THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 188/2011

In the matter between:

ELWYN DALE HARLECH-JONES **Appellant**

and

SHIRLEY MARGARET HARLECH-JONES **Respondent**

Neutral citation: *Harlech-Jones v Harlech-Jones* (188/2011) [2012] ZASCA 19 (22 March 2012)

Coram: Mthiyane DP, Cloete, Mhlantla and Leach JJA and Boruchowitz AJA

Heard: 6 March 2012

Delivered: 22 March 2012

Summary: Divorce ─ maintenance ─ wife cohabiting with and being fully maintained by another man ─ this state of affairs lasting for years before the divorce and intended to be permanent ─ wife failing to show she was entitled to maintenance from her husband on divorce.

O R D E R

On appeal from: Eastern Cape High Court, Port Elizabeth (Schoeman J sitting as court of first instance):

The appeal succeeds and the order of the high court is amended to read as follows:

'The marriage between the parties is dissolved by decree of divorce.'

J U D G M E N T

LEACH JA (MTHIYANE DP, CLOETE AND MHLANTLA JJA AND BORUCHOWITZ AJA concurring.)

[1] The appellant appeals against an order obliging him to pay R2 000 per month to the respondent, his wife of almost 29 years, upon dissolution of their marriage. His principal objection against the order lies in the fact that for some eight years prior to the divorce the respondent had been cohabiting with another man. This, the appellant contends, disentitles her from receiving maintenance from him. In the alternative, the appellant suggested the sum of R2 000 per month is in any event too high given his straitened finances.

[2] The parties were married out of community of property in December 1972. Two sons, both now majors and self-supporting, were born from their union. In December 2000, after 28 years of marriage, the appellant left the matrimonial home in Port Elizabeth as he had formed a relationship with another woman and had decided on a new life. He purchased another residence in the city, but his new relationship also failed and within six months he had formed an intimate relationship with another man with whom he has since been cohabiting. They left Port Elizabeth and at the time of the trial in the high court were living in Steytlerville, a small town in the rural areas of the Eastern Cape.

[3] The respondent was friendly with a married couple, Tim and Diana Smith, whom she had come to know some years previously when their sons attended the same school. In April 2001, shortly after the appellant had moved out of the common home, Diana Smith passed away. In September 2001 (by which time the appellant was already cohabiting with his male partner) a relationship began to blossom between the respondent and Tim Smith. With the passage of time the relationship became more intimate and, in April 2003, the respondent moved into both Mr Smith's home and bedroom, and they thereafter cohabited as man and wife. During the first two years that they had lived together the respondent's youngest son, Mark, who was at university at the time, lived with them as well.

[4] In the meantime, in February 2003, the respondent issued a divorce summons out of the Port Elizabeth High Court in which, as ancillary relief, she claimed payments of maintenance for both Mark and herself, and payment of a sum equivalent to one half of the value of the appellant's estate. The parties thereafter entered into settlement negotiations and, in September 2003, some six months after the appellant had commenced to live with Mr Smith, a deed of settlement was concluded in which the appellant undertook to pay the respondent R3 000 per month as maintenance until her death or remarriage and to retain her as a beneficiary on his medical aid scheme. In addition the appellant also agreed to make various payments in respect of Mark's upkeep and to pay various monetary amounts.

[5] Unfortunately for all concerned, the appellant had run into financial difficulties and was sequestrated the day before the divorce hearing. As a result, the judge hearing the matter indicated that he would not be prepared to make the terms of the settlement an order of court, apparently being of the view that certain of its provisions could not be enforced by reason of the appellant's sequestration. As a result the divorce did not proceed and remained unresolved. The appellant continued living with his partner and the respondent cohabiting with Mr Smith. Moreover, pursuant to the sequestration the respondent's assets were frozen in terms of the Insolvency Act 24 of 1936. This led to litigation between the appellant's trustee on the one hand and the respondent on the other, which only ended late in 2007 when a settlement agreement was concluded which led to her assets being

released. Despite this, the divorce proceedings were held in abeyance for several years. However, by the time the parties eventually took the matter to court (in February 2010) they had settled all proprietary claims and the only outstanding issue the high court was asked to decide was the question of the respondent's claim for maintenance.

[6] After they separated, the appellant initially retained the respondent as a beneficiary on his medical aid scheme. He undertook to continue to do so in the settlement agreement which was not implemented due to his sequestration. Unfortunately, he removed her as a beneficiary of the scheme in 2006 and, when the respondent was diagnosed with cancer of the jaw in April 2009, she was personally obliged to pay for the urgent surgery she required. By the time of the trial in February 2010, the respondent had spent almost R180 000 on treating her cancer and was due to undergo further surgery in the near future to cover a gaping hole in her cheek, an unfortunate consequence of the treatment. The anticipated surgery was to be carried out at a state hospital, rather than at a private institution, but the future cost of treating her condition was not known.

[7] When the respondent first moved in with Mr Smith, she insisted upon, as she put it, 'paying her own way', and did in fact pay him a total of R25 000 in respect of accommodation between May and November 2003. However, after her assets were frozen she had to rely on Mr Smith's generosity, and he supported and maintained her (and Mark for the two years he lived with them) although the appellant did make some contributions towards Mark's education expenses. That continued after the respondent's assets were restored in late 2007, but she does not appear thereafter to have made any regular or substantial contribution towards the expenses of the joint household she shared with Mr Smith. She seems in the main to have used her assets to pay for certain personal items of expenditure, such as entertainment, her hairdresser, her cell phone account and an amount she pays one of her sons to reimburse him for having her as a dependant on his medical aid. She also made odd contributions by purchasing household items such as a hi-fi and a washing machine.

[8] Although the evidence establishes that when the respondent initially moved in with Mr Smith it was regarded as a temporary arrangement, the relationship between

them matured over the almost eight years that they had lived together before the trial. By then they both regarded their relationship as permanent and neither had any intention of terminating it. Mr Smith supported the respondent unconditionally and was prepared to continue to do so indefinitely. By the same token, not only was the respondent being maintained by him but she, reciprocally, assisted him in his business, for which he paid her a small gratuity.

[9] Importantly, the first time the respondent sought to recover any maintenance from the appellant after the divorce proceedings were instituted, was in February 2010 when she brought proceedings under Uniform rule 43 seeking maintenance *pendente lite* (an application which failed when Hartle AJ refused the order sought as she concluded that there was no reasonable prospect of the respondent recovering maintenance when the matter came to trial). And it is not without significance that when the opportunity to settle the divorce action arose in early 2008 (after her assets had been restored to her), the respondent refused to sign a settlement agreement; not on the basis that it contained no maintenance for her, but because it made no provision for the appellant to reimburse Mr Smith in any way for the support he had provided Mark. This all indicates the relationship she had with Mr Smith was of such a nature that she neither required nor sought maintenance from the appellant.

[10] From this it is clear, as was indeed common cause at the trial, that the respondent and Mr Smith had, for almost eight years, lived together 'as man and wife' in that, although they were not formally married, they had lived together in the same home, had a common household which they maintained and to which they contributed, and maintained an intimate relationship.[1] Put differently, they lived together in a fixed and stable relationship in which they mutually regarded each other as a permanent partner.

[11] Relying upon judgments such as *Dodo v Dodo* 1990 (2) SA 77 (W) at 89G; *Carstens v Carstens* 1985 (2) SA 351 (SE) at 353F; *SP v HP* 2009 (5) SA 223 (O) para10 it was argued, both in the high court and in the appellant's heads of

[1] Cf *Drummond v Drummond* 1979 (1) SA 161 (A) at 167A-C.

argument, that it would be against public policy for a woman to be supported by two men at the same time. While there are no doubt members of society who would endorse that view, it rather speaks of values from times past and I do not think in the modern, more liberal (some may say more 'enlightened') age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse. Each case must be determined by its own facts,[2] and counsel for the appellant (whom I must hasten to add had not been responsible for the preparation of the appellant's heads of argument) did not seek to persuade us to accept that the mere fact that the respondent was living with Mr Smith operated as an automatic bar to her recovering maintenance from the appellant. Instead he argued that the respondent had failed to prove that she was entitled to a maintenance order in her favour. It is to that issue that I now turn.

[12] Under the common law, the reciprocal duty of support existing between spouses, of which the provision of maintenance is an integral part, terminates upon divorce. This might well cause great hardship and inequity particularly where one spouse, during the subsistence of the marriage, has been unable to build up an estate and has reached an age where he or she is unable to realistically earn an adequate income ─ the classical case being that of a woman who has spent what would otherwise have been her active economic years caring for children and running the joint household. This potentially iniquitous situation is alleviated by s 7 of the Divorce Act 70 of 1979. Section 7(1) which provides for a court on granting a decree of divorce to make a written agreement between the parties in regard to the payment of maintenance by one party to another an order of court ─ while in other cases s 7(2) provides:

'In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be

[2] In this regard the various English cases to which we were referred, such as *Grey v Grey* [2009] EWCA Civ 1424 and *K v K* (2006) 2 FLR 468 (FD); [2005] EWHC 2886 (Fam) were of no meaningful assistance, set as they are in a statutory matrix which differs from that of this country.

relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.'

[13] It is trite that the person claiming maintenance must establish a need to be supported. If no such need is established, it would not be 'just' as required by this section for a maintenance order to be issued. It is on this issue that the respondent's claim must fail. Both she and the appellant had moved on with their respective lives and had formed intimate and lasting relationships with others. As I have stressed, for almost eight years prior to the divorce hearing the respondent had lived as another man's wife: a man who provided for her needs, put a roof over her head and in all factual respects treated her as his partner in life. This was a situation which both she and Mr Smith regarded as permanent and which they intended would remain so.

[14] The respondent was therefore being fully maintained by her new partner in life, and had no need for that maintenance to be supplemented in any way. This is borne out not only by the financial figures she produced indicating the amount of maintenance Mr Smith was spending on their joint household but also by her failure to claim maintenance from the appellant until, almost as an afterthought, rule 43 proceedings were launched in February 2010. As already mentioned, it is also shown by her attitude in refusing to sign the proposed settlement agreement earlier offered to her solely as it made no provision for Mr Smith to be reimbursed for supporting, not her, but her son Mark. Accordingly, the respondent's claim simply fails at the first hurdle as she failed to show that she actually required maintenance from the appellant.

[15] It is apparent from the above that, the high court erred in concluding that the respondent had in fact established a claim for maintenance against the appellant. The appeal against the maintenance order must therefore succeed.

[16] Turning to the question of costs, although the appellant has succeeded in this appeal, counsel for the appellant informed us that the appellant did not seek to have

the respondent pay the costs of the appeal. Nor did he seek to rely upon a relevant open tender made under Uniform rule of court 34 on 29 July 2009 to argue that the respondent should pay the costs below from that date. Instead he suggested that no order should be made in respect of the high court proceedings. This was a commendable attitude given the length and history of the marriage and one which I understood the respondent's attorney accepted would be appropriate if the appeal was to succeed. In regard to the order of the high court, this can be brought about by merely deleting paragraphs 2 and 3 of the order it made, leaving only the divorce decree extent.

[17] In the result the following order will issue.

The appeal succeeds and the order of the high court is amended to read as follows:
'The marriage between the parties is dissolved by decree of divorce.'

L E Leach
Judge of Appeal

APPEARANCES:

For Appellant:	A Beyleveld SC Instructed by: Spilkins Inc, Port Elizabeth Symington & De Kok, Bloemfontein
For Respondent:	G J Friedman (Attorney) Instructed by: Friedman Scheckter, Johannesburg Matsepe Inc, Bloemfontein