

SOUTH AFRICA / JUDGMENT

C.S.S v P.M.S (CA334/15) [2016] ZAECHGC 68 (25 August 2016)

[2016] ZAECHGC 68

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, NG Beshe, MJ Lowe

CASE / FILE NUMBER

CA334/15

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

number: CA 334/15

Date

heard: 1/8/16

Date

delivered: 25/8/16

Not

reportable

In

the matter between:

C.
S.
S.
Appellant
and
P. M.
S.
Respondent

JUDGMENT

PLASKET J

- [1] The appellant (Mr S.) and the respondent (Ms S.) were married to each other, out of community of property and with the accrual system excluded. It being common cause that the marriage had broken down irretrievably, and Mr S. having instituted an action for divorce, the only issues that finally remained for determination when the trial eventually commenced were whether Ms S. was, in terms of her counter-claim, entitled to maintenance and, if so, in what amount.
- [2] Revelas J, the trial judge, having heard the evidence of Ms S., the only witness to testify, granted a decree of divorce and reserved judgment on the maintenance issues. She later made an order which, to the extent relevant to this appeal, read:
- ‘1. The plaintiff is to pay the defendant maintenance in the amount of R14 000.00 per month until her death or remarriage, whichever event occurs first.
2. The plaintiff is to pay the defendant’s costs of suit.’[1]
- [3] Mr S. applied for leave to appeal against the order made by Revelas J. She granted leave to appeal to the full bench.

The

facts

- [4] When Ms and Mr S. first met in 1992, Ms S. was employed as a manager by the firm PG Glass in Grahamstown. Mr S. was in the process of being sequestrated and, when he subsequently had been, he was, for a number of years, an unrehabilitated insolvent. As her firm obtained work from, inter alia, the Department of Public Works, to perform work such as the installation of windows in government-owned buildings, she began to use Mr S.’s skills in this regard, thus providing him with work. At the same time, a personal relationship developed between them.
- [5] During 1993, Ms S. obtained a business diploma in middle management. By this time she had gained substantial experience in the building industry. She and Mr S. decided to establish their own business as her skills as a manager and his skills in performing the work appeared to mesh. She left the employ of PG Glass.

- [6] A close corporation called Hillside Construction was formed with Ms S. holding an 80 percent interest and a Mr Langbooi holding the remaining 20 percent. (The close corporation was named after one of Mr S.'s family's farms, Hillside, in the Kirkwood district, on which the parties lived.) Mr S., being an insolvent could not be a member. The capital used to start Hillside Construction was derived from the pension fund and unemployment insurance fund payments made to Ms S. when she left the employ of PG Glass.
- [7] Hillside Construction proved to be a successful business due in large measure to Ms S.'s managerial experience and contacts and Mr S.'s skills as a builder.
- [8] By 1997 it had done so well that a large amount of money was diverted from it to develop a second business, the Look-Out Guest Farm, on another of the S. family's farms, Uitkyk. A lapa and chalets were built for entertainment and leisure, wedding receptions, conferences and so on. This business which, as I understand it, was largely run by Ms S. also proved to be successful.
- [9] At much the same time, Hillside Construction lent Mr S.'s mother R520 000. In return, she gave him the use of her farm Miskraal. Mr S. together with Ms S. developed citrus orchards on it. Once again, this proved to be a successful business operation.
- [10] During 2000, Mr Langbooi left Hillside Construction. Ms S. was then its sole member. It had run up a large tax liability. As a result, Ms S. decided to de-register it and transfer its assets to a new close corporation, Phambile Construction. It was as successful as Hillside Construction had been.
- [11] When the parties started out in business together in 1993, they lived frugally but as their businesses grew they began to enjoy a comfortable standard of living: each owned a motor vehicle; they lived in a large house; they acquired four immovable properties, including two farms; and apart from cash and equipment in the construction business, they also owned game, goats, sheep and cattle.
- [12] Ms S. facilitated contact between Mr S. and his children from his previous marriage. During September 2002, Mr S. informed her that his two sons would henceforth live with them. She saw to their daily needs and fetched and ferried them between school and the farm. They, in turn, showed little respect for her, and Mr S. did nothing about a situation that grew increasingly intolerable for Ms S..
- [13] The parties began to argue and when Ms S. told Mr S. that they needed to work on their relationship, his attitude was that if she was dissatisfied, she should leave. In November 2007, she did precisely that.
- [14] The immediate and insurmountable difficulty that Ms S. faced was that both her home and her businesses were situated on the S. family's farms. She was effectively cut off from her businesses and her livelihood.

- [15] She moved to Port Elizabeth where she lived with her daughter, R.. She assisted R. in her gardening and landscaping business and also assisted with catering at a golf club.
- [16] Mr S. then agreed to pay the rent for a flat for her but he stopped paying the rent after six months with the result that Ms S. was evicted. Through her attorney's efforts, however, she was allowed to return for a while.
- [17] She had befriended a man by the name of S.. He had plans to move to China so he entered into an arrangement with Ms S. in terms of which she would live in his house in Port Elizabeth and act as au pair and housekeeper for his school-going daughter, M., until she matriculated.
- [18] While living in Mr S.'s house, Ms S. was granted interim maintenance of R15 000 per month, in terms of rule 43 of the uniform rules. At one stage, Mr S. stopped paying maintenance and only resumed doing so when an application was brought for his sequestration.
- [19] Matters continued to deteriorate for Ms S. after she left Mr S.'s house. She could not find stable employment but ran errands for her daughter. She suffered a nervous breakdown. R. moved to Cape Town and Ms S. followed her in 2011. R. found her employment at a net salary of R7 000.
- [20] Despite her efforts, she was not able to find better work: her age, it seemed, counted against her. She managed to find employment with a business called Go Green which refurbished restaurants and shops. Her salary remained more or less the same as it had been in her previous employment.
- [21] She decided to acquire a coffee shop in Stellenbosch, which she called Urban Spoon. She did so with money which she borrowed from Mr S.. The coffee shop was not a success and after she had a back operation – one of three such operations that she underwent – she was physically unable to keep the shop open at night. She found herself once more in the position of being unable to support herself.
- [22] The facts that I have outlined above were not challenged, seriously or at all, during Ms S.'s cross-examination. Having accepted them, Revelas J drew the following conclusions from them:
- [22] The defendant is a woman who had worked all her adult life and made the best of her insubstantial formal qualifications to improve her lot and that of her family, including the plaintiff. Since he met the defendant, the plaintiff's circumstances improved dramatically. She helped him to rise from insolvency into the life of a successful businessman. His attempts to woo her back were all premised on promises of a very material nature, which gave the impression that the defendant's input and financial contribution to his business and life style were sorely missed.

[23] It must also be accepted that the defendant made serious efforts to earn a living after she left the common home. She is not physically capable of running a restaurant. She also had had three back operations and cannot keep the required long hours on her feet to run a restaurant at night. The evidence was never challenged. In the business sector in which she is proficient, she is unable to find employment where she can earn even R10 000,00 per month. She has thus far obtained work at very low salaries and was only appointed as a favour to her daughter. Her greatest earning capacity lay in the entertainment business at Look-Out which was intrinsically tied up with the plaintiff's businesses and farms. Due to the prevailing circumstances, she can no longer conduct that business or continue it anywhere else. Thus she is presently incapable of generating income sufficient to keep a roof over her head unless she drops her standard of living very far below anything she was ever used to. Even the low income jobs are, due to her age, an uncertainty in the future. Given her contribution to the plaintiff's business interests which are not covered to their full extent in this judgment, and his present life style, it would be unfair to expect her to live without any financial assistance whatsoever as the plaintiff wishes her to do. . . '

[23] Revelas J accordingly found that Ms S. had established a need for maintenance and that an amount of R14 000 was, in all the circumstances, a just amount.

The

issues

[24] Two issues arise in this appeal. They are whether Ms S. established an entitlement to maintenance at all and, if she did, whether she established the quantum of that maintenance.

[25] Revelas J correctly held that a spouse, on the dissolution of his or her marriage, has no automatic right to maintenance[2] and that if that spouse believes that he or she is entitled to maintenance, it is necessary to establish a need.[3] Section 7 of the Divorce Act 70 of 1979 caters for this situation. Section 7(1) and

(2) provide:

'(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection

(3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.’

[26] The effect of s 7(2) is to give a court a discretionary power, guided by the factors listed in the section, to determine whether maintenance is to be paid, the amounts to be paid and the period for which it is to be paid.[4] In the determination of the amount that is awarded, as with the entitlement to maintenance, the touchstone is what the court considers just in the context of the factors that it is required to consider. In *Beaumont v Beaumont*,[5] Botha JA held in respect of the ‘factoring in’ of the misconduct of one of the parties:

‘It is true that the learned Judge did not indicate in precisely what manner he was giving effect to the appellant's misconduct as a relevant factor in deciding upon a figure in respect of maintenance, but in my view he was not required to do so and he cannot be faulted for not having done so. I cannot imagine that a Court must go through a process of first fixing a particular amount that might have been appropriate in the absence of any misconduct and thereafter readjusting it by means of a percentage or a specific proportion because of the misconduct. There is no need to quantify, in whatever way, the weight to be accorded to each relevant factor; a mathematical approach would be out of place.’

[27] Finally, the cases make it clear that in determining whether a party is entitled to maintenance and, if so, in what amounts and for how long, a court is exercising a discretion. [6] In argument before us, there was some debate as to the nature of the discretion and the breadth of a court of appeal's powers of interference. That issue has been authoritatively dealt with in the *Beaumont* case[7] in which Botha JA held:

‘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 a discretion is involved. In the particular context with which we are concerned here, I would quote the following passage from the judgment of Ormrod LJ in *Preston v Preston* 1982 Fam 17 (CA) at 29, where he approved of what had been said in an earlier case:

“We are here concerned with a judicial discretion, and it is of the essence of such a discretion 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.”

[28] It was argued by Mr Jooste, who appeared for Mr S., that Revelas J misdirected herself in two respects that went to the entitlement to maintenance, its duration and the amount. She had, he argued, ignored the fact that Ms S. had concealed the fact, in her rule 43 application, that her expenses were in fact less than she claimed as a result of living in the house of Mr S. and looking after his daughter. Secondly, Revelas J had failed to consider that Ms S. was responsible, in large measure due to a misconceived counter-claim

based on the alleged existence of a universal partnership, for the divorce taking a long time to be finalised.

[29] After Revelas J had set out the history of the matter and her conclusions as to that history, which I have quoted in paragraph 21 above, she turned to the exercise of the discretion that s 7(2) vested in her. She stated:[8]

‘In my view, the defendant has established a need for maintenance. The remaining question is in what amount. In this regard I take into account that the [defendant] is capable, for some time in the future, albeit a short period, to earn a small income. Also, while she was living in Bluewater Bay, she was earning interim maintenance in respect of items she was, for that period, not entitled to. The fact which weighed most with me in exercising my discretion in the defendant’s favour is her financial contribution to the plaintiff’s business. In my view a just amount would be slightly less than what she received as interim maintenance, the amount being R14 000.00 per month.’

[30] In my view, it cannot be said that Revelas J misdirected herself as to the first issue, namely whether an entitlement to maintenance had been established by Ms S.. The facts are strongly in favour of that being a just outcome. She was clearly alive to the fact that Ms S. had benefitted from receiving interim maintenance which, to an extent and for a period, she was not entitled to. This she appears to have factored in when she determined the amount of maintenance to be paid – a smaller amount, by R1 000 per month, than the interim maintenance and R2 500 less per month than the amount she claimed. I can see no misdirection in that.

[31] Mr Jooste also argued that the amount of maintenance was not properly quantified. I disagree. It is clear from the judgment that Revelas J considered that the amounts claimed by Ms S. were properly proved. It is so that some items were in the nature of estimates, but, in my view, fairly accurate and reasonable estimates. Most were not challenged, vigorously or at all, in cross-examination. Revelas J used this as a starting point and then reduced the amount. I find no misdirection in her method that would entitle this court to interfere with the exercise of her discretion.

[32] I can find no fault with Revelas J’s conclusion that maintenance should be paid to Ms S. until her death or remarriage,

whichever event is first to occur. Once the joint effect of Ms S.'s age, health problems and the loss of her business are taken into account, no other just finding is possible when the length of the marriage, Ms S.'s substantial contribution to Mr S.'s current wealth and the other factors listed by Revelas J are added to the mix. The length of time for the divorce proceedings to be finalised are, in my view, irrelevant: appropriate costs orders were made in respect of the Ms S.'s amendments to her counter-claim, the costs of two exceptions and the costs of two postponements. Once it is accepted that Revelas J did not misdirect herself in finding that Ms S. was entitled to maintenance until her death or remarriage – a finding I have found to be unassailable on the facts – the fact that the divorce could have been finalised earlier than it was is irrelevant: it had no bearing on Mr S.'s maintenance obligation, whether interim or final.

Conclusion

[33] For the reasons that I have given above, the appeal must fail. I consequently make the following order.

The appeal is dismissed with costs.

C Plasket

Judge of the High Court

I agree.

NG Beshe

MJ Lowe

APPEARANCES

For the appellant: P Jooste instructed by Netteltons

For the respondent: GJ Gajjar instructed by Whitesides

[1] The remaining paragraph of the order concerned costs orders made against Ms Smith in respect of amendments to her counter-claim, two exceptions and two postponements.

[2] *Portinho v Portinho* 1981

(2) SA 595 (T) at 596G-597B.

[3] *Botha v Botha* 2009 (3) SA 89 (W), paras 29-33; *AV v CV* 2011 (6) SA 189 (KZP), paras 7-9.

[4] *HR Hahlo* *The South African Law of Husband and Wife* (5 ed) at 357.

[5] Beaumont v Beaumont 1987

(1) SA 967 (A) at 995B-D.

[6] See for instance, Botha v Botha (note 3), para 32.

[7] Note 5 at 1002B-E.

[8] Judgment, para 24.

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