IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

[Delivered by email on the 26th of March 2020, by agreement]

Case No: 19881/2019

In the matter between:-

HM **Applicant**

and

LM **Respondent**

CORAM: WILLE, J

DATE OF HEARING: 6TH OF MARCH 2020

DATE OF JUDGMENT: 26TH OF MARCH 2020

JUDGMENT

WILLE, J;

INTRODUCTION

[1] The applicant was granted certain interim relief on the 28th of January 2020 and seeks confirmation of this relief, *pendente lite*. The relief now sought is not in any broader terms than the relief granted in terms of the Interim Order.[1]

[2] The following relief was granted to the applicant in terms of the IO, namely that the respondent was;

> *'interdicted and restrained from alienating, entering into any sale of or transferring, disposing of or encumbering, in any manner whatsoever, the immovable property situated at Portion/Section of the Farm 195 Victoria Bay, Western Cape, South Africa (the property), pending the outcome of the divorce action between the parties, under case number 19881/19 (the divorce action); and*

[1] The "IO"

2.1 ejected from the property, pending the outcome of the divorce action'

[3] The parties were married in 2008 under and in terms of an antenuptial contract which excluded the accrual regime. About (11) years later they decided to leave their matrimonial home[2] on a farm in the Northern Cape and they together moved and lived in Victoria Bay[3], which became their new matrimonial home.[4]

[4] During October 2019, the respondent left the property[5] and returned to the old matrimonial home and from that time until the 5th of December 2019, the applicant lived at the property in peace, whilst the respondent lived in the old matrimonial home.

THE APPLICANT'S CASE

[5] It is the applicant's case that because she issued out a divorce action against the respondent during November 2019, this triggered certain abusive and inappropriate behaviour by the respondent, which in turn led to threatening and inappropriate messages from the respondent. Further, it is alleged, that the respondent caused security personnel to enter upon the property without the consent of the applicant in order to harass her.

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[2] The old matrimonial home
[3] The property
[4] This is disputed and the respondent takes the position that this is the parties holiday home and is not a matrimonial home
[5] The respondent's case is that they went to the property for a break and he left the property for work purposes only

[6] In addition, it is alleged that the applicant received a threatening video from the respondent via 'Facebook Messenger', during the beginning of December and then, without prior notification, the respondent stayed for one night, uninvited, at the property. This was all, despite a letter from the applicant's attorneys requesting the respondent not to attend on the property.

[7] During his stay, it is averred that he threatened, intimidated, swore at and became aggressive towards the applicant. Following upon this behaviour, the applicant sought and obtained an Interim Protection Order[6] against the respondent on the 12th of December 2019.

[8] This IPO, seemingly assisted the respondent for a fortnight, as during this period, she lived at the property, in peace. During late December 2019, the applicant's mother fell ill, and she left to property, in order to assist her ailing mother in Springbok. The property remained vacant[7] during this time.

[9] On the 14th January 2020[8], and without prior notification and uninvited, the

[6] The 'IPO'
[7] This in my view is significant and is a factor to be considered in connection with the 'balance of convenience'
[8] The respondent did not occupy the property for a considerable period of time

respondent again occupied the property. It was during this time, that the applicant became aware of the respondent's extramarital affair as she witnessed footage of the respondent cuddling and kissing his girlfriend on a CCTV camera installed in the property.

[10] On the 21st of January 2020, the applicant advised the respondent that she would be returning to the property on the 24th of January 2020 and requested the respondent vacate the property, prior to her occupation. In anticipation, it is alleged, that the respondent re-configured the access codes on the front access gate, so as to prevent the applicant from accessing the property. In direct response to this, arrangements were made with the sheriff of the court for the service of the IPO on the respondent.

[11] In order to run further interference, so it is alleged, the respondent re-configured the codes for access to the garage and simultaneously discontinued the applicant's access to the alarm system, so that effectively she was unable to enter the property. Thereafter, the respondent reluctantly, allowed the applicant access to the property, but not access to all areas and rooms of the property. An argument ensued and the respondent allegedly verbally abused the applicant. The applicant left the property the following day as the situation with the respondent being on the property became 'intolerable' for her.

[12] The following night the respondent's girlfriend slept at the property and allegedly wore some of the applicant's clothing of a personal nature. This all culminated in the applicant launching and urgent application which resulted in the IO being granted on the 28th January 2020, in the terms referenced earlier in this judgment.

THE RESPONDENT'S CASE

[13] The respondent denies that any conduct on his part could have made staying with applicant intolerable and takes the position that they are indeed, despite all their differences[9], able to stay together. This, I must say is rather far fechted. He further denies that the applicant ever had any cause to be fearful him and avers that he has never ill-treated or verbally abused her.[10]

[14] The respondent also takes the view that the property is not the parties matrimonial home, but is in fact their 'holiday home'. Further, the respondent avers that he did not prevent the applicant from having access to the property, save for the fact that he denied her access to the main bedroom of the property.[11]

[9] This despite the IPO being in operation so as to avoid acts of "domestic violence'
[10] These denials in my view amount to 'bald' denials and are never really engaged with sufficiently and in the proper context
[11] The IPO specifically caters for the fact that the respondent is prevented from denying the applicant access to the property

[15] The respondent admits that he is romantically involved with another woman, to which he submits he is entitled, as the applicant instituted divorce proceedings against him. He concedes that their marriage relationship has broken down irretrievably.[12]

THE DISPUTE REGARDING THE REGISTRATION OF THE PROPERTY

[16] Central to some of the disputes between the applicant and the respondent in connection with the granting of the IO and indeed this order, *pendente lite*, is a dispute about the ownership of the property. The applicant advances that after the IO had been granted, she consulted with a new set of legal representatives, who advised her that an error had been made in her initial particulars of claim, and that this error regrettably, also found its way into her initial founding affidavit.

[17] She, at the outset, referred to the property as being an asset in the 'universal partnership' between the parties. Her position is now that despite the fact that the property is registered in the respondent's name, half of the property is held by the respondent as her 'nominee' and the parties are co-owners of the property, in undivided equal shares.

[12] He offers no explanation how the parading of his new partner in the applicant's night gown would assist in creating an atmosphere in which they could live together in peace and harmony pending the finalization of their pending divorce action

[18] The applicant's new case is; that at the outset the parties orally agreed to purchase the property in their joint names[13]; that they would hold the property as co-owners in equal undivided shares; that the parties, as purchasers, signed a deed of sale to purchase the property in their joint names and that subsequently the parties' conveyancing attorney advised that the property could not lawfully be registered in their joint names because of a statutory limitation. The applicant's case is that she relied on this advice, rightly or wrongly, it matters not.

[19] In order to fortify her position, the applicant referred to some historical facts in order to understand the negotiations leading up to the purchase of the property in the proper context. According to the applicant, the parties orally agreed that the property would be purchased in the name of a company, whose shares would be held equally by them but that ultimately, due to pressure applied by the seller of the property, who refused to wait for the registration of a company, the parties agreed that the property would be purchased and registered in the name of the respondent, who would hold the applicant's half share in the property, as her 'nominee'. This is vehemently denied by the respondent. The respondent takes issue with these allegations and advances that it was never agreed that the property was to be registered in both parties' names.

[13] The letters and statement of account from the conveyancing attorney was addressed to both parties

[20] It is argued by the respondent that the seller of the property was a 'trust' which could have been purchased by both parties, had this been their true intention. Further, the applicant did not contribute financially towards the purchase of the property. The respondent takes the position that he is the outright owner of the property and he can do with the property as he pleases. Accordingly, no rights of any nature accrue to the applicant in connection with the property and particularly she enjoys no right to occupy the property which is solely his holiday home.

THE LAW AND THE DECIDED AUTHORITIES

[21] The applicant takes the view that the legal test to be applied, is the test which is traditionally applied when determining the granting of interim relief. This because the application is an interlocutory application and the relief requested is *pendent lite*.

[22] The respondent takes the view that although the application is interlocutory in nature, the effect of the relief as sought, if granted, will be final in nature. Accordingly, the test to be applied, so submits Mr Olivier, is the test to be applied when granting an interdict for final relief. What is significant is that, should the latter approach be adopted, the 'balance of convenience' will not weigh in when the relief is considered.

[23] The appropriate test to be applied was clearly set out in *Dempsey*[14], a matter in which the wife, inter alia, sought confirmation of an order ejecting her husband from the matrimonial home, pending the outcome of a divorce action, where it was held as follows;

> *'It should however be realised that the application is merely interlocutory and the effect of the granting thereof is only temporary and not finally decisive of either party's rights. Therefore the court will normally grant an interdict upon a degree of proof less exacting than that required for the final grant of a final interdict'*

[24] In *Badenhorst*[15], a matter somewhat analogous to this, an interim interdict was granted, preventing a husband from gaining access to a farm, in circumstances where his wife was residing, and the following, inter alia, was held;

> *'The wife's right to eject him must therefore flow from considerations which to a great extent must depend on the merits of the matrimonial dispute'*

[25] It seems to me that the relief sought by the applicant is very much temporary in nature, pending the outcome of the divorce action scheduled to commence in August 2020, a few months hence. Accordingly, in my view, the applicant, in order to succeed, must show a prima facie right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; that the balance

[14] [1998] JOL 1936 (SE) at paragraph 5
[15] 1964 (2) SA 676 (T).

of convenience favours the granting of interim relief and that there is no other satisfactory remedy.

A PRIMA FACIE RIGHT

[26] The requirement of a prima facie right requires a delicate balancing act of the facts, provided by the respondent weighed up against the facts advanced by the applicant, viewed in the context of whether the facts advanced by the respondent, place real doubt on the applicant's case. If this is well established, the applicant case must fail. If the facts advanced by the respondent, appropriately measured, offer up only an unconvincing explanation, the respondent's case must fail. Put in another way, the proper approach is to consider the factual allegations made by the applicant, read together with the facts set out by the respondent, which facts the applicant is unable to dispute.

[27] Simply put, I must weigh up the inherent probabilities and then consider whether the applicant will be able to obtain final relief at a trial, with reference to the facts presented, specifically in connection with the disputed issues. I must at the same time bear in mind that the applicant bears the onus of proof.

[28] This approach may be influenced to some extent, depending in whose favour the balance of convenience 'leans' and whether this incline is heavily in favour of the applicant or the respondent, as the case may be.

BALANCE OF CONVENIENCE

[29] The applicant contends that the balance of convenience favours her, because; the respondent has other properties at which he can reside; the respondent could easily move back to the old matrimonial home and has more than sufficient funds to obtain alternative accommodation in Victoria Bay, should he wish to stay there in the area. The respondent advances a similar argument, as the applicant may move to the old matrimonial home or rent a suitable property, *pendent lite*, for a few months.

[30] I have to weigh up the prejudice the applicant stands to suffer if the order is not granted, against the prejudice that will be suffered by the respondent, if the order is granted. The stronger the prospects of success, the less the need for such balance to favor the applicant. I am vested with a wide discretion which must in essence be a *carefully considered judicial discretion*, taking into account the facts and the law.

NO OTHER SATISFACTORY REMEDY

[31] The applicant takes the position; that she has nowhere else to stay; has no viable alternative to living at the property and accordingly the application was necessary and urgent. No other satisfactory remedy was available to her. Further, it is submitted that the applicant should not have to use her own funds to rent or buy another house to live in *pendente lite*, because it is her husband's conduct which makes living with him intolerable. The respondent takes the position that the applicant is a woman of some considerable means and can easily rent a suitable property should she not wish to reside in the matrimonial home in the Northern Cape.

DISCUSSION

[32] Mr Pincus, on behalf of the applicant submits that the 'nominee' arrangement between the parties cannot be the subject of any serious challenge. This, inter alia, due to the fact that the respondent's stated position is that he desires to sell the property and tenders to hold half the nett proceeds in trust *pendente lite.* In addition, the applicant relied on the advice by the conveyancing attorney regarding the alleged statutory impediment regrading joint ownership. Finally, the correspondence from the transferring attorney was addressed to both parties.

[33] Further, it is submitted that the respondent's inappropriate behaviour and interference of the applicant's rights to peaceful occupancy of the property prevented the applicant from remaining on the property. This made it impossible for the parties to continue living together. The property is a matrimonial home and accordingly the applicant enjoys the legal right to be restored to her peaceful occupation of the property. It would be tantamount to 'driving her out' to allow respondent to remain in the property, taking into account his wholly inappropriate behaviour and conduct.

[34] The submission is made on behalf of the applicant that the decided authorities support her right to occupy the property in these circumstances, whether the home is owned solely by the respondent, solely by the applicant, or jointly, and even to the exclusion of the respondent.

[35] In addition, it is submitted by Mr Pincus that the conduct and behavior of the respondent by; attempting to rent out the property even though the applicant was living there; threatening that he would fetch homeless people from the street and house them in the property; carrying on an intimate relationship with another woman at the property; sleeping with his girlfriend in the main bedroom; allowing his girlfriend to wear the applicant's night gown and, telling the applicant to 'take [her] panties and toothbrush and f….. off', are all factors that militate in favour of the applicant.

[36] Mr Olivier, submits in the main, that the applicant issued out a divorce action and in her particulars of claim she did not claim maintenance from the respondent. Significantly, she did not allege that she was dependent on the respondent for accommodation and finally, the property was not their matrimonial home, but is a holiday home.

[37] In his view, the applicant enjoys no rights to occupy any other home, other than the *matrimonial home* which is situated in the Northern Cape. The respondent avers that the applicant must occupy the matrimonial home in the Northern Cape. The main point seems to be that no allegation has ever been made that the property was converted from a holiday home to the matrimonial home.[16] I am not convinced that this *conversion* contended for is necessary in law.

[38] The respondent's opposition is largely based on the argument that a spouse, who is not the owner of the matrimonial property, cannot eject the *owner spouse* from the property, pending a divorce action. The position taken is that the applicant is not entitled to an eviction order and that the trial court will be in a better position to decide these issues, including costs. This issue bears further scrutiny particularly in view of the fact that most of the authorities to which I have been referred were decided prior to our constitutional democracy. It is however important for the purposes of this judgment to analyse and

[16] I am of the view that this is an extremely 'old-fashioned' way of approaching this issue and is artificial

consider the current decided authorities, on this issue.

[40] In *Buck* ,[17] and *Silverstone*,[18] it was held, inter alia, as follows; [19]

> *'In my view she [the wife] has a right to be in the matrimonial home while a petition is pending before this court and this court is entitled to protect that right and ensure that pressure is not put on a wife to abandon her petition by evicting her from the home. In the present case I am satisfied that if I let the husband return to the house I am really driving the wife out'*

[41] *McWhirter*,[20] it was held that;[21]

> '*In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband cannot turn the wife out……..the authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage, coupled with the fact of separation owing to the husband's misconduct…..…..If a husband has been guilty of desertion and nothing else, he is entitled to come back at any time asking to be forgiven and she is then bound to receive him. She cannot then keep him out of his house. But if he has, in addition to desertion, been guilty of cruelty or adultery, she is not bound to take him back. She can keep him out of the house. Her possession may then be quite exclusive'*

[42] In *Hall,* [22] it was held that:[23]

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[17] 1974 (1) SA 609 (R), cited with approval in Oosthuizen v Oosthuizen 1986 (4) SA 984 (T) at 992I
[18] (1953) 1 All ER 556
[19] At 557G-H.
[20] (1952) 1 All ER 1311.
[21] At 1311.
[22] (1971) 1 All ER 762 (CA).
[23] At 764B-C.

'But I would like to say that an order to exclude one spouse or the other from the matrimonial home is a drastic order. It ought not to be made unless it is proved to be impossible for them to live together in the same house…'

[43] In *Buck* supra, it was, in addition, held that;[24]

'The question which spouse (if either) owns the property may have some weight in the case of a wife seeking the remedy, but as a rule very little weight. Where the husband has not left the matrimonial home much stronger grounds would have to emerge than when he returns after desertion or periodic absences. Much turns on questions of physical molestation or pressures of other kinds exerted by the husband, and the Court must also consider the motives of the spouses……..This is a case where it is clear that the Respondent is not returning [to the matrimonial home] for the benefit of his wife's company or to promote a reconciliation…….My conclusion is that the petitioner has made out a sufficient case that the presence of respondent in the same house as herself creates an impossible situation with which the petitioner must not be expected to put up.....I consider that there will be little hardship on him if he has to resort to an hotel during the interim…..'

[44] In applying the appropriate test, I am of the view that, inter alia, that because of the respondents inappropriate behaviour and conduct, the applicant was obliged to seek interim relief. Had she not proceeded in this fashion, the respondent would have continued to make life at the property intolerable and this in turn, would have 'driven her out' of the property.

[45] The respondent's behavior and conduct, was in my view, of a sufficient degree to establish a '*reasonable fear of molestation*' by the respondent, should she return to the

[24] At 613A-F

property. This in turn, goes directly to the issue of balance of convenience as the trial in the main action is only some (5) months hence. Accordingly, I find in favor of the applicant on the issue of balance of convenience.

[46] The respondent argues that the property is not the parties matrimonial home, but it is their holiday home. Accordingly, it is submitted that the applicant falls to be evicted as she enjoys no protection. It is difficult for me to accept that in modern society a married couple are capable, by legal definition, of having only one single matrimonial home. Many married couples have holiday homes, homes in the city and homes in the country which they occupy together because of the marriage relationship between them. These homes, in my view, are all matrimonial homes because they occupy these homes together as a married couple.

[47] As a matter of logic, as long as the property has been used from time to time as the married couple's residence prior to separation, this in my view, qualifies it as a matrimonial home. This property was ordinarily occupied by the parties as their residence for regular family life and in my view undoubtedly qualifies as a matrimonial home of the parties.

[48] With regard to the sale of the property, this issue is of necessity, inextricably linked

to the relief sought by the applicant to occupy the property, *pendent lite*. In the event that she is afforded the right to live in the property, she will of necessity, be entitled to protect the property against it being sold *pendente lite*, particularly while she is in occupation.

[49] Again on this issue, I find in favour of the applicant. In the applicant's amendment application, the applicant includes a prayer that she be entitled to purchase the respondent's half interest in the property, at a market related price. Although this is disputed by the respondent, this remains a factor that militates against the sale of the property *pendent lite.*

COSTS

[50] The applicant seeks her costs of and incidental to this application. The applicant contends that no evidence will emerge at the trial, which is relevant to these issues, which will have the effect of placing the trial court in a better position to determine the costs of this application. The respondent submits that costs should stand over for determination by the trial court as there may be evidence presented at the trial, which is relevant, and which may have an effect on the determination of these costs. I agree with the respondent.

[51] I am not satisfied that a proper case has been made out that costs should be awarded at this stage. I am not convinced that it is a *racing certainty* that no relevant evidence may be tendered at the trial which may place the trial court in a better position, to decide upon the costs of this application.

ORDER

[52] In the result the following order is granted, namely;

1. That the interim order granted on the 28th of January 2020 is hereby confirmed *pendente lite.*

2. That the costs of and incidental to this application and the wasted costs incurred on the 26th of February 2020 (if any), including costs of two counsel, shall stand over for determination by the trial court.

'D WILLE'

WILLE, J

For the Applicant:

Adv B Pincus SC with Adv C Small

Instructed by: Maurice Phillips Wisenberg – Cape Town

Attorney: Bertus Preller

For the Respondent:

Adv K Olivier SC with Adv A Heese

Instructed by: Hannes Pretorius Bock & Bryant – Somerset West

Attorney: W Bock