FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 86

PARTIES**:** **TOUFEEQAH ISMAIL** **Applicant**

AND

YUSUF ISMAIL **1st Respondent**
NASIFA ISMAIL **2nd Respondent**
ERA SUN PROPERTIES **3rd Respondent**

- Registrar: CASE NO**: 2002/06**
- Magistrate:
- High Court: **EASTERN CAPE DIVISION**

DATE HEARD: **25/01/07**

DATE DELIVERED: **08/02/07**

JUDGE(S): **Jones J**

LEGAL REPRESENTATIVES –

Appearances:
- for the Applicant(s): **Mr. T. Jakavula**
- for the Defendant(s): **Mr. Mohammed**

Instructing attorneys:
- Plaintiff(s): **LEGAL AID BOARD**
- Defendant(s): **N.N. DULLABH & CO.**

CASE INFORMATION -
- *Nature of proceedings* : **INTERDICT**

Not reportable

In the High Court of South Africa
(Eastern Cape Division) Case No 2002/06
Delivered:

In the matter between

TOUFEEQAH ISMAIL **Applicant**

and

YUSUF ISMAIL **1st Respondent**

NAFISA ISMAIL **2nd Respondent**

ERA SUN PROPERTIES **3rd Respondent**

SUMMARY: Interdict – right of a second wife in an Islamic marriage to interdict her husband and his first wife from selling her home in respect of which she has an unregistered 99 year lease – interdict granted.

JUDGMENT

JONES J:

[1] This is the return day of a rule *nisi* calling upon the respondents to show cause why they should not be interdicted from selling certain residential property at 42 Queens Road, King William's Town. The 1st and 2nd respondents, who are husband and wife and who are the registered owners of the property, oppose confirmation of the rule. The 3rd respondent is cited as an interested party because it was instructed to sell the property on behalf of

the 1st and 2nd respondents. It has not participated in the proceedings, and the relief sought against it is supplementary to the relief against 1st and 2nd respondents.

[2] The applicant is in occupation of the property. She resides there with her two children and uses it to run the business of a crèche. The applicant is the 1st respondent's second wife. In 1992 they were married in accordance with Islamic rites, a union which is evidenced by a certificate from the Muslim Judicial Council. The applicant has two children who were born prior to her marriage with the 1st respondent. The children have lived with the applicant throughout the duration of the marriage. After their marriage the 1st respondent provided the applicant with a flat in King William's Town which was her home. He and the 2nd respondent, who are married by civil rites, subsequently purchased the Queens Road property. The applicant's case is that they did so in order to provide her with a permanent home in replacement of the flat. With this object in view the 1st respondent and the applicant entered into a 99 year lease of the house in Queens Road. It was their intention to register the lease. But this was never done. Some time after moving to King William's Town the applicant and the 1st respondent became estranged. She continued to reside in the Queens Road property but she

alleges that the 1st respondent did not maintain her adequately. To make ends meet she opened a crèche at her home, which produced a monthly income of R4000-00. She requires that income for the subsistence of herself and her two children. In about June 2004 she found out that the respondents had put the Queens Road property on the market. She then received a letter from 1st respondent's attorneys confirming that the property was for sale, and shortly thereafter an estate agent brought prospective purchasers to view it. She feared that the property might be sold without reference to her, and that she would have nowhere to live. She sought advice from the local legal aid centre, and in due course brought an urgent application for an interim interdict prohibiting the sale of the property. The notice of motion was served on the respondents on 7 July 2006. On 17 July 2006 she received a document (RTI 1) giving her '*talaak'* from the marriage. As I understand it, this was notice of the 1st respondent's unilateral termination of the Islamic union between him and the applicant.

[3] Mr *Mohamed* for the respondents no longer persists with an objection *in limine* that the applicant failed to make out a proper case of urgency. But he argues that the application is nevertheless premature, and, further, that the applicant has failed to prove a clear right or a threatened violation of a right for which the only reasonable remedy is the protection of an interdict.

[4] It is indeed so that some of the arguments raised on behalf of the applicant are premature and that a proper basis for them is not established on the papers. There are also disputes of fact. My conclusion is, however, that on the facts which are common cause or which cannot realistically be disputed, that applicant has indeed made out a case for an interdict.

[5] Mr *Jakavula* argued on behalf of the applicant that her right to an interdict is based on various alternative causes of action: – the agreement of lease; the provisions of section 26 of the Constitution of the Republic of South Africa, 1996 which affirm a right to adequate housing; the provisions of the Prevention of Illegal Eviction Act No 19 of 1998 which lays down procedures for the proper eviction of persons from their homes, and which gives a measure of protection from eviction, for example, where the household is headed by a woman. He also invoked the provisions of the Maintenance Act No 99 of 1998 which gives a wife the right to maintenance from her husband, and he relied in that regard on *Amod* v *Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA) and *Khan* v *Khan* 2005 (2) SA 272 (T).

[6] The arguments based on a constitutional right to a home, protection from eviction, and the remedy of maintenance are without substance. The applicant has not made out a case for any of that relief on the papers. There is no allegation that she is about to be evicted. Assuming for the moment, without deciding, that the applicant has a claim for maintenance, she cannot in ordinary circumstances enforce her right to maintenance by interdicting the sale of her husband's property. For that, it is necessary to prove a right in the property itself.[1] I therefore need not consider the complicated issue of the

1 In *Wormald NO and others* v *Kambule* [2005] 4 All SA 629 (SCA) the court was

maintenance rights given by our law to a second wife by Islamic rites, an issue which is further complicated by the question whether the parties are validly divorced by Islamic tradition, and if so whether the divorce process was offensive to the Constitution. There is insufficient information in the papers for me to determine these issues. But it matters not. Because her entitlement to maintenance is not relevant to the relief she seeks, I need make no pronouncement at all on the issue. It is therefore not necessary to deal with the judgment in *Kahn* v *Kahn supra*, which is the only case of which I am aware which deals with the rights of parties to an Islamic marriage which is in fact polygamous.

[7] Has the applicant proved a clear right to the property which entitles her an interdict prohibiting its sale? Her starting point is the *de facto* relationship between her and the 1st respondent. She was his second wife by Islamic rites. This relationship forms the background to the rights and interests of the applicant in the property in Queens Road, which were ultimately recorded in the long lease. The lease is now the source of her rights. In the circumstances of this case and following the reasoning of Farlam J, as he then was, in *Ryland* v *Edros* 1997 (2) SA 690 (C) 711C,[2] pronouncements on the invalidity

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concerned with different facts, remedies and defences, but the action involved the eviction of an alleged second wife by Xhosa custom from the home in which she had resided as second wife. The remarks of the learned Judge of Appeal in paragraphs 13 and 14 are instructive. She held that even if the second wife had a right to maintenance which included being given the use of residential and agricultural land, this did not in itself give her a real right in the land in question, or a right to demand to occupy any land of her choice.

2 It seems to me that although Farlam J was careful to confine his remarks to the situation where the union was *de facto* a monogamous one, his reasoning is applicable here as well.

of Islamic marriages at common law in *Seedat's Executors* v *The Master (Natal)* 1917 AD 302 and *Ismail* v *Ismail* 1983 (1) SA 1006 (A) do not preclude me from giving recognition to the applicant's rights under the lease. In recent years the highest courts in the land have recognized the fact of an Islamic marriage for various purposes, although it was not entered into in terms of the Marriage Act 25 of 1961 and may not have had the blessing of the common law. Examples are *Daniels* v *Campbell NO and others* 2004 (5) SA 331 (CC), and *Amod*'s case *supra*.[3] On the facts before me the 1st respondent and the applicant were married in accordance with Islamic rites and Muslim tradition on 16 August 1992, from which date the applicant became 1st respondent's second wife. She was part of his household, albeit a separate household from that of his first wife, and he therefore established a separate home for the applicant at 42 Queens Road in accordance with Muslim tradition. On 12 June 2003 the parties entered into the lease agreement in respect of the house at 42 Queens Road. The lease was for a fixed period of 99 years from 1 July 2003, with a monthly rental of R25.00 escalating at 10% per annum. The terms of the lease and the background to its conclusion lead irresistibly to the inference that the intention of the parties was to give the applicant the right to

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3 These cases dealt with the rights of a wife in a *monogamous* Muslim marriage against the backdrop of the interpretation or application of a statute providing for relief to a spouse. In *Daniels* the court held that the word spouse in the Act included a spouse in a *de facto* monogamous Muslim marriage even though it was not recognized as valid at common law. The real issue In *Daniels* and *Amod* was not the validity of the Muslim marriage, but simply whether the relationship between the *de facto* husband and wife entitled the wife to relief in terms of the statute on a proper, constitutionally acceptable interpretation and application of the law. The real issue here is simply the enforcement of rights under a lease. It has not been argued, and in my view it cannot be argued, that the applicant's position as the second wife in a Muslim marriage is a bar to the enforcement of her rights under the lease.

live in that particular house for the rest of her life. The 1st respondent sought to suggest otherwise in his opposing affidavit and said that he purchased the Queens Road property for investment purposes. But there is no genuine dispute of fact in this regard. No matter the reason why he says he purchased the property, the terms of the lease and the rights it confers on the applicant are beyond question.

[8] The respondents have not denied that the 1st respondent has put the house at 42 Queens Road on the market, that the 1st respondent's attorneys and his estate agents have confirmed this, that prospective buyers have been brought to see the house, and that a number of people have shown an interest in buying it. The applicant alleged that she believed that a sale was imminent and that she may not be able to resist the claims of a buyer who purchases without knowledge of the lease. That is indeed so. The lease is binding on the parties to it. But under section 1(2) of the Formalities in respect of Leases of Land Act No 18 of 1969, a long lease is not valid against a creditor or a successor under onerous title of the lessor for more than 10 years unless the lease is registered or the creditor or successor in title knew of the lease. The onus of proving knowledge would appear to be on the lessee (*Grant* v *Stonestreet and others* 1968 (4) SA 1 (A) 16H – 17A). Nowhere in the papers have the respondents undertaken that any sale of the property will be subject to the long lease.

[9] In my view these facts establish (a) the applicant's right to lifelong occupation of the property at 42 Queens Road, and (b) a threatened invasion of that right by the respondents because they can sell the property in circumstances in which she could be given lawful notice by the purchaser to vacate in 10 years. An interdict in the terms she seeks is the only reasonable way in which she can protect her right. While it may well still be possible to compel registration of the long lease as an alternative remedy, this would not avail against a *bona fide* purchaser until after the date of registration. She is entitled to an order for final relief.

[10] This brings me to the terms of the rule. In my view the applicant is entitled to absolute relief – an order preventing the respondents absolutely from selling the house at 42 Queens Road during the subsistence of the lease. The applicant did not seek absolute relief. Her notice of motion sought an order interdicting the 1st and 2nd respondents 'from selling or giving instructions to sell the house at 42 Queens Road, King William's Town until they have identified and made available an alternative place of abode and have provided proper means of support and/or maintenance for the applicant'. The rule *nisi* was granted in those terms. The applicant has not made out a case for maintenance in these papers, and I should not confirm that part of the rule *nisi* which purports to relate the interdict to her rights to maintenance in the future. Those rights should be determined in other proceedings, when the question of maintenance can properly be considered. But I can and must

confirm an order interdicting the sale 'until [the respondents] have made available an alternative place of abode' for the applicant because that is what the applicant asked for even though she was entitled to more. Before I do so, I should make it clear what such an order means to avoid any confusion about what is intended by 'an alternative place of abode'. My order means that the respondents may not sell the property until they have provided the applicant with the same rights which she presently enjoys in terms of the lease in respect of an alternative adequate home (which need not be as large or as costly but in which a creche can be run) and which is in a similar area to 42 Queens Road.

[11] During the course of argument counsel for the respondents tendered alternative accommodation to the applicant. The applicant refused the tender despite the terms of the order sought. A tender of this nature may have impacted on the order for costs if it had been made timeously and refused. As it is, all the costs of an opposed application had been incurred before the tender was made. I can see no reason, therefore, why costs should not follow the event.

[12] Paragraph 1 of the rule *nisi* is confirmed and there will be a final order incorporating the terms of paragraphs 3.1, 3.2 and 3.3 of the notice of motion, save that the words 'and have provided proper means of support and maintenance' will be deleted from paragraphs 3.1 and the words 'and also proper and sufficient means of support and/or maintenance' shall be deleted from paragraph 3.2.

RJW JONES

Judge of the High Court
5 February 2007