

IN THE HIGH COURT OF LESOTHO

In the matter between:

BRYAN MAcCARTHY

Applicant

and

LISEBO REGINA MAcCARTHY (nee Khoali) 1st Respondent

THE DEPUTY SHERIFF – MR LIPHULO 2nd Respondent

JUDGMENT

Coram : Hon. Hlajoane J

Dates of Hearing : 12th June, 2014.

Date of Judgment : 6th August, 2014.

SUMMARY

Parties having been divorced in 1988 - The order for maintenance for the wife by agreement of both parties having been made an order of Court on condition wife remains unmarried – Husband having defaulted to pay maintenance since 2000 – Writ of Execution issued

for such arrear maintenance from 2000 to date – The effect of Provision of Rule 57 (1) of High Court Rules on superannuation – Writ issued more than ten years after husband defaulted to pay declared unlawful and invalid.

Annotations

Statutes

- 1. Act No.8 of 1980 High Court Rules**

Books

- 1. The South African Law of Husband and Wife 5th Edition 1985 at 354 by H.R. Hahlo**

Cases

[1] This is an application for stay of execution pending a declaratory order. The applicant has also asked this Court to restrain and interdict the 2nd respondent from removing his motor vehicle which 2nd respondent has attached pending the present application.

[2] The matter has been opposed and opposing papers have been duly filed. In his application the applicant has

raised a point of law in challenging the attachment of his motor vehicle.

[3] The background of this case is that applicant and 1st respondent were once legally married. Their marriage was however dissolved by divorce before this Court on the 13th June, 1988.

[4] The order of divorce also included a deed of settlement agreed to by both parties. The deed of settlement was in relation to ancillary prayers. The settlement was to the effect that applicant undertook to pay maintenance to 1st respondent in the amount of eight hundred and fifty maluti (M850.00) per month. The maintenance was to be paid so long as 1st respondent remained unmarried, and this was made an order of Court.

[5] It would seem that applicant had been paying the maintenance for the 1st respondent as per the order of

Court. There is also nothing indicating that the 1st respondent has remarried.

[6] The 1st respondent has in her opposing papers alleged that applicant only paid maintenance until the year 2000. But applicant has alleged in his founding papers that he had been paying large sums of monies to the 1st respondent which were way above the amount of maintenance he had to pay. But to this the 1st respondent showed that those large sums of monies transferred via internet banking were paid in lieu of the property which applicant was buying from the 1st respondent for his three children.

[7] Attached to her papers the 1st respondent had annexed that Deed of Sale which however never came to finality as applicant just unilaterally stopped paying since the year 2012.

[8] Applicant then goes further to say he was taken aback when on the 22nd March 2013 he was served with the civil summons in a certain CIV/T/85/2013 by the messenger of Court. 1st Respondent in that case was claiming for maintenance in the amount of one hundred and twenty-three thousand, two hundred and fifty maloti (M123,250). The amount was for arrear maintenance from 1st January, 2000 to the 31st January 2013.

[9] I must pause here and mention that applicant only mentioned that he was once served with summons in CIV/T/85/2013 and has attached his plea in those proceedings as annexure “BM3”. We have however not been told as to what became of the C/T/85/2013 case. Whether or not it reached finality has not been stated.

[10] Respondents counsel has referred to **Hahlo**¹ on the issue of maintenance, where it is shown that divorce puts an end to the reciprocal duty of support that existed between the spouses during marriage. However, the law relating

¹ H.R. Hahlo – The South African Law of Husband and Wife 5th Edition 1985 at 354

to maintenance after divorce provides that a Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to payment of maintenance by the one party to the other. This case has been one such a case where applicant and 1st respondent signed an agreement of maintenance and that agreement was made an order of this Court.

[11] Applicant has attached “BM4” which is a Warrant of Execution. The warrant is said to be for area maintenance since 2000 to date. The warrant still makes reference to the judgment that was granted on the 13th June, 1988. On the strength of that warrant the messenger of Court attached applicant’s Fortuner vehicle on the 22nd May, 2014.

[12] In challenging the Warrant of Execution applicant’s counsel referred to the provision of **Rule 57 (1) of the High Court Rules**². It is framed as follows:-

² Act No.8 of 1980 High Court Rules

“After the expiration of three years (3) from the date on which a judgment or Order was pronounced no writ of execution may be issued pursuant of such judgment or order unless the debtor consents to the execution of a writ or the judgment has been revived by the Court.”

The section provides further that the debtor be given not less than seven (7) days’ notice of the application for the revival of such judgment.

[13] It has not been disputed that the writ was issued on the strength of the order made on the 13th June, 1988. Also that the writ was issued on the 15th May, 2014. Applicant’s counsel argued for the superannuation of the order for maintenance.

[14] Respondents’ counsel however felt that it is a procedural misdirection to say that the order had to be revived yet the maintenance order being an on-going process cannot be said to have lapsed. She still referred to no other order but the 1988 order for maintenance.

[15] My reading of **Rule 57 (1) and (2)** is very clear. True enough a maintenance order is an on-going process. 1st Respondent has shown that applicant stopped paying the maintenance in 2000. The writ was issued in May this year. The writ was issued more than ten years after the applicant had defaulted in paying maintenance. This has been quite a long time. This is one case where even the principle of quiescence has to work. The order had become dormant.

[16] The intention of the legislature in having provided provisions as in **Rule 57** must have been to deal with judgments which would be left for ages without being executed, particularly in civil matters. This was aimed at discouraging such practices.

[17] 1st Respondent may have stayed unmarried but the inordinate delay in claiming for arrear maintenance

cannot be condoned. In the absence of an application or reviving the order, the writ remains invalid.

[18] Based on what has been said above, the warrant of execution that was issued on the 15th May, 2014 based on the order of 13th June 1988 after applicant had defaulted to pay maintenance since 2000, is declared unlawful and of no legal force and effect.

[19] On the question of costs, each side felt that the other side has been unreasonable in having approached this matter in the manner he/she did. Each case always has its own peculiar circumstances, and I must say that one's faculties were shaken a bit in dealing with this matter. It was not a very easy decision to make, and to this Court a first of its kind. I found therefore that each side had been genuine in what it believed in so that it can never be said it was an issue of an abuse of Court process. I would not award costs *de bonis propriis* as each one of you had asked against the other but will conclude that each party is to bear its own costs.

A.M. HLAJOANE
JUDGE

For Applicant: Mr Setlojoane

For Respondents: Mrs Manyokole