IN THE HIGH COURT OF SWAZILAND

Civil case No: 1271/12

In the matter between:

HELEN ELIZABETH BOTHA (BORN ELLIOT) **APPLICANT**

AND

ANDRE CHRISTO BOTHA **FIRST RESPONDENT**

STANDARD BANK SWAZILAND LIMITED **SECOND RESPONDENT**

Neutral citation: *Hellen Elizabeth Botha (Born Elliot) v. Andre Christo Botha & Another (1271/12) [2013] SZHC172 (9 August 2013)*

Coram: **M.C.B. MAPHALALA, J**

Summary

Civil Procedure – *ex parte* application for an interdict *pendete lite* interdicting and restraining the first respondent from selling and disposing his assets pending the divorce action on the basis that she has a vested right to claim half of the net accrual of the Estate of the first respondent upon the dissolution of the marriage in terms of section 7 (3) of the Divorce Act No. 70 of 1979 – held that prior to the granting of the decree of divorce the applicant has a contingent right as opposed to a vested right – held further that the right to claim a redistribution of assets between the parties is determined by the Court granting a decree of divorce.

JUDGMENT
9 AUGUST 2013

[1] This is an ex parte application brought on a certificate of urgency for an interdict *pendete lite*. The applicant sought an order that pending finalisation of an action for divorce and ancillary relief instituted contemporaneously with this application, a *rule nisi* to issue returnable on a date and time to be determined by the Court in the following terms: Firstly, that the first respondent be prohibited and interdicted from directly or indirectly threatening or assaulting the applicant. Secondly, that the first respondent be prohibited and interdicted from removing, disposing or selling of or otherwise alienating any furniture and household effects which are currently in the Common home of the parties.

[2] Thirdly that the first respondent be interdicted and restrained from denying the applicant unrestricted reasonable access to the said matrimonial home, or from directly or indirectly obstructing such access. Fourthly, that the applicant be authorised to take whatever steps and actions that may be necessary for the applicant together with her attorney and /or any other person or persons of her choice to enter the said matrimonial home and to remove therefrom the applicant's personal furniture and household effects.

[3] Fifthly, that the first respondent be permitted to observe such removal but be interdicted and restrained from in any manner directly or indirectly interfering with such removal by the applicant. Sixthly, that the applicant be directed to compile an inventory of all items so removed by the applicant and to deliver a

copy of such inventory to the first respondent or his attorneys within two (2) days of such removal indicating on the said inventory the basis on which the applicant claims to be entitled to the items listed thereon. Seventh, that the Deputy Sheriff for the district of Hhohho and/or the Swaziland Police Service be authorised and empowered to give full effect to prayers 3.3, 3.4, and 3.5.

[4] Eighthly, that the first respondent forthwith returns to the applicant her personal laptop computer, which is now in the possession of the first respondent , alternatively, that the first respondent forthwith provides the applicant with a similar new laptop computer. Ninthly, that the first respondent be prohibited and interdicted from encumbering, disposing, selling, or otherwise alienating any of his assets including any moneys in his personal bank accounts as well as the assets mentioned in paragraph 13 of the Particulars of Claim in the abovementioned action.

[5] The applicant further sought an order directing the first respondent to make a full disclosure under oath or affidavit to the applicant's attorneys on or before 26th July 2012 of all first respondent's assets and the value of each asset including interests in companies other than those mentioned in the founding affidavit and all bank accounts into which he had deposited moneys for his own profit, a list of the names of all clients to whom the first respondent has rendered services on behalf of Computer Solutions (Swaziland) (Pty) Ltd, Nyosi Consulting (Pty) Ltd and Nyosi General Dealer since January 2011 and

copies of all invoices issued to such clients, a list of all payments received from the said clients by the first respondent, copies of all the annual financial statements of the said companies since 2003, particulars of any and all payments made by the first respondent or behalf of the said companies to one Thobile Ndaba and to any employee of the companies referred to in prayer 3.6.2 above, the basis for such payments.

[6] The applicant also seeks an order that the second respondent be interdicted from making any payments or otherwise releasing any moneys from account numbers 551051726 and 551197703 held with it by Computer Solutions (Swaziland) (Pty) Ltd. Lastly, the applicant seeks an order to serve the *rule nisi* on all parties having an interest in or being affected by prayers 3.7, 3.9, 3.10 and 3.11 above.

[7] On the 19th July 2012 Justice Hlophe made the following Order:

COURT ORDER

BEING:

Whereupon: having heard Counsel for the Applicant

It is ordered that:

1. The usual forms and services relating to the institution of proceedings are dispensed with and that this matter be heard as a matter of urgency.

2. That the applicant's non-compliance with the Rules relating to the above-said forms and services is condoned.
3. Pending finalization of the action for divorce and ancillary relief instituted contemporaneously with this application by the applicant, that a rule nisi issues in the following terms:

3.1 That the First Respondent be prohibited and interdicted from directly or indirectly, threatening or assaulting the applicant.

3.2 That the First Respondent be prohibited and interdicted from removing, disposing of, selling, or otherwise alienating any furniture and household effects which are currently in the matrimonial home of the applicant and the first respondent.

3.3 That the first respondent be directed to forthwith grant the applicant unrestricted access to the said matrimonial home;

3.4 That the applicant be authorised to forthwith with her attorney and/or any other person or persons of her choice, enter the said matrimonial home and remove therefrom the applicant's personal furniture and household effects.

3.5 That the first respondent be permitted to observe such removal but that the first respondent be interdicted and restrained from in any manner, directly or indirectly, interfering with such removal by the applicant.

3.6 That the applicant be directed to compile an inventory of all items so removed by the applicant and to deliver a copy of such inventory to the first respondent or his attorneys within two (2) days of such

removal, indicating the said inventory and the basis on which the applicant claims to be entitled to the items listed thereon.

3.7 That the deputy sheriff for the Hhohho District and/or the Royal Swaziland Police be authorised and empowered to give full effect to 3.3,3.4 and 3.5 above if required

3.8 That the first respondent forthwith returns to the applicant her personal laptop computer, which is now in the possession of the first respondent, alternatively, that the first respondent forthwith provides the applicant with a similar new laptop computer

3.9 That the first respondent be prohibited and interdicted from encumbering, disposing, selling, or otherwise alienating any of his assets including any moneys in his personal bank accounts as well as the assets mentioned in paragraph 13 of the Particulars of Claim in the abovementioned action.

3.10 That the first respondent be directed to make a full disclosure under oath in respect of the following, and deliver such affidavit to the applicant's attorneys on or before 26th July 2012:

3.10.1 All the first respondent's current assets and the approximate value of each such asset, including first respondent's interests in companies other than those mentioned in the Founding Affidavit; and all bank accounts including savings accounts which the first respondent deposited moneys for his own benefit; and

3.10.2 A list of the names of all clients to whom the first respondent has rendered services on behalf of Computer Solutions (Swaziland) (Pty) Ltd, Nyosi Consulting (Pty) Ltd and Nyosi General (Pty) Ltd since January 2011 and copies of all invoices issued to such clients; and

3.10.3 A list of all payments received from the said clients by the first respondent;

3.10.4 Copies of all the annual financial statements of the said companies since 2003; and

3.10.5 Particulars of any and all payments made by the first respondent on behalf of the said companies to one Thobile Ndaba and to any employees of the companies referred to in prayer 3.6.2 above, and the basis for such payments.

3.11 That the second respondent be interdicted from making any payments or otherwise releasing any moneys from account numbers 551051726 and 551197703 held with it by Computer Solutions (Swaziland) (Pty) Ltd.

3.12 That the applicant be granted permission to serve copies of this order on all parties having an interest in or being affected by 3.7, 3.9, 3.10 and 3.11 above.

4. That the orders in 3.1, 3.2, 3.9 (as amended), 3.11 and 3.12 above operate with immediate effect pending the return date herein.

5. That the respondents shall show cause on the 27th July 2012 as to why the

above rule nisi should not be confirmed.

6. That the respondents are granted leave to anticipate the return date herein on 24 hours' notice.
7. That the applicant is granted leave to file a Supplementary Affidavit concerning her personal assets.

[8] The applicant is sixty-nine years of age and employed by Transtech (Pty) Ltd in Matsapha. The first respondent is a businessman employed by Easigas in Mbabane. The applicant and first respondent are married to each other. The applicant alleges that she is a co-director with the first respondent in Computer Solutions with equal shareholding. She further alleges that they are also co-directors in Nyosi Consulting (Pty) Ltd and Nyosi General (Pty) Ltd with equal shareholding.

[9] It is common cause that the applicant seeks an interdict pending finalization of a divorce action between her and the first respondent. They were married out of community of property in 1980 and the said marriage still subsists. Their matrimonial home is situated in Mbabane and owned by Nokuthula Family Trust; and, both are beneficiaries in terms of a Deed of Trust.

[10] The applicant contends that she suffers from severe chronic emphysema. She further contends that for years, the first respondent has physically and mentally abused her including hitting her with his fist; and, that on the 16th May 2012,

the first respondent pushed her into a bath filled with water, grabbed her by the throat and held her head under the water after she had changed his e-mail address. Around the same time, she discovered in his briefcase pornographic literature as well as sex aids, which she assumes he kept for sexual exploits with other women.

[11] She alleges that she subsequently instituted divorce proceedings when cohabitation with the first respondent became untenable. A letter in this regard was served on the 24th May 2012 allegedly with a view to settling the matter amicably. The applicant invited her niece, Jean Van der Meulen from Cape Town to stay with her on a few days when the letter was served. Her niece arrived on the same date that the letter was served on the first respondent. When he returned from work, the niece prevented him from entering the house; the applicant further called her attorney Mrs. Currie and Mr. Eugene Rochat, a director of the company she works for in order to assist her. They both spoke to the first respondent and he confirmed hitting her and threatening to hit her again if she deserved it. The first respondent subsequently forced her and the niece to vacate the matrimonial home; she is currently leasing a one room studio flatlet.

[12] On the 27th May 2012 the first respondent changed locks save for an exterior bedroom door and security gate; and, on the 22nd June 2012, the first respondent gave the applicant a front door key to enable her to pack her

belongings. Similarly, on the 24th and 29th June 2012, he allowed her to pack and remove her belongings.

[13] She concedes having taken custody of property title-deeds belonging to the parties allegedly for safety reasons of the motor vehicles registered in her name and that of Computer Solutions' name as well as her work permit. The documents in her custody include Deed of Transfer in favour of Surrey Glen, a certificate of consolidated Title Goje Township in Ezulwini, a Deed of Transfer being the Remainder Portion 153 of Farm 50 at Ezulwini, Deed of Transfer – Nokuthula Family Trust, Notarial Deed of Trust ifo Nokuthula Family Trust, blue books of the Toyota Camry and BMW of which she is the registered owner as well as the Ford motor vehicle of which the Computer Solution is the owner.

[14] She concedes taking bedding from the house including sheets, pillows, duvet covers, towels, face clothes, bathmats, dish towels and leaving plenty others. She further contends that a significant number of her personal property still remains in the matrimonial home. She argues that she purchased a washing machine but the first respondent does not want her to use it notwithstanding that the leased premises does not have one. On the 15th July 2012, the first respondent locked the gate denying her access to the property. Similarly, she accuses the first respondent of taking her personal laptop which has a negative bearing for doing her work properly.

[15] She contends that she has always had a tacit agreement with the first respondent that the proceeds of the Computer Solutions Investments would be applied for the mutual benefit of both parties; and, that the company holds two bank accounts with the second respondent being 551051726 and 551197703 in respect of which the first respondent secured the sole signing rights. She argues that since they were married, she has assisted the first respondent in establishing the companies; and, that she has made substantial contributions directly or indirectly to the growth and maintenance of his Estate.

[16] She further contends that she has a clear right, and not only a *prima facie* right, to occupy the matrimonial home and enjoy all benefits attached; and, that she could not do so in view of the violence exerted towards her by the first respondent. She contends that she is not prepared to cohabit with the first respondent anymore; however, she contends that she requires possession of her personal belongings to which she has a clear right. She also contends that she has shown an apprehension of irreparable harm and injury to herself and her personal belongings which may be damaged. She argues that her apprehension of irreparable harm is well-grounded and reasonable in view of her physical assault by the first respondent.

[17] She contends that her application further seeks to stop the dissipation of assets belonging to the first respondent to her prejudice. She argues that upon the decree of divorce, she would probably be entitled to half of his Estate in view

of her contribution to the estate. She reiterates that she is a co-director with equal shareholding in Computer Solutions, Nyosi Consulting (Pty) Ltd as well as Nyosi General (Pty) Ltd. She further concedes that the divorce proceedings are still at an early stage.

[18] The applicant has filed a supplementary affidavit in which she has attached annexure 'HEBS1', a list of furniture and household effects which she owned prior to the marriage. She has further attached annexure 'HEBS2', a list of furniture and household effects she purchased during the marriage for the joint household. Annexure 'HEBS3'is a list of furniture and household effects purchased by the first respondent on which she lay no claim. She states that the remainder of the furniture, crockery, cutlery, pots, curtains, linen, electric appliances and other household effects would be divided between the parties in due course; and, that these items are packed in boxes in the garage of the matrimonial home. She contends that she only requires the items in annexure 'HEBS1'and 'HEBS2' to which she is entitled as the owner.

[19] The application is opposed by the first respondent, and, he has filed an Answering Affidavit. In *limine* she argues that there is non-joinder on the basis that the applicant sought and was granted relief against parties who are not before Court. He contends that the Computer Solutions Swaziland (Pty) Ltd is a company duly registered in accordance with the company laws of Swaziland; and, that the said company is a separate legal entity with legal capacity. He

contends further that the company should have been cited in these proceedings; and, that Notwithstanding the non-joinder, the company has been interdicted from withdrawing monies from its bank accounts. It is common cause that the applicant and the first respondent own equal shareholding of the company.

[20] The first respondent contends that he has been interdicted from selling a vacant plot being the remainder of portion 153 of Farm 550, Hhohho district, measuring 17589 hectares of which he is a co-owner with Rademacher who is not cited as a party to the proceedings. He argues that the applicant is aware of the joint ownership of the property; and, that the relief sought and granted in respect of this property directly affects the rights of his co-owner. He further contends, in *limine,* that it is common cause between the parties that they were married to each other in South Africa in terms of an antenuptial contract which is attached to her divorce proceedings. He quotes paragraph 5 thereof which provides the following:

> "**5. That each of the said intended consorts shall be at full liberty to dispose of his or her property and effects by will, codicil or other testamentary disposition, or in any manner, as he or she may think fit, without hindrance or interference in any manner of the other of them.**

[21] He also contends that it is common cause between the parties that the proprietary consequences of their marriage are to be governed by the laws of the Republic of South Africa since they were both domiciled and resident there

at the time of marriage. He contends that the applicant cannot rely on section 7 (3) of the Divorce Act to interdict him from dealing with his Estate as he deems fit since she has yet to prove her claim.

[22] He argues that the applicant has failed to make out a case on the papers for freezing his Estate, and, that her claim only arises upon divorce. The applicant has conceded in her founding affidavit that she is only entitled to a transfer of 50% of his Estate as it exists on the date of divorce; hence, the first respondent contends that there is no basis in law to freeze his entire Estate pending divorce. He further laments the fact that the interim order was issued *ex parte* on speculative grounds and not on proven material facts; and that consequently, she has a duty to disclose all material facts to Court but which she has failed to do. He argues that if all the facts had been placed before Court the order sought and granted by the Court would not have been granted. He further argues that the application having been brought *ex parte*, it is extremely mala fide; and, that he is advised that when an applicant seeks an Order ex parte, she must display the utmost good faith and make a full disclosure to the Court of all relevant facts which she had failed to do.

[23] He contends in *limine* that the application is not urgent and that no case has been made out why the urgent relief should have been granted let alone on an *ex parte* basis. He argues that the apartment occupied by the applicant is fully furnished and that the items she requires are not needed. He argues that the

applicant should have lodged the application in terms of Rule 43 if she requires the items for establishing an alternative dwelling. He further argues that there is a material dispute of fact with regard to the items she wanted to remove.

[24] On the merits he argues that the applicant is deployed by Computer Solutions (Pty) Ltd to do work on behalf of Transtech (Pty) Ltd and Cartract (Pty) Ltd and Dr. Stevenson as an accountant. He concedes that they each hold 50% shareholding with applicant in Computer Solutions Swaziland (Pty) Ltd as well as Nyosi Consulting (PTY) Ltd. He contends that he holds 50% shares in Nyosi General (Pty) Ltd and that the other 50% is held by Themba Dlamini; he denies that the applicant is involved in this company. He further contends that the company is dormant. To that extent he argues that Themba Dlamini should have been joined in these proceedings.

[25] He argues that the applicant is not entitled to a full disclosure of his assets on an urgent basis, and, that the Rules of Court provide for discovery once pleadings are closed in the course of the main divorce action. He further argues that the disclosure of documentation related to the companies invokes the non-joinder pleaded in *limine*. He concedes that they were married in South Africa with the applicant on the 30th August 1980 out of community of property; however, he adds that the marriage is in terms of an antenuptial contract. He denies that the marital home belongs to either of them notwithstanding that they are beneficiaries; and he contends that it belongs to

Nok'thula Trust. To that extent, he argues that the Trust should have been joined in the proceedings.

[26] He denies abusing the applicant physically and mentally including hitting her. He contends that he is defending the divorce action and has accordingly filed a plea and counter-claim to the divorce action. He alleges that they both abused alcohol on a regular basis during the marriage which led to arguments and physical assaults between them; and, that in February 2010, he stopped taking alcohol but the applicant did not. He contends that when the applicant is under the influence of alcohol, she becomes extremely abusive and provokes him to the extreme; and, that on the morning of the 16th May 2012, after drinking the night before, she was abusive towards him and further provoking him to the extreme such that he pushed her and she fell into the bath. He alleges that one of her acts of provocation was when she changed his e-mail address knowing that it was extremely important for business purposes in communicating daily with various clients. He argues that the allegation of a suitcase with pornographic literature and sex aids which the applicant associates with sexual exploits with other women is irrelevant for purposes of the relief sought by applicant. However, he argues that the suitcase has always been in his study since the early 90's and that applicant was aware of its existence and contents.

[27] He concedes that cohabitation with the applicant has become untenable; and, he attributes this to alcohol abuse by the applicant which leads to her aggressive and provocative behaviour. He decries the fact that the applicant did not disclose that he responded to the letter of demand; and, that he assured the applicant's attorney that he has no intention of withdrawing money in the bank accounts invested by Computer Solutions Swaziland (Pty) Ltd because this is company funds. In the same letter he has assured applicant's attorney that she is at liberty to access the Common home provided she behaves herself properly; and, that he has undertaken to allow the applicant to bring any other person to the home if she feels threatened provided the said person is of acceptable behaviour. In the letter he mentions that her fear that he would harm her are unfounded. He alleges that the behaviour of the applicant and her niece Jean Van der Meulen was extremely provocative when she tried to block his entrance to the Common home; he further alleges that Jean Van der Meulen further threatened his life; and, that he found his clothing placed in a bag outside the Common home, and, he was told to leave by the niece.

[28] The first respondent denies forcing the applicant to leave the Common home and contends that she left of her own volition, and, that she has chosen not to return. He does not deny locking the home but argues that he allowed the applicant access to the Common home but that she abused the permission by removing many items inclusive of his personal documents, and, that she has

refused to return the items. He further denies refusing entry to the applicant to do her washing.

[29] He contends that annexure 'HEB4' is not a complete list of the items removed by the applicant from the Common home; he argues that the applicant removed more items than those reflected in the list. He further contends that he purchased the immovable property situated at Surrey Glen referred to in paragraph 8.13.1.2 of the founding affidavit and that the property was registered in her name as his nominee. He also contends that the title deeds of 'former clients' were held by him as security for monies owed by them for services rendered; and, that the applicant's conduct of returning the title deeds to them has compromised his security. He argues that the applicant did not have a right to remove these documents. Similarly, he contends that the remaining portion 153 of Farm 50 in Ezulwini is his property, and, that the applicant has no business removing his title deed.

[30] He denies that the laptop taken from the applicant is her personal property and avers that it belongs to Computer Solutions (Pty) Ltd, and, that the company printer is used to print e-mails. He denies that he has kept her at arm's length with regard to his personal finances or the running of the companies of which they each hold a 50% shareholding. He argues that Computer Solutions Swaziland (Pty) Ltd is almost exclusively used by applicant for business activities in Swaziland and the income generated is deposited into her personal

account. He further argues that the two bank accounts held with the second respondent were opened with his personal money to avoid withholding tax.

[31] The first respondent argues that the applicant has no right to his Estate but only a claim for redistribution in terms of the provisions of Section 7 (3) of the Divorce Act No. 70 of 1979 which will be adjudicated during the divorce hearing. He argues that the applicant has not made out a case that he intends dissipating, alienating, encumbering or dealing with the Estate in such a fashion as to prejudice her potential claim. He contends that until his Estate is dealt with in terms of section 7 (3) of the Divorce Act, he has a legal right to deal with his assets as he deems expedient in view of the provisions of the Antenuptial Contract concluded between the parties. He denies that he is involved in a relationship with a third party or that he harbours an intention of transferring his assets to her or to dissipate his Estate to the prejudice of the applicant's claim.

[32] The applicant has filed a replying affidavit in which she contends that Rule 43 is irrelevant in the present proceedings, and, that the contention by the first respondent that she should invoke Rule 43 instead of the present proceedings is misconceived. She argues that Rule 43 provides only for maintenance *pendete lite*, a contribution towards the costs of a pending matrimonial action, interim custody of a child or interim access to a child. She further contends and reiterates that she works for Transtech (Pty) Ltd on a full time basis; and, that

she works on a part-time basis for Cartrack Swaziland (Pty) Ltd in which Dr. John Stephens is a book-keeper.

[33] She denies that there is a non-joinder on the basis that no relief is sought against these companies. However, she does not dispute that the companies are separate legal entities as distinct from their shareholders. Similarly, she denies that she is seeking discovery in terms of the Rules of Court but a full disclosure of his assets with a view to properly formulate and prosecute her intended claim for redistribution in terms of the South African Divorce Act.

[34] She denies abusing alcohol or assaulting the first respondent as alleged or at all. She reiterates that on the contrary it is the first respondent who drank heavily until February 2011, and, then abused her physically and mentally; the abuse occurred even when the first respondent was sober. The physical assault took the form of punching her, hitting her with fists or strangling her. She contends further that the first respondent repeatedly threatened to drown her in the swimming pool or to throw her over the garden wall into the vacant bush; and, that his behaviour did not change when he gave up drinking is February 2011. She describes him as tall, strong and heavy with a quick and violent temper. At one time he pushed her into the bath and her head under the water. She alleges that earlier that morning she found him in an uncompromising position with a maid called Agnes.

[35] She concedes that the first respondent's briefcase may have been in the study as alleged but he denies knowledge of the pornographic contents. She contends that the relevance of these sexual contents is that the first respondent indulged in sexual exploits which used penis pumps and sex toys. She argues that since he did not use them with her, the implication is that he committed adultery with other women since 1996. She argues that she was shocked and disgusted by the discovery as the respondent's wife, and that no wife can be expected to tolerate such gross and indecent behaviour by her husband.

[36] She denies that she left the Common home out of her own volition and argued that the first respondent had told her and her niece to leave the Common home. She contends that it would not have been in her interest to refuse to leave and to incur his wrath. She further contends that she is not prepared to stay alone in the house with him given his abusive and violent conduct towards her; and that she brought her niece from Cape Town because she feared for her life when the first respondent receives the letter of demand from her attorneys. She contends that the alleged crossbow used by her niece against him was brought into the house by the first respondent who had borrowed it from her employer. She contends that the crossbow was intended for defence and not as a threat to his life.

[37] She reiterates that she has no idea about his personal finance or his remuneration from Easigas or from his consulting work or any of his other

businesses. Similarly, she denies knowledge of his bank accounts. She disputes that the accounts of Computer Solutions held with Stanlib were opened with his money; she contends that they were opened with money she inherited from her mother. She further denies that Computer Solutions (Pty) Ltd is exclusively used by her, and, she argues that the first respondent used it as well to purchase computer equipment, paid his Rotary Club fees in Mbabane and further paid the architect's fees when renovating the house through the company, and more transactions which she cannot recall; she contends that the cheque book with information is with him. She denies knowledge of 'Botha Consultancy', and argues that this is evidence that he has been keeping her away from his business matters. She concedes knowledge of Nyosi Consultancy business but argues that she is not privy to where the income generated is deposited. She concedes further that before she left in May 2012, he told her that he has closed the current account even though she cannot confirm the information.

[38] She concedes that she has no evidence that the first respondent is dissipating his Estate. At paragraph 58.1 she states:

> **"58.1 I have no idea whether the first respondent is dissipating, alienating, encumbering or otherwise dealing with his Estate as I have no idea what it consists of. He has been secretive about everything and has certainly not divulged his financial situation to me at all in the past six years. I therefore respectfully submit that it is reasonable to assume,**

with reference to his vindictive behaviour in the past, that he will do everything in his power to dissipate or conceal his assets from me."

[39] Patrick Martin Forsyth-Thompson deposed to a supporting affidavit in which he denies that he is indebted to the first respondent. He is one of the people whose title deeds were taken from the house by the applicant and handed over the owners; and, the first respondent complained that he has been deprived of his security for what he owed him.

[40] Toni-Ann De Jager has also deposed to a supporting affidavit in which she confirms that she was present when the first respondent admitted to Mr. Rochat and Attorney Mrs Currie that he had hit the applicant and would hit her again. Attorney Currie has deposed to an affidavit confirming what has been said about her in the founding affidavit deposed by the applicant.

[41] Engella Elizabeth Lubbe has deposed to an affidavit in which she states that she has known the applicant for approximately twenty years; and, that in all the social occasions she attended with her, the applicant has never abused alcohol; and, that her conduct and behaviour were always impeccable. This was also confirmed by David Lewis Moir, Mervin Paul Lubbe, Dr. John Woolcott Stephens, Pamela Helen Moir, Ann Louis Bertram and Clarke Wilson Thom in their supporting affidavits.

[42] It is apparent from the evidence that the applicant and first respondent were married to each other on the 30th August 1980 in Cape Town, South Africa, out of community of property in terms of an ante-nuptial contract wherein community of property, community of profit and loss and the accrual system were excluded; the marriage still subsists. It is common cause that the applicant seeks an interdict *pendete lite* on the basis that she has a vested right in certain assets which form part of the Estate of the first respondent. This is further reflected in prayers 3.9 to 3.11.

[43] Pursuant to lodging this application, the applicant further lodged an action for divorce; and, it is common cause that the divorce proceedings are still at an early stage. The interim relief claimed by the applicant presupposes that she has a vested right to claim half of the net accrual of the first respondent upon the dissolution of the marriage in terms of section 7 (3) of the Divorce Act No. 70 of 1979. Section 7 of the Divorce Act provides the following:

> **"7. (3) a Court granting a decree of divorce in respect of a marriage out of community of property-**
>
> **(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or**
>
> **(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22 (6) of the Black Administration Act No. 38 of 1927,**

as it exists immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988,

May, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of assets, of the other party as the Court may deem just be transferred to the first-mentioned party.
[sub-s. (3) added by s. 36 (b) of Act 88 of 1984 and substituted by s. 2 (a) of Act 3 of 1988]

4. **An order under subsection (3) shall not be granted unless the Court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the Estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would have otherwise have been incurred, or in any other manner. [sub-s. (4) added by s. 36 (b) of Act 88 of 1984.]**

5. **In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the Court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the Estate of the other party as contemplated in subsection (4), also take into account-**
   (a) The existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 Act No.38 of 1927;
   (b) Any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

(c) Any order which the Court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and

(d) Any other factor which should in the opinion of the Court be taken into account."

[44] There is no dispute that the marriage between the parties was solemnised on the 30th August 1980 or that the marriage was out of community in terms of an antenuptial contract excluding community of property, community of profit and loss and the accrual system. In the circumstances the provisions of the Matrimonial Property Act No. 88 of 1984 are not applicable. In terms of that Act, all marriages out of community of property concluded between parties in terms of an antenuptial contract after commencement of the Act are subject to the accrual sharing system unless it is specifically excluded.

[45] It is apparent from the provisions of section 7 (3), (4) and (5) that the Court dealing with the divorce action has a discretion to redistribute the assets of the parties in the absence of any agreement between them. However, the applicant has to show that the parties were married prior to the Matrimonial Property Act No. 88 of 1984 which became operative on the 1st November 1984, out of community of property, in terms of an antenuptial contract excluding community of property, community of profit and loss as well as the accrual system. Furthermore, the applicant should show that she contributed directly or indirectly to the maintenance or increase of the Estate of the first respondent during the subsistence of the marriage, either by the rendering of services or the

saving of expenses which would otherwise have been incurred. In addition Court would have to determine the existing means of the parties.

[46] The right to claim a redistribution of assets between the parties is determined by the Court granting a decree of divorce. The right to claim only vests on the granting of a decree of divorce, prior to that, the applicant in terms of section 7 (3) of the Divorce Act only has a contingent right as opposed to a vested right. *Watermeyer JA* in the case of *Jewish Colonial Trust Ltd v. Estate Nathan* 1940 AD 163 at 175-6 said the following:

> "**Unfortunately the word 'vest'; bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right, that he has all rights of ownership in such right including the right of enjoyment. If the word 'vested' were used always in that sense, then to say that a man owned a vested right would mean no more than that a man owned a right. But the word is also used in another sense to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right when the word 'vested' is used in this sense Austin (Jurisprudence, vol. 2, lect 53) points out that in reality a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or a possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right."**

[47] A spouse married out of community of property and subject to the accrual system, who is in the position where there is a danger that the other spouse will squander his or her assets before the finalisation of divorce proceedings,

thereby negatively impacting on the calculation of accrual, has two possible remedies: firstly, an application for an interdict *pendete lite* or an application to have the other spouse declared a prodigal. However, where the marriage is not in community of property, the applicant spouse has no vested right in the assets of the respondent's spouse estate. Section 3 (1) of the Matrimonial Property Act 88 of 1984 (the Act) makes it clear that the right of a spouse to claim half of the nett accrual of the other spouse's Estate is acquired at the dissolution of the marriage by divorce or death. Pending the dissolution of the marriage or finalisation of a claim in terms of s 8 (1) of the Act, a spouse who alleges that his/her estate has shown no accrual or a smaller accrual than the Estate of the other spouse and who claims half of the difference of the accrual between the two estates, has a contingent and not a vested right. The contingent right will become a vested right if (a) the marriage is dissolved by divorce; (b) there is at the date of the divorce, an accrual in the Estate of the other spouse greater than the accrual in the Estate of the applicant spouse; and (c) the applicant spouse's right to participate in the accrual is not declared forfeit in whole or in part. The Court will grant an interdict to protect a contingent right arising by statute or at common law and may impose limitations on the exercise of the right. The contingent right of the applicant spouse to share in the accrual of the Estate of the other spouse, being conferred by statute, would be protected by interdict *pendete lite* where the *lis* is a divorce action in which the right is asserted or a claim in terms of s 8 (1) of the Matrimonial Property Act. However, where the relief sought *pendete lite* is predicated on the assumption, incorrect in law, that

the applicant spouse has a vested right in the particular assets forming part of the other spouse's Estate the relief cannot be granted.

See the case of *Reeder v. Softline Ltd and Another* 2001 (2) SA 844 (W) at 848-852.

[48] Sections 3 and 8 of the Matrimonial Property Act 88 of 1984 provide the following:

> **"3. (1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.**
>
> **(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the Dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.**
>
> **....**
>
> **8. (1) A Court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the Court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage 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 accrual concerned in accordance with the provisions of this Chapter or on such other basis as the Court may deem just."

[49] *Watermayer JA* in the case of *Durban City Council v. Association of Building Societies* 1942 AD 27 at 33 further drew a distinction between a contingent and a vested right, and, he states the following:

"In the large and vague sense any right to which anybody may become entitled is contingent so far as that person is concerned, because events may occur which create their right and which may vest it in that person; but the word 'contingent' is also used in a narrow sense, 'contingent' as opposed to 'vested', and then it is used to describe someone's title to the right. For example, if the word 'contingent' be used in the narrow sense, it cannot be said that I have a contingent interest in my neighbour's house merely because my neighbour may give or bequeath it to me; but my relationship to my neighbour, or the terms of a will or contract, may create a title in me, imperfect at the time but capable of becoming perfect on the happening of some event, whereby the ownership of the house may pass from him to me. In those circumstances I have a contingent right in the house."

[50] It is apparent from the evidence before this Court that the applicant does not have a vested right but merely a contingent right in respect of the assets of the first respondent respect in terms of section 7 (3) of the Divorce Act. The first respondent's contingent right will materialise in two respects: firstly, on dissolution of the marriage; secondly, if at the date of divorce, the Court finds it

just and equitable that it should order a redistribution of the assets between the parties.

[51] There is non-joinder of Computer Solutions (Swaziland) (Pty) Ltd in respect of the bank accounts which the applicant seeks to freeze in prayer 3.11 of her Notice of Motion. It is trite law that a company is a juristic person apart from its shareholders and may sue or be sued in its own capacity. It is not in dispute that the company has a direct and substantial interest in the subject-matter of the litigation, and any order issued by the Court in this regard will adversely affect it; and, for the applicant to refer to the non-joinder as a mere technicality is misconceived. Similarly, the contention by the applicant that the parties are the only shareholders of the company with a 50% equal shareholding does not detract from the trite principle of law that a company has a separate legal personality from its shareholders with its own capacity to litigate.

[52] There is no evidence before this Court that the applicant was at any stage provocative in the extreme to the first respondent as alleged. Similarly, there is no evidence that the applicant abused alcohol when the parties stayed together or that she assaulted the first respondent as alleged. On the contrary, and based on the evidence before me, I am satisfied that the first respondent did assault the applicant whether or not he had consumed alcohol; and, such an assault was not justified in law. It is apparent from the evidence that the applicant fears the first respondent, and, that she invited her niece to stay with

her in the Common home because of the consistent physical and emotional abuse to which she was subjected by the first respondent. It is further apparent from the evidence that the applicant did not leave the Common home on her own volition, but that she was forced to leave by the first respondent's violent and abusive conduct. In addition, it is not in dispute that the first respondent subsequently changed the locks to the premises, and, thereby denying her access to the premises.

[53] It is common cause that the applicant, pursuant to the interim order, did remove from the Common home her personal furniture and household effects as reflected in annexure 'HEBS4'. Prior to the removal, she alerted the first respondent who did not object to the removal. He complains that annexure 'HEBS4' is not a complete list of what she removed from the house; however, he doesn't mention the items which have been omitted from the list. Similarly, he doesn't dispute that the items on the list constitutes personal furniture and household effects owned by the applicant. His concern is that she removed more items from the premises than what she needed for personal use at her apartment.

[54] Items which did not belong to her include title deeds of 'former clients'. He concedes that properties situated at Surrey Glen in Ezulwini are registered in her name. However, he contends that he personally bought the properties and that she holds the properties in her name as his nominee. It is worth

mentioning that the applicant says she took the documents for safekeeping including the Deed of Transfer Nok'thula Trust, Notarial Deed of Trust ifo Nok'thula Family Trust, Blue Book for a Ford, registered in the name of Computer Solutions (Swaziland) (Pty) Ltd. However, she claims that she is entitled to keep the Blue Books for the Toyota Camry and BWM on the basis that she is the owner of the motor vehicles.

[55] It is not in dispute that both parties are beneficiaries in Nok'thula Family Trust, and that the Trustees are Attorneys Judy Curries and Musa Nsibandze. It is also not in dispute that the Common home is owned by the said Trust and that both parties are now lawfully residing at the Common home. Both parties are entitled to reside in the Common home. Furthermore, no relief is sought against the Trust; hence, the issue of non-joinder of the Trust cannot succeed. However, at paragraph 11 of the Founding Affidavit, the applicant states that she does not seek to re-establish cohabitation with the first respondent because of fear of physical harm from the first respondent.

[56] There is a material dispute on the ownership of the laptop computer. The applicant contends that it belongs to her and the first respondent contends that it belongs to Computer Solutions (Swaziland) (Pty) Ltd; hence, in the absence of the joinder of the company, the computer cannot be released to the applicant.

[57] Accordingly I make the following order:

(a) The application succeeds in part as follows:

(i) The first respondent is interdicted and restrained from threatening or assaulting the applicant.

(ii) The applicant is allowed to keep the items which she removed from the Common home as personal furniture and household utensils.

(iii) The first respondent is interdicted and restrained from denying the applicant unrestricted reasonable access to the Matrimonial home or from directly or indirectly obstructing such access.

(iv) The applicant is directed to compile an inventory of all items removed by the applicant from the premises and deliver it to the first respondent's attorney within five days hereof.

(v) No order as to costs.

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M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant	Advocate Margriet Van der Walt Instructed by Attorney L. Mamba
For Respondent	Advocate D. Smith Instructed by Attorney M. Nsibandze