

SOUTH AFRICA / JUDGMENT

W v W (2463/2017) [2017] ZAFSHC 192 (29 September 2017) [2017] ZAFSHC 192

COURT

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

2463/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 2463/2017

In

the matter between:

B.
T.
W.
Applicant
and
S.
W.
Respondent

JUDGMENT

BY: C REINDERS, J

HEARD ON: 7 SEPTEMBER 2017

DELIVERED ON: 29 SEPTEMBER 2017

[1] The bonds of marriage between the applicant Mr B. T. W. ("Mr W.") and respondent Mrs S. W. ("Mrs W.") was dissolved on 2 February 2016 and the Deed of Settlement ("the Deed") concluded on the same date was made an order of this court.

[2] On 19 May 2017 Mr W. issued this application praying for orders in the following terms:

"1. That it be declared that the Respondent cohabits with another person on a permanent basis.

2. That it be declared that the Applicant is not liable to pay maintenance to the Respondent in terms of the Deed of Settlement made an order of this Honourable Court on 2 February 2016 under Case

Number 5078/2013.

3. That it be declared that the Applicant is not liable to retain the

Respondent as a beneficiary on his existing medical scheme (Discovery Health).

4. That the Respondent pay the costs of the application only in the event of her opposing this application."

[3] The application is opposed by Mrs W.. In terms of the Deed Mrs W. became the sole owner of the property situated at [...] K. K. Road, Bloemfontein ("the property"). It is common cause that Mr W. had to pay maintenance monthly to Mrs W. at the rate of R 40 000-00 (with escalation as agreed upon) and had to retain her as a beneficiary on his existing medical aid scheme. Paragraph 1.4 of the Deed reads as follow:

"Such maintenance and medical aid contributions shall be payable until the Plaintiff dies remarries or cohabits with another person on a permanent basis."

[4] Most probably both parties believed at the time of the conclusion of this deed that all disputes between them were resolved by the order of divorce and the Deed. If so they were wrong and the mentioned paragraph 1.4 led to the present litigation.

[5] The provisions of paragraph 1.4 is not in dispute and should I be able to find that the respondent is permanently cohabiting with another person, the relief sought should be granted.

See: Drummond v Drummond 1979 (1) SA 161 (A)

- [6] The applicant bears the onus on a preponderance of probabilities to convince me that the respondent is permanently cohabiting with another person. He avers that "shortly after the divorce" it came to his attention that Mrs W. and a third party, Mr C. W. ("Mr W.") had been involved in a love affair "for some time before the divorce and that they have been, since about 2 February 2016, cohabiting at the property". In confirmation of his version he annexed affidavits of the domestic worker Mrs J. N. ("Mrs N."), Mr W.'s previous wife Mrs Judy W. ("Mrs W.") and Mr F. L. (Mr L.). Mrs N. stated that Mr W. was living with Mrs W. in the house at the property, she saw him in bed with her and he had his meals with her. During April she noticed that he sleeps in the flat next to her room at times. She was paid by Mr W. to do his laundry. Mrs W.'s affidavit revealed that she had proof by way of text messages of a sexual relationship between Mr W. and Mrs W. during December 2015. Mr W. also left the communal home permanently during February 2016 to "live with the respondent". Mrs W. and Mr W. together frequents shopping malls and public areas. Mr L. is a contractor who was employed at the holiday home of Mr W. during April 2017. He observed Mrs W. and Mr W. travelling together and spending the Easter weekend alone in each other's company during that time. All the aforementioned lead him to believe that the respondent and Mr W. is cohabiting on a permanent basis at the property.
- [7] Not so says the respondent. In her answering affidavit she explains that she has never permanently cohabitated with Mr W. as contemplated by paragraph 1.4 of the Deed. She admits having had a relationship with Mr W. but same was terminated at the beginning of 2017. She realised that Mr W. was not the one for her and did not want to commit herself to him, especially following the disaster of her marriage to Mr W.. Mr W. had been renting the flat on the premises from her since November 2016 for R 5000,00 monthly and she does not deny that they are friends. She annexed an affidavit of the same domestic worker, Mrs N., wherein Mrs N. clarifies and qualifies her initial statement annexed to the applicant's papers. Mrs N. confirms that Mr W. is sleeping in the said flat and not living with Mrs W.. Respondent annexes a letter dated 30 May 2017 of Mrs W. wherein she withdraws certain statements made by her in an affidavit annexed to the applicant's papers. Lastly respondent annexes an affidavit of Mr W. wherein he denies the permanent cohabitation and confirming the applicant's version.
- [8] The relief sought by the applicant is final in nature. This relief is sought by way of motion proceedings. Where final relief is sought by way of motion proceedings the test to be applied is that stated in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E – 635C.

"...(W)here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justifies such an order."

[9] If I apply the test as I should I cannot find that the respondent is permanently cohabiting with a third party. She denies it and annexes confirmatory affidavits to that effect. I cannot reject her version as being palpably false or far fetched on the papers.

See: National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at 290 para [26].

In considering respondent' version I do not take note of the information supplied by Mrs W. as it is not confirmed by way of an affidavit. Suffice to say that the factual dispute cannot be resolved by me on the papers.

[10] In argument before me (and in his heads of argument) Mr Van Rhyn on behalf of Mr W. submitted that in the event that I find that there is a bona fide dispute of fact which cannot be resolved on the papers, the matter should be referred for oral evidence. Mr Louw for the respondent urged me to conclude that the factual dispute was foreseeable when the application was launched. In support hereof he relied on correspondence between the attorneys of record preceeding the application. Annexed to the founding affidavit is a letter dated 22 March 2017 addressed to Mrs W.' attorney wherein applicant's attorney stated that Mrs W. "... has been and is cohabiting with Mr C. W. on a permanent basis... " and that Mr W. "will make no further maintenance payments... ". In reply to these averments a letter dated 28 March 2017 indicated that the allegations by Mr W. is denied. Reliance was also placed by Mr Louw on a text message sent to the applicant on 29 March 2017 before the application was issued wherein respondent denied the permanent cohabitation. This was in response to a preceeding text message sent by Mr W. to Mrs W. informing her that he is no longer liable to maintain her as she is "cohabiting with Craig."

[11] What is of serious concern to me is that the applicant out of his own accord. and before a court has pronounced on the merits mero motu decided not to comply with the court order. He declares that since March 2017 he has stopped the payments of maintenance as

ordered by court on 2 February 2016. This he did at a time when he knew that the respondent denied permanent cohabitation. To me it seems that this application was then launched merely to confirm and condone his conduct since March 2017. The application was launched almost two months after he stopped payment of the maintenance. The first letters between attorneys were exchanged as far back as March 2017 according to the papers. As mentioned I cannot resolve the factual dispute on the papers but the applicant's conduct in this regard does not impress me at all. Referral to oral evidence is in my discretion. I am not prepared to exercise my discretion to refer the matter for evidence.

[12] I wish to stress my viewpoint that I am unable on the papers to resolve the factual dispute and the order that I make should not be seen as a dismissal and a final adjudication of the facts.

[13] For the reasons above I make the following order:

The application is dismissed with costs.

C. REINDERS, J

On behalf of the applicant: Adv. A.J.R. van Rhyn SC

Instructed by:

Rossouws Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. M.C. Lauw

Honey Attorneys

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Prepared on 10 October 2026 · Esheria