

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

CASE NO: 2023-114308

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

SIGNATURE:

DATE: 8/8/24

In the application of:

G[...] **J[...]** **W[...]**

Applicant

and

L[...] **W[...]**

Respondent

JUDGMENT

LABUSCHAGNE AJ

- [1] The applicant and the respondent are in the throes of a divorce. They are married out of community of property with inclusion of the accrual system. Both declared their assets to have a nil value at commencement of the marriage. Despite this declaration, the respondent was the owner of a property in Mooikloof, Pretoria, which became the matrimonial home.

- [2] The applicant left the matrimonial home on 22 December 2022. In October 2023 the applicant heard that the property was being sold. He asked his attorneys to find out the details, but three letters later, there was still no response. On 2 November 2023 the applicant launched an urgent *ex parte* anti-dissipation application seeking that the net proceeds of the sale of the respondent's immovable property at Mooikloof be held in Trust by JJR Attorneys pending conclusion of the main divorce action between the parties.
- [3] On 7 November 2023 the *ex parte* application was heard and a *rule nisi* was granted by Kooverjee J, calling upon the respondent to show cause on 11 March 2024 why the order should not be confirmed and made final.
- [4] The order of the court was served on the respondent and the application became opposed. The *rule nisi* was extended on 11 March 2024 to 22 July 2024 for the final hearing. This is the judgment on the return day.
- [5] Pursuant to the *rule nisi* that was granted, the applicant, on 23 February 2024, caused the net proceeds of the sale of the Mooikloof property to be transferred to JJR Attorneys, being an amount of R2 824 777.65. Since 23 February 2024 the entire proceeds have been held by JJR Attorneys.
- [6] Transfer of the property had taken place on 2 February 2024 based on an offer to purchase dated 20 September 2023 for the amount of R4,2 million.
- [7] The parties were married on 10 July 2004 and two children have been born of the marriage. The eldest, a daughter, is registered as a first year medical student at the University of Pretoria for 2024. Their son is a Grade 11 scholar at G[...] High School.
- [8] The marriage has irretrievably broken down. Divorce proceedings commenced on 5 July 2023 under case number 65613/2023 and pleadings have closed in that action.

[9] On 23 October 2023 the respondent launched a rule 43 application. The applicant answered to the rule 43 proceedings on 6 November 2023, the day before the *ex parte* urgent application was heard. The rule 43 application was argued on 5 June 2024.

[10] In the period after launching of the urgent application and until 5 June 2024, the applicant's stated intention was to secure part of the net proceeds of the aforesaid sale for purposes of payment of his claim against the respondent for an accrual. The respondent intended securing the other part of the funds for purposes of the tertiary education of the minor children. For this purpose, she intended setting aside R1,5 million (R750 000.00 for each child) to pay for their tertiary education. The balance would be part of the accrual.

[11] At the hearing of the rule 43 application on 5 June 2024, the parties agreed that they would seek the following order when the matter is argued on the return date:

"4.1 R1,5 million (One and a Half Million Rand) of the proceeds held in trust by JJR Attorneys be paid over to Weavind & Weavind Attorneys' Trust account ('Weavind') to be administered by the director Niel Cloete of Weavind:

4.1.1 R750 000.00 (Seven Hundred and Fifty Thousand Rand) to be allocated to the major child in respect of her tertiary educational needs comprising of:

4.1.1.1 University fees;

4.1.1.2 Hostel fees;

4.1.1.3 Textbooks, stationary, scrubs, educational equipment and/or any educational related need as reasonably required by the tertiary institution from time to time;

4.1.2 *R750 000.00 (Seven Hundred and Fifty Thousand Rand) be allocated to the minor child's tertiary education (as defined in 4.1.1 supra);*

4.1.3 *Weavind is to invest the money stipulated in paras 4.1.1 and 4.1.2 supra in separate interest bearing accounts."*

[12] Due to the aforesaid agreement R1,5 million of the funds that are subject to the interim order will be transferred to Weavind & Weavind to pay for the tertiary education of the children. The dispute before me therefore relates to the balance of the restrained funds, being approximately R1,3 million. This amount is held by JJR Attorneys pending the determination of this application.

[13] At the hearing, counsel for the applicant indicated that he approaches the court on two bases, namely:

13.1 Anti-dissipation; and/or

13.2 On the basis of his claim to a share of the net proceeds of the property to secure his claim for an accrual, being quasi-vindicatory in nature.

[14] At the hearing of the matter, counsel for the respondent contended that counsel for the applicant's reliance on the alternative argument of the applicant's claim being quasi-vindicatory in nature was not foreshadowed and that she sought an opportunity to provide supplementary heads of argument. Both parties were offered an opportunity to file such heads and have done so.

[15] In argument, counsel for the applicant contended that the causes of action are not true alternatives. He contended that, if required to comply with the anti-dissipation requirements as set out in **Knox D'Arcy (see below)**, the

onus would be higher than if the matter were dealt with as quasi-vindictory in nature. The applicant contends the following:

15.1 That he has a substantial accrual claim against the respondent in the divorce action, the accrual in her estate being far more than in his. He contends that the respondent was guilty of violent, disingenuous, erratic and insincere conduct and had a habit of incurring significant expenses without prior approval, while requiring the applicant to cover those costs. He contends that the respondent's failure to respond to three of the applicant's attorneys' emails (10 October, 13 October and 25 October 2023) and one telephone call (18 October 2023), requesting information regarding the status of the sale of the Mooikloof property, was to be taken into account.

15.2 He contends that the respondent's plea that was filed on 1 November 2023 indicating a change in tack as far as the net proceeds were concerned, caused alarm. In that plea the respondent seeks a forfeiture of the applicant's claim to the accrual, whereas previously she contended that the funds would be available to meet his claim for an accrual.

[16] Based on the alarm caused by the respondent's conduct, the applicant contends that he had no other remedy available to him to secure the net proceeds as a source for payment of his claim for accrual.

[17] These contentions are disputed by the respondent. She contends that she was unaware of the applicant's fear of dissipation of the net proceeds at the time when his attorneys wrote three letters enquiring about the status of the sale of the Mooikloof property. She contends that she fully explained the delay in responding to the letters (12 calendar days). She contends that the claim for forfeiture in the plea does not constitute an intention to dissipate the net proceeds of the sale and she denies that there was a change in tack or a mutating case as contended for by the applicant.

[18] In the rule 43 application the respondent (as applicant in those proceedings) contends in the founding affidavit that she intends dealing with the proceeds of the sale of the property as follows:

18.1 R750 000.00 would be placed in a separate bank account by the respondent for the benefit of the children's tertiary education;

18.2 All expenses related to the mayor child's tertiary education shall be paid from the separate account;

18.3 The respondent shall provide the applicant with a copy of the bank statements of such account;

18.4 Should any tertiary education expenses of the mayor child not exhaust the funds held and the mayor child reaches the age of 25, then the funds held in the account should be transferred to the mayor child;

18.5 There was a similar paragraph pertaining to the minor child for a similar amount. She then contends that the balance of the proceeds would form part of the accrual.

[19] The applicant's contention that he has a substantial claim for an accrual is based on the respondent's financial disclosure form, indicating a net asset value of R12 458 660.28. By contrast, the net asset value of the applicant's estate amounted to R555 583.57. Based on these figures, the applicant contends that he has a claim for accrual, being half of the difference between the aforesaid amounts, of R5 673 746.57.

[20] The three letters referred to above are foundational to the applicant's fear of dissipation. The applicant's attorneys had requested an undertaking in a letter of 13 October 2023 that the net proceeds of the property would be held in Trust until the divorce proceedings were finalised so as to ensure that the proceeds of the sale are preserved and are not squandered, thereby

protecting the applicant's right in the accrual claim. This first letter met with no response.

[21] The applicant's attorneys of record then contacted the respondent's attorneys of record on 18 October 2023 and enquired directly with Mr Venter regarding the status of the sale. Mr Venter indicated that he did not have the facts and that he would revert during the course of the next week. This conversation was placed on record on 19 October 2023. A further letter was sent on 25 October 2023, requesting the detail relating to the status of the immovable property. The respondent's attorneys then advised that they would revert in due course if so instructed. This was taken as an indication that there may be no response unless instructions were received to that effect.

[22] On 1 November 2023 the respondent filed her plea in the divorce action claiming forfeiture of the applicant's share in the accrual. This was the final event that triggered the launching of the urgent application. The respondent's ostensible about-face caused alarm. Where the respondent had previously indicated that such net proceeds would be available as part of the accrual, she now claimed forfeiture of his claim to any benefits arising from the accrual. The applicant contends that this change in tack, coupled with a history of alleged violent and erratic behaviour, indicated to the applicant that the respondent would squander the proceeds in an attempt to reduce or eliminate the disparity in their respective accruals.

[23] These facts were sufficient to persuade Kooverjee J to grant an interim order. The application was however brought *ex parte* and without the respondent's version being before court.

GRANTING OF *EX PARTE* ANTI-DISSIPATORY RELIEF

[24] The granting of an *ex parte* anti-dissipatory relief *pendente lite* is an extraordinary remedy that must be justified by facts.

- [25] In **Knox D’Arcy and Others v Jamieson and Others** 1996 (4) SA 348 (AD) Grosskopf JA stated the following regarding anti-dissipatory relief:

“The question which arises from this approach is whether an applicant 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. Having regard to the purpose of this type of interdict the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intention of preventing execution in respect of the applicant’s claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency.”

- [26] In quasi-vindictory claims, the requirement of showing an intention on the part of a respondent to defeat the claim of creditors need not be established. J Cane in an article “Prejudgment Mareva-type Interdicts in South African Law”, SALJ (1997) Volume 114, page 77 describes a quasi-vindictory or quasi-proprietary claim as one in which the applicant claims delivery of specific property under some legal right to possession. Such a claim would be an exceptional case, in the context of the quote from **Knox D’Arcy** supra, in which an applicant does not have to prove a risk that the respondent is likely to remove or hide assets to ensure that when judgment is given, there are no traceable assets against which a judgment can be executed (page 87). The impact of the distinction in quasi-vindictory claims is that an apprehension of irreparable harm is presumed. It is however open to a respondent to rebut this presumption (Cane, page 79).

- [27] Cane states at page 79:

“In cases in which the applicant has a vindicatory or quasi-vindicatory claim, he would not be required to prove a well-grounded apprehension of irreparable harm, for there is a rebuttable presumption of irreparable injury if the interdict is not granted. This does not mean however, that the question of irreparable harm is completely irrelevant. First it is ‘open to the respondent to defeat the claim for the interdict by rebutting the presumption’.”

[28] Counsel for the respondent contended that, where there is an identified earmarked fund to which the respondent establishes a claim, then those funds can be restrained by an interdict *pendente lite* to preserve execution of his claim. In this instance, the claim would be a claim to share in the difference in accrual between the estates of the parties to a divorce.

[29] In **Fey N.O. v Van der Westhuizen and Others** 2005 (2) SA 236 (C) Meer J found, in a matter in which the trustee of an estate was seeking to secure assets pending a claim in terms of the Insolvency Act to such assets, applied the following dictum in **Hawkins’ Trustees v Corio Saw & Planing Mills Ltd and Others** 1923 WLD 125 (per Tindal J):

“The principle seems to be that if the thing itself which forms the subject matter of the disposition is in the hands of the creditor, on a prima facie case being made out by the trustee that he is entitled to reclaim it for the estate, the court will attach the thing until the trustees’ case can be finally decided, even if mala fides or collusion is not established and the thing itself is money, and even if the probability of irreparable loss has not been established.” (**Fey** (*supra*) at 251 B – D).

[30] The question is whether a claim to share in an accrual in divorce proceedings is quasi-vindicatory. It is in the end a claim sounding in money.

[31] Money that is in a bank account become comingled with other money in the bank through commixtio. One consequence of the principle of commixtio is that a creditor cannot interdict the dissipation of an amount of money from a

bank account on the basis of some vindicatory or ownership right to it. (**Carsten and Another v Kullmann and Others** (case number 49174/2017) – unreported – per WGH Van der Linde J at [19].

- [32] In **Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others** 2003 (3) SA 268 (W) the following is stated at par [29]:

“Money, like any species of property, may be interdicted pending a vindicatory or quasi-vindicatory claim for that money. There is however a problem in this regard.”

- [33] As Schutz JA said in **First National Bank of Southern Africa Ltd v Perry NO and Others** 2001 (3) SA 960 (SCA) at 967 H – I:

“It might seem a simple thing to recover stolen money from one found in possession of it. But the matter is complicated by the rule in our law, and inevitable rule it seems to me, flowing from physical reality, that once money is mixed with other money without the owner’s consent, ownership in it passes by operation of law.”

- [34] However, what a creditor can do by means of a quasi-vindicatory action is to lay claim to money in a bank account, if the money has deliberately been kept apart from other money, and thus forms part of an identifiable fund intended for a specific purpose. The creditor must have an underlying legal right against a debtor to whose credit the money stands, to lay claim to the money (**Carsten** (*supra*) at par [20]).

- [35] What a creditor can also do, is to show that its debtor is threatening to dissipate or secrete its assets to avoid having to satisfy its creditor’s judgment granted some day down the line, is to interdict such dissipation pending the determination of liability and the obtaining of the judgment. The object of such an interdict is to prevent the creditor being stuck with what would otherwise be a hollow judgment (**Carsten** (*supra*) at par [21]).

[36] The respondent provided an explanation for her failure to timeously respond. She contends that she was busy finalising her rule 43 sworn statement that was dated 23 October 2023. The applicant then served a notice of bar in respect of her plea to his counterclaim, and she had to attend to filing that plea. The children were in the midst of their final exams and the respondent, and her children were preparing to move out of the Mooikloof property.

[37] The applicant summarises his grounds for the anti-dissipatory relief in paragraph 40 of his founding affidavit, which reads:

“The fact that no response is forthcoming from the attorney and that the respondent now all of a sudden has change of tact (sic) and a mutated case, coupled with the history of the matter and the respondent’s disingenuous, violent and erratic behaviour leave no doubt in my mind that, once registration of transfer occurs, the respondent will squander the proceeds of the sale in an attempt to reduce, alternatively eliminate, the disparity and accrual between my estate and the respondent’s estate.”

[38] The respondent denies that the applicant has made out a case for anti-dissipatory relief on the aforesaid grounds. She contends that, since 25 October 2023, the applicant has been aware of the respondent’s intentions in respect of the Mooikloof proceeds as set out in the founding affidavit of the rule 43 application.

[39] In Attorney Grove’s letter of 25 October 2023, the applicant’s attorney raised no dispute on any aspect of the respondent’s intentions regarding the proceeds. On 6 November 2023 the applicant, responding to the respondent’s rule 43 application, raised no objection regarding her intentions regarding the proceeds of the Mooikloof property. He contended as follows:

“36.2 I have taken note of how the applicant wishes to deal with the proceeds of the said property, however, I do not believe that the

applicant has my best interests in mind especially with regard to the asset that forms part of the joint estate and ultimately the accrual.

36.3 *As a result thereof, the proceeds of the sale of the immovable property should be placed in a Trust account pending the finalisation of the divorce.”*

[40] This response, signed a day before the ex parte application was brought, expresses no concern about dissipation of the net proceeds of the sale. One would expect the applicant, having already commenced with the ex parte application on 2 November 2023, to have expressed his fear of dissipation in answer to the rule 43 application. At least, since his fear of dissipation was the driving force for the urgent ex parte application, he should have disclosed that his answering affidavit, signed a day before, does not express his fear of dissipation. And he should have explained why not. In the rule 43 order granted on 5 June 2024, the respondent contends that the applicant conceded and agreed that R1,5 million of the net proceeds be held separately for the children’s education. This had been a bone of contention until then. She however contends that her intentions had been clear since October 2023.

[41] In the applicant’s replying affidavit he has contended that the following are irrelevant for purposes of adjudicating this application:

41.1 The history of the sale of Mooikloof;

41.2 Contact with the children;

41.3 Consultation with the Family Advocate.

[42] In his founding affidavit there were three grounds for the fear of dissipation. Only one remained. The applicant’s case regarding his fear of dissipation has therefore shrunk substantially since granting of the interim order on 7 November 2023.

[43] The applicant's reliance on the respondent's alleged violent, ingenious and insincere conduct are closely related to the applicant's lack of contact with his children since February 2023.

43.1 The respondent contends that the children do not wish to have contact with their father, being angry with him for being in a relationship with a third party. The applicant ostensibly attributes damage to his property on 25 September 2023 to the respondent, where she contends that her son destroyed the applicant's property because he was angry with his father.

43.2 The respondent apparently damaged a wedding photo of the parties on 25 December 2022. That is two days after the applicant left the common home. How this is linked to the risk of dissipation of assets in November 2023 is not fully explained.

43.3 The applicant's son is 16 and attends a High School at which the mother of one of the other scholars is the third party with whom the applicant has a relationship. He is angry about this. There is no ostensible basis for attributing the damage to the applicant's property to the respondent in these circumstances.

[44] The applicant's Rule 43 affidavit indicates that the applicant is concerned over the respondent's control over the funds as he does not believe that she has his best interests at heart.

[45] It is apparent from the applicant's version that by 2 November 2023 he had decided to commence with the *ex parte* application. This was expedited by the respondent's plea to the counterclaim in which she sought forfeiture of his claim to an accrual. However, when the applicant answered to the respondent's rule 43 application, he made no allegation that the respondent is dissipating assets, denuding her estate or in some way defeating his

claim. He also makes no reference to his intention to launch an urgent application for failing to respond to the aforesaid three letters with alacrity.

[46] The applicant contends that the plea of forfeiture of his claim that was delivered in response to his counterclaim on 6 November 2023 represents a change of heart on the part of the respondent. He made the conclusion that she intends squandering the net proceeds of the sale of the property.

[47] Counsel for the respondent however points out that, in the pleadings as at that stage the applicant in his counterclaim claimed an accrual amount of R284 000.00 together with unquantified division of movables. There was no substantial accrual claim at that stage.

[48] In her particulars of claim dated 5 July 2023 the respondent (as plaintiff) pleaded that each party retain their own assets and be responsible for their own debts, and that each party remains sole owner of pension funds, annuities and policies and that neither has a claim against the other in respect thereof. The respondent therefore pleaded that there would be no sharing of any accrual by the applicant. She therefore denies the contention that there was a change in tack in her plea to the counterclaim dated 1 November 2023. The respondent was consequently consistent in her particulars of claim and in the plea to the counterclaim that there was no sharing of any accrual by the applicant.

[49] In these circumstances, the applicant's inference that the respondent was about to squander the net proceeds of the immovable property because of change in tack as far as forfeiture of the accrual is concerned, is a leap in logic not justified by the underlying facts. A forfeiture claim in divorce proceedings does not equate to an intention to dissipate assets. Forfeiture is in this case raised as a defence to the counterclaim.

[50] Counsel for the respondent contended that the limited ambit of the applicant's accrual claim on the pleadings was not pointed out to the Judge hearing the *ex parte* application on 7 November 2023. Anti-dissipatory relief,

based on the principles in **Knox D'Arcy**, had to be confined to such assets as would be sufficient to satisfy the applicant's claim in respect of the accrual and no more (see **Knox D'Arcy Ltd and Others v Jamieson and Others** 1994 (3) SA 700 (WLD) at 701 H – I).

[51] On the applicant's version, the respondent's net asset worth was R12 458 660.28. This was more than enough to meet the limited accrual claim of R284 000.00 plus unidentified, unquantified movable assets consisting of vehicles. These vehicles were in the applicant's possession at that time. There was therefore no need to interdict the Mooikloof proceeds to satisfy the limited accrual claim.

[52] The applicant (as plaintiff in the counterclaim) filed a notice of intention to amend his accrual claim in March 2024. His right to do so is not at issue at present. The respondent accepts, as evidenced by the heads of argument filed by the respondent's counsel, that the applicant *prima facie* has established a claim to an accrual, but at the time of the granting of the order on 7 November 2023, it was minimal as set out above. The relief granted was therefore overbroad as the limited nature of the claim to accrual was not set out in the papers that served before the Judge on 7 November 2023. The applicant has established a *prima facie* accrual claim, forfeiture aside, but not to the extent covering the net proceeds of the sale in an amount of approximately R2,8 million.

DISCUSSION

[53] Based on the notice of amendment that the applicant served in March 2024 providing for an increased claim for an accrual, the claim for accrual that serves on the papers before me is different to that that served before the court that granted the *ex parte* order.

[54] If the claim to an accrual is quasi-vindictory, then, as far as an interim interdict is concerned, evidence that there is an earmarked fund in the face of a competent claim to share in the accrual would be sufficient to establish a

prima facie right to the relief. Further, irreparable harm is presumed. Thirdly, the applicant need not show that he does not have an alternative remedy.

[55] Applying the principles of quasi-vindictory relief *pendente lite*, counsel for the applicant contends that the applicant need only show that the proceeds of the sale of the Mooikloof property is in an earmarked fund to which he has a strong claim by virtue of his claim to share in the accrual. It is then presumed that he would suffer irreparable harm. In addition, the applicant need not establish the absence of an alternative remedy (**Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others** 2003 (3) SA 268 (W) at par [28]).

[56] The nature of an accrual claim has been referred to in a number of cases. In **RS v MS** 2014 (2) SA 511 GSJ the Court (per Bester AJ) stated the following at par [17]:

“[17] *However, it is trite that even a contingent right to claim half of the accrual in the Estate of the other spouse could be protectable by interdict pendente lite, but then an applicant for such relief must show:*

- (a) *That the respondent has assets within the jurisdiction of the court;*
- (b) *That the respondent, prima facie, has no bona fide defence against the applicant’s alleged contingent rights;*
- (c) *That the respondent has the intention to defeat the applicant’s claim or to render it hollow by dissipating or secreting assets.*

[18] *But, even if these jurisdictional requirements are present, then an applicant must still show a well-grounded apprehension of irreparable loss, should the interdict pendente lite not be granted. It*

is perhaps apposite here to point out that, because of the draconian nature, invasiveness and conceivably inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in the clearest of cases.” (See generally: **Knox D’Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (A) ... at 372 C; **Mngadi v Beacon Sweets and Chocolates Provident Fund and Others** 2004 (5) SA 388 (D) ... at 396 E; **Reeder v Softline Ltd and Another** 2001 (2) SA 844 (W) at 849 to 851.

- [57] In **BM v BNG** (unreported case number 2008/25274) (South Gauteng High Court, Johannesburg – as it then was) Brassey AJ describes a party’s interest in an accrual in divorce proceedings as *“purely equitable for, questions of dissipation aside, it becomes exigible only ‘at the dissolution of the marriage ... by death or divorce’ in terms of s 4 (1) of the Act.”*

- [58] The right to share is not a vested right but a contingent right to participate in the benefits of the accrual upon dissolution of the marriage (Cloete J in **Reeder v Softline Ltd and Another** (*supra*) 2001 (2) SA 844 (W) at 848 I to 849 B.

- [59] Where there is a risk of dissipation of assets against which a right to share in an accrual takes place, then no doubt interim relief *pendente lite* can be obtained.

- [60] In **RS** (*supra*) the claim to share in an accrual, in an anti dissipation context, was not dealt with as a quasi-vindicatory claim. It is apparent from that case that the applicant still needs to establish the risk of dissipation with the intention to prejudice the applicant’s accrual claim. However, that judgment does not expressly deal with the issue of quasi vindicatory relief. The jury is apparently still out on this issue as far as an accrual claim is concerned. The argument that such a claim is quasi vindicatory is well supported by authorities in a different context. As will be apparent from what follows, I need not make a finding on this topic.

- [61] In this instance, I intend dealing with the matter on both assumptions. Firstly on the basis that the claim is not quasi-vindictory and the applicant has to comply with the aforesaid **Knox D’Arcy** principles, including showing a state of mind aimed at undermining execution of a valid claim to share in the proceeds of the accrual. Secondly, I will assume the claim is quasi vindictory, and deal with it on the basis that irreparable harm is presumed because there is an identified earmarked fund and a strong claim to share in the proceeds in that fund.
- [62] On my assessment of the facts of the matter, the respondent has been consistent in her intentions regarding use of the net proceeds of the sale of the Mooikloof property. Her primary concern was for that of their children and their education. The balance would be available if a claim to share in the accrual is established on the part of the applicant. The respondent however has raised a defence against such claim based on forfeiture.
- [63] As her intentions have not changed since October 2023, the basis upon which the applicant approached the court *ex parte* in November 2023 does not hold good. The fact that the applicant has agreed to the setting up of an educational fund for their children, as the respondent has intended throughout, confirms that the extent of the rule nisi exceeds the amount required to achieve its purpose. Whether the applicant had control of that fund or not, it cannot be said that setting up a fund for the education of his children amounts to dissipation of the respondent’s assets with the intention of thwarting his accrual claim. The facts placed before the court by the respondent cast serious doubt over the subjectively perceived risk of dissipation of the net proceeds of the sale. The applicant’s fear of dissipation turned out to be unfounded. Those facts also cast serious doubt over the ambit of the rule nisi. Further, even if the proceeds of the sale were placed beyond the reach of the applicant, there were sufficient assets to meet his claim to the accrual. He would not be harmed by utilisation of the net proceeds for the purpose for which the respondent wished to use it. This is so regardless whether one utilises the accrual claim as formulated in the

pleadings in November 2023(the limited accrual) or the accrual based on the amendment filed in March 2024.

[64] On the basis of **Knox d’Arcy**, I find that the applicant has not established the required intention on the part of the respondent of secreting assets in order to prejudice the applicant’s accrual claim. As the respondent has sufficient assets to meet the applicant’s accrual claim, forfeiture aside, there was no risk of irreparable harm in respect of the applicant’s accrual claim. His claim, if established, would not be rendered hollow. The applicant’s *prima facie* right to a contingent claim for accrual , at dissolution of the marriage, was not placed in jeopardy by the respondent. Further, even if he could establish a right to interdictory relief , pendent lite, it would not be for the full amount of the proceeds of the sale. His accrual claim was for R284 000 and vehicles (which were already in his possession at that time).The order granted ex parte was for the full proceeds of the sale, which is in excess of his accrual claim at that time. Even assuming that the claim will increase due to the amendment of March 2024, the execution of a successful accrual claim was not placed at risk.the respondent has sufficient assets, even for the increased claim.

[65] The second element of an interim interdict is whether the applicant has established a reasonably apprehended risk of injury or harm to the aforesaid *prima facie* right. The applicant has agreed to R1,5 million of the net proceeds being earmarked for the children’s education and being paid and administered by Weavind & Weavind Attorneys.

[66] The respondent has shown fiscal responsibility as far as tertiary education of their children is concerned. The liability to provide for the education of the children is not that of the respondent alone, but also of the applicant. The securing of funds for their education as agreed has ostensibly fallen on the respondent alone. Part of the amount of R1,5 million so set aside must of necessity be made up of the applicant’s duty of maintenance to his dependent children. This is shared obligation between the parties and setting

up an educational fund does not amount to squandering the proceeds of the sale.

[67] I do not have cogent facts before me indicating that the respondent would recklessly squander the net proceeds after deduction of the educational fund, with the intention of defeating the plaintiff's claim to share in the accrual. She has denied such intention and the facts do not suggest that she will act differently.

67.1 At the time when the interim order was granted on 7 November 2023, the applicant's claim to an accrual was limited. The vehicles which he claimed were already in his possession. The remaining claim amounted to approximately R284 000.00. The applicant claimed an accrual based on the respondent's assets, only one of which consists of the balance of the proceeds of the sale of the Mooikloof property.

67.2 In the absence of clear evidence of an intention to dissipate, there is no real risk of the respondent dissipating the balance of the proceeds of the sale. If she were to, despite denying any intention to dissipate, nevertheless proceed and dissipate the assets, the applicant would be entitled to appropriate redress in the divorce action. There are many other assets that add up to an amount far in excess of the amount under restraint.

67.3 Depriving the respondent from utilising the balance of the proceeds to be economically active would prejudice the respondent.

67.4 Although an order giving effect to an accrual claim only takes effect upon the decree of divorce being granted, for decision the moment with respect to which the respective values of the estates is to be assessed is not date of divorce, but date of *litis contestatio*.

67.5 In B,M v B, NG case number 2008/2274(unreported South Gauteng judgment , per Van der Linde J) the following is stated in respect of a contingent monetary claim in based on accrual at par [40]:

“...[40 On this matter the established principle is that the operative moment is *litis contestatio* ,for that is the moment at which the dispute crystallises and can be presented to court ...

[41] Since *litis contestatio* is the lodestar for the applicable decision, transactions after this moment are irrelevant and should be left out of account. By saying this,I do not mean to suggest, of course, that the pleadings are fixed in stone; if they erroneously reflect the true state of affairs , they can(subject to the normal exceptions) be corrected so that they accurately state the facts. What cannot be done , however, is to make amendments or otherwise tender evidence in order to bring transactions into account that occurred only after close of pleadings.”

When the *ex parte* order was granted , *litis contestio* had been reached as the pleadings had closed. The transfer of the net proceeds after transfer in Feb 2024 was therefore a transaction after *litis contestatio* that was not relevant in establishing the respective accruals in the estates of the parties. It could not diminish the accrual in the respondent’s estate.The risk of dissipation could therefor only relate to the recoverability of the accrual claim asserted by the applicant based on the respective accruals as at *litis contestatio*.The applicant has not established a reasonably apprehended risk of irreparable harm.

[68] If the matter were considered in the context of quasi vindicatory relief, pendent lite, the result is the same. The respondent has rebutted the presumption of irreparable harm.

[69] Considering the balance of convenience, it favours the respondent. As the respondent has sufficient assets available to meet the applicant’s claim, there is no risk that the applicant would suffer more than if the relief were

refused. The respondent is economically more successful than the applicant and depriving her of using the balance of the proceeds of the sale, could jeopardise her ability to be economically active. The balance of convenience consequently does not favour the applicant, but the respondent.

[70] In the premises, whether the applicant's claim is found to be quasi-vindicatory or not, the applicant has not established a case for confirmation of the interim order.

[71] As a final consideration, I regard the non-disclosure by the applicant to the judge on 7 November 2023 as relevant to the Court's overall discretion to grant or refuse interdictory relief. As ex parte applicant the applicant had a duty to disclose material facts that might have influenced the Court. This relates to the non disclosure of the limited ambit of his accrual claim at the time. The order sought and obtained was for an amount far in excess of his then accrual claim. His amendment was not filed at that time and an increased accrual claim was not being asserted in November 2023. I would also discharge the rule nisi in the exercise of my overall discretion due to the non-disclosure of material facts.

[72] Therefore, it is ordered that:

1. R1 500 000.00 (one and a half million Rand) of the proceeds held in trust by JJR Attorneys be paid over to Weavind & Weavind Attorneys' Trust account ("Weavind") to be administered by the Director Niel Cloete of Weavind & Weavind Attorneys:

- 1.1 R750 000.00 (seven hundred and fifty thousand Rand) be allocated to the major child in respect of her tertiary educational needs comprising of:

- 1.1.1 University Fees;

- 1.1.2 Hostel Fees;

- 1.1.3 Textbooks, stationary, scrubs, educational equipment and/or any educational related needs as reasonably required by the tertiary institution from time to time;
- 1.2 R750 000.00 (seven hundred and fifty thousand Rand) be allocated to the minor child's tertiary education (as defined in paragraph 1.1.1 supra);
- 1.3 Weavind is to invest the monies stipulated in paragraph 1.1.1 and 1.1.2 supra in separate interest-bearing accounts;
- 1.4 The parties are to jointly instruct Weavind to pay, or reimburse a party, for the major and/or minor child's tertiary expenses, alternatively, release monies to either Party to directly pay the tertiary expenses;
- 1.5 The parties are to provide Weavind with invoices and proof of payment as and when received;
- 1.6 In the event that the parties disagree on payment of a particular tertiary expense, Weavind is to mediate the dispute between the parties and is authorised to determine, subject to judicial review, whether the said expense qualifies as a reasonable tertiary educational expense (as defined in paragraph 1.1.1 supra) payable from the proceeds held in trust having due regard to the best interests of the particular child;
- 1.7 The applicant shall be liable for Weavind's fees and disbursements;

2. The remainder of the net proceeds of the sale of the Mooikloof property which is held by JJR Attorneys shall be released by JJR Attorneys to the applicant .
3. The applicant I ordered to pay the costs of the application on Scale C, including the costs of two counsel, one of which is a senior.

LABUSCHAGNE AJ
ACTING JUDGE OF THE HIGH COURT