

NOT REPORTABLE

6 SEPTEMBER 2007

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSCAAL PROVINCIAL DIVISION)

CASE NO: 22675/05

In the matter between

JACOBUS LOURENS RHEEDER

PLAINTIFF

And

ELANOR RHEEDER

DEFENDANT

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JUDGMENT

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RASEFATE, A J

1. The parties are in the process of a divorce action. Having been married since 1983, their two sons are 23 and 19 years old. They approach Court for adjudication of only the Defendant's claim for maintenance as contained in her counter claim in which she claims in prayer 6, an order for maintenance for herself in the amount of R 3000.00 per month. Two issues were identified by agreement of Counsel on both sides, namely: 1. Plaintiffs' liability to maintain the defendant; and 2. the amount of such maintenance if Court found that Plaintiff was liable.
2. In accordance with the principle that who claims testifies first, the Defendant took the stand:

3. She is 41 years old, and has standard 8 as her highest education. She has never worked, except for a month or so when she says she did help out in a kindergarten during an unspecified period. Otherwise she was always a house-wife during which she raised the two sons and managed the family home.

She has weak feet and legs with some discomfort since she was hit by a car when she was two years old. She can hardly walk in normal shoes without discomfort, and has to wear special shoes. One of her toes had to be removed because it was not growing.

4. Defendant further testified that she suffers from depression with anxiety, and has to take anti-depressants as chronic medicine. She is on the Plaintiff's medical aid but the provision is exhausted, and he refuses to pay the excess to doctors, with the result that she cannot use the facility.
5. She left the marriage home after the Plaintiff assaulted her and had violated a protection order which she had obtained. She produced copies of the protection order as well as a J88 form which indicates injuries on her body at the time. She demonstrated with letters from two instances that she did apply for work, but was turned down for reason that she did not have transport; and because of her disability. She receives a state disability grant of R 870.00 per month which is her only income since her separation from the Plaintiff.

She accounts for her use of the allowance as follows:

Medicine:	R 100.00
Rent:	R 400.00
Food:	R 270.00

Personal care: R 100.00

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Total: R 870.00

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Her monthly needs she states to be -

Medicines: R 1 500.00 (chronic medicine included)

Rent: R 975.00

Food: R 600.00

Personal care: R 200.00

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Total: R 3 275.00

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With her allowance taken into account in respect of her needs, she has a shortfall of R 2, 405.00 per month.

6. Defendant presented a salary slip which indicates that the Plaintiff earned as at 27 May 2005 a basic salary of R15, 253.00, in addition to which there is a small amount in what is called "night-out plus S & T". After deductions his nett pay amounted to R 9, 049.41.

On these bases the Defendant contends that the Plaintiff is liable and able to augment the shortfall in her needs and he is in a position to do so.

7. The Plaintiff does not deny any of the facts presented by Defendant in the situation above: Her physical condition; her dependency on chronic medicine; her psychological condition, as well as the fact that she has always been a house-wife. He also confirms his income to be about R10, 000.00 per month, quite evidently referring to his nett. He seeks

- to avoid liability for maintenance of the Defendant in that she lives with another man as man and wife who should be maintaining her.
8. He also contends that he is not able to pay any maintenance to her because he cannot afford it: he lives in a 3 bedroom flat with his sons and a brother who is not working for the past three months, whom he supports. He says that the two sons are not employed whereas the Defendant contends that they are both working. He alleges that he is about to be declared medically unfit to continue working due to three back operations he underwent as a result of accidents while he was working.
  9. The relationship with the other man, whose name is Gawie Weiss, the Defendant testified that they are only friends, having met during group sessions which forms part of their therapy; when they had been admitted together in Vista clinic. Having both attempted suicide, they had something in common, and found support in each other. He is accommodating her as a temporary measure because she has nowhere to stay. She has a letter from the Housing Board where she has applied for a house, but has been told that the waiting period is about 6 to 7 years. She testified that Gawie is actually “gay” and has no sexual interest in her, nor does she have in him. She describes their relationship as being like mother and son, and she does his washing, cooking and cleaning the flat – a one bedroom flat with no door between the bedroom and the cooking/living area – the chores she takes as her contribution *in lieu* of payment in money to the full extent. She says she sleeps on a mattress in the living area.
  10. She called Gawie to testify. He confirmed all that the Defendant has testified, about how they met and found each other during group therapy; and both having attempted suicide before, they had much in common. He helps the Defendant with accommodation as she has no roof over her head. He is not maintaining the Defendant. Having himself financial problems of his own, he says that he has been black-listed with the Credit-Bureaux, and has already been handed over to

attorneys about his debts.

11. The Plaintiff testified that he is a diesel mechanic by occupation, earning R 10,000.00 per month. He said that he forgot to bring his pay slip with to Court. Part of his evidence has already been referred to. He confirms the Defendant's evidence as far as it relates to the fact that the Defendant introduced her to Gawie when she was admitted in Vista Clinic, when he had visited her and found them standing and talking. He maintains that he was told by her mother that the Defendant and Gawie were having a love relationship, and also to having seen them in the street holding hands. [It is however, remarkable that these versions were not put to the Defendant and only came up when Plaintiff testified].
12. Plaintiff also called his son Lourens to testify, who said that he had seen the Defendant and Gawie kissing passionately and concluded that theirs is a love relationship, having stayed with them for a while and visiting and sleeping over as he does.
13. What is clear in the case is that the parties have, by virtue of their marriage which is still subsisting between them a reciprocal duty of support to each other. See June D Sinclair, the Law of marriage, Volume 1, p. 442 et seq.
14. The Defendant has proved that she is in need, and that the Plaintiff is in a financial position to augment the shortfall in her disability. She has a valid reason not to be living with the Plaintiff anymore due to the deterioration in their relationship, to the extent that they both attempted to commit suicide due to resultant the stress. He has assaulted her, for which she obtained a protection order, which Plaintiff violated, and she was even advised by police to rather leave the common home. She did so, which is to the personal welfare of both of them.
15. The fact that Defendant found friendship and accommodation with a

man does not *per se* translate in her losing the right to maintenance from her husband, and the husband is not automatically released from that duty. It would have been the same for the Defendant if it was the Plaintiff who was in need. The reciprocal duty exists *ex lege* between them, and only if one of them is in a relationship akin to marriage with another, and there is proof that they have assumed a mutual responsibility to support each other; or that the one who claims maintenance is in fact being supported by the new partner, can they lose the *ex lege* right to maintenance from their marriage partner or spouse. Compare in this regard the decision in *Welgemoed v Mennell 2007(4) SA 446 (SECLD)* where Selikowitz, J found that a maintenance order in terms of section 7(1) of the Divorce Act 70 of 1979 may endure beyond a subsequent marriage.

16. I find that it has not been proved that the Defendant and Gawie have assumed such a relationship with a reciprocal or mutual duty of support to each other. Gawie may or not be gay; and they may or not be having a sexual relationship, but on their evidence they have not assumed a reciprocal duty to support each other.
17. In the premises I find that the Defendant has proved that she is in need of maintenance; that the Plaintiff is legally obliged to maintain her, and that he is in a financial position to do so. The claim in this regard is prayer 6 of the Defendants' counter claim.
18. Although the prayer is for maintenance in the amount of R3, 000.00, the Defendant has proved her need in the amount of R2, 405.00. She is entitled to judgment to the extent that she has proved her claim.

I therefore make the following order:

1. The Plaintiff be and is hereby ordered to pay maintenance to the Defendant in the amount of R 2, 405.00 per month; and

2. The Plaintiff is to pay Defendants' costs of the trial pertaining to this order.
3. Argument and submission by Defendants' counsel that other prayer be granted at this stage cannot be acceded to, as those depend on the marriage being dissolved.

R. E. RASEFATE

JUDGE OF THE HIGH COURT

Heard on: 24 August 2007

For the Plaintiff: Adv. R De Villiers

Instructed by: Des Bischoff Prokureurs

For the Defendant: Adv. S. Buitendag

Instructed by: Rita Jordaan Prokureurs

Date of judgment: