

**IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION**

**CASE NO: 12166/07
12691/07**

In the matter between:

D[...] G[...]

Applicant

and

R[...] B[...] G[...]

1st Respondent

A[...] S[...] P[...]

2nd Respondent

Judgment delivered on this 8th day of November 2007

NDITA, J:

[1] This is an application for the attachment and retention of the proceeds from a sale of immovable property situate at erf 1[...] Somerset West, Cape Town, Western Cape, due to the respondent for the payment of future maintenance claims. The Court granted an *interim* order authorizing the Sheriff to attach and seize the net proceeds on 11 September 2007, pending the return date. Today is the return date.

FACTUAL BACKGROUND

[2] The applicant and the first respondent were divorced on 7 April 2000. When the parties were divorced, they had one child, a daughter, now 11 years old and the applicant was awarded sole custody. They concluded a Settlement Agreement in terms of which the respondent agreed to pay a sum of R1500-00 per month towards the maintenance of the minor child. In addition to the maintenance, the respondent was ordered to pay all expenses reasonably incurred in respect of the child at primary, secondary and tertiary levels of education.

[3] After the divorce decree was issued, the parties decided during 2001 to live together again. At that time, the respondent was employed as the National Operations Manager at HRP Distribution Services and earning a salary of R43 000-00 per month. According to the applicant, the respondent was a dedicated father, who provided for the minor child's every need during this period. However, both the applicant and the respondent were also drug users. The applicant has sought help with her addiction and, according to Dr Dion Nortjie she seems committed to a programme of recovery and the prognosis is good. It is not disputed that, towards the end of 2006, the respondent's drug addiction was adversely affecting his family life and in October 2006 he resigned his position at HRT Distribution Services. He has not worked since.

[4] The respondent became negligent in his handling of the family's financial affairs to the extent that, from September to November 2006, he had spent an amount in excess of R1 000 000-00 (one million rand). The money was obtained from the sale of his shares. The applicant effected the necessary payments and admits that the respondent was up to date with his maintenance payments at the time the proceedings were instituted, but is at present in arrears pending this action for the months of September, October and November 2007. There is a dispute of facts with regard as to how much money the applicant spent from these proceeds. Such dispute is however immaterial for the purposes of the present application.

[5] The respondent offers to pay a sum of R100 000-00 upfront and furthermore to increase the monthly maintenance payments from R1 500-00 to R3 000-00 per month. He is currently in a drug rehabilitation programme as part of the bail conditions in criminal proceedings at the Somerset West magistrate's court. Presently he is unemployed and has no source of income. Neither does he have proper accommodation.

APPLICABLE LAW

[6] Sec 28(2) of the Constitution of the Republic of South Africa provides that the child's best interests are of paramount importance in all matters concerning the child. Similarly, the Maintenance Act 99 of 1998 has also taken significant steps in putting mechanisms in place to ensure the recovery of maintenance from recalcitrant parents.

[7] In **Mngadi v Beacon Sweets and Chocolates Provident Fund and Others** 2004 (5) SA 388 at 396E-397A Nicholson J observed as follows:

“The law has never shrunk from interdicting a debtor from dissipating funds to thwart the rights of creditors. Such cases are decided because the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so. In general an applicant needs to 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, except possibly in exceptional cases.

In those cases the effect of the interdict is to prevent the respondent from freely dealing with this own property to which the applicant lays no claim. I interpolate to state that in casu the children are creditors, though only

*admittedly insofar as each month's maintenance is due and payable, but have a spes in the lump sum in the future. Justice may require 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. See **Knox D'Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (A) ([1996] 3 All SA 669) at 372C (SA); **Mcitiki and Another v Maweni** 1913 CPD 648 at 687; **Bricktec (Pty) Ltd v Pantland** 1977 (2) SA 489 at 493 E-G.*

It seems to me that it is no great leap for the courts to extend the last mentioned principles to cover safeguarding a payout in the hands of a fund, such as the first respondent herein. The provisions of the Pension Funds Act apply to that situation – that is the payment of future maintenance – with full force more especially s 37A(l) and the proviso thereof which protects dependants and ‘entitles the fund to pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine’.”

[8] It has been firmly established that, where the future maintenance claims of a minor child are threatened, the courts do not hesitate to issue orders attaching lump sum pension fund benefits. (See **Magewu v Zozo and Others** 2004 (4) SA 578; **Soller v Maintenance Magistrate Wynberg and Others** 2006 (2) SA 66; **Burger v Burger and Another** 2006 (4) SA 414.) This is so whether or not the recalcitrant parent is in arrears.

APPLICATION OF THE LAW OF THE FACTS

[9] Mr. Le Roux submitted, on behalf of the respondent, that he is not unwilling to contribute to the maintenance of the minor child. Further more, if one looks at the context of the respondent's life, it becomes clear that he has

been a successful and relatively wealthy man who has been employed at a high-income level with many executive responsibilities. But the question that begs to be answered is, what is the worth of that success and wealth if it is inconsistent and mismanaged to the extent that the paramount interests of the minor child are compromised. The conduct of recklessly spending just over a million rand in a period of 3 months flies in the face of the respondent being a dedicated parent. Clearly, this court is entitled to intervene in order to secure the interest of the minor child. Similarly, the fact that he is attempting to rehabilitate himself and has plans of starting up a business does not provide sufficient justifications for the refusal in respect of the relief sought.

[10] One of the submissions made by Mr. Le Roux is that maintenance of minor children is a reciprocal duty of both parents and it would be a violation of the respondent's right to dignity to attach the amount in toto without due regard to the fact that the respondent is also entitled to his livelihood.

[11] It is necessary to reiterate that sec 28(2) of the Constitution elevates the interests of the child to paramouncy. The effect therefore is that even if this provision were to be carefully balanced against the right to dignity, the right of the child takes centre stage.

THE RELIEF IN THE PRESENT MATTER

[12] The *interim* order issued by HJ Erasmus J is as follows:

“1. *Applicant is permitted to bring this application on an urgent basis and condoning the Applicant's non-compliance with the Rules of Court insofar as time periods and the giving of notice of this application is concerned.*

2. *A rule nisi is issued calling upon Respondent to show cause, if any, on Monday 15 October 2007 at 10h00 or as soon thereafter as the matter*

may be heard why an order in the following terms should not be made final:

2.1 The Sheriff is authorized and directed to attach and seize the full net proceeds due to the Respondent from the sale of the property known as erf 1[...], Somerset west, (also known as 1[...] Y[...] W[...] Close, Bayview Heights, Somerset West).

3. The Sheriff is authorized and directed to attach and seize the sale proceeds referred to in 2.1 above from whomsoever will attend to the registration of transfer of the said property from the Respondent to the purchaser of the said property.

4. The Sherriff is authorized and directed to hold the funds so attached and seized in Trust in an interest bearing account pending the final outcome of :-

4.1 the Applicant's application to the Somerset West Maintenance Court for a determination of the amount of monthly maintenance to be paid by Respondent in respect of the Respondent's minor child J[...] R[...] G[...];

4.2 The Applicant's application to this Court for the appointment of a Receiver who will be authorized and directed:-

4.2.1 to take possession and control of the funds held in Trust by the Sheriff;

4.2.2 to retain in Trust such amount as would equal the total of:-

4.2.2.1 the amount ordered by the Somerset West Maintenance

Court (together with an annual escalation thereof equal to the annual increase in the Consumer Price Index) for such period until the minor child, J[...] R[...] G[...], attains the age of majority;

4.2.2.2 an amount to be determined by the Receiver which would equal the anticipated educational expenses payable by the Respondent until the said minor child, J[...] R[...] G[...], completes her secondary education;

4.2.2.3 an amount to be determined by the Receiver which would in the discretion of the Receiver be adequate to cover the reasonable and necessary medical expenses of the minor child, J[...] R[...] G[...], until the said minor child attains the age of majority.

4.2.3 to pay to the Applicant on a monthly basis from the funds held by him in Trust such monthly maintenance amount as shall be determined by the Somerset West Maintenance Court and any other amounts payable by the Respondent in terms of the order of the Witwatersrand Local Division of the High Court dated 7 April 2000 under case number 887/2000 until such time as the funds held in Trust are exhausted or until the said minor child attains the age of majority;

4.2.4 to recover his fees from the funds held by him in trust;

4.2.5 to pay to the Respondent any amount not disbursed by him in terms of 4.2.2.1, 4.2.2.2, 4.2.2.3, 4.2.3 and 4.2.4 above.

5. The Respondent is to pay the costs of this application.

6. The Applicant is to issue the application referred to in 4.1 and 4.2 above within thirty (30) days of this order.

7. *The Respondent is permitted to anticipate the return date of this application by giving Applicant twenty four (24) hours notice.*

8. *Service of this order shall be effected on the Respondent by the Sheriff.*

9. *Paragraphs 2.1, 3, 4 and 5 above shall operate as an interim order pending the return day of the rule nisi."*

[13] It gives the minor child the protection she requires against the squandering of the money by the first respondent. The minor child is 11 years old and currently in grade 6. Should she pass, she is expected to be in High School in the next two years. The present balance of the amount is R650 000-00. This is a substantial amount.

[14] It is not disputed that the respondent has neither accommodation nor means to earn a living. It would cause him substantial injustice if this fact was not taken into account. It is therefore necessary to amend it. In the result I issue the following order.

[15] The rule *nisi* issued by this court on 11 September 2007 is confirmed but amended as follows:

1. The Sheriff is directed and authorized to seize an amount of R400 000-00 due to the respondent from the sale of the property.
2. The first respondent is ordered to pay the costs.

NDITA, J