



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
1 OCTOBER 2024	[Redacted]
DATE	SIGNATURE

Date: 1 October 2024

Case number: 054684/2024

In the matter between:

B T T M

APPLICANT

And

N K M

RESPONDENT

JUDGMENT

MINNAAR AJ.

[1] The parties were married to each other on 12 January 2007, in community of property, and the marriage still subsists. On or about 17 May 2024, the applicant instituted divorce proceedings seeking an order dissolving the bond of marriage and division of the joint estate. The

respondent delivered a plea. The plea shows that the parties agree that the marriage bond should be dissolved and the joint estate be divided.

[2] The applicant approached the Family Court on an urgent basis for the following relief:

- a. That the parties' joint estate be divided immediately in equal shares as provided for in Section 20 of the Matrimonial Property Act, No 88 of 1984, as amended.
- b. That Mr Bekker be appointed as receiver or liquidator of the parties' joint estate, with the powers and mandate provided to him as envisaged in the mandate attached to the founding papers.
- c. In the alternative to the above, an order that a decree of divorce is granted with the relief ancillary to the divorce action.
- d. In the event of opposition to the application, the respondent be ordered to pay the costs of the application on the scale as between attorney and client, alternatively on the scale as between party and party, including the costs consequent to the employment of senior counsel.

Section 20 of the Matrimonial Property Act, No 88 of 1984 (hereinafter referred to as "Section 20"):

[3] Section 20 provides:

"20 Power of court to order division of joint estate

(1) A court may on the 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 other persons 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 just.

(2) A court making an order under subsection (1) may order that the community of property be replaced by another matrimonial property system, subject to such conditions as it may deem fit."

[4] Division of the joint estate is a natural consequence of the dissolution of a marriage in community of property. To seek such a division before the dissolution of the marriage is a drastic step. There must be strict compliance with the provisions of Section 20. Extraordinary relief of this nature is not just for the taking and due consideration should be given before a court is approached.

[5] Before an order in terms of Section 20 can be issued, the following requirements are to be met:

- a. The interest of the applicant in the joint estate are being, or will probably, be seriously prejudiced by the conduct or intended conduct of the respondent.
- b. The guilty/delinquent spouse will not be prejudiced thereby.
- c. There are proper and substantive grounds for such an application.

- d. The 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.
- e. 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 tampering with the assets of the joint estate will invariably have an impact on the liabilities that are in the interest of the creditors.
- f. The 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.¹

[6] The respondent is the sole member of Go-Sedimogile Construction and Projects CC ("the CC"). The respondent's interest in the CC forms part of the parties' joint estate. The CC operates in the logistics and transport of coal. The CC owns various horses and trailers and other vehicles and same is being used in the day-to-day running of the CC.

¹ *AB v JB* [2009] ZAGPPHC 185 (21 April 2009) at par 9 and 10

[7] According to the applicant, the respondent has embarked on a mission to cause the applicant irreparable harm and damage as the respondent has decided to sell or alienate assets of their joint estate, specifically to the applicant's detriment and prejudice.

[8] In terms of the founding affidavit, the purported alienation the applicant is relying on relates to the respondent's outreach to Pearson & Ferguson (Pty) Ltd, being represented by Mr. Clint Mokgwathi ("Mr Mokgwathi"). It is the case of the applicant that the respondent and Mr Mokgwathi prepared a draft sales and purchase agreement, in terms of which Pearson & Ferguson (Pty) Ltd, intends to purchase certain trucks and trailers from the CC. Reference is made to emails exchanged between the respondent and Mr Mokgwathi. The alleged draft sales and purchase agreement is not attached to the applicant's application.

[9] According to the applicant, the respondent has also secretly decided to syphon an amount of approximately R1 200 000.00. This amount was allegedly retained in the respondent's personal bank account. The applicant alleged that this money is being utilised to build a home on a property that belongs to the respondent's mother.

[10] In the answering affidavit, the respondent provided a full explanation as to the dealings with Mr Mokgwathi. It is the respondent's case that no sale as alleged by the applicant materialised.

[11] In amplification, the respondent states that in the nature of the business the CC is conducting, it will follow that vehicles in the fleet will have to be sold to enable to reliability of the fleet and to comply with the requirements of the contracts that the CC are bound to.

[12] The respondent pertinently denies that she is alienating any assets of the CC. In paragraph 32 of the answering affidavit, the respondent challenges the applicant to refer to any other asset(s) the respondent has sold or is in the process of selling. The applicant fails to counter this allegation and nothing is presented on the challenge raised.

[13] As to the allegation that she had syphoned money to her mother, it is the respondent's case that the money is for the construction of the Church Mission House of which the applicant is aware and has agreed to. The parties' contribution to the church and their social responsibilities is not a secret between them. This is not something that came out of the blue as the applicant wants this court to believe.

[14] The onus to succeed with Section 20 rests solely with the applicant. The applicant dismally failed to shed this onus in his founding papers. It is trite that an applicant needs to make out a prima facie case in his or her founding affidavit. *In casu*, the applicant's attempt to bolster his case in the replying affidavit is an exercise in futility.²

² *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316A

[15] The applicant failed to provide any material evidence of the actual disposal of assets. This court is not convinced that assets are being sold, or might be sold to the detriment of the joint estate.

[16] The applicant further failed to present convincing evidence that the applicant's interests in the joint estate are being, or will probably, be seriously prejudiced by the respondent's conduct, or intended conduct.

[17] The applicant is also completely silent on the prejudice that the respondent might suffer. Contrary to the alleged prejudice the applicant might suffer, to order the dissolution of the joint estate, will severely prejudice the respondent as it would have a detrimental impact on her capability to earn an income through the CC.

[18] The court is further kept in the dark on the crucial requirement that the applicant must fully set out the nature and extent of the joint estate's assets and liabilities. This court cannot order dissolution of the joint estate if the court is not appraised of facts relating to what the joint estate comprises.

[19] Save to state that the CC owns some horses, trailers and motor vehicles, the applicant dismally fails to explain the nature and extent of the joint estate's assets and liabilities. To state that the CC owns some vehicles does not suffice.

[20] From the answering affidavit, it is evident that some of the vehicles were purchased with financial assistance from Standard Bank and Toyota Finance and that the credit agreements are still in place. Why the applicant could not have provided details of the liabilities of the joint estate remains a mystery.

[21] Equally so, save to state that the applicant has shares in some legal entities and that these entities own some vehicles, the applicant is completely silent regarding the assets and liabilities of these entities. The applicant does not even attempt to indicate the value of the assets or to state what steps he took to obtain such valuation.

[22] No evidence is presented of the liabilities of the joint estate and the scope of these liabilities. As such the court is not apprised of any other persons that might be affected by the immediate division of the joint estate and what possible prejudice such other persons can suffer.

[23] The application is flawed with shortcomings. There are no proper and substantive grounds to warrant the order sought. The applicant has failed to furnish full and proper facts to enable this court to exercise its discretion judicially. It follows that the application cannot succeed.

Urgency:

[24] Rule 6(12)(b) of the Uniform Rules of Court is clear: In every affidavit or petition filed in support of any urgent application, the applicant shall set forth explicitly the circumstances which he avers render the

matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

[25] The applicant failed to meet these requirements. Mere lip service to the requirements of urgency is insufficient.³

[26] The applicant's urgency is premised on the purported sale of assets and the letter by the applicant's attorney, dated 14 August 2024, in terms of which the respondent is requested to provide an undertaking not to sell any assets that form part of the joint estate.

[27] The respondent's attorney immediately responded stating that the respondent does not know of any assets being sold. A request was made for more details to place the respondent in a better position to respond to the allegations.

[28] On 15 August 2024, the applicant's attorney responded. In this letter, the applicant's attorney states that the respondent knows exactly what assets she offered to third parties. With this response, and instead of providing clarity on what assets are allegedly being sold, or are intended to be sold, the applicant left the respondent guessing. A final demand was sought for an undertaking that no assets, that form part of the joint estate, will be sold.

³ *Luna Meubel Vervaardigers (Edms) Bpk v Makin* 1977 (4) SA 135 (W) at par 137E

[29] No assets are being sold, and the applicant's attempt to create urgency by threatening, and vague, letters of demand, is of no assistance to create urgency. All that the letters achieved was to create self-made urgency for the applicant.

[30] It follows, that the application is not urgent. Instead, it is an opportunistic abuse of the process of this court.

Application to strike out:

[31] On Thursday 5 September 2024, the respondent delivered an application to strike out certain matter from the founding- and replying affidavit. It is the case of the respondent that she is being prejudiced by the applicant's inclusion of inadmissible hearsay evidence in the founding affidavit and impermissible matter in the replying affidavit (new matter, alternatively, departure together with inadmissible hearsay).

[32] The applicant elected not to respond to this application.

[33] The hearsay complaint deals with the applicant's reliance on what transpired between the respondent and Mr Mokgwathi. It further relates to what has been stated by Me Khumo Mogotlhong as to the CC's intention to continue with its business and communications by the respondent's personal assistant Lesego.

[34] Section 3(1) of the Law of Evidence Amendment 45 of 1988 deals with hearsay evidence. The general rule is that hearsay evidence shall not be admitted as evidence. Section 3(1)(a) to (c) deals with the exceptions to this general exclusion.

[35] On the date of the hearing, a confirmatory affidavit by Mr Mokgwathi was handed up in court with an explanation provided by counsel that it was impossible to timeously obtain a confirmatory affidavit by Mr Mokgwathi as it was difficult to get hold of him. No explanation in this regard is provided in either the founding or the replying affidavit or in the confirmatory affidavit. This confirmatory affidavit is not allowed into the record.

[36] No attempts were made to obtain confirmatory affidavits from Me Mokgotlhong and Lesego. In the replying affidavit, reference is made to dealings between Dean from Truck Busters and the respondent. Once again, no attempt was made to obtain and present a confirmatory affidavit from Dean.

[37] In relying on the evidence of Mr Mokgwathi, Me Mokgotlhong, Lesego and Dean, the applicant failed to meet any of the requirements of Section 3(1)(a) to (c) of the Law of Evidence Amendment Act 45 of 1988.

[38] It follows that any reliance by the applicant on the evidence by Mr Mokgwathi, Me Mokgotlhong, Lesego and Dean constitute inadmissible hearsay and is thus struck out.

[39] The respondent's complaint of new matter being introduced in the replying affidavit relates to Me Mokgotlhong and Dean. The new matter relates to events that occurred after the founding affidavit was deposed. Any prejudice that the new matter could cause to the respondent is catered for in the dismissal of the application. It further follows that this new matter should be struck as it contains inadmissible hearsay.

Costs:

[40] The application was brought in haste whilst not being urgent and failed to meet the requirements of Section 20. The application is ill-conceived, opportunistic and an abuse of the process of this court.

[41] The respondent seeks costs on the scale as between attorney and client. There is no reason to deprive the respondent of such costs.

ORDER:

Consequently, I make the following order:

1. The application is dismissed.
2. The following are found to be inadmissible hearsay and are struck from the founding affidavit:
 - a. Paragraph 26;
 - b. Paragraph 27;

- c. Paragraph 29;
- d. Annexure "L";
- e. Annexure "M";
- f. Annexure "N"

3. The following are found to be inadmissible hearsay and are struck from the replying affidavit:

- a. Paragraphs 20.3 to 21.6;
- b. Paragraphs 32.5 to 32.6;
- c. Paragraph 58;
- d. Paragraph 65.4;
- e. Paragraph 73;
- f. Annexure "RA3";
- g. Annexure "RA13";
- h. Annexure "RA16".

4. The applicant is to pay the costs of the application, inclusive of the costs of the application to strike out, on the scale as between attorney and client.



Minnaar AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard on	: 10 September 2024
For the applicant	: Adv F W Botes SC
Instructed by	: Arthur Channon Attorneys Inc
For the respondent	: Adv L Matsiela
Instructed by	: Mokhetle Attorneys Inc
Date of Judgment	: 1 October 2024