

SOUTH AFRICA / JUDGMENT

Raziya v Raziya (11841/11) [2012]

ZAWCHC 79 (16 April 2012)

[2012] ZAWCHC 79

COURT

Western Cape High Court, Cape Town

BEFORE

Fourie

CASE / FILE NUMBER

11841/11

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 11841/11

DATE: 16 APRIL 2012

In the matter between:

NOMHLE RAZIYA

.....Applicant

and

BONGANI RAZIYA

.....Respondent

JUDGMENT

FOURIE, J

In this application the applicant seeks the following relief:

- 1) An order holding respondent in contempt of court for his failure to comply with the terms of a consent paper which was made an

order of court upon their divorce on 15 November 2004, as amended by an agreement concluded on 12 August 2005.

- 2) An order directing the respondent to pay her the sum of R954 200 in respect of arrear maintenance and furniture in terms of the

aforesaid consent paper, and

3) Costs of suit on the scale as per attorney and own client.

The applicant's case is based squarely on the terms of the consent paper, which was made an order of Court on 15 November 2004 and the subsequent amendment thereof on 12 August 2005. However in his answering affidavits, the respondent contends that the consent paper, as subsequently amended in 2005, was subject to two further amendments by the parties on 30 March 2007 and during

2008. In terms of the latter two amendments, the respondent's maintenance obligations towards applicant and the three minor children of the parties were reduced due to financial difficulties experienced by respondent. Full details of these amendments are provided by respondent in his affidavits, which allegations are supported by correspondence between the parties' attorneys confirming the conclusion and execution thereof. Respondent also alleges, and has provided written proof, that he has complied with the terms of these amendments. In addition

thereto, his answering affidavits show that the parties' three children had left the applicant's home long ago to live with respondent who fully supports them. This is confirmed by a supporting affidavit deposed to by the parties' oldest daughter. In her replying affidavit the applicant has made no attempt at all to counter these allegations and the supporting evidence provided by the respondent. In fact, the allegations are met with terse, bald denials in circumstances where the respondent's allegations cry out for a response. Nor does applicant attempt to explain why she has waited for four to five years to enforce the provisions of the original consent paper. The obvious inference to be drawn, particularly in view of the details provided by respondent of the subsequent amendments agreed

to by the parties, is that applicant was a party thereto, for had she not been she would surely have taken steps to enforce the terms of the original consent paper much earlier. Even if I were to accept that the applicant's bald denials do give rise to a genuine dispute of fact between the parties, the applicant, who seeks final relief on these papers, is faced by what is commonly referred to as the Plascon Evans rule, namely that the matter is to be adjudicated on the facts as stated by respondent, together with the admitted facts in the applicant's founding affidavit. On this basis, I have to accept that the parties did conclude the subsequent two amending agreements in 2007 and 2008, and that respondent has fully complied with his obligations in terms thereof. Furthermore, that the agreement reached on 30 March 2007, was a settlement with regard to all arrear maintenance obligations of

respondent. Finally, I also have to accept that the three children have for quite some time now been living with respondent and that he takes care of all their financial needs. Applicant has placed much store on the existence of the original court order incorporating the consent paper, and respondent's failure to comply with such order. It is so that respondent has not taken steps to have the court order relating to his maintenance

obligations, as embodied in the consent paper, varied by the Court, nor did he approach the maintenance court to have his maintenance

obligations reduced in accordance with the latest two agreements concluded by the parties. However, the existence of the latter two agreements and respondent's compliance with the terms thereof, cannot merely be ignored. It was submitted on behalf of respondent that the conclusion of the 2007 and 2008 agreements constituted a novation of the parties'

agreement as embodied in the consent paper, read with the 2005 amendment thereof. This is no doubt correct, but such novation would not itself amount to a variation of the original court order. However I am of the view that, by concluding and accepting

performance in terms of the 2007 and 2008 agreements, the applicant waived her right to enforce the provisions of the consent paper, read with the subsequent amendment thereof. She fully knew what her rights were in terms of the consent paper, and the subsequent amendment, yet she concluded the 2007 and 2008 agreements with the assistance of her attorneys, while knowing that respondent's maintenance obligations were to be reduced in terms thereof. In my opinion this clearly constitutes a waiver or abandonment of the rights which she had in terms of the consent paper and the 2005 amendment thereof. In these circumstances, it surely cannot be found that respondent is in contempt of the original order of court, nor that the amount of R954 200, or any amount at all, is due and owing to applicant by respondent, as arrear maintenance. It follows that the application falls to be dismissed. This brings me to the issue of costs. It was submitted on behalf of respondent that a punitive costs order should be made against

applicant. In particular, respondent submitted that the application was devoid of all merit. It was further argued that, in view of applicant's failure to bring the existence of the 2007 and 2008 agreements to the Court's attention, as well as the fact that

respondent has fully complied with his obligations in terms thereof, the Court should find that there are special circumstances present justifying a punitive costs order. I have given this submission serious consideration. However, on reflection, I am not convinced that this conduct of the applicant should necessarily be branded as vexatious. It may have been the product of a misreading of the legal position, by believing that the applicant's rights in terms of the original consent paper were not extinguished by the conclusion of the 2007 and 2008 agreements, particularly as these agreements were not embodied in a written agreement duly signed by both parties. In the circumstances I do not believe that a punitive costs order is justified. In the result the APPLICATION IS DISMISSED WITH COSTS, including the costs occasioned by the postponement of the matter on 10 August 2011 and 5 December 2011. FOURIE, J

The applicant's case is based squarely on the terms of the consent paper, which was made an order of Court on 15 November 2004 and the subsequent amendment thereof on 12 August 2005. However in his answering affidavits, the respondent contends that the consent paper, as subsequently amended in 2005, was subject to two further amendments by the parties on 30 March 2007 and during

2008. In terms of the latter two amendments, the respondent's maintenance obligations towards applicant and the three minor children of the parties were reduced due to financial difficulties experienced by respondent. Full details of these amendments are provided by respondent in his affidavits, which allegations are supported by correspondence between the parties' attorneys confirming the conclusion and execution thereof.

Respondent also alleges, and has provided written proof, that he has complied with the terms of these amendments. In addition

thereto, his answering affidavits show that the parties' three children had left the applicant's home long ago to live with respondent who fully supports them. This is confirmed by a supporting affidavit deposed to by the parties' oldest daughter.

In her replying affidavit the applicant has made no attempt at all to counter these allegations and the supporting evidence provided by the respondent. In fact, the allegations are met with terse, bald denials in circumstances where the respondent's allegations cry out for a response. Nor does applicant attempt to explain why she has waited for four to five years to enforce the provisions of the original consent paper.

The obvious inference to be drawn, particularly in view of the details provided by respondent of the subsequent amendments agreed

to by the parties, is that applicant was a party thereto, for had she not been she would surely have taken steps to enforce the terms of the original consent paper much earlier.

Even if I were to accept that the applicant's bald denials do give rise to a genuine dispute of fact between the parties, the applicant, who seeks final relief on these papers, is faced by what is commonly referred to as the Plascon Evans rule, namely that the matter is to be adjudicated on the facts as stated by respondent, together with the admitted facts in the applicant's founding affidavit. On this basis, I have to accept that the parties did conclude the subsequent two amending agreements in 2007 and 2008, and that respondent has fully complied with his obligations in terms thereof.

Furthermore, that the agreement reached on 30 March 2007, was a settlement with regard to all arrear maintenance obligations of

respondent. Finally, I also have to accept that the three children have for quite some time now been living with respondent and that he takes care of all their financial needs.

Applicant has placed much store on the existence of the original court order incorporating the consent paper, and respondent's failure to comply with such order. It is so that respondent has not taken steps to have the court order relating to his maintenance

obligations, as embodied in the consent paper, varied by the Court, nor did he approach the maintenance court to have his maintenance

obligations reduced in accordance with the latest two agreements concluded by the parties. However, the existence of the latter two agreements and respondent's compliance with the terms thereof, cannot merely be ignored.

It was submitted on behalf of respondent that the conclusion of the 2007 and 2008 agreements constituted a novation of the parties'

agreement as embodied in the consent paper, read with the 2005 amendment thereof. This is no doubt correct, but such novation would not itself amount to a variation of the original court order. However I am of the view that, by concluding and accepting

performance in terms of the 2007 and 2008 agreements, the applicant waived her right to enforce the provisions of the consent paper, read with the subsequent amendment thereof. She fully knew what her rights were in terms of the consent paper, and the subsequent amendment, yet she concluded the 2007 and 2008 agreements with the assistance of her attorneys, while knowing that respondent's maintenance obligations were to be reduced in terms thereof.

In my opinion this clearly constitutes a waiver or abandonment of the rights which she had in terms of the consent paper and the 2005 amendment thereof. In these circumstances, it surely cannot be found that respondent is in contempt of the original order of court, nor that the amount of R954 200, or any amount at all, is due and owing to applicant by respondent, as arrear maintenance.

It follows that the application falls to be dismissed.

This brings me to the issue of costs. It was submitted on behalf of respondent that a punitive costs order should be made against

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respondent has fully complied with his obligations in terms thereof, the Court should find that there are special circumstances present justifying a punitive costs order. I have given this submission serious consideration. However, on reflection, I am not convinced that this conduct of the applicant should necessarily be branded as vexatious. It may have been the product of a misreading of the legal position, by believing that the applicant's rights in terms of the original consent paper were not extinguished by the conclusion of the 2007 and 2008 agreements, particularly as these agreements were not embodied in a written agreement duly signed by both parties. In the circumstances I do not believe that a punitive costs order is justified.

In the result the APPLICATION IS DISMISSED WITH COSTS, including the costs occasioned by the postponement of the matter on 10 August 2011 and 5 December 2011.

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