IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 59089/2013

DATE: 21 AUGUST 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:,

N[...] J[...] E[...] M[...] Applicant

And

L[...] O[...] M[...] Respondent

JUDGMENT

STRAUSS, AJ:

1. The applicant brought an application in which he seeks relief that the respondent is ordered to comply fully with the court order granted under case number 16235/2010, being a decree of divorce order.

2. The applicant seeks that the respondent is ordered to retain the applicant as a beneficiary and/or dependant on her medical fund benefit scheme, alternatively, that the respondent ensures that the applicant is covered for the same benefits which the respondent currently enjoys under the medical aid or benefit scheme.

3. In the alternative relief is sought that the court grants an order that the respondent procures a medical aid with an independent medical aid provider, separate from the respondent's own, to cover the medical needs of the applicant and that the respondent, must pay the monthly premium thereof and that this medical aid will provide similar cover that the applicant enjoyed under the respondent's medical aid scheme previously.

4. The respondent opposed this application and her main defence is that due to the policy of her employer the

SANDF, any ex spouse of a employee of the SANDF is not entitled to membership on the medical aid held with the SANDF, after divorce. The employer cancelled the applicant's membership due to the divorce, and the respondent denies that they had come to any other agreement that entitled the applicant to another medical aid.

5. The parties were married to each other on 14 August 1999 in community of property. They were divorced on 25 June 2010, and incorporated a settlement agreement as an order of court when they divorced. The settlement agreement with specific reference to the medical aid is contained in paragraph 7 thereof, which states the following:

> "*The parties agree that the defendant (the now respondent) shall retain the plaintiff (the now applicant) as a beneficiary dependent on her medical aid fund benefit scheme "*

6. I pause to mention that no period is stipulated in which the respondent had to retain the applicant on her medical aid. It is also not indicated in the settlement agreement which medical aid they referred to when they signed the settlement agreement on 26 June 2010. At the time of the signing of the settlement agreement and long before that, it is however not in dispute that the respondent was and still is employed by the South African National Defence Force, and that her medical scheme was always held with the SANDF, and that the applicant had throughout their marriage also been a member of this medical aid, due to his marriage with the respondent. It was thus correctly conceded by counsel for the applicant, that the medical aid referred to in the settlement agreement could only have been the medical aid held with the SANDF

7. The applicant, after the decree of divorce was granted, remained on the medical aid of the respondent for approximately two years, until June 2012. However, during the course of June 2012 the applicant was removed from the medical aid by the respondent's employer and not by the respondent herself. Thus, for a period of two years none of the parties were aware of the fact that as soon as they were divorced, the employer of the respondent was entitled to terminate the membership of the applicant on the medical aid, as no ex-spouse are entitled to remain on the medical aid and receive cover if the employee and such a spouse are divorced, this was set out in the medical aid policy of the SANDF.

8. The respondent maintained throughout that her employer removed the applicant from the medical aid scheme and it was due to no fault on her part, and she could also not force the SANDF to readmit the applicant as a member of the medical aid scheme. The applicant was therefore removed in terms of the Department instructions and policy and plan, which policy was attached to the papers.

9. The applicant's counsel now argues that if the court accepts the fact that the respondent is unable or it is impossible for her to reinstate the applicant on her medical aid, she must procure another medical aid and pay

for such medical aid. In this regard counsel referred to the matter of ***Rossouw v Hauman 1949 (4) SA 796 (C).*** In this matter an application for an interdict was brought against the respondent who had to perform works in terms of a consent agreement, that was made an order of court, the application sought the restraining of the respondent to proceed with the works, and the respondent contented that he was no longer bound by the agreement, as is had became impossible to perform.

I was referred to page 799 in the matter supra, where it is stated:

> *"An event occurs not contemplated by the parties and therefore not especially dealt with in the contract, which, when it happens, frustrates the object Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides must be a common relief and from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the parties would be bound to the contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and the other, if he chose, to a new obligation "*

10. Counsel argues that the court therefore must set aside the agreement between the parties due to the fact that there was a mistake of material fact which was common to the parties. Due to this common mistake of a material fact the court may set aside an agreement, that is the correct legal position, but one must apply it to the set of facts before this court, to find if the case law is applicable.

11. Unfortunately the application before me is not to set aside or rescind the court order, but to compel the respondent to comply therewith. It is a form of declaratory relief sought against the respondent to provide a medical aid for the applicant, either with the SANDF or with another medical aid fund.

12. The respondent disputes and denies that any agreement or intention to agree to an alternative medical aid fund to be provided to the applicant formed part of the settlement agreement, or was made an order of court. I agree with this submission, the only court order currently in existence between the parties, is the obligation of the respondent to retain the applicant on the South African National Defence Force Medical Aid for an unspecified period.

13. This, we now know, is impossible due to the fact that the internal policy of the South African National Defence Force is to remove ex-spouses from the medical aid, which they did. Further an event such as this should have been contemplated by the parties when signing the agreement, they were at least one would expect, to have specified the period in which the respondent had to retain the applicant on her medical aid, and the position should the respondent not be able to keep the applicant on her medical aid any longer.

14. The court has seen various settlement agreements that specifically deal with a period of medical aid provision, the extent thereof, and the replacement of a medical aid fund, should the initial medical aid become unavailable. Both parties failed to incorporate any such terms in the settlement agreement ,and I can therefore not now ex post facto read it into the settlement and make it an order of court against the respondent. That would be unfair, unreasonable and prejudicial towards the respondent.

15. This is, with respect, not a situation where it was a mistake common to the parties as a result of their common object which had been frustrated. The applicant I find had only procured the individual advantage of a medical aid which he cannot hold any longer, due to the fact that the respondent's employer will not allow this advantage.

16. The applicant therefore is obliged to approach the Magistrate's Court, to enforce his right to maintenance in obtaining a medical aid fund on his behalf. The Magistrate's Court is equipped to investigate the facts that there was at least an agreement to provide medical aid to the applicant, which forms part of maintenance and is embodied in the settlement and a court order. The magistrate court can investigate the relative means, income and expenditure of the parties to pay maintenance and or to receive maintenance. This enquiry may not take place in this Court as it is not the correct forum to investigate the relative income of both the parties and it is purely for a Maintenance Court to do so. The respondent can also exercise her rights in the maintenance court in raising defences against the maintenance of the applicant.

17. The applicant implores this court to read into the settlement agreement that the respondent agreed when she signed the settlement agreement, that in the event that she could not retain the applicant on the medical aid, she would provide him with another medical aid, for the rest of his life and pay for such a medical aid per month.

18. I find, that the only terms the parties agreed to, was that the applicant is retained on the respondents medical aid with the SANDF which medical contribution was deducted from her salary, I cannot find on the papers before me that the respondent agreed or contemplated that the applicant had to be kept on another medical aid that would cost her much more than what she was paying with the SANDF.

19. I cannot allow extrinsic evidence interpreting a document. The document is clear in what rights it gives to the applicant. The applicant's application was doomed from the beginning due to the fact that the relief claimed in the notice of motion could never be granted once it became clear that it was not the respondent who cancelled the medical aid, but the policy of the SANDF that the membership of the applicant be cancelled.

20. There is not enough evidence or even a suggestion that the respondent was deliberate when signing the

settlement agreement knowing that the applicant would not be able to be retained on the medical aid. This, I find, stems from the fact that two years after the divorce the applicant continued to be a member of the respondent's medical aid and it is probably due to the red tape and the slow mechanics of the SANDF that the applicants membership was only cancelled two years after the date of divorce, and he therefore had the benefit of two years' medical aid which he was in any case not supposed to have in terms of the policy of the SANDF. The respondent, having regard to the above circumstances, was also brought under the incorrect assumption that the applicant could remain on the medical aid, after divorce.

21. Thus, it can never be said that the respondent knew when signing the settlement agreement that the applicant's medical aid contribution or medical assistance will be cancelled by her employer, and that there was in the absence of the medical aid with the SANDF an agreement between the parties that the respondent must obtain a medical aid fund for the applicant, at great costs with another medical aid scheme.

The application is thus dismissed with costs.

S STRAUSS

ACTING JUDGE OF THE HIGH COURT