IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

NOT REPORTABLE

Case No:51139/2007

DATE:23/03/2011

In the matter between:

KC M APPLICANT

And

M P M RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] The applicant brought two urgent applications, both under the same case number, against the respondent. The first application was dated the 2 November 2007, the second application was dated 4 December 2007. Both these applications were opposed and served before me.

[2] In the first application, the applicant sought an order, pending the institution of an action,

1. interdicting the respondent from interfering or coming within 100 meters of:

1.1 the lodge situated at Mokoena-a-Meetse, Mamone Village, Ga-Mohlaia Section, Jane Furse Sekhukune Limpopo;

1.2 the immovable property situated at 16 Avril Street Birchleigh North, Kempton Park;

2. Interdicting the respondent from damaging or using or controlling motor vehicles BMW and Toyota Corolla.

3. Directing the respondent to return the keys to the lodge;

4. Directing the respondent to refrain from damaging the electricity and Telkom communication supply to the lodge situated at Mokoena-a- Meetse, Mamone Village, Ga-Mohlala Section, Jane Furse Sekhukune, Limpopo;

5. Restraining the respondent from interfering with or threatening or harassing or assaulting or pointing or using a firearm or verbally abusing the applicant in any manner whatsoever.

6. Interdicting the respondent from telling anyone that the applicant has spread the HIV / AIDS virus to him

7. That the costs of the application be reserved for determination at the trial.

[2] The second application was for an order:

2.1 declaring the respondent to be in contempt of court in respect of the order granted on November 2007, and 2.2 directing the respondent to hand over the keys of the lodge situated at Mokoena-a-Meetse, Mamone Village, Ga-Mohiala Section, Jane Furse Sekhukune Limpopo;

2.3 directing the respondent to hand over the Toyota Corolla to the Sheriff of the High Court upon service of this order.

3. Ordering the respondent to pay the costs of this application.

[3] In respect of the first application Hartzenberg J on the 20 November 2007 granted the applicants an interim order with immediate effect, pending the divorce action, substantially the orders referred to in her application, with certain variances. In respect of the lodge the respondent was ordered to return the keys thereof by not later than 10: 00 on 22 November 2007 to the attorney/ Paul Du Plessis Attorneys at 588 Norvat Moreleta Park. The respondent was granted leave to file an answering affidavit on or before 30 November 2007. The applicant was granted leave to file her replying affidavit on or before 7 December 2007 in the event the respondent filed his answering affidavit in time.

[4] On the 11 December 2007 Bertelsmann J issued a rule nisi, with immediate effect, in terms of prayers 3 and 4 returnable on 14 December 2007 in terms of which the respondent was ordered to hand over the keys of the lodge situated at Mokoena-a-Meetse, Mamone Village, Ga-Mohlala Section, Jane Furse Sekhukune Limpopo; and that he hand over the Toyota Corolla to the sheriff of the High Court upon service of this order. It was further ordered that if the respondent has failed to act as ordered herein above, upon service of this order, he must come to court on 14 December 2007 to show cause why he cannot be held for contempt of court order and be sentenced to 60 days imprisonment. The costs were reserved. This order, flows from the second application brought by the applicant against the

respondent also on urgent basis.

[5] The order of Bertelsmann J was further extended on various occasions. On 14 December 2007 I extended the rule nisi to 20 December 2007 on which date it was further extended by Van Oosten J to 25 January 2008. On the latter date it was further extended by Hartzenberg J to 15 February 2008 with a further order that the Respondent is to file an opposing affidavit on or before 25 February 2008. Dolamo A.J. to 25 June 2008. The Court also noted that the respondent avers that he is no longer in posession of the keys, of the lodge. The Court ordered that, in the event the respondent finds the keys, they must be immediately handed over to the applicant, and that they may not be used by the respondent. On 15 February 2008 Dolamo AJ extended the rule nisi to 9 June 2008 and he reserved the costs.

[6] On 9 June 2008 the matter appeared once more before me and I reserved judgment. It is regrettable that it has taken this much for me to hand down this judgment. I have no doubt that the parties herein would have wanted this judgment to have been delivered much earlier. The delay is primarily due to the systemic circumstances that prevail in this Division, which hopefully would be addressed at an appropriate forum.

[7] The respondent subsequently filed his answering affidavit on 11 February 2008. The applicant filed her replying affidavit which was deposed to on 27 May 2008. In paragraph 4 of her affidavit the applicant seeks condonation for the late filing of the replying affidavit. She states that: "As it can be seen from the content the lodge was ransacked by the respondent and I had to go to great lengths to collect the various documents attached to this affidavit. For a portion of time (sic) I had to go into hiding because of the respondent's threats to me. In the circumstances I respectfully submit that there is no prejudice to the respondent Because this is a replying affidavit the respondent does not need time to

respondent to it. By the time this affidavit is filed there will be sufficient time for the respondent's counsel to prepare for the motion court week of 9th June 2008."

[8] The respondent's answering affidavit was filed on 11 February 2008. In terms of rule 6(d)(iii) the applicant was supposed to have filed her replying affidavit within 10 (ten) days of the filing of the answering affidavit. Her replying affidavit was filed well out of time. Her replying affidavit was deposed to on 27 May 2008. Its filing sheet is dated the 28 May 2008. There is no indication when it was served and filed with the registrar. I assume that it was served and filed on 28 May 2008.

[9] It is trite that condonation is matter of the discretion of the court. Where a party seeks the indulgence of the court, such party must, to the court's satisfaction, advance an adequate explanation for the remissness and also show that there is no prejudice to be suffered by the other party; vide Standard Bank ofSA Ltd v RTS Techniques and Planning (Pty) Ltd[1].

[10] Where a party realises that it is going to be out of time in filing court papers, such party must in advance seek the indulgence of its opponent and indicate when it anticipates to be ready with its papers and filing thereof. In the event its opponent is not accommodative, then it must immediately approach the court on application for condonation; vide Darries v Sheriff, Magistrates Court, Wynberg and. Another.[2] If such party does not want to burden the costs with such an application, it must nonetheless place it on record to its opponent that, in order to avoid burdening the costs; it will bring an application for condonation for the late filing of its papers on the hearing of the matter. But it must appreciate that, in the event of the condonation not being granted, it stands or fall on whatever papers it has already

1 1992 (2) SA 532 (TPD) at 534G-I.

2 1998 (3) SA 34 (SCA) at 40I-41D

filed. The applicant was 3 (three) months late with her replying affidavit. The matter was to be heard on 9 June 2008. It means that the filing of her replying affidavit was also filed in court not within 10 days before the hearing of the matter. The respondent still had to prepare for the hearing of the matter. In my view the respondent was prejudiced by the late filing of the replying affidavit as he was afforded very little time to do so. The delay of three months is in my opinion inexcusable; vide Commissioner for Inland Revenue v Burger[3]. In the result I therefore decline to exercise my discretion in favour of the applicant and therefore the condonation is refused.

[13] In my view, what I need to decide is whether the rule nisi should be confirmed. I will have to decide this aspect by having regard to the evidence before me, which is the affidavit of the applicant and that of the respondents.

[14] It is common cause that the parties were married to each other in community of property on 6 July 1998 and the marriage still subsists. It is also common cause that whatever assets bought by either party, belong to the joint estate. Some of these assets are, for instance, the Toyota Corolla, motor vehicle, a BMW vehicle motor vehicle, a Lodge situated at Mokoena-a-Meetse, Mmamone Village, Ga-Mohlala Section, Jane Furse Sekhukhune, Limpopo, immovable property situate at 16 Avril Street, Birchleigh North Park, Johannesburg, Gauteng.

[15] The rule nisi interdicts the respondent, inter alia, from controlling the vehicles belonging to the joint estate, from entering into the immovable properties of the joint estate. These orders, if confirmed, would be of final nature.

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3 1956 (4) SA 438 (AD) at 449E-F

[16] The respondent has denied some of the allegations made against him by the applicant. In that regard it is apposite to cite what was said in Mkhatshwa v Mkhatshwa and Another[4] by Moseneke J (as he then was): "It is settled law that in motions proceedings the appropriate stage for making an application to refer the application to evidence is at the outset and not after argument on the merits. Of course, this rule is not inflexible. As the Rule 6(5) of the Uniform Rules of Court provides, a Court faced with a real dispute of facts may dismiss the application or 'make such order as to it seems meet with a view to ensuring a just and expeditious decision'. See Kali v Decotex (Pty) Ltd and Another[5].

If there is a dispute of fact on the affidavits, the general rule is that the relief sought by the applicant should only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify the granting of the order. See Plascon-Evans Paintings Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-G."

[17] In my view, both parties have a right to access and the use of these properties, irrespective who bought or contributed how much for the procurement of what assets. The applicant does not have a better right than what the respondent has. On a balance of convenience, it is not desirable to confirm the rule nisi, which has the effect of divesting the respondent of his rights over such property, no matter how transient in duration. Such an order would, in my view, violate the respondent's constitutionally enshrined rights to property or housing; vide ss 25 and 26 of the Constitution of the Republic of South Africa[6].

[18] Some of the orders through the rule nisi are to protect the applicant against any assault or threat by

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4 2002 (3) SA 441 (TPD) at 445 G-I.

5 1988 (1) SA 943 (A) at 366G-367D

6 Act 108 of 1996

the respondent. The respondent has in his answering affidavit stated that the applicant has an alternative remedy against any assault or threat by the respondent in the form of a Domestic Violence Interdict as well as well as the police. On her own version, the respondent's firearm was confiscated by the police. This refutes applicant's version that the police do not want to assist her. The respondent has denied her averments of intimidation and assault. In the circumstances I must accept the version of the respondent, in my view, the applicant has not shown that she does not have any other remedy either than obtaining the order sought. Put differently, the facts stated by the applicant and admitted by the respondent do not justify the confirmation of the rule nisi.

[19] In so far as the contempt order application, the respondent has stated that he did comply with the court order, in this regard he has stated that the Toyota Corolla was with the sheriff. He has also denied that he was in contempt of the court. I am not inclined to find otherwise, as there is insufficient material upon which I can premises any finding that the respondent is in contempt of court orders.

[20] In the premises, I am of the view that both the main application and the contempt order application should be dismissed. The costs were reserved on several occasions. In view of the fact that the parties are married in community of property, in the event I order any of the parties to pay the costs, these would be borne in the final analysis by the joint estate. In the circumstances, I am of the view that an appropriate order would be to order that each party pay his or her own costs.

[21] In the premises I make the following order:

1. That the rule nisi is discharged;
2. That the contempt order application is dismissed;
3. That each party is ordered to-pay his/ her costs.

N.M MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD : 14 MARCH 2011

DELIVERED : 28 MARCH 2011

APPLICANT'S ATT: M.C.KRUGER ATTONEYS.

APPLICANT'S ADV: MS. NADINE ERASMUS.

RESPONDENT'S ATT: MALOPE MAHLALELA ATTORNEYS.

RESPONDENT'S' ADV : MR. MABUSE