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NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

Case No. EL 819/2020

In the matter between:

J[...] L[...] T[...] Applicant

and

C[...] H[...] T[...] First Respondent

WYLDE ATTORNEYS INC. Second Respondent

JUDGMENT

HARTLE J

[1] The applicant, who is married to the first respondent by antenuptial contract with the application of the accrual system, seeks an anti-dissipation

interdict against him pending the finalization of their divorce action (issued out of this court under case number 1269/19), in effect freezing the nett proceeds from the sale of their matrimonial home which the applicant, at the time of the launch of this application, was expecting to be paid by the second respondent. The latter party was the conveyancer appointed by the first respondent to register the transfer and the firm also represents him in the pending divorce action.

[2] The application was launched on an urgent basis, but the question of urgency effectively became moot by the order of this court granted on 25 August 2020 pursuant to which an undertaking was given by the second respondent to hold the nett proceeds of the sale in trust pending finalization of this application at least. Urgency, more particularly the applicant's expectation that short service of the application should be condoned by this court, was however not conceded by the respondents.

[3] After I heard argument in the matter on 17 September 2020, I ordered that this undertaking given by the second respondent be extended pending the delivery of my judgment herein.

[4] The simple question for determination is whether the applicant has made out a case for the grant of the interdict.

[5] An anti-dissipation interdict, so called, may be granted where a respondent is believed to be deliberately arranging his affairs in such a way so as to ensure that by the time the applicant is in a position to execute judgment he will be without assets or sufficient assets on which the applicant expects to execute. It is not a claim to substitute the applicant's claim for the loss suffered, but to enforce it in the event of success in the pending action so that he will not

be left with a hollow judgment. It is an interdict of an unusual nature. It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. In fact, the applicant, as is the case in this instance, lays no claim to the property in question merely alleging a general right to damages or, as is the case here, to a matrimonial property accrual. Moreover, the conduct sought to be interdicted is usually *prima facie* lawful, yet its effect is that it prevents the respondent from dealing freely with his assets. The applicant further obtains no preferential rights over the asset forming the subject matter of the interdict.¹

[6] The remedy that the interdict provides performs a similar function to that of the “*Mareva* injunction of the English law but the English principles are not automatically applicable. It has its own unique development in our country and our law has recognized this type of interdict for many years without giving it any specific name. The interdict is dubbed “an anti-dissipation interdict” by Stegmann J in the leading case of *Knox D’Arcy Ltd v Jamieson*² although the Appellate Division of the Supreme Court³ did not consider such appellation to be quite appropriate. Instead, it observed that:

"anti-dissipation" (the title) suffers from the defect that in most cases, and certainly in the present case, the interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot get his hands on them."

[7] Since the purpose of the interdict is to prevent a person (the intended defendant) who can be shown to have assets and who is about to defeat the plaintiff’s claim, or to render it hollow, by secreting or dissipating assets before

¹ See generally (in relation to paragraph [6] to [10] above) *The Civil Practice of the High Courts of South Africa*, Herbstein and Van Winsen, vol 2, 5th ed at 1488-1493 and the authorities cited in Chapter VII titled: “Anti-dissipation Interdicts (The So-called “*Mareva*-Type Injunctions” or ‘Freezing Injunctions’).

² 1994 (3) SA 700 (W) at 706D-E.

³ *Knox D’Arcy v Jamieson* 1996 (4) SA 348 (A).

judgment can be obtained or executed, and thereby successfully defeating the ends of justice by doing so, the applicant who bears the onus to establish the necessary requirements for the grant of the interdict, need show a particular state of mind on the part of the respondent, i e, that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. But it is not essential to establish an intention on the part of the respondent to frustrate an anticipated judgement *if the conduct of the respondent is likely to have that effect*.

[8] The requirements that must be satisfied to obtain an anti-dissipation interdict (which is interim both in form and substance)⁴ are the same for any other interim interdict, provided that it has been held that the interdict is *sui generis*. It is either available or it is not and no other remedy, such as a claim for damages, can really take its place.

[9] As for the standard of proof required and the manner in which disputed facts are to be approached in determining whether the interdict should be granted or not the Supreme Court of Appeal in *Knox D' Arcy Limited v Jamieson* concluded as follows:

“The basis of the petitioners' claim as set out in the petition for leave to appeal and their heads of argument is that they have proved *prima facie* that the respondents had an intention to defeat the petitioners' claims, or to render them hollow, by secreting their assets. It was common cause that if these facts could be proved, together with the other requirements for an interim interdict, the petitioners would have a good case, and for the reasons given above I agree with this approach. There was some argument on whether the fact that assets were secreted with the intent to thwart the petitioners' claim had to be proved on a balance of probabilities or merely *prima facie*. However, it seems to me that here also the relative strength or

⁴ This is so despite the fact that the respondent is irreversibly inconvenienced while the interdict is in operation and the resolution of the main dispute is pending. It is said that irrevocable inconvenience is inherent in the temporary regulation of disputes by means of interim interdicts. See *Knox D' Arcy Ltd v Jamieson* 1995 (2) SA 579 (W) at 600G-H, 603F-606B.

weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted.”

[10] Firstly, a word needs be said regarding the basis upon which the applicant claims she has an interest in approaching this court for the interdict.

[11] A spouse married out of community of property in terms of an antenuptial contract with accrual has no vested rights in any of the assets, investments or property registered in the name of the other spouse. The Matrimonial Property Act, No. 88 of 1984 makes it clear that only on dissolution of the marriage does a spouse acquire a right to claim half of the nett accrual of the other spouse's estate.⁵ Before that dissolution, a spouse who has an accrual in his or her estate that is smaller than the accrual in the other spouse's estate has only a contingent right to claim half of the accrual in the estate of that other spouse, not a vested right.⁶

[12] The applicant spouse's right to claim the accrual, if the jurisdictional basis for it exist, will only become a vested right when the contingency materializes, upon dissolution of the marriage either by divorce or death.

[13] The applicant spouse was held in *RS v MS and Others*⁷ to have no general right to prevent the other spouse from freely dealing with his own property. Even if that contingent right could be protected by an interdict *pendente lite* such an application would need to show:

13.1 that the other spouse had assets within the jurisdiction of the court;⁸

⁵ See section 3 (1) and (2).

⁶ *RS v MS and Others* 2014 2 SA 511 (GJ) at paras [11] – [13].

⁷ *Supra* at para [15].

⁸ The interdict is however no longer restricted to assets within the Republic. See *Metlika Trading Ltd v Commissioner, SARS* 2005 (3) SA 1 SCA at 17.

13.2 that the other spouse had no *bona fide* defence against the applicant's alleged contingent right;⁹ and

13.3 that the other spouse had the intention to defeat the applicant's claim or to render it hollow by dissipating or secreting assets.¹⁰

[14] Even if those requirements are present, an applicant must still show a well-grounded fear of irreparable loss should the interdict not be granted *pendente lite*.

[15] Because of the draconian nature of this remedy,¹¹ the courts have been reluctant to grant it except in the clearest of cases.¹²

[16] The effective relief sought by the applicant in the present instance, if the order is granted, is that the first respondent will be precluded from dealing with the *entire* proceeds of the sale of his property pending the finalization of the divorce claim including the adjudication of the applicant's contingent accrual claim against the first respondent.¹³

⁹ Stegmann J clarified in *Knox D' Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 372 that this requirement is inappropriate. However, one of the ways of establishing a *prima facie* right and/or a well-grounded apprehension of irreparable harm is to show that the respondent lacks a *bona fide* defence to the applicant's claim. See *Knox D' Arcy Ltd v Jamieson* 1995 (2) SA 579 (W) at 593H-600G.

¹⁰ *Supra* at para [17]. This brings us back into the purview of the special *Knox D' Arcy* interdict.

¹¹ By its very nature the effect of such relief is that it is invasive and inclined to render the consequences inequitable.

¹² *Supra* at para [18]. See generally *Knox D'Arcy Ltd & Others v Jamieson & Others* [1996] (4) SA 348 A at 372C; *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others* 2004 (5) SA 388 (D) at 396 E; *Reeder v Softline Ltd* 2001 SA 844 (W) at 849 – 851. See also *The Civil Practice of the High Courts of South Africa*, Herbstein and Van Winsen, vol 2, 5th ed at 1492-3.

¹³ Ms. Mitchell who appeared for the applicant acknowledged at the hearing that it would not be proper to interdict the entire proceeds but that an amount of R676, 658,00 should be held in reserve to satisfy her client's contingent accrual claim (acknowledged by the first respondent in earlier correspondence to represent the value of her interest although in his answering affidavit he put her interest no higher than R500, 000,00). It is unthinkable, in the light of the caution expressed by our courts concerning the potentially prejudicial nature of anti-dissipation interdicts, that the applicant could have sought to interdict the entire proceeds held in trust by the second respondent representing the nett proceeds of the transfer, estimated to be in the sum of approximately R1, 402, 000,00. (The applicant could not even be bothered to say what the extent of the proceeds were). This was in fact the case that the respondents were required to meet and also appears to be the premise upon which the first respondent was prevailed upon to give the interim undertaking which he did for the entire proceeds to be held in trust, to his obvious prejudice.

[17] It is not in dispute that the applicant has an accrual claim against the first respondent. It is only the third requirement postulated above (which is the *raison d'être* for the grant of an anti-dissipation interdict) which is in contention and which in my view effectively disposes of this matter.

[18] At the launch of the application the transfer arising from the sale of the immovable property was said to be “imminent”. The second respondent confirmed that the transfer had not been registered by the time of the launch of the application,¹⁴ but asserted that it would have been registered “before the 2nd of September 2020”.¹⁵

[19] The second respondent clarified in the answering affidavit further filed on its behalf that the purchase price for the sale of the matrimonial home was in the sum of R3 1 000 000.00 and constituted a market related value for the property. The applicant did not suggest otherwise and also did not take issue with the first respondent’s sale of the property *per se*. Her only interest was in the *pro tempore* freezing of proceeds of the sale.

[20] The application was quite evidently motivated on the basis of the respondent’s failure to have given an undertaking required by her attorney from the first respondent prior to registration of transfer that the proceeds would be held in trust pending the finalization of the divorce action. The sale of the property itself must have come as no surprise to the applicant since the first respondent advised his intention on 25 November 2019 already, via the agency of the second respondent, of his intention to dispose of it. However, the second

¹⁴ The application was ostensibly issued on 21 August 2020 (although the registrar’s stamp bears the date 11 August 2020.) It was served on the respondents on 24 August 2020.

¹⁵ This background is relevant because the applicant purported to launch the application on truly short notice, if not ostensibly on an *ex parte* basis if regard is had to the prayers as framed in the notice of motion. The respondents lament the fact that despite transfer being at least a week away they were forced to court under great haste and directed to file their answering affidavits under extremely truncated periods so that the matter could be heard on an urgent basis.

respondent had advised in such communication that “(i)n the event that our client receives any offers on the immovable property this will be conveyed to your offices in order to come to an agreement regarding the proceeds.”

[21] On 5 August 2020 the second respondent informed the applicant’s attorneys that the property had been sold and requested that she vacate it with the parties’ two children by the end of August 2020. On 7 August 2020, the applicant’s attorneys addressed a letter to the second respondent requesting the firm, *inter alia*, to give the undertaking (premised no doubt on their earlier assurance given but with the twist indicated below) that:

“the proceeds of the property are to be held in trust by the conveyancing attorneys until finalization of the divorce. This is to ensure that your client does not diminish his assets further.”

[22] The second respondent appeared to be of the view that since the first respondent had acknowledged that the applicant had an accrual claim in her favour, that it was unnecessary to give any undertaking. They were further quite emphatic in refuting any suggestion that the first respondent had ever attempted to dissipate his assets (more particularly the parties’ home) with the intention to prejudice her. They questioned why the applicant’s attorneys were alleging that the first respondent was “diminishing” his assets and added their assurance that:

“the value of the immovable property has been included in all of the first respondent’s schedules of assets and liabilities. It was previously explained to your client and to her previous attorneys of record that our client is not able to afford the cost of the immovable property in the current economic recession and with the sole responsibility of (their daughter’s) tertiary education falling squarely on (his) shoulders the parties will need to ultimately make changes in their respective accommodation once the divorce is finalized.”

[23] They further intimated that instructions were held on behalf of the first respondent to oppose any urgent application launched by the applicant on the basis that such an application was unnecessary.

[24] This was taken by the applicant as a refusal to provide the undertaking sought. On 12 August 2020, the applicant's attorneys advised the second respondent as follows:

“It is noted that your client refuses to provide an undertaking to retain the proceeds of the sale of the property in trust. Your contention that your client has not dissipated his assets is incorrect. From his section 7 notice dated 4 December 2019 to his so-called “amended section 7 notice dated 9 July 2020, a mere seven months later, his nett assets have been diminished by more than R1 000 000.00 (one million rand) from R2, 368, 767.00 to R1, 353, 316.38.

Should your client not intend to dissipate his assets further, we fail to see why he refuses to provide the undertaking to retain the proceeds in trust pending finalization of the divorce.”

[25] He was given a final opportunity to provide such an undertaking by 19 August 2020.

[26] The second respondent reverted on 19 August 2020. The opinion was expressed that the first respondent's updated section 7 notice¹⁶ had indicated an increase in his liabilities rather than a decrease in his assets and that this could not be construed as a dissipation of his assets. The second respondent further assured the applicant's attorney that the first respondent was mindful of his obligation to provide accommodation for the applicant and their children hence

¹⁶ This notice was ostensibly provided pursuant to the provisions of the Matrimonial Property Act during the conduct of the divorce proceedings.

his “hesitation to commit the nett proceeds to being held in trust pending the finalization of the divorce in the event that the funds may be required for the purchase of a suitable immovable property.” The second respondent went on to confirm the first respondent’s commitment to both support the applicant and the minor children and to settle the divorce on a fair and equitable basis.

[27] Self-evidently the applicant’s belief that the first respondent has the intention to frustrate her contingent accrual claim rests entirely on the showing in the section 7 notice that that he had reduced the value of his accrual by more than R1 000 000.00 in only 7 months coupled with his by now clear intimation that he was not going to give her the undertaking as sought despite previously (in 2019) confirming that he had no problem keeping her in the loop in this respect.

[28] It is plain to see however that this deduction is based (with hindsight) on a mere paper entry, the reduced figure having been arrived at by the corresponding indication in the notice (dated in July 2020) that his liabilities have increased. The contentious liabilities include a purported loan taken from his mother in the sum of R113, 000,00, drawings against the bond in the sum of R160, 268,00 for a so-called “Covid loan”, provision for tax payable to SARS, legal fees (evidently in respect of the pending divorce action), and the costs associated with the sale of the matrimonial home, provision for which was ostensibly not made in the earlier section 7 notice. One of the indicated liabilities, for “tertiary and educational fees”, has even been reduced substantially since the earlier notice by approximately R130, 000,00. (I am satisfied on this showing on its own that no conduct on the part of the first respondent is demonstrated which either establishes the requisite intention for the grant of the anti-dissipation interdict or gives one an impression that this

showing is likely to have the effect of frustrating the applicant's anticipated judgment in the divorce action.)

[29] No doubt with a view to demonstrating *male fides* on the first respondent's part to add credence to her claim that he is attempting to frustrate the payment of her contingent claim in due course (the value of which she did not even bother to quantify) she asserted (feebly in my view) in this respect that there these historical expenses against the first respondent's asset base indicated in the section 7 notice had been "lavishly" incurred by him "going on holidays and purchasing luxury equipment for surfing". In this respect she alleged that between June 2019 and July 2020 he travelled substantially for pleasure including an overseas trip to Israel for two weeks in June 2019, a trip to Durban in June 2019 and a trip to Jeffrey's Bay in July 2019. A further trip to Jeffrey's Bay happened again in July 2020.

[30] She asserts the following reason why she suggests that the entire proceeds from the sale of the first respondent's property to which she can lay no claim must be preserved pending adjudication of her accrual claim in the divorce proceedings:

"I have already been severely prejudiced by the first respondent's conduct regarding his accrual and should he receive the proceeds, I have no alternative remedy to safeguard the amount which will be due to me. The first respondent has lavishly spent money and increased his liabilities substantially, which I submit he has done with the intention to prejudice me. I dispute his need to increase such liabilities or incur them and I will dispute this in the divorce action. The first respondent refuses to undertake to keep the proceeds in trust and the only logical conclusion for that would be that he intends to spend it."

[31] Although suggesting her reluctance to have approached this court for the relief which she seeks, the applicant's claims that the first respondent has left her with "no option" based on his refusal to give her the requested undertaking or to propose any manner to "safeguard her accrual claim".

[32] The first respondent in his answering affidavit reveals that he contemplates using the proceeds of the sale of the property for the purpose of purchasing immovable property as suitable accommodation for the applicant and the children. He asserts that he has always been *bona fide* in his dealings with her throughout these proceedings and denies that he at any stage has attempted to conceal or dissipate his assets in order to harm or prejudice her. He further denies in any event that he spent money lavishly or incurred unnecessary liabilities with the supposed intention to prejudice her.

[33] No doubt realizing that she had failed in her founding affidavit to indicate any facts from which it can properly be inferred that the first respondent has or is dissipating his assets with malevolent intent to prejudice her contingent claim, the applicant brazenly sought to broaden the basis for an interdict application in her replying affidavit *inter alia* by seeking to paint the first respondent in a bad light, making allegations against him that on anyone's reading are plainly scandalous and vexatious. More especially the suggestion is made that he has the propensity to resign from employment and to dissipate or conceal assets to frustrate her claims based on past alleged conduct when faced with marital problems and divorce proceedings. More importantly, the allegations further constitute new material not even remotely canvassed in the founding affidavit which fundamentally seek to change the premise of her case made out in the first place. This information would also certainly all have been within her knowledge when she deposed to her founding affidavit, yet she fails to explain the late introduction of such material.

[34] It is such a trite legal principle that an applicant must make out his case in his founding papers and should be permitted to amplify such a case in reply only in exceptional circumstances. The first respondent made an application to strike out several allegations in the replying affidavit on the basis that they are prejudicial to him and stand to be struck out on the grounds that they attack his credibility; that the applicant makes averments that are inadmissible; and that she introduced new matter. There is absolute merit in the submissions made on the first respondent's behalf that the highlighted paragraphs stand to be struck out as inadmissible. Clear prejudice exists in allowing them to stand. Most notably, having been hurried along to argue the matter on an urgent basis, the first respondent has not had an opportunity to deal with the applicant's purported new case.

[35] Reverting to the applicant's limited if not banal allegations relied upon in her founding affidavit it is not apparent that *prima facie* the first respondent intends to defeat the applicant's claim or to render it hollow by dissipating his assets in order to achieve such an end. The paper entry which suggests that he is concealing the real value of his estate, or undervaluing it, is simply that. A dated statement of value that can be challenged in the divorce action. There are simply no other primary facts from which the inference can or should be drawn that the first respondent is ordering his affairs in such a manner that is likely to have the effect of frustrating the payment of the applicant's contingent accrual claim in due course or rendering the payment thereof nugatory.

[36] In any event on the applicant's own admission the first respondent is well able to provide for his maintenance obligations and other obligations from his substantial income which suggests that he should therefore in any event be in a position to meet payment of the applicant's accrual claim which he has assured

the court he will make good on. In *RS v MS & Others*¹⁷ the court held that the balance was in the applicant's spouse's favour since his wealth and income-earning potential meant that any eventual claim by the applicant would be quickly settled if successful but granting the application would cause him significant harm by depriving him of the funds he required to run his business.

[37] In the result the application ought to be dismissed. Despite the applicant's claimed financial circumstances, it would be remiss of me not to grant costs against her (which can be deducted from the accrual claim paid to her ultimately) on the simple basis that there was no real basis to have approached this court for the grant of an anti-dissipation interdict, the real reason being to force her hand regarding the required undertaking. Her interests would have been better served in my view by holding the first respondent to terms to do as he said, which is to provide the undertaking promised by him in 2019 once the property had been sold. The fact that he has confirmed in these proceedings that he remains committed to paying her the value of her accrual does not detract from the fact that the applicant's recourse to the present applicant constitutes an abuse plain and simple. I am also inclined to award punitive costs in respect of the first respondent's application to strike out for the reasons stated above.

[38] I make the following order:

1. The entirety of paragraphs 4, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 37, 39, 42, 52, 47, 49 and 53 of the applicant's replying affidavit are struck out.
2. The applicant is ordered to pay the costs of the interlocutory application to strike out on the scale of attorney and client.

¹⁷ *Supra* at par [27].

3. The main application is dismissed with costs on the party and party scale.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 September 2020

DATE OF JUDGMENT: 22 January 2021*

*Judgment delivered electronically on this date by email to the parties.

APPEARANCES:

For the applicant: Ms. N Mitchell of The Legal Aid Board South Africa, East London (ref. Ms. N Mitchell).

For the first and respondent: Ms. N Molony instructed by Wylde Attorneys Inc., East London (ref. Ms. T Wylde).