

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCE, BLOEMFONTEIN

Case No.: 2962/2013

In the matter between:

G[...] F[...] V[...]

Applicant

and

L[...] V[...]
B[...] V[...]

First Respondent
Second Respondent

JUDGMENT: SESELE, AJ

HEARD ON: 7 NOVEMBER 2013

DELIVERED ON: 28 NOVEMBER 2013

- [1] This is an application for the declarator that the first respondent's right to maintenance in terms of the Settlement Agreement which was made a court order on 9 October 2008 under case number 5806/2008 has lapsed; that the Warrant of Execution issued by the Registrar under case number 5806/2008 be set aside, and that the second respondent be ordered to uplift any attachment made in terms of the Warrant of Execution dated 27 May 2013, alternatively, that the Warrant of Execution issued under case number 5806/2008 be suspended.

- [2] The first respondent launched a counter-application for the simultaneous hearing with the main application for an order that the applicant be ordered to comply with the maintenance order in terms of the Deed of Settlement which was made a court order under case number 5806/2008 on 9 October 2008; that the applicant be ordered to pay the arrear maintenance and that the second respondent be authorised to realise the applicant's attached assets and to deal with the proceeds thereof at the second respondent's discretion.
- [3] The application and the counter-application turn on the terms of the Settlement Agreement *inter alia* clause 2 which provides:

“Eiseres se reg om onderhoud sal verval by hertroue of afsterwe, welke ookal eerste mag plaasvind of wanneer sy as man en vrou saam met 'n ander man saamleef.” **(my emphasis)**

Clause 4:

“... Gemelde reg sal verval by Eiseres se hertroue of sodra sy met 'n ander mand saamwoon as man en vrou ...”

- [4] The order in this matter can only be granted if the applicant's averments which are not in dispute and the first respondent's admissions justify the granting of the order – **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) 623 (A) at 634 – 635.

- [5] The test for determining whether the first respondent lives together with another man as the applicant contends is set out in **Drummond v Drummond** 1979 (1) SA 161 (AD) at 167A as “living under the same roof, establishing, maintaining and contributing to a joint household and maintaining an intimate relationship”.
- [6] The first respondent admits the intimate relationship with Mr W[...] who has been her fiancé since January 2013 and they intend to marry on 1 [...]. The first respondent denies that she and Mr W[...] live as husband and wife as the applicant contends. The first respondent admits that she regularly visits Mr W[...]’s house, keeps some of her furniture there, and has moved her dog-breeding business to that house because of lack of space at the single flat which she rents.
- [7] In addition to the above the first respondent admits that her children visit her at Mr W[...]’s house because her flat is small. Furthermore, the first respondent spends time with her children and Mr W[...]’s children at Mr W[...]’s house to build a relationship for the eventuality of her marriage to Mr W[...]. The photos on which the applicant relies are indeed photos of the first respondent, the children and her furniture at Mr W[...]’s house.
- [8] Significantly, the first respondent avers that Mr W[...] does not maintain her and she does not expect him to do so as she no longer wants to be financially dependent on anyone as she used to be while she was married to the applicant. This explanation must be accepted because it makes sense.

- [9] The applicant instructed the private investigator, Mr Buitendag, on 4 April 2013 to establish whether the first respondent indeed lives at Mr W[...]’s house. In Mr Buitendag’s report (annexure “C” to the founding affidavit) it is noted *inter alia* that on 4 April 2013 both the first respondent and Mr W[...] came out of the house to meet him; that on 10 April 2013 the first respondent, in answer to the question whether he may collect the puppy which he had bought on any day the first respondent said: “Yes, I am always here”. The first respondent thereafter took Mr Buitendag through the house and while doing so, Mr Buitendag got the impression that she knows the house well.
- [10] In my view Mr Buitendag’s observations on 4 April 2013 and 10 April 2013 are not sufficient to support the applicant’s case for the following reasons: the first respondent and Mr W[...]’s are engaged, the first respondent regularly visits Mr W [...], her children visit her there and her dog-breeding business is based there.
- [11] It is common cause that the first respondent rents a flat in terms of a lease agreement, keeps some of her belongings there, and receives municipal accounts in respect of the flat. The first respondent further avers that she maintains the flat as her home. The explanation is plausible and I accept it.
- [12] In **Watson v Watson** 1959 (1) SA 185 (N) at 187G-H it was held that considerable intimacy of a spouse to another man without being married does not constitute an implied term

prohibiting such living together in a deed of settlement similar to the deed in this case.

- [13] In **DBG v NG**, case number 7032/2003, delivered on 24 February 2011, at paragraph 14 it was held that proof of the existence of a personal and intimate relationship is not sufficient to infer that the parties are living as husband and wife. In order to justify a finding that the parties are living as husband and wife the court must be satisfied that they are living under the same roof and have established, maintained and contributed to a joint household.
- [14] The first respondent does not admit living together with Mr W[...] as husband and wife. The explanation furnished by the first respondent is not far-fetched or untenable so as to warrant rejection or referral to oral evidence – **Administrator, Transvaal and Other v Theletsane and Others** 1991 (2) SA 192 at 197A-B, **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at para [26].
- [15] The applicant stopped paying maintenance effective from 1 May 2013 when he considered his maintenance liability to have lapsed. The applicant's attorneys directed a letter to the first respondent on 18 April 2013 to this effect. The first respondent, through her attorneys of record, disputed the applicant's grounds for stopping maintenance. The attorneys also attached the first respondent's lease agreement and the municipal account as proof that the first respondent does maintain her own residence.

- [16] The applicant should have approached the maintenance court for an order to terminate the maintenance order - **Bannatyne v Bannatyne** 2003 (2) SA 359 (SCA).
- [17] The first respondent was entitled to enforce payment of maintenance by having issued the Warrant of Execution to enforce the court order which had to be obeyed as it has not been set aside – **Sparks v Sparks** 1998 (4) SA 714 (W) at 726E-F.
- [18] The first respondent was within her rights to launch the counter-application. Failure to have done so would have resulted in her being prejudiced because the applicant seeks, *inter alia*, an order to suspend execution of the Warrant of Execution pending a determination by the maintenance court.
- [19] The first respondent has been successful in her opposition to the main application. The counter-application should succeed. There is therefore no reason in law not to grant her costs.
- [20] **ORDER**
- 20.1 The application is dismissed with costs.
- 20.2 The counter-application is upheld with costs.
- 20.3 The applicant is ordered to comply with the court order under case number 5806/2008 granted on 9 October

2008 in respect of payment of maintenance in terms of clauses 2 and 4 of the Deed of Settlement.

20.4 The applicant is ordered to pay all arrear maintenance owing to the first respondent within 14 days from the date of this order.

20.5 The Sheriff of this court is authorised to realise the applicant's attached property and to deal with same at his discretion.

L. M. S. SESELE, AJ

On behalf of the applicant: Adv. C. D. Pienaar
Instructed by:
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On behalf of first respondent: Adv. J. S. Rautenbach
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