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REPUBLIC OF SOUTH AFRICA

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

CASE NO: 21709/2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
8/11/2022

In the matter between:

S[....] Y[....]

Applicant

And

H[....] S[....]2

Respondent

JUDGMENT

MAKUME, J:

INTRODUCTION

[1] This is an opposed application which was launched by way of urgency. The Respondent Mrs S[....]2 H[....] is contesting the urgency of this application. She maintains that the Applicant has not demonstrated that he will not obtain sufficient redress in the ordinary course. Secondly the Respondent says that there are numerous disputes of fact which an urgent Court cannot be called upon to resolve.

Lastly the Respondent raises the issue that the Applicant in seeking a final interdict has failed to meet the requirements thereof.

BACKGROUND

[2] The Applicant and the Respondent first married each other in terms of Islamic rights on the 21st August 1999. This was followed by a Civil marriage in terms of the laws of this country on the 13th April 2001. The parties concluded an ante-nuptial contract in terms whereof community of property, profit and loss as well as the accrual system are specifically excluded.

[3] There are three children born out of the marriage namely:

3.1. S[....]3 Y[....] S[....] born on the 19th April 2003

3.2 U[....] Y[....] S[....] born on the 5th August 2007

3.3 H[....]2 Y[....] S[....] born on the 22nd January 2010

[4] U[....] and H[....]2 are still minor and are both at High School whilst the eldest son S[....]3 who is now a major is a student at the University of Pretoria

[5] The parties matrimonial home is situated at [....] S[....]4 Crescent Extension 7, Lenasia, Gauteng. The parties have been occupying this home together with the children for 22 years. The home is an asset in the Y[....] A S[....] Family Trust that was established in the year 2012. The Respondent is a trustee of the Trust and the only beneficiaries are the three children of the marriage and the Respondent.

[6] The Respondent together with the minor children left the common home during January 2022 due to matrimonial problems between the parties. They moved into an apartment situated at Unit [....], The R[....], 4 Dimple Street Extension 13 Lenasia, Gauteng. The Applicant acquired that property by way of a lease agreement and has been paying for that.

[7] On the 9th September 2022 the Applicant served divorce papers on the Respondent in which he claimed not only a decree of divorce but that he be awarded primary residence of the minor children.

[8] On receipt of the divorce papers the Respondent moved back to the common home and has been occupying one of the bedrooms together with the two minor children since the 26th September 2022.

[9] On the 29th September 2022 the Applicant issued this urgent application setting it down for hearing on the 10th October 2022. The Notice of Motion has various prayers in the alternative so is the affidavit which is long and contains irrelevant matter for purposes of this urgent application. The affidavit is riddled with contentious issue which can only be resolved in the divorce trial.

[10] The only relevant prayer worth considering in this application is that firstly the Applicant seeks an order that Dr Robyn Fasser a clinical psychologist be appointed to investigate and to provide a report and recommendation with respect to the best interest of the minor children U[....] and H[....]² as regards primary residence, care and contact.

[11] The Applicant seeks an order that pending the report of Dr Robyn Fasser that he be awarded primary care and residence of her minor children.

[12] It is prayers 8,9,10 and 11 of the Notice of Motion which persuaded me that the application is urgent had it not been for those prayers which I quote in full and verbatim below I would have struck the application from this roll due to lack of urgency.

THE IMPUGNED PRAYERS

“(8) The Respondent shall within two hours of this order leave the property situated at [....] S[....]⁴ Crescent, Lenasia Extension 7, Gauteng.

(9) In the event that the Respondent does not comply with 8 above the Sheriff of the above Honourable Court is authorised and requested to carry out the removal of the Respondent from the property.

(10) The Respondent as interdicted and restrained from entering and occupying the property situated at [...] S[...]4 Crescent, Lenasia Extension, Gauteng.

(11) The Respondent to pay the costs of the application in the event of opposing same.”

[13] It is common cause that the main reason why the parties are now involved in divorce proceedings is the fact that the Applicant married a second wife- in accordance with Islamic faith without the consent of the Respondent. It is when the relationship between them became intolerable that the Applicant proposed to the Respondent that he will purchase for her within- 3 to 6 months a home of equivalent value and standard to their matrimonial home. In the meantime, the Respondent agreed to move to Unit 10 pending the acquisition of the promised home by the Applicant. This did not happen instead the Applicant proceeded to issue divorce summons. He reneged on his agreement.

[14] In paragraph 29 of her Answering Affidavit the Respondent says that the Applicant is obliged in terms of the Islamic religion to ensure that his first wife and children are properly provided for and treated with dignity and respect. It is interesting to note that in his reply in paragraph 16 the Applicant does not dispute this cardinal and important fact about the Islamic practice regarding the first wife. All he could say in reply is that “our marriage relationship terminated due to the grounds listed in my particulars of claim in the divorce action.”

[15] The Respondent further makes a valid point in paragraph 110 of her Answering Affidavit in the following words:

“I did not “force” myself into the home. I let myself in with my keys which I had retained. The apartment in which I had resided was only meant to be a

temporary measure for a limited period of three months and at the very most six months. It is a small apartment not suitable for me to reside in permanently with the children and we are cramped and uncomfortable in it. There is no garden or swimming pool and the boys who are active teenagers accustomed to a large garden, are finding it difficult to be limited to such a confined space.”

[16] In his Replying Affidavit at paragraph 35 the Applicant does not deal with the promise he made that between 3 and 6 months he shall have provided a suitable accommodation and house of equal value for the Respondent he instead concentrates on other irrelevant issues.

[17] The fact remains that the Respondent decided to return to the Common home firstly because the Applicant failed to comply with their agreement and instead chose to file for a divorce. The question that remains is therefore whether the Applicant has made out a case for evicting the Respondent on property which is indirectly owned by her as a trustee and beneficiary. The Applicant has made numerous accusations about the Respondent’s behaviour and that the children are traumatised they cannot live with the Respondent in the same house. I am unable to accept this the children have been staying with their mother the Respondent since January 2022 why would they now feel uncomfortable to live with her in their house which they are used to.

[18] The Applicant has failed dismally to persuade this Court to grant him the order evicting the Respondent. This court cannot see its way right to force the Respondent to relinquish her right of use and enjoyment of the property that she owns.

[19] In the result this application falls to be dismissed with costs. I have already ruled that the balance of the prayers are not urgent and fall to be struck of the roll due to lack of urgency.

ORDER

- i) The Application to evict the Respondent is dismissed.

ii) The balance of the prayers in this application are not urgent and are struck off the roll.

iii) The Applicant is ordered to pay costs of this application which costs shall include the costs of counsel.

DATED at JOHANNESBURG this the 8th day of NOVEMBER 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 13 OCTOBER 2022
DATE OF JUDGMENT : 08 NOVEMBER 2022

FOR APPLICANT : ADV GROBLER
INSTRUCTED BY : AYOOB KAKA INCE

FOR RESPONDENT : ADV SEGAL SC
INSTRUCTED BY : DASOO ATTORNEYS