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

**CASE NO: 2017/30005**

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

23.05.23

In the matter between –

**M, S L**

PLAINTIFF

AND

**M, B**

DEFENDANT

**Neutral Citation:** *M v M* (Case No. 2017/30005) [2023] ZAGPJHC 546 (23 May 2023)

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**JUDGMENT**

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**MOORCROFT AJ:**

*Summary*

*Freedom to contract - Settlement agreement in divorce action – maintenance obligation undertaken until death of the defendant – section 7(1) of Divorce Act, 70 of 1979*

*Tacit and implied terms distinguished –a tacit term is a term agreed to by parties tacitly but not reduced to writing – an implied term is a term implied by law*

*No case made out for a tacit or implied term that obligation ceases upon remarriage*

*Rescission – section 8 of Divorce Act - good reason or good cause - no justification for rescinding clause dealing with maintenance obligation*

*No justification for holding that divorce order granted by consent was incompetent because the maintenance obligation was not terminable by remarriage or cohabitation*

### Order

[1] I make the following order:

1. *The action dismissed;*
2. *The plaintiff is ordered to pay the defendant's costs, such costs to include the costs reserved on 25 May 2022.*

[2] The reasons for the order follow below.

## Introduction

[3] The litigation had its origins in an application launched in 2021 in terms of which the applicant, now the plaintiff, sought an order that paragraph 2 of an order granted by Vorster AJ on 20 October 2017, in terms of which a settlement agreement in a divorce action between the parties was made an order of Court by consent, be rescinded and set aside in terms of Uniform Rule 42, alternatively in terms of the common law, and alternatively in terms of section 8 of the Divorce Act, 70 of 1979. In the alternative the plaintiff sought an order that the maintenance order as per the settlement agreement be discharged and/or varied.

[4] The application came before Wright J. There were numerous disputes of fact on the papers that could not be resolved on application, and the matter was referred to trial. In terms of the order by Wright J, the notice of motion was to stand as a simple summons, the notice to oppose as a notice of intention to defend, and the applicant was to deliver a declaration by 30 June 2022 after which the matter was to proceed as a trial action. The costs were reserved for determination by the Trial Court.

[5] The plaintiff thereafter filed a declaration that departed from the relief sought in the notice of motion that stood as a simple summons and the defendant filed a plea. In the declaration the plaintiff now sought an order

- 5.1 declaring that the settlement agreement between the parties made an order by Vorster AJ contains a tacit, alternatively an implied term that maintenance is terminable also upon the remarriage of the defendant,
- 5.2 that the plaintiff was discharged from paying maintenance in favour of the defendant,
- 5.3 and alternatively an order declaring that the consent order made by Vorster AJ was an incompetent order and should be rescinded or varied.

### The evidence

[6] The plaintiff and the defendant were married in 2004 and they were married out of community of property. They were divorced in 2017 and a written settlement agreement<sup>1</sup> was made an order of court. The document is common cause. It deals with proprietary matters as well as maintenance and other issues.

[7] The plaintiff and the former domestic worker who worked for the defendant testified for the plaintiff. The plaintiff testified that the defendant did not remarry but that she lived with a man named B<sup>2</sup> at the former matrimonial home in Craigavon in Fourways. In cross-examination he conceded that he had not known that she had vacated the property already in 2021.

[8] The source of his information relating to the cohabitation is his discussions with the children, primarily it would seem the daughter born of the marriage between the plaintiff and the defendant. He knew that B was the father of the minor male child born in 2012 during the subsistence of the marriage and was in possession of a paternity test that showed that he was not the biological father.

[9] He testified that he never really meant to pay maintenance of R100 000 per month indefinitely, but conceded that the draft agreement<sup>3</sup> formed the subject of a discussion between him, the defendant, and the defendant's attorney. In the discussion he pointed out the clauses that he was not satisfied with and wished to have deleted from the agreement. Those clauses were identified in the draft as clause 2.2 and clause 4.5. In respect of clause 2.4 he demanded that a monetary limit be included to cap the value of the motor vehicle to be purchased. He was then satisfied with the agreement as it stood. He testified that at the time he just wanted the divorce to be finalised.

[10] The plaintiff was not represented by attorneys when these discussions took place. The plaintiff is a successful businessman who operates a restaurant and a panel-beating

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<sup>1</sup> CaseLines 001-A-19.

<sup>2</sup> Mr B N, referred to as "B."

<sup>3</sup> CaseLines 001-F-166.

business, and his decision to negotiate with his wife and her attorney without his own attorney being involved to protect his rights, was not one based on economic constraints.

[11] The plaintiff also called Ms M who testified that she worked for the defendant at various times over the last seven years until January 2023. She testified that B's clothes were in the defendant's house on a permanent basis which would indicate some kind of live-in arrangement, but that he would only be at the house intermittently. He came and went, and would leave for a few days after staying over for two or three weeks.

[12] The defendant testified on her own behalf. She confirmed that she was involved in an "on and off" romantic relationship with B and that he would visit for days at a time before returning to his own residence in Houghton. The defendant and the third party have an intermittent romantic relationship but they are not married, nor was lobola ever paid. She never considered entering into a marriage with him. They had the child together in 2012 and then reconnected in 2021 on a romantic basis. They then separated again in November 2022 and rekindled their relationship in February 2023.

[13] She testified that her son lives with her and during 2021 to January 2023 her daughter born of the marriage between the plaintiff and the defendant also lived at the house.

### Analysis

[14] A tacit term -

*"...is an unspoken provision of the contract. It is one to which the parties agree, though without saying so explicitly. The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, would immediately say, "Yes, of course that's what we agreed." Before a court can infer a tacit term, it must be satisfied that there is a necessary implication that they intended to contract on that basis."*<sup>4</sup>

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<sup>4</sup> *Food and Allied Workers Union v Ngcobo* NO 2014 (1) SA 32 (CC) para 37.

[15] An implied term is a term implied by law (which is why Rule 18(7) does not require a pleader to state the circumstances from which an implied term is to be inferred) but unfortunately the phrase is often used to describe a tacit term.<sup>5</sup> When reading case law referring to a tacit term, one must analyse the judgment to determine whether the term is used with reference to a term implied by law, or a term impliedly (i.e. tacitly) incorporated by the parties.

[16] A party who relies on a tacit contract is required to plead and prove the unequivocal conduct from which the tacit contract can be deduced.<sup>6</sup> A party relying on a tacit term must prove that there was no express agreement reached on the aspect in question<sup>7</sup> and when a party contends for a construction that departs from the *prima facie* meaning of the text, the circumstances relied upon for the interpretation must be pleaded.<sup>8</sup> This the plaintiff did not do.

[17] In the particulars of claim there are bald statements to the effect that the settlement agreement contained a tacit, alternatively an implied term to the effect that the spousal maintenance was terminable upon the defendant's death or remarriage, that the defendant is involved in a romantic relationship with a third party – the biological father of the child born during the marriage of the plaintiff and the defendant – and that the relationship amounts to or is akin to a marriage and/or permanent life partnership and/or cohabitation, that the defendant's relationship with the third party gives rise to the circumstances upon which the spousal maintenance is to be terminable, and consequently it is not just and equitable in the circumstances for the maintenance order to continue to exist, and the plaintiff should be discharged therefrom.

[18] Clause 2.4 of the settlement agreement provides that the plaintiff shall buy a motor vehicle for the defendant every five years until “*the death or remarriage of*” the defendant (then the plaintiff). Clause 4 provides for maintenance of R100 000 per month “*until the* [defendant's] *death*.” The plaintiff now seeks an order that clause 4 be read to contain a tacit or implied term that maintenance is terminable upon the defendant's death or remarriage, and (although there is no prayer to such effect in the prayers) that “*remarriage*” includes a

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<sup>5</sup> Van Loggerenberg DE and Bertelsmann E *Erasmus: Superior Court Practice* RS 18, 2022, D1-241.

<sup>6</sup> See *Roberts Construction Co Ltd v Dominion Earth-Works (Pty) Ltd and Another* 1968 (3) SA 255 (A).

<sup>7</sup> See *Nel v Nelspruit Motors (Edms) Bpk* 1961 (1) SA 582 (A).

<sup>8</sup> *SociÉTÉ Commerciale De Moteurs v Ackermann* 1981 (3) SA 422 (A).

cohabitation arrangement.

[19] Clause 6 of the settlement agreement provides that the agreement “*constitutes the whole agreement*” and there is nothing in the evidence, the conduct of the parties, and the circumstances of the matter that merits the inference that a tacit term such as contended for by the plaintiff, was agreed upon. It is also not so that reading the tacit term into the settlement agreement is the only reasonable interpretation of the agreement.

[20] Importing a tacit term that the maintenance liability should cease upon remarriage (or cohabitation) would be in conflict with the express wording of clause 4 of the agreement.<sup>9</sup>

[21] The term contended for is also not implied by law and there is no such statutory limitation on the freedom of contract in section 7(1) of the Divorce Act, 70 of 1979. In terms of section 7(1) a Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by one party to the other.

[22] It is only in the absence of a settlement agreement that section 7(2) applies. The Court then has the power to order payment of maintenance until the death or remarriage of the party in whose favour the order is given. The limitation is not found in subsection (1) and the legislature made a clear distinction in this regard.

[23] A reference to cohabitation in clause 4 of the settlement agreement is therefore neither a term implied by law nor a term tacitly agreed upon by the parties. If it had been the intention of the parties to include cohabitation in clause 2.4 of the agreement, there is no reason why they would not have said so. The parties expressly chose to refer to “*death or remarriage*” in clause 2.4 and to “*death*” in clause 4. The plaintiff argues that the phrase “*until the Plaintiff’s death*” in clause 4 included a tacit reference to remarriage but there is no logical reason why firstly a tacit or implied term that maintenance is terminable upon death *or remarriage* must be read into the contract, and then secondly that the well-known word “*remarriage*” must be interpreted to include something that is not a marriage but a cohabitation. No argument can be made out to explain why they tacitly agreed that remarriage be included in clause 4 when it was expressly included in clause 2.4 and excluded in clause 4, and that it was then also tacitly agreed that cohabitation be included in

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<sup>9</sup> Compare *Odgers v De Gersigny* 2007 (2) SA 305 (SCA) para 10.

the concept of remarriage.

[24] For the sake of completeness it is important to note also that the plaintiff does not rely on rectification. This is not a matter where the parties had agreed that maintenance would cease upon remarriage but that due to a common error, the reference to remarriage was not included in clause 4.1 of the agreement. The plaintiff expressly avowed reliance on the remedy of rectification.

[25] The order that was made by Vorster AJ was an order by consent between the parties and there is no indication in the pleadings or the evidence as to why the order would be *“incompetent.”* The averments relating to *“incompetence”* found in the particulars of claim seem to relate to the incorrect stance adopted by the plaintiff that a maintenance liability terminable only by death is not to be recognised in the law (particularly section 7(1) of the Divorce Act).

[26] Rescission and variation of a court order is dealt with in Rule 42 of the Rules of Court, in the common law, and in section 8 of the Divorce Act. In argument the plaintiff’s counsel quite correctly did not seem to rely on the common law or on Rule 42, the rule that applies to an order sought or granted erroneously, or granted because of an ambiguity or because of a mistake common to the parties.

[27] Section 8 of the Divorce Act provides for the rescission, variation or suspension of maintenance orders *“if the court finds that there is sufficient reason therefor.”* The corresponding phrase in the previous legislation<sup>10</sup> was *“good cause”* and the two phrases<sup>11</sup> have the same meaning.<sup>12</sup>

[28] The Courts have, for obvious reasons, refrained from an exhaustive definition of *“sufficient reason”* or *“good cause.”* In the absence of a change of circumstances a Court is not likely to interfere<sup>13</sup> but a change of circumstances is not a statutory requirement. The particular circumstances of each case must be considered and the Court may vary an ill-considered agreement when it is *contra bonos mores*. In *Baart v Malan*<sup>14</sup> the Court deleted

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<sup>10</sup> Section 10 of the Matrimonial Affairs Act, 37 of 1953.

<sup>11</sup> The Afrikaans text in both the old and the new Act referred to *“voldoende rede.”*

<sup>12</sup> *Levin v Levin* 1984 (2) SA 298 (C).

<sup>13</sup> *Havenga v Havenga* 1988 (2) SA 438 (T) 445.

<sup>14</sup> *Baart v Malan* 1990 (2) SA 862 (E).

maintenance provisions from a settlement agreement on the basis that the provisions whereby the applicant undertook to pay her whole income to the respondent as maintenance for their children, were *contra bonos mores*.<sup>15</sup> However, an unjust<sup>16</sup> settlement is not necessarily *contra bonos mores*. Parties have freedom of contract and it is not for the Court to make a contract for the parties.

[29] Remarriage may possibly constitute sufficient reason for the rescission or variation of a maintenance order in terms of section 8 of the Divorce Act, but there is no room for an implied term to effect automatic termination of maintenance upon remarriage.<sup>17</sup>

[30] The evidence falls short of confirming a permanent cohabitation arrangement, and no case is made out for a variation or rescission of clause 4 of the settlement agreement in terms of section 8 of the Divorce Act.

### *Contra preferentem*

[31] The agreement was drafted by the defendant's attorney and the plaintiff's counsel argued that the agreement ought to be interpreted *contra preferentem*.<sup>18</sup> The rule is a rule of last resort, to be applied when all other methods to ascertain the intention of contracting parties have failed. In the present matter there is no ambiguity and no room for application of the rule.

### Contracts of unspecified duration

[32] In argument the plaintiff's counsel relied also on *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd*<sup>19</sup> where the Court interpreted a specific contract and recognised a tacit term allowing for termination of a commercial co-operation agreement of unspecified

<sup>15</sup> The *locus classicus* is *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)

<sup>16</sup> *Reid v Reid* 1992 (1) SA 443 (E).

<sup>17</sup> *Welgemoed v Mennell* 2007 (4) SA 446 (SE) 450E – 451B.

<sup>18</sup> Compare *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A).

<sup>19</sup> *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 (5) SA 287 (SCA).

duration on reasonable notice. There was no express term dealing with the duration of the agreement nor any indication that the parties intended to be bound in perpetuity.

[33] The present matter is of course distinguishable on the facts: The duration of the maintenance obligation is specified in the settlement agreement and it is perfectly acceptable to agree to pay maintenance until death.

#### The recognition of relationships other than marriage

[34] It was argued on behalf of the plaintiff that the recognition<sup>20</sup> of same-sex relationships and permanent life-partnerships between people merited the recognition of co-habitation as a '*marriage*' and therefore that the alleged cohabitation between the defendant and the third party meant that the duty to maintain in paragraph 4 of the settlement agreement was terminable. There is no merit in the argument.

[35] The fact that the law now recognises other relationships as akin to marriage and the parties to such relationships equally deserving of the protection of the law, does not mean that in the settlement agreement now before Court the word '*marriage*' should be given an extended definition never intended by the parties.

#### Conclusion

[36] For all the reasons set out above, I make the order in paragraph 1.

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<sup>20</sup> See *Bwanya v the Master of the High Court and Others* 2022 (3) SA 250 (CC), *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC), *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), *Pillay v Naidoo* 2022 JDR 0445 (GJ), and *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C).

**J MOORCROFT**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

***Electronically submitted***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **23 MAY 2023**.

|                            |                        |
|----------------------------|------------------------|
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| DATE OF THE HEARING:       | 15 & 16 MAY 2023       |
| DATE OF JUDGMENT:          | 23 MAY 2023            |