

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

FHP 0018 of 2017

FH 01629 of 2013

Between

SHARMEEL MOHAMMED

Appellant

And

KIM JOAN MOHAMMED

Respondent

Panel: A. Mendonça J.A.

P. Moosai J.A.

P. Rajkumar J.A.

Appearances: Mr. R. Dowlath appeared on behalf of the Appellant

Ms. F. Toby appeared on behalf of the Respondent

REASONS

Delivered by A. Mendonça J.A.

1. On March 12, 2020 we allowed this appeal and set aside the order of the court below. We now reduce to writing our reasons for so doing.
2. This appeal is brought by the Appellant (the husband) from the Judge's order made on June 13, 2017 on the Respondent's (the wife) application for financial provision under section 24 of the Matrimonial Proceedings and Property Act (the Act).
3. The parties were married on June 29, 1986. Their relationship deteriorated and the wife eventually filed for divorce on July 23, 2013 relying on the fact of unreasonable behaviour on the part of the husband. The decree nisi was granted on November 6, 2013 and made absolute on January 14, 2014.
4. There are two children born to the parties both of whom are now over the age of eighteen. They are Saleem Mohammed born on March 24, 1987 and Kareena Mohammed born on February 17, 1995. I shall hereafter refer to them together as "the children".
5. The wife's application for financial provision was made on March 19, 2015. By that application the wife sought the following relief in respect of the following matrimonial assets: (a) a declaration that she is entitled to a half share or interest in the matrimonial home at Factory Road Extension, Piarco; (b) a declaration that she has a half share or interest in lands at Arouca; (c) a declaration that she has a half share or interest in identified motor vehicles; (d) a declaration that she is entitled to a half share of all monies held at CLICO; and (e) a declaration that she is entitled to a half share of all monies held at RBC Royal Bank, St. Augustine.

6. The Judge in her judgment on the application for financial provision made the following findings in relation to the matrimonial assets referred to above:

(a) "The matrimonial home situate at #120 Factory Road Extension, Piarco. Purchased in 1998 for the sum of \$65,000, the parties moved in in 2002, and, at the time of the [wife's] submissions filed on the 19th December, 2016, remained incomplete. The [husband] admitted that the [wife] assisted in the construction of the home but not to the extent that she stated at paragraph 5 of her Narrative Affidavit. The said property is now vested in the name of [the children] transferred by the [husband] on the 23rd April, 2013 approximately 3 years and 9 months ago..."

(b) The land in Arouca. The land is "vested in the name of [the children] purchased on the 26th April, 2013...Purchased when the parties had separated."

(c) Motor Vehicles

i. "PBZ 3701 – a Hyundai Matrix vested in the name of Saleem Mohammed transferred by the Respondent on 29th April, 2013;

ii. PBF 7151 – a Nissan Sentra vested in the name of Saleem Mohammed transferred by the Respondent on the 29th April, 2013;

iii. TCU 9826 – A Nissan Navarra vested in the name of Saleem Mohammed transferred by the Respondent on the 29th April, 2013."

(d) Monies held at CLICO. The sum of \$1,000,000.00 was deposited with CLICO. This money was obtained from the sale of a property that was acquired during the course of the marriage. When CLICO went into financial difficulty the Respondent received the sum of \$75,000.00 in cash and \$925,000.00 in bonds. As soon as he was able to, the husband liquidated the bonds, paid off some debts including a loan on one of the

vehicles which was transferred to the child, Saleem Mohammed, and transferred monies amounting to over \$500,000.00 to the children. The transfers to the children occurred on April 29 and April 30, 2013.

(e) Monies held at RBC Royal Bank. These monies were held in an account in the joint names of the husband and wife. The Respondent made several large withdrawals from the account over time amounting to approximately \$430,000.00. The account was then closed on December 30, 2013.

7. It is therefore clear from the above that by the time the application for financial provision was filed the husband had disposed of the matrimonial assets that were vested in his name to the children or one of them.
8. The Judge identified the issues for her determination and included among them were (a) whether the husband intended to frustrate or impede the wife's claim for financial provision by disposing of the matrimonial assets; and (b) whether the court should set aside the dispositions made by the husband.
9. In that regard, the Judge referred to section 44 of the Act which is as follows:

“44. (1) Where proceedings for relief under any of the relevant provisions of this Act (hereafter in this section referred to as “financial provision”) are brought by a person (hereafter in this section referred to as “the applicant”) against any other person (hereafter in this section referred to as “the other party”), the Court may, on an application by the applicant—

(a) if it is satisfied that the other party is, with the intention of defeating the claim for financial provision about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;

(b) if it is satisfied that the other party has, with the intention mentioned in paragraph (a), made a disposition to which this paragraph applies and that if

the disposition were set aside financial provision or different financial provision would be granted to the applicant, make an order setting aside the disposition and give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payment or the disposal of any property);

(c) if it is satisfied, in a case where an order under the relevant provisions of this Act has been obtained by the applicant against the other party, that the other party has, with the intention mentioned in paragraph (a), made a disposition to which this paragraph applies, make such an order and give such directions as are mentioned in paragraph (b),

and an application for the purposes of paragraph (b) shall be made in the proceedings for the financial provision in question.

(2) Subsection (1)(b) and (c) apply respectively to any disposition made by the other party (whether before or after the commencement of the proceedings for financial provision), not being a disposition made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any such intention as is mentioned in subsection (1)(a) on the part of the other party.

(3) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or to a disposition or other dealing with property which is about to take place and the Court is satisfied—

(a) in a case falling within subsection (1)(a) or (b), that the disposition or other dealing would (apart from this section) have the consequence; or

(b) in a case falling within subsection (1)(c) that the disposition has had the consequence,

of defeating the applicant's claim for financial provision, it shall be presumed, unless the contrary is shown, that the other party disposed of the property with the intention mentioned in subsection (1)(a) or, as the case may be, with that intention, about to dispose of or deal with the property.

(4) In this section—

“disposition” does not include any provision contained in a Will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise;

“property” has the meaning assigned to it in section 41(7);

“the relevant provisions of this Act” means any of the provisions of sections 23, 24, 25, 26, 27, 31 [except subsection (6) thereof] and 39,

and any reference to defeating an applicant’s claim for financial provision is a reference to preventing financial provision from being granted to the applicant, or to the applicant for the benefit of a child of the family, or reducing the amount of any financial provision which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at the instance of the applicant under the relevant provisions of this Act.

(5) The provisions of this section shall not apply to a disposition made more than three years before the commencement of this Act.”

10. Of particular materiality to this appeal is section 44(1)(b). That section gives the court the power to set aside a disposition made by a party to the application for financial provision if the court is satisfied that the disposition made by that party is made with the intention of defeating the claim of the applicant for financial provision and that if the disposition is set aside financial provision or different financial provision would be granted to the applicant.
11. As can be seen from sub-section (4) of section 44 the meaning of “disposition” in the section is very wide. Save that it does not include any provision in a will or codicil, it includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise. The dispositions made by the husband would therefore be dispositions within the meaning of the section.

12. The Judge considered the evidence before her, which consisted of the affidavit evidence of the husband and wife upon which they were cross-examined. The Judge found that the dispositions of the matrimonial assets which were made by the husband were made with the intention of defeating the wife's claim for financial provision and that if set aside, a different financial provision would be granted. The Judge stated that she agreed with the submissions of counsel for the wife that the husband's "intention was to dispose of the matrimonial assets and to impede the [wife's] claim...by reducing the amount of any financial provision which may be made in her favour or defeating any order which the honourable court may make in this case." The Judge further stated that:

"25. The Court accepts the wife's submission that the husband's actions have resulted in the matrimonial assets being completely depleted to the point where he is now asking the Court to make a lump sum payment of a mere \$30,000., to be paid off in two and a half years. The [husband] has proven himself to be a man of great business acumen and knew exactly what he was doing when he transferred the various properties to the children. The Court will not sit idly by and allow the [husband] to make a mockery of the system by disposing of all the assets and then claim impecuniosity."

The Judge therefore concluded that she would exercise her powers to set aside certain of the dispositions. It is apparent from the order she made (which we will refer to below) that those dispositions were at least in relation to the matrimonial home and the CLICO monies.

13. The Judge then considered the factors outlined in section 27 of the Act. In brief summary the Judge found that the marriage was a long marriage, that throughout the marriage the parties enjoyed a very comfortable standard of living as a result of their joint efforts, that the husband was the main breadwinner during the marriage deriving his income from managing his garage shop and that the wife contributed to the house and welfare of the

family. In relation to the income and expenses of the parties the Judge stated that the wife alleged her income to be \$600.00 per month whereas the husband alleged the wife's income to be \$2,000.00 per week. The Judge, however, observed that neither party provided any evidence to support their mutual claims. In relation to the income of the husband, the Judge stated:

"35. The husband in his Form 9, disclosed that he is a Mechanic employed with Jodhan's Motor Supplies and Services Ltd., earning a gross monthly income of \$5,000. A job letter from his employer was attached. The [Respondent] wife contended that the [husband] earns additional income from his private garage, which is still in operation. The [husband] denied this contention, yet failed to provide any documentary evidence to substantiate his claim that visits from EMA Official and subsequent warnings, in addition to his father's concern caused him to cease his business operation."

The Judge then considered the evidence relating to the conduct of the parties and their financial needs, obligations and responsibilities which we need not refer to specifically.

14. The Judge then made the following order on the application for financial provision:

"i. The [Respondent] wife has acquired FIFTY PERCENT 50% of the value in the former matrimonial property situate at #120 Factory Road Extension, Piarco in full satisfaction of her share, title and interest in the said property. The Deed of Gift registered as DE 2013 010064 57D001 is hereby revoked. The [Appellant] husband is to effect a valid deed of conveyance in the [Respondent] wife's favour within one month of the revocation of DE201301006457D001, failing which, the Registrar of the Supreme Court shall execute the said Deed of Conveyance in the [Respondent's] favour. All associated costs to be borne by the [Appellant].

- ii. The former matrimonial home shall be valued, the cost of which is to be borne equally by the parties. Within three (3) months from the date of receipt of the valuation report on the matrimonial property, both parties shall have the option to buy out the other's half share. If not, the said property shall be sold and the proceeds of sale divided equally.
- iii. That a lump sum of \$30,000 be made payable to the [Respondent] wife, representing the value of the motor vehicle removed from her absolute use and control, within one (1) month of the date of this Order.
- iv. The [Respondent wife] is entitled to half share of the monies invested in CLICO being \$500,000. Said sum to be made payable within six (6) months of the date of this Order.
- v. The [Appellant] husband to bear the costs of these proceedings, to be taxed in default of agreement."

15. The Appellant appealed and sought an order of this court setting aside the order of the Judge. Counsel for the Appellant submitted that the court was wrong to set aside the dispositions for the simple reason that the wife never made an application under section 44 for the court to do so, which is required by the section. In those circumstances, the assets which were transferred to the children could not have been considered for distribution. The only asset which could properly have been considered in the making of an order for financial provision is the husband's salary of \$5,000.00 per month. Accordingly, counsel submitted that the Judge was restricted to the award of a lump sum payment based on that salary. In the circumstances, it was submitted that the order of the Judge ought to be set aside in its entirety and replaced with an order for the payment of a lump sum payment of not more than \$30,000.00 payable by instalments.

16. Counsel for the wife accepted that a formal application was not made under section 44 of the Act. She, however, submitted that the failure by the wife to have made such an application was not fatal since the court could treat an application as having been made. She argued that evidence was led of the Appellant's intention to defeat the wife's claim and the Appellant was cross-examined about the dispositions. A formal application would not have elicited different evidence from the Appellant and he was therefore not prejudiced by the failure to make a formal application under section 44 of the Act.
17. It is clear from section 44 that the party seeking an order for the avoidance of disposition made by the other party is required to make an application. As section 44(1) provides the court may "on an application by the applicant" make an order setting aside the disposition and further provides in relation to section 44(1)(b) that the application shall be made in the proceedings for the financial provision in question.
18. Section 44 however does not expressly provide for the application to be in writing. In this case it is fair to say that although a written application was not made that an application was made by the wife's submissions seeking an order that the dispositions be set aside.
19. Rule 8.4 of the Family Proceedings Rules however requires as a general rule that an application shall be in writing. But the court has the discretion to permit an application to be made orally. However, rule 12.6(3)(b) of the Family Proceedings Rules requires that an application and any evidence in support of it seeking the avoidance of a disposition order should be served by the applicant on the person in whose favour the disposition is alleged to have been made.

20. It seems to us that section 44 read together with the Family Proceedings Rules mandates that an application for the avoidance of a disposition under section 44 should be made in writing and be served on the necessary parties. On the evidence before the Judge these parties were in this case the husband and the children. What then follows from the failure of the wife to make an application in writing and to serve it on the parties?
21. If this were a matter solely between the husband and the wife we would be hard-pressed to say that the inevitable conclusion should be that the order of the Judge should be set aside as we do not see that the husband could properly complain of any unfairness or prejudice occasioned by the wife's failure to serve an application.
22. The husband never sought or never attempted to hide the fact that the assets were given to the children. His position was that he "always" told his wife that everything he had worked for was for the children. He stated that by 2012 when he was approaching fifty and was having difficulty finding persons to work in his garage and he could not work extra-long hours any longer, he told the wife that he should begin to slow down. He further said that he told the wife that the children were now "big" and that they should be given what they had for them and that the wife agreed. The husband was cross-examined and he maintained his position that the dispositions were all done with the agreement and consent of the wife. In short, the husband's position was that the gift of the assets to the children was something that he had discussed with the wife and with which she had agreed. The dispositions had therefore been done with their joint intention of benefitting the children and not with the intention of defeating the wife's claim for financial provision.

23. The wife was also cross-examined. The husband's case was put to her. While she admitted that she had discussions with the husband about giving property to the children, she however denied that she was consulted when the dispositions were made. She stated that when the husband made the decision to transfer the assets to the children he did not confide in her about that. She further testified that she only became aware of this dispositions after reading the husband's affidavit in these proceedings.
24. The Judge accepted the wife's evidence and as I have mentioned above found that the disposition of the assets by the husband was done with the intention of defeating the wife's claim. The Judge used strong language to describe the actions of the husband describing them as "dishonest, deceitful and calculated all in an attempt to defeat the [wife's] claim for financial relief".
25. It is clear from the wife's application for financial relief that she was seeking a share or interest in the very assets that were transferred to the children. She maintained this claim even after she learnt of the dispositions to the children. In the circumstances it should have come as no surprise when the wife's submissions included a submission that the transfer of the assets to the children should be set aside.
26. The husband had sought to explain his position as to the disposition of the assets and that evidence was before the court. He did not say that had he been served with an application under section 44 he would have led any other evidence. It is in those circumstances that we say that we do not see that the husband can complain of a lack of fairness or prejudice occasioned by the failure to make a written application under section 44. The findings made by the Judge and the order she made were certainly open to her on the evidence presented.
27. However, this is not a matter solely between the husband and wife as the children are necessary parties. While we cannot say the husband suffered any

unfairness or prejudice, we cannot say the same thing in relation to the children. They took no part in these proceedings, they were not parties to the proceedings and of course were not served with an application under section 44. There was no evidence that they were even aware of the proceedings. In so far as the wife seeks to avoid dispositions made to them, they should have been served with an application under section 44. The failure to do so is a material error. The children of course were entitled to be heard on such an application. What would have been their position and what they would have said in relation to the application is a matter of conjecture. We, of course, cannot say that anything they would have said would not have influenced the judge to make a different finding or come to a different conclusion. As a consequence of the failure to file and serve an application under section 44 on the children, the decision of the Judge cannot stand and the order should be set aside.

28. We may mention that counsel for the wife referred the court to certain cases. Meaning no disrespect to counsel, all we will say is that those cases do not assist the wife's case and we do not see the need to refer to them in any detail and will not do so.
29. We do not believe that the justice of the case would be met by an order of a lump sum payment of \$30,000.00 as proposed by counsel for the husband. It is not in dispute that we have the power to order a new hearing and in our judgment that would be the most appropriate order to make in the circumstances of this case. Accordingly we order as follows:
 - i. The Order of the Judge dated June 13, 2017 is set aside;
 - ii. Leave is granted to the wife to file an application under section 44 of the Act and affidavit(s) in support thereof and to serve same upon all necessary parties within 21 days of the date hereof;

- iii. Upon the filing of the application as provided for in (ii) above the matter is remitted to the High Court (Family Division) for a re-hearing before a different Judge; and
- iv. There shall be no order as to costs both here and below.

Dated this 16th day of March, 2020.

A. Mendonça J.A.

P. Moosai J.A.

P. Rajkumar J.A.