

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

[CIVIL]

SUIT NO.: DOMHCV2011/0133

BETWEEN: MAGDALENE JOSEPHINE FONTAINE

Respondent/Applicant

And

SYLVESTER ISRAEL FONTAINE

Applicant/Respondent

Appearances: Mr. Jeffrey L. Douglas-Murdock of Heather F. Felix-Evans Chambers,
Counsel for the Applicant/Respondent
Mrs. Singoalla Blomqvist-Williams, Counsel for the Respondent/Applicant

2013: October 25th

2014: March 11th

DECISION

[1] **THOMAS, J. (Ag.):** On 11th July 2013, Sylvester Israel Fontaine, the Applicant/Respondent filed an application seeking the following order: The Interim Order dated 20th May 2011 ordering the Applicant/Respondent pay the Respondent/Applicant the sum of \$1200.00 per month be discharged with immediate effect.

[2] The grounds of the application are:

1. On the 20th May 2011, the Applicant/Respondent was ordered to pay the Respondent/Applicant the sum of \$1200.00 per month for maintenance with immediate effect.
2. The Applicant/Respondent is a pharmacist who operates a pharmacy as his only income generating activity which has operated at a significant loss.
3. The Applicant/Respondent is not able to meet his debt obligations or staff salary payments. He has laid off all of his staff and is operating his pharmacy business alone.
4. The Respondent/Applicant currently lives with her family in a family-owned apartment in Roseau and has little or no expenses not met by her family.
5. Section 31 of the Matrimonial Causes Act 1973 gives the Court the power to vary or discharge any interim order for maintenance having regard to all the circumstances of the case, including any change in any of the matters to which the Court was required to have regard.
6. In the circumstances the Applicant /Defendant applies for an order to discharge the interim order for maintenance made on the 20th May 2011.

Affidavit in support

[3] In his affidavit in support of the application, the applicant/respondent deposes as to the matters relevant to his application. In summary these are: he runs a pharmacy business, his wife, the Respondent/Applicant, is an employee of the company, Eezzee Pharmacy Ltd; his wife has not returned to work since her sick leave ended on or about March 22nd, 2013 after taking sick leave on or about February 22nd, 2013; the business has run into serious financial losses which has rendered him unable to adhere to the order of the court; his only source of income comes from the company; the company losses, the debt burden and his own personal debt have combined to make him unable to honour the payments to his wife; he has a personal debt of \$130, 717.50 while the company's debt is \$321,947.52; the company's losses for 2010, 2011 and 2012 are \$36,109.00, \$54,698.00 and \$52,974.00, respectively; his average monthly expenses¹ total \$4003.00; his vehicle was repossessed.

¹ These are detailed at paragraph 9 as follows:

[4] In her affidavit in reply filed on 9th October 2013, the respondent/applicant deposes that she is a director and shareholder of the said company; the applicant/respondent has had complete control of the company; when the marriage broke down her salary was stopped and she has not been paid for more than one year; the payments of \$1200.00 per month ordered by the court was stopped in May 2012; the applicant/respondent has not disclosed his monthly salary and has not filed annual tax returns; she has been advised that the documents² exhibited are not germane to the matter as Eezzee Pharmacy is not a party to this suit.

Affidavit of means

[5] Pursuant to an order of the court the applicant/respondent filed an affidavit of means on 18th October, 2013. In this affidavit the applicant/respondent addresses, with modifications, essentially the same issues as in his affidavit in support. They are as follows: he confirms that his wife is a director and shareholder of the company; for the past year he has taken out an average of \$800.00 from the company sales to provide for living expenses; his monthly expenses total \$1785.00; he lives with his adult son and housemate who pay the light and water bills entirely; his rent contribution is \$475.00; his son and housemate pay most of the groceries/market/ food bill so that he is able to live on the remainder of the approximately \$800.00 per month; he is \$21,600.00 in arrears in payments ordered by the court from May 2012 to October 2013, he has been unsuccessful in obtaining refinancing for the company business; the balance on his account at the Central Co-operative Credit Union is \$100.85 and the balance on his account at the National Bank of Dominica is \$90.44, as of 30th September, 2013.

Issues

[6] The issue for determination is: Whether the order of the court against the applicant/respondent, made on 20th May 2012, should be discharged.

a Personal residence rent: \$475.00; b. Business rent: \$1,600.00; c. Light (DOMLEC) residence: \$200.00, d. Light (DOMLEC) business: \$275.00; e. DOWASCO residence: \$50.00; f. DOWASCO business: \$83.00; g. Groceries/Market/Food: \$800.00; h. Phone (Cell/land line) residence:\$80.00; i. Phone (Cell/land line) business: \$260.00; j. Transportation: \$150.00; Personal care (barber, etc): \$30.00

² Being: IF 2(a), 2 (b) , 2 (c), 2 (d), 2 (e), 2 (f), 2(G), 2 (h) 2(i), 2(j), 2(k), 2 (l), 2 (m), IF3 (a), IF3 (b)

Submissions

- [7] In his submissions on behalf of the applicant/respondent, learned counsel, Mr. Jeffrey L. Douglas-Murdock cites and examines various authorities³ and the law, being section 31 of the **Matrimonial Causes Act 1973**. Thereafter, the submissions go on to identify the reasons for the incapacity of the applicant to pay as ordered by the court.
- [8] The following are the aspects of the evidence identified by learned counsel to advance his client's case: the applicant and the company are in tremendous financial difficulties; the respondent abandoned the applicant and the applicant was left to manage the business; the respondent stays in a family home, but the applicant must assist his son and housemate in meeting the expenses of the rented apartment they maintain; and in the circumstances the applicant cannot sustain the payments.
- [9] In submissions on behalf of the respondent/applicant emphasis is placed on the applicant's expenses and income, as deposed. The following are relevant: the applicant's food bill is equal to his salary; according to the company records the company paid wages from January 2011 to May 2011 in the sum of \$72, 414.00 of which entertainment amounted to \$3,387.05; the company was profitable and the applicant's salary was such that he could meet the monthly expenses, including the maintenance order of \$1,200.00; the loan from the National Co-operative Credit Union had a repayment of \$2,936.00 monthly so that the applicant would have informed the institution that his salary was in excess of \$2,936.00 in order to secure the loan; the applicant's evidence that he does not own land, but under cross-examination he admitted that the land was given to him but the transfer was not registered; the applicant's evidence is that he lives with his son, a housemate and a child yet he wants the court to believe that he has to pay the utility bills and more than half of the rent; the applicant is only responsible for ¼ of the running expenses of the house.

The relevant law

³ The authorities cited are: *Re Hudson (deceased) Hudson v Hudson* [1966] 1 ALL ER 110; *Lewis v Lewis* [1977] 3 ALL ER 992; *Foster v Foster* [1964] 3 ALL ER 541; *Newmarch v Newmarch* [1978] 1 ALL ER 1

[10] The relevant law is section 3 of the **Matrimonial Causes Act 1973**. This section gives the court the discretion to vary or discharge, to which this section applies, or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended. And by virtue of subsection 2 (a) the section applies to inter alia, any interim order for maintenance. Further, subsection (7) of the same section mandates the court, in the exercise of its power under subsection (1) to "have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates...".

Conclusion

[11] The circumstance to which the court must have regard is the change in the applicant's evidence where in his affidavit in support he seeks to say that his expenses are the company's expenses; but in his affidavit of means he seeks to make the separation with a quantum leap effect. In this regard it will be recalled that the applicant/respondent deposed that his monthly expenses included the company's rent, light, water and phone being, \$1,600.00; \$275.00, \$883.00; and \$260.00, respectively. At the same time, according to him, he had to pay his own rent, lights, water, food, phone, transport and personal care. The expenses, respectively, are: \$475.00, \$200.00, \$800.00, \$80.00, \$150.00, and \$30.00. This "my average monthly living expenses" would be \$4,003.00.

[12] In about three months the applicant's "personal average monthly living expense" now totaled \$1,785.00. Significantly, in a house with two other adults his food still costs \$800.00 per month.

[13] This is what the applicant deposes at paragraph 6 of his affidavit of means:

"I live with my adult son and another housemate in Canefield. They pay the DOMLEC and DOWASCO bills entirely. I pay my rent contribution of \$475.00. My son and the housemate pay most of the groceries/market/food bill so that I am able to live on the remainder of the approximately \$800.00 per month I receive from company sales to meet my other monthly living expenses."

[14] It is to be noted that despite what is quoted above regarding the food bill being met by his son and the housemate, the itemized expenses still show \$800.00 for groceries. To this

must be juxtaposed what the applicant deposed, in part, at paragraph 5 of his affidavit of means: "For the past year, I have taken out an average of approximately \$800.00 per month from the company's sales to provide myself with some money to offset my living expenses." Thus, the only income of \$800.00 must satisfy personal average monthly living expenses of \$1,785.00.

[15] Based on the evidence as a whole, it is the finding of the court that the applicant must be characterized as a stranger to the truth. In this regard learned counsel for the respondent submits that "the Husband's evidence was tailored to give the Court the impression that he is a man of limited means almost indigent."

[16] Against the background of the evidence, learned counsel for the applicant asks the court to discharge the interim order. On the other hand, learned counsel for the respondent submits that the applicant has not shown how his circumstances have changed and further that "if which we do not accept that his income is less why then is the company still subsisting why is he still incurring debts."

[17] Learned counsel for the applicant has cited a number of cases⁴ in which the English courts have exercised the power where there are changes in the circumstances and the need to look at all the relevant circumstances.

[18] On the other hand learned counsel for the respondent/applicant has cited the case of **Ratcliffe v Ratcliffe**⁵. It is not strictly in *pari materia* with the other cases since it is based on the **Maintenance Agreements Act 1957** which in section 1 (3) empowers the court to alter maintenance agreements if there are changes in the circumstances. In this case, part of the holding is that if a change is voluntary induced by the husband's own act did not render it just that financial arrangements contained in the agreement should be altered at his instance.

⁴ See footnote 3, *supra*

⁵ [1963] 3 ALL ER 993

[19] The foregoing is persuasive having regard to the legislation and the fact that in the case at bar the applicant has given blatantly contrived evidence in the hope to persuade the court to discharge the order. This is firmly rejected by the court.

[20] Accordingly, it is the conclusion that the applicant with his contrived evidence cannot persuade the court to discharge the interim order. The application is therefore denied.

Costs

[21] It is the further determination of the court that the applicant must pay the respondent cost in the amount of \$2,500.00 on or before 11th April, 2014.

.....

Errol L. Thomas
High Court Judge [Ag.]