IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 7032/03

In the matter between:

D B G Applicant

and

N G(born DE H) Respondent

JUDGMENT DELIVERED: 24 FEBRUARY 2011

FOURIE, J:

[1] Applicant has brought an urgent application for the staying of four warrants of execution issued out of this court by respondent under case number 7032/2003, until such time as an action to be launched by applicant seeking, *inter alia,* the setting aside of such warrants, has been finally determined. Respondent opposes the application. I should add, that the intended action setting aside the said warrants, was instituted by applicant on 3 December 2010.

[2] The background to the application may be briefly summarised as follows:

The parties were previously married to each other. The marriage was terminated upon this court issuing a decree of divorce on 17 October 2003, when a consent paper entered into between the parties was made an order of court. Paragraph I of the consent paper makes provision for the payment of maintenance by applicant to respondent until respondent's death, remarriage or cohabitation in a relationship analogous to that of husband and wife for a period exceeding 6 months, whichever event shall first occur. Applicant contends that respondent has been cohabiting with a third party, one Alistair Wood, in a relationship analogous to that of husband and wife for a period exceeding 6 months and he has accordingly ceased paying maintenance to respondent. The aforementioned warrants were issued by respondent in respect of the outstanding maintenance payments. Pursuant to an application brought by respondent regarding sendee of the warrants, applicant has launched this application.

[3] Respondent opposes the application on several grounds relating to the merits thereof, as well as on the basis that the matter is not urgent. In view of the conclusion that I have reached, it is not necessary for me to deal with the issue of urgency.

[4] Clause 1 of the consent paper, expressly provides that applicant's obligation to pay maintenance to respondent shall continue until her death, remarriage or

cohabitation in a relationship analogous to that of husband and wife for a period exceeding 6 months, whichever event shall first occur. As I see it, the obligation to maintain respondent is subject to a resolutive condition (death or remarriage or cohabitation), the fulfilment of which would terminate applicant's obligation to effect payment of maintenance. Put differently, the obligation to pay maintenance shall continue until one of the events occur, which would terminate the obligation.

[5] The parties are agreed that the onus to prove the fulfilment of the resolutive condition, i.e. cohabitation by respondent in a relationship analogous to that of husband and wife for a period exceeding 6 months, rests upon the applicant. As the relief sought entails the suspension of the execution of a court order, rule 45A of the Uniform Rules of Court, comes into play. It provides that a court may suspend the execution of any order for such period as il may deem fit, thereby affording the court a discretion of the widest kind and imposing no procedural or other limitation on the power so conferred. (See **Road Aecident Fund v Strydom** 2001 (1) SA 292 (G) at 301 B-C). In **Strydom** it was emphasised, at 304, that courts will, generally speaking, grant a stay of execution where real and substantial justice requires such a stay or where injustice would otherwise be done. As pointed out by Erasmus, **Superior Court Practice,** at Bl -330A, a court could, in the determination of its discretion under Rule 45A, with advantage borrow from the requirements for the granting of an interim interdict. However, this does not mean that only the principles relative to an interim interdict have to be followed in the exercise of

the court's discretion in an application under Rule 45A.

[6] In **RAF v Strydom,** supra, at 304-306, the court did borrow- from the requirements for the granting of an interim interdict. It found that an injustice would be done to applicant by way of irreparable harm being caused to it if execution for the full balance of the judgment plus costs were to take place at the instance of respondent, who would probably afterwards not be able to satisfy the costs order in applicant's favour. Therefore, the court held that the balance of convenience favoured applicant and that applicant had no other satisfactory remedy.

The first step in the enquiry whether real and substantial justice requires a stay of the warrants pending the final determination of the action instituted by applicant, is to determine whether it has been shown by applicant that respondent is cohabiting with Wood in a relationship analogous to that of husband and wife for a period exceeding 6 months. If one borrows from the requirements for the granting of an interim interdict, applicant has to demonstrate that he has a clear right, or at least a *prima facie* right, to the relief sought in the main action. I should mention that in the main action applicant seeks an order declaring that the aforementioned resolutive condition has been fulfilled and that his liability to pay maintenance to respondent has been terminated, as well as an order setting aside the four warrants of execution.

[8] At the outset it is necessary to determine the common intention of the

parties by having regard to the words used by them in the consent paper, viz *"the aforementioned payments will continue until plaintiff's .....cohabitation in a relationship analogous to that of husband and wife for a period exceeding six months ....* " (my emphasis). What did the parties intend to convey by using these words in formulating the resolutive condition in the consent paper?

[9] The ordinary meaning of the word *"cohabit"* is defined in the Concise Oxford English Dictionary as *"live together, and have a sexual relationship without being married"*. There is no indication in the consent paper that the parlies intended the word *"cohabitation"* to have a meaning different from the ordinary meaning of living together without being married.

[10] In **Drummond** v **Drummond** 1979 (1) SA 161, the Appellate Division had occasion to interpret the phrase *"living together as man and wife",* as follows at 167B-C:

"I respectfully agree with the observations of EloffJ in the judgment of the Full Court, namely that it denotes:

'the basic of components of a marital relationship except for the formality of marriage...the main components of a modus vivendi akin to that of husband and wife are, firstly, living under the same roof secondly, establishing, maintaining and contributing to a joint household, and thirdly maintaining an intimate relationship'.

[11] In **Drummond** the phrase employed by the parties was *'Hiving together as man and wife'*\ while in the present consent paper the parties used the phrase *"cohabitation in a relationship analogous to that of husband and wife".* In my view, both the phrases employed simply mean the living together of the parties in a relationship akin to the relationship between a husband and his wife. It was argued on behalf of applicant that the difference in the wording between **Drummond** and the present case, indicates that applicant has a lower hurdle to clear, i.e only proof of cohabitation in a relationship analogous to that of husband and wife. In this regard reliance was placed on the dictionary meaning of the word *"analogous",* namely *"partially similar".* It was accordingly submitted that respondent's relationship with Wood does not need to be the same as that of husband and wife; it only needs to be partially similar to that of husband and wife.

[12] In my view this distinction is more apparent than real. It also loses sight of the wording of the clause in the consent paper, requiring cohabitation, i.e. the living together of respondent and Wood. It appears to me that there is no difference between a relationship where two unmarried persons live together as husband and wife and the case where they live together in a relationship analogous to that of husband and wife. In both instances the relationship necessarily has to be analogous to that of husband and wife, as they are, in fact, not married, but cohabiting or living together in a relationship as if they were husband and wife.

[13] In my opinion, the resolutive condition imposed by the parties in the

consent paper, is clear. The event upon which the applicant's liability for the payment of maintenance would cease, is the living together of respondent and Wood in a relationship similar to that of husband and wife for a period exceeding six months, with the main components of such a relationship being their living under the same roof, having established, maintained and contributed to a joint household and maintaining an intimate relationship.

[14] If one now turns to the facts of this case, it is common cause that respondent and Wood are involved in a personal and intimate relationship. However, that is not sufficient to establish a relationship analogous to that of husband and wife. As indicated above, it has to be shown that, in addition to the intimate relationship, they are living under the same roof and have established, maintained and contributed to a joint household. Can it be said that, on the facts before the court, the latter two requirements have been established?

[15] I believe not. Il is common cause on the papers that respondent and Wood do not live under the same roof. She has her own residence in Newlands, while Wood's primary residence is on his farm at Franschoek. There is nothing to gainsay the allegation of respondent that they have never cohabited and very seldom see each other during the week. According to respondent, she visits Wood approximately three times per month and spends the weekend with him on such occasions. They have also never been on holiday together.

[16] It is clear from the papers that respondent and Wood have not established or maintained a joint household. She says that Wood has never contributed a cent towards her household expenses, nor has she contributed towards Wood's household expenses. What happens, is that when she visits him on the farm over weekends, she purchases food as she loves cooking and Wood then reimburses her for such expenses.

[17] It follows, in my view, that applicant has not shown that respondent and Wood are cohabiting, in the sense envisaged in the consent paper. They are not living together and therefore not cohabiting. Their relationship can also not be described as one analogous to that of husband and wife. I agree with the submission on behalf of respondent, that, at best, the evidence shows that they arc simply involved in a romantic relationship while the main components of a relationship akin to that of husband and wife, are absent.

[18] I therefore find that applicant has failed to prove that he has the necessary clear right, or *prima facie* right, to entitle him to the interim relief sought in this application. It follows, in my view, that applicant has also failed to show that real and substantial justice requires a stay of the warrants pending the final determination of the main action. In the circumstances it is not necessary for me to consider the remaining requirements for the granting of an interim interdict.

[19] During argument I raised the question whether this *dum casta* clause in the consent paper, withstands constitutional scrutiny. In particular, it may be asked whether the clause, which seems to constitute an implied term as to chastity, does not offend the respondent's constitutional rights entrenched in sections 10 and 18 of the Constitution. However, in view of the conclusion that I have reached in regard to the interpretation and application of the clause, it is not necessary for me to prolong this debate.

[20] This brings me to the issue of costs. When an application for an interim interdict is refused, the general rule is to refuse it with costs. (See **Goldsmid v The South African Amalgamated Jewish Press Ltd 1929 AD** 441 at 446). There are, in my view, no circumstances present in the instant case which would justify a departure from this general rule. It was submitted on behalf of respondent that a punitive costs order should be made in her favour, but, in my opinion, there are no grounds to justify the making of such an order.

[21] In the result the application is dismissed with costs, including the costs occasioned by respondent in regard to the substituted service application.

P B Fourie, J