Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal Case No: **A66/2021**

In the matter between:

M~~ARIA~~ M~~AGDALENA~~ L~~INDEQUE~~ Appellant

and

J~~OHANNES~~ J~~ACOBUS~~ L~~INDEQUE~~ Respondent

CORAM: MBHELE, DJP *et* TSANGARAKIS, AJ

HEARD ON: 20 FEBRUARY 2023

DELIVERED ON: 18 MAY 2023

JUDGMENT BY: TSANGARAKIS, AJ

INTRODUCTION

[1] This appeal has as its provenance an application prosecuted in the Maintenance Court for the district of Bethlehem ("*the Court a quo*") in terms of the provisions of section 6(1) of the Maintenance Act, no. 99 of 1998.

[2] That application was prosecuted by the respondent (as applicant) against the appellant (as respondent).

[3] A synopsis of the proceedings before the Court *a quo* reveals that the respondent inter alia sought the discharge of his maintenance obligations towards the appellant and a reduction of the amount of maintenance payable by the respondent to the respective parties' minor child.

[4] The Court *a quo inter alia* held, in respect of the respondent's maintenance obligations to the appellant, that:

> "*This court therefore on the evidence finds that the respondent is cohabiting with another man, thus triggering the suspensive condition terminating her continued maintenance.*"

[5] It bears mention that although the appeal was also prosecuted in respect of the maintenance order granted by the Court *a quo* in respect of the respective parties' minor child, this portion of the relief was abandoned during argument.

[6] Commensurately therefore the appeal only lies against the Court *a quo's* order in respect of the discharge of the respondent's maintenance obligation to the appellant.

APPLICABLE LEGAL PRINCIPLES

[7] The controversy in this appeal emanates from, and revolves around, the provisions of clause 3 of a written Deed of Settlement which was concluded during the divorce proceedings prosecuted by the appellant (as plaintiff) against the respondent (as defendant).

[8] Clause 3, as aforesaid, reads thus:

> "*Dat die Verweerder onderhoud aan die Eiseres betaal tot haar dood, hertroue of samewoning met 'n ander man, welke gebeurtenis ookal eerste mag plaasvind in die bedrag van R16 000,00 per maand, ...*"

[9] The clause, as aforesaid, can be loosely translated as follows:

> "*That the Defendant must pay maintenance to the Plaintiff up until her death, remarriage or cohabitation with another man, whichever event occurs first in the amount of R16 000,00 per month, …*"

[10] The reproduced extract of paragraph 3 of the Deed of Settlement is known as a *dum casta* clause.

[11] In ***Drummond v Drummond*** *1979 (1) SA 161 (A) at 167 A to C* the Court held as follows regarding the interpretation of such a clause:

"*This clause was obviously designed to provide for the contingency that the appellant might establish a permanent relationship with some other man, and enjoy the advantage of being supported by him, without attracting the consequences of a marriage and the resultant cessation of any liability for maintenance on the part of the respondent.* ***As to the meaning of the phrase 'living together as man and wife', I respectfully agree with the observations of ELOFF, J in the judgment of the Full Court, namely that he denotes***

"the basic components of a marital relationship except for the formality of marriage"

and that

"the main component 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****.*"

- And I would add – **in which sexual intercourse, in the case of parties of moderate age, would usually, but not necessarily always, be an essential concomitant and, in that context, the phrase "*on a permanent basis*" connotes, in my view, a continuing relationship**, one that is intended by the parties to continue indefinitely without change.

[12] In the matter of ***Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*** *(427/01 [2002] ZASCA 98 (6 September 2002)* the Supreme Court of Appeal, dealing with the issue of resolving factual disputes, held thus:

'[5] The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. ***As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.***

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. *The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail...'*

[13] The judgement delivered in the matter of **National Employers' General Insurance v Jagers 1984 (4) SA 437 (ECD) at 440D – 441A** is also instructive:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in criminal cases, but nevertheless ***where the onus rests on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the Plaintiff's allegations against the general probabilities.*** *The*

estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the Plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the Plaintiff's case any more than they do the Defendant's, the Plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the Defendant's version is false.

This view seems to me to be in general accordance with the views expressed by Coetzee J in Koster KO-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorwee en Hawens (supra) and African Eagle Assurance Co Ltd v Cainer (Supra). ***I would merely stress however that when in such circumstances one talks about a Plaintiff having discharged the onus which rested upon him on a balance of probabilities that means that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitutes separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth***

probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

THE FACTS

[14] During the proceedings in the Court *a quo*, the following more pertinent facts came to the fore.

[15] The appellant, and one Mr Coetzee, have been in a relationship since or about October 2016. They entered into their relationship approximately two months pursuant to the bonds of marriage between the appellant and the respondent having been dissolved by way of a decree of divorce. The relationship between Mr Coetzee and the appellant is of an intimate nature and they share the same room and bed when he frequents the applicant's residence in Bethlehem.

[16] Mr Coetzee, although working in Gauteng during the week, spends his weekends, holidays and free time with the appellant at her residence in Bethlehem. Mr Coetzee also spent in excess of two weeks at the appellant's residence during the national lockdown brought about by the recent Covid-19 global pandemic. Whilst at the appellant's residence Mr Coetzee will "*buy some stuff*", make contributions to petrol and takes the appellant and her (and the respondent's) minor child out for dinner. Mr Coetzee and the appellant also take vacation together with the appellant and respondent's minor child, to destinations such as Mozambique, for which he pays albeit that he does not

necessarily make payment of all the expenses brought about by such vacations.

[17] Mr Coetzee possesses and has the benefit of the use of an Isuzu bakkie that has been financed by the respondent. Mr Coetzee pays the appellant in the amounts equal to the instalments due in terms of the appellant's financing of the motor vehicle aforesaid

[18] Additionally various items belonging to Mr Coetzee are stored at the appellant's residence in Bethlehem which include his Venter trailer, his braai stand and various canopies.

[19] His clothing items are also regularly hung up on the washing line at such residence. This particular aspect of the evidence was, however, disputed by the appellant. She testified that the only male items of clothing hung on the washing line belonged to her son-in-law who could not return to China, as a consequence of the Covid-19 global pandemic, and resided with the appellant for a period of two weeks. More about this aspect later.

[20] Moreover, Mr Coetzee contributes to the needs of the minor child conceived during the marriage between the appellant and the respondent. So, for instance, he has purchased the minor child a horse and pays for her cellphone.

CONCLUSION

[21] The element of an intimate relationship (as dealt with and explained in the ***Drummond*** matter dealt with herein above) is common cause between the respective parties and as such this aspect need not be considered further.

[22] I now turn to deal with the two remaining elements, evident from the ***Drummond*** matter, being that of "*living under the same roof*" and *"establishing, maintaining and contributing to a joint household".*

[23] The more pertinent facts of this matter, as dealt with herein above, are by and large common cause between the respective parties and they, on a proper and objective interpretation of their submissions, effectively only differ in the applications of the principles of law to such facts.

[24] At this juncture, it is relevant to point out that the *dum casta* clause in terms of the deed of settlement does not require the cohabitation by the appellant with another man "*as man and wife*" but only "*samewoning met 'n ander man*".

[25] In weighing up the evidence and testing the respondent's allegations against the general probabilities it, in my view, falls to be accepted that the respondent's version is probably true and the Court *a quo* was correct in accepting the same. The Court a quo made no findings as to the respective parties' credibility nor was it necessary for it to do so.

[26] The tipping of the probabilities in favour of the respondent are borne out by the largely common cause facts recorded herein above.

[27] The facts illustrate that Mr Coetzee has been in a relationship with the appellant shortly pursuant to her divorce from the respondent. On the probabilities Mr Coetzee's employment in Gauteng is the sole reason that he is only able to spend his weekends, holidays and free time with the appellant at her residence situated in Bethlehem. In today's day and age, it can hardly be contended that it is uncommon for individuals to live in one place and work at another.

But for his employment Mr Coetzee would on the probabilities live at the appellant's residence during the week too.

[28] Moreover the storage of Mr Coetzee's Venter trailer, his braai and various canopies and the regular hanging of his clothing items upon the washing line at the appellant's residence are, in my view, further proof of the fact that he lives under the same roof as the appellant. The appellant's explanation that the male clothing items hung on the washing line belonged to her son-in-law does not bear scrutiny as it only accounts for a paltry period of 2 weeks in circumstances where Mr Coetzee and the appellant have been in a relationship for several years and the appellant's clothing has been regularly seen on the washing line.

[29] As to the final element of *"establishing, maintaining and contributing to a joint household"* it is clear that Mr Coetzee is in more than one way financially contributing towards the appellant by "*buying some stuff*", make contributions to petrol, taking the appellant and her (and the respondent's) minor child out for dinner, going on vacations for which he pays albeit that he does not necessarily make payment of all the expenses brought about by such

vacations, possesses and has the benefit of the use of the Isuzu bakkie and contributes to the needs of the minor child.

[30] For these reasons, the appeal stands to be dismissed with costs.

[31] The last aspect, which falls to be considered, are the costs which stood over when the appeal served before this Court and was postponed on both 1 August 2022 and 14 November 2022.

[32] Insofar as the costs, relevant to the proceedings of 1 August 2022 are concerned, the postponement on that date was necessitated by unsuccessful attempt(s) by the appellant to reconstruct the record and provide the Court with a complete record for purposes of appeal. Accordingly, that postponement was solely the result of the appellant's failure to duly comply with her obligations in terms of Uniform Rule of Court 50 as she, from the onset of the appeal, failed to deliver a complete record or to take the necessary steps to ensure that a complete record could be reconstructed and provided.

[32] On 14 November 2022, the appeal was again postponed as a consequence of the record being incomplete. Manifestly clearly, this postponement again was occasioned by the failure on the part of the appellant to construct the record.

[33] In light of these facts, and in the exercise of my judicial discretion, the appellant ought to bear the wasted costs occasioned by these postponements.

[34] Insofar as the costs of the appeal are concerned, there exists no cogent reason(s) why those costs should not follow the result.

ACCORDINGLY, I MAKE THE FOLLOWING ORDERS:

The appeal is dismissed with costs, including the wasted costs occasioned by the postponement of the appeal on 1 August 2022 and 14 November 2022.

S. TSANGARAKIS, AJ

I agree:

N.M. MBHELE, DJP

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