

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

CASE NO. 2059/21

In the matter between:

O[...] G[...] (Born M[...]) Applicant

And

Z[...] G[...] Respondent

JUDGEMENT

RUSI AJ:

[1] On 11 May 2021, the Applicant instituted divorce proceedings in this court (“the main action”) against the Respondent. In the main action the Applicant seeks, *inter alia*, a decree of divorce. It is common cause that the parties were married in community of property on 02 October 2015 at Engcobo, Eastern Cape.

[2] The parties’ matrimonial home is in Ntlekiseni Administrative Area, Zimbane Location, Mthatha. However, both parties currently reside Johannesburg since 2015, with the Applicant residing in Randburg, while the Respondent resides in Boksburg. The joint

matrimonial estate consists in immovable and movable assets. There are three minor children born out of the marriage, they reside with the Applicant in Randburg.

[3] On 24 May 2021, the Applicant caused a letter to be written by her legal representatives, Zilwa Attorneys, to the Respondent's legal representatives. A portion of the said letter that is pertinent *in casu* is to the following effect:

"Our instructions are also to bring to your attention that our client has reliably learned that your client is in the process of disposing, alienating or encumbering the assets belonging to the joint estate without our client's consent. Our client is of the view that your client is doing all this purely to ensure that when the divorce is finalized, there would be no assets left for division of the joint estate. We are therefore instructed to demand, as we hereby do, a written undertaking to the effect that your client will desist from dissipating and disposing of the assets belonging to the joint estate. Any asset that needs to be disposed of should be discussed with our client, through our office, and written consent has to be obtained until the divorce process has been finalized. Let us receive the undertaking and response in connection to the above within 2 days from the date of receipt hereof, failing which our instructions are to bring an urgent application for interdict against disposal of assets".

[4] In response to the above quoted letter, and without giving the undertaking sought by the Applicant, the Respondent's legal representatives, Nkobi Attorneys, wrote to the Applicant's attorneys on the 26 May 2021, informing them, *inter alia*, that this Court does not have jurisdiction to hear the divorce action because both the Applicant and Respondent

are domiciled in Johannesburg. They are also actively employed, and have property situated in Johannesburg. Their minor children reside and attend school in Johannesburg. The Respondent's legal representatives proposed in their response mentioned above, that the Applicant withdraws the divorce action in this Court because in their view, the Applicant instituted the main action in this Court purely for her convenience.

[5] Aggrieved by the response given by the Respondent's legal representatives as set out above, and in light of the fact that no undertaking was given by the Respondent as the Applicant sought in the letter dated 24 May 2021, the Applicant brought this application on 01 June 2021.

[6] The Applicant is represented by Mr Zilwa, and Mr Nkobi represents the Respondent. In this application, the Applicant seeks an order in the following terms:

6.1 That the application be heard as a matter of urgency, and that the non-compliance with the Rules as to form and service be condoned.

6.2 That a *rule nisi* be issued, returnable on 22 June 2021, calling upon the respondent to show cause, if any, why the following orders should not be made final:

6.2.1 That the Respondents be interdicted, pending the outcome of the divorce proceedings, from disposing of, alienating, or encumbering the following property, respectively:

(i) Immovable property situated in 2075 Notsung Street, Mapleton, Extension 12B Boksburg.

(ii) Immovable property situated in Unit 4 Baliza Complex, 1 Nature Street, Sharonlea, Randburg.

- (iii) A rural home situated in Ntlekiseni Administrative Area, Zimbane Location Mthatha.
- (iv) A vacant erf situated in 1206 Rayton Extension 7, Culinan, Pretoria.
- (vi) Two commercial flats situated in Slovo Park Mthatha.
- (vii) BMW 730d model
- (viii) BMW X5 model
- (ix) BMW M6
- (x) BMW 2 series
- (ix) BMW 3 series
- (x) Ford Ranger
- (xi) Toyota Hilux
- (xii) Mobile Fridge
- (xiii) Trailer
- (xiv) Furniture
- (xv) Meat-cutter

6.3 That paragraph 6.2 above shall operate as interim relief pending the finalization of this application.

6.4 That the Respondents pays the costs of this application only in the event of him opposing it.

[7] It has not been made clear what the status of the main action is in view of the aforementioned correspondence between the parties preceding the present application. The documents filed in support of this application indicate that the respondent raised or intends to raise an objection to the summons issued in the main action. This is gleaned from a letter addressed to the Applicant's Attorneys dated 26 May 2021, wherein the following is written:

"1. The summons does not comply with rule 17(1)(b) which states that a Defendant must be afforded 20 (not the 15 days afforded to the defendant by the plaintiff) days after giving his notice of intention to defend, to deliver a plea (with or without a claim in reconvention), or an exception or an application to strike out.

2. Section 2(1) (a) of the Divorce Act which provides that a court shall have jurisdiction in a divorce action if the parties are or either of the parties is domiciled in the area of jurisdiction of the court on the date on which the action is instituted.

3. The parties in this matter are both domiciled in Johannesburg as it appears in both the Plaintiff's summons and particulars of claim. And there is absolutely no advantage to any of them instituting the divorce action in Mthatha High Court.

4. Kindly note that we shall stay the filing and service of Defendant's plea/ and or exercising whatever right the Defendant has in law pending your response to the request made above."

[8] At the time of hearing this application, no indication was given by either party whether any of the intended defences or objection to the summons were indeed raised and what their outcome was. I therefore accept that the main action is extant.

[9] The Respondent opposes the application on the ground that, this Court has no jurisdiction to hear the matter, in that both parties are residing, and domiciled in Johannesburg; and also that the Applicant has not made out a case for the urgent relief sought, in that she relies on unsubstantiated hearsay evidence.

[10] The Applicant contends that this Court's jurisdiction to hear this application arises from the fact that the marriage between the parties was celebrated and consummated in Engcobo, which is situated in this court's area of jurisdiction. Further, contends the Applicant, the parties' matrimonial home being in Ntlekiseni Administrative Area Zimbane Location, Mthatha, she is domiciled in this court's jurisdiction. The Applicant further contends that even though she resides in Gauteng, she has never renounced her domicile in Engcobo, or Ntlekiseni Administrative Area.

[11] On the issue of urgency, it is alleged by applicant that based on the reliable information as she sets out in the letter dated 24 May 2021, regarding the Respondent's alleged disposal of assets belonging to their joint estate, she reasonably fears that if this court does not grant her urgent relief, the joint estate will be depleted by the Respondent, to her prejudice and to the prejudice of the interests of the minor children born out of the marriage. When the respondent failed to give the undertaking she sought by the letter dated 24 May 2021, contends the Applicant, she was left with no other alternative appropriate remedy but to seek urgent interim relief.

[12] The issue to be determined by this court is three pronged- whether this court has jurisdiction to hear this application; and whether the applicant has made out a case for the hearing of the application as a matter of urgency. If the court finds in favour of the Applicant on these first two issues, the issue to be determined by this court will be whether the case presented by the Applicant meets the requisites for granting of an interim interdict.

[13] The requisites for granting of interim interdict are trite- the Applicant must show that she has a clear right, or if not clear, *prima facie* right which she seeks to protect by means of interim relief. In the case of a *prima facie* right, the applicant must show that she has a well-grounded apprehension of irreparable harm to herself if the interim relief sought is not granted, and she ultimately succeeds in establishing this right. The balance of convenience must favour the granting of the interim relief. Lastly, the Applicant must show that there is no other alternative appropriate relief available to her. (*Setlogelo v Setlogelo*)¹.

[14] This being an application for interim interdict pending finalization of the main action, the issue of this Court's jurisdiction falls within the purview of the Divorce Act 70 of 1979 (the Divorce Act). In section 1 of the Divorce Act, 'divorce action' is defined as including, *inter alia*, an action *pendete lite* for an interdict.

[15] It is trite that this Court derives its jurisdiction from relevant legislation and common law. In light of the nature of these proceedings, the starting point is section 2(1) of the Divorce Act which provides that a court shall have jurisdiction in a divorce action if the parties are or either of the parties is- (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.

¹ Setlogelo v Setlogelo 1914 AD 221 at 227

[16] Pertinently, section 4 of the Divorce Act provides that the provisions of that Act shall not derogate from the jurisdiction which a court has in terms of any other law or the common law. In terms of section 21(1) of the Superior Courts Act of 2013² (“the Act”), this Court has jurisdiction *over all persons residing in or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction, and all other matters of which it may according to law take cognizance.* (Italics provided).

[17] In this regard, the court in ***Cordiant Trading CC v Daimler Chrysler Financial Services***³, stated thus (on the interpretation of the similarly worded section 19(1) of the Supreme Court Act 59 of 1959):

[10] The limitation as to the territorial area of each High Court is imposed by section 19(1) (a) of the Supreme Court Act 59 of 1959 (the Act). The section provides that such Court shall have jurisdiction over persons residing and causes arising within its area of jurisdiction. For the present purposes, the jurisdiction of the *court aquo* must be determined with regard the requirement of causes arising. In the past, these words were construed to mean proceedings over which a High Court has jurisdiction under common law. In *Ewing Mc Donald & Co Ltd v M Products Co 1991 (1) SA 252 (A)*, Nienaber AJA said at 275 F-G: “The expression ‘causes arising’ has been interpreted in the *Bisonboard* judgment at p11 of the typescript copy “ . . . as signifying not ‘causes of action arising’ but ‘legal proceedings duly arising’, that is to say, proceedings in which the Court has jurisdiction under common law.

² Superior Courts Act, 2013 (Act 10 of 2013)

³ *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (6) SA 205 SCA, at 211D

Since a Court under the common law would have had jurisdiction over persons domiciled within its area of jurisdiction (who would include, although not confined to persons “residing or being in”), “persons residing or being in” and “causes arising” are not antithetical concepts, the former is merely an elaboration of the latter”.

[11] Plainly, what is meant in the above interpretation is that ‘causes arising’ does not refer to causes of action but to all factors giving rise to the jurisdiction under common law. Of course such factors do not exclude a cause of action. It is by now well established that, in appropriate cases, a court which has jurisdiction over the area within which a cause of action arose is competent to decide a matter on that basis alone.

[18] In an attempt to buttress her contention that this court has jurisdiction to hear this application, the Applicant alleges that “*in as much she is resident and employed in Johannesburg since 2015, she does not regard this as her permanent residence because she could leave this the place at any point, hence she considers her permanent home to be in Ntlekiseni Administrative Area, Zimbane Location Mthatha*”. The Applicant maintains this contention even though in similar vein, she states that she visits her marital home in Ntlekiseni once a year, in the month of December.

[19] It is apposite to make reference on this score, to the case of *Ex Parte Minister of Native Affairs*⁴. In that case, De Villiers CJ set out the following principles regarding the determination of a person's residence:

"The question whether a person resides at a particular place at any given time depends on all the circumstances of the case read in light of general principles. A person cannot be said to reside at a place which is temporarily being visited. Although a person may have more than one residence, a person can only reside in one place at any given point in time. When it is said of an individual that he resides at a place, it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done"

[20] In light of the facts which have been made common cause by the parties as set out above, and the above cited authorities on the subject of jurisdiction, the Applicant's contention regarding where she is residing and domiciled, cannot be sustained. She cannot be said to be resident in or being in this Court's jurisdiction for the purposes of the present proceedings. Be that as it may, this being an application for an interim interdict *pendete lite*, this Court is enjoined to consider whether the facts giving rise to the known requisites of an interdict exist in this Court's territorial jurisdiction, entitling this Court to hear this application.

[21] In *Zokufa v Compuscan (Credit Bureau)*⁵ Alkema J, said the following regarding jurisdiction of the court in interdict proceedings:

[62] I therefore conclude that in interdict proceedings a court will have jurisdiction if the requirements for the grant of an interdict are satisfied

⁴ Ex parte Minister of Native Affairs 1941 AD 53

⁵ Zokufa v Compuscan (Credit Bureau) [2011] All SA 203 (ECM)

by the facts within the area of jurisdiction of that court. I believe, with respect, that this is the only test which should be applied in deciding jurisdiction in interdict proceedings.

[63] The next step is to establish the facts supporting the three requirements for an interdict, and then to establish whether or not those facts originated or exists in the area of jurisdiction of this court. This enquiry by necessary implication entails an analysis of the Applicant's substantive legal rights.

[64] The conventional common law grounds of jurisdiction are usually categorized in claims sounding in money, claims involving property, et cetera. Therefore, in interdict proceedings, the substantive legal right to the relief sought will usually determine the grounds of jurisdiction. For instance, if the interdict relates to immovable property, to which the applicant has shown a legal right, then normally, the court in whose area of jurisdiction the land is situated will have jurisdiction.

[22] As a starting point, I must state that by virtue of the regime of the Applicant and Respondent's marriage, the Applicant is *ex lege* entitled to share in the joint estate upon dissolution of the marriage. Two of the immovable properties belonging to the joint estate are situated in this Court's territorial jurisdiction. However, in light of the principles set out above in *Cordiant Trading* and *Zokufa*, this cannot be the end of the court's inquiry. The court must consider whether there are other facts which support the rest of the requisites for the granting of an interdict. In so doing, the court must consider whether those other facts

exist or occurred in its territorial jurisdiction. This will of necessity involve a consideration of the merits of the application.

[23] *In casu*, what presents this Court with difficulty is the fact that *ex facie* the notice of motion and the Applicant's founding affidavit, the interim interdict sought is in relation to the immovable and movable property belonging to the joint estate of the parties which is situated in both this Court's area of jurisdiction, and in the Johannesburg High Court's jurisdiction, respectively. The Applicant has not alleged with specificity, which of the assets enumerated, this application relates to. The only averment that the applicant makes in her founding affidavit dated 27 May 2021, regarding the assets belonging to the joint estate, and why she is entitled to the relief sought is the following:

[8] I have been reliably informed that the Respondent is in the process of disposing of our assets. I believe such information because, not so long ago, he requested copies of vehicles' registration papers because he wanted to sell some of them, **but that was before the divorce proceedings commenced.** It is becoming clear to me that the sole reason for that action on his part is to ensure that our estate value, at the finalization of our divorce, would be almost nil. (Emphasis added).

[9] I should add that Respondent has now formed a new love relationship with another woman and they are residing together. There is a reasonable belief on my part that the Respondent is having underhanded motives regarding our assets that would disadvantage me and my kids.

[10] After having learned about the Respondent's intentions, I instructed my attorneys of record to address a letter to his attorneys demanding an undertaking that he will desist from alienating and/or disposing of our assets. A copy of the letter is attached herewith marked 'B'.

[11] The response that was received from his attorneys simply raised highly technical points that did not address any material issue at hand instead of giving an undertaking I sought from him. His letter also makes a bizarre demand to the effect that I should withdraw the divorce proceedings and institute them in Johannesburg. A copy of the letter is attached herewith marked 'C'.

[12] I was then left with no option but to come to the conclusion that he is hell bent in disposing of our assets hence he is refusing to give me the undertaking."

[24] It was only in her replying affidavit that the Applicant alleged that her application relates to the two commercial flats situated in Slovo Park, Mthatha. In regard to the two commercial flats, she further alleged in her replying affidavit that "*she has received calls from some of the tenants occupying the commercial flats, enquiring if the commercial flats are being sold since they had noticed people coming to view them*". This allegation as it stands, albeit raised in the replying affidavit in disregard of the principles governing the purpose of a replying affidavit, is devoid of sufficient basis on which to determine whether indeed, there was a reasonable basis for her to entertain a reasonable apprehension of injury to her rights to share in the joint estate.

[25] No further details are given by the Applicant in her papers regarding when, in relation to this application this information came to her attention, and who was present to give the persons allegedly viewing the flats access to the two flats. Nothing has been said by the Applicant regarding who oversaw the alleged viewing of the commercial flats, and what was done, where, and when, by the persons who viewed the commercial flats, and/or the Respondent, after the alleged viewing.

[26] The onus rests on the Applicant to prove in accordance with the principles afore mentioned, that this court has the competence to hear the matter. The Applicant has not discharged this onus. The Applicant has failed to show that in respect of her proprietary rights to the joint estate, the Respondent has engaged in dishonest or mala fide conduct, and that he intends to dispose of, at most, the joint assets situated in this Courts territorial jurisdiction. It must be added, that the fact that the Respondent failed to give an undertaking as was sought by the Applicant is neither here nor there, and cannot, without more, entitle the Applicant to interim relief.

[27] The applicant has therefore failed to show that she has a well-grounded apprehension of irreparable harm to herself if the interim relief sought is not granted, and that the balance of convenience favours the granting of the interim interdict. I do not find it necessary therefore, to determine whether the Applicant has made out a case for the hearing of this application as a matter of urgency.

[28] On the issue of costs, I have considered the fact that the Applicant unreasonably persisted with bringing this application in this Court despite facts as set out above, which militate against the course she followed. I may add that Applicant so persisted, in spite of the Respondent's reasonable attempts to settle the issue of jurisdiction amicably. The Applicant's

conduct is an abuse of the process of court. A punitive cost order is justified in these circumstances.

[29] In the result, the following order is made:

1. The point *in limine* raised by the Respondent, of lack of jurisdiction, is upheld.
2. The application is dismissed, with costs on an attorney and client scale.

L. RUSI
JUDGE OF THE HIGH COURT (ACTING)

Date Heard: 01 June 2021

Date Delivered: 10 June 2021

Appearances: *H. Zilwa for the Applicant; Mr M.T Nkobi for the Respondent*