G.P.-S.59968—1970-71—2 500

J 219

261/77

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE ~~Provincial~~ Division)
(~~Provinsiale~~ Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

G. N. DRUMMOND. *Appellant,*

versus

S. G. DRUMMOND. *Respondent*

Appellant's Attorney ISRAEL TS. *Respondent's Attorney* [illegible] V+B
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate E M Gertelowitz *Respondent's Advocate* P M Mulligan SC
Advokaat vir Appellant *Advokaat vir Respondent* B Kramer SC

Set down for hearing on
Op die rol geplaas vir verhoor op

(TPD) 1:2

Coram: Rumpff CJ Miller Kotzé JJA
Trengove et Hoexter AJJA.

9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 3.45 pm

C A V

The Court dismisses the said appeal with costs.

Judgment per Trengove AJA.

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf
9		

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

261/77.
M.C.

G.N. DRUMMOND v. S.G. DRUMMOND.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GWENDOLYN NYASA DRUMMOND (born KENNEDY) Appellant

and

SEFTON GRANT DRUMMOND Respondent

Coram: RUMPFF, C.J., et MULLER, KOTZÉ, JJ.A.,
et TRENGOVE, HOEXTER, A.JJ.A.

Heard: 5 September 1978

Delivered: 29 September 1978.

J U D G M E N T

TRENGOVE, A.J.A. :-

The appellant and the respondent were formerly married to each other. On the 5th March 1974,

/the.....

the respondent obtained a decree of divorce against the appellant, in the Witwatersrand Local Division, and at the same time the court made an agreement entered into between the parties an order of court. In terms of the agreement the custody of the minor child of the marriage, a daughter, Karen, was awarded to the appellant, and the respondent was ordered to pay maintenance for her at the rate of R75 per month. Clause 3 of the agreement provides as follows:-

"(a) The plaintiff shall pay maintenance in respect of the defendant at the rate of R125.00 (one hundred and twenty-five rand) per month until her death or remarriage.

(b) It is agreed that the plaintiff's obligation in terms of sub-clause (a) above shall cease should the plaintiff prove that the defendant is living as man and wife with a third person on a permanent basis."

This appeal arises from an application, which was brought by the respondent, for an order in terms of section 10 (1) of the Matrimonial Affairs Act, No. 37 of 1953, rescinding paragraph 3(a) of the above agreement on the ground that the appellant and a certain Hubert Bosch were living together as man and wife on a permanent basis.

The matter came before VAN WYK DE VRIES J. in the Wit= watersrand Local Division, and he dismissed the application. On appeal, the full court of the Transvaal Division reversed that decision and granted the respondent the relief sought. From this decision an appeal has now been brought to this Court, the appellant having been granted leave by the Court a quo.

In view of the issues that were raised on behalf of the appellant it will be convenient to refer at the outset to the history of these proceedings. The respondent's application was filed with the registrar on the 3rd December 1974. In the founding affidavit, he alleged that the appellant and the said Bosch were living together as man and wife in appellant's flat at 204 Riepen Hall, 16 Argyle Avenue, Sandton, and that they had been living together as such since at least March 1974. The factual grounds on which the respondent

relied in support of this allegation, were set out in his affidavit. He claimed that the appellant's conduct constituted good cause for the rescission of the maintenance order within the meaning of section 10 (1) of the Act. The appellant opposed the application and in her answering affidavit, which was sworn to on the 11th February 1975, she emphatically denied the allegation made against her. She admitted, however, that Bosch was staying in the flat but she said that he was doing so as a boarder and that he was paying her R130 per month for his board and lodging. She explained that she had taken on a lodger in order to supplement her income as she was unable to make ends meet. Bosch, in a supporting affidavit, stated tersely that he had read the appellant's affidavit and that he confirmed the allegations insofar as they related to him. In the replying affidavit, which was filed on the 20th February 1975, the respondent joined issue with the appellant and persisted in his allegation that she and Bosch were cohabiting.

When the matter came before the court for hearing on the 21st May 1975, the parties were agreed that the issues of fact, on the affidavits, could not be decided without the aid of viva voce evidence. By consent, the court then granted an order referring the matter for the hearing of oral evidence under Rule 6(5)(g) of the Rules of Court, in respect of the following issues, namely, "whether the applicant's obligation to pay maintenance to the respondent at the rate of R125 per month, in terms of an agreement made an order of court at the time of the divorce between the parties, has ceased by virtue of the fact that the respondent is living as man and wife with a third party on a permanent basis," alternatively, "whether the applicant is entitled to an order reducing or increasing the maintenance payable by him to the Respondent in terms of the said order of court." It was also stipulated in the order that if either of the parties intended calling any witness who had not already made an affidavit in the proceedings, an affidavit

from such witness should be served on the other party at least 10-days before the hearing.

The application eventually came before VAN WYK DE VRIES J., for the hearing of oral evidence, on the 15th November 1976. At the commencement of the hearing, counsel for the appellant informed the court that he had been advised that the respondent wished to lead evidence - including that of certain witnesses who had not made affidavits - of facts concerning the relationship between the appellant and Bosch, which had arisen since the initiation of the proceedings and, indeed, even after the reference for the hearing of oral evidence, on the 21st May 1975. He objected to the leading of the proposed evidence on the grounds that it went beyond the scope of the inquiry, as defined in the order of court, and that it was, therefore, not receivable. This objection was sustained. The learned judge ruled against the admissibility of the proposed evidence but, as he subsequently intimated in his judgment, the ruling was

not applied rigidly. That was the position as far as the evidence of the respondent and Bosch was concerned. They were, in fact, the only witnesses to testify on the disputed facts. The learned judge allowed the respondent to give evidence on a number of matters relating to the period subsequent to the initiation of the proceedings, and he allowed Bosch to be cross-examined extensively on his relationship with the appellant during that period. The appellant elected not to testify. Having heard the evidence VAN WYK DE VRIES J., held that the respondent had failed to discharge the onus resting on him. He came to this conclusion primarily because Bosch, who impressed him as an "open and frank witness" denied that he and the appellant were living together as man and wife. The learned judge placed some reliance on the allegations in the appellant's affidavit despite the fact that she had not given evidence at the hearing. This was clearly a misdirection. The full

court, / ...

court, on the other hand, found on the admitted facts that the respondent had succeeded, notwithstanding Bosch's denial, in discharging the onus resting on him. Counsel for the appellant submitted that the Court a quo erred in coming to this conclusion, on the evidence.

Before turning to the evidence, I must first refer to the requirements of clause 3(b) of the agreement. This clause was obviously designed to provide for the contingency that the appellaht 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 it denotes "the basic components of a marital relationship except for the formality of marriage"

and / ...

and that "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" - 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.

Now, what was the nature of the relationship between the appellant and Bosch, according to the evidence? Were they living together as man and wife, as the respondent alleged, or was their relationship merely that of a landlady and her boarder, as both the appellant and Bosch asserted in their affidavits. The admitted facts may be stated as follows.

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The appellant met Bosch in 1973 when they were both working for the same firm. They became friendly, and although Bosch left the firm towards October of that year they still kept in touch with each other. Early in 1974, the appellant told Bosch that the respondent had divorced her. During May 1974, she approached Bosch for a loan. She complained that she was not receiving her maintenance from the respondent on time. Bosch then lent her R100 and a further R100 in June 1974. From then on, Bosch, from time to time, paid the appellant substantial sums of money, varying from R100 to R500 at a time. In August 1974 Bosch went to stay with the appellant at 204 Riepen Hall. This was a two-bedroom flat. The appellant and Karen slept in the one bedroom, and Bosch in the other.

Bosch stated in his evidence-in-chief that the appellant offered to take him in as a boarder because she needed the money. He said that it was initially agreed that he would pay her R80 per month, for his board and lodging, this was later

increased to R130 per month, and eventually to R160 per month. However, under-cross-examination Bosch gave a different account of how it happened that he went to stay at Riepen Hall and of the arrangement that he made with the appellant. His evidence in this regard was as follows :-

> "Let me explain all the circumstances when I moved in to Riepen Hall. I had advanced mrs. Drummond quite a lot of money. I asked her back for this money. She could not pay me back, so I suggested that I rather move in as a boarder, as a lodger and let us more or less set off the lodging fee against the loan I advanced. Mrs. Drummond at that time was very depressed, she was in financial straits all the time, nearly all the time because she could not make both ends meet. I helped her again, as you can see, and stayed on in order to help her."

Thus, Bosch, in fact, never paid the appellant R130, or any other fixed amount for board and lodging, as he and the appellant alleged in their affidavits. There is no evidence at all of a continuous and consistent payment of lodging fees. What in fact happened was that Bosch

paid the appellant various amounts of money, from time to time, to cover her expenses. During the time that he stayed at Riepen Hall, Bosch paid the appellant R2885, an amount which bears no relation to the boarding fees referred to in his evidence-in-chief. On this evidence I have grave doubts about whether there was ever a genuine relationship of landlady and boarder between the appellant and Bosch. I also doubt whether the appellant really found it difficult to make ends meet, as Bosch said, for she seems to have spent a considerable amount of money on things in excess of her everyday needs. For instance, she bought a car for about R5000 towards the end of 1974, although she had the use of two other cars - a company car and one taken over from the respondent at the time of the divorce - and she also bought an electric organ.

But, whatever their relationship might have been when Bosch first arrived at Riepen Hall, it is quite clear from the evidence that, by December of that year, he and

the appellant were on a very intimate footing with each other. Bosch had by then already been staying at Riepen Hall for some five months. Referring to his relationship with the appellant during this period, Bosch said, in his evidence-in-chief, that he regarded the appellant as his "girlfriend" and then in cross-examination he said the following:-

> "We became friendly, really friendly, as you see it as boyfriend and girlfriend, that was at the beginning of 1975. I personally can admit, I tried hard to reach that relationship before but it was impossible as mrs. Drummond had a psychological stumbling block against any contact with men. As she explained to me that stumbling block derived from her previous marriage, apparently there were some incidents which I promised not to disclose, but she never but never I think can be all right in any proper relationship with a man. Even now mrs. Drummond is not a proper lover. She is very frigid."

Although the appellant may, initially, have been sexually irresponsive this does not appear to have

been / ...

been due to any lack of affection for Bosch. She did not reject his advances, and he certainly did not regard her reaction as a rebuff.

Towards the middle of December 1974, the appellant and Karen went to Rhodesia for a holiday with relatives. Bosch also decided to go, but as he could not get away from his work until the 20th December, he arranged to meet the appellant at the Victoria Falls. Bosch flew to Rhodesia, he spent a few days hitch-hiking with a friend, and then met the appellant at the Falls. They spent two days together there, and then travelled back to the Republic by car, via Salisbury, where they stayed with the appellant's sister overnight. By now the appellant had apparently succeeded in overcoming her psychological barrier against contact with men for, according to Bosch, he had sexual intercourse with the appellant at the beginning of January 1975, and on some nine occasions thereafter. Bosch described the appellant as a "frigid lover" and this is probably why they did not

have intercourse more frequently.

The evidence also shows that, quite apart from this intimate relationship, the appellant and Bosch were living in a manner akin to that of husband and wife. The appellant was rendering the duties of a housewife to Bosch and he was supporting and caring for her as a husband would. The appellant prepared the food; she saw to Bosch's laundry; they had their meals together; they used to go to the shops together to buy groceries and other provisions for the household; Bosch explained that he used to accompany the appellant because she had a weak back and needed assistance; well that, of course, is precisely what a caring husband would do; Bosch almost invariably spent his evenings at Riepen Hall because, as he said, he was not keen on going out socially; and, occasionally, he and the appellant went to visit her relatives. This relationship continued throughout 1975. At the beginning of 1976 Karen went to a boarding school. Bosch and the appellant, however, stayed on at Riepen Hall until the end of March, when she gave up the flat.

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From Riepen Hall the appellant and Bosch went to-stay at 198 Oxford Road, where they rented two rooms from a mrs. Allison at R25 per week. Bosch seems to suggest that they went there independently of each other, but this is very unlikely. They stayed at this address for about four months. Bosch said that he and the appellant occupied separate rooms, but he admitted that some of his clothes and personal effects were kept in the appellant's room. Bosch paid the rent for the two rooms and explained that he did so because the appellant gave him the use of her car; he also contributed about R20 per month towards the cost of their meals, which they had to provide themselves. In other respects their relationship continued as before. Towards the end of August 1976, Bosch who was out of work at the time, obtained employment at Sasolburg. The appellant then moved to a house at Rivonia, which she leased. Bosch arranged the lease for her; he paid the initial deposit of about R200, as well as the rent of R375 per month, for three months

in advance i.e., until the end of October 1976. Whilst employed at Sasolburg, Bosch used to spend his weekends with the appellant at Rivonia, and he also contributed R70 per month towards her household expenses. So much for the evidence.

Having regard to the cumulative effect of all the facts and circumstances outlined above, I am of the view that the Court a quo was fully justified in coming to the conclusion that the respondent had succeeded in establishing, on a balance of probability, that the appellant and Bosch had been living together as man and wife, on a permanent basis, during the period August to December 1974, and thereafter. As mentioned earlier on, VAN WYK DE VRIES J., accepted Bosch's denial of the existence of any such relationship with the appellant, because Bosch impressed him as an honest witness. However, from the admitted facts and those which were clearly established, it is quite apparent that the impression which Bosch, and also the appellant, sought to convey,

in their affidavits, that their relationship was merely that of landlady and boarder, was a manifestly misleading one. The fact that they already had a very intimate relationship with each other at the stage when they made their affidavits only came to light when Bosch was cross-examined, and the question may well be asked why they initially refrained from revealing the true nature of their relationship to the court. In view of Bosch's disclosures, under cross-examination, I can well understand why the appellant decided against testifying at the hearing and exposing herself to cross-examination. It is quite obvious that she could not have done so without having to make admissions prejudicial to her case. These are factors which the learned judge appears to have overlooked in his evaluation of Bosch's evidence, and of the appellant's case. In this regard, I am in respectful agreement with the comment by ELOFF J. in the judgment of the full court, namely, that the learned judge of first instance "should have examined more critically than he

in fact appears to have done, whether Bosch's bland assertions could be given full weight in the light of what he himself perforce had to admit".

To conclude on this aspect of the case. Looking at the evidence as a whole, I am satisfied that it has been established that the appellant and Bosch were living together as man and wife on a permanent basis, at the time when the motion proceedings were initiated, and thereafter.

Counsel for the appellant also submitted that, in considering whether the respondent had discharged the onus resting on him, the Court a quo should have disregarded the evidence of the appellant's relationship with Bosch subsequent to the date on which the motion proceedings were launched, i.e., 3rd December 1974. He contended that the Court a quo erred in taking that evidence into account in its consideration of the issues between the parties because it was not relevant to the facts in issue and because it fell outside the scope of the inquiry as indicated by the affidavits. There is no substance in

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the first contention. The evidence of the subsequent conduct of the appellant and Bosch has a very legitimate and material bearing on the question whether they were living together as man and wife at the time in question. Evidence by which the existence of this sort of relationship is proved is seldom, if ever, direct; generally speaking it is usually impossible to prove it except by circumstantial evidence. A relationship of this nature involves an element of continuity, it is one that must of necessity have some duration, and its existence at any particular time can, therefore, only be established by facts illustrating the preceding or subsequent relation of the parties. And in this regard, evidence of the subsequent conduct of the parties concerned, is usually admissible for the purpose of showing what inference ought to be drawn from the evidence of previous acts of familiarity. (Body v. Body, (1860) 30 LJP & M 23; Wales v. Wales (1900) P. 63; Rudman v. Rudman (1964) 2 All E.R. 102;. Phipson on Evidence, 11th ed. par. 295; Cross on Evidence, 4th ed. 322).

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I now come to the second leg of the argument on this aspect. It was contended that the evidence in question should have been disregarded as it related to matters which fell outside the ambit of the inquiry envisaged in the order of court of the 21st May 1975, to which I have already referred. When a matter is referred to oral evidence under Rule 6(5)(g), the parties are usually limited in their evidence to the proof of the allegations in their affidavits. The mere fact that a dispute has been referred to oral evidence, does not enlarge the scope of the inquiry (Wepener v. Norton, 1949 (1) SA 657 (W) at p. 658). But the ambit of an inquiry as indicated in the affidavits may be extended by the terms of reference and, in special circumstances, also by the judge presiding at the hearing, subject, of course, to the absence of prejudice to the other party, not remediable by an appropriate order as

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to costs.

Although the scope of the inquiry is not clearly defined in the order of court, it can, in my view, nevertheless be inferred from the terms of reference that the issue, which was referred for viva voce evidence, was whether the appellant and Bosch were living together as man and wife, at any time, during the period August 1974 to 21st May 1975. Any evidence tending to show that the appellant and Bosch were cohabiting during that period, was properly receivable as falling within the scope of the inquiry. Then there is a further consideration. I have already referred to the circumstances under which this additional evidence was received by the Court a quo. The learned judge initially ruled against the admissibility of the additional evidence and then decided not to apply this ruling rigidly as far as the appellant and Bosch were concerned. It has not been contended that, in doing so, the learned judge failed to

exercise / ...

exercise his discretion judicially. Although it is in the interests of the administration of justice that the well established rules regarding motion proceedings - including proceedings arising out of an order under Rule 6(5)(g) - should ordinarily be strictly observed, it does not follow that they must always, and without exception, be rigidly applied. As was pointed out by OGILVIE THOMPSON JA., in James Brown & Hamer (Pty.) Ltd. v. Simmons N.O., 1963 (4) 656 (A.D.) at p. 660 E, "some flexibility, controlled by the presiding judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted". Now what was the position in regard to the additional evidence in the present instance? The evidence in question was not available at the time when the application was launched as it related to facts which arose thereafter, and in many instances even after the case had been referred to evidence. This additional evidence was relevant and material, as I have already pointed out, and it is not the appellant's case that she was in any way prejudiced

by the admission of the evidence at the hearing.

As a matter of fact the appellant knew full well what additional evidence the respondent wished to place before the court, for its nature had been disclosed in correspondence, which had admittedly passed between the attorneys of the parties, prior to the hearing and as it happened, the facts which came to light as a result of the additional evidence were virtually common cause at the conclusion of the hearing. In the course of his argument, counsel sought to make much of the fact that the matter was only set down for hearing some sixteen months after it had been referred for the hearing of oral evidence. He contended that the respondent had deliberately delayed the matter because he realised that he had not made out a prima facie case on the affidavits, and was hoping to get additional evidence to support his claim. There was undoubtedly an inordinate delay in having the matter enrolled, and although it has not been explained satisfactorily, I cannot, on the available information

hold that counsel's contention is well-founded.

As to the contention that the respondent had not made out a prima facie case, it is interesting to note that when the matter came before the court in May 1975, appellant's counsel did not then contend that respondent had failed to make out such a case, or that he should not have resorted to motion proceedings. This is not a case in which it was sought to introduce additional evidence in order to make out a cause of action, or raise a new ground, or advance a new case. The respondent merely wanted to rely on the new facts as additional evidence in support of his case. There is furthermore no evidence whatsoever that the appellant was in any way prejudiced by the delay in having the case set down for hearing; there is no evidence that she or her attorney ever complained to the respondent about the delay and if she was really concerned about it, her attorney could have taken the necessary steps to have the case enrolled.

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In the result I have come to the conclusion that counsel's contention that the additional evidence should have been disregarded by the Court a quo is without substance.

Counsel for the respondent asked the Court to make a special order as to costs, under Rule 69(1) of the Rules of Court, authorising fees consequent upon the employment of two counsel, should the appeal be dismissed. I am not satisfied that an order to that effect is justified in the present instance.

In the result, the appeal is dismissed with costs.

J.J. TRENGOVE,
Acting Judge of Appeal.

RUMPFF, CJ.)
MULLER, JA.) Concur.
KOTZÉ, JA.)
HOEXTER, AJA.)