

SOUTH AFRICA / JUDGMENT

C.A.W.S v P.J.S (32798/2007) [2010] ZAGPPHC 641 (21 June 2010)

[2010] ZAGPPHC 641**COURT**

North Gauteng High Court, Pretoria

BEFORE

P C Van der Byl

CASE / FILE NUMBER

32798/2007

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No.32798/2007

Date: 21 June 2010

Not reportable

In the matter between:-

C[...] A[...] W[...] S[...]Plaintiff

and

P[...] J[...] S[...].....Defendant

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] This is a divorce action in which the parties were at the commencement of the trial in agreement on all the issues raised in the pleadings, except for -

- (a) the part of the Defendant's assets to be transferred to the Defendant as envisaged in section 7(3) of the Divorce Act. 1984 (Act 70 of 1979);

- (b) the question whether the Plaintiff should be provided with full medical aid by the Defendant;
- (c) the question as to who should pay the costs of suit.
- [2] On these issues -
 - (a) the Defendant tendered one-third of his assets whilst the Plaintiff insists on a transfer of one-half of his assets;
 - (b) the Defendant is prepared to retain the Plaintiff on his medical aid, provided that she pays that part of the premium payable in respect of her as a dependant as well as any excesses not covered by the medical aid, being an offer which, as it appears from the Plaintiffs evidence and submissions made on her behalf, she seems to be prepared to accept;
 - (c) it would appear to be the contention of the Defendant that the Plaintiff should not have the benefit of an order of costs in her favour.
- [3] In the circumstances, particularly, in view of the dispute between the parties regarding the division of the Defendant's assets. I am called upon to determine what part of the Defendant's assets I, in the circumstances, deem it just and equitable to be transferred to the Plaintiff and then, of course, to make an appropriate order of costs.

Relevant facts of the matter

- [4] It is common cause -
 - (a) that the parties were married out of community of property more than 30 years ago on 15 March 1980;
 - (b) that one child, K[...], who is now 22 years of age and has since married, was born out of the marriage;
 - (c) that the marriage relationship has irretrievably broken down with no reasonable prospect of restoration of a normal marriage relationship; and
 - (d) that the Defendant left the common home on 13 July 2007 consequent, apparently, upon a protection order obtained by the Plaintiff.
- [5] I was at the commencement of the trial informed by Mr. Culhane who appeared on behalf of the Defendant, in elaboration of the particulars contained in paragraph 6.4 of the Defendant's amended plea, that it is acknowledged that the value of the Plaintiffs estate is R1 386 769,15 of which he tendered one-third which translates into an amount of R462 256,38.
- [6] On the other hand, it would appear, according to particulars furnished for purposes of trial by the Plaintiff and confirmed by the Plaintiff in her evidence -
 - (a) that her assets currently consist of a few household items with an estimated value of R1 000; and

- (b) that her liabilities currently amount to about R244 200 consisting of -
- (i) a bank overdraft of about R15 000;
 - (ii) an amount owing on her credit card of about R55 000;
 - (iii) legal costs in an amount of R85 000;
 - (iv) moving costs in an amount of R16 200 incurred in respect of her move after the Defendant sold the communal home;
 - (v) arrear rental payable in respect of her current accommodation in an amount of R30 000;
 - (vi) university fees in respect of their daughter, K[...], in an amount of R15 000;
 - (viii) living expenses of about R28 000.

[7] It, furthermore, appears that the Plaintiff is entitled to an inheritance of R483 205 from her mother's estate who passed

away during July 2009 of which she already, by way of an advance, received an amount of R92 000 which she utilized, inter alia, as part payment of K[...]'s university fees, legal fees payable in respect of these divorce proceedings and on a holiday after her mother's death.

[8] The Plaintiff is currently employed by a charitable organization called Topsy Foundation where she earns a net income of between R21 000 and R23 000 per month with no pension or medical benefits.

[9] The Defendant's gross income, on the other hand, appears, according to his evidence, to consist of R11 142,98, made up as follows -

- (a) pension under one life policy, R5 965,22;
- (b) pension under another life policy, R677.76;
- (c) salary from his current employer, R4 500.

It is apparent that the first two figures would be reduced by an amount proportionate to an award that may be made by this Court.

[10] According to the Defendant his monthly expenses amount to R12 228.

[11] This brings me to the evidence adduced by the Plaintiff and the Defendant relevant to the dispute between the parties on the extent of the assets to be transferred from the Defendant to the Plaintiff.

[12] According to the Plaintiff, who is currently 52 years old, they were, when they got married, both employed. Since their marriage their respective earnings were paid into a joint account from which the joint household expenses were paid. She stopped working at some stage after she fell pregnant some seven years after they got married, but again commenced working during her pregnancy and worked until her baby was about three months old.

Thereafter she was a housewife and attended to their child (who was at the time very ill) and to the normal household functions with the assistance, once a week, of a housemaid. When K[...] was about three years old the Plaintiffs mother moved in with them and contributed liberally to the household expenses by, for example, having sold some of her paintings. This continued until K[...] was six years old when she obtained, initially temporarily and later permanently, employment and her earnings were then once again paid into their joint account until she opened her own account during 2001 when she started to feel insecure as the marriage started to break down.

The Defendant seems to have been discharged from his employment early in December 2001. Whilst he was unemployed his father contributed about R5 000 towards the household expenses and she paid for expenses, including K[...]’s school fees, in excess of those expenses. The Defendant again obtained employment in February 2002 at Nedbank where he was employed until February 2007 when he decided to take early pension.

Until 2001 and apparently thereafter the Defendant obtained shares and insurance policies that were paid for out of the joint account and the pension paid out after he took early retirement.

After the Defendant left the matrimonial home the Plaintiff, K[...] and her mother remained in the house until approximately April 2009 when the Defendant sold the house.

Before the house was sold the Defendant paid the bond, telephone, water and electricity, insurance and medical aid and contributed towards the maintenance of K[...] and the Plaintiff paid the expenses necessary to maintain the property.

As far as K[...]’s studies at the University of Johannesburg are concerned the Defendant has over a period of about five years paid an amount between R400 000 and R500 000.

After the house was sold she, together with K[...] and her mother, moved to a cottage where she is currently living at a rental of R5 000 per month.

[13] The Defendant, who is 60 years old, largely confirmed the evidence adduced by the Plaintiff.

It, furthermore, appears from his evidence -

- (a) that until the house was sold in April 2009 he paid the bond on the house, the rates, water, refuse removal and electricity payable to the Municipality in respect of the communal home and the amounts payable to Telkom in respect of the home telephone;
- (b) that he paid the premiums on the policies, I assume, from which he is currently receiving an income, and the premiums payable to the medical aid scheme in respect of the three of them;
- (c) that he at all times contributed about R500 per week to the joint household expenses;
- (d) that he did contribute an amount of R13 500 towards the maintenance of the Plaintiff during the period 27 July 2007 to 3 March 2008;

(e) that he is currently driving a 1988 model Mercedes Benz with an estimate value of R19 000.

He conceded that after he left the communal home on 13 July 2007 he did not make any contribution to K[...]’s studies as he was never approached, but that he offered to make a contribution of R30 000, but never paid the amount as his offer was not accepted

[14] It is against this factual background that I am now called upon to pronounce upon the extent of the part of Defendant’s assets which I deem to be just and equitable to be transferred to the Plaintiff.

Considerations relevant to transfer of part of Defendant’s assets to the Plaintiff

[15] In terms of section 7(3) of the Divorce Act, 1979, a court granting a decree of divorce is empowered, in the case of, as in this case, a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, 1984, to order that such part of the assets of the one party as the court may deem just be transferred to the other party.

[16] In considering such an order the court is enjoined -

- (a) to determine, as provided in subsection (4) of that section, whether it would be equitable and just by reason of the fact, inter alia, that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services or the saving of expenses which would otherwise have been incurred;
- (b) in determining the part of the assets to be transferred as provided in subsection (3), I am called upon to take into account, as provided in subsection (5), inter alia -
 - (i) the existing means and obligations of the parties;
 - (ii) any other factor which should in the opinion of the court be taken into account.

[17] It is, bearing in mind the tender made by the Defendant that one-third of his assets be transferred as provided in section 7(3) of the Divorce Act, 1979, in effect not in dispute that the Plaintiff contributed directly or indirectly to the increase of the estate of the Defendant during the subsistence of the marriage.

[18] Having regard to the dispute as to the part of Defendant’s assets that should be so transferred, I am enjoined, in determining the part to be so transferred, to take into account the existing means and obligations of the parties.

[19] It is in this regard that the inheritance which is vested in the Plaintiff from the estate of her late mother has been raised on behalf of the Defendant as part of the existing means of the Plaintiff which raises the question whether an inheritance should for purposes of the application of the said section 7(3) be taken into account when considering the existing means of the Plaintiff.

[20] I have in this regard been referred to two reported decisions by Ms. Feinstein who appeared on behalf of the Plaintiff.

[21] The first of these decisions is the decision in *Beira v Beira* 1990 (3) SA 802 (W) in which the Court was concerned with the question whether in the application of subsection (3), read with subsection (5), of section 7 of the Divorce Act, 1979, the value of assets donated to a trust of which the plaintiff was a beneficiary was relevant in determining "the wealth of the plaintiff in her own right, which might have the effect of causing the amount to be redistributed to be lower than might otherwise have been the case".

At 807I-808B the learned Judge, in comparing the provisions of section 7(3) of the Divorce Act, 1979, with the provisions of section 5(1) of the Matrimonial Property Act, 1984, in terms of which an inheritance, legacy or donation does not, for purposes of determining the accrual of the estate of a spouse, form part of such accrual and the circumstances under which these provisions were enacted, held that also in the case of a redistribution under the said section 7(3) an inheritance, legacy or donation should be excluded from consideration for purposes of a redistribution.

[22] The second of the decisions I have been referred to is the decision in *Jordaan v Jordaan* 2001 (3) SA 288 (C) in which the Court was also concerned with the question whether a farm the husband inherited should be taken into account in determining the extent of his estate for purposes of a redistribution of his estate.

At 297H, para [22] the learned Judge held as follows:

"[22] Daar moet voorts 'n onderskeid getref word tussen die aanwasbedeling en 'n herverdelingsbevel ingevolge die bepalings van art 7. Artikel 5 van die Wet op Huweelksgoedere 88 van 1984. wat met die aanwasbedeling handel, sluit spesifiek 'n erflating, legaat of 'n skenking wat 'n gade gedurende die bestaan van 'n huwelik toegeval het uit as deel van die aanwas van die boedel. Artikel 7(3) bevat geen sodanige uitsluiting nie en gevolglik beoog die Wetgewer na my mening dat erflatings en diesmeer wel in ag geneem kan word by 'n herverdelingsbevel mits dit reg en billik is".

The learned Judge then proceeded and held that in the circumstances of that case where the wife, having attended to the household functions and, particularly, to care for their disabled child, made it possible for her husband to fully oversee the farming operations.

[23] On the principles enunciated in either of these cases, this is a case where the Plaintiffs inheritance should in my opinion, for at least two reasons, not be regarded as part of the Plaintiffs estate for purposes of determining the part of the Defendant's estate to be transferred to her estate. Firstly, the inheritance became vested in her during July 2009, ie., almost two years after the Plaintiff left the communal home and, secondly, more importantly, bearing in mind that the Plaintiffs existing liabilities amount to more than R244 000, the majority of which seems to have accumulated after the parties separated in July 2007. The major part of the balance of the inheritance will obviously be absorbed by the Plaintiffs liabilities. Furthermore, the Plaintiff expended more than R400 000 towards K[...]s

education which should have been shared by the Plaintiff and the Defendant. In view of these considerations there is in my view simply no good reason why the Defendant should be entitled to the benefits derived from Plaintiffs inheritance.

[24] This brings me to the question as to the part of Defendant's assets to be transferred to the Plaintiff.

[25] One is, taking into consideration the position in which the Parties now find themselves, struck by the fact that at the end of a marriage of 30 years -

- (a) the Defendant has, on the one hand, amassed an estate in excess of R1,3 million; and
- (b) the Plaintiff, on the other hand, possesses only a few movable items to the value of about R1 000 and is burdened with liabilities of R244 000.

[26] It is in my view apparent from the evidence that we are here concerned with a husband and wife who during the subsistence of their marriage both made contributions to the household expenses from a joint banking account until 2001 and thereafter from separate joint accounts. As far as the Plaintiff is concerned it is clear that she devoted her whole life and earnings to her family. As far as the Defendant is concerned he was, although he also contributed to the joint household, however, able to amass some personal assets by way of policies and has, having made payments to the bond held over their communal home, obtained the benefit of immovable property registered in his name. Currently he is earning an income from those policies and received a nett amount of R900 000 from the sale of the house of which he invested R600 000 in an interest bearing account. The interest earned from this investment has not been disclosed as part of his income, apparently because the interest accumulated as part of the capital amount invested.

[26] All this in itself obviously justify a significant redistribution of the Defendant's estate, but the Court must, as far as is possible, balance the scales.

[27] In an attempt to do so, I must take into account, as I have already indicated, the existing means and obligations of the parties.

[28] As far as the Plaintiff is concerned she is currently employed earning a net income of between R21 000 and R23 000 per month.

[29] As far as the Defendant is concerned, he disclosed, apart from interest earned on the R600 000 investment, a gross monthly income of slightly more than R11 000 which will be reduced proportionate to the award I may make in this matter.

- [30] Taking into consideration these facts, I am satisfied that the parties have at all times during their marriage primarily shared the household expenses to such an extent that the Defendant was enabled to invest in the policies from which he is currently earning an income and to make payments towards the communal home the sale of which rendered a net amount of R900 000, part of which seems to have been utilized towards some mutual debts, leaving R600 000 which he invested.
- [31] It seems to me that the R600 000 investment and the value of the policies form the major part of the Defendant's assets and I can see no reason why I should hold that the Plaintiff is entitled to less than half of those assets.
- [32] This brings me to the question of costs. In view of the fact that the assets accumulated between the parties during their marriage will, if half of the Defendant's estate is awarded to the Plaintiff, in effect be divided into two. Furthermore, bearing in mind the relative modest value of the estate and the costs involved in persisting with their respective claims, this is in my view a matter where the parties should have considered their risks instead of reducing their estates by incurring unnecessary legal costs. They are to be equally blamed that this matter has taken almost three years to be brought to finality on issues which are not particularly complicated.

Where the aim is to balance the scales an order that any party should pay the costs of the other would upset the balance.

I accordingly regard it just and fair that each party should pay his or her own costs.

[33] In the premises I make the following order:-

1. A decree of divorce is granted.
2. The Defendant is ordered to retain the Plaintiff on his medical scheme, provided that she pays her share of the premium payable in respect of her as a dependant as well as any excesses not covered by the medical aid.
3. The Defendant is ordered to transfer half of his estate, calculated on the basis that his estate amounts to R1 386 769,15, to the Plaintiff.
4. No order is made as to costs.

P C VAN DER BYL

ACTING JUDGE OF THE HIGH COURT

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