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

CASE NO: B957/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

(4) Date: 17 February 2025

Signature:

In the matter between:

K[...] G[...]

First Applicant

And

D[...] G[...]

First Respondent

VAN ZYLS ATTORNEYS INC

Second Respondent

LEOVAS INVESTMENTS (PTY) LTD

Third Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The applicant is seeking on an urgent basis, an order interdicting the First Respondent from alienating, transferring, or encumbering property situated at 5[...] M[...] Street, Moreletapark, Pretoria, Gauteng, pending finalization of the divorce action between the parties.

- [2] The parties are embroiled in an acrimonious divorce action against one another. It is no surprise that the husband, who is the respondent in the application, opposes this application as well.

B. BACKGROUND

- [3] The parties attended counselling sessions in an attempt to save their marriage and concluded a settlement agreement before the institution of the divorce action by the first respondent.
- [4] In terms of the settlement agreement the applicant is entitled to receive transfer of the M[...] property.
- [5] The catalyst for the application was that the first respondent apparently concluded a sale agreement in respect of the property, in order to dispose thereof before the divorce action is adjudicated upon. This will have the effect of defeating the applicant's claim even before the divorce court makes its decision, rendering hollow any judgment granted in favour of the applicant in this regard.
- [6] Various applications have been brought pending the divorce, notably a Rule 43 application, contempt of court proceedings against the first respondent, and an application to authorize the issuance of a warrant for incarceration of the first respondent for contempt of court.
- [7] The first respondent's entrenched stance is that he is unable to afford the obligations imposed upon him by the Rule 43 Court Order despite findings to the contrary by the Court that heard the contempt application.

[8] In the current application, the first respondent maintains his plea of poverty and insisted that he must sell the M[...] property in order to afford compliance with the Rule 43 order.

[9] It is worth noting that the first respondent currently lives and works in the United States of America. His net monthly salary (after deductions) amounts to more than R180 000.00 per month.

C. URGENCY

[10] The applicant was informed of the sale agreement between the first and third respondents on 6 December 2024.

[11] In correspondence through his attorneys, the first respondent repeatedly assured the applicant that he would approach the court for leave to sell the M[...] property.

[12] It is an undeniable fact that he concluded the sale agreement without approaching any court.

[13] On 11 December 2024, the applicant's attorneys addressed a letter to the third respondent, informing it of the applicant's claim. No response was received. The applicant's attorneys closed their office on 12 December 2024 for the December recess.

[14] When the applicant's attorneys reopened on 8 January 2025, they addressed a letter to the first respondent's attorneys, requesting an undertaking that the transfer of the property to the third respondent be held over, pending the divorce action. The first respondent's attorneys responded on 13 January 2025, refusing to give such an undertaking.

[15] This application was launched thereafter on 16 January 2025.

- [16] The respondent assailed this application on the grounds that it was unjustifiably launched on an urgent basis in circumstances where the said urgency was self-created.
- [17] The applicant's contention is that she first sought compliance with the provisions of the settlement agreement from the respondents and only launched this application when compliance was not forthcoming.
- [18] From *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*,¹ it is seen that a party who seeks consensus prior to lodging the application cannot be accused of being dilatory or that urgency was self-created.
- [19] The relief sought in this application is an anti-dissipation interdict. The purpose of this type of interdict is to prevent the disposal of an asset, pending the adjudication of the applicant's claim.
- [20] The respondent's view is that this application should be dismissed with costs, contending that:

¹ 2004 (2) SA 81 (SE) at 94C-D; See also *Kumah v Minister of Home Affairs* 2018 (2) SA 510 (GJ) at 511D-E.

- 20.1 the applicant had repudiated the settlement agreement by refusing to return to mediation when they disagreed;
- 20.2 she had turned her back on what was agreed²;
- 20.3 furthermore, there is a dispute of fact as to why the parties entered into the settlement agreement. According to the respondent, he did so in an attempt to salvage the marriage;
- 20.4 the applicant has no real right as the respondent is the owner of the property, at best the applicant has a right only to the accrual when it is calculated at the dissolution of the marriage.

[21] Adv Coertze submitted on behalf of the applicant that the matter of *Knox D'Arcy Ltd v Jamieson and Others*³ relied upon by the respondent is distinguishable from the current case. In *Knox D'Arcy* the applicant sought to preserve the property as security for a claim she had against her spouse for payment of monies. Here the applicant is claiming the property itself consequent to the provisions of the signed settlement agreement which has been made an order of Court. In *Knox D'Arcy* Grosskopf JA specifically held that "...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."⁴ [emphasis added].

[22] In *Knox D'Arcy*, the court referred to the earlier decision in *Mcitiki and Another v Maweni*⁵ where Hopley J stated as follows:

" ... (T)hey all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor

² Respondent's answering affidavit para 17.6 and 17.7.

³ 1996 (4) SA 348 (SCA).

⁴ *Knox D'Arcy supra* para [62].

⁵ 1913 CPD 684 at 687.

is wasting or getting rid of such funds to defeat his creditors, or is likely to do so."

[23] In *Webster v Mitchell*⁶ the test for an interim interdict, such as the one sought herein, was laid down as follows:

"In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the respondent."

Prima facie right:

[24] The applicant must show that she has a *prima facie* right, though open to some doubt.

[25] The applicant relies primarily on the settlement agreement concluded between the parties, in terms of which the property is awarded to her, as the basis of the right relied upon.

[26] This is amplified by the Court Order in the Rule 43 application, which requires the first respondent to pay the bond instalments in respect of the M[...] street

⁶ 1948 (1) SA 1186 (WLD)

property specifically, and the applicant's right to have her claim adjudicated upon in terms of Section 34 of the Constitution, without the judgment being rendered hollow due to the first respondent's disposal of the property.

[27] The first respondent has given an incoherent explanation of the purpose of the settlement agreement. One such version⁷ is that the agreement was to serve as security to the applicant if the emigration to the USA did not work out. This contradicts the preamble of the settlement agreement and clause 15 of the agreement. These provides that the agreement is for the purposes of the divorce and should be incorporated into the final decree of divorce.

Reasonable apprehension of irreparable harm:

[28] It is common cause that the first respondent is in the process of selling the M[...] property contrary to his undertaking in the agreement. This sale, regardless of the first respondent's avowed reason, will clearly render the eventual incorporation of the settlement agreement in a final divorce meaningless.

No suitable alternative remedy:

[29] The applicant's only viable remedy is to claim transfer of the M[...] property. The divorce action is nowhere near conclusion. The first respondent's insistence that the applicant should await her share of the accrual is not relevant as a remedy for a blatant breach of the settlement agreement.

Balance of convenience:

[30] The applicant and the minor children will be deprived of their home if the sale is permitted to proceed, in addition to the applicant's claim in the divorce action being rendered hollow.

⁷ Respondent's answering affidavit

[31] On the other hand, the first respondent contends that he must sell the property in order to meet the dictates of the Rule 43 court order, which he has already been found guilty of being in contempt of by a court on 29 October 2024.

[32] In its judgment, the court was scathing in its findings regarding the first respondent's honesty regarding his financial position, his attempts at misleading the court and worse.

[33] It is trite that the court in exercising its discretion must balance or weigh the prejudice which the applicant will suffer if the interim interdict is not granted against the prejudice the first respondent will suffer if it is granted.⁸

D. CONCLUSION:

[34] The first respondent's pleas of poverty and his contention that he must sell the M[...] property for financial reasons ring hollow, especially having regard to his record in this litigation and cannot be sustained.

[35] In so far as costs are concerned, the normal rule as established over time is that costs follow the cause. It was submitted on behalf of the applicant that respondent's *mala fides* as foreshadowed in the contempt of court application, are the sole cause of the applicant having to incur legal costs and that she should not be left out of pocket as a result thereof.

[36] Upon a consideration of all the evidence before me, the following order is made:

⁸ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) 383 C-D and 383 E-F.

1. The applicant's non-compliance with the rules in respect of filing and service is hereby condoned and the present application was heard as an urgent application in terms of the provisions of Uniform Rule 6(12);
2. The first respondent is interdicted and restrained from alienating, transferring or encumbering the property situated at 5[...] M[...] Street, Moreletapark, Pretoria, Gauteng, pending finalization of the divorce action under the above case number.
3. The first respondent is ordered to pay the costs of this application on an attorney and client scale.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 30/01/2025

Date of Judgment: 17 February 2025

On behalf of the Applicant: Adv A. Coertze
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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 17 February 2025.