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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **8937/2013**

Reportable: Yes

Of interest to other judges: Yes

Revised.

12 June 2014

In the matter between:

C, J Plaintiff

and

C, N Defendant

JUDGMENT

MABASA AJ

Introduction

[1] This is an action for divorce. The Plaintiff (Mrs C.) is a 59 year old housewife and the Defendant (Mr C.) is a 55 year old Chartered Accountant. The parties were married on 7 December 1985, out of community of property with the exclusion of the accrual system. The crisp issue for determination is the quantum of maintenance. The principle to pay maintenance has been conceded.

[2] In a Rule 43 application granted on 02 May 2013 by this Court, the Respondent/Defendant was ordered to:-

- 2.1. pay interim maintenance, to the Applicant/Plaintiff, in the sum of R20,000.00 per month;
- 2.2. retain the Applicant on his medical aid as well as pay excess medical expenses not amounting to more than R1000.00 per month;
- 2.3. pay the Applicant's short-term insurance and car maintenance with the maintenance not amounting to more than R750.00 per month;
- 2.4. make contribution to the Applicant's costs in the sum of R7500.00.

[3] On the first day of this trial the Defendant submitted a tender **with prejudice** for the following order:

- 3.1. A decree of divorce;
- 3.2. The Defendant to pay maintenance to the Plaintiff in an amount of R20,000.00 per month;
- 3.3. The Defendant to retain the Plaintiff as a dependent on the medical aid scheme of which she is currently a member;
- 3.4. The Defendant to make a contribution in an amount not exceeding R150,000.00 towards the purchase of a vehicle for the Plaintiff. This amount is to be paid directly to the supplier if and when the Plaintiff has purchased another motor vehicle;
- 3.5. The Defendant to make a contribution to the Plaintiffs legal costs in the amount of R30,000.00 payable immediately and directly to Plaintiff's attorneys of record. This amount is payable in addition to the contribution made in terms of the Rule 43 order.
- 3.6. Save for the above, each party to pay his/ her own legal costs and retain assets currently in his/ her possession and control.

[4] This offer was rejected by the Plaintiff. The relief sought by the Plaintiff includes *inter-alia*;

- 4.1 A decree of divorce;
- 4.2 Monthly maintenance for the Plaintiff until her death or remarriage in the amount of R25,000.00;

- 4.3 The costs of retaining the Plaintiff on a comprehensive medical aid scheme with chronic illness benefits;
- 4.4 Payment of the Plaintiffs excess medical expenses ;
- 4.5 Payment of an amount of R2 million for the purchase of an immovable property;
- 4.6 Payment of an amount of R100, 000.00 for the purchase of household furniture;
- 4.7 Payment of an amount of R50, 000.00 in respect of relocation costs;
- 4.8 Payment of an amount of R200, 000.00 for the purchase of a motor vehicle;
- 4.9 Costs of the suit.

FACTUAL BACKGROUND

[5] The parties were married to each other in 1985 in Bloemfontein. Two children were born of the marriage. A 26-year-old son, who is a university graduate and employed as a data analyst, as well as a 20- year-old daughter who is currently a first year actuarial science student Wits University . It is common cause that the Defendant has agreed to support her until becomes self-supporting.

[6] The Plaintiff has no formal qualifications. Her highest qualification is a matric certificate. According to her testimony she commenced her employment career at Standard Bank in Bloemfontein and worked herself through the ranks to a managerial position. The parties purchased a house in Bloemfontein and the home loan was registered in her name because of the preferential interest rate she received as a staff member of Standard Bank. The Defendant at that stage was responsible for household expenses such as buying groceries and paying the domestic helper. Her father passed away in 1989 and she received an inheritance of R20, 000.00. This money was spent on renovating the house in Bloemfontein.

[7] During 1995 the parties relocated to Johannesburg. Shortly after the move to Johannesburg they took a joint decision that the Plaintiff should stop working to look after the minor children. This was after an incident of serious neglect of the younger child by the domestic helper.

[8] During this time both their cars were stolen and they were without transport whilst waiting for the insurance company to replace their cars. It was a very traumatic time for the Plaintiff. She had to do all the household chores as well as the gardening without any domestic assistance. She had to do shopping on foot. She had no money, no telephone, a two year old baby and a young child to care for. She mourned the loss of her job, suffered from insomnia and had to consult a cardiologist.

[9] Shortly thereafter she received a lump sum pension payment from her previous employer, Standard bank in the amount of R186, 000.00. The parties decided to buy a Toyota Conquest for the Plaintiff. The Defendant suggested that R180, 000.00 of this money be paid into the mortgage bond of their matrimonial home in Hurlingham , Johannesburg.

He offered to pay her a monthly interest of R2000.00 to cover her insurance policies. The bond was registered in the name of a discretionary trust, Ruhandri Trust. The trustees of the trust are the Plaintiff , the Defendant and the Defendant's brother of Willem Jacobus Coetzee. The beneficiaries are the Plaintiff, the Defendant and their two children.

[10] She further testified that the Defendant was very secretive about his financial affairs. She had no idea what was happening in the family's finances. She never saw any of the trust bank statements nor had she attended any meetings. She signed and initialled the trust deed and that was the extent of her involvement in the trust. The Defendant's financial position was a total secret to her. He only informed her that they were very privileged as all their debts were fully paid.

[11] For the first five years in Johannesburg she did all the household chores including the gardening by herself. She also took the minor children to and from school. She unsuccessfully tried to seek part-time employment to supplement her income. She enjoyed sewing and needle work and got involved in a business venture to do interior decorating with a friend.

[12] The Defendant gave her a Samba which is a debit card that she could only use at stores like Checkers and Game. It had a R5000 limit was intended for groceries only. The Defendant paid all the other household expenses. The Plaintiff had to pay for her own doctors' consultations and over-the-counter medicine. In order to save money she bought second- hand clothes for the children. She also made her own clothes. This card was subsequently recalled by the Defendant.

[13] She earned between R3000 and R5000 per month from her part-time activities. With the money she bought fabric and made curtains for the matrimonial home, and as well as other decorative items such as headboards and bedside lamps. The Defendant did not approve of her part-time activities and she says that "he despised it"

[14] In her view the Defendant did not have a good relationship with the children. He is a perfectionist with very high standards. Both the children are highly intelligent and hard-working. The Defendant refused to buy computer equipment for their studies and refused to allow them Internet access at home. Her son completed his degree in 2012 and is now working as a data analyst. He lives with the Defendant. Her daughter passed matric with seven distinctions. She commenced her studies at Pretoria University and was awarded a bursary to study chemical engineering. However, she did not complete her studies as she struggled to cope without a computer. She lives with the Plaintiff

[15] In 2013 the Plaintiff surrendered her insurance policy to purchase computer equipment for her daughter. She received R36, 000.00 of which R10, 000.00 was spent on the computer equipment. The balance was used to assist her ageing mother who lives in Warden in the Free State. Her mother fell and broke her hip and the Plaintiff spent three months assisting with her care and recuperation. When she returned to Johannesburg she had lost her sewing contract.

[16] She stated that the reasons for their breakdown of the marriage were that the Defendant started drinking heavily after his mother passed away. He had numerous adulterous affairs, which he denies. The living conditions in the matrimonial home became unbearable because of the Defendant's alcohol abuse. She moved out of

the matrimonial home and now lives in a rented flat.

[17] The Plaintiff is not a healthy person. She testified with regard to her medical condition that she suffers from high blood pressure, deep vein thrombosis, spastic colon, ulcers, osteoporosis in both hips, cysts on her thyroid glands and disintegrated discs in her neck. As a result of her medical problems she had to stop sewing and hanging curtains. She can no longer sit for long periods of time as it causes severe migraines. She is also on medication for depression.

[18] This has impacted her contract work. For the last three months she has had no income. She is computer illiterate with no other skills, and a limited earning capacity. She has no pension, no savings and no provision for retirement. She had to borrow R80, 000.00 from family and friends to institute the divorce proceedings. The Defendant stopped paying the R2000.00 interest payments.

[19] She testified about her financial position in great detail. The gist of it is that the parties are debt free. All their finances are controlled by the Defendant whom she describes as a very "stingy" man. The matrimonial home is held by the trust, of which both plaintiff and Defendant and the two major children are the beneficiaries. The Defendant currently resides in the matrimonial home. The Plaintiff wishes to purchase a unit a retirement village to secure accommodation for herself in later years.

[20] Industrial psychologist Lisa Roets testified on behalf of the Plaintiff. The objective of her assessment was to determine the future employability of the Plaintiff. She confirmed that the Plaintiff has been unemployed since 1995. She started a business venture with a friend to make curtains and to do interior decorating. This was unsuccessful. The Plaintiff is not a healthy person and it is unlikely that she will find employment in the open labour market. Due to her advanced age she is unemployable as she cannot acquire new skills. The income she received from her sewing activities was not a large amount and it is not a stable source of income. The Plaintiff does not have formal qualifications. She was simply making curtains upon order and in the long term this was not sustainable. This evidence was not challenged.

[21] The Defendant is a 55 year old chartered accountant and associate director at PriceWaterhouseCoopers. He testified that he has been in the employment of the same company since 1981. He will be compelled to retire in approximately 4 years' time at the age 60. He receives a net income of approximately R64, 000.00 per month. He also receives an annual bonus which is the equivalent of one month salary.

[22] In his view the marriage broke down simply because the parties grew apart. Until recently (a month before the trial) there was still talk of a possible reconciliation. He conceded that this is no longer possible and that the marriage has broken down irretrievably. However, he still loves his wife and children. He stated that the Plaintiff was a faithful wife and good mother. He disagreed that the Plaintiff's evidence that he did not have a good relationship with the children. He tried to be involved in their lives insofar as it was possible for him.

[23] He does not dispute the fact that the Plaintiff is a beneficiary of the trust and that it owes her R180, 000.00. He has full control and a veto right as chairman of the trust, which means that he can remove the Plaintiff as the beneficiary of the trust at any time.

[24] The Defendant is a very prudent man. He testified that he was raised by conservative parents who instilled upon him the value of saving. The family never had a lavish lifestyle and he is extremely debt- adverse. His goal was to invest in his income wisely to make provision for his retirement and that of the Plaintiff. As a result he has built up a sizeable estate which includes several immovable properties which are held in trust and closed corporations. All the family cars are old and have not been replaced in many years.

[25] Based upon the Plaintiff's calculations of the Defendant's nett worth is in the region of R10 million, of which a sizeable component R2.8 million consists of cash in hand. The Defendant is financially savvy and has invested his income in such a manner that he will receive maximum benefit upon retirement.

The issues

[26] The main issue in dispute is the amount of money payable to the Plaintiff as maintenance.

The law

[27J The Plaintiff now turns to this Court to make a determination in terms of section 7 (2) of the Divorce Act 70 of 1979. This section stipulates that:

'the court may, having regard to the existing or prospective means of each of the parties, the 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, the conduct in so far as it may be relevant to the breakdown of the marriage, 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 one party to the other party for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.'

The existing and prospective means of the parties.

[28] Ms Halgryn for the Plaintiff submitted that the Plaintiff finds herself penniless after 29 years of marriage to the Defendant. From the evidence it is clear that the Plaintiff's financial situation is dire. She has had no income from her sewing activities for the last three months. She is entirely dependent on the maintenance that she receives from the Defendant. She has no savings, no investments or any other form of financial security. This evidence is uncontested.

[29] The Defendant is a wealthy man. Based on the Plaintiff's calculations his net asset value is in the region of R10.4 million. However, the three immovable properties in which he has an interest are held in trust or closed corporations. His provident fund benefit in the sum of RS 720 644.00 is included in the calculation. According to his own list of assets and liabilities he stated a total of R4.7 million as

his total assets. He has no liabilities and its creditors are negligible. His cash in hand and other similar institutions amount to the sum of R2 874 709, 00. His monthly salary is approximately R64 000.00 nett, and he receives an annual bonus in the discretion of the company which is the equivalent of one month's salary.

Their respective earning capacities

[30] The Plaintiff has no formal qualifications or training. This sewing and needlework activity from which she has generated a meagre income is more of a hobby than a stable income producing venture. The industrial psychologist confirmed that the Plaintiff is unemployable in the open labour market. She concluded that it is too late for the Plaintiff to acquire new skills to build a career that would provide her with an income from which he could live. She is almost 60 years old and cannot be expected to learn new skills, or to be gainfully employed. Her poor medical condition was not disputed by the Defendant.

[31] The Defendant is a highly qualified professional employed as an associate director at PriceWaterhouseCoopers where his job involves Risk Management. He holds a B Compt. Honours degree. He has been employed by this company for his entire working life. According to his testimony he has to retire at the age of 60 years. He is in good health.

Financial need and obligations of the parties

[32] Counsel for the Defendant, Mr Heyneke conceded the Defendant's obligation and ability to pay maintenance to the Plaintiff. Each of the parties provided their own income and expenditure list. According to the Plaintiffs list, her reasonable monthly expenses amounted to R34, 840.00. Mr Heyneke submitted that this list needed adjustment as some of the expenses were duplicated or incorrectly calculated and it included some of her daughter expenses which the Defendant has agreed to pay. According to him, the adjusted figures for the Plaintiff s maintenance needs are an amount of R17, 610.00. He argued that the Plaintiff will not only have a surplus but she will also earn "pocket- money" from sewing. Accordingly the sum of R20, 000.00 which constitutes roughly a third of the Defendant's income is more than reasonable.

Standard of living of the parties prior to the divorce

[33] Ms Halgryn submitted that the parties did not live a life of luxury as a result of the Defendant's miserly attitude. He forced them to live a frugal life while his estate flourished to R10 million. He provided basic necessities such as food and accommodation.

The age of the parties and the duration of the marriage

[34] The Plaintiffs 59 years old and the Defendant 55. The parties were married for 29 years.

Conduct relevant to the breakdown of the marriage

[35] Ms Halgryn argued that the conduct of the Defendant such as his extramarital affairs and excessive drinking, his abusive treatment of the Plaintiff, as well as the frugal lifestyle that he forced the family to live led to the breakdown of the marriage relationship. The Defendant did not challenge the Plaintiff's reasons for the breakdown of the marriage.

Application of the law

[36] Ms Halgryn made it clear that the Plaintiff is not seeking a redistribution of assets in terms of section 7 (3) of the Divorce Act. Instead she was pleading with this Court to use the very wide discretion which is conferred upon it by the subsection 7 (2) in making an order which is 'just'. Failure to do so will offend the rights and values of equality and dignity as enshrined in our Constitution. Mr Heyneke argued that the Plaintiff's claim for a lump sum amount is nothing but a transfer of assets which the Plaintiff is not entitled to. He conceded, however that lump sum payments are permissible in law.¹

¹ Zwiegelaar v Zwiegelaar 2001 (1) SA 1208 (SCA).

[37] The Plaintiff assumed the traditional role of homemaker whereas the Defendant's role was that traditional breadwinner. The problem with this gendered division of labour is that it can result in great inequity if the marriage is terminated after many years and close to retirement of the parties. This cannot be in line with our Constitutional ideals.

[38] Our Constitution is a value-laden document with one of its ideals the achievement of a society based on equality.² The achievement of substantive equality and transformation are foundational values of the Constitution. Academic writers advance the view that substantive equality can be understood as a remedy to systemic and entrenched inequalities. In this regard Albertyn argues that the idea of substantive equality entails 'transformatory' change.³

[39] In contemporary South Africa gender equality within marriage and society generally remains aspirational.⁴ Our Courts have a duty to remedy disadvantage resulting from social or historical context. This would necessitate a retreat from legal formalism towards a purposive approach in adjudication to ensure justice and fairness between the parties.

[40] Former Chief Justice Pius Langa stated that "it is no longer sufficient for judges to rely on the say-so of parliament or the technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values."⁵ Accordingly, our courts have to embrace transformative constitutionalism. The judiciary should not only be deeply committed to the values of the Constitution but should actively seek to promote Constitutional values.

[41] The Plaintiff in this matter made economic and career sacrifices for the benefit of the marriage, as opposed to the Defendant who did not sacrifice his career and

² See the preamble and s 1 of the Constitution.

³ Catherine Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 SAJHR 257.

⁴ Amanda Barratt 'Whatever I acquire will be mine and mine alone': Marital agreements not to share in constitutional South Africa 2013 SALJ 688.

⁵ Chief Justice Pius Langa 'Transformative Constitutionalism' STELL LR 2006 3 at 353.

retains all the benefits and is now at a considerable financial advantage. Her inability to support herself financially is a direct result of the career sacrifices she made for the good of the family. Although she performed the role of the traditional housewife she made a valuable contribution to the .growth of the Defendant's estate.

[42] I am of the view that the Plaintiff demonstrated real need and the Defendant has conceded his duty and ability to pay. The Defendant further conceded the competence of a lump sum payment, in addition to, monthly maintenance payments, by offering the Plaintiff an amount of R150, 000.00 for the purchase of a motor vehicle.

[43] With regard to her claim for accommodation in a retirement village, I do not think it is an unreasonable claim. It is a necessity not a luxury. In the *Zwiegelaar* case Scholtz AJ referred to Sinclair in *The Law Marriage* vol 1 at 443 and stated that the author "correctly refers to maintenance in the matrimonial context as a reciprocal duty of support which entails the provision of accommodation, food, clothing, medical and dental attention, and whatever else the spouses reasonably require". Since her claim for accommodation will be allowed, the claim for medical aid and excess medical expenses will be incorporated in the monthly maintenance payment, as the rent component will fall away.

[44] The Plaintiff conceded that the R100, 000.00 claim for purchase of household furniture is no longer accurate, and that an amount of R30,000 should be sufficient. For relocation costs the Plaintiff reduced her claim from R30, 000 to R20, 000.

[45] With regard to costs Ms Halgryn argued that the Defendant was not prepared to concede that the Plaintiff is unemployable. Therefore the evidence by the industrial psychologist was justified and necessary.

[46] In conclusion I am satisfied that the Plaintiff established a claim within the parameters of the provisions of section 7 (2) of the Divorce Act. The amount to be awarded is aimed to do justice between the parties having regard to all the factors considered. as well as the constitutional requirements of justice and equity.

[47] In the result to make the following order:

1. A decree of divorce is granted;
2. The Defendant is to pay monthly maintenance for the Plaintiff until her death or remarriage in the amount of R20, 000.00;
3. The Defendant is to pay an amount of R1.5 million to the Plaintiff for the purchase of an immovable property;
4. The Defendant is to pay an amount of R30, 000.00 to the Plaintiff for the payment of household furniture;
5. The Defendant is to pay an amount of R20, 000 to the Plaintiff for relocation costs;
6. The Defendant's is to pay an amount of R200, 000.00 to the Plaintiff of the purchase of a motor vehicle;
7. Costs of this suit, including the costs of the Plaintiff's expert, the industrial psychologist.

MABASA AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Counsel for the Plaintiff: Adv T. Halgryn

Instructed by: Karin Davis-Hannibal

Counsel for the Defendant: Adv E. Heyneke

Instructed by: Gerhard Botha Attorneys

Date of Hearing: 02 June 2014

Date of Judgment: 12 June 2014