The name of this matter has been anonymised to preserve confidentiality.

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 9797/2019

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 20 June 2019
Judgment: 24 June 2019

In the matter between:

IF	First Applicant
YF	Second Applicant
and	
BBD	First Respondent
BCF	Second Respondent
CFA	Third Respondent
ABC (PTY) LTD	Fourth Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicants seek an order interdicting the third respondent (a firm of attorneys) from making payment of the funds held by it in trust to the second respondent pending the final determination of maintenance proceedings between the applicants and the second respondent. The object of the

interdict is the preservation of the funds to satisfy the judgment sounding in money that the applicants expect they will then be in a position to execute against the second respondent's property.

[2] The funds in issue may for the purposes of these proceedings be characterised as being of two parts.

[3] The first part, in the sum of R300 000, comprises an amount held in trust by the third respondent pursuant to the terms of a settlement agreement in litigation in this court under case no. 13288/2015 between the second respondent and the first respondent in the current matter. The first and second respondents were previously married to each other, and are the parents of the applicants in the current matter. Clause 2.3 of the settlement agreement provided that the third respondent firm of attorneys would hold the amount of R300 000 in trust on behalf of the second respondent pending the finalisation of maintenance proceedings between the first and second respondents. The clear intention of the clause was that the funds would be available, if necessary, to satisfy any unpaid maintenance that might be due in favour in favour of the first respondent in respect of the maintenance of the applicants upon the final determination of such proceedings. The applicants in the current matter were minors at the time, and the pending maintenance proceedings related in part to the second respondent's obligations in respect of their support. The terms of the divorce order granted dissolving the bonds of marriage between the first and second applicants obliged the second respondent to contribute towards the maintenance of the applicants until they completed their tertiary education or became earlier self-supporting. The applicants have not completed their tertiary education and are not yet fully

self-supporting. Having attained the age of majority, they have become parties in their own right to seeking performance by the second respondent of the obligations that are sought to be exacted in terms of the pending maintenance proceedings.

[4] The second part comprises of funds held in trust by the third respondent attorneys that are the proceeds from the winding up of the business of a certain company (cited as the fourth respondent in these proceedings) in which both the first and second respondents held an interest. At the time that the first and second respondent entered into the aforementioned settlement agreement in respect of the litigation in case no. 13288/2015, the company had certain outstanding contingent liabilities. It was then uncertain whether the incidence of those contingencies would ultimately require the first and second respondents to make a pro rata personal contribution towards the settlement of the company's liabilities, or whether there would instead be an amount available for distribution to them. As matters eventuated, an amount became available for distribution. And it is the part of it to which the second respondent is entitled that the applicants seek to have preserved in the third respondent attorneys' trust account so that it will be available to be appropriated in satisfaction of the judgment they expect to be able to enforce against the second respondent upon the finalisation of the maintenance proceedings.

[5] The basis for the interdictory relief insofar as it goes to the first part of the funds held in trust by the third respondent is contractual. It is founded on clause 2.3 of the settlement agreement. It is clear, notwithstanding that they did not say so in terms, that the applicants' case is that the clause in question

evinced in part a contract for their benefit, and that by instituting these proceedings they have demonstrated their acceptance of the benefit.

[6] It is unnecessary for the purposes of this judgment to go into the detail of the pending maintenance proceedings. It suffices to say that thus far they have resulted in judgments for the payment of maintenance in respect of herself and the applicants being obtained by the first respondent against the second respondent in the German courts. The applicants and the first respondent have for several years now been resident in Germany. The second respondent, who is a German citizen but resides locally, did not actively participate in the proceedings in Germany and he maintains that the awards obtained against him there are unsustainable for the purposes of enforcement against him in this country. The parties were at one with each other that the German courts' maintenance orders would become enforceable against the second respondent only once proceedings in respect of them had been completed in this country under the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963, and that that stage has not yet been reached.

[7] The second respondent, however, gave to understand in his answering affidavit that he considered that the extent of his obligations in respect of the maintenance of the applicants had been determined in terms of a decision made by a local attorney who had been appointed as a facilitator for the purposes of clause 2.6 of the consent paper concluded between the first and second respondents when they were divorced. The terms of the consent paper were made an order of court in case no. 2413/10 on 24 March 2010. Clause 2.6 thereof provided:

> The parents [i.e. the first and second respondents] agree that in the event that any dispute should arise between them regarding any aspect of maintenance in respect of the children [i.e. the applicants] as provided for above, such dispute shall be referred to a facilitator who shall be appointed and shall deal with the issues in the manner set out in paragraphs 1.5 to 1.9 above.

[8] The substance of the second respondent's contention in this regard was that the maintenance proceedings had been finalised by the facilitator, and that pursuant to the facilitator's determination he was in point of fact not indebted to the applicants. There was no merit in the point the second respondent sought to take in this regard, and his counsel, advisedly, did not seek to defend it at the hearing.

[9] It would not have been competent for the court that granted the divorce and incorporated the terms of the consent paper as part of the order to purport to devolve the function of determining any future dispute between the parties concerning a variation of the then agreed maintenance obligations on a private party such as the facilitator. That is because the function is one that by its nature can be fulfilled only by a court of competent jurisdiction in the exercise of an inalienable authority. It is in any event clear upon a proper contextual reading of the consent paper that the parties thereto, and by extension the judge who made its terms an order of court, did not intend clause 2.6 to have the import now contended for by the second respondent. It is evident that the envisaged role of the facilitator was merely to act, if necessary, as a mediator in respect of disputes between the parties in respect of the implementation of the maintenance agreement incorporated in the

consent paper. The facilitator's designated role did not extend to that of an adjudicator in lieu of the maintenance courts.

[10] In the circumstances I am satisfied, and the second respondent's counsel did not try to argue to the contrary, that the sum of R300 000 still falls to be retained in the name of the second respondent in the third respondent attorneys' trust account pending finalisation of the maintenance proceedings under the Reciprocal Enforcement of Maintenance Orders Act.

[11] As to the second part of the funds that the applicants seek to preserve, it is clear, as their counsel acknowledged, that the nature of the relief sought is (for want of a better name) an anti-dissipatory order of the sort comprehended under the common law; in other words, broadly speaking, the local equivalent of the type of freezing order that English lawyers refer to as 'a *Mareva* injunction'. The locus classicus on this remedy in our jurisprudence is *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (SCA), especially at p. 372.

[12] An applicant seeking to obtain an anti-dissipation order has to satisfy stringent requirements. He or she has to establish the existence of a particular state of mind in the respondent; namely, 'that he is getting rid of the funds, or is likely to do so, *with the intention of defeating the claims of creditors*' (emphasis supplied). E.M. Grosskopf JA reasoned the position in *Knox D'Arcy* loc.cit. as follows, '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. 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'.

[13] The applicants have not satisfied the demanding requirements for anti-dissipatory relief, nor have they shown that theirs is an exceptional case in which those requirements might arguably fall to be relaxed. In the circumstances they have not made out a case for the freezing of what I have called the second part of the second respondent's funds held in the third respondent attorneys' trust account.

[14] The applicants have been partly successful. I consider the measure of their success to have been substantial enough to merit them being awarded part of their costs. Justice will be done if the second respondent pays half the applicants' costs of suit.

[15] The following order will issue:

(a) The third respondent attorneys are hereby interdicted, pending the finalisation of proceedings under the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 for the enforcement of the maintenance order obtained against the second respondent in the Maintenance Court at Hamburg, Germany, for the payment of maintenance in respect of the applicants, from making payment to the second respondent of the sum of R300 000 held by them in trust in terms of clause 2.3 of the settlement agreement, dated 5 December 2017, entered into in case no. 13288/2015, a copy of which is annexed as annexure IF4 to the founding papers.

(b) Save as set out in paragraph (a) of this order, the further relief sought by the applicants in respect of the balance of the funds held in trust by the third respondent attorneys for the second respondent is refused.

(c) The second respondent is ordered to pay one half of the applicants' costs of suit.

A.G. BINNS-WARD
Judge of the High Court