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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



CASE NO.: 2016/15453

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

In the matter between:

J B

PLAINTIFF

and

D B

DEFENDDANT

JUDGMENT

VAN DER WESTHUIZEN, A J

[1] The plaintiff and the defendant were previously married to each other, that relationship being terminated by a decree of divorce that was granted by this court on 14 October 2005. Incorporated in the decree of divorce was a settlement agreement that was made an order of court by agreement.

[2] The present action flows from an alleged breach of the settlement agreement, in particular paragraph 7.4 thereof, on the part of the defendant. Paragraph 7 of the settlement agreement reads:

“7.1 The Plaintiff will pay to the Defendant the sum of R7 500.00 per month, the first payment to be made on the first day of the month following the date upon which a final order of divorce is granted and thereafter on the first day of each and every consecutive month until the Defendant becomes self supporting. Should the parties fail to reach agreement about of the Defendant to support herself the matter will be referred to an advocate appointed by the parties jointly, and failing agreement, by the Johannesburg Bar Council with not less than 10 years experience who will adjudicate the dispute in order to determine whether the Defendant is self supporting or not. His decision will be final and binding on the parties.

7.2 The maintenance aforementioned will on the anniversary date of this divorce increase annually by at least the CPI scale applicable at the time of such increase.

7.3 The Plaintiff will retain the Defendant as a principal member on her present medical aid scheme, or a medical aid scheme with no lesser benefits that the one she is presently a member on. The Plaintiff will pay the monthly premiums of such scheme. The Plaintiff's obligation in

respect of medical costs of the Defendant will be limited to the annual limits of any such scheme.

7.4 The obligations of the Plaintiff referred to in 7.1 and 7.2 above will terminate should the Defendant remarry or reside with a man in matrimonial partnership for a period exceeding six months.”

- [3] The plaintiff testified on his own behalf and led the evidence of Ms J-D. The latter is the daughter of a Mr J who is claimed to have been in a matrimonial partnership with the defendant for a period exceeding six months as contemplated in the clause 7.4 recorded above.

- [4] The defendant denied that she breached the provisions of clause 7.4 and testified on her own behalf. She presented the evidence of the said Mr J in support of her defence.

- [5] Evidence was led over a two-day period. The trial was run on 2 and 3 August 2017. Both parties closed their respective cases. The parties concluded their argument on the merits on the second day. I reserved judgment. Whilst considering and preparing my judgment, I was notified of an application relating to the re-opening of the case of one of the parties. That application was subsequently set down for adjudication on 8 September 2017. The defendant sought to lead evidence allegedly not being available during the trial. On the aforementioned date it came before me. The application was postponed to 18 September 2017 for argument. The matter became opposed. On 18 September 2017 I heard the application for re-opening the defendant's case and dismissed the application for the reasons enumerated in my *ex tempore* judgment delivered on 18 September 2017. I do not intend to deal with that application in this judgment. It is merely recorded for the sake of completeness.

- [6] The plaintiff contends that the defendant breached the provisions of clause 7.4 in that she entered into a relationship with the said Mr J for a period exceeding six months. The said relationship being one akin to a matrimonial partnership as contemplated in clause 7.4 of the settlement agreement.
- [7] It was argued on behalf to the defendant that the evidence led on behalf of the plaintiff did not support the allegations in the plaintiff's particulars of claim where it is stated that the defendant is "presently in a marriage relationship". It is further submitted that the evidence led on behalf of the plaintiff thus does not prove the allegation contained in the particulars of claim and hence that no case has been made out in that regard. The evidence, so it is submitted, relates to a period prior to the institution of the action and that at the date of the institution of the action, the defendant was not involved in a marriage relationship as contemplated in the settlement agreement. There is no merit in that submission for what follows.
- [8] It is trite that allegations in particulars of claim do not constitute evidence. Furthermore, the purpose of particulars of claim is merely to identify the real issues in dispute that is subsequently delineated by the allegations in answer thereto as contained in the plea.¹ It is the Court's duty to determine what the real issues between the parties are and, provided no possible prejudice can be caused to either party, to decide those real issues.² Furthermore, it was held in *Stead v Conradie*³ that a court is not to follow the *ipsissima verba* of the pleadings blindly.
- [9] The real issue between the parties is whether there has been a breach of clause 7.4 of the settlement agreement or not. That issue can only be decided on the evidence placed before court.

¹ *Schill v Milner* 1937 AD 101 at 105; see also *Sentrachem Bpk v Wenhold* 1995(4) SA 312 (A)

² *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173

³ 1995(2) SA 111 (A); See also *Randfontein, supra*.

- [10] In my view, clause 7.4, as quoted above, does not lean to an interpretation that a matrimonial relationship is to exist at the time when proceedings are instituted to give effect to the provisions of clause 7.4 of the settlement agreement.
- [11] In the present instance, both parties dealt with that issue in the evidence led in their respective cases.
- [12] It is not submitted that any prejudice was suffered in respect of the plaintiff's case as dealt with in the evidence led on his behalf, nor could any prejudice be inferred. No prejudice was proven. The defendant dealt with plaintiff's evidence as led and the defendant was prepared to deal therewith in defence. Furthermore, and in my view, the circumstances relating whether there is or has been a breach of the provisions of clause 7.4 lie within the peculiar knowledge of the defendant.⁴ The defendant would be in the special position to rebut any evidence led in that regard on the part of the plaintiff.
- [13] Justice will not be served should plaintiff be held to the *ipsissima verba* of his particulars of claim. As recorded above, the real issue is whether there was a breach of the settlement agreement irrespective of the time that it occurred, if it so occurred.
- [14] The present plaintiff was the plaintiff in the divorce proceedings. The plaintiff's present action does not impact upon the provisions of clause 7.3 of the settlement agreement. The relief is only directed at the provisions of clauses 7.1, 7.2 and 7.4. A positive finding upon clause 7.4 would by necessity impact negatively upon the provisions of clauses 7.1 and 7.2, and release the plaintiff from his obligations in that regard.

⁴ See *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA) at [7]

[15] Clause 7.4 of the settlement agreement is termed a so-called *dum casta* clause.⁵

[16] A summary of the plaintiff's evidence reveals the following:

- (a) The parties were married to each other which marriage was dissolved on 14 October 2005. The parties had on 6 September concluded a written settlement agreement that was made an order of court as part of the decree of divorce that was granted on 14 October 2005;
- (b) The plaintiff continued making payment in terms of the settlement agreement to the defendant since the grant of the decree of divorce incorporating the settlement agreement;
- (c) During 2013 it came to the plaintiff's knowledge that the defendant was involved in a matrimonial relationship with a certain Mr H J;
- (d) The plaintiff became so aware due to various circumstances. One being that the plaintiff received a telephone call from the said Mr H J. The call was made following on an incident during which the defendant became hysterical and the said Mr J sought help from the plaintiff;
- (e) During March 2014, the aforementioned Mr J's daughter from a previous marriage, one C J-D, called the plaintiff and advised him that her father was involved with his ex-wife and that they were living together as husband and wife. At that stage the plaintiff knew that defendant and the said Mr J were together, but was unaware that they were involved in a matrimonial relationship;

⁵ See *Cohen v Cohen* 2003(3) SA 337 (SCA) at [4]

- (f) The plaintiff and defendant's daughter married during October 2014. The plaintiff attended his daughter's wedding, but his ex-wife, the defendant, although initially invited, did not attend the wedding. His daughter had shortly before the wedding, told her mother not to attend her wedding, the reason therefor is not relevant for present purposes;
- (g) The plaintiff instructed his attorney to send a letter of demand to the defendant in respect of the breach of the provisions of clause 7.4 recorded above;
- (h) During cross-examination it was suggested to the plaintiff that he was in cahoots with the said C J-D and her mother who was previously married to the aforementioned Mr J. The plaintiff denied the suggestion;
- (i) The plaintiff was further taken to task that he waited before issuing the present proceedings and that he was aware that at the stage of commencing these proceedings, the defendant was not in a matrimonial relationship with any man and in particular not with the said Mr J;
- (j) Much was said during cross-examination in respect of the six months period referred to in clause 7.4 quoted above. The plaintiff denied that that clause could only be interpreted as requiring a continued period of six months, and not an interrupted period of six months;
- (k) The plaintiff was also taken to task under cross-examination about non-compliance with his obligations in respect of the payment of maintenance. The latter is irrelevant in respect of a determination of a possible breach of the provisions of clause 7.4 of the settlement agreement;

- (l) When the defendant's version was put to the plaintiff in respect of the relationship between the defendant and the said Mr J, evidence was solicited indicating that that relationship was more than "purely friendship". I shall refer to that evidence when dealing with the evidence of Ms J-D.
- (m) It was put that the relationship had ended prior to the date of the kitchen-tea being held for the defendant's daughter and hence that no bases existed for the allegations contained in the particulars of claim on which this action was premised;
- (n) The plaintiff arranged for a private investigator to investigate the allegations of the relationship between the defendant and Mr J. Photographs were taken at the defendant's house where the vehicle of the said Mr J was parked.

[17] Ms J-D's evidence can be summarised as follows:

- (a) Ms J-D testified under *sub poena*;
- (b) She is the daughter of the aforementioned Mr H J and his ex-wife;
- (c) Ms J-D knows of the defendant and knew her for a number of years. She called the defendant, "D[...]";
- (d) She knew of the defendant since 2011/2012 and testified that the defendant was at her house on two occasions. Once for a Sunday afternoon lunch and the other when a "braai" was held for her grandfather;
- (e) The defendant also accompanied the said Mr J to other family functions;

- (f) Ms J-D recounted events from which it was clear that the relationship between her father and the defendant were more than purely friends. These included telephonic discussions with her father during which he and the defendant were together in the bath and clearly being intimate: another where her father and the defendant were in bed together and sleeping and did not answer the telephone timeously; an event at which her father indicated that he would pay an amount to his ex-wife and that the defendant was not to know thereof as she would be upset about that: her father would indicate on occasions, when she struggled to get hold of him on the telephone, that the cell-phones were charging in the kitchen as the phones were not allowed in their bedroom at night: her father indicated that he was not willing to attend to other “projects” as he had things to do for the defendant;
- (g) In short, Ms J-D testified that everything pointed to an intimate relationship and not a mere friendship. In that regard, she testified that she herself was in an extra-marital relationship and knew all the telling indications of such a relationship;
- (h) Ms J-D further testified that the defendant on occasion mentioned that she had to be careful of her relationship with Mr J coming out in the open, as she would stand to lose her maintenance;
- (i) There was a dispute in respect of the occasion of Ms J-D’s husband’s 40th birthday party at Hartbeespoort Dam. Nothing turns on what year that was held. The facts on what happened that day are clear. The defendant and Mr J attended that celebration together and were clearly “a couple”;

[19] The plaintiff called two independent witnesses. The one was a Mr Andries Visagie, a Deputy Sherriff and one Morné Erasmus. The latter was the private investigator who testified about the photograph taken at the defendant's residence where the said Mr Jourbert's vehicle was parked. The evidence of Mr Erasmus during cross-examination was denied as not proving anything. The occasion was simply explained that it was by chance that Mr J's vehicle was parked there, as he was doing work for the defendant at that time.

[20] The evidence of Mr Andries Visagie was to the effect that legal process in respect of Mr J was served at the defendant's residence on 13 January 2014. The inference apparently sought to be drawn was that that was the address where process could be served upon Mr J. The aforementioned process was served upon Mr J personally. No cross-examination was directed at Mr Visagie.

[21] The defendant's evidence can be summarised as follows:

- (a) The defendant admitted to entering into the settlement agreement during 2005;
- (b) She denied being in breach of the provisions of the aforesaid clause 7.4 of the settlement agreement. Her response was a mere "I did not do that";
- (c) The defendant testified that she had met Mr J approximately 10 years ago at a church meeting when she inquired about someone who could attend to handyman tasks. Mr J was introduced to the defendant and he attended to certain handyman tasks at her home;
- (d) Following on that introduction and the errands undertaken by Mr J, a friendship ensued. The friendship became more intimate and later developed into a romantic relationship;

- (e) The romantic relationship evolved into one where Mr J would sleep over and the parties became intimate and shared a bed. He moved into her bedroom. Initially it was only on occasion, however, it became clear under cross-examination that it was on a continued and permanent basis;
- (f) Despite protestations on the part of the defendant, she under cross-examination conceded that they had entered into a relationship where they lived together as husband and wife. Both she and Mr J cared for a joint household and contributed thereto, either in respect of groceries, money and maintenance of the joint household. The defendant was at pains to indicate that the monies Mr J paid was only in respect of his lodging during interrupted periods. The defendant's explanation was unconvincing;
- (g) The defendant was at pains to explain that they never continued their relationship in excess of six month's and that it was interrupted. Under cross-examination, the defendant could not provide precise details of the periods when the relationship was interrupted and for what period. The defendant conceded that they re-kindled the relationship every time after an "interruption";
- (h) It was conceded that Mr J wanted a "permanent" relationship and when the problems arose about the defendant's daughter, he decided to end their relationship. That was sometime in 2014;
- (i) The defendant disputed the evidence of Ms J-D. In that regard the defendant was evasive;

- (j) It was conceded that prior to Mr J, the defendant had no relationship with other men nor after the relationship with him had broken down;
- (k) The defendant conceded that the relationship was one of husband and wife and not mere platonic.

[22] The evidence of Mr J was the following:

- (a) He corroborated the circumstance under which he met the defendant;
- (b) Mr J confirmed that a romantic relationship evolved between them and that it was intimate to the extent that they shared the same bed and the same bedroom. He was at pains to point out that he also occupied a different room on occasion;
- (c) Mr J testified that they were in love and that he wanted a permanent relationship;
- (d) He was also unable to indicate the periods when he allegedly moved out of the defendant's house and the reasons therefore. No specific evidence was led in that regard. No documentary proof was provided to confirm the periods when he allegedly had to work on his computer and when he had done so in an endeavour to create his invoices for work he undertook for third parties;
- (e) Mr J confirmed part of the evidence of Ms J-D and attempted to dispute other;
- (f) He testified under cross-examination that he was committed to the relationship with the defendant and that she was likewise committed thereto;

(g) Mr J conceded that he undertook the maintenance of the common home and testified that the defendant paid in cash. No evidence was provided as to the amounts paid in respect of the said maintenance and what was done in that regard. His evidence as to the amounts paid by him for his “lodging” was vague and non-specific;

(h) He conceded under cross-examination that over a period of three years, he did not keep record of his stay with the defendant but that it was in excess of six months.

[23] In my view, considering the evidence of the defendant and Mr J, it is clear that they enjoyed a matrimonial relationship. The evidence of Ms J-D supports such conclusion. No convincing explanation was provided why Ms J-D’s evidence should be rejected.

[24] The evidence of the Deputy Sherriff in respect of the service of process was not convincingly explained nor why the residential address of the defendant was provided for the service of process. The only inference to be drawn in that regard is that Mr J was in fact living at that address under the circumstances recorded above and conceded by the defendant and Mr J.

[25] Both parties accepted in their evidence that the content of the phrase “matrimonial relationship” is akin to that of living together as husband and wife.

[26] In *Drummond v Drummond*⁶ the Appellate Division, as it was then known, held that the content of the phrase “living together as man and wife” donates the basic components of a marital relationship except for the formality of marriage. It was further held that “*the main*

⁶ 1979(1) S 161 (A)

components of a modus vivendi akin to that of husband and wife are, firstly, living under the same roof, secondly establishing and contributing to a joint household, and thirdly maintaining an intimate relationship.” It was held that sexual intercourse would usually be an essential concomitant in such relationship.⁷

[27] From the evidence recorded above, it is common cause that the parties lived under the same roof, contributed to a joint household established to their advantage, and that an intimate relationship (including sexual intercourse) was maintained. The parties were at a loss to explain the alleged “interrupted” cohabitation and that did not exceed, on their interpretation of the phrase “six months” i.e. that it was to be continuous. It is clear on the evidence of both the defendant and Mr J that they re-kindled their relationship after the alleged “interruption”. It was conceded by Mr J that the relationship exceeded a period of six months. On the defendant’s evidence the relationship was to continue indefinitely, albeit with “interruptions”.

[28] It follows that the plaintiff has established that a matrimonial relationship between the defendant and Mr J existed for a period exceeding six months.

[29] There remains the issue of costs. In my view, justice will be served that no order as to costs is made.

[30] In my view, the plaintiff is entitled to the relief sought.

I grant the following order.

(a) It is declared that the plaintiff’s maintenance obligation as provided in clauses 7.1 and 7.2 of the deed of settlement

⁷ See also *EH v SH* 2012(4) SA 164 (SCA) at [10]

concluded on 6 September 2005 between the plaintiff and the defendant, is terminated.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: J W Kloek
Instructed by: Jan Rossouw Attorneys

On behalf of Respondent: Ms E Erasmus
Instructed by: Riekie Erasmus Attorneys

Dates of Hearing: 2 and 3 August 2017
Dates of Hearing

Re-opening of Case: 8 and 18 September 2017

Date of Judgment: 17 November 2017