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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No.: 36892/08

DATE: 21/04/2009

In the matter between:

A W B

Applicant

And

J C B

Respondent

JUDGMENT

VILAKAZI AJ:

1. Applicant and respondent were married to each other in community of property on the 10th March 1990. Three (3) children were born of the marriage relationship between them two (2) of whom are still minors. Their common home is situated at 160 Bonaero Avenue. Bonaero Park, Kempton Park. The parties were separated on the 3rd of March

2007; all the children presently reside with the respondent in the common home.

2. The joint estate of the parties consists of the immovable property situated on Erf 403 Rhodesfield and Erf 160 Bonaero Park, Kempton Park. No Deed's search was attached to the applicant's Founding Affidavit, a factor which makes it difficult for the Court to determine ownership of the properties referred to. Besides motor vehicles and a business managed and run by the respondent under the name and style of CBS, no list of other movables and certificates of registration in respect of the vehicles have been attached to the Founding Affidavit.

3. By all indications, the marriage relationship between applicant and respondent has reached such a state of disintegration that applicant eventually instituted divorce proceedings in 2007 under case number 23581/2007, which for some strange and inexplicable reasons has been pending since its inception. As a result of this unsatisfactory state of affairs, the applicant decided to pre-empt the logical conclusion of the divorce case by instituting these proceedings.

Relief sought

4. The applicant has brought an application in terms of section 20 of the Matrimonial Property Act, 88 of 1984, in terms of which she seeks the following relief:

4.1 An order that the joint estate subsisting between the parties by virtue of marriage in community of property be effected forthwith;

4.2 That a liquidator be appointed to give effect to the order for the division of the joint estate and he be granted all the powers;

4.3 That the costs of this application be cost in the division of the joint estate except in the event where respondent opposes the application, than in that event respondent be

ordered to pay the costs of this application from his share of the joint estate.

5. The respondent served his Notice of Intention to Oppose and filed his Answering Affidavit in which he vehemently opposes the granting of such an order.

Legal principles - Matrimonial Property Act, 88 of 1984

6. This application is regulated by the provisions of section 20 of the Act and is totally independent of the divorce action and may be instituted at any time whether or not a divorce is pending. The purpose of this section and other related sections of the Act which I shall referred to later were intended to protect women and bring about parity in the status of women in particular vis-a-vis the management and administration of their joint estate. However, this Act brought cold comfort to women married under customary law and other ethnic systems / marital regimes which the government of the day did not recognise.

7. The salient sections of the Act are:

"14. Subject to the provisions of this Chapter, a wife in a marriage of community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of joint estate as those which her husband in such a marriage had immediately before the commencement of this Act. (My emphasis)

15 (1) Subject to the provisions of subsections (2), (3) and (7) a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the consent of the other spouse-

(a) alienate, mortgage, burden with the servitude or confer any other real right in any immovable property forming part of the joint estate;

(b) enter into any contract for the alienation, mortgaging, burdening with the servitude or confer any real right in immovable property forming part of the joint estate.

(c) alienate, cede or pledge any shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets or any investments by or on behalf of the other spouse in a financial institution forming part of the joint estate;

(d) alienate or pledge any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments;

(e) withdraw money held in the name of the other in any account in a banking institution...

(f) as a credit receiver entering into a credit agreement as defined in the Credit Agreement Act, 1980 (Act No. 75 of 1980) [and to its successors] and to which the provisions of that Act apply...

(j) as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act 68 of 1981), and to which the provisions of that Act apply.

(h) bind himself as surety.

20 (1) A court may, on application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that the other person will not be prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other

basis as the court may deem fit." (My emphasis)

8. Section 14 of the Act abolishes the marital power which her husband exclusively had with regard to the disposal of the joint estate and generally the administration of the joint estate. Husband and wife now have the same power with regard to the administration

and management of the joint estate. While s15 of the Act enumerates acts which may not be performed by the one spouse without the consent of the other. The section protects the one party against the other against disposal of the assets of the joint estate in carrying debts against the joint estate. It is therefore clear that any conduct of a spouse carried out without the consent of the other may be set aside by the court if it offends against the provisions of subsection 2 of s15. In a way subsection 2 provides protection to a spouse against the conduct of the other which is calculated to prejudice the joint estate or the undivided share of the other spouse. In my view, s15 provides an alternative to the prejudicial consequences which may be attendant upon the granting of a division of joint estate prematurely in terms of s20 of the Act.

9. It is trite that a division of the joint estate in a marriage in community of property follows naturally upon the dissolution of the marriage. However, s20 of the Act overrides this natural consequence of a divorce and indeed sometimes lead to unwarranted consequences which may have a negative or prejudicial effect on the joint estate, especially in cases such as this where the sole of source of income for the joint estate is a business closely bound to the one party.

10. The section authorises the Court to order an immediate division of the joint estate at the instance of the other spouse where circumstances justify the granting of such an order. It is clear from the wording of the section that before the court may issue such an order, it must be satisfied that:

- (i) The interests of the applicant in the joint estate are being or will probably be seriously prejudiced by the conduct or intended conduct of the respondent;
- (ii) The guilty/delinquent spouse will not be prejudiced thereby;

- (iii) There are proper and substantive grounds for such an application;
- (iv) Applicant must set out the nature and extent of the prejudice being or about to be caused by the respondent, in other words material evidence of the actual disposal of the assets or diminution of the undivided half share of the joint estate must be set out in full to enable the court to assess whether the urgency to grant the relief is real, potential or imminent and capable of being carried out by the delinquent spouse:
- (v) The applicant must set out fully the nature and extent of the assets and liabilities of the joint estate and indicate their value or obtain a valuation thereof. This need not be done with mathematical precision but it will be enough to give the court an idea of the size of the value of the assets for it is obvious that any tempering of the assets of the joint estate will invariably have an impact on the liabilities that is on the interest of the creditors.
- (vi) Applicant must indicate practical and workable solutions and set out the nature of the relief sought concisely and to furnish full and proper facts to enable the court to exercise its discretion judicially.

See A Practical Guide to Patrimonial Litigation in Divorce Actions, Adv. PA van Niekerk SC. LexisNexis 4-3 — 4-6

11. The granting of the order is within the discretion of the court. For that matter, it is important that an applicant who approaches the court in terms of this section needs to take the court in confidence and disclose all facts relevant to enable the court to assess the situation. If the information is inadequate or particularities of the prejudice to the applicant are sketchy, the court will most certainly be reluctant to make such an order.

12. I now turn to evaluate the factors placed before this court by the applicant in support of the relief sought conjunctively with the evidence placed by the respondent in his

resistance to the granting of the relief. In her Founding Affidavit, the applicant glibly lists those assets which according to her knowledge form part of the joint estate, namely two immovable properties and motor vehicles without any supporting documents from the Registrar of Deeds or the Registering Authority. She alleges that she left the common home due to physical and emotional abuse at the hands of the respondent, repeated death threats and actual physical violence. She states that since she left the common home she has no access to the management and administration of the assets of the joint estate. The respondent is running a business under a close corporation which business also forms part of the joint estate. There is a balance of R700 000.00 outstanding on the bond in respect of the immovable property and estimates the value of the property to be between R900 000.00 to R1000 000.00. Shortly before she left the common home the respondent had approached her several times requesting her to sign certain documents relating to the sale of one of the immovable properties but she refused.

13. The following allegations in her Founding Affidavit need to be scrutinised to ascertain whether they satisfy the yardstick against which the application must be assessed:

"15.1 Alhoewel ek en die respondent steeds gelyke eienaars is van die gemeenskapiieke boedel, word die geheel van die gemeenskapiieke boedel tans deur die respondent beheer, en word ek eenvoudig geheel en al uitgesluit.

15.2 Dit dien vermeld te word dat die respondent ook toeasien het dat allerlei roerende bates soos voertuie van wesenlike waarde en ander bates geregistreer word deur sv besigheid, ek kan slegs vermoed vir belastingdoeleindes. Die waarde van die geheel van sv besigheid val eateer die respondent in sv persoonlike hoedanigheid toe aangesien die ledebelang 'n persoonlike boedelbates is, so word ek geadviseer.

15.3 Daar bestaan aeen moontikheid dat die gemeenskaplike boedel in aile gevalle nie op 'n latere stadium verdeel sal moet word nie, ten tye die finalisering van die egskeidingsaksie."(My emphasis)

14. The applicant does not furnish the court with full and proper information indicating the nature and size of the joint estate at the time when she left the common home; the extent to which the joint estate, or she alleges, her half share in the joint estate has been diminished since her departure from the common home. Most of the averments she relies on for the relief sought are based on conjuncture, speculation and suspicion that the respondent is or intends to diminish her share in the joint estate or that the respondent's administration of the joint estate is counterproductive or prejudicial to the joint estate as a whole. It must be borne in mind that the parties are married in community of property, whatever negative effect the respondent has on the applicant's undivided half-share of joint estate negatively impacts on the joint estate as a whole. For the respondent to interfere or try diminish the applicant's half-share in the joint estate, he must do in such a way that his half-share is not jeopardise and that the respondent can only achieve this by manipulating the cash in the estate or disposal of some other assets of which the applicant is unaware.

15. On the evidence placed before it the Court may grant an order for a division of the joint estate. This is indeed a drastic step and a departure from the normal divorce proceedings which in a way terminates the subsistence of the joint estate between the parties without the dissolution of the marriage. This being the case, the section imposes an onus or obligation on the applicant to satisfy the court of the existence of certain factual allegations which will enable the Court to exercise its discretion properly.

16. In assessing the application, the Court must balance the interests of the applicant, those of the respondent and take into account the interests of the creditors. The Court does not look only at the applicant's averments but assesses all factual allegations conjunctively to arrive at the most appropriate decision. It is accordingly important that applicant should indicate the extent to which, if ever, the granting of an order for the division of the joint estate may prejudice the respondent for if the order also prejudices the respondent's interests in the joint estate then the granting of the order would have a negative effect on the joint estate as a whole and this will militate against granting the applicant the relief sought. The nature and extent of the creditors of the joint estate is an important factor which the Court must take into account in the exercise of its discretion whether or not to grant the order. In my view, when an applicant brings this type of an application, it is important to furnish the court with the names, the nature and extent of the creditors' exposure in the joint estate. Furthermore, it is preferable under such circumstances that the applicant should also notify the creditors of the application in order to give them an opportunity to decide whether to oppose or concede the granting of the order if their interests will adequately be protected.

17. In this matter, the respondent is the sole contributor to the joint estate; he is presently conducting a business from the common home which in a way saves the joint estate from paying any rentals to a third party. From the proceeds of the business, he services the bond, maintains the children and generally maintains the household and the joint estate. An order for immediate division of the joint estate will most certainly have a negative impact on the respondent's ability to generate income and maintain the joint estate.

18. The applicant alleges that the respondent is registering motor vehicles in the name

of the business probably as a way of saving on tax which is not an indication that the respondent is diminishing her share in the joint estate or that there is some irregularities which the respondent is committing. She alleges further that the respondent told her that he intended to dispose off the property in Roseville which property was or is currently registered in their names. There is no basis upon which the respondent can dispose of this property without the applicant's knowledge and consent or involvement in the process. Consequently, this cannot be a conduct intended to prejudice the applicant.

19. In resisting the relief sought by the applicant the respondent contends that:

- (a) If an order for the division of the joint estate is ordered, the children who are presently living with and being cared for by him will have no roof over their heads;
- (b) He has always been responsible for payment of the bond to safeguard this precious asset of the joint estate;
- (c) If the common home is sold at this stage, the joint estate will suffer losses; the property is presently situated in the vicinity or in the corridor between Kempton Park and the OR Tambo Airport; there is a lot of development taking place around the area and there is also uncertainty as to what the future holds for the residents or owners of properties in the area as the Airport continues to develop and expand towards their area. He contends that it would be prudent to hold on to the property until there is clarity and certainty about the development being earmarked for the area. Placing the property on the market at this stage might be prejudicial as the future might hold better prospects.
- (d) At present, he is running the business a close corporation and it is the only source of income for the family and generation of wealth for the joint estate. The proceeds of the business are used to pay all expenses of the family and the joint estate. Besides, there

are also a number of employees who are dependent on the business.

(e) The respondent contends that an order for the division of the joint estate will necessarily result in the sale of the business known as CBS and by virtue of its one-man business closely associated with him personally, it is unlikely to attract any buyers. The business is inextricably linked to him and cannot survive without him. Although the respondent alleges that there are other remedies available to the applicant, he does not state what those remedies are to enable the Court in the exercise of its discretion to consider what order, if any, to make in this regard. It seems that both parties are very frugal with material information to assist the court in arriving at an appropriate decision. The onus rests on the respondent to set out fully what other alternative remedies are available. In the final analysis the onus rests on the applicant to satisfy the Court that she is entitled to the relief sought.

20. In *Geanay v Portion 117 Kalk Heuvel Properties cc and Others* 1998 (1) SA 622 (T) at 623b, although this was a matter involving members of a cc, the same principles applied. It was held that "A liquidation order would not be granted if the applicant acted unreasonably and there was some other remedy available."

And at page 631 the court referred to and quoted from *Wackrill v Santon International Removals (Pty)Ltd and Others* 1984 (1) SA 282 (W) at 292d-f where the court held: "The onus of establishing that some other remedies are available, and that the applicant is acting unreasonably in not pursuing it, rests on the persons opposing the winding up application."

21. Above all the respondent contends that s14 of the Matrimonial Property Act gives the applicant equal powers in the disposal of assets of the joint estate, contracting of debts against the joint estate and generally in the management of the joint estate.

Hence he cannot conclude any transaction without the applicant's knowledge.

Furthermore, s15 of the Act sets out instances in respect of which the applicant may not perform any juristic action without the respondent consent. It is clear therefore that the applicant has adequate protection against the prejudicial mismanagement of the joint estate by the respondent.

22. I have read the Founding Affidavit of the applicant and the respondent's Opposing Affidavit and I have taken into account arguments presented to me by counsel. I have also considered other remedies provided by the Matrimonial Property Act; the extent of the protection afforded to a wife by the Act, but I could find nothing in the applicant's Founding Affidavit which inclines me to grant her the relief sought. I am therefore not persuaded that the applicant has proved that she is entitled to the relief sought; the averment pertaining to the nature and extent of the joint estate, the allegation of the diminution of her undivided share in the joint estate by the respondent are inadequate to enable me to exercise my discretion in her favour. In short, the applicant has not made out a proper case for the relief sought.

In the circumstances I make the following order: The application is dismissed with costs.

T.J. VILAKAZI

Acting Judge of the High Court