



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**Not Reportable
Case No: 12178/2015**

In the matter between:

HBL

PLAINTIFF

and

CGL

DEFENDANT

ORDER

1. A decree of divorce is granted.
2. The plaintiff is directed to pay maintenance to the defendant for a period of three years from date of divorce or until her remarriage or cohabitation, whichever occurs first:

2.1 In the sum of R15 000 per month, escalating annually at the rate of increase of the Consumer Price Index on the anniversary of the date of divorce.

2.2 By payment of the monthly premium required to retain the defendant on his medical aid scheme.

2.3 By payment of the sum of R272 per month towards the defendant's cellphone.

3. The plaintiff is directed to pay the defendant the sum of R85 000 in respect of the loan from the defendant to the plaintiff, along with interest thereon at the legally applicable rate from date of service of the claim in reconvention until date of payment.

4. The plaintiff is directed to pay a sum of R50 000 towards the costs of suit of the defendant. This is in addition to the contribution to costs paid pursuant to the initial Rule 43 application.

5. The plaintiff is directed to pay the costs of the initial Rule 43 application.

JUDGMENT

Delivered on: 21 September 2018

Gorven J

[1] The parties both seek a divorce. There remain two issues. The first is a maintenance claim by the defendant (the wife). This claim is for R29 570 per month until death or remarriage. The amount should escalate annually. In addition she seeks to be retained on the husband's medical aid scheme at his expense. The second is a claim for repayment of an amount which she claims she loaned the plaintiff (the husband). The amount is R136 900, being an initial loan of R151 900 less R15 000 which was repaid. And costs of suit.

[2] There is much common ground. The parties met in 1988. They married on 6 April 1996. The marriage was out of community of property with the application of the accrual system. No accrual claim lies either way. Twin boys were born on [...] February 1998. I shall not name them. They both require support. The husband undertakes this obligation. This will be needed for four to

six years. One of them was born with a rare, serious, heart condition which still requires ongoing management. The wife did not work during the marriage apart from one or two part time periods which will be mentioned later. The wife has just turned 50 and the husband is 49.

[3] Section 7(2) of the Divorce Act¹ governs a claim for maintenance. This reads:

‘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.’

Subsection 7(1) relates to agreements between the parties and thus does not apply. Subsection 7(3) concerns an asset redistribution order if the accrual system does not apply. That, likewise, is not relevant here. Section 7(2) confers a wide discretion on a court.² While a ‘clean break’ from financial dealings between the parties is desirable, it cannot always be achieved. In the present matter, the parties both have negligible assets far exceeded by their liabilities. It is common ground that some form of order for maintenance is appropriate. The husband says that this should be for a limited period. The wife says it should persist until death or remarriage.

¹ Divorce Act 70 of 1979.

² *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 987E.

[4] In *Pienaar v Thusano Foundation and another*,³ Friedman JP said the following:

‘In its plain, grammatical meaning, “just” means *inter alia* correct, appropriate, fair-minded, sound, deserved, fitting, reasonable, justified and “equitable” means *inter alia* even-handed, fair, honest, reasonable, right.’

This was said in the context of insolvency proceedings. Satchwell J has affirmed this approach in the context of s 7(2) of the Divorce Act.⁴ I agree.

[5] Although each party sought to cast aspersions on the conduct of the other, no serious misconduct was proved. In the heat of disagreements, the parties both became angry and directed unsavoury language at the other. For the most part, however, it seems clear that they attempted to work together as a family unit. It was agreed that the wife would not take up employment once the boys were born. She would stay at home and care for them. For much of the marriage she undertook all household tasks with limited assistance. She assisted the husband in his business of a supermarket and when he managed a farm in Weenen. Her contribution to the marriage was therefore considerable and must not be underestimated. At no stage during the marriage did the husband request that she take up employment.

[6] The wife studied for a Basic Secretarial Course with Computer and Word procession at the Vryheid Technical College in 1987. In 1988 she obtained N4 and N5 level qualifications in a secretarial course at the Pietermaritzburg Technical College, studying communication, typing, audio typing and tourism and hotel reception. In 1989 she studied at Maritzburg Business College in basic principles of public relations, business communication and typing. She completed a course in the widely used Pastel accounting software in 2005. At

³ *Pienaar v Thusano Foundation & another* 1992 (2) SA 552 (B) at 580D–F.

⁴ *Botha v Botha* 2009 (3) SA 89 (W) para 46.

the beginning of 2018 she began an eighteen month qualification in Montessori pre-school education.

[7] Between 1988 and 1998, when the boys were born, the wife worked in an administrative position. After that, the husband alone provided for the family. At the time, he was working at Electromatic Shurlok Alarms. They lived in Pietermaritzburg. When the boys were about 18 months old, the family moved to Umhlanga, where they rented a home. The husband started a supermarket business at the Arcadia Centre in Durban North. After a few months, they returned to Pietermaritzburg where the husband opened a second supermarket in Alexandra Road. When the boys started at nursery school, during mornings the wife assisted in the supermarket. She checked in stock, packed shelves, cashed up, did some administrative work and, if necessary, worked on tills. After school, she cared for the boys.

[8] In 2005, the boys were enrolled for Grade 1 at Clifton School in Nottingham Road. The wife obtained her Pastel qualification that year. She ferried them from and to Pietermaritzburg for about 18 months. After this, the family moved to Rosetta, nearby the school. During this period, the wife occasionally had paid help with the household tasks. The husband was running his two supermarkets and some bottle stores. At the end of 2011 the boys finished Grade 7 and the family moved to a farm in Weenen. The husband had lost all his businesses. He became employed as farm manager. The boys were boarded at St Charles College in Pietermaritzburg. The wife was employed to do administrative work in the farm office on Tuesdays, Wednesdays and Thursdays. This involved filing and working on Pastel software. She was paid R3 000 per month. In 2013 they returned to Pietermaritzburg. They had not been able to continue working for the farm owner who had a psychological illness.

[9] The wife moved into a duplex with the boys, who then attended St Charles College as day scholars. The husband was employed by Macsteel in Zambia from February 2013 at a monthly salary of about R102 000. He has worked in Zambia to this day. The plan was for the wife to join him there but this never eventuated. The parties agreed that, in 2015, the boys would resume boarding at St Charles College. The husband said that, in order to afford this, he had to terminate the lease of the duplex. The wife perforce moved to a farm near the Swaziland border with KwaZulu-Natal. There she stayed with her mother, who lived on the farm.

[10] The farm is owned by the Alan Goss Oasis Trust (the trust). The wife's mother conducts a game hunting business on it for her profit. Prior to his demise in early 2018, the wife's father was also involved in the business. The wife is one of three remaining capital beneficiaries of the trust. The other two are her sisters, one of whom lives with her mother on the farm. The trustees are accorded the discretion to distribute income or profits to any of these beneficiaries. None have received any capital or income to date. She accepts that she is entitled to reside there at any time and will be supported when she does so. The wife did no work on the farm. She has no knowledge of the financial affairs of the trust.

[11] In September 2015, the wife received the summons in this matter. She was advised by the attorney representing the husband at the time to return to Pietermaritzburg and find a job. She did so but did not find work. She resided with a friend. In January 2016, she commenced unpaid employment with a friend who owned a jewellery store. This was intended to make her more employable. This work terminated in October 2017 when she moved to Johannesburg. On 11 October 2017, she completed ten online applications in

response to advertisements for administrative positions in Johannesburg. The salaries offered ranged from R10 000 to R16 000 per month. When these bore no fruit, she began her Montessori training in January 2018. Such employment commands a salary of about R4 000 a month in Johannesburg and less in KwaZulu-Natal.

[12] The issues which require decision are as follows. What monthly amount does the wife reasonably need in order to maintain her? Is she likely to obtain an income? If so, when is this likely to be? If so, what will she be likely to earn? What amount can the husband reasonably afford to pay?

[13] The wife put up a list of what she said were her present monthly expenses. These total the sum claimed. These greatly exceed amounts for the listed items paid from the three months of bank statements she provided. When challenged on this, she said that they were what she used to spend during the marriage. But none of this was supported by vouchers and she did not say at what stage of the marriage this was supposedly the case. The list is entirely unconvincing. I accept that she has clearly been relying on the charity of various people. But she was unable to give any clarity on actual amounts needed for various items.

[14] She has received R17 000 per month since April 2016 when the Rule 43 application resulted in an order for that amount. In addition, she has been retained on the husband's medical aid scheme and he pays R272 per month for her cellphone account. She has had to take out some loans during this period. One is from her bank for the deposit for her present course. This had almost been repaid. The other is by way of an indication that she is liable to her attorney in the sum of R240 000. Although this is an estimate, she is required to liquidate whatever is owed at the rate of R3 000 per month.

[15] The wife's counsel attempted to rely on the Rule 43 application to arrive at an amount for maintenance. In it, the husband said that her reasonable monthly expenses totalled R14 650. It was submitted on the wife's behalf that to this sum should be added amounts for electricity and water, cellphone, her course of study and loan repayment, pension provision and the like. None of these had been included at the time. However, since that time, the husband's income from employment has reduced from about R102 000 per month to between R47 000 and R55 000 per month. As I have said, no evidence was led concerning most of the expenses claimed.

[16] The financial position of the husband is not seriously challenged. He was retrenched by Macsteel in June 2017. He is currently employed by SMC Zambia Ltd. His income from employment is a nett monthly amount of US\$ 4 000. His salary slips are reflected in Zambian Kwacha. This entire amount is deposited by his employer into his South African bank account held with First National Bank Ltd. He is unsure whether the US dollar amount is converted into Rands at the ruling exchange rate or whether the Kwacha amount is so converted. On 29 May 2018, the amount was R47 044, on 31 July it was R49 628 and on 20 August it was R55 480. His employer pays for his vehicle expenses, including fuel, and for his cellphone. He lives with his girlfriend in her accommodation. She pays for this and for his daily upkeep in Zambia. When he visits South Africa, his girlfriend accompanies him and pays for his expenses.

[17] The husband directly related each item of his schedule of monthly expenses of R66 414.62 to his bank statement dated 28 August 2018. All of the amounts recur monthly. In addition, he has to pay for medical expenses for one of the boys not covered by the medical aid and gap cover. These include

consultations with an ear nose and throat specialist and with a paediatric cardiologist. These generally take place once or twice a year each. On 19 September 2018, this boy is having a surgical procedure which will not be fully covered. Until 6 August 2018, the husband had made provision for these expenses in a dollar denominated bank account with First National Bank. On that date, the account was closed and the Rand equivalent of the balance was paid into his current account in reduction of his overdraft. This came to R82 760.76.

[18] The husband's expenditure exceeds his income every month. He recently took a loan from his employer of R85 000 to pay his attorney. He is repaying this by way of a deduction from his nett salary at the rate of US\$ 200 per month. He has no fixed assets. The limit of his overdraft facility with the bank is R103 000. As at August 2018, the debit balance on that account was R34 061.32, an amount of R10 599.04 was due on his Discovery credit card and an amount of R8 240.80 was due on his First National Bank credit card. His total indebtedness from these three sources adds up to R52 901.16 which is more than half of his overdraft limit.

[19] I turn to the earning potential of the wife. The wife relied on the evidence of Dr Sonia Hill, an industrial psychologist. She had conducted certain tests. The wife's personality was suitable for a caring position. She was also able to learn new skills. Although she had moderate to severe depression, this could be treated. Dr Hill did not say that this militated in any way against the wife's future employment. The wife would be suitable as a Montessori pre-school educator. Dr Hill had not been told of the administrative qualifications or skills of the wife. In particular, she had not been told that, during her Montessori course, the wife had applied for such work in Johannesburg by letter dated 14 March 2018. In it, she wrote:

‘I am tri-lingual and am proficient in Word and Excel. I have worked on PowerPoint and Pastel but would need a little guidance again, as I haven’t used (these) in the last 2 years.’

At the very latest, the wife used Pastel in 2011, while on the farm at Weenen. Dr Hill had also not been told of the range of work performed by the wife in the husband’s supermarket or in the Weenen farm office. She simply was not asked to, and did not, comment on an administrative position as a potential avenue of employment.

[20] Dr Hill readily conceded that she has no expertise in what is available in the job market, either in KwaZulu-Natal or Gauteng. This, too, of the recruitment and placement field. As such, she was unable to shed professional light on the probability of the wife obtaining employment given her age, qualifications and work history. She likewise has no expertise in the kind of salaries which persons with a Montessori qualification command. She opined that the wife would not be likely to be employed when younger people applied for the same position in a competitive job market. In general terms she may be right. However, as she conceded, this opinion does not arise within her area of expertise. As a result, her evidence is of limited assistance.

[21] The employability of the wife is probably the central issue in her claim for maintenance. If she is likely to find employment at some stage, it would be inequitable to saddle the husband with lifelong maintenance. On the contrary, if she is unlikely to do so, it would be equally inequitable to order the payment of maintenance for a limited period only. I am required to sail between this Scylla and Charybdis in arriving at a determination.

[22] All other things being equal, the goal of any maintenance order is to maintain a similar lifestyle to that enjoyed during the marriage. All too often, however, this goal is simply impossible of achievement. That is clearly the case

at present. The husband has proved that his monthly expenditure amounts to R66 414.62. This includes R17 000 as interim maintenance to the wife, a cellphone subscription for her of R272.36 and her retention on his medical aid scheme. The wife claims an additional sum of R12 570 but no longer claims the cellphone subscription as a separate amount. She says this represents her previous lifestyle during the marriage. If this were to be awarded, the monthly expenses of the husband would total R78 984.62.

[23] It is simply untenable for the husband to continue indefinitely in this manner. Already, he is in debt and, each month, his indebtedness increases by between R9 000 and R17 000, depending on the exchange rate. If maintenance in the sum requested by the wife was ordered, he indebtedness would increase by an additional amount of R12 570 to between R21 500 and R29 500. If he is ordered to pay what is requested by the wife, the longest period it will take for him to reach his overdraft limit will be two and a half months.

[24] The wife is currently unemployed. I am not convinced that she has done sufficient to address that situation. She has received maintenance *pendente lite* since April 2016. She registered with two employment agencies in Pietermaritzburg at the end of 2015. She made ten online applications in October 2017 for administrative positions in Gauteng. She applied for an administrative position in Gauteng in March 2018 and for a Montessori placement in April 2018. She led no evidence of any other steps taken by her. Her claim required evidence from a recruitment and work placement specialist as to the options open to the wife. Most unfortunately, this was not provided. With the lack of evidence, I am perforce left to manufacture, polish and gaze into a crystal ball to make the best estimate possible on these issues.

[25] The choice of training as a Montessori pre-school educator may well suit the personality of the wife. It is, however, poorly paid and such educational institutions are vastly outnumbered by other pre-school facilities. The fact that she has not been more diligent in applying for work should not result in the husband having to support her for a longer period than would otherwise be the case. It is incumbent on a person in her position to find work and, if necessary, to upskill herself for that purpose. The wife is far more likely to find work of an administrative nature. All of her work to date has been in this area. However, it will serve no purpose to require the wife to abandon her present training by ordering that she maintain herself immediately. Her course concludes in July 2019. She will require maintenance until at least then. There is certainly no evidence to the effect that she is likely to be permanently unemployed. No such appropriate evidence was led.

[26] Taking into account the lack of concrete evidence to the contrary and the facts and factors set out above, I see no good reason why the wife cannot obtain employment within a period of three years from the date of divorce. She does not need to wait until she completes her course to begin this search. The only indications as to a likely salary in this area are the advertisements she responded to in October 2017. As I said, these ranged between R10 000 and R16 000. The best I can estimate is that a starting position, given her background and experience, is likely to command a salary in that range. I am alive to the evidence of the wife that she wants to return to KwaZulu-Natal but I was not told of likely salaries in this province. The wife struck me as intelligent, level headed and personable with high levels of integrity. Once she has found employment, I have little doubt that she will be regarded as a valuable employee and is likely to progress to a higher salary after a relatively short time.

[27] Turning to the husband. It was pointed out that, apart from medical aid contributions, he pays R32 460 per month to maintain the boys. This covers accommodation, living expenses, cellphones and gym membership totalling R10 532.74 each. Educational fees average R5 700 per month per child. In other words, the husband is supporting each of them to the tune of over R16 000 per month. Counsel for the wife could not point to any of these expenses which could be reduced. Neither can I find any. The best that might be done is if the boys are able to find part time employment while pursuing their studies. Even this is not assured given their poor academic record so far and the health challenges faced by one of them. No evidence was led that they would be able to manage but I take the view that they should attempt to do so. Assuming that they can each earn R2 000 per month that way, this would only serve to reduce the monthly deficit of the husband by R4 000. In a month where his salary realises R55 000, any amount in excess of R7 000 for the wife would still see his indebtedness increase. In months where it realises less than that, even a lower sum would do so.

[28] In the light of all of the above, I would probably have awarded maintenance in the sum of R13 000 per month for a period of three years, escalating annually at the Consumer Price Index on the anniversary of the award. In addition, I would have required the husband to retain the wife on his medical aid for the same period. This I would have done on the basis that, without taking into account their tuition expenses of R5 700 each, the boys each receive R10 532. In addition, she requires a further R1 933 per month until July 2019 for the Montessori course. Rounding up the total gives R13 000.

[29] However, the husband made an open tender for maintenance in terms of Rule 34. This was to elapse after three years or at her remarriage or cohabitation, whichever takes place first. The tender comprised three items.

First, payment of R15 000 per month, escalating annually at the rate of the Consumer Price Index on each anniversary of the order. Secondly, the retention of the wife on his medical aid. Thirdly, an amount of R272 in respect of the wife's cellphone. In the light of that offer, I must conclude that the husband can somehow make provision for such payments for that period. Since it exceeds what I would probably have awarded the wife in the light of his financial situation, I regard it as a reasonable amount in the difficult circumstances of this matter.

[30] I turn to the wife's claim for repayment of a loan. The wife testified that she exchanged some gold coins owned by her so as to lend money to the husband. This realised about R100 000. She could be no more precise than this. He used this to pay the boys' school fees in April 2014 and to buy one of the boys a set of bagpipes. In addition, her mother loaned the husband R50 000 which she has asked the wife to recover from the husband. He had agreed to repay both loans. It is common cause that the husband paid the wife R15 000 for her to buy goats and start farming them on the trust's farm. She instead used this money to purchase a vacuum sealer. She intended at the time to build a business cutting up and packing the meat of game shot on the farm. This, she says, was abandoned by her as unlikely to succeed since the hunters take the game back to their own butchers. She now regards this as a part repayment of the loan.

[31] These are two different loans on her evidence. The first relates to her sale of the gold coins. The second relates to R50 000 lent by the wife's mother to the husband. This latter claim is that of the wife's mother. It was readily and correctly conceded by the wife's counsel that the wife has no claim arising from it.

[32] The claim arising from the gold coins stands on a different footing. Here, the wife asserted in evidence that there had been a clear agreement that the money realised was loaned to the husband and he undertook to repay it. This evidence was not challenged. The closest he came to challenging it was when his counsel put to the wife that she, too, had an obligation to pay for the school fees of the boys and to provide gifts such as the bagpipes to one of them. Her response was that it had been agreed between them that the husband would be responsible for these expenses. In his evidence, the husband also did not challenge her evidence. He said that he might have said that he would repay it when he could. Since his ability to pay was not put to the wife as being a term of the agreement, it is my view that the wife proved that a loan agreement was concluded. The loan was for R100 000 of which R15 000 was repaid. Since the agreement was silent on the date of repayment, the common law position must prevail. That is to the effect that such a loan is repayable on demand. Demand was made with the service of the claim in reconvention⁵ and, as a result, interest on the loan must run from that date.

[33] As for costs, there are three aspects to deal with. The costs of the action, the reserved costs of the application in terms of Rule 43 and the reserved costs of the application in terms of Rule 43(6). The Divorce Act provides:

‘In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.’⁶

[34] Costs are generally regarded as something to be paid from assets although this is by no means an invariable approach. In the present matter, neither party has any assets which might satisfy a costs order. They both have serious

⁵ *West Rand Estates Ltd v New Zealand Insurance Company Ltd* 1926 AD 173 at 183.

⁶ Section 10.

indebtedness to satisfy. In addition, as has been exhaustively dealt with, neither party has income which can easily cover a costs order. In the light of the near intractable situation concerning maintenance reflected above, it cannot be said that either party has acted unreasonably in pursuing their claims. In a commercial matter, the open tender would ordinarily result in the party who declined it paying the costs incurred after they had had a reasonable time to consider it. However, the open tender did not include one for repayment of the wife's loan. In those circumstances, it seems to me just and equitable that the husband should pay the amount tendered as costs in the sum of R50 000 and, for the rest, to require each to pay their own costs of the action.

[35] As regards the first Rule 43 application, the husband had reduced the amount he had been paying to the wife to R6 000 per month. She had not alternative source of income. On any version, she could not survive on that sum and was obliged to incur the costs of that application. The husband must pay those costs.

[36] The Rule 43(6) application raises different considerations. It was brought by the husband. He sought a reduction in the interim maintenance payable on the basis that he had been retrenched by Macsteel Zambia and that his salary from MSC Zambia was significantly less. This prompted a counter-application by the wife for a further contribution to her costs, in addition to the initial one of R15 000. Both of these applications were dismissed. In my view, no order for costs should be made on this application.

[37] In the result:

1. A decree of divorce is granted.

2. The plaintiff is directed to pay maintenance to the defendant for a period of three years from date of divorce or until her remarriage or cohabitation, whichever occurs first:

2.1 In the sum of R15 000 per month, escalating annually at the rate of increase of the Consumer Price Index on the anniversary of the date of divorce.

2.2 By payment of the monthly premium required to retain the defendant on his medical aid scheme.

2.3 By payment of the sum of R272 per month towards the defendant's cellphone.

3. The plaintiff is directed to pay the defendant the sum of R85 000 in respect of the loan from the defendant to the plaintiff, along with interest thereon at the legally applicable rate from date of service of the claim in reconvention until date of payment.

4. The plaintiff is directed to pay a sum of R50 000 towards the costs of suit of the defendant. This is in addition to the contribution to costs ordered by way of the initial Rule 43 application.

5. The plaintiff is directed to pay the costs of the initial Rule 43 application.

Gorven J

Date of Hearing: 17, 18 and 19 September 2018

Date of Judgment: 21 September 2018

Appearances

For the Plaintiff: EM Bezuidenhout
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Locally represented by Macgregor Erasmus
Attorneys

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