

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 2057/2008

In the case between:

SUSARA JOHANNA VAN DE POL

Applicant

and

HENDRIK VAN DE POL

Respondent

JUDGMENT: H.M. MUSI, JP

DELIVERED ON: 29 MAY 2008

[1] On 23 May 2008 I granted an order dismissing the application herein and indicated that my reasons would follow. Such reasons follow hereunder.

[2] This is a Rule 43 application brought by the applicant against her husband, the respondent, for maintenance *pendent elite* for herself only. The parties are no longer staying together as man and wife, the applicant having left the common home on 24 November 2007. She has since instituted an action for divorce which is pending in this

court. She says that the marriage relationship between herself and the respondent has broken down irretrievably and that she has no intention of returning to the common home. I should mention that the parties were married to each other out of community of property on 20 May 1988.

- [3] The basis of the claim for maintenance *pendente lite* is that the applicant is unemployed and has no means of supporting herself. She says that since her departure from the common home she has been living with friends and such friends have been providing her with her daily needs. She says that she can no longer depend on the goodwill of friends and now wants the respondent to resume maintaining her. She has submitted a statement of her monthly financial requirements totalling R4 500,00. She wants the respondent to contribute an amount of R3 000,00 per month towards those needs. She is also claiming a contribution towards the costs of her divorce action in the amount of R5 000,00.

- [4] I should mention at this stage that the couple have two minor children, both girls age 15 and 14 respectively. It is common cause that these children have been placed in the care of the respondent's brother in Bela Bela (formerly Warmbaths) pending a final decision by the Children's Court. They have been with the respondent's brother since November 2007 to date.
- [5] The respondent is opposing the application, essentially on two grounds. Firstly, he alleges that the applicant was not forced to leave the common home but that she left of her own accord in order to join her extra marital lover, one Thys de Villiers. He alleges that the applicant has been conducting a illicit love affair with this man all along and has been living with him since her departure from the common home. He says that Thys de Villiers is employed as an electrician and is maintaining the applicant. The second ground is that the respondent cannot afford to pay the amounts claimed. He has submitted a list of his monthly expenditure which shows that his total expenditure

exceeds his monthly income of R8 000,00. The statement shows that he contributes an amount of R2 000,00 per month towards maintenance of the two minor children.

- [6] The cardinal question is whether the respondent is exonerated from contributing towards the applicant's maintenance by virtue of the applicant's alleged cohabitation with another man. In support of this allegation of an illicit love affair, the respondent has annexed to his answering affidavit, marked "A", a report compiled for the Children's Court by a Social Worker attached to a welfare organisation called Free State Care in Action on 27 November 2007. It is apparently on the basis of this report that the parties' two minor children were placed in the custody of the respondent's brother. The report narrates a sad history of "ernstige huweliksprobleme met gepaardgaande drankmisbruik, aanranding en buitegtelijke verhoudings deur Mev. Van de Pole." It points out that the respondent is a truck driver whose work takes him away from home during the week and that in his absence the

applicant would leave the children alone to visit her boyfriend. The theme that the applicant conducted an extra marital affair permeates the whole report alongside allegations that she abused alcohol and of assaults on her allegedly perpetrated by the respondent.

[7] In a nutshell, the report supports the respondent's allegation that the applicant conducted an illicit love affair. In her founding affidavit, the applicant mentions that the minor children were placed in the care of the respondent's brother by the Social Workers at Bothaville but does not allude to the reasons for their removal nor does she allude to the welfare report at all. In oral argument in this court, her counsel did not challenge the authenticity of such report.

[8] In applications of this nature it is not always possible to establish the true facts or make any definite findings of fact precisely because of the nature of the proceedings. The pleadings are by way of affidavits where only a founding

affidavit and an answering affidavit are normally filed. However, where a respondent raises in the answering affidavit a serious, contentious issue, the applicant can apply for permission to respond by way of a replying affidavit. In this case no attempt was made to respond to the serious allegations made in the answering affidavit that the applicant is living with another man who apparently supports her. And, as I have said, such allegations find support in the report of the social worker. I must decide the matter on the basis of the papers before me and on such papers there is nothing to gainsay the respondent's version on the point in issue and I accordingly accept it for purpose of this judgement.

- [9] Ms. Wright, for the respondent, referred to the case of **CARSTENS v CARSTENS** 1985 (2) SA 351 (SECLD) and urged me to refuse the application on the authority thereof. The following was stated in this case at 353 F:

i°It is in my view against public policy that a woman should be entitled to claim maintenance *pendente lite* from her husband

when she is fragrantly and deliberately living as man and wife with another man.”

The question is whether this dictum is applicable to the instant case. Mr. Coetzer, for the applicant, submitted that the facts of the instant case are distinguishable. He said that in **CARSTENS** the applicant had not only been living with another man but had also committed adultery as a result of which a child was born and that she and her lover lived together as man and wife. In effect counsel suggested that the applicant is less morally culpable and for that reason the dictum should not apply.

- [10] With respect, I do not see what is the difference between a woman who has given birth to a child by her extra marital lover with whom she lives and one who has simply moved in with her lover and is living him. They are both cohabiting with their lovers and it matters not whether or not a child has been born out of the illicit love affair. 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 353i, citing Hahlo). 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. I hold therefore that the dictum in **Cartens** is applicable to the instant case.

- [11] In **Carstens** a contribution towards costs was awarded in spite of the fact that maintenance *pendent elite* had been refused. The rationale for this was that the parties were married in community of property and as such the applicant had a share in the assets of joint estate. It was held that she was entitled to claim such share through the divorce action and for that reason she was entitled to a contribution towards the costs to enable her to pursue her claim. In *casu*, the parties are married out of community of property and there is no indication on the papers that she is making any claim against the estate of the respondent.

[12] I accordingly declined to order contribution as well and dismissed the application.

H.M. MUSI, JP

On behalf of the applicant: Adv. J. C. Coetser
Instructed by:
Horn Van Rensburg
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On behalf of the respondent: Adv. G. J. M. Wright
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