



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

CASE NUMBER: 1884/2018

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES.

DATE: 9 February 2024

In the matter between: -

L. E.

Applicant

and

L.A.

Respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 13h00 on 9 February 2024.

SUMMARY: Application in terms of section 20 of the Matrimonial Property Act, 88 of 1984 for the immediate division of a joint estate in a foreign marriage.

- Held that the Matrimonial Property Act, 88 of 1984 applies to the enforcement of rights and obligations flowing from marriages governed by South African law.
- Held that the applicant could not succeed with her application because the parties had entered into a foreign marriage by virtue of the husband's *lex domicilii matrimonii* in which event the proprietary consequences of a foreign marriage must be determined in accordance with the law of the matrimonial domicile.
- Restated the principle that a party is not entitled to make out a case in reply unless under exceptional circumstances.
- Restated the importance of complying with the provisions of Rule 36(9) when relying on expert evidence.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] This court was called upon to determine three interlocutory applications, namely an application for immediate division, an application for leave to amend and an application brought in terms of Rule 30.

[2] The sequence within which papers were filed and proceedings were brought can only be described as a Gordian knot. It demanded serious unravelling as will be demonstrated.

SEQUENCE OF PROCEEDINGS AND PAPERS

[3] The applicant is the plaintiff in a pending divorce action instituted by her in this court on 19 January 2018. The applicant married the respondent on

2 March 2002 at Bucharest, Romania.

- [4] The applicant initially applied for the immediate division of what she referred to as the joint estate in terms of section 20 of the Matrimonial Property Act, 88 of 1984 ("**the MPA**") and for the appointment of a liquidator and receiver to determine the value. This application was brought on the 5th of December 2022.
- [5] The respondent opposed the application on, *inter alia*, the basis that there is no joint estate as the parties' proprietary rights are governed by either Turkish or Romanian Law.
- [6] The applicant filed her replying affidavit on 5 April 2023.
- [7] After the filing of answering papers on 28 February 2023, both parties amended their pleadings in the divorce action. More detail regarding the nature of these amendments will follow.
- [8] Simultaneously with the filing of her replying papers, the respondent gave notice of her intention to amend her notice of motion in terms of Rule 28.
- [9] In terms of the proposed amendment, the relief that the applicant now seeks is, on a mere cursory glance, substantially different.
- [10] Firstly, the applicant seeks an order declaring that the Turkish laws "*(alternatively Romanian law)*" are applicable to the parties' marriage. Secondly, the applicant seeks an order for the immediate division of the assets acquired during the subsistence of the marriage in accordance with

Turkish, alternatively Romanian law. The applicant persists with her relief for the appointment of a receiver and liquidator to value the assets and divide them.

[11] The amendment of the notice of motion is sought on the founding papers as they currently stand. The founding papers were not supplemented.

[12] On the 18th of April 2023, the respondent formally objected to the proposed amendment on 18 April 2023. The respondent contended that the proposed amendments sought to introduce an entirely new cause of action to the respondent's prejudice.

[13] In response to the replying papers, the respondent filed a rule 30 notice on the 18th of April 2023 and objected to the replying affidavit on *inter alia* the basis that the relief sought constitutes an entirely new cause of action.

[14] All three application were placed before me for hearing.

THE AMENDED PLEADINGS IN THE DIVORCE ACTION

[15] Initially, the applicant at paragraph 5 of her unamended particulars of claim dated 19 January 2018 alleged a marriage in community of property "*according with the laws of Romania*".

[16] On 25 November 2019, the respondent served a plea where he admitted the conclusion of a marriage in community of property "*save to state that the Laws of the Republic of South Africa will govern the division of the joint*

estate of the parties".¹ In his counterclaim, the respondent alleged that the parties were married in community of property and that the assets forming part of the parties' joint estate were to be divided as provided for in the MPA with the alternative of appointing a forensic auditor and/or liquidator to establish the extent of the assets of the joint estate and to divide such assets equally between the parties.²

[17] On the 9th of June 2023, the applicant filed a notice of her intention to amend her particulars of claim. The amendment was not objected to, and was effected on the 27th of June 2023. Paragraph 5 of the particulars of claim in its amended form now reads as follows: -

"The parties were married to each other on the 2nd of March 2022 at Bucharest, Romania, in accordance with the laws of Romania..."

[18] At paragraph 10 of the amended particulars of claim, the applicant pleaded that the proprietary consequences of the marriage relationship are governed by the laws of Turkey, alternatively Romania and that: -

[18.1] assets which were brought into the marriage by either party remain separate property and ownership thereof remains vested in that party;

[18.2] assets which are acquired during the marriage relationship are to be divided equally between the parties;

¹ Plea, paragraph 3.1.

² Counterclaim, paragraph 12.

[18.3] inheritances and/or damages received by either party during the marriage, remain separate property and remain vested in that party.

[19] Pursuant to the applicant amending her particulars of claim, the respondent amended his plea on the 31st of July 2023 as follows: -

"5. *The Defendant admits that the parties were married to each other at Bucharest, Romania on the 2nd of March 2002...*"

[20] The respondent also pleaded that the proprietary consequences of the marriage are governed by the laws of Turkey, alternatively Romania, on the basis that "*the Defendant was domiciled in either Turkey or Romania, at the time of the marriage*".³

[21] The respondent pleaded at paragraph 12 of the amended counterclaim that in accordance with both the laws of Romania and Turkey: -

[21.1] assets which were brought into the marriage by either party remain separate property and ownership thereof remains vested in that party;

[21.2] assets which are acquired during the marriage are not jointly owned by the spouses and there is no property belonging to the union of the marriage;

[21.3] inheritances and/or damages received by either party during the

³ Paragraph 12, amended plea.

marriage, remain separate property and remain vested in that party;

[21.4] the acquired property of a spouse is his/her own property and the other spouse has a right to claim half of the residual value upon termination of the legal matrimonial property regime;

[21.5] on termination of the marriage, each spouse has a right to a monetary claim for his/her share of the residual value of the acquired property or of the other spouse;

[21.6] the residual value of the acquired property is determined as at the date of the institution of divorce proceedings, but only becomes due and payable upon divorce and after the completion of the liquidation of the property regime.

[22] The respondent pleaded further that the matrimonial consequences of a marriage concluded in accordance with the laws of Romania are as follows: -

[22.1] assets which were brought into the marriage by either party remain separate property and ownership thereof remains vested in that party;

[22.2] inheritances and/or damages received by either party during the marriage, remain separate property and remain vested in that party;

[22.3] assets which are acquired during the marriage are to be divided equally between the parties, alternatively, in accordance with the proven contribution(s) of each party during the subsistence of the marriage;

[22.4] the matrimonial property regime terminates on the date of the institution of divorce proceedings.

[23] The applicant admitted the aforesaid allegations in her plea to the counterclaim to the extent of such allegations being consistent with the averments in the particulars of claim.

[24] The respondent seeks an order declaring that the parties were married either in terms of Turkish or in terms of Romanian law. The applicant does not. She seeks this declaratory relief in the present application.

THE APPLICATION

[25] In her founding papers, which preceded the amended pleadings, the applicant described the parties' applicable marital regime as follows: -

"6.1 The respondent and I were married to each other on 2 March 2002 in Bucharest, Romania in terms of Romanian law, in terms of which it can be accepted that we are married in community of property, as no marital contract/antenuptial contract was executed and/or registered between us."

[26] The respondent denies this:-

"4. ...There is no joint estate existing between my wife and myself

because in simple terms, our proprietary rights are governed by either Turkish or Romanian law, and the said Act [the MPA] has no relevance to our marriage.

5. *... I denied that it is common cause between us that the marriage regime is one in community of property..."*

[27] In her replying affidavit, the applicant asserts that the respondent agrees that the proprietary consequence of a marriage in accordance with Turkish or Romanian law is a division of assets acquired during the marriage.⁴ This is not entirely correct. There is a distinct difference between these two laws in that the Romanian law provides for an alternative to a division of assets and that is a division in accordance with the proven contribution(s) of each party during the subsistence of the marriage.

[28] The applicant went further and attached to her replying papers expert opinions on the patrimonial consequences of Turkish and Romanian law.

APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

Replying papers/Rule 30

[29] It is trite that the necessary allegations must appear in the founding papers⁵ for the court will not, save in exceptional circumstances,⁶ allow the applicant to make or supplement a case in a replying affidavit, and will order any matter appearing in it that should have been in the founding affidavits to

⁴ Replying affidavit: para 3.10 and 3.11.

⁵ Pearson v Magrep Investments (Pty) Ltd 1975 (1) SA 186 (D);

⁶ Shephard v Tuckers Land & Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177G-178A

be struck out.⁷

[30] It may well be that the averments in the replying papers were necessitated by the respondent's denial in his answering papers that the parties were married community of property, but the applicant ought then to have applied for leave to supplement her papers, whereafter the respondent would have been able to answer to the averments and expert evidence. In such instance, the respondent would have been afforded a fair opportunity to put up rebutting expert evidence. That is on the assumption that the expert evidence sought to be adduced by the applicant was properly before this court. In my view, it is not.

[31] The provisions of Rule 36(9) provide for the leading of expert evidence. *Erasmus*⁸ aptly describes the purpose of the sub-rule thus:

*".. to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise from the trial. Furthermore, proper compliance with the subrule may enable experts to exchange views before giving evidence and thus to reach agreement on at least some of the issues, thereby saving costs and the time of the court."*⁹

[32] The opposing party is given notice, the expert report is filed, and the expert

⁷ Seymour v Seymour 1937 WLD 9; Victor v Victor 1938 WLD 16; De Villiers v De Villiers 1943 TPD 60; Mauerberger v Mauerberger 1948 (3) SA 731 (C);

⁸ Erasmus; Superior Court practice: RS 21, 2023, D1-488B

⁹ *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F

is qualified as such. The applicant failed to comply with this rule, has not applied for condonation or advanced any reason why the Court should receive the expert evidence in this manner and in motion proceedings where the respondent is deprived of his right to cross-examine these witnesses and to adduce rebutting expert evidence which may very well differ from that of the applicant's expert evidence not only in relation to the proprietary consequences, but whether or not an immediate division as sought can be granted under the circumstances.

[33] Moreover, the declaration of whether the proprietary consequences of the parties' marriage is in terms of Turkish or Romanian Law is a pending issue in the divorce action which is the correct forum within which these issues should be ventilated with the benefit of *viva voce* evidence.

[34] In the circumstances, I find that the Rule 30 application has merit and should be granted.

The proposed amendment to the notice of motion

[35] Even if I am wrong on this point, it does not detract from the fundamental difficulty that the applicant's founding papers do not make out a case for the relief that she seeks in her proposed amendment to the notice of motion, and for this reason I refuse the proposed amendment to the notice of motion.

Immediate division applications and international private law

[36] The case before me is accordingly premised on the original notice of motion and the applicant's reliance on section 20 of the MPA.

[37] At the outset it is important to deal with the critical difference between substantive and procedural law as pointed out by Mr Pincus SC who appeared for the respondent. Foreign law governs the proprietary consequences of the marriage (substantive law), while the procedural law relates to the methodology applied by a South African Court to enforce the proprietary consequences. If anything, the MPA would be the source of procedural law.

[38] Section 20 of the MPA provides as follows:-

*"The 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."* (emphasis added).

[39] The legislature's intention is clear and that is to protect a spouse from proprietary abuse in a joint estate.

[40] As patriarchal and discriminatory as it is in our country's hard-fought constitutional dispensation, the common rule remains that the proprietary consequences of a marriage are governed by the husband's domicile at the

time of the marriage.¹⁰ This is especially so where there is no antenuptial contract.

[41] *Forsyth*¹¹ describes the proprietary consequences of a marriage to include whether the marriage is in community of property, or out of community of property or whether a regime of partial community is established, and the division of the estate upon divorce.

[42] The authorities also make it plain that the matrimonial domicile determines the law applicable to the proprietary consequences of the marriage once and for all.¹² Therefore once adopted, it cannot be changed during the subsistence of the marriage.¹³

[43] In *Bell*¹⁴ the plaintiff instituted action for divorce in South Africa, claiming a redistribution of assets in terms of ss 23 and 24 of Part 2 of the Matrimonial Causes Act of 1973 of England. Issue was taken with the prayer by way of exception and, in dismissing the exception, Kuper AJ said the following at 196H—I and 197E:

"It is clear beyond doubt and has been clear for more than 70 years that in the absence of an antenuptial contract the proprietary consequences of a foreign marriage must be determined in accordance with the law of the

¹⁰ Brown v Brown 1921 AD 478; Frankel's Estate and Another v The Master and Another 1950 (1) SA 220 (A); Sperling v Sperling 1971 (3) SA 707 (A) at 716F-G.

¹¹ Forsyth; Private International Law (Fifth Edition), The Family And Choice of Law; p. 291.

¹² Forsyth *supra* at 298; Brown v Brown *supra* at 482; Sperling v Sperling *supra* at 716G-H, Blatchford v Blatchford's Estate and Anderson v The Master 1949 (4) SA 660 (E) at 667-668.

¹³ A principle of immutability is hence adopted; Blatchford's Estate *supra* at 373; Chiwell v Carlyon (1897) 14 SC 61 at 67-8.

¹⁴ Bell v Bell 1991 (4) SA 195 (W)

matrimonial domicile, which is to say the domicile of the husband at the time of marriage.

"I am bound to decide this matter by reference to the laws of England as embodied in her common law and in her statutes (and it is immaterial whether for that purpose the private international law system of England is itself taken into account or not). Included in those statutes, of course, is the Matrimonial Causes Act of 1973."

[44] Josman AJ held in *Esterhuizen*¹⁵ held that the MPA was intended to deal with local marriages where the domicile of the husband was in South Africa. In that matter the parties, who were domiciled in Namibia at the time of the marriage, had concluded an antenuptial contract there. The plaintiff, the wife, sought an order in terms of s 7(3) of the Divorce Act 70 of 1979, requiring that one-half of the net value of her husband's assets be transferred to her. The court found that section 7(3) is not applicable to foreign marriage by antenuptial contract.

[45] I find no reason to differ from *Esterhuisen* despite the applicant's allegation that the parties' property regime contains elements of division. In my view the underlying principles of *lex domicilii matrimonii* remain the same. The MPA forms part of South African law and does not apply to foreign marriages, unless expressly provided for by way of antenuptial contract, as South African law is not the *lex causae* of such marriages.¹⁶

¹⁵ Esterhuizen v Esterhuizen 1999 (1) SA 492 (C) at 500A.

¹⁶ Ex parte Senekal et Uxor 1989 (1) SA 38 (T) at 39 H.

[46] For the aforesaid reasons, the application is destined to fail.

COSTS

[47] Once the answering papers were filed and after the pleadings were amended, it ought to have been clear to the applicant that the success of her application was in jeopardy. Had she withdrawn her application at that stage or applied for leave to supplement her founding papers, matters, especially as far as the issue of costs are concerned, may have turned out very differently. Despite these warning signs, the applicant persisted with her application.

[48] Having said that, this Court cannot ignore the fact that the respondent is to some extent to be blamed for the woes of the applicant. The respondent presented a completely different case in his answering papers to his pleadings in the divorce action and this necessitated the amendments in the action and in the application for immediate division. In the circumstances, I am disinclined to grant costs in favour of the respondent in respect of the application to amend and the Rule 30 application, although he was substantially successful.¹⁷

ORDER

[49] I accordingly grant an order in the following terms: -

"1. *The Rule 30 application succeeds with no order as to costs.*

¹⁷ *Berkowitz v Berkowitz* 1956 (3) SA 522 (SR); *Howe v Essey* 1963 (3) SA 402 (T) at 404A-D.

2. *The application for leave to amend is dismissed with no order as to costs.*

3. *The application for immediate division is dismissed with costs, including the costs of two counsel where employed."*



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: **6 September 2023**

DATE OF JUDGMENT: **9 February 2024**

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