IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A112/10

In the matter between:

L M Appellant

And

G J M Respondent

JUDGMENT: 25 FEBRUARY 2011

E STEYN J

1] This is an appeal regarding a post-divorce maintenance order.

2] In September 2006 the plaintiff, appellant in this appeal, instituted an action against the defendant, the respondent in this matter, for a decree of divorce, payment of maintenance for herself, as well as payment of her reasonable medical expenses and costs of suit. The respondent claimed that the appellant's claims, save for a decree of divorce, should be dismissed with costs. He later abandoned his claim for costs

3] On 21 July 2009 a decree of divorce was ordered and appellant's claims were dismissed. The court a *quo* mistakenly ordered appellant to pay respondent's costs. The appellant's application for leave to appeal was refused. The Supreme Court of Appeal granted appellant leave to appeal to a Full Bench of this Honourable Court.

LEGAL PRINCIPLES RELATING TO SPOUSAL MAINTENANCE

4] The reciprocal duty of support, that arises between spouses, comes to an end

on the termination of the marriage, whether by death or by divorce. The Divorce Act, 70 of 1979 ('the Act'), makes provision for court orders relating to maintenance. S 7 (2) of the Act provides that in the absence of an order made in terms of an agreement between the parties, the court may, having regard to certain specified factors, make an order which the court finds lust, 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. (Own emphasis here, as elsewhere.)

5] There is no statutory right to maintenance by reason of the marriage and no act proclaims that maintenance in any amount for any period wili be ordered by reason solely of the marriage and the inability of one party to maintain the standard of living to which he or she has become accustomed.

6] I refer to Schafer. Family Law Service. First Binder, under **C26.** p 21:

> "The language of s 7(2} of the Divorce Act 70 of 1979 is clearly discretionary and the ex-spouse seeking an award has no right as such. The discretionary power of the court to make an award includes the power to make no award at all."

> See also Botha v Botha, 2009 (3) SA 89, par 29 and 33 on p 95 D-l

7] Schafer. supra, under C 27 on p 23 comments as follows regarding the circumstances the court will consider:

> "The means , earning capacities, financial needs and obligations and age of the parties, and an order in terms of Section 7(3) of the Divorce Act for

the transfer of assets from one party to the other, all relate to the criteria of need for support and ability to pay, while the conduct of the parties and any other factor which the court feels should be taken into account, introduce a moral judgment. That the court may consider 'any other factor* which in its opinion should be taken into account, highlights the fact that although the court may have regard to the various factors, its discretion is absolute.

8] The learned author refers to Grasso v Grasso. 1987(1) SA 48 C, where 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 ir. 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."

8] Section 7(2) of the Act can and should be used by the courts to ensure fairness between the parties. For example, in Rousalis v Rousalis 1980 (3) SA 447 (C) p 450, followed by Kroon v Kroon 1986(4) SA 616 (E) 623. the court stated that a wife of long standing who by working had helped her husband to build up his separate estate, would be entitled to far more maintenance in terms of s 7(2) than one who had for a few years merely shared his bed and kept his

house.

9] 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.

BACKGROUND FACTS

10] In July 1994 the parties were married to each other, out of community of property, excluding the accrual system. No children were born of the marriage. Both parties have children from previous marriages. Appellant alleged that their marriage broke down as a result of the fact that the respondent verbally and emotionally abused her, criticized her and was controlling towards her. From 2002 she was no longer prepared to consort with respondent as man and wife, and finally left the former common home in September 2006, despite the pleas of respondent. The respondent alleged that the appellant married him for his money, never showed him any iove and affection and criticized him.

11] At the date of hearing of the matter the appellant was 63 years old while the respondent was 77 years old

12] Appellant's testimony that the respondent was very abusive, broke her down emotionally and was very "racialist", referring in this regard to his criticism of her ministry career, was not very persuasive. I am not convinced that these factors played any meaningful role in the breakdown of the marriage. Instances of criticism by the respondent of appellant included allegations that he did not allow her to do shopping for the house; she was never given any funds and had no access to his money, credit cards or cheques. She alleged that respondent had promised that he would help ner in her career in the ministry as a pastor. Her

ability to continue with her career after the marriage was. according to her, non-negotiable. It appears from her testimony that the respondent in fact assisted her and supported her generously and extensively in her career.

13] As regards respondent's allegation that appellant did not show him any love and affection, appellant's response was unsatisfactory. *Inter alia* she claimed that for twelve years she looked after the house and cooked. Later she claimed that respondent was not satisfied with the way she did the washing and ironing and he attended to this chore himself on his own behalf. She prepared food for herself only as she did not like the food he preferred. It became apparent that appellant's role as a homemaker was limited, especially when evidence was presented about her frequent travels, locally and abroad. These travels, as part of her occupation, sometimes extended for months on end, when respondent had to fend for himself, unless he accompanied her.

14] Appellants formal educational qualifications are limited. She left school when she was in standard 8, married for the first time in 1966 and since approximately 1970, when her first child was born, she has not beer, in formal employment. However, in due course appellant zealously embraced the career of a missionary and pastor. Appellant was involved in missionary work since after her divorce from her first husband, which was in about 1984. In 1988 she briefly remarried someone with the same career. No evidence was presented that she received any post divorce maintenance from either of her first twc husbands and the impression was created that she supported herself and her children after her first and second divorces.

15] After her first divorce appellant sold the former home and invested her share of the proceeds of R100 000 in a fixed deposit. She worked at a mission station in the lowveld accompanied by her three children and used some of the funds in this account from time to time, but she atwavs tried to put it back because she

wanted to leave the children something. This creates the impression that she must have received income to replace the funds withdrawn. The father of the children did not contribute to their support. According to her, from about 1990. she and the children lived in the Cape, where she continued with her mission work. She met respondent in 1994, while working in Gordons Bay.

16] Shortly after their marriage appellant and respondent went to London, Europe and Israel, where she had "ministry engagements[1]' for three months. Respondent financed the trip, which was regarded as tneir honeymoon. According to Appellant they had their first big argument in London and. since then, she had reservations about the marriage.

17] Appellant could not explain satisfactorily why. after the allegedly unacceptable London argument and her complaints of the respondent's subsequent behaviour, she and the respondent continued living together and went overseas together on many occasions. Although the respondent sometimes accompanied her. he was prepared to allow the appellant to spend long periods overseas or locally, on her own, to do her missionary work. Her colleagues were frequently accommodated in respondent's home without being obliged to contribute to household expenses and respondent assisted appellant in the marketing and/or selling of her books and tapes. He provided her with a motor vehicle to assist in her ministry activities. From the evidence presented it was noted that appellant's version of the respondent as an abusive person, who criticized her career, was either an exaggeration or untrue.

18] Extensive evidence was presented with regard to overseas trips and tours, undertaken by appeliam, occasioned by her missionary work, such as months long trips to various far flung places including the Ukraine, for three years running, India, Israel, America. Canada. South Korea, Europe, Africa, etc. From her evidence and the list provided by her relating to overseas trips, it appears

that she undertook more than 20 overseas trips over the period from 1994 to 2006/2007. At times respondent financed appellant's trips and on other occasions she was financed by the host organisation. Although infrequently, respondent also financed friends or colleagues of appellant to accompany her.

19] There were discrepancies in appellant's evidence relating to her trips and the funding thereof and the contents of a document listing the trips, which she presented to court. For example, in respect of her trip to Israel in 2006, she testified that respondents son gave her a cheque which she utilised to buy flight tickets. According to the document relating to her trips, this trip was funded by her 'Wordschool' group and it was in fact respondent who made a gift of R 10 000, 00 to her.

20] When the appellant was asked to describe the state of her health, she testified about various ailments, such as swollen fingers and a painful back. She volunteered that the intimate side of the relationship with defendant had been abusive and painful and led to her having to undergo a hysterectomy in 1998. However, it appeared from a letter by her gynaecologist that she had been anxious to undergo this operation, since she did not want to experience vaginal bleeding during her overseas trips. She said she tried to continue with her marriage until 2002 when she "couldn't any more", due to pain. This evidence, relating to the cause of her gynaecological problems, was shown to be suspicious and one of several instances where plaintiff was less than truthful. It was shown that appellant's gynaecological problems were most probably caused by hormonal dysfunction. The letter of the gynaecologist tendered in evidence, is irreconcilable with her version, placing blame on the respondent for her problems in this regard.

21] Appellant's testimony about injuries sustained by her in a motorcycle accident, was also open to doubt. She testified that she had been told by a

medical practitioner that she required an operation as she was haemorrhaging inside and a bone was cracked. She accordingly had a hip operation in 2004 and allegedly she was still in pain in 2009. Once again, when the medical reports/letters were examined, her eviaence was clearly exaggerated and not entirely truthful. No medical expert testified.

22] According to Appellant she still needs a lot of medical care. This aspect was not explained in detail or supported by acceptable expert evidence. Appellant's appearance in the court a *quo* did not give the impression to the court that she had any notable physical problems and her continued active and extensive involvement in her missionary work and local and overseas travelling is hard to reconcile with any meaningful physical infirmity.

23] Appellant ministers the bibie to wordschool people that invite her to different churches. She testified that she does not receive any fixed income from this type of work but she receives donations and her fuel exDenses are sometimes covered She was vague on the aspect of the donations that she received from church related activities per month. During cross-examination she admitted to receiving various amounts of cash for the services she rendered in the ministry. With some of these funds she said she purchased certain expensive assets, such as a laptop and overhead projector, assets not previously divulged. Considering the rather large sums of money allegedly received by visiting missionaries, such as a Brazilian friend, accompanied by appellant, who received between R 60,000, and R 100,000, after a local trip, the question remains why she could not benefit financially to the same extent.

24] As regards assets, appellant stated that she had virtually no funds left in her accounts, including the savings account where the funds were deposited from the home that she soid in Sea Point. She allegedly had to withdraw funds from this account to pay her legal costs over a period of three years. She has no

liabilities. Details of how the funds in her accounts became depleted in large amounts, over a period of some three months, just prior to the divorce, were scant,

25] With regard to her expenses, appellant's testimony was not always consistent, especially when the contents of her Rule 43 affidavit were analysed. It was noticeable that her estimated fuel expenses were high, presumably due, *inter alia,* to the extensive travelling required in her career. It was shown that she travelled close to 30 000 to 4C 00C km in a year, after she left respondent.

26] The extent of the appellant's involvement in her missionary work became more evident as her testimony under cross-examination proceeded. She admitted that she had been involved in television programs for a period of two years. However, she stated, unconvincingly, that she no longer wanted to do this work, despite the fact that expensive equipment had been purchased TO facilitate producing shows, tapes and DVD's. The equipment and the value thereof had not been divulged in her initial testimony. Appellants speculation that her work in the ministry and the TV work may be affected as a result of the divorce, was shown to be unfounded. Her commitment to her career continued after she left the respondent. In 2007 she undertook a month long trip to Portugal with a team. Extensive local trips were undertaken.

27] During cross-examination it was established for the first time that appellant was "trained to be a missionary" and in fact was a qualified pastor. She qualified in 1987 at the Rhema Church in Cape Town. (She contradicted her earlier evidence that she only came to the Cape in 1990.) It was not explained why this important information relating to her qualifications was not divulged during her evidence in chief and why it was not relayed to the expert. Mr Swart, who testified on her behalf.

28] The respondent's financial situation was referred to by apDeltant in vague terms and unsupported by her evidence. Respondent and a company, of which he is the sole shareholder, is the owner of a shopping centre in the Paarl, ('Laborie') and a house in Gordon's 3ay, the former common home. According to respondent Laborie is presently facing a financial diiemma as only four of eighteen premises on the property are rented, with no indication of any imminent improvement, due to the financial downturn in property rentals and due to new competing developments in the area. It is not disputed that Laborie is respondent's only source of income.

29] The evidence of respondent that Laborie is running at a financial loss and that it has no commerciai value, was not controverted by appellant. It has been on the market for some time, but no offers have been received to purchase the property. Appellant admitted that she had limited knowledge about respondents business matters. She was aware that in 2006. when all the shops in the shopping complex were rented out, respondent had been offered R14 million for Laborie. She believes the house in Gordons Bay is worth approximately R7 million, but admitted that the property market had dropped. No expert evidence relating to current market values was presented.

30] Appellant accepted that respondents income at the date of hearing was only from the rental of the four shops in the shopping complex She could not dispute the high operating expenses payable by respondent or that he was suffenng a financial loss. In fact she contended that his business was "going down the drain". She added the advice that he should "sell it and live with what he has stil! before he is going to lose it air and volunteered that his situation would get worse if he did not sell as soon as possible. She accepted that nobody wanted to buy either property and that the bond on the home was nearly as high as its current municipal valuation. She suggested that respondent should give her the house after paying off the bond and that his wealthy sons could assist him.

31] The appellant was questioned at length about he: relationship with a certain Mr Victor Bello. ('Bello'), also a missionary. Belle came to stay with the parties in **2005** and stayed **a** lot longer than respondent anticipated. He joined appellant during her trip to Israel in 2006. after she contacted him. When she returned to South Africa from Israel she instructed the institution of divorce proceedings and left the home Shortly thereafter Belle arrived bacK in South Africa and stayed with appellant at **her** new home for an extended penod of time According to her there were several other people staying there as well. When Bello returned **to** Portugal the next year, she accompanied him to do outreach in Portugal and on her return **to** South Africa, Bello accompanied the Appellant again. From the evidence presented by the parties relating to this relationship, the perception of impropriety is **irresistible. Appellant's protestations** in **this regard were unconvincing**

32] Of significance **is** the reason why appellant, on **her** version. finally left respondent. Appellant stated during cross-examination that she decided to leave respondent while she was doing missionary work in Israel in **2006** for **a** period **of** three months. She testified that she had been trying for twelve years to Dersuade respondent to include her in his **will** or in **a** trust, but he was not prepared to sign the necessary documentation Appellant testified that she oecided to divorce respondent as a "drastic measure", as she put it. "to look after myself for the rest of my life, because he is not going to include me.[r]

33] Mr Andrew Swart, the "counselling psychologist" called as expert by appellant to testify about her employability, or lack thereof, failed dismally in his task. His investigation into relevant facts and circumstances was superficial. He conducted a once-off 90 minute consultation. No collateral information was obtained. Some of the facts related by him are not consistent with the evidence of appellant, who seems to have kept him in the dark about aspects that couid reflect negatively on her case. For example, he testified that appellant had. for

the previous 13 years, been doing mainly housework and looking after the house, being a wife to respondent. This was patently untrue.

34] When asked about the difference in respondents career and that of Reverend McCauley of Rhema Church, he mentioned that the Rhema Church was a wealthy church and they were making a living out of the church, hence its ministers were well provided for. However. Swart was not informed that appellant had qualified as a pastor at the Rhema cnurch. He admitted that such information was highly relevant and that it was a surprise to him that he was not advised accordingly. He was also ill advised as to the extent of her work and was unaware of the television shows and the production of DVD's and recording equipment.

35] Swart stated that appellant "maintained her lifestyle by doing mission work" after her first husband left, when her oldest child was 8. He did not seem to consider that appellant had maintained herself and raised her three children over many years as a single parent from the funds received in the course of her work. He had failed to enquire about the extent of funds received/donated to or earned by appellant. His conclusion, that appellant was not suitable for formal employment, in circumstances wnere he was apparently unaware that she was self-employed as a missionary, was irrelevant

ARGUMENT ON BEHALF OF APPELLANT

36] Counsel for appellant argued that the court a *quo* did not exercise its discretion judicially, that it did not evaluate the facts correctly and that it applied the law incorrectly As regards the facts, it was the contention of the counsel for the aDpellant that the court a *quo* had not given sufficient significance to the lack of means of the appellant and that her qualifications as a pastor and her work o^{r} career was no* a money making venture It was argued that her need for maintenance had been established and thattne respondents ability tc maintair

appellant had been shown. It was also argued that respondent was devious in presenting his evidence to court It was suggested that it was suspicious that respondent experienced a bleak financial situation just at the time when the divorce was heard.

37] It is clear that it was in fact the appellant who was not entirely honest with the court There are numerous aspects where she exaggerated or underolayec evidence, depending on the advantage to her case Appellant has not divested herself of the *onus* of proving on a balance of probability that she does not have sufficient means to maintain herself. Neither has she shown, on a balance of probability, that respondent is financially able to make the payments she claims. This court is aware of tne global economic recession over the last few years, which has resulted in financial hardship to many local property owners leading to litigation including evictions and sales in execution. Appellant has not shown that respondent's submissions relating to the financial problems experienced by him are untrue or even of a suspicious nature It is alleged by appellant anc her representatives, that respondent must turn his assets into cash. However, it is not apDarent that he wil. oe able to do so in the foreseeaoie future, or at all The argument by appellant's counsel that appellant has not been gainfully employed for the Dast forty years, was not supported **by** her evidence.

INTERFERENCE ON APPEAL

38] It was argued by counsel for the apDeliant tnat this court can interfere witn the judicial exercise of tne court *a quo's* discretion. However, where a lower court has given a decision on a matter within its discretion, the court of appeal will only interfere if it comes to the conclusion that the court *a quo* has not exercised a judicial discretion, or has exercised it improperly, in the sense that it has exercised its discretion capriciously or upon a wrong principle or has been misdirected on the facts or has not brought its unbiased judgment to bear on the question.

39] I quote from Herbstein and van Winsen, The Civil Practice of the High Courts of South Africa. Fifth edition p 1245:

> "However, more recently the courts have distinguished between discretion in a strict sense and discretion in a wider sense. In *Media Workers Association of South Africa v Press Corporation of South Africa Ltd (Perskor*),* EM Grosskopf JA stated that the former is characterised by the fact that a number of courses are available to the repository of the power and that the essence of a discretion in this narrower sense is that if the repository of the power follows any of the available courses, he would be acting within his powers and his exercise of power could not be set aside merely because another court would have preferred him to have followed a different course amongst those available to him.*

40] In Western Cape Housino Development Board v Parker. 2005 (1) SA 462 (C) Fourie J commented, while referring, *inter alia,* to the Media Workers judgment and to Ex Parte Neetlino and Others. 1951 (4) SA 331 (A) at 335 E, that it is a well settled principle that the power to interfere on appeai in matters of discretion is strictly circumscribed.

41] In Beaumont v Beaumont 1987 (1) 967 at p 1002 B-E, Botha JA commented as follows in a matter where a divorce order regarding maintenance was taken on appeal:

> "The discretion to be exercised was vested in the trial Judge. When once it is found, as I have done, that he had not misdirected himself, and that he had not exercised his discretion improperly, the room for this Court to interfere with the result arrived at by him, is very limited indeed. That is always the case when the exercise of discretion is involved !!

The learned Judge quoted from a juogmem by Ormrod LJ in Prestor v Preston 1982 Fam 17 (CA) at 29:

"We are here concerned with a judicial discretion, and it is of the essence that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is. in fact, plainly wrong, that an appellate body is entitled to interfere.'

THE JUDGMENT OF THE COURT *A QUO*

42] In a well formulated judgment Yekiso J conducted an exhaustive analysis of the appropriate factual issues in this matter, as prescribed by the provisions of s 7(2) of the Act. Relevant recognised legal principles relating to the award of maintenance to a spouse on dissolution of mamage were considered and authonties were referred to. It was correctly pointed out that maintenance orders post-divorce are matters in the discretion of the court. Contrary to the argument of plaintiff's counsel, no significant aspect relevant to a finding in this matter was not considered by the court a *quo* and in my opinion no factual errors or misdirections were made, save that the court *a quo* maae a costs order against plaintiff in error.

43] The court a *quo* found that, after balancing all the relevant factors, it was just ano fair to the parties, in the judicial exercise of the courts discretion, that the court make no maintenance award I am not persuaded that this court can interfere with the judicial exercise of the court a gi/o's discretion in view of the legal principles and factual findings that I have set out above in this regard.

FINDING

44] The appellant has not discharged the *onus* of persuading this court that the

trial court erred and that but for its mistake, it would have come tc a different conclusion. After consideration of ali the facts on record, I am unpersuaded that this court is entitled to interfere with the order of the court *a quo,* either on a factual or a legal basis, save for the order relating to the costs incurred in the divorce action .

45] Accordingly, I would refuse the appeal. Respondent has waived a costs order in the appeal as a gesture of goodwill and I would make no order as to costs of the appea;. I would accordingly confirm the order of the court a *quo* in the divorce matter, save that the order of the court *a quo,* that appellant be held liable for the costs of respondent in the divorce action, is set aside.

E STEYN, J
Judge of the High Court

I agree and it is so ordered.

DESAI, J
Judge of the High Court

I agree

P GOLIATH, J
Judge of the High Court