agree otherwise.

40.6. The first respondent is to pay the costs of the application.

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B M Gilbert
Acting Judge of the High Court

Date of hearing:	5 October 2021
Date of judgment:	6 October 2021
Counsel for the Applicant:	Ms A Saldulker
Instructed by:	Coetzee Martinuzzi Attorneys Bedfordview
Counsel for the First Respondent:	Mr L E Thobejane (Attorney)
Instructed by:	Botha Massyn & Thobejane Attorneys Kempton Park