

SOUTH AFRICA / JUDGMENT

Lowe v Lowe (26004/2009) [2011] ZAWCHC 68 (10 March 2011)

[2011] ZAWCHC 68

COURT

Western Cape High Court, Cape Town

BEFORE

MIA

CASE / FILE NUMBER

26004/2009

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 26004/2009

In the matter of:

TERENCE ALFRED LOWEApplicant

versus

MEHLISS CATHERINE LOWERespondent

Judgment:

10 March 2011

MIA AJ:

- [1] This application was brought to set aside alternately to stay a writ of execution issued out of this court. When the matter came before me. Counsel for the applicant indicated that the applicant was only proceeding with the alternative leg, namely, that the writ of execution be stayed subject to the applicant instituting proceedings in respect of the writ.

[2] The parties were previously married and were granted a decree of divorce by order of this court. A consent paper was incorporated into the court order. The consent paper dealt with, inter alia custody of the minor child, maintenance for the minor child as well as the respondent (plaintiff in the divorce matter) and expenses which the applicant was liable for. The terms of the consent paper relevant to this application are clauses 5.2.1, 5.2.2, 5.3, 5.5, 6.2, 7.2.6 and 7.2.8. They provide as follows:

"Clause 5.2.1

Defendant shall pay all reasonable medical, dental (including orthodontic treatment), ophthalmological treatment (including the provision where necessary of spectacles and/or contact lenses), pharmaceutical (incurred on doctor's prescription), surgical, hospital, psychological, therapeutic, physiotherapeutic, dietetic and similar medical expenses reasonably incurred in regard to the minor child.

Clause 5.2.2

Prior to any extraordinary medical expenditure (as defined herein) being incurred either in respect of the nature of the treatment or the cost of treatment. Defendant's prior written consent shall, save in the case of emergencies, first be obtained, and which consent shall not be unreasonably withheld.

Clause 5.3

Defendant shall pay all reasonable costs of school fees (equivalent to those of a government school unless otherwise agreed to by Defendant in writing and which consent will not be unreasonably (withheld) in respect of the minor child, as also the reasonable costs of extramural and sporting activities and sports camps (including fees, clothing and equipment reasonably required therefore) engaged in by the minor child where same are offered by the school and/or additional tuition, school books, school requirements, stationery and school uniforms. In the event of MISHKA wishing to engage in any extracurricular or sporting activities offered outside of those ordinarily offered by the school, or Plaintiff intending for

MISHKA to attend a private school, Defendant's prior written consent thereto shall first be obtained, which consent shall not be unreasonably withheld.

Clause 5.5

The maintenance amounts as set forth in paragraph 5.1 above shall increase annually on the anniversary on which a decree of divorce

herein may be granted, by such amount as is commensurate with the increase in the Consumer Price Index as notified by the Central

Statistical Service in respect of the Republic of South Africa based on the 12 urban areas as reflected in the Middle Income Grout (Cape Peninsula) for a period of 12 months expiring on the last day of the month preceding such anniversary of the divorce.

Clause 6.2

Defendant shall for so long as his maintenance obligation in terms hereof endures, effect payment of all reasonable medical, dental (including orthodontic treatment), ophthalmological treatment (including the provision where necessary of spectacles and/or contact lenses), pharmaceutical (incurred on doctor's prescription), surgical, hospital, psychological, therapeutic, physiotherapeutic, dietetic and similar medical expenses reasonably incurred in regard to the Plaintiff.

Clause 7.2.6

Defendant shall continue to assume responsibility for the property charges levied in respect of the Trust Property (being only rates and taxes, municipal levies, Eskom and necessary repairs), until such time as registration of transfer or ownership to a new owner occurs. Defendant shall keep a record of such payments made by him, which amounts shall be added to Defendant's loan account in the Trust. The Defendant's loan account shall not be increased, save as provided for herein, pending the sale of the immovable property, it is recorded that the amount of the loan account is currently R440 202.00 (four hundred and forty thousand two hundred and two Rands)".

Clause 7.2.8

Defendant shall pay to Plaintiff an amount of R2 500-00 as a contribution towards her costs of relocation, which amount shall be paid to Plaintiff one month prior to the intended relocation. Plaintiff shall timeously inform Defendant accordingly.

[3] The respondent applied for a writ to realize the amount of R124 916.39. This amount was made up as follows:

Claim A.

- Medical and pharmaceutical expenses incurred

From 6 September 2006 - 16 September 2009 R6 174.22

- Outstanding school fees from 18 August 2006 - 23 September 2009 R7 075.99

- Outstanding school fees from 18 August 2006 -

23 September 2009 R7 075.99

- Pharmaceutical expenses incurred in respect of respondent from 2 November 2005 - 17 September 2009 R41 818.38

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17 September 2009 R41 818.38

- Outstanding doctors accounts in respect of respondent for 1 July 2005 - 21 September 2009 R22 384.05

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respondent for 1 July 2005 - 21 September 2009 R22 384.05

Claim B. Property charges in respect of the trust property R23 666.46 Contributions towards the respondents cost of Removal R2 500.00 Arrear maintenance R21 448.38

Claim B.

Property charges in respect of the trust property R23 666.46

Contributions towards the respondents cost of

Removal R2 500.00

Arrear maintenance R21 448.38

[4] The applicant averred that he was not indebted to the respondent and that he did not owe her any amount. He stated that he did not see the invoices reflecting the above amounts and that the respondent did not inform him of these claims. He denies that the amounts were incurred and contended that even if the amounts were incurred that they were unreasonable and referred specifically to the pharmacy bill for R41 818.38. The applicant explained that his financial position had changed drastically and had deteriorated to the extent that he was not able to afford the amounts provided for in the consent paper. Consequently he applied for a reduction in his maintenance obligations in the Magistrates Court, Bellville. He envisaged that maintenance would be reduced retrospectively and such reduction would result in his past payments placing him in a position where he overpaid the respondent. [5] Counsel for the applicant presented submissions on two grounds namely: that the order for payment of maintenance as provided in the consent paper was an order ad factum praestandum and not one ad pecuniam solvendum. It was thus enforceable only by way of contempt of court proceedings and not by a writ of execution as the respondent did in the present matter. in the alternative he submitted that the amounts payable in terms of 5.2.2 and 6.2 were not reasonable expenses and in light hereof there was uncertainty and a writ of execution could not be issued for the medical expenses. [6] When the matter was heard before me, the order of the Magistrate Bellville had been communicated to the parties. Counsel were ad idem that there was no order addressing the maintenance retrospectively and the amounts incurred relating to clauses 5.2.1, 5.2.2, 5.3, 6.2, 7.2.6 and 7.2.8 remained unaffected by the order of the magistrate, Bellville. The applicant could thus not rely on an overpayment to the respondent. Counsel for the applicant indicated that he could not take claim B further. This claim related to the Eskom bill and a contribution towards the cost of relocation and the outstanding arrear maintenance which is provided for in the consent paper and is ascertainable. [7] The only issue which remained was the amounts due in terms of claim A. Counsel for the applicant submitted that clauses 5.2.2 and

6.3 required the applicant to do something rather than that he pay a certain amount. Clause 5.1 refers to the words "shall pay all reasonable medical", clause 6.2 used the words "Defendant shall effect payment of all reasonable, medical Both these clauses order the applicant to make payment of sums of money. Even if I were to accept that the clause is one *ad factum praestandum*, in *Du Preez v Du Preez* 1997

- (2) 400 (CPD), *Shock AJ* dismissed the contention that it was incompetent to execute by way of a writ where the order falls under the category *ad factum praestandum*. Support for this view is found in *Manley v Manley* 1941 (CPD) 95. a full bench decision of this Division. I am of the view that this is the correct approach and am not persuaded by Counsel's submission that it is not competent to execute by way of a writ in the present matter. [8] The provisions of Rule 45 of the Rules of Court envisage a judgment liability where the debt or other obligation of the judgment debtor and the matter which is to be enforced by the sheriff are described specifically and with certainty. There must be certainty as to what the creditor is entitled to under the judgment, failing which the writ may be set aside if the judgment is not definite and certain. [See *Erasmus Superior Practice* at B1-323, *De Crespigny v De Crespigny* 1959
- (1) SA 149 (N) *Butchart v Butchart* 1997
- (4) SA 108 (WLD), *Du Preez v Du Preez* 1997
- (2) 400 (CPD)]. [9] The applicant stated that the medical and pharmaceutical costs incurred were unreasonable. He previously chose the medium of the medical aid scheme to satisfy his obligation in terms of clauses 5.2.2 and 6.2. There is no indication that the medical aid rejected any claims submitted by the respondent in respect of herself or the minor child in the past that would support the applicants' statement that the expenses were unreasonable. The applicant had access to statements of the medical aid. The amounts paid out in previous years could be compared to the amounts claimed presently to show that these amounts were unreasonable. The applicant could also have placed before me, as Counsel for the respondent submitted, medical reports to rebut the reports and statements presently before me. The applicant did neither but persisted with the denial regarding the reasonableness of the costs without any reports to support his contention. [10] The relief requested was to stay the execution as opposed to the initial request to set aside the writ of execution. The stay of the writ of execution is granted "where real and substantial justice requires such a stay or where injustice would otherwise be done" [per *Traverso J* (as she then was) in *Santam v Norman and Another* [1997] JOL 128 (C) and *Strime v Strime* 1983
- (4) SA 850 (C)]. The applicants' obligations in terms of the consent paper remained unaltered in respect of the claim A and B as there was no retrospective order by the Magistrate, Bellville. The applicants' denial that the expenses were incurred is refuted by the

various correspondence and reports from doctors treating the respondent, attached to the replying affidavit. The applicant's bald denial that medical costs were incurred is countered by medical reports from doctors treating the respondent. The second leg of the applicant's attack on the writ of execution on the basis that the respondent's medical and pharmaceutical costs are

unreasonable is not sustained in the absence of medical reports or statements to the contrary. I can find no real or substantial prejudice on the facts before me. [14] For the aforementioned reasons the application is dismissed with costs. MIA, AJ

[4] The applicant averred that he was not indebted to the respondent and that he did not owe her any amount. He stated that he did not see the invoices reflecting the above amounts and that the respondent did not inform him of these claims. He denies that the amounts were incurred and contended that even if the amounts were incurred that they were unreasonable and referred specifically to the pharmacy bill for R41 818.38. The applicant explained that his financial position had changed drastically and had deteriorated to the extent that he was not able to afford the amounts provided for in the consent paper. Consequently he applied for a reduction in his maintenance obligations in the Magistrates Court, Bellville. He envisaged that maintenance would be reduced retrospectively and such reduction would result in his past payments placing him in a position where he overpaid the respondent.

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[6] When the matter was heard before me, the order of the Magistrate Bellville had been communicated to the parties. Counsel were *ad idem* that there was no order addressing the maintenance retrospectively and the amounts incurred relating to clauses 5.2.1, 5.2.2, 5.3, 6.2, 7.2.6 and 7.2.8 remained unaffected by the order of the magistrate, Bellville. The applicant could thus not rely on an overpayment to the respondent. Counsel for the applicant indicated that he could not take claim B further. This claim related to the Eskom bill and a contribution towards the cost of relocation and the outstanding arrear maintenance which is provided for in the consent paper and is ascertainable.

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- [8] The provisions of Rule 45 of the Rules of Court envisage a judgment liability where the debt or other obligation of the judgment debtor and the matter which is to be enforced by the sheriff are described specifically and with certainty. There must be certainty as to what the creditor is entitled to under the judgment, failing which the writ may be set aside if the judgment is not definite and certain. [See *Erasmus Superior Practice* at B1-323, *De Crespigny v De Crespigny* 1959]
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[14] For the aforementioned reasons the application is dismissed with costs.

MIA, AJ

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