IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 24227/2021

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
Date: 5 December 2022

In the matter between:

BRADLEY BRETT LIEBMAN APPLICANT

and

ATHOLL DAVID VICTOR LIEBMAN RESPONDENT

In re:

ATHOLL DAVID VICTOR LIEBMAN APPLICANT

and

BRADLEY BRETT LIEBMAN RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for security for costs. The applicant in this application is the respondent in the main application, a sequestration application. The parties are referred to as they are cited in this application. The respondent, Mr. A.D.V. Liebman, is the applicant's father.

[2] Rule 47(1) of the Uniform Rules of Court provides as follows:

> 'A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which security is claimed, and the amount demanded.'

Background

[3] The parties were engaged in acrimonious litigation during 2019. The claim underpinning the sequestration application represents an amount due and owing to

the respondent, by the applicant, in terms of costs orders granted in favour of the respondent. The applicant also obtained costs orders against the respondent.

[4] Through the costs orders granted in his favour, the respondent established a claim in terms of s 9(1), read with s 10 of the Insolvency Act 24 of 1936, against the applicant. In the answering affidavit filed in the sequestration application, the applicant admits his indebtedness to the respondent in the amount of R752 955.85. The applicant, however, denies that he is factually insolvent, or that he has committed an act of insolvency. He claims that the sequestration is used for ulterior purposes and as an act *in terrorem*. The applicant states that if the respondent is afraid that he will not be paid, he can attach the applicant's right, title, and interest in his claims against the residue in trusts and companies that are in the process of being wound up. The parties built up a substantial property portfolio over the years that is partly owned by companies and partly owned by trusts. The applicant is a director of the property-owing companies and a beneficiary of all the property-owning trusts.

[5] The following are relevant for determining whether the respondent is an *incola* or *peregrinus*:

i. Both the applicant and the respondent are citizens of the United States of America ('the USA');

ii. The respondent expressed his desire to retire and to move to the USA after his wife passed away in June 2018, and the parties entered into negotiations regarding his exit from the Liebman Group of Companies and the various property-owning trusts. The respondent believed that he would receive more advanced and better medical treatment in the USA;

iii. The respondent has an interest in an immovable property, a single residence, in the USA described as [....] C[....] Avenue, C[....]2, CA [....] ('the USA property') in July 2021 in that the immovable property is co-owned by the K&J Trust of which he and his daughter are the trustees;

iv. The respondent returned to South Africa in 2018 to facilitate the winding up of the companies and trusts. He left again for the USA during March 2020 and only returned fleetingly when the application for security was heard in February 2022. He left again for the USA shortly thereafter;

v. Prior to leaving South Africa in 2020, the respondent shipped the furniture and movable assets from his flat in Johannesburg, inclusive of his favourite left-hand drive Toyota Supra motor vehicle, to the USA. The respondent contends that the furniture and assets belong to his daughter as it was bequeathed to her;

vi. In the sequestration application, the respondent states that he is 'currently residing at [....] 18th Street, S[....], C[....]3, United States of America, [....].'

vii. The respondent avers that he traveled to the USA seeking medical treatment, but the COVID-19 pandemic caused a delay in his medical treatment. He has been advised to delay his return to South Africa. He considers himself to be domiciled in South Africa and intends to return to South Africa. He has a South African bank account with ABSA, he is still a member of Discovery Health Medical Aid, and he has a Vodacom Cell phone contract. The respondent avers that he pays the levies and insurance in respect of a Plettenberg Bay immovable property owned by the JSRM Trust and that he renewed his Fidelity Fund Certificate with the Estate Agency Board of South Africa for 2021;

viii. The respondent is 85 years old and not in good health. Both his daughters, with whom he has a close relationship, reside in the United States.

Applicable legal principles

[6] Section 1 of the Domicile Act, 3 of 1992, provides as follows:

> '**1. Domicile of choice.**—(1) Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status.
>
> (2) A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.'

[7] Section 5 of the Act provides that the acquisition or loss of a person's domicile shall be determined on a balance of probabilities.

[8] The court stated in *Holland v Holland*[1] that domicile is an objective factual relation between a person and the particular territorial jurisdictional area or country. In *Chinatex Oriental Trading Company v Erskine,*[2] Chetty J explained that a domicile of choice can be acquired by sufficing two elements (i) physical presence (an objective fact) and (ii) an intention to remain indefinitely (a subjective test). As far as the first requirement, the objective test, is concerned, Chetty J stated with reference to *Johnson v Johnson*[3] that a person's physical presence requires more than a 'visit or sojourn' to the country. The longer the person is settled at a particular place, the

---

[1] 1973 (1) SA 897 (T) at 903C-D.

[2] [1998] JOL 2697 (C) at 8.

[3] 1931 AD 391 at 441.

greater the likelihood of a court regarding the person as a resident there for the purposes of domicile. The second element, *animus manendi*, 'does not require an intention to remain permanently. The person must display a state of mind which is consistent with the intention of remaining indefinitely which intention need not be irrevocable in order to show that a domicile of choice has been acquired.' In *Eilon v Eilon*[4] the court held that a continuing emotional attachment to one's country of origin is insufficient to negative a domicile of choice.

Discussion

[9] It is a sad reality that courts often become the battlefields where family feuds play out. The acrimony and bitterness between the applicant-son and his respondent-father seep through every paragraph of the affidavits filed. Both parties are motivated by their respective 'truths', and as a result, an elderly father seeks to sequestrate his son over a debt of R752 955.85. The question that this court needs to answer is whether the father is an *incola* or *peregrinus* of South Africa, and if found to be a *peregrinus*, whether the court should order him to furnish security for the costs of the sequestration application. In *NH obo ERH v Schindlers Lifts SA (Pty) Ltd*,[5] Vahed J explained that an *incola* does not have a right which entitles him or her as a matter of course to the furnishing of security for costs by a *peregrinus*. The court has a broad judicial discretion in that regard, and the fact that one party is a *peregrinus* will 'feature heavily in the exercise of that discretion.' The discretion must, as all discretions, be exercised judicially taking into account all the relevant facts, as well as considerations of equity and fairness to both parties,[6] against the

---

[4] 1965 (1) SA 703 (A) at 705A.

[5] (7914/2018) [2020] ZAKZDHC 41 (1 September 2020).

[6] *International Trade Administration Commission and another v Carte Blanche Marketing* CC *and another: in Re Carte Blanche Marketing* CC *and another v International Trade Administration Commission and others* [2019] ZAGPPHC 33 at par [7].

constitutional backdrop that everybody has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.[7]

[10] The common cause facts in this matter are that the respondent is an elderly man who suffers from various health conditions and who relocated to the USA, amongst others, to obtain quality medical care. Both his daughters reside in the USA. His only son, with whom he has no relationship, resides in South Africa. The respondent acquired the right to reside in a private dwelling in the USA, albeit through a trust. Nothing in the answering affidavit suggests that the respondent has any support system in South Africa. His only remaining links with the country, except for the business interests that are the proverbial bone of contention between himself and his son, is a bank account from which the medical aid premiums are deducted, his Discovery medical aid, and a cell phone contract. The respondent's claim that he intends to move back to South Africa to reside here permanently is not borne out by the facts. The respondent's affidavit does not disclose material issues in which there is a *bona fide* dispute of fact that is capable of being decided only after viva voce evidence has been heard.

[11] The respondent shipped the contents of his flat in Johannesburg to the USA before he left the country. He claims in the answering affidavit that the movable assets were bequeathed to his daughter Jacqueline. The excerpt of the Will attached to the answering affidavit, however, reflects that the right title and interest to the said Johannesburg flat was bequeathed to the JJLG Trust subject to a life-long usufruct in favour of the respondent, with all the deceased's movable assets being bequeathed to the respondent. The respondent traveled to South Africa, with a one-way flight ticket just before the sequestration application was heard but left the country again soon after the sequestration application was postponed pending the finalisation of the current application. He does not explain the remaining extent or duration of the medical treatment that he needs to undergo before he will return permanently or how

[7] Section 34, Constitution of South Africa, 1996.

his medical needs will be sufficiently tended to in South Africa. The respondent's emotional and commercial ties with South Africa are not overlooked, but his prolonged physical absence from the country within the factual context as set out above, substantiates a finding, despite his unsubstantiated protestation, that he left South Africa with the intention to stay in the USA indefinitely. He is found to be a *peregrinus.*

[12] The respondent does not own any unbonded immovable property in South Africa. He did not even attempt to make out a case that he has sufficient assets in the country to pay the legal costs if the sequestration application is dismissed with costs.

[13] No reasons exist to deviate from the position that costs follow success. I do not find appropriate facts substantiating a punitive costs order.

ORDER

In the result, the following order is granted:

1. The respondent, the applicant in the sequestration application, is directed to furnish the applicant, the respondent in the sequestration application, with security for the costs of the sequestration application;

2. The registrar of this court is to determine the form, amount, and manner of the security for the costs and communicate same to both parties in the prescribed manner;

3. In the event that the respondent has not furnished the applicant with the security for costs in the amount, form, and manner determined by the registrar within

15 (fifteen) days of the registrar's decision, the applicant is authorised to approach the court on the same papers, duly supplemented, for an order that the proceedings in the sequestration application are stayed until this order is complied with, or to apply for the dismissal of the sequestration application;'

4. The respondent is to pay the costs of the application.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Adv. M. D. Silver
Instructed by:	David Kotzen Attorneys
For the respondent:	Adv. J. L. Kaplan
With:	Adv. E. Dreyer
Instructed by:	Michael B Notelovitz Attorneys
Date of the hearing:	7 November 2022
Date of judgment:	5 December 2022