IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, GEORGE)

CASE NO: 15209/16

In the matter between:

TRACY COUGHLAN Applicant

And

IWAN OTTO KOSSAR 1st Respondent

SANLAM PRIVATE WEALTH LIMITED 2nd Respondent

Coram: Yekiso J
Dates of Hearing: 18 November 2016
Judgment Date: 25 November 2016

JUDGMENT

YEKISO, J

[1] On 16 September 2016 and, on *ex parte* basis, the applicant instituted proceedings out of this court, on notice of motion, for the relief set out in paragraphs 1,

2, 3 and 4 of the notice of motion. The matter was enrolled for hearing on that same day. On 19 September 2016 the matter served before Veldhuizen J. After hearing the application, Veldhuizen J issued a *Rule Nisi* substantially along the lines of the relief sought in the notice of motion, returnable on Monday, 24 October 2016. On 24 October 2016 the matter served before Dolamo J. On 26 October 2016 Dolamo J extended the *Rule Nisi* to 18 November 2016 simultaneously directing the applicant to file her replying affidavit, if any, by no later than 7 November 2016. The essence of the relief sought is an order that the second respondent retains monies held in the first respondent's name pending an action to be instituted by the applicant against the first applicant for arrear and future maintenance.

[2] On 18 November 2016 the matter served before me. After hearing argument I reserved judgment, simultaneously advising the parties that my judgment in the matter will be handed down during the course of the week commencing on 21 November 2016. In the paragraphs which follow, is my judgment in the matter.

THE PARTIES

[3] The applicant is an adult female person residing at No […] [..] Road, Heatherlands, George. The first respondent is an adult male person and a professional diver by trade. He states in his answering affidavit that from the beginning of September 2016 he, together with his partner, have been residing at […], Le Petit Morne, La Gaulette, Mauritius. The second respondent is a private investment company having its registdered office at Vinyeard Office Estate, 199 Jip de Jager Drive, Welgemoed, Cape Town. It has a branch office at 2 Church Street, Church Corner Building, George.

BACKGROUND

[4] The applicant and the first respondent were involved in a relationship for a period of more than 10 years. Two children were born of this relationship, being E., who is 12 years of age, and M., who is 9 years of age. The parties subsequently terminated their relationship amicably. In so doing, the parties concluded a written agreement which they both signed on 30 August 2012. The first respondent's obligation towards maintenance of the minor children is set out in paragraph 2 of that agreement. As at the time of the institution of these proceedings, according to the applicant, the first respondent was in arrears with his maintenance payments in an amount of R29,726-57. At the time of the termination of their relationship the first respondent owned a property in George, being erf 5[…], George and commonly known as […] J[…] Street, George. After termination of the parties' relationship the applicant was mandated by the first respondent to manage the lease of the property and the collection of rentals arising therefrom.

[5] On 23 February 2015 the first respondent addressed an email to the applicant wherein the first respondent, amongst other things, informed the applicant that he had instructed an estate agent to place the property on the market and that, henceforth, the applicant's mandate to manage the lease thereof and the collection of rentals would be terminated. The mandate was to terminate at the end of February 2015. The property was subsequently sold during March 2016 at a purchase consideration in an amount of R850,000-00. Early during 2016 a paternity dispute arose between the applicant and the first respondent with regards to the paternity of the minor children. This was

resolved by way of a DNA-blood analysis. The results of the DNA-blood analysis confirmed the first respondent's paternity of the minor children.

[6] On the same date that the first respondent informed the applicant that he was putting his property on the market, the first respondent informed the applicant that circumstances in the diving industry where the first respondent was employed at the time had changed and that this would have an effect on his ability to pay maintenance and, possibly, termination of his employment. The respondent annexes, as annexure "IOK", a document entitled "Settlement Agreement and Discharge of All Claims" suggesting that, as at 27 April 2016, termination of his employment with his then employers was being negotiated. On or about 3 June 2016 onwards there was exchange of email communication between the applicant's and the first respondent's attorneys with a view to negotiate a reduction in maintenance due to the first respondent's imminent loss of employment.

[7] The first respondent has funds invested with Sanlam Private Wealth Limited, the second respondent in these proceedings. During the course of 2016 the first respondent had instructed his investment consultant with the second respondent to transfer $50 000-00 of his invested funds to a different account. The reason for the transfer was triggered by financial advice the first respondent had received. This was based on possible instability in the markets due to the then looming elections both in South Africa and the United States of America. That transfer, so the first respondent states in his answering affidavit, was purely for investment reasons.

[8] On 27 July 2016 the applicant obtained information from an undisclosed source that the first respondent was in the process of moving investments he holds with the second respondent offshore and that the first respondent planned to put such offshore investment on his current partner's name. The applicant received this information from a person whose identity she promised not to reveal. She states in her founding affidavit that she has full confidence in the reliability of the person and the information received.

[9] Based on that information the applicant instituted proceedings out of the maintenance court, George on *ex parte* basis, for a *rule nisi* returnable on 8 September 2016 calling on the first respondent to show cause why an order in the following terms should not be confirmed and made final:

[9.1.] That the second respondent be ordered to retain all funds of the first respondent invested with it, or under its control, of an amount which is to be calculated actuarially for the future maintenance of the minor children, and for the amount of R15,370-26 in terms of the maintenance order issued in terms of the Maintenance Act, 99 of 1988.

[9.2.] That the second respondent be ordered to pay the aforementioned amount to the applicant, and the actuarially calculated balance to the third respondent who ostensibly would have been the Master of the High Court, Cape Town.

[9.3.] That the second respondent pays the money to the Master's guardian fund, who will manage the funds and pay to the applicant a monthly amount for the benefit of the children's future maintenance, as actuarially calculated, for a period till the minor children reach the age of majority.

[9.4.] That the first respondent, or his estate, shall be entitled to be paid from the sum retained in the Master's guardian fund any balance that remains once the children would no longer be in need of support.

[9.5.] That pending the return date of the *rule nisi* the second respondent be interdicted from paying any funds of the first respondent under its control or invested with it, to the first respondent.

[10] The first respondent opposed confirmation of the *rule nisi.* In the course of that litigation it was ascertained that the agreement concluded between the applicant and the first respondent on 30 August 2012 terminating their relationship was not made an order of court as anticipated by the parties. Once the applicant became aware of this fact, and on 1 September 2016, the applicant issued yet another application, on *ex parte* basis and enrolled for hearing on 2 September 2016 wherein the applicant sought an order that the agreement concluded between the applicant and the first respondent on 30 August 2012 be made an order of court. That order was not granted but instead same was postponed to 21 September 2016. On 15 September 2016, subsequent to the launching of the second application, the first respondent's attorneys of record, addressed a letter to the applicant's attorneys, per email, making the following request:

> "Geliewe op 'n dringende basis te bevestig wat u kliënt van voorneme is om te doen op 21 September 2016 en verlang ons ook dat kennis aan ons kantore verleen word, alvorens u kantore enige ander forum nader."

Despite this request there was instituted the current proceedings, once again on *ex parte* basis, wherein the applicant sought the form of relief as set out in the notice of

motion. As has already been pointed out that relief, in the form of a *rule nisi,* was granted by Veldhuizen J on 19 September 2016.

[11] In paragraph 22 of his answering affidavit the first respondent discloses his financial position. In that paragraph the first respondent states that, apart from his investment with Sanlam, which is diversified but has a total worth of R3 807 542-44, he has the following accounts which include their balances: Nedbank cheque account – R18 258-25; Nedbank investment 5% - R181 577-94; Lloyds Isle of Man - £11 500-00; Mauritian Regular Savings in MUR Rs 70 457-11 (joint account with partner); and Mauritian Current Account in GBP £1 993-82. It is the first respondent's investment with the second respondent that the applicant seeks this court to attach as security for the future maintenance of the parties' minor children.

EVALUATION

[12] The effect of the relief that the applicant seeks is that this court should order the second respondent to retain the first respondent's funds and investments held by it and that the first respondent be restrained from dealing with such funds and investments pending an action to be instituted by the applicant. Thus, what the applicant seeks this court to do is to restrain the first respondent from dealing with his assets pending outcome of an action which the applicant intend to institute against him. Thus, the relief the applicant seeks is nothing short of an anti-dissipation order.

[13] The approach in the determination of the kind of relief the applicant seeks in these proceedings is set out in several authorities. *Knox D'Arcy Limited & others v Jamieson & others* 1996 (4) SA 348 (A) at 372F-I is authority for the approach to be

adopted in the determination of the question as to whether an anti-dissipation order is the appropriate relief in the given set of circumstances. In that authority Grosskopf JA made the following observation in the determination of that question:

> "The question which arises from this approach is whether an applicant need 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. 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 this restriction in cases where the respondent is shown to be acting *male fide* with the intent of preventing execution in respect of the applicant's claims. However, there 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."

[14] The matter before me was triggered by the information the applicant obtained, on the basis of hearsay, that the first respondent was in the process of moving an investment he holds with the second respondent offshore and to invest it offshore in the name of his girlfriend. This, so the applicant states in her founding affidavit, is structured to take away all security for payment of future maintenance for the minor children which she dearly needs to make ends meet and maintain their lifestyle. But the first respondent denies this. Whilst admitting that he had instructed the second respondent to transfer $50 000-00 to a different account, he denies that he had intended to transfer his entire investment with the second respondent offshore; to close

the account with the second respondent or that he intended to put the offshore investment into the name of his partner. He states that the reason for the transfer was triggered by the financial advice he received. This related to possible instability in the markets due to the looming elections both in South Africa and the USA and suggestions that he reinvest portions of his investments in US dollars. The whole transaction was purely for investment purposes and was not an endeavour to transfer his entire investment with the second respondent offshore.

[15] *Mr Joubert,* in argument before me and in seeking to persuade me to grant the relief sought, relies on the judgment of Hlophe JP in *Pumla Viola Magewu v Tamsanqa Cosmos Zozo & two others,* CPD case number 7821/2003 (unreported). That authority related to a respondent who was a chronic defaulter in discharging his maintenance obligations. There had, as for an example, previously been attempts to secure maintenance payments by way of an emoluments attachment order. The circumstances of the matter before me are different. There is no evidence to suggest that the first respondent is a chronic defaulter in his maintenance obligation. The only evidence that there is, apart from the alleged arrears in an amount of R29 726-57, is that all that the first respondent seeks is an amicable settlement towards reduction of maintenance payable necessitated by loss of employment.

[16] The requirements for an interim interdict are trite and these are:

a) *prima facie* right, though open to some doubt;

b) an apprehension of irreparable harm if the interim relief is not granted and the final relief is granted in due course;

c) the balance of convenience in favour of the applicant; and

d) the absence of a satisfactory alternative remedy.

[17] In the instance of this matter the applicant resides in South Africa and the first respondent resides in Mauritius. It is a matter of judicial knowledge that both South Africa and Mauritius are countries existing in a civilised world where reciprocal enforcement of maintenance orders is not beyond question. That is an alternative remedy available to the applicant should a need arise to enforce the first respondent's maintenance obligations. Moreover, it has not been shown, in the circumstances of this matter, that the first respondent is acting *mala fide* with the intention of evading his maintenance obligation. The only evidence that there is, which triggered this application is information, based on hearsay, that the first respondent was about to transfer his funds and investment held by the second respondent offshore and invest such funds in investments in the name of his partner. But the first respondent denies this. His denial does not seem to be farfetched warranting the rejection thereof out of hand. I cannot, in the circumstances of this matter, grant the relief the applicant seeks on the basis of evidence I consider to be of doubtful quantum. All these factors taken into account, and considered against the facts as set out by the first respondent in his answering affidavit, this application ought to fail.

[18] In the result I make the following order:

(1) The application is dismissed with costs.

(2) The *Rule Nisi* issued by Veldhuizen J on 19 September 2016, and extended by Dolamo J on 26 October 2016, is discharged.

N J Yekiso
Judge of the High Court

Counsel for Applicant:	Adv LJ Joubert, George
Attorneys for Applicant:	Cilliers Odendaal, George
Counsel for First Respondent	Adv A Schmidt, George
Attorney for First Respondent:	Millers Inc, George

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25/11/2016 – YEKISO J

(1) The application is dismissed with costs.
(2) The Rule Nisi issued by Veldhuizen J on 19 September 2016, and extended by Dolamo J on 26 October 2016, is discharged.