

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No. 82419/2015

Reportable: YES

Of interest to other judges: YES

Revised.

22/12/2016

In the matter between:

F

Plaintiff

and

F

Defendant

JUDGMENT

A. MAIER-FRAWLEY AJ

Introduction

1. Because the interests of a minor child are involved, and because allegations of a salacious nature were made by the parties, I deem it prudent not to refer to the parties and the children born of their marriage by name. For this reason the citation of the parties in this judgment will be F (Mrs F, referred to as the plaintiff) and F (Mr F, referred to as the defendant). The minor child will remain unnamed, as too, the major dependant child.

2. This is an action for divorce in which the plaintiff claims *inter alia*, a decree of divorce, division of the joint estate, payment of maintenance for the plaintiff and on behalf of two children born of the marriage (one minor and one dependant major) and ancillary relief.

3. The defendant instituted a counterclaim in which he claims a decree of divorce, division of the joint estate and ancillary relief. The counterclaim incorporates a tender for payment by the defendant of maintenance in respect of the plaintiff and both children. I set out the relevant tender in specific terms below.

4. At the outset of hearing, the court was informed that the division of the joint estate and the parties' respective rights in regard to the care and control of the minor child, including defendant's rights of contact to the minor child, were not issues for determination at trial. The parties indicated through their respective counsel that the matrimonial property will be sold and the net proceeds thereof divided between the parties. A division of the joint estate would occur in accordance with the precepts of the law, either by agreement between the parties or at the direction of an appointed referee.

5. The following were the only issues for determination at the hearing:

5.1 The merits of a formal application brought *in limine* by the plaintiff (as applicant) in terms of Rule 43(6) of the Uniform Rules of Court (rule 46(3) application) for payment by the defendant (as respondent) of a further contribution towards the plaintiff's legal costs

5.2 The amount of maintenance payable by the defendant in respect of the plaintiff and the duration thereof;

5.3 The amount of maintenance payable by the defendant in respect of the minor child;

5.4 The amount of maintenance payable by the defendant in respect of the major but dependant child; and

5.5 Liability of each party in respect of costs.

6. In terms of the parties' pre-trial minute, only those documents referred to in evidence were to be taken into account by the court.

7. The court was specifically informed by counsel representing the respective parties to disregard the amended pleadings filed of record in the action and to determine the matter on the un-amended pleadings filed of record but contained in a separate bundle for this purpose.

Rule 43(6) application

8. The plaintiff in the action was the applicant in the Rule 43(6) application whilst the defendant in the action was cited as the respondent in the application. For convenience, the parties will be referred to as indicated earlier in this judgment.

9. In terms of her Rule 43(6) application, the plaintiff sought a contribution towards her legal costs in the amount of R250 000.00. A substantive application was served on the defendant prior to the trial date. The defendant failed to file an opposing affidavit. That carried with it the consequence that the defendant was *ipso facto* barred from gainsaying the plaintiff's allegations by means of controverting evidence on affidavit in terms of the provisions of Rule 43(3) of the Uniform Rules of Court. The defendant remained entitled to argue the application on the plaintiff's sworn statement or to convince the court to hear such evidence as was considered necessary in terms of subrule (5).

10. The plaintiff urged the court to entertain the application *in limine* at the outset of the proceedings. The defendant requested the court to determine the application only after evidence was led at trial. No explanation was tendered by the defendant for his failure to reply to the plaintiff's sworn statement. Nor was the court directed to any specific evidence considered as necessary in the adjudication of the matter.

11. After hearing and considering argument from counsel appearing for the respective parties, I entertained the application before evidence was led at trial and made an order in the following terms:

"The defendant is ordered to contribute the sum of R200,000.00 towards the Plaintiff's legal costs, which amount is payable by way of EFT directly into the trust account of the

Applicant's attorney of record within 10 (ten) days of the grant of this order."

12. When making the order aforesaid, I indicated to the parties that I would provide reasons therefor in my judgment at the conclusion of the trial. These are my reasons.

13. As was apparent from the papers filed in the Rule 43(6) application, the plaintiff obtained an order for interim maintenance against the defendant on 3 March 2016 in terms whereof the defendant was ordered, *inter alia*, to pay an amount of R10 000.00 towards the plaintiff's legal costs on or before the 1st of the month following the date on which the order was granted. The defendant failed to pay such amount.

14. According to the plaintiff, she has been unemployed since February 2014. She is presently 55 years old. She has no savings or investments to use towards the payment of the costs incurred by her in the divorce litigation. She has had to borrow money from friends and her church in order to maintain herself and the two children born of the marriage between the parties.

15. The defendant vacated the matrimonial home in the first week of October 2015 and thereafter only made sporadic and minor arbitrary maintenance payments to the plaintiff in respect of the upkeep of the matrimonial home and the monthly expenses of the plaintiff and the two children, both of whom reside with the plaintiff. The plaintiffs monthly expenses were stated to amount to R22 208.46 in respect of herself and the minor children.

16. The plaintiff was forced to resort to litigation in order to obtain monetary relief. *Inter alia*, she sought and obtained a Domestic Violence interdict for emergency monetary relief pursuant to which the defendant was ordered to pay R750.00 per month in respect of medical expenses. The defendant failed to comply with the order and instead brought an application for a variation thereof, which the plaintiff had to defend and which was subsequently dismissed by the court.

17. Thereafter, the minor child applied for and was granted an interim protection order against the defendant as a result of threats made by the defendant to remove him from his current school, which the plaintiff was obliged to fund. The plaintiff then brought a

Rule 43 application for interim maintenance pending the finalization of the divorce action, which was opposed by the defendant. An order was granted in favour of the plaintiff, which the defendant failed to comply with.

18. The defendant later approached the Children's Court, Pretoria, in bid to remove the minor child from the plaintiff's care, which the plaintiff is opposing. Thereafter the defendant brought an urgent application against the plaintiff and third parties, *inter alia*, to uplift the hold on his bank accounts, which the plaintiff opposed and simultaneously therewith, brought a counterclaim for contempt of court relating to the defendant's non-compliance of the Rule 43 order. The defendant subsequently withdrew the urgent application and tendered to pay the plaintiff's costs, which he again failed to pay. The plaintiff's contempt application is pending adjudication.

19. It was demonstrated that the plaintiff incurred enormous costs in either instituting or defending the various applications, which, save for the matter pending before the Children's Court, were all necessitated by the defendant's failure to pay maintenance on behalf of the plaintiff and the children and/or his failure to comply with existing court orders.

20. In the divorce action, the plaintiff seeks payment of maintenance in respect of herself in perpetuity, on the basis that she is medically unfit to work. The defendant disputes her entitlement to maintenance in perpetuity and his ability to pay the amount claimed. This necessitated the plaintiff having to employ the services of three experts in differing fields of specialization for purposes of proving her claim. Due to the defendant's failure to comply with pre-trial procedures relating to discovery of his financial position, the plaintiff was compelled to employ various procedures to investigate the nature and extent of assets forming part of the joint estate, the defendant's income potential and living expenses. To this end, the plaintiff incurred additional costs to secure available documentation from various entities and institutions, including the launch of interlocutory applications to compel the defendant to make proper discovery.

21. The papers revealed that the defendant earns a monthly income in excess of R42 000.00 by virtue of his employment at the Department of Trade and Industry. He also

has access to funds from other sources *inter alia*, an amount of R502 644.49 received in February 2015 pursuant to an employment grievance procedure. The defendant allegedly forged the plaintiff's signature in order to obtain a credit card from which he gained access to further funds, which were not placed at the disposal of the plaintiff or the children. The defendant's bank statement shows that he received an amount of R70 000.00 during November 2014. In addition, an amount of approximately R800 000.00 was paid into the defendant's Standard Bank account in October or November 2014, being the proceeds of a second bond which had been registered over the matrimonial property, to which funds the plaintiff did not have access.

22. On the uncontroverted evidence, the defendant has been utilizing funds, which are only at his disposal, with which to fund his litigation and which form part of the joint estate to which the plaintiff has no access.

23. From a perusal of the *pro forma* bill of costs of the plaintiff's attorneys, her aggregate total legal costs thus far amount to R578 363.73, which amount includes the costs of three experts.

Relevant legal principles

24. An application in terms of Rule 43(6) may be brought in the event of a material change of circumstances. The defendant's conduct since the grant of the Rule 43 order referred to earlier resulted in litigation in various courts which increased the plaintiff's costs of litigation. The initial contribution given in the Rule 43 order is clearly inadequate with which to fund the plaintiff's trial costs.

25. The amount of a contribution payable by a respondent pursuant to a Rule 43(6) application is in the discretion of the court. In this regard, I am to have regard to the circumstances of the case, the financial position of the parties and the issues involved in the pending litigation. The applicant is required to be put in a position to adequately present her case before court.¹ A further relevant factor is the scale on which a respondent litigates and the scale on which the applicant intends to litigate.² What is adequate depends on the nature of the litigation, the scale on which the husband is

¹ See: *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 639.

litigating, the scale on which the wife intends to litigate, with due regard being had to the husband's financial position.³ The contribution sought need not be limited to disbursements only but can include attorney's reasonable fees.⁴ It is trite that an applicant is ordinarily entitled to a contribution only up to and including the first day of trial but that thereafter contributions may be claimed on a day to day basis.⁵

26. In terms of section 9(1) of the Constitution of the Republic of South Africa, both parties have the right to equal protection of the law. In the case of *Cary v Cary*⁶ the position was stated thus: '...The question of protecting Applicant's right to and respect for and protection of her dignity also arises in the present situation where a wife has to approach her husband for the means to divorce him.'

27. I am satisfied that the plaintiff has made out a *prima facie* case for a further contribution in that she has insufficient means of her own, in contradistinction to the defendant who appears to have sufficient means at his disposal. The plaintiff is not entitled to all her anticipated costs, but she is entitled to a substantial contribution towards them.⁷

28. In the light of the circumstances of the matter, the quoted authorities and mindful of the fact that the plaintiff was not entitled to the costs of interim applications but only to a contribution towards the costs of the action,⁸ I considered the amount of R200 00.00 awarded to be reasonable.

Plaintiff's Claim and Defendant's Tender in his Counterclaim

29. In terms of her un-amended pleadings, the plaintiff claims:

29.1. Lifelong maintenance in respect of the plaintiff in the sum of R20 000.00 per month;

² See: *Nicholson v Nicholson* 1998 (1) SA 48 (W) at 50 C-G.

³ See: *Muhlman v Muhlman* 1984 (1) SA 413 (W) at 418G.

⁴ See: *Senior v Senior* 1999 (4) SA 955 (W) at 962.

⁵ See: *Bates v Bates* 1969 (3) SA 168 (R).

⁶ 1999 (3) SA 615 (C) at 621.

⁷ See: *Nicholson supra* at 511; *Dodo v Dodo* 1990 (2) SA 77(W) at 98F.

⁸ See: *Service v Service* 1968 (3) SA 526 D at 528F; *Micklem v Micklem* 1998 (3) SA

29.2. Maintenance in respect of the children in the amount of R10 000.00 per month per child;

29.3. Payment of the children's school fees and school related expenses including the costs of extramural activities, school uniforms, books, stationery, school tours, clothing and equipment;

30. In the counterclaim, the defendant tenders to pay:

30.1. Rehabilitative maintenance in respect of the plaintiff in the amount of R5 000.00 per month for a period of 6 (six) months;

30.2. Maintenance on behalf of the minor child in the amount of R1 500.00 per month until he attains the age of 25 or becomes independent, whichever occurs first;

30.3. Payment of the minor child's high school educational expenses including but not limited to school fees, reading materials, stationery and extra-mural expenses;

30.4. A contribution towards the major dependant child's maintenance until he attains the age of 25 or independency, whichever event occurs first.

31. Both parties seek an order for costs of suit.

Background

32. The parties were married to each other in community of property on 14 February 1996. They have thus been married for a period of 20 years. The parties have two children, a major dependant child who is presently 19 years old and a minor child, who is presently 16 years old. The major dependant child is not currently pursuing any form of tertiary studies and is looking for employment, although the defendant is assisting him in the quest to secure some or other position in the Republic of China next year. The minor child attends a private school. Although the 19 year old child is a major, he still resides with the plaintiff and is currently still dependent on the parties for his financial support. Both children reside with the plaintiff at [...] A. Street, Constantia Park, Pretoria (the erstwhile matrimonial home). The parties have been living apart since 2

October 2015, being the date on which date the defendant vacated the common home.

33. The parties experienced unresolved marital difficulties/conflict for a number of years, caused *inter alia*, by pervading feelings of mistrust that developed as a result of what can be termed as 'grounded suspicions' of infidelity on either side, a lack of any meaningful communication between the parties, with attendant failure or inability to address their problems, either meaningfully or at all, the fall-out from indiscriminate physical altercations, and stress occasioned by financial hardship experienced during 2013 and subsequent thereto.

34. It is common cause between the parties that their marriage has irretrievably broken down and that there is no reasonable prospect of restoring their marital relationship. The parties disagree on the reasons for the breakdown of the relationship. The parties are *ad idem* that it is in the minor child's best interests that both parties be granted parental responsibilities and rights pertaining to the minor child with regard to care, contact, maintenance and guardianship.

Evidence tendered at trial

35. The plaintiff testified in support of her claim and called three expert witnesses to testify on her behalf, namely, Ms. Karen Havenga (Counselling Psychologist), Mr. W. Wessels (Industrial Psychologist) and Dr Birrell (Orthopaedic Surgeon). The qualifications and expertise of the respective experts within their specialized fields of practice were not in dispute. Thereafter the defendant testified. He called no further witnesses before closing his case.

36. I do not propose to summarize all the evidence of the witnesses in the course of this judgment, the reason being that the evidence appears on record. I have however considered all the evidence presented by the parties. I will refer to salient aspects of the evidence which I consider relevant and cogent in arriving at the decision in this matter, bearing in mind the remarks of Nugent J (as he then was) in *S v Van der Meyden*.⁹ For the sake of convenience, I summarize the expert testimony first.

⁹ 1999 (1) SACR 447 (W) at 449j-450b - where a caution was sounded to have regard to the totality of the evidence presented. Albeit that the remarks were made within a criminal context, they are equally apposite within a civil context.

Evidence of Clinical Psychologist

37. Ms Havenga compiled a written report in regard to the plaintiff's psychological and emotional state of mind and the impact thereof on her present level of functionality. She confirmed the contents of her report and stated that it was compiled from what was subjectively reported to her by the plaintiff, the outcome of clinical tests conducted by her and her own clinical impressions, and evaluation of the plaintiff.

38. Ms Havenga testified that the plaintiff suffers from depression which was brought on by problems experienced in the marriage, the resultant breakdown of the marriage and the stress of the divorce. The plaintiff reported to her that she tried to commit suicide in January 2014, whereafter she suffered burn-out and stopped working. Ms Havenga is of the opinion that the plaintiff may still harbour suicidal tendencies. The plaintiff was a vulnerable individual before the divorce, having been molested by her father as a young girl and not having had a good family life whilst growing up. The plaintiff was involved in a relationship with a married man for ten years before her marriage with the defendant. The plaintiff also has a son from a previous relationship who is presently a major, who works and lives in Cape Town. When the plaintiff met the defendant, she had the belief and expectation that the defendant was going to provide everything she ever dreamed of. When the marriage fell apart, so did the plaintiff.

39. Ms Havenga's clinical diagnosis is that the plaintiff is very depressed and has elevated feelings of anxiety, 'which will make it more difficult for her to cope with the stressors in a work environment'. These problems are ascribed to 'divorce related factors and the plaintiff's physical problems'. The plaintiff reported suffering from back and hip pain and relayed to Ms Havenga, the emotional toll which the defendant's behaviour and the pending divorce has had on her. In Ms Havenga's opinion, there is no 'quick fix' for depression. She cannot say with certainty that the plaintiff will not find employment, but opines that having regard to her age, the plaintiff's lack of education, the sequelae of her depression such as fatigue, lack of drive, lack of motivation and energy and lack of concentration, she will likely find it difficult to maintain employment.

40. Ms Havenga is of the opinion that although the plaintiff's functioning should improve with the aid of therapy and medication, she could not say to what degree it would

improve. She recommends that the plaintiff undergoes 28 to 32 sessions of psychological therapy at a cost of R1 025.00 per session.

Evidence of Industrial Psychologist

41. Mr. Wessels confirmed the contents of his written report. He was requested to assess the plaintiff's employability taking into consideration her current disposition with regard to the divorce and her overall profile of employability. He explained his assessment methodology whereby he considered the plaintiff's qualifications and work experience, her subjective reports about her physical and psychological disposition, information obtained from collateral sources such as a recruitment agency together with reports of the other two experts who testified at trial as well as his own experience gained over the last 30 years.

42. In his report, he set out the plaintiff's work history and qualifications as reported to him by the plaintiff. The plaintiff has a Grade 12 (matric) formal qualification. Pre 1992, the plaintiff's work experience was intermittent and of a temporary nature, mostly in administrative capacities. Post 1992, the plaintiff's work experience became more gainful, stable and of a permanent nature, whereby the plaintiff performed general administrative and secretarial functions and later on practiced call-centre occupations. The plaintiff worked at Garlicks in Cape Town performing administrative duties from 1992 until 1995. In 1996, after re-locating to Pretoria, she commenced employment at the Department of Finance (as it was then known) where she steadily enhanced her employment opportunities. She started off as an administrative clerk and was promoted in later years to Senior Administrative Clerk/Call Centre Agent/Acting Call Centre Supervisor until she attained the position of Assistant Director in the department of National Treasury - Pensions Administration, where she remained for the period 1 July 2008 until 28 February 2014. She resigned from her employment on 28 February 2014. Her reason for leaving was reported as 'a marital decision'.

43. The plaintiff has been unemployed for over two years. She presented Mr Wessels with 13 written applications for employment that, according to his report, 'yielded either no response or indicated that she is too old'. The plaintiff reported that she was earnestly searching for employment and 'continues to approach employers but remains unsuccessful to date'.

44. In Mr. Wessels opinion, it is highly unlikely that the plaintiff will find employment in the corporate sector of the market due to her age and circumstances. In his view, the plaintiff presents as visibly depressed which he believes would not 'encourage/convince employers that she is a favourable prospect'. It is more likely for the plaintiff to secure employment in the non-survey sector of the employment market, such as doctor's receptionist, shop assistant, either on a permanent or temporary basis. Mr Wessels postulates the plaintiff's earning capacity on a full day basis (whether permanent or temporary) at between R8 000.00 to R10 000.00 per month and on a half day basis at between R5 000.00 and R8 000.00 per month. Whilst the plaintiff's chances of finding employment appear poor, they are not impossible.

45. During cross-examination, it was put to Mr. Wessels that the plaintiff had in fact been invited to two interviews pursuant to sending out job applications, one for the position of receptionist and the other for a secretarial position. Mr Wessels was not informed thereof by the plaintiff. He indicated that an interview itself does not guarantee success but conceded that the plaintiff's chances of finding employment would thereby appear to be better. On a question whether the plaintiff would be able to take up half day employment in order to pursue her passion for hairdressing in the afternoons, Mr. Wessels indicated that this would be possible.

Evidence of Orthopaedic Surgeon

46. Dr. Birrell confirmed the contents of his written report. He testified that the plaintiff was referred to him for purposes of determining her suitability to work, with specific reference to her health complaints. He confirmed that the plaintiff has scoliosis of the lumbar spine, which accounts for the pain experienced in the lower back and hips. The plaintiff's x-rays indicate that her spine is permanently skew with deterioration above normal for someone of the plaintiff's age. According to Dr. Birrell, it is a fluctuating condition that may take one or ten years to get worse. Dr Birrell is of the view that surgical intervention is not a viable option for the plaintiff.

47. The plaintiff reported that she was diagnosed with hypertension 19 years ago. Her general practitioner diagnosed her with depression in 2012. She was diagnosed with osteoarthritis in October 2014. The plaintiff experienced lower back pain since 2004. Dr.

Birrell confirmed that the plaintiff is presently depressed.

48. The plaintiff reported to Dr. Birrell that she is seeking employment and has sent out many CV's, which have thus far been unsuccessful. She is unsure why.

49. Prior to seeing the plaintiff's x-rays, Dr. Birrell assessed the plaintiff's loss of work capacity to be around 5 to 6% in a clerical type position. He recommended that the plaintiff undergo occupational therapy ergonomic advice, should she return to the workplace. After perusing the x-rays, he increased the plaintiff's loss of work capacity to 10%. During cross-examination, Dr. Birrell explained that 'for the rest of the 90%, the plaintiff would be functioning with these problems'. During his evidence-in-chief, Dr. Birrell opined that the plaintiff could possibly do clerical type work including the type of work previously performed at the Government Employee's Pensions Fund. However, in a written addendum dated 24 October 2016, Dr. Birrell had expressed the belief that, taking the plaintiff as a whole, including her mental status, she 'is not at all in any serious contention to find suitable employment, i.e, for practical purposes, she must be considered unemployable.'

50. The plaintiff's x-rays were admitted into evidence as exhibit "A".

Evidence of plaintiff

51. The plaintiff confirmed that she is 55 years old, grew up in Cape Town, completed grade 10 in 1979 and did Matric in 1995. At the age of 7, she was sexually molested by her father until the age of about 15 or 16. The plaintiff suffered flashbacks of the molestation in later years and received counselling therefore through a wellness-programme offered at government departments in 2005.

52. The parties were married on 14 February 1996 in Cape Town. Thereafter the parties relocated to Pretoria.

Plaintiff's employment

53. The plaintiff took up employment at the Department of Finance, where she continued working in different positions, as documented in the report of Mr. Wessels.

54. The plaintiff started a short course in Human Resources at Unisa in 2014. She completed 3 modules and has yet to complete the fourth module, which she would like to do.

55. Whilst employed, the plaintiff received a 13th cheque annually and certain performance bonuses. At the time of her resignation in February 2014, the plaintiff was earning about R22 000.00 as documented in Dr. Birrell's report. The plaintiff resigned from her employment on 28 February 2014 since which time she has not worked.

56. The plaintiff testified that she wants to work and if offered employment, she would gladly accept it. To this end, she has applied for various positions but has been unsuccessful to date. She attended two interviews. Her evidence was that she does not know why they were unsuccessful. Later during cross-examination she said that she received negative feedback in respect of the one interview. In a sworn statement deposed by her in terms of Rule 43, the plaintiff mentioned that she had been invited to attend two interviews but she could not attend these as she had no petrol or airtime. It is unclear whether these were two unrelated interviews.

57. Under cross-examination the plaintiff confirmed the contents of her covering letters that accompanied her job applications. In these letters, she indicated that she was energetic, qualified, possessed necessary skills, enjoyed mutual interests and would be an asset to the employer. The plaintiff applied for various positions at Government departments which required diplomas, believing that her lack of diploma status would not be an impediment to a successful application as her position at the Government Pension Fund had also required a tertiary qualification which she did not possess, yet she had obtained a position based on prior experience. It was put to her that if she were to apply for positions within her realm of qualifications, she would be successful.

Marital problems

58. The plaintiff was hospitalized for an attempted suicide in January 2014. The parties experienced marital problems over a number of years. The plaintiff suspected the defendant of having extra marital affairs as early as 2003. In 2003, the plaintiff caught her husband caressing another woman's breasts at a party which he blamed on having consumed too much alcohol. He apologized for the incident but did not pay much

attention to the plaintiff thereafter. This led to an incident in 2005 when the plaintiff was caught stealing a box of hair colour dye. She did this to get attention from her husband.

59. In the years following, there was a decline in intimacy in the marriage and sexual relations became strained. In 2015, the plaintiff found condoms, penis enlargement pills and gels in the defendant's gym bag. She also discovered hotel receipts and cellphone money transfers from the defendant to a certain gentleman by the name of 'R...' 'H...' (RH). After perusing certain of the defendant's bank statements, the plaintiff discovered that the defendant had made various purchases of clothing and personal items for RH. The plaintiff confronted the defendant about having an extra-marital affair but he refused to provide answers and shut down towards her, either refusing to talk to her or dismissing her when she tried to discuss it. This led to physical altercations after the plaintiff had a 'meltdown' which resulted in the defendant being hospitalised after one such altercation. The defendant vacated the matrimonial home in October 2015. The plaintiff instituted divorce proceedings thereafter.

Financial problems

60. The plaintiff testified that she took 'pills' in January 2014 due to financial problems that the parties started experiencing during 2013. For the whole of 2013, the parties had no water and electricity in their house as municipal bills were not paid. Notwithstanding the financial problems, that same year the defendant purchased a SLK Mercedes motor vehicle for his personal use. The plaintiff voiced concerns about the impracticality of purchasing a luxury car which could not fit a family of four and which the parties could ill afford. The defendant nevertheless purchased the car, asserting that it was 'his money'. At some stage thereafter, the plaintiff purchased an Audi motor vehicle for herself. During this time, the defendant started demanding that the plaintiff contribute more money towards household expenses. She used her income over this period to purchase groceries, children's clothing, sundry gifts and to pay for the children's extra mural activities.

61. Towards the end of 2013, the plaintiff discussed resigning from her employment with the defendant so that she could use her pension money to settle their debts. The defendant refused, stating that he would not support her if she were to resign. According to the plaintiff, she resigned from her employment in February 2014 solely at

the insistence of the defendant.

Health problems

62. The plaintiff confirmed her health problems as testified by Dr. Birrell. She testified that she previously underwent a back infiltration procedure but that her back problems persist. She has osteoarthritis, is depressed and suffers from anxiety. She has been taking medication for the past six months for depression and anxiety and the back pain is treated by means of analgesics obtained from the Steve Biko and Tshwane district hospitals. She has also been receiving counselling at these institutions.

63. The plaintiff and the children were beneficiaries of the defendant's medical aid until 2013 or 3104 when the defendant cancelled the medical aid, which he did not reinstate thereafter.

Monies expended by plaintiff

64. After her resignation, the plaintiff received a 'resignation benefit' in the net amount of R1 193 656.96, which was paid out to her in April 2014. According to the plaintiff, she paid various expenses from this money, *inter alia*, her motor vehicle, repairs to a leaking roof in the matrimonial home, outstanding bills, groceries, household and living expenses, personal bank loans, architect's fees for proposed renovations to the matrimonial home, educational and other expenses for the minor child and a piano, including R73 000.00 which she spent on new household appliances and equipment. In addition, the plaintiff used R 100 000.00 to contribute towards a family trip to Germany, and loaned an amount of R180 000.00 to the defendant with which to pay his debts. All the money was spent and there is nothing left of it.

65. The plaintiff cashed in a retirement annuity and received the amount of R76 621.00 on 7 June 2016. She used the money to pay for household necessities, water and electricity costs and clothes for the children. As was demonstrated in cross-examination, the plaintiff spent approximately R73 000.00 within the space of two months and there is nothing left of these monies.

Lifestyle during marriage

66. The plaintiff testified that the parties enjoyed a middle class lifestyle. The defendant

drove a Jeep motor vehicle before he purchased a SLK Mercedes. In 2014, the defendant sold the SLK and purchased a Mercedes A-class vehicle. In October 2014, he sold the A-class vehicle and purchased a Golf 7, all without the plaintiff's consent. The plaintiff drives an Audi A1 motor vehicle which is paid up and prior thereto, she drove a Mazda A2. The family went to Europe during the marriage and Germany in 2015.

Lack of financial support since separation

67. After the defendant vacated the common home, he bought groceries for the home on the odd occasion but did not pay maintenance. The plaintiff did hairdressing for friends on occasion to earn some money. No amount was specified in this regard. The plaintiff also loaned money from friends and obtained assistance from family and food parcels from the church. As indicated earlier in the judgment, the plaintiff obtained an order against the defendant in the magistrate's court for payment of medical expenses in the amount of R750.00 per month, which was thereafter varied to the amount of R5 000.00 per month in respect of maintenance. The defendant did not comply with these orders and on 3 March 2016, the plaintiff obtained an order in terms of Rule 43 in this court for payment by the defendant of *inter alia*, interim maintenance in the amount of R13 000.00 per month, payment of reasonable medical expenses and payment of household expenses directly to the service providers concerned. In addition, the defendant was ordered to pay an amount of R10 000.00 as a contribution towards the plaintiff's legal costs. The defendant failed to comply with the Rule 43 order.

68. The plaintiff cause a writ of attachment to be issued pursuant to which funds were attached from the defendant's Al Baraka Bank account. Of the monies attached, R15 000.00 was paid to Deutsche Schulle, the plaintiff received an amount of R17 000.00 and the rest remained with plaintiff's legal representatives for legal costs. It was put to the plaintiff in cross-examination that at the time that the writ was issued, she had an amount of R7 000.00 in her bank account whilst claiming that there was no food in the house. The plaintiff's bank account showed various deposits into her account, *inter alia*, from SA Retail bonds in respect of an investment and an amount of R40 000.00 from the defendant. The plaintiff admitted that she was receiving money from outside sources at the time the writ was issued.

Maintenance requirements in respect of plaintiff and children

69. During her evidence, the plaintiff reduced her claim for maintenance in respect of herself and the children to the total amount of R9 866.50 per month, that is, R4 402.75 in respect of the plaintiff and R5 463.75 in respect of the two children. The plaintiff's reduced claim does not include provision for medical or accommodation costs.

70. During cross-examination, certain expenses were challenged to be unreasonable and/or unnecessary and/or excessive. It was put to the plaintiff that reasonable amounts were respectively, R2 975.00 in respect of the plaintiff and R2 375.00 in respect of the minor child, yielding a total expense of R5 350.00. The plaintiff conceded that an amount of R1 500.00 would be sufficient in respect of the minor child per month but denied that the projected amount of R2 975.00 would be sufficient in respect of the plaintiff.

71. The plaintiff did not quantify her reasonable medical or future accommodation costs in respect of either herself or the children.

Defendant's new tender in respect of plaintiff and the minor child

72. The defendant tendered to pay R1 500.00 per month in respect of the minor child for a period of 6 (six) months and R5 000.00 per month to the plaintiff for a period of 6 (six) months. The defendant tendered to pay R2375 per month in respect of the minor child upon the expiry of the six month period.

Major dependant child

73. No tender was made by the defendant in respect of the major dependant child on grounds that the defendant presently pays for the major dependant child's expenses by agreement with him, based on what is needed and what the defendant can afford. It was put to the plaintiff that since the child is a major, the child can approach the Maintenance Court in the future, should he feel the need to do so. The plaintiff testified that she does not know of the terms of the arrangement between the defendant and the major dependant child or what exactly is paid for by the defendant. The plaintiff explained that she continues to incur costs in respect of the major dependant child's lodging with her, particularly as regards the use of water, electricity, the consumption of food, petrol and the like. The major dependant child also remains dependent on the

parties for accommodation, payment of medical expenses, clothes and travelling expenses.

Evidence of defendant

Personal circumstances

74. The defendant testified that he is 51 years of age. He is employed as a Director at the Department of Trade and Industry where he has been seconded to assist in a new branch dealing with foreign investment for the country. In this position, he is required to travel locally and abroad. He has worked at the department since 1 October 2013. He resides at [...] Estate, [...] O. Avenue, Centurion, together with a tenant, RH.

75. The defendant vehemently denied being involved in an extra-marital affair with RH. He categorized his relationship with RH as one of mentorship. He assisted RH to establish his own company and arranged language training and entrepreneurship for him. All payments made to RH or funds expended on his behalf have been reimbursed to the defendant.

Children

76. The defendant confirmed that the minor child and major dependant child reside with the plaintiff in the erstwhile matrimonial home, which he vacated on 2 October 2015 and that the major dependant child is still dependent on the parties for his support.

77. According to the defendant, he consistently buys groceries for the major dependant child, pays his cell phone contract and gives him money for entertainment and clothes when asked and if finances permit. According to the defendant, the children understand if he cannot give them what they ask. He cannot predict that he will have the finances if ordered to pay a set amount for the major dependant child each month. He is negotiating to send the major dependant child to China next year to take up employment there.

78. There is a pending case regarding the minor child in the Children's Court where that court is yet to decide on the minor child's residency. The court has called for a psychological evaluation and report and there is an investigation into a possible placement for the minor child. Pending finalization of the matter in the Children's Court,

both parents will share rights and responsibilities in regard to the minor child, with primary residency to remain with the plaintiff subject to the defendant having reasonable rights of contact to the minor child.

79. The defendant confirmed his tenders in respect of the minor child as made in the counterclaim and as put by his counsel to the plaintiff in cross- examination.

Reasons for breakdown of marriage

80. The defendant testified that the marriage was 'never good from the start'. Shortly after their marriage, he discovered that the plaintiff was having intimate relations with her ex-boyfriend. The plaintiff continued to see her ex-boyfriend thereafter. That caused feelings of mistrust to linger even though he forgave the plaintiff and 'tried to move on'. The plaintiff issued summons for divorce in the Western Cape High Court in 1996, which the defendant did not contest. The action was withdrawn after the parties decided to relocate to Pretoria. The parties never enjoyed healthy communication. According to the defendant, he could never have a 'decent conversation' with the plaintiff because the plaintiff would 'flare up' within seconds. The plaintiff attacked him violently on many occasions. The last physical altercation occurred in August 2015 as a result of which the defendant was hospitalized. That was 'the final straw' for him 'with the attacks'.

Financial problems in the marriage

81. For many years the defendant was the major contributor of all household expenses and costs pertaining to the children.

82. The defendant testified that he fell into financial difficulties as from 2013 from which he has never recovered. The cause thereof was not stated.

83. On 2 February 2015, the defendant received an amount of R502 644.59 from the proceeds of a second bond which the parties procured over the matrimonial property. According to the defendant, the bond was obtained to enable the parties to do renovations at the matrimonial home however, the renovations were never effected. He used the money to pay for household expenses and debts, including arrear school fees. He also gave the plaintiff an amount of R40 000.00 with which to pay her debts, although the plaintiff testified that the money was given to her as a gift. There is nothing

left of such funds.

84. The defendant stated that he applied for a loan of R200 000.00 in November 2015 to assist with the 'financial situation'. Under cross-examination the defendant testified that notwithstanding his financial dilemma, he assisted a work colleague with a loan of R24 000.00 over this period and purchased luxury items for himself, for example, clothing to the value of R5 220.00, cosmetics to the value of R2 500.00 and expended the amount of R5 300.00 for the Gautrain.

Defendant's contributions after the parties separated

85. Documentary evidence indicated that the defendant paid R10 000.00 on 15 April 2016 and R2 144. 17 on 16 April 2016, prior to the grant of the Rule 43 order on 3 May 2016. On 7 May 2016, he paid a further amount of R7 700.00. No further payments were made pursuant to the Rule 43 order aside from payments made directly to the children, the amount of which remained unquantified.

Defendant's financial means and capacity

86. The defendant testified that he earns R42 030.00 per month as evidenced by his pay-slip for June 2016. He receives annual increases, a subsistence allowance for local and international travel, as well as medical and car allowances in addition to his salary. He is also entitled to a performance bonus provided he meets the required performance criteria. According to the defendant, he has not received a performance bonus in the last few years. The defendant is not on any medical aid and thus receives the medical allowance in addition to his salary.

87. According to the defendant, he incurred a debt of R203 260.00 to SARS in respect of an outstanding tax liability. Differing amounts are deducted by his employer from his salary each month in liquidation of the arrears owing to SARS. The defendant stated that he does not know why the deductions fluctuate from month to month. For example, the defendant received a net amount of R32 641.55 in October 2016 and November 2016 respectively. Documentary evidence showed that the sum of R1 776.92 was deducted from his salary in March 2016. In the months of April, May and June 2016, the sum of R1 500.00 was deducted each month. During July to September 2016 no deductions were made. In October and November 2016 the sum of R12 543.49 was

deducted each month. No evidence was tendered as any payment arrangement with SARS or for how long a period such deductions will be made.

88. In addition to his salary, the defendant receives an amount of R4 100.00 per month from RH in respect of rent and municipal services. The defendant conceded under cross-examination that the cash component pertaining to his car allowance is R9 400.00 per month whereas his actual monthly expense in respect of his car is R6 057.00 leaving a difference of approximately R3 000.00 at his disposal. Under cross-examination the defendant stated that he earns extra income from selling perfumes and clothing on the side. The amount thereof was not stipulated. He later stated that the amount earned therefrom is 'negligible'. Thereafter the defendant stated that he only earns R20.00 extra per month from such endeavours. As established in cross-examination, the value of this additional income stream could not be verified by reference to bank statements as these were not discovered by the defendant. According to the defendant, he could not discover his bank statements as his accounts, save for the account held at FNB, have been frozen.

89. The present net value of the defendant's pension benefit is R1 782 359.41. The defendant testified that he uses public facilities and therefore has not taken out a medical aid.

90. The defendant confirmed his list of expenses as set out in his opposing affidavit filed in the Rule 43 proceedings. Certain of these expenses are not presently being incurred. The defendant testified that he cannot afford to pay the bond instalment in respect of the matrimonial property, or related property expenses. These expenses will fall away entirely once the matrimonial property is sold and outstanding debts liquidated.

91. The defendant's current living expenses amount to R21 957.00 per month, which includes costs incurred in respect of school fees, clothes for the children, extramural activities, maintenance for the minor child and amounts paid for the major dependant child. The amount of R21 957.00 excludes his maintenance liability towards the plaintiff or any contribution towards the medical expenses incurred by the plaintiff personally or on behalf of the children.

92. An amount of approximately R36 000.00 is outstanding in respect of school fees, which amount the defendant is liquidating by arrangement with the school.

93. The matrimonial property is valued at approximately R 1.2 million. There is an outstanding bond liability of R886 000.22.

94. The parties were placed under debt review in June 2016. According to the defendant, the joint estate liability in respect of accumulated debts is R1.3 million. The defendant is supposed to pay an amount of R7 300.00 per month in terms of a debt review restructuring agreement but stated that he cannot afford to pay such amount.

95. The defendant testified that he lacks the financial ability to pay the cost orders that were obtained against him by the plaintiff in the preceding litigation between the parties.¹⁰

Relevant legal principles

96. Spousal maintenance post-divorce is dealt with in section 7 of the Divorce Act 70 of 1979 (the Act).

97. In the absence of a written agreement (settlement agreement) and in terms of section 7(2) of the Act, the court may make an order which it finds just in respect of the payment of maintenance by the one spouse to the other, by taking various factors into account. The court is required to consider the factors referred to in section 7(2) in order to decide, firstly whether maintenance is to be paid at all and, if so, the amount to be paid and the period for which maintenance is to be paid. The factors referred to in section 7(2) are the existing or prospective means of each party, their respective earning capacities, financial needs and obligations, the age of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct insofar as it may be relevant to the break-down of the marriage and any other factor which in the opinion of the court should be taken into account.

¹⁰ Whether such inability was caused by fault on the part of the defendant was not one of the triable issues in this case but merely a factor that could be considered in determining the plaintiff's claim for maintenance.

98. 'When the court makes an award for maintenance in terms of section 7(2) of the Act it must make an order which is *'just'*'. This implies that the court should be fair to both parties bearing in mind those factors enumerated in the section'.¹¹ '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'.¹² The enquiry is necessarily directed towards the interest of both spouses and the impact which the order will have on each.¹³

99. In *Grasso v Grasso* 1987(1) SA 48 (C), Berman J said the following at p 52 of his judgment:

"In setting forth, in s 7(2) of the Divorce Act of 1979 the various factors to which the court is to have regard when considering the payment of maintenance upon divorce, no particular stress was laid on any one or more of these factors, and they are not listed in any particular order of importance or of greater or lesser relevance. The proper approach, it seems to me, is to consider each case on its own merits in the light of the facts and circumstances peculiar to it and with regard to those factors set out in this particular section of the Divorce Act - which list of factors is clearly not exhaustive of what the court is to have regard to in deciding what maintenance, if any, is to be paid upon divorce by one spouse to the other, for the court is free to have regard to any other factor which, in its opinion, ought to be taken into account in coming to a fair and just decision." (own emphasis)

100. In *Swart v Swart* 1980(4) SA 364 (O) Flemming J made the observation that as far as marriage is concerned an overall picture must be formed, the court must try to identify that conduct which has really caused the breakdown and thereafter considerations of justice must prevail in the determination of maintenance.

101. In terms of section 6(1)(a) of the Act, a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances.

¹¹ See: *LW v LW* (52148/2007) (2013] ZAGPPHC 268 (22 June 2013) at para 36.

¹² See: *Botha v Botha* (2005/25726) (2008] ZAGPHC 169 (9 June 2008) at para 115.

¹³ Ibid *Botho* para 43.

102. It is trite that a child is entitled to reasonable maintenance for housing, clothing, medical, dental and health care, education and recreation. What is reasonable depends on circumstances such as *inter alia*, the position of the family, the child's health, the child's aptitude towards his or her studies, parties' standard of living, the child's needs and a parent's ability to pay.¹⁴ In all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied.

Evaluation of evidence

Impressions

103. The plaintiff portrayed herself as a hopeless victim of circumstances for which the defendant was solely to blame. The defendant on the other hand, portrayed himself as a benevolent philanthropist who helps others and always tries to do the best that he can. In another sense, he portrayed himself as a victim of abuse at the hand of the plaintiff, and a hapless victim of irrepressible financial adversity. The portrayals are not exactly realistic or convincing, for a consideration of the totality of the evidence points to the conclusion that each party made life choices for which they are individually responsible and accountable.

No-fault principle and divorce

104. That both parties endured emotional hardship during their marriage is manifest from their testimony. Both parties however demonstrated an alarming inability to manage large sums of money or to measure any form of restraint in financial expenditure during times when they had access to funds. It is incomprehensible how the parties managed to sink into financial privation to the extent testified, when between them, they derived a joint income of approximately R38 000.00 (in 2013). By the time that the plaintiff resigned in February 2014, she was earning about R22 000.00 per month, whilst the defendant was earning just over R28 000.00 per month, yielding a combined income of approximately R50 000.00 per month. No evidence was presented in respect of the quantum of the household expenses of the parties during those years. The evidence revealed that the plaintiff expended a sum in excess of R1.2 million within

¹⁴ See *Smit v Smit* 1980 (4) ALL SA 52 (O).

the space of a year, and the defendant expended a sum close to R2 million in two years over and above his salary. As indicated earlier in this judgment, vast sums of money were spent on 'household expenses' and settling debts, yet today the parties still find themselves deeply indebted to the extent that they are currently under debt review.

105. In my view, both parties were equal participants in the demise of their marital relationship. Both parties have demonstrated extreme financial imprudence. In the words of Satchwell J in *Botha v Botha*¹⁵ with which I align myself, 'Fault plays no part in the breakdown of this marriage. There is no evidence from either party that the conduct of either is so heartless or cruel or blameworthy that any penalty consideration should apply to the consideration of maintenance.'

106. I am satisfied from the evidence of the parties that their marriage has irretrievably broken down and that there exists no prospect of the restoration thereof. The marriage is to be dissolved by decree of divorce.

Accommodation expenses

107. 'In *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA) the court commented that it would be just, in appropriate cases, to recognize accommodation requirements as part of maintenance needs, while *Buttner v Buttner* 2006 (3) SA 23 (SCA) stated that the court is enjoined to "effect justice as between the parties" [para 24]'.¹⁶

108. The difficulty for the plaintiff in this matter is that no evidence was led in regard to the plaintiff's future accommodation needs or expenses, which were also not quantified, with the result that the content of the expenditure and assessment thereof, including the averred needs of the plaintiff and the children cannot be determined or decided. A court is not called upon to speculate upon or divine¹⁷ (with or without the assistance of the parties), the ultimate outcome of disputed issues in the absence of supporting evidence.

109. The plaintiff has had the benefit of continued accommodation in the matrimonial

¹⁵ (2005/25726) [2008] ZAGPHC 169 (9 June 2008).

¹⁶ Ibid *Botha* at para 44

¹⁷ See: *Legal-Aid South Africa v Mzoxolo Mogidiwana* (1055/13) [2014] ZASCA 141 (26 September 2014) at para [18].

home since the parties separated in October 2015, whilst the defendant has paid for separate rented accommodation without assistance from the plaintiff. The evidence of each party revealed that for the greater part of the marriage, the defendant financed the mortgage bond liability and paid for the majority of the expenses associated with the home and children, although the plaintiff contributed thereto. After the financial debacle in 2013 to date, both parties paid for such expenses from funds placed at their disposal. In these circumstances, it would be just for the future accommodation needs of the plaintiff to be financed from funds that will be paid to her upon division of the joint estate.

Plaintiff's claim for maintenance

110. It is common cause or at least not seriously refuted that the plaintiff is presently in need of maintenance. The totality of the evidence supports such a finding and all that remains to be said is that the plaintiff has founded a claim for maintenance. The central issue in dispute is in respect of the duration and quantum of the maintenance payable.

Duration of maintenance

111. The plaintiff was employed prior to her marriage to the defendant and worked for a continuous period of 18 years whilst married. The plaintiff proffered various versions for resigning from gainful employment in 2014. She told Mr Wessels that her resignation was based on a 'marital decision'. In her Rule 43 affidavit, she informed the court that she was hospitalized for burn-out whereafter the defendant proposed that she should resign, stay at home and be more involved with the children. She testified in these proceedings that she resigned at the *insistence* of the defendant, in circumstances where the defendant had unequivocally told her two months earlier *not* to resign and that if she did, he would not support her. On the defendant's version, he told the plaintiff not to resign because the parties could not afford to live on a single income.

112. When regard is had to the economic hardship that the parties endured during 2013, when municipal services were cut due to non- payment of bills, it is highly improbable that the defendant would have demanded the plaintiff's resignation as contended by her. It is more probable that the plaintiff herself voluntarily exercised the choice to resign when she did. This conclusion is supported by the evidence which unequivocally showed that the plaintiff acted as an economically independent adult both

prior to and throughout the marriage until her resignation in February 2014.

113. The evidence revealed that the plaintiff suffered back pain and depression for many years in the marriage, yet managed to cope with her duties and maintain her employment. The totality of the evidence reveals that she did not resign because of her *then* existing physical or emotional dispositions. Even after the parties separated, the plaintiff pursued hairdressing in order to derive some income. With all her health and marital problems, the plaintiff remained motivated to work and did work. Her pain and depression did not impede her ability to work prior to her resignation in February 2014. The experts seem to suggest that the plaintiff would now not be able to cope or maintain employment because of her physical and emotional dispositions. The opinions of the experts ignore the reality of the evidence that the plaintiff was capable of working and did work, in spite of these dispositions. The plaintiff herself testified that she wants to work and would love to pursue her passion for hairdressing. I cannot therefore find that the plaintiff has established an inability to work such as to entitle her to maintenance in perpetuity.

114. The order which the plaintiff seeks will result in the defendant effectively having to work for the rest of his life to support her whilst she remains unproductive , inactive and financially dependent. This will not be fair or appropriate in the circumstances of this case, for I am persuaded that for as long as the plaintiff does not work, she will remain beholden to a man who has demonstrated that he will not be held. In the circumstances of this case, it would be appropriate to apply the 'clean break' principle¹⁸ whereby each party can become economically independent of the other.

115. The evidence suggests that the plaintiff s future employment is less secure by reason of her age. The evidence also suggests, however, that the plaintiff is able to continue working in the same field and capacity in which she worked prior to her resignation. The plaintiff is obtaining treatment for her pain and depression. She herself testified that she is 'coping better'. Based on the testimony of Ms Havenga, the plaintiffs functioning should continue to improve with therapy and medication. I propose making an order that will provide a window of opportunity for the plaintiff to continue with

¹⁸ See: De Jong 'New Trends Regarding the Maintenance of Spouses Upon

therapy and to secure employment, thereby incentivizing her to achieve financial autonomy and become self-supporting.

Amount of maintenance

116. The plaintiff's reduced claim in respect of her own maintenance requirements is the sum of R4 402.75 per month. I am not persuaded that such amount is either unreasonable or exaggerated. This figure excludes the plaintiff's reasonable medical requirements. I am satisfied that the plaintiff is in need of therapy as recommended by Ms. Havenga. Provision should therefore be made for the plaintiff's medical expenses in this regard. Having regard to the uncontroverted evidence of Ms. Havenga, the plaintiff will benefit from therapy at a cost of R1 025.00 per session. I am of the view 24 such sessions at intervals of one session per month is reasonably required.

117. During her evidence-in-chief, the plaintiff testified that the expenses incurred by her in the home in respect of the children amount to R5 463.75. The plaintiff conceded under cross-examination that an amount of R1 500.00 per month in respect of the minor child would be sufficient for the minor child's support at this juncture. That concession carried with it the necessary implication that the expenses listed in the plaintiff's schedule of expenses were somewhat inflated in respect of the children. The amount of R1 500.00 excludes the minor child's reasonable medical and accommodation costs. The defendant is obliged to contribute towards such costs. As the accommodation costs have not been quantified, this court is not in a position to speculate about what is reasonably required. I am mindful of the fact that the defendant receives a medical allowance in addition to his salary and that he makes use of public facilities for his medical requirements.

118. It was held in *Bursey v Bursey and Another* 1999 (3) SA 33 (SCA) at 36 C-H that: "According to our common law both divorced parents have a duty to maintain a child of the dissolved marriage. The incidence of this duty in respect of each parent depends upon their relative means and circumstances and the needs of the child from time to time. The duty does not terminate when the child reaches a particular age but continues after majority...That the duty to maintain extends beyond majority is recognized by s6 of

Divorce', 1999 (62) *THRHR* 15 and the discussion of the authorities cited therein.

the Divorce Act 70 of 1979. Section 6(1)(a) provides that a decree of divorce shall not be granted until the Court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. Section 6(3) provides that a Court granting a decree of divorce may make any order which it deems fit in regard to the maintenance of a dependent child of the marriage... A maintenance order does not replace or alter a divorced parent's common law duty to maintain a child. In *Kemp v Kemp* 1958 (3) SA 736 (D) Jansen J stated at 738A-B that as a matter of expediency the Court, as the upper guardian of the child, usually regulates the incidence of this duty as between the parents when it grants the divorce and that its order for maintenance is ancillary to the common law duty to support." (own emphasis).

119. As regards the major dependant child's support, the evidence of the defendant to the effect that he pays for what the major dependant child needs and asks of him, finances permitted, stands unrefuted. On the defendant's own version, he paid for the major dependant child's costs to travel to Germany, this while Rule 43 proceedings were either pending or concluded. By his own admission, the defendant did not comply with the Rule 43 court order for maintenance claimed in respect of the plaintiff, the major dependant child and the minor child, yet he testified that he expended monies on overseas trips to Poland and Germany for the children respectively during this period. The defendant's version that he *may not* be in a position to comply with any court order in respect of the major dependant child's ongoing support is in the circumstances, not credible.

120. The difficulty which I have in the present matter is that the expenses paid for by the defendant in respect of the major dependant child's monthly requirements were not quantified in evidence. On the unrefuted evidence of the defendant, certain of the major dependant child's living expenses are being paid for by the defendant. The defendant has undertaken, by way of tender, to continue making such payments. I am not satisfied that it is in the major dependant child's best interests that payment of these expenses is to be left solely to the discretion of the defendant. The major dependant child is presently seeking employment and once gainfully employed, any *pro rata* contribution towards his support as is payable by the parties will naturally require re-assessment. As he is a major, he will be entitled to approach the maintenance court directly in future,

should the defendant's present payments prove to be insufficient for his needs.

121. Having regard to the plaintiff's schedule of expenses insofar as they pertain to the major dependant child, the plaintiff incurs, at the very least, ongoing costs in respect of his food and groceries and consumption of services and provisions in the home. The order which I envisage making in respect of the major dependant child is one which will cater for his requirements in this regard.

122. I also intend to make an order that will ensure that the children's reasonable medical costs are catered for. Once the children's accommodation costs are properly quantified, the plaintiff will be entitled to apply for a variation in maintenance to take account of these costs.

Defendant's financial means and capacity

123. As indicated earlier in this judgment, the defendant's salary is currently R42 030.00. The defendant provided no supporting documentation in regard to any payment arrangement with SARS or the period over which payments are to be made. In the absence of any evidence in that regard, I am unable to conclude that the liability to SARS ought to take precedence over the defendant's maintenance obligations.

124. It is impossible to rely on the credibility of the defendant for his expenditure or income. The defendant has not provided a true or accurate disclosure of his financial affairs. He failed to make proper or adequate discovery of his financial position, particularly as regards his bonuses, allowances and other benefits of employment, which were only revealed under cross-examination.

125. As demonstrated through the able and thoroughly prepared cross-examination of Mr. Olivier who appeared for the plaintiff, the defendant also has additional income streams with which he supplements his salary. It was clearly demonstrated that even when the defendant suffered financial difficulties, he spent money on luxuries for himself, made payments on behalf of colleagues (whom he had no duty to support), all in abject disregard of his maintenance obligations. By way of example, during the period from 11 February 2015 to 25 July 2015, the defendant made airtime purchases and cash transfers to RH in the aggregate total amount of R9 098.00. In 2016, the defendant

continued to expend money on RH, *inter alia*, in respect of luxury clothing items. The defendant's version, namely that he was reimbursed for such expenditure (whether by the Peoples Republic of China or the Department of Finance in South Africa) is highly improbable. No evidence whatsoever was tendered to support the allegation that the defendant's employer, the Department of Finance, reimbursed the defendant for any of these expenses. It is in any event inherently improbable that the Department of Finance would contract with its employees to maintain third parties as part of an alleged entrepreneurship programme with the Republic of China.

126. On the totality of the evidence, I find that the defendant is well able to afford payment of maintenance in the amounts that I envisage ordering.

Order sought by plaintiff in written heads of argument

127. In written heads of argument presented on behalf of the plaintiff, she seeks an order 'that the Government Employees Pension Fund of the Defendant with pension fund number [...] be ordered to pay an amount of R1227 820.71 (one million two hundred and twenty seven thousand eight hundred and twenty rand and seventy one cents), directly to the plaintiff into a bank account, alternatively, a pension fund/annuity as indicated by the plaintiff within 60 days from date of this order'.

128. The order sought is in respect of cost orders previously granted against the defendant in prior proceedings involving an urgent application, application to compel and the Rule 43(6) application.

129. In the pleadings filed of record, both parties sought an order declaring that the defendant's interest in the Government Employees Pension Fund, for purposes of the joint estate, be regarded as an asset of the joint estate.

130. It is not appropriate for me to make the order sought, firstly because neither the manner in which the division of the joint estate is to occur, nor the parties' respective rights in regard to the proportion of distribution of assets were triable issues in these proceedings and secondly because the plaintiff has at her disposal, *inter alia*, the mechanism of contempt of court procedures to enforce her rights in regard to the unpaid cost orders.

131. I was also requested to make an order against the defendant for payment of the minor child's *tertiary* education costs. It is equally inappropriate for me to make such order where these costs were not sought by the plaintiff in the pleadings (being the un-amended pleadings upon which I was to determine the matter) and in respect of which no evidence was tendered. I therefore decline to make the orders sought.

Costs

132. Both parties have succeeded to some extent in their individual claims. However, the defendant's conduct during the litigation requires special mention. The evidence showed that the defendant provided financial support for himself and third parties whilst reneging on his responsibilities towards his family. The defendant ignored court orders.¹⁹ The defendant made inadequate disclosure of his financial circumstances. I gained the impression that the defendant litigated on a 'catch me if you can' basis,²⁰ and that the defendant was trying to undermine the payment of maintenance to the plaintiff. A cautionary warning is sounded to the defendant: Court orders are to be obeyed until set aside.²¹ In the circumstances, it is just that the defendant be ordered to pay the plaintiff's costs in the action.

133. In the result, I grant the following order:

Order

1. A decree of divorce;
2. Division of the joint estate;
3. It is declared that the defendant's interest in the Government Employees Pension Fund, number [...]7 is, for purposes of the joint estate, to be regarded as an asset of the joint estate;
4. Both parties are to retain parental responsibilities and rights pertaining to the minor child with regard to his care, contact, maintenance and guardianship;

¹⁹ Whether the defendant's conduct amounts to contempt of court, is for another court to determine within the framework of established judicial precedent regarding proof of the legal requirements pertaining to the crime of contempt.

²⁰ See: *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014).

²¹ See: *Gauteng Province Driving School Association & others v Amaryllis Investments (Pty) Ltd & another* (006/11) [2011] ZASCA 237 (1 December 2011) at para 19.

5. Primary residence in respect of the minor child is granted to the plaintiff pending the finalization of proceedings instituted in the Children's Court, subject to the defendant being entitled to reasonable rights of contact to the minor child by arrangement between the parties;
6. The defendant is ordered to pay maintenance in respect of the minor child as follows:
 - 6.1. The amount of R 1 500.00 per month directly to the plaintiff into a bank account nominated by her, commencing on 1 January 2017 and thereafter payable on or before the 1st of each and every succeeding month, until he reaches the age of 25 or becomes self-supporting, whichever occurs earlier;
 - 6.2. The minor child's high school educational costs, including but not limited to school fees, books, uniforms, stationery, tours, clothing and equipment;
7. The defendant is ordered to pay maintenance in respect of the major dependant child as follows:
 - 7.1 The amount of R1 500.00 per month directly to the plaintiff into a bank account nominated by her, commencing on 1 January 2017 and thereafter payable on or before the 1st of each and every succeeding month, until he reaches the age of 25 or becomes self-supporting, whichever occurs earlier;
 - 7.2 The reasonable costs of the major dependant child's cell phone, entertainment, pocket money and clothing until he reaches the age of 25 or becomes self-supporting, whichever occurs earlier;
8. The amounts referred to in paragraphs 6.1 and 7.1 are to escalate annually in accordance with the Consumer Price Index as published from time to time;
9. In respect of the plaintiff, the defendant is ordered to pay:
 - 9.1 Rehabilitative maintenance in the amount of R4 403.00 per month for a period of 3 (three) years, commencing on the 1st January 2017 and thereafter payable on or before the 1st of each and every succeeding month, which amount is to be paid into a bank account nominated by the plaintiff for this purpose and which amount is to escalate annually in accordance with the Consumer Price Index as published from time to time;

- 9.2 The amount of R1 025.00 per month for a period of 24 months (24 sessions] in respect of therapy, which amount is to be paid directly to the service provider concerned;
10. The defendant is ordered to pay the reasonable medical costs of the minor child and the major dependant child directly to the service provider/s concerned;
11. Mr. F, the defendant in the main action and plaintiff in reconvention, is ordered to pay the party-party costs of Mrs. F, the plaintiff in the main action and defendant in reconvention.

MAIER-FRAWLEY AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	5-8 December 2016
Date of judgment:	21 December 2016
Judgment delivered	22 December 2016

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