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

CASE NO: 2021/56843

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

20/10/2022

In the matter between:

N [....] , M [....] M [....] 1

Applicant

And

N [....] , A [....] M [....] 3

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application for relief in respect of a house belonging to a Tribal Authority and occupied by third parties with the consent of the Authority, none of whom are joined to the application, and application for delivery of a motor vehicle falling within the joint estate of the applicant and the respondent. Application dismissed.

Order

[1] In this matter I make the following order:

1. *The late filing of the answering affidavit is condoned;*
2. *The application is dismissed;*
3. *Each party is to pay his or her own costs.*

[2] The reasons for the order follow below.

INTRODUCTION

[3] The parties are married in community of property. The applicant vacated the rented property shared by the couple (not the property with which the application is concerned) during August 2021 and she instructed attorneys to institute divorce proceedings. The applicant now seeks an order in the following terms:

- 1 To order the First Respondent to allow the Applicant access to their matrimonial home, situated at House [...] M [...] 4 V [...]
- 2 To order the First Respondent to allow the Applicant reasonable access and enjoyment to the property forming part of the joint estate pending the divorce proceedings, more specifically access and enjoyment of the motor vehicle forming part of the joint estate (A White Toyota Fortuner 2016 model 2.7 vvt bearing registration number [...]);
- 3 Interdicting and restraining the first Respondent from:

- 3.1. Selling the immovable property situated at **House** [...] M [...] 4 V [...]
 - 3.2. Negotiate and entering into any form of agreement which relates to the affairs of the above-mentioned property including renting it out without the applicant's consent;
 - 3.3. Preventing the Applicant from accessing the above-mentioned immovable property
- 4 Ordering the first Respondent to pay the cost of this application on an attorney and client scale.
 - 5 Futher and/or alternative relief.

Condonation application

[4] The answering affidavit was filed out of time. It was four months late. The respondent explains that he was always in contact with his attorney and never intended to abandon his opposition. The appointment of new counsel expedited the matter and it is argued that there was no prejudice to the applicant.

[5] In order for the matter to be ventilated fully without incurring even more costs for the parties condonation is hereby granted. Nothing will be achieved by dismissing the application on the basis that the answering affidavit was out of time as the present matrimonial dispute will not be resolved. If the matter were to be dismissed on that basis, the costs would likely have followed the result and looking at all the facts it is appropriate in my view to make no order as to costs to mark the court's displeasure at the lateness of the answering affidavit, which degree of lateness is prejudicial to the administration of justice.

The merits of the application

[6] The applicant informs the court that the parties acquired immovable property situate at [...] A [...] Street, A [...] 1 and [...] M [...] 5 H [...] Estate, Dendor ext [...], Polokwane, and that the Tribal Court allocated the property in Makgofe to the

parties. She relies on a letter under the signature of Headman Makoakga of the Moletjie Local Government, Limpopo Province dated 26 September 2014. No English translation is provided. In the letter the names of D N [...] (the respondent's brother), M M [...] 6 , M N [...] (the respondent), and K M [...] 7 are mentioned. These are the children of the respondent's mother, the late Mrs M [...] 8 C [...] N [...].

[7] The applicant resides at the A [...] 1 property. The respondent resides in Brackendowns.

[8] They are also the owners of movable assets, including the Toyota vehicle referred to in the notice of motion and a second vehicle. In November 2021 her attorneys demanded access to the Makgofe property and to the Toyota. The letter elicited a response from the respondent. He expressed the view that the Makgofe property does not belong to the respondent and himself, but is a family home of the children of his¹ mother, the late Mrs N [...]. He accused the applicant of leaving with most of the movable assets.

[9] The respondent states that the applicant is the owner of her own family home at [...] B [...] R [...], Polokwane; the applicant denies this.

[10] The Makgofe property was allocated to the respondent's brother, Mr D [...] P [...] N [...], who lives at the property and who makes use of the movables in the house. His name appears on a certificate issued by the Moletsi Tribal Authority dated 9 July 2021.

[11] The Makgofe property is not the matrimonial home nor was it ever the property of the parties to the application. To the knowledge of the applicant the respondent's siblings have a direct and substantial interest in the Makgofe property yet neither the siblings nor the Moletsi Tribal Authority are joined in the application.

[12] The applicant is not entitled to an order granting her access to the house occupied by the respondent's brother, nor to the other relief sought in respect of the

¹ The respondent incorrectly refers to her as the applicant's mother but the obvious error is corrected by the applicant in the replying affidavit.

house. The house is not an asset in the joint estate and is not the matrimonial home, and third parties not before court would have an interest in any litigation.

[13] With regard to the Toyota, the respondent says that he has always been the primary user of the vehicle. The respondent mainly made use of public transport. When she left the matrimonial home the car remained in his possession and he makes the monthly payments. The patrimonial effects of the separation and the divorce will have to be dealt with but on the evidence now available no case is made out to compel the respondent to hand over the Toyota to the applicant. The vehicle is in the respondent's possession and there is no reason to deprive him from possession.

[14] For these reasons I make the order in paragraph 1.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **20 October 2022**

ATTORNEY FOR THE APPLICANT: M E NETSHIPISE

INSTRUCTED BY: MUDAU & NETSHIPISE ATTORNEYS

COUNSEL FOR RESPONDENTS: C GRANT

INSTRUCTED BY: G J BRITS ATTORNEYS

DATE OF THE HEARING: 18 October 2022

DATE OF ORDER: 20 October 2022

DATE OF JUDGMENT: 20 October 2022