

SOUTH AFRICA / JUDGMENT

H v H (4897/2007) [2017] ZAGPPHC 1200 (30 October 2017) [2017] ZAGPPHC 1200

COURT

North Gauteng High Court, Pretoria

BEFORE

Mali

CASE / FILE NUMBER

4897/2007

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 4897/2007

30/10/2017

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED

In the matter between

W M H

APPLICANT

and

S C H

RESPONDENT

JUDGMENT

MALI J:

- [1] The applicant seeks an order setting aside two Warrant of Execution("writs") issued by the Registrar of this honourable court. Both writs were issued on 25 August 2015, for separate amounts. The first writ was issued for the amount of R 460 000.00 ("Writ 1") and the second writ was issued for the amount of R 385 059. 43 ("Writ 2").
- [2] The parties were married to each other and the said marriage was dissolved by the court order on 21 January 2008. Both writs were issued in favour of the respondent on the basis of the settlement agreement that was made an order of court in the divorce proceedings.
- [3] On the date of hearing, the court first heard the application for condonation of the late filing of the applicant's replying affidavit. The application for condonation was dismissed. The reasons were given

on ex tempore judgment.

- [4] It is common cause that in 2007 the parties entered into a settlement agreement, subsequently in 2008 they entered into another agreement. In 2013 the parties entered into another agreement which was made an order of court on the instance of the applicant in 2014.
- [5] The issue for determination is whether the respondent was entitled to have the writs issued in her favour. This is on the background of the interpretation of the above mentioned three agreements.
- [6] Rule 45 A provides as follows:

"The court may suspend the execution of any order for such period as it may deem fit."

- [7] "As a general rule the court will grant a stay of execution where real and substantial injustice requires such a stay or, put otherwise, where injustice will otherwise be done. Thus the court will grant a stay of execution where the underlying cause of the judgment debt is disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. It has been held, that, in particular circumstances, the court could, in the determination of the factors to be taken into account in the exercise of its discretion under this rule, borrow from the requirements for the granting of an interim interdict, namely that the applicant must show (a) that the right which is the subject of the main action and which he or she seeks to protect by reason of the interim relief is only prima facie established though open to some doubt; (b) that if the right is only prima facie established, there is a well - grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he or she ultimately succeeds in the establishing of his or her right; (c) that the balance of convenience favours the granting of interim relief; (d) that the applicant has no other satisfactory remedy." See Erasmus Superior Court Practice at B1-330- B1-330A. (own emphasis)
- [8] The test has been succinctly laid down in *Dumah v Klerksdorp Town Council*[1] as follows:

"The court must consider what would be just and equitable as between the parties and, if it considers that, regard being had to the factors, the execution must be stayed, then it is proper to exercise its discretion in favour of the stay".

[9] In Cooper v Feinstein[2] Ndita AJ as she then was stated as follows:

"It appears from what the learned authors discuss that the circumstances in which the courts will grant or refuse the application for suspension of writ of execution vary from case to case depending on the circumstances of each case. There is therefore no hard and fast rule."

WRIT 1

[10] Writ 1 turns on the non-payment of a monthly amount of R 5000.00 by the applicant to the respondent. The payment is for the period from 1 December 2007 until 1 August 2015. It totals to R 460 000.00. The purpose of this payment was for the respondent's alternative accommodation since she left the common home after divorce.

[11] The basis for the relief sought is that the respondent obtained writ 1 in bad faith. She had failed to disclose to the Registrar that clause 8 of the Settlement by agreement had been amended in its entirety and in terms of a later order of this honourable court. The relevant sub- clauses of clause 8 read as follows:

"8.5 Erf 310, IFAFI/Powderweg 46, IFAFI, Hartbeespoort

8.5.1 Die Verweerder is die geregistreerde eienaar van die gemelde onroerende eiendom.

8.5.2 Die Verweerder sal die geme/de onroerende eiendom met 'n bestaande verband verhoog alternatiewelik uit 'n bestaande verband onttrek

sodat die Verweerder 'n voorskot van R5000 000,00 sal inbetaal in die tjekrekening van Frankie & Johnny BK vir doeleindes van die bydrae en betaling tot stads- en streeksbeplanners rekeninge vir dienste gelewer. Die Verweerder sal verplig wees om gemelde bedrag te betaal en oor te plaas uit sy gemelde verbandrekening na die rekening van Frankie & Johnny BK so speeding doenig.

8.5.3 Behalwe vir soos hierin vervat word sal die Verweerder nie geregtig wees om die gemelde onroerende eiendom te verpand, beswaar of vervreem of verder besaar sander die voorafverkree skriftelike toestemming van die Eiseres, welke nie onredelik weerhou sal word nie. Die partye kom hiermee ooreen dat die gemelde onroerende eiendom bemark sa/ word en verkoop sal word teen 'n merkverwante prys skriftelik tussen die partye op ooreengekom en by versuim deur die partye om 'n ooreenkoms te bereik hieroor, sa/ die gemelde onroerende eiendom verkoop word teen 'n marlverwante prys en soos bepaal mag word deur die President van die Prokureursorde van die Noordelike Provinsies of sy genomineerde van tyd tot tyd.

8.5.4 Die netto opbregts verkry uit die verkoping van die gemelde onroerende eiendom sal gelykop tussen die Eiseres en die Verweerder verdeel

word. Die Verweerder sal a/le dokumentasie onderteken wat redelikerwys ondreteken moet word ten einde uitvoer hieraan gee.

8.5.5 Indien die Verweerder sou versuim om enige document wat benodig word om onderteken te word te onderteken word die Balju Pretoria Sentraal gemagtig om namens die Verweerder op sy koste sodanig dokumentasie te onderteken.

8.5.6 Die Verweerder sat aan die eieseres 'n bedrag van R5,000.00 per maand betaal vanaf 1 Desember 2007 sodat sy altematiewelike verblyf vir haar en die seun Quantin kan bekom. Die Verweerder sal aanspreeklik wees vir sy bedrae totdat die huidige woonhuis verkoop is teen 'n markverwante prys.

[12] In terms of the Court Order dated 11 May 2015, whereby a settlement agreement dated 10 June 2013 was made an order of Court, the parties agreed as follows:

"Whereas the Plaintiff and Defendant were divorced by virtue of a Final Order of Divorce on or about 16 January 2008, under case number 4897/07 issued by the High Court of South Africa, Transvaal

Provincial Division.

And whereas the plaintiff and Defendant signed settlement agreement at Pretoria dated 16 November 2007 (Annexure 'A' hereto [settlement agreement that was made an order of Court in terms of the decree of divorce order])

Now the {Plaintiff and Defendant are desirous of amending paragraph 8 of the aforesaid Settlement Agreement as indicated below:

1. The Plaintiff shall transfer her 50% membership interest in Frankie & Johnny CC...to the Defendant;
2. The Defendant shall transfer his 50% membership interest in lfa 457 Investments CC... to the Plaintiff;
3. All previous amended agreements are hereby declared null and void. Plaintiff and Defendant shall keep any assets currently in their

names and shall have no claim against each other deriving from the amended settlement agreements."

[13] The applicant's contention is that the amount of R 5000.00 payable to the respondent as stipulated in clause 8.5.6 of the 2007 agreement was for the purposes of the respondent to procure alternative accommodation. This is despite that the payment was supposed to stop when the common home ("property") was sold. The respondent had to vacate the common home after the divorce.

- [14] It is further contended that the applicant's obligation to pay R 5000.00 per month to the respondent was extinguished by the agreement of 2008 which amended clause 8.5.6 and other clauses in the 2007 of the agreement. Clause 1B of the 2008 agreement entitled the respondent to the immovable property referred to as Melodie 99. According to the applicant clause 1B had the effect of providing accommodation to the respondent.
- [15] According to the applicant the 2013 agreement resulted in the respondent abandoning any claim she might have had in terms of the divorce settlement or 2007 agreement and also 2008 agreement in particular the benefits derived from clause 1B, being Melodie 99. In 2013 the respondent's entitlement to the payment of R 5000.00 came to an end. The applicant states that in the event the Registrar of the High Court had been aware of this information the respondent would not have obtained the writ.
- [16] Respondent contends that 2013 agreement did not pertain to other matters agreed upon in 2007 other than dealing with CCs. Whether Melodie 99 was transferred to the respondent did not take away the payment of R 5000.00. This is confirmed by the applicant's subsequent actions in 2014 when he sought an order clarifying the 2013 agreement. He never raised an issue about the payment of R5000.00. The relevant property related to the entitlement of R 5000.00 has not yet been sold by the applicant. The applicant is therefore liable for payment of R5000.00 per month.
- [17] There is no replying affidavit by the applicant, therefore all the arguments raised from the bar cannot be considered. It is trite that in the case of factual dispute the version of the respondent must be accepted. The court cannot read the transfer of Melodie 99 as substitution for the payment of R 5000.00 Those words are not in the contract. Words in the contract are that R 5000.00 is payable until the common home property is sold. The question of reasonableness in the interpretation of contracts does not arise.
- [18] Both parties agree that clause 3 of the 2013 agreement is ambiguous. The applicant submits that it is because of the ambiguity that the respondent interprets clause 3 as if the parties reverted to the 2007 agreement. The applicant's submission is that he has fulfilled his obligations by providing the respondent alternative accommodation at 99 Melodie. It is not in dispute that 99 Melodie belongs to one of the Close corporations Frankie & Johnnie CC. Even though the applicant submits that the clause 3 is ambiguous but he maintains that the respondent has been provided accommodation.
- [19] The applicant's counsel referred to ("Endumeni")[3] it was held that, in interpreting a contract, the court must have regard to the language of the clause as well as the purpose for which it was agreed. At paragraph [26] the SCA stated;

"In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose

of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."

[20] The court is persuaded to find that the intention of the parties was no longer about the implementation of the R5 000.00 payment. It is submitted that it is sensible to interpret the 2013 contract as invigorating the conditions or resolutions of the 2007 contract that have been fulfilled as it did not make sense to continue paying the amount of R5 000.00 per month. This is because the applicant had signed an agreement to transfer the property from Frankie & Johnny

CC to the respondent.

[21] In casu looking at the words provided for in the contract, the 2007 contract is clear. There is no provision, in the 2007 contract, for alternative accommodation. R 5000.00 payment was undoubtedly linked to the sale of common home which had not been sold at the date

of hearing of this application. Furthermore the 2008 contract states that Melodie 99 is the alternative accommodation. The transfer only dealt with membership interests. The purpose of the parties was to sell a certain property, the common home. What I find to be unbusinesslike is the applicant's approach to simply substitute the properties without having considerations to their values. I conclude that the 2007 resolutions were not fulfilled because the common home was not yet sold. The writ of R 460 000.00 shall stand.

WRIT2:

[22] Writ 2 is in respect of alleged arrear maintenance for the party's son as well as 50 % of the son's medical expenses not covered by the medical aid. The amount is R1 943.21 per month and R43 514.55 for arrear medical aid contribution. The claims are for the period of August 2008 to August 2011.

[23] According to the applicant the divorce order in as far as it relates to the parties' son was rescinded on 5 August 2011 by the Brits Maintenance Court. The reason for rescission was because the party's son had reached the age of majority. The applicant submits that the magistrate rescinded the order because he had paid an amount of R22 690.00 for arrear maintenance. It is not disputed that the sum of R22 690.00 included an amount for legal costs. As a result the respondent received R20 747.20, an amount less than what was due to her. Furthermore not all the facts were placed before the Magistrate when the applicant sought to have the order rescinded. Maintenance for the son had to endure until he reached the age of majority or was self-supporting. Although the son had reached the age of majority, he was not yet self supporting when the order was granted by the magistrate.

[24] As earlier indicated, the court is bound to accept the respondent's version since the applicant's replying affidavit is not before court. On a proper application of the law to the facts in this case the underlying cause of judgment was still in existence when the order was granted. I reiterate, the partie's son was not yet self-supporting. There is no justification for setting aside of the writ. Having regard to the above writ 2 shall stand.

[25] In the result the following order is made:

25.1 The application is dismissed with costs.

N.P MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv. Marneweck

Instructed by:

SPIES BESTER POTGIETER ATIORNEYS

Counsel for the 1st Respondent: Adv. Stone

Instructed by:

WEAVIND & WEAVIND ATTORNEYS

Date of Hearing:

14 June 2017

[1] 1951(4) SA 519 (T)

[2] (112 9/02) 12005) ZAWCHC 28

[3] Nata Joint Municipailty Pension fund v Endumeni Municipality

[2012] 2 All SA 262(SCA)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/1200.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/h-v-h-unknown-topic-agpphc-2017>

Prepared on 10 October 2026 · Esheria