IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A2/2013

Date: 26 November 2014

In the matter between:

P[...] C[...] Appellant

and

T[...] Y[...] Respondent

JUDGMENT

POTTERILL J

[1] The appellant is appealing against prayers 2 and 3 of the court *a quo*'s order. The appellant is appealing pursuant to the granting of leave to appeal by the Supreme Court of Appeal. Prayers 2 and 3 read as follows:

> "*2. THAT the plaintiff to pay maintenance to the defendant in the amount of R8 500,00 (eight thousand five hundred) per month, untii her death or remarriage whichever shaif occur first, payable as from 1 July 2012 and thereafter on or before the 1st day of every consecutive month;*
>
> *3. THAT the plaintiff pays the defendant's costs*."

[2] The appellant's main contention was that a court should very carefully exercise its wide discretion when ordering maintenance for an ex-spouse post divorce. On the facts before the court *a quo* the discretion exercised was not just. The amount of the maintenance awarded was however not the subject of appeal. In the alternative it was argued that rehabilitative maintenance should have been ordered for a short period.

[3] As background I set out the following common cause facts:

3.1 The parties were married by ante-nuptial contract excluding the accrual system on *Jk* November 1992.

3.2 It was appellant's first marriage and respondent's fourth marriage with two pre-teen minor children having been born out of the respondent's second marriage. No children were born from this marriage.

3.3 Appellant was *3U* years old at the time of the marriage and respondent *37* years old. When the summons was issued the appellant was 52 years and the respondent was 55 years. At the time of the divorce the respondent was 56 years old.

3.4 The respondent had attended University but had not obtained a tertiary qualification. She did achieve a diploma in photography at a tertiary institution but never practised this as a profession. She had various employments before the marriage and during her previous marriages mostly of an administrative nature and some in the form of self-employment. At the time of entering the marriage the respondent owned her own close corporation originally established to print local marketing but was utilising it as a conference consulting and coordinating business. During 1994 no further business was conducted pertaining to conference consulting and coordinating except for one conference that was arranged for SARS. The respondent generated some income with the following:

3.4.1 The respondent wrote a book entitled "Get wise" which was published in 1994 and updated with second and third editions in 1996 and March 2001;

3.4.2 During 1997 and 2000 the appellant and respondent both conducted a legal costs consultancy business with the respondent tasked to type the calculated the bills prepared by the appellant;

3.4.3 In November 2002 the respondent published two versions of a loose leaf publication entitled "Domestic Wise" and "Huiswerkerswysheid". In October 2004 she compiled a seven page conference supplement for the Pretoria News.

3.4.4 The parties bought as a company with each a 50 % share, a guesthouse in Jeffreys Bay. The parties managed the guesthouse from October 2005 until May 2007. This guesthouse was not successful and it was closed and reopened twice. The guesthouse was acquired as a result of the appellant not enjoying his job and the respondent not really making any money.

3.4.5 I do not find it necessary to refer to the common cause facts pertaining to the income, finances and needs of the parties as the amount awarded as maintenance is not in dispute.

[4] The appellant was and is a practising attorney in the office of the State Attorney with a BA degree and an LLB degree. At the time of the divorce he was earning R28 000 per month.

[5] The appellant's main contention was that the court *a quo* erred in ordering maintenance to be paid upon divorce to his spouse until death or remarriage. The appellant's submission was that after divorce an ex-spouse should not be entitled to maintenance, except if there was something intrinsic in the marriage warranting and justifying maintenance; that the spouse requesting maintenance somehow lost something because of the marriage or that such spouse contributed to it sufficiently to have suffered a loss or be entitled to be reimbursed for her efforts. It was thus argued that there must be a foundation, a basis from which to begin to build on, failing which the discretion could not even begun to have been invoked. It was further argued that it is a *sine qua non* test i.e. a but for the marriage the respondent would have been self-supportive; conversely whether the marriage made her non self-supportive.

[6] It is simply bad in law to argue that maintenance is only to be ordered as "reimbursement" for spouses' efforts in the marriage. Maintenance is not a bill to be paid for effort at the end of a marriage. Neither is maintenance a prize to be won for something intrinsically good in the marriage. It can never be considered as a factor that just because a man maintained his wife during the marriage she is barred from claiming maintenance after the divorce; this is exactly one of the factors that must be taken account of.

[7] If the submission on a *sine qua non* test is for argument sake accepted then the appellant should fail in the appeal on this very submission. This is so because on the common cause facts in the marriage of 1years the appellant had paid off the respondent's pre-marital debts and financially funded her business enterprise. The respondent did not contribute to household expenses or accommodation leaving her with all of her income to be utilised for herself. The appellant also assumed some level of responsibility maintaining the respondent's two daughters from the previous marriage where the respondent had insufficient funds. The appellant thus maintained the respondent during the marriage. The respondent accordingly lost her earning capacity as she was not required to contribute to the common household and just on and off made some pocket money. The marriage thus in the words of the appellant's submission had made her non self-supportive.

[8] It would also not send a general message to spouses not to be good to their wives financially during the marriage otherwise they will pay maintenance *ad infinitum.* This is so because each case is

judged on its own facts. The duration of the marriage, the tertiary education or not, the age of a spouse etc. may all differ from matter to matter and will either necessitate maintenance or not. This is certainly also not a gender based sword against ex male spouses. This proposition is proved with the decision in ***Botha v Botha*** **2009 (3) SA 89 (WLD)** wherein the court found the following:

"*[115] The issue of support must be based on a contextualisation and balancing of all those factors considered to be relevant in such a manner as to do justice to* ***both parties****."* [My emphasis]

[9] The appellant also submitted that the court *a quo* erred in accepting the medical condition of the respondent as a bar to obtain employment. The reason for this is that the medical documentation was limited, vague, uncertain and constituted hearsay evidence. It is however common cause that the respondent had a stroke in 1998. The other two incidents in respectively February 2011 and January 2012 are admitted by the appellant. The respondent referred to them as strokes whereas the appellant referred to them as TIA's (transient ischemic attacks). Even if at best for the appellant we accept that the respondent had one stroke and then two TIA's there is certainly an underlying medical condition. He also conceded that this underlying medical condition resulted in a memory loss and that she is also numerically dyslexic. This coupled with her age and her lack of a meaningful tertiary education as well as experience and skill certainly will not be in good stead in obtaining employment. The court *a quo* was accordingly correct in factoring in the medical condition as one of the factors to be considered as to whether maintenance must be ordered or not. The appellant on the one hand contradicts himself in that he admits that she had numerical dyslexia by saying that she had in anyhow never been good with figures, but then stating that from the spread sheets it would seem that her arithmetic is good. Such factual contradictions do not support a submission of the stroke not having any *sequelae* and therefore she could obtain employment.

[10] It is simply untrue to argue before this court that the respondent had a wealth of work experience and an outstanding CV. The respondent testified as to how and to whom she had sent in her CV's and that she had received no job offers despite same. This was uncontested by the appellant. The appellant referring to his tenant of 60 years who obtained employment is simply not relevant, even if we did know whether she had a tertiary education, had been working up to 60 in a specific field etc. With the medical condition and not being successful in procuring employment with her limited skills and qualifications, rehabilitative maintenance was not an option. The court *a quo* did not err in refusing rehabilitative maintenance. The respondent was disabled by the marriage to earn an income as she was not required to do so. Her age, medical condition, her lack of skills and qualifications render reintroduction to employment a problem.

[11] Section 7(2) reads as follows:

"*(2) 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 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. "

The court accordingly has a wide discretion in granting maintenance taking into consideration the factors mentioned in section 7(2) or any other factor which is relevant in the circumstances of the case. The order must then be just. To come to a just conclusion the court is guided by broad conclusions of law, justice and equity. The court has to balance the respective interests, intentions and counterbalance the competing forces and resolve and determine them in a fair, proper and reasonable manner. The court *a quo* gave a well-reasoned judgment taking into account all the factors as placed in evidence before him. There was no other factor which he should have taken cognisance of in order to come to a just decision. The only attack on the justness of the order is that as he was a good husband financially maintaining his wife and her children and therefore she should not be entitled to any further maintenance. The appellant's attitude was clearly expressed in the trial that "*he does not feel obliged to pay maintenance after the divorce".* The appellant's contentions are subjective philosophical discourse and submisisons which are legally irrelevant.

[12] The appellant also appealed against the costs order. I cannot find that the court *a quo* did not exercise its discretion judicially. The appellant from the outset indicated that he did not want to pay maintenance and the matter proceeded to trial upon which maintenance was ordered. The appellant must carry the costs of that trial. He was not successful in disputing that the respondent is entitled to maintenance and therefore he should carry the costs.

[13] I accordingly make the following order:

The appeal is dismissed with costs.

S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

D.S. MOLEFE

JUDGE OF THE HIGH COURT

I agree

K.L.A.M. MANAMELA

ACTING JUDGE OF THE HIGH COURT

CASE NO: A2/2013

HEARD ON: 19 November 2014

FOR THE APPELLANT: In person

FOR THE RESPONDENT: ADV. M.L. HASKINS SC

INSTRUCTED BY: Couzyn Hertzog & Horak

DATE OF JUDGMENT: 26 November 2014