

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 763/2010

In the case between:

NYEFOLO DAPHNEY QONQO

Applicant

and

ELIEA JAN QONQO

Respondent

CORAM:

LEKALE, AJ

JUDGMENT:

LEKALE, AJ

HEARD ON:

4 MARCH 2010

DELIVERED ON:

11 MARCH 2010

[1] This is an application in terms of Rule 43 of the Uniform Rules of Court for:

[1.1] maintenance, inclusive of the use of a motor vehicle, pendente lite in favour of the applicant;

[1.2] contribution towards the costs of the divorce action between the parties which is pending before this court.

- [2] The parties have not been living together since the 29th December 2009 with the respondent husband remaining at the common house.
- [3] Prior to the 29th December 2009 the applicant wife had the use of an Isuzu motor vehicle and was somewhat involved in the administrative side of the family security business which is being conducted through a close corporation of which she is a member. Her monthly income from the said business was R5 000,00.
- [4] The Isuzu motor vehicle has since been seized and returned to the respondent on the strength of a spoliation order issued by the magistrate's court. The relevant spoliation proceedings were still pending in the said court as at the date of hearing this application viz. the 4th March 2010.
- [5] The parties are in agreement that the respondent was responsible for the monthly expenses of the common home inclusive of the applicant's expenses while the latter was allowed to use her income of R5 000,00 for herself.
- [6] The motivation for the application is that the applicant is currently without income and is, further, without the means of transport.

[7] The thrust of the respondent's opposition is that the applicant presently cohabits with her boyfriend who, most probably, assists her financially.

[8] In support of the respondent's contention that the applicant's boyfriend should attend to her financial needs **Advocate Wright**, appearing for the respondent, relies mainly on the decision of this court in **SP v HP 2009 (5) SA 223(0)** where it was held, per Musi JP endorsing the decision in **Carstens v Carstens 1985 (2) SA 351 (SE)** at paragraph [10], that

“It has been laid down that it is contrary to justice and equity that a person in the applicant's position should at the same time collect support from her husband as well as from her ‘putative’ second husband (Carstens at 3531, citing Hahlo).”

[9] The duty of support existing between married couples is reciprocal and flows from the marital relationship which “**creates a physical, moral and spiritual community of life, a consortium omnis vitae.**”

(see **Sinclair on The Law of Marriage Vol.1 Juta & Co 1996 @ 422** and **Peter v Minister of Law and Order 1990(4) SA 6(E) @ 9**)

[10] The decision in **SP v HP** (supra) is, however, no authority for the proposition that cohabitation with a spouse's paramour relieves the spouse's lawfully wedded partner of the duty of support vis-à-vis the

spouse and saddles the paramour with such a duty. The court in that decision held that:-

“The objection is not so much about the moral turpitude attaching to the illicit cohabitation, but more about the notion of a woman being supported by two men at the same time...”

(see paragraph [10] in *SP v HP* (supra))

[11] It follows from the said decision, which I may emphasise is not inconsistent with the consortium created by marriage, that for the respondent to be relieved of his duty of support towards the applicant as his wedded wife, it should be clear, on the balance of probabilities, that the applicant's boyfriend gives her financial support. The mere fact that they cohabit is, in my view, insufficient for that purpose.

[12] In my view the principle is that, even where the applicant does not cohabit with her paramour, if the evidence proves that she receives support from her boyfriend, the respondent is thereby relieved of his duty of support towards her in an appropriate case.

[13] The present matter is distinguishable on the facts from **SP v HP** (supra) and **Carstens v Carstens** (supra) insofar as:

[13.1] in *Carstens* it was common cause between the parties that the applicant had a common budget with her paramour whose name was also apparent from the papers before the court;

[13.2] in SP v HP the name of the live-in boyfriend was disclosed as well as his occupation which was given as being an electrician. The issue of support to the applicant in that matter was stated as a fact insofar as the respondent deposed that the paramour was employed and maintaining the applicant;

[13.3] in the present matter neither the name nor the occupation of the boyfriend is apparent ex facie the material properly before the court. The inference that the applicant receives financial support from her paramour is drawn by the respondent from the fact that the two cohabit and that **“no proof of the details pertaining to obtaining employment are made”** by the applicant in her supporting affidavit.

[14] There is, with respect, no basis whatsoever before the court from which an inference that the applicant receives support from her boyfriend can be drawn. Such a conclusion is a matter of speculation and conjecture and is, apparently, nurtured by suspicion on the part of the respondent.

[15] The respondent, further, maintains that he is financially unable to meet the applicant's needs. I am, however, not persuaded by this argument because, in his papers, he gives the reason for stopping to support the applicant as being the fact that the parties are not staying

together and the extra-marital affair in which the applicant is engaged as well as the fact that the applicant no longer assists him in the business.

- [16] A further bone of contention between the parties is the applicant's real or actual needs. I am, however, prepared to accept that her needs amounted to at least R5 000,00 per month as at the 29th December 2009 insofar as the parties are ad idem that that was the amount which the respondent allowed her to use exclusively for her maintenance while he attended to her other monthly expenses.
- [17] The parties are, further, in agreement that it is not appropriate for this court to decide on the issue of the motor vehicle with **Advocate Reinders**, for the applicant, opining that it would, probably, have been advisable for the present application to have stood down until the spoliation application has been determined by the Magistrate's Court. I am in agreement with the parties in this regard.
- [18] There is, effectively, no dispute between the parties over the need for as well as an appropriate contribution towards costs. In this regard the respondent party requested that the contribution in question be directed to be made by way of monthly instalments while the applicant, on her part, effectively acquiesced to the proposal through her counsel.

ORDER:

[19] When all is said and done I am satisfied that the following is an appropriate order:

[19.1] the respondent is directed to pay R5 000,00 to the applicant pending finalisation of the divorce action with effect from the 1st April 2010 and monthly thereafter on or before the 7th day of each succeeding month;

[19.2] the respondent is, further, directed to pay R3 500,00 to the applicant as contribution towards the costs of the divorce action at the rate of R500,00 commencing on the 1st April 2010 and monthly thereafter on or before the 7th day of each succeeding month;

[19.3] the costs of the application shall be costs in the divorce action.



L.J LEKALE, AJ

On behalf of applicant:

Adv Reinders
Instructed by:
Hill, McHardy &
Herbst

On behalf of respondent:

Adv Wright
Instructed by:
McIntyre & Van Der
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