

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 13600/2023P

In the matter between:

K[...] L[...] F[...]

APPLICANT/DEFENDANT

And

D[...] R[...] P[...]

RESPONDENT/PLAINTIFF

JUDGMENT

P C BEZUIDENHOUT J:

[1] On 13 September 2023 Respondent herein (as Plaintiff therein) instituted an action in this court against Applicant (as Defendant therein) wherein he claims that he and Applicant had a domestic partnership agreement and claims the following relief:

1. An order confirming the dissolution of the spousal relationship existing between the parties.
2. An order appointing a liquidator with authority to value and realise the joint estate and the jointly owned assets of the parties and to liquidate the joint liabilities with the parties and to prepare a final account paying to the parties whatever is owing to them by virtue of the spousal relationship.

3. An order declaring that a partnership alternative that a universal partnership exist between the parties in respect of the business subsequently registered as “Little Fields”.
4. An order that the parties relationship alternatively that universal partnership in respect of the business formally known as “Little Fields” subsequently registered as “Little Fields” be dissolved.
5. An order that a liquidator be appointed to take charge of all assets of the partnership alternatively universal partnership, dispose of same, pay all debts of the partnership alternatively universal partnership and divide the net proceeds equally between the parties.
6. Costs of suit.

[2] It was alleged in the particulars of claim on 24 February 2023 the parties entered into a notarial agreement and confirmed that they had been in a good faith heterosexual spousal relationship for more than 5 years; that it entailed reciprocal duties and that they had previously signed a cohabitation agreement. A copy of the said notarial agreement is attached to the particulars of claim. It sets out that they have been in such a heterosexual spousal relationship for more than 5 years which is intended to be permanent and to the exclusion of any other person and their relationship continues to subsist. This spousal relationship entails reciprocal duties care and support and refers to a cohabitation agreement signed on 17 December 2020.

[3] At the time that the action was instituted Respondent was permanently resident in South Africa in the jurisdiction of this court but subsequently relocated to England where he had originally come from. He alleges in the particulars of claim that he contributed in excess of £50 000 to the farming operation to purchase assets etc.

[4] Besides the notarial agreement signed on 24 February 2023 Applicant and Respondent signed a cohabitation agreement before a notary public on 17 December

2020. It commences with the preamble that the parties are living together under a domestic partnership arrangement and have been since February 2015. On 17 December 2020 Applicant and Respondent also signed an affidavit before a commissioner of oaths which is headed “Affidavit in respect of parties to a permanent spousal relationship” on a form of the Department of Home Affairs. Therein they stated that they were parties to a spousal relationship for the past 5 years and 10 months. None of these three documents were attached to Applicant’s founding affidavit.

[5] Applicant in her plea in response to the documents referred to above states that the parties entered into an informal arrangement which could be equated to a domestic partnership for purpose of convenience only. This informal arrangement was solely for purposes of regulating the financial implications flowing from their platonic friendship. She denies that there was any good faith heterosexual spousal relationship between the parties.

[6] Applicant on 17 November 2023 applied for an interim protection order in terms of section 5(2) of the Domestic Violence Act 116 of 1998 in the Magistrates’ Court Howick. In the papers there is no affidavit attached relating to this application and it is accordingly not possible to determine what was alleged transpired and which allowed the Magistrate to grant the said interim protection order. However the fact that such an application was brought in term of the Domestic Violence Act is indicative that there was some domestic relationship between the parties as appears from the affidavits referred to above dated 24 February 2023 and 17 December 2020.

[7] The interim protection order was anticipated by Respondent on 20 November 2023. The parties entered into a settlement agreement with heading “draft order” stamped by the Magistrate on 12 December 2023. The ruling/judgment by the learned Magistrate on 12 January 2024, after the settlement had been reached, states that “Application withdrawn IPO not extended and the matter removed from the roll.”

[8] In the said settlement agreement it was agreed *inter alia* that Respondent could reside on the farm until he left the country and that an airline ticket would be purchased for him by Applicant. It was also agreed that in respect of any benefit due to him in respect of the flock of sheep on the farm and freight costs relocating to the United Kingdom Applicant would pay to him an amount of R250 000.00 to be paid into his attorney's trust account. Applicant would also do all that is necessary and sign all documents necessary to sell and transfer the Land Rover vehicles and a trailer which are to be sold. The proceeds would be paid to Respondent. Respondent's rights in respect of the High Court Action under case number 13600/2023P are reserved.

[9] Respondent returned to the United Kingdom at the end of December 2023. On 26 January 2024 Applicant brought an application that Respondent be directed to give security for costs in relation to the action which I have referred to in the sum of R 200 000.00 and that the action be stayed until such time that Respondent has provided such security. The application is opposed by Respondent. It is common cause that Respondent is now a *peregrine* and that Applicant may request that security for costs be provided.

[10] It was submitted on behalf of Applicant that the action was vexatious and one way of preventing vexatious litigation is to direct that Plaintiff furnish security for costs. It was submitted that the agreements relied upon by Respondent militate against the conclusion propounded by Respondent that any sort of partnership was formed or on came into existence between the parties. It was further submitted that Respondent attempted to mislead the Court in relation to the Draft Order agreed to in the family violence proceedings as he stated in his affidavit that it had not been made an order of Court.

[11] It was submitted that Respondent as a *peregrines* owns no immovable property in South Africa, that he does not own anything and on his own version is in debt, attempting to start life afresh in the United Kingdom.

[12] From what I have set out above it is, in my view, apparent that it cannot be said that the action is vexatious as what is contained in the said affidavits which are attached to the papers and which were also on two occasions signed before a notary public that indeed there was on paper a of domestic relationship between the parties and if it was not so that someone was not being truthful as to the state of affairs. The affidavit on the form of the Department of home Affairs refers to “A permanent spousal relationship.”

[13] In my view, there is nothing in the papers to indicate that it has been instituted *male fide* or vexatious. The only issue is thus whether, as a *peregrine* Respondent should be ordered to pay an amount as security for costs. Applicant provided a judgment by Pillemer AJ which relates to two companies but where it was held that ordering security against a *peregrinus* is the usual practice and that he was not satisfied that any of the grounds relied upon as to why security should not be awarded were valid. One of the reasons relied upon was that Defendant would have to proceed against Plaintiff overseas to obtain costs in its favour an increased expense in the event of being successful.

[14] It was submitted on behalf of Respondent that it has to be considered whether the claim was made in good faith and has reasonable prospects of success. Should Applicant be successful with a costs order why that would not be recoverable in Respondent's jurisdiction. It was submitted that the settlement agreement which was reached at the domestic violence proceedings was not in full and final settlement as Respondent had specifically, in the last paragraph, stated that he reserved all his rights in respect of the main action.

[15] On behalf of Respondent I was referred to judgment of Binns-Ward J. in the matter of Donal Anthony McHugh N.O. & others v Paul Michael Wright case number 5641/2020 Western Cape Division where it was held that in *Magida v Minister of Police* 1987 (1) SA 1 (A) Joubert JA identified that an incola enjoyed no right under the common law to require a non-domicile foreigner claimant to provide security for these costs as a matter of course. It was held in held in paragraph 33:

“In all the circumstances Wright is going to be stretched to afford his own legal costs, let alone also those of the respondents if he is unsuccessful in the litigation. That is a factor weighing in favour of the parties seeking security for their costs, but, as the principles rehearsed above show it is not of itself a decisive one.”

[16] It considered whether the litigation was frivolous or vexatious. As I have already referred to above, in my view, it cannot be said that the litigation is frivolous or vexatious especially considering the various affidavits under oath, two before a notary public where Applicant specifically refers to a domestic relationship. Respondent was also not misleading the court by stating the settlement was not made an order of court. Although it's heading “draft order” it was not made an order of court as appears from the courts order referred to in paragraph 7 above. It is indeed so that it is not necessary at this stage for the merits of the action to be considered especially having found it is not vexatious. The question therefore is whether Applicant will be able to recoup the costs in the event of being successful in the litigation.

[17] It was held in Magida at 15 E:

“The Roman Dutch Authorities referred to supra emphasise that no one should be compelled to furnish security beyond his means and that a *peregrinus* should not on account of his impecuniosity be deprived from prosecuting his action against an *incola*.”

[18] Respondent appears to have the money which is in his attorney's Trust account and should also have the money from the vehicles and trailer.

[19] Applicant has however failed to set out all the facts in her founding affidavit and wrongly accused Respondent of misleading the court. It is also not so that what is contained in her affidavits does not support Respondent's contentions.

[20] It may be a more costly process for Appellant to recover her costs if successful but although there is nothing to indicate that it cannot be done I am of the view that some security for costs should be granted in the amount set out in the order.

[21] However due to the factors I have mentioned above I am of the view that no costs order is justified.

Order:

An order is granted in terms of paragraphs 1, 2, 3 and 4 of the Notice of Motion the amount in paragraph 1 to be R 75 000.00.

P C BEZUIDENHOUT J.

JUDGMENT RESERVED: 1 AUGUST 2024

JUDGMENT HANDED DOWN: 19 AUGUST 2024

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