

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

REPORTABLE

Case no. 6386/2004

DATE: 28/1/2005

In the matter between:

WILMA KRUGER

Applicant

and

DANIEL JACOBUS KRUGER

Respondent

JUDGEMENT

LEGODI J

*INTRODUCTION :*

1. This is an application in terms whereof the applicant is asking for immediate division of the joint estate of the applicant and respondent in equal shares or division on such other basis as the court may deem fit.
2. The application is brought in terms of Section 20 of the Matrimonial Property Act 88

of 1984.

### *BACKGROUND*

3. The applicant and respondent were married to each other in community of property, profit and loss on the 13<sup>th</sup> October 1990 and this marriage still subsists.
4. The applicant issued divorce summons against the respondent under case number 35089/2003 and to-date no date has been allocated for the trial of the divorce matter although date of hearing has already been applied for.
5. The respondent has been charged with an offence of murder and attempted murder where the applicant is the complainant in the attempted murder charge.
6. The applicant in substantiation of her application amongst others stated that she did not know how the respondent was spending his income, that the respondent had instructed an attorney and advocate to represent him in the criminal case and that legal costs will run into thousand of rands, and that if the joint estate was not divided this would effectively meant that half of her share in the joint estate will be used to pay for the legal costs, that as from April 2004 there will be no salary paid over to the respondent and that therefore there will be no monthly payment in respect of the bond and that her sister whose husband is alleged to have been killed by the respondent, intends instituting civil proceedings against the respondent.

### *LEGISLATION*

7. Section 20( 1) of Act 88 of 1984 provides that 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 first.

### *ISSUES RAISED*

8. The issues that was raised during argument was whether or not the applicant has established on the balance of probability that she was entitled to an order in terms of Section 20 and what was intended to in terms of the section thereof?

### *DISCUSSIONS AND SUBMISSIONS*

9. It emerged during argument that the real assets of the joint estate were the house and the pension benefits of the respondent.
10. It is also important to mention that it transpired during argument that the respondent has since been released from detention and that he has since returned to work and that there were no arrears in respect of the bond repayments.
11. Mr Erasmus on behalf of the applicant submitted that the applicant has established on the balance of probability that she was entitled to the reliefs sought. However on behalf of the respondent Mr Wagener submitted firstly that the applicant had failed to show that she will be seriously prejudiced by the conduct or proposed conduct of the respondent and secondly that the conduct or proposed conduct complained of could not have been intended to be a ground for the granting of such an order for immediate division in terms of Section 20.
12. The main conduct complained of, was during argument cited as incurring of liabilities to the joint estate in the form of legal expenses already incurred and still to be incurred in defending the respondent in the criminal case particularly the indication that the property

might or will be used as a security for any legal fees in defending the respondent. Lastly there was a concern about the pension benefits that might be due to the respondent. The concern being that if the estate is not divided, the liability incurred by the respondent against the respondent may affect the value of the joint estate.

13. Coming back to the provisions of Section 20, the section seems to lay down the following requirements for a party to succeed in the application under Section 20:

13.1 that the applying spouse will probably be seriously prejudiced by the conduct or proposed conduct.

13.2 that the other spouse against whom the application is brought will not be prejudiced by the immediate division.

13.3 that the court need to be satisfied that such conduct or proposed conduct will seriously cause prejudice to the party seeking to invoke the provisions of Section 20.

14. The respondent has returned to work and he is said to be up to date with his bond repayments. The initial fear expressed by the applicant was that the respondent was likely to fall in arrears in the light of the fact that the respondent was in detention and that his services were likely to be terminated or that his salary was likely to be stopped. Of great concern to the applicant was that should the respondent be in arrears, the bank will take over the house at great financial loss to the joint estate. This fear has now become speculative or not real as the respondent has returned to work and is up to date with his monthly payments on the bond.

15. It follows therefore that the applicant now heavily relies on the proposed conduct of the respondent to pledge the house for legal expenses in the coming criminal case. Counsel on

behalf of the respondent argued that the respondent had already bound himself to his legal representatives in respect of the costs incurred and legal costs still to be incurred. As regards costs already incurred these are already joint estate's liabilities. The applicant is worried that these liabilities occasioned by legal costs are to increase enormously to the depletion of her half share in the joint estate.

16. There is no doubt that defending the respondent on serious charges of murder and attempted murder can be at a great cost to the joint estate. However the real issue is whether or not the applicant should be entitled to the relief sought on this ground. This raises the issue firstly whether or not the section 20 was intended to cover those genuine expenses incurred against the joint estate or to put it differently whether or not the section was intended to cover such conduct although affecting the joint estate adversely cannot be said to be wrongful or illicit. The other issue is whether the conduct or proposed conduct complained of can be said to be seriously prejudicial to the applicant.
17. Both counsels indicated that they could find no authority on Section 20 and in particular the construction thereof. The section seems to be intended to protect a spouse against any conduct which recklessly, negligently and or illicitly is aimed at prejudicing seriously the innocent spouse. In my view the conduct of the respondent in incurring legal expenses towards the defence of the respondent in the criminal case can neither be negligent, reckless nor illicit. It appears to be a matter of must for the respondent to be properly represented. In my view it will be upset to suggest that any expenses incurred against a joint estate by or in respect of the one spouse should entitle the other spouse to invoke the provisions of Section 20 even where there is a justification for such costs or expenses.
18. In the instant case however the applicant is a complainant in the attempted murder charge. I have not fully been addressed on the merits or demerits of the criminal case against the respondent nor do I think that this would have been appropriate without prejudicing the respondent. The respondent should be entitled to be presumed innocent until the contrary is

proved. One might be tempted to find that because the applicant is a complainant in the criminal case, the respondent should not be entitled to the use of the joint estate beyond his share or incur expenses, beyond his half share, and that therefore in order to protect the applicant's half share of the joint estate, the joint estate should be divided immediately. I do not think the circumstance of the case justifies such a ruling. This will then bring me to consider whether or not the applicant succeeded in showing that she will be seriously prejudiced (my own emphasis).

19. The applicant initially feared that the respondent will lose his employment which may have resulted in the loss of the house. On the other hand the applicant feared that should the respondent be unable to pay his debts judgment might be taken against him and that execution thereof would affect the whole joint estate. This might be so, however in the light of the fact that the respondent is back at work this fear will in my view be speculative.
20. The proposed conduct by the respondent to use the house as a security for legal costs cannot in itself be sufficient to justify application of the provisions of Section 20. Serious prejudice must be established on the balance of probability and I am not satisfied that the applicant has established such prejudice.
21. Regarding the pension benefits the more the applicant remain in the pension scheme, the more pension benefits will accumulate. Neither the criminal case nor the divorce matter is to be heard and finalized in the near future so it was submitted by both counsels. To bring the accumulation of the pension benefits to an end at this stage will in my view neither be of benefit to the applicant nor to the respondent. One must remember that in terms of Section 20, the division must also not be prejudicial to the other party. Immediate division of the joint estate in the present case will in my view be prejudicial to the respondent particularly in respect of both the house and the pension benefits. One or two years down the line when the divorce and or criminal case is finalized, the value of the house would have increased drastically and this should be of benefit to both parties.

22. Considering therefore the increase of the value of the house and pension benefits in the future, and the fact that the respondent is working as against escalation of the legal costs increasing the joint estate's liabilities, I am unable to make a finding of serious prejudice to the applicant.
23. There were other complaints which were raised by the applicant, for an example cancellation of signing authority on a particular joint bank account, unnecessary squandering of the joint estate's assets by the respondent and the applicant's salary been paid into an account controlled by the respondent. All of these did not appear to be real issues any longer when the matter was argued before me. The salary of the applicant is no longer paid into the joint account and therefore the concern that the applicant cannot operate the account due to the cancellation of her signing powers had fallen off. Regarding the allegation of irresponsible manner in which the respondent is using the assets of the joint estate, this appear to be a disputed fact and no finding of fact can be conclusively made in this regard.
24. I am not satisfied that the applicant has established on the balance of probabilities that she is entitled to the reliefs sought.

### *CONCLUSION*

I therefore conclude by dismissing the applicant's application with costs.

M F LEGODI

JUDGE OF THE HIGH COURT

Heard on: 30/11/2004

Applicant's Counsel: Adv M C Erasmus

Respondent's Counsel: Adv S D Wagener

Attorneys for applicant: Andrew Burden Attorneys, Pta

Attorneys for respondent: De Oliveira Serr o Attorneys, Pta