

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 10/3/2017

CASE NO: 4081/2013

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

In the matter between:

K. K. T.

Plaintiff

and

M. S. R.

Defendant

JUDGMENT

DAVIS, AJ:

[1] NATURE OF THE APPLICATION:

1.1 The Plaintiff styled its application as an *"anti-dissipation application"* and claimed the following relief:

" 1. That, pending the determination and finalisation of the application for leave to appeal (or a petition for leave to appeal) and the appeal itself, the Defendant be and is hereby interdicted and restrained forthwith from selling, disposing and/or dissipating any and all of the assets that form part of the joint estate between the

parties, they being inter alia:

1.1 *an immovable property, being Erf No. [...] H. Extension [...] as held under Title Deed T[...];*

1.2 *an immovable property, being Erf No. [...] M. E., X11 as held under Title Deed T[...];*

1.3 *an immovable property, being Erf No. [...] B. R., Afrique de Estate, Hartebeespoortdam as held under Title Deed T[...];*

1.4 *business interests, shareholding and/or equity in the registered and operating companies as more fully described in Annexure "K3" to the Founding Affidavit;*

1.5 *policies, savings and/or investments as held with any and/or various financial institutions in the name of and under the identity document of the Defendant;*

1.6 *a motor vehicle, being a Range Rover bearing registration letters and numbers [M...]; and*

1.7 *a motor vehicle, being a Mercedes Benz C63 AMG registered in the name of the Defendant and whose registration letters and numbers are to the Plaintiff unknown.*

2. *That the Defendant be ordered to pay the costs of this application only in the event that he opposes the relief sought herein.*

1.2 The aforesaid application was brought on notice for hearing on the days on which the divorce action was set down, being 7 and 8 March 2017.

1.3 The Plaintiff in the divorce action is the Applicant in this application and the

Defendant in the divorce action is the Respondent. For ease of reference and sake of convenience the parties shall be referred to as in the divorce action.

1.4 The Defendant opposed the application by way of a notice in terms of Rule 6(5)(d)(iii).

1.5 The application was heard prior to the commencement of the divorce action. Judgment was reserved to be delivered simultaneous with the separate judgment in the divorce action. The oral arguments were, at my invitation at the conclusion of the divorce action, supplemented by written Heads of Argument.

[2] **BASIS FOR THE PLAINTIFF'S APPLICATION:**

2.1 During the course of long and heavily contested divorce litigation between the parties, Kollapen J ordered forfeiture of the benefits of the marriage in community of property in favour of the Defendant (in respect of all but one of the assets of the estate). This was done on 10 August 2016 and the judgment has since been reported as **KT v MR** 2017(1) SA 97 (GP).

2.2 The *dies* for the delivery of an application for leave to appeal the aforesaid order expired on 31 August 2016. The Plaintiff delivered an application for leave to appeal together with an application for extension of time/condonation on 22 September 2016. These applications came before Kollapen J on 20 October 2016 on which date they were postponed *sine die*.

2.3 The Plaintiff claims that the delivery of the application for leave to appeal suspended the operation of the forfeiture order by virtue of the provisions of Sections 18(1) and 18(5) of the Superior Courts Act, No. 10 of 2013.

2.4 The Plaintiff further claims that the present application merely affirms the

aforesaid position of suspension and that she is furthermore entitled to the relief claimed on the following grounds:

"5. 1 *Recently and after the postponement of the application for leave to appeal, the Respondent has taken steps to dispose of some of the assets forming part of the joint estate.*

5. 2 *In particular, the Respondent had put on the market one of the properties forming part of the joint estate, being House No. [...], B. M. E., Centurion, Gauteng Province [the asset referred to in prayer 1.2 of the Notice of Motion]. This the Respondent did on the basis that the said property is in his view of the forfeiture order granted (sic).*

5.3 *It is trite that the joint estate constituted as a result of the marriage that subsists between the Respondent and I means that I own one half of all the assets in the joint estate.*

5.4 *The forfeiture order granted meant that all of the assets in the joint estate now belong to the Respondent, except the property excluded as per paragraph 25(i) of the judgment.*

5.5 *As mentioned hereinabove I have now applied for leave to appeal against the forfeiture order and the judgment concerning same ...*

5. 8 *In the premises the forfeiture order is suspended pending the decision of the application for leave to appeal or the appeal itself. The Respondent can therefore not dispute (sic) of the assets forming part of the joint estate . . .*

6. Conclusion:

In the premises and all things considered, it is my respectful submission that I have

made out a case for the relief I seek in the present application."

[3] **THE DEFENDANT'S OPPOSITION RAISED IN TERMS OF RULE 6(5)(d)(iii):**

The Defendant raised the following issues:

3.1 The application is an irregular step within the meaning of Rule 30;

3.2 The requirements for a temporary interdict have not been met:

3.2.1 There is an absence of a *prima facie* right;

3.2.2 The Plaintiff has failed to allege and prove that she has a well-grounded apprehension of irreparable harm if the interim relief is not granted;

3.2.3 The balance of convenience is against the grant of the interdict;

3.2.4 The Plaintiff failed to allege and prove the absence of similar protection by any other ordinary remedy.

[4] **AD THE IRREGULARITY:**

4.1 The objection is that the application is styled as an interlocutory application in terms of Rule 6(11). The current procedures before court are however the finalisation of the divorce action and "*the forfeiture order under appeal is not incidental to, subordinate or accessory to the divorce action*", so the Defendant argues.

4.2 I do not agree. The divorce action between the parties consisted of three parts. In terms of a first question separated in terms of Rule 33(4) the issue of the existence of a marriage between the parties was decided separately. The Defendant denied that the parties were married to each other in terms of customary law pursuant to Section 3 of the Recognition of Customary Marriages Act, 120 of 1998. This issue was decided in favour of the Plaintiff by Makgoka J on 4 April 2014. In his judgment the learned judge reserved

the question of costs as he was of the view that it should be decided "*with the determination of the remaining issues*". He also made express reference to the Defendant's then counterclaim for forfeiture of benefits.

4.3 The issue regarding the forfeiture of benefits was also decided separately in terms of Rule 33(4) by Kollapen J as already referred to above.

4.4 The issue of forfeiture of benefits is one of the factors which a court can and should take into account in adjudicating the Plaintiff's outstanding claim in the divorce action set down for 7 and 8 March 2017 wherein she claims rehabilitative maintenance for herself. The issue of forfeiture or not impacts on the Plaintiff's asset position and her ability to maintain herself.

4.5 Although the aforementioned issues were decided separately in terms of Rule 33(4) they are clearly part and parcel of the same action and litigation between the parties and the issues which feature in the separated issues all impact to varying degrees on each other. To my mind therefore, the current application can be seen as interlocutory in both the forfeiture part of the divorce action as well as the remaining part of the divorce action itself.

4.6 None of the preceding steps in terms of Rule 30 regarding the alleged irregularity have in any event been taken by the Defendant.

4.7 The first point of objection is therefore dismissed.

[5] **AD THE ABSENCE OF A PRIMA FACIE RIGHT:**

5.1 The Defendant's opposition on this basis is somewhat confusing. The notice in terms of Rule 6(5)(d)(iii) states the following:

"(i) The Applicant is applying for an interim interdict pending an appeal. On Applicant's own ipse dixit there is a judgment granted after a full trial in which

judgment a forfeiture order was granted against her thus denuding her of her alleged right to the properties she now wishes to interdict the Respondent from dealing with and/or disposing of

(ii) The above notwithstanding, Applicant in her affidavit does not at all deal with the prospects of success on her appeal. In the premises Applicant has failed to establish a prima facie right."

5.2 The abovementioned argument is flawed: If the operation of the forfeiture order was validly suspended by a timeously delivered application for leave to appeal, then the Defendant would not have had the right to deal with the property as if his own and would have had to deal with the property as if still part of the joint estate. He could conceivably then have been restrained from unilaterally dealing with immovable property other than in accordance with the Matrimonial Property Act, No 88 of 1984.

5.3 At the conclusion of the trial and whilst the judgment regarding this application was still reserved, I referred the parties to the judgment of **Panaviotou v Shoprite Checkers (Pty) Ltd and Others** 2016(3) SA 110 (GJ). Neither of the parties has in subsequently delivered written Heads of Argument convinced me that the decision in this matter is not applicable to this application.

5.4 In the **Panayiotou**-case Sutherland J investigated what the minimum requirements are to satisfy the requirements of Section 18(5) read with Section 17(2) of the Superior Courts Act, No. 10 of 2013 which will result in a judgment being suspended pending application for leave to appeal or a petition to the Supreme Court of Appeal for leave to appeal. With reference to **Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and**

Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004(6) SA 40 (SCA) it was held that a judgment is not

suspended by the late delivery of an application for leave to appeal even though lastmentioned may be accompanied by a simultaneous service of a condonation application. I see no compelling reason to differ from this judgment or to conclude that it is wrong and should not be followed.

5.5 Therefore, similarly as in the **Panayiotou**-matter, the judgment of Kollapen J on the facts of this matter is not suspended and the Plaintiff's application should fail for want of a *prima facie* right.

[6] AD APPREHENSION OF IRREPARABLE HARM:

6.1 Apart from the aforementioned lack of a *prima facie* right, the Plaintiff has not set out grounds resulting in a reasonable apprehension of irreparable harm if the interim relief is not granted. Say for example the Plaintiff would succeed in her appeal only to find that the Defendant has in the meantime sold the immovable property, then there is still no indication that there would not be sufficient assets remaining to satisfy the Plaintiff's claim for one half of the joint estate.

6.2 It is clear from the judgment of Kollapen J that the Defendant is a man of substantial means and that there are numerous other assets (all of which he had either acquired prior to his marriage with the Plaintiff or paid for if acquired during the subsistence of the marriage). The Plaintiff only refers to the placing in the market of a single immovable asset. Even if the proceeds of this asset are dissipated, there is no indication or even an allegation that her claim for one half of the estate would not be able to be satisfied from the remainder of the assets.

6.3 The Defendant's objection on this ground must therefore be upheld.

[7] **AD BALANCE OF CONVENIENCE:**

7.1 The restraining order sought by the Plaintiff is couched in extremely wide terms. The proposed order encompasses not only all immovable and movable or liquid assets but if granted, would have the effect of freezing all of the Defendant's financial investments and bank accounts or at least so limit his dealing therewith that he would be economically disenfranchised. These are draconian and far reaching measures. The balance of convenience favours the Defendant and, in the absence of any irreparable harm, there is no balance which favours the Plaintiff.

7.2 If the order is granted the Defendant might suffer significant financial harm and this should not be countenanced where it is well-known that he has sufficient funds to satisfy any eventual claim by the Plaintiff. See in this regard **RS v MS and Others** 2014(2) SA 511 (GJ).

[8] **AD AL TERNA TE REMEDIES:**

8.1 Even if the Plaintiff is successful in her appeal against the forfeiture order and even if it is found consequently that the Defendant acted unilaterally outside the provisions of Section 15 of the Matrimonial Property Act, No. 88 of 1984, then any adjustment for a loss suffered by the Plaintiff can still take place in terms of Section 15(9) of the aforesaid Act.

8.2 The Plaintiff has failed to indicate that this alternate remedy would not be sufficient to meet the needs of the case.

8.3 The objection raised by the Defendant in this regard must also be upheld.

[9] **COSTS:**

I have, in the separate judgment dealing with the divorce action, not only dealt with costs

previously reserved by Makgoka J in respect of the initial separated issue determined by him but also with the costs of the divorce order itself. The considerations applicable in the divorce trial itself are absent from the present application and I find no compelling reason why the normal principle that costs should follow the event should not be adhered to.

[10] **ORDER:**

Having considered all of the above aspects, the Plaintiff's application is dismissed with costs.

N DAVIS

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 6 March 2017

Judgment delivered: 10 March 2017

Counsel for Plaintiff: Adv D Z Kela

Attorneys for Plaintiff: Ndumiso Voyi Inc.

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