

SOUTH AFRICA / JUDGMENT

H v H (AR324/09) [2010] ZAKZPHC 67 (7 October 2010)

[2010] ZAKZPHC 67

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Van Zyl, Steyn, Lopes

CASE / FILE NUMBER

AR324/09

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No : AR324/09

In the matter between :

Ha HAppellant

and

A M R H.....Respondent

J U D G M E N T

The Court

[1] This appeal comes before us by way of leave granted to the appellant by van Heerden AJ who granted the parties a decree of divorce and other relief.

[2] The parties in this appeal were married to each other on the 5th October, 1996. Three children were born of their marriage, namely :-

R A I, a boy born on the 20th July;

J R E, a girl born on the 23rd September; and

W R C, boy born on 30th May.

[3] For the reasons set out in the record of the proceedings before van Heerden AJ, the appellant caused action to be instituted against the respondent claiming a divorce and other relief. The trial was heard before van Heerden AJ who granted judgment on the 1st October 2008.

[4] The appellant now appeals against certain aspects of that judgment. The aspects which are not disputed between the parties are :-

the grant of a decree of divorce; and

care of, and access to, the minor children; and

maintenance payable by the respondent for the minor children.

[5] The issues on which the appellant seeks leave to appeal are the following :-

she maintains that van Heerden AJ was incorrect in ordering the respondent to pay maintenance to her only until the 31st July, 2012, and that she is entitled to maintenance for an indefinite period;

that the registration of the matrimonial home of the parties into the name of the appellant was pursuant to a donation by the respondent to her of that property. The appellant accordingly maintains that the matrimonial property should have been excluded from the accrual calculations; and

in the event that the registration of the matrimonial home into the name of the appellant was not granted pursuant to a donation, van Heerden AJ should have held that the respondent had forfeited the benefits of the marriage in terms of s 9(1) of the Divorce Act, 1971.

[6] In the light of the argument that was advanced by the appellant who appeared in person, it would be prudent to reiterate that an appeal court may only consider the appeal based on the facts that were in existence at the time when the judgment was given. New circumstances which have subsequently arisen may not be considered by an appeal court unless an application is made setting out exceptional circumstances warranting the admission of that evidence.

See *Weber-Stephen Products v Alrite Engineering (Pty) Ltd and Others* 1992(2) SA 489 (A) at 507 C – D.

[7] In her address to the Court the appellant raised a number of factual matters which had arisen since the judgment of van Heerden AJ.

[8] In this case no exceptional circumstances appeared from the address of the appellant which would have enabled this Court to admit as evidence any of the statements made by her.

- [9] Although no formal application was made by the appellant to persuade this Court to admit in evidence the new factual allegations made by her during her address, the fact that she raised them may be considered to have constituted such an application. Even if that were so, no basis was laid for the admission of further evidence, and the respondent was not given advance notice of those submissions and the opportunity to deal with them.
- [10] Those factual allegations cannot then form any part of the deliberations of this Court.
- [11] What remains to be considered is whether there was any basis upon which this Court could interfere with the judgment of van Heerden AJ.

The duration of the maintenance ordered :

- [12] The amount of maintenance which the respondent is to pay to the appellant together with his contribution to the appellant's medical aid were agreed upon between the parties at the trial. The amount of the maintenance was the sum of R5 000 per month and van Heerden AJ ordered that that should be paid by the respondent until July, 2012.

- [13] In the appellant's heads of argument reference is made to four factors which demonstrate her requirement for indefinite maintenance. They are :-

the substantial duration of the marriage, including the prior period of cohabitation;

that during the marriage the appellant spent her life looking after the home and raising the children, whilst the respondent was at work earning an income; and

that the appellant gave up working shortly after the parties were married, because they agreed she should remain at home and look after the children; and

the appellant is totally dependant on the respondent financially, and has no source of income of her own.

- [14] In the introduction to his judgment, van Heerden AJ recorded that the parties had decided to part after some 12 years of marriage.

- [15] On the 16th February, 1996, they became engaged and were married to each other on the 5th October of that year. It seems clear from the evidence of the parties that the relationship between them came to an end after the arrest of the respondent for his role in the frauds allegedly perpetrated in the Tigon group of companies. He was arrested on the 12th March of 2003.

- [16] The appellant testified that for the 18 months after the arrest of the respondent he treated his family and her as if they were the enemy. She got nothing out of the respondent whatsoever, and considered that sufficient grounds for her to have sought a divorce. During 2005 the respondent gave to the appellant the s 204 statement which he had prepared in respect of his involvement in the Tigon companies.

- [17] From that day on, at least partly because of her response to the document, the communication between the parties reached an all time low and the appellant regarded the respondent as a stranger.
- [18] Summons was issued by the appellant on the 11th April, 2007.
- [19] The importance of these dates is that it would probably be more accurate to regard the marriage between the parties as one which endured from October 1996 to early in 2005 – i.e. ultimately eight and a half years. It is clear from the record that at the time the s 204 statement was handed over to the appellant she regarded the marriage between the parties as over. Her reaction to the respondent thereafter was extremely hostile and her conduct seemed to be aimed solely at getting him to confess to her satisfaction, the harm which he had caused to their relationship. Regarding the period prior to the marriage, the appellant made it clear that she and the respondent did not live together as husband and wife. In cross-examination she refuted the suggestion that she had moved in with the respondent at the early in
1996. She said that she only moved in with the respondent permanently when they were married.
- [20] The upshot of all this is that the marriage between the parties was not one of substantial duration, sufficient to make the suggestion of permanent maintenance a strong one. The question must therefore be answered with consideration to the other factors raised in the appellant's heads of argument.
- [21] There were various factors which prevented the appellant from working during various times in the marriage. Although the appellant was employed at the time of the marriage and continued thereafter until December 1996 she had to give up the job because of her illness.
- [22] The children of the parties were born in July 1997, September 1999 and May 2002 and the appellant did not work again until she opened a shop in approximately December of 2002, in the meantime devoting herself to the upbringing of the children.
- [23] The appellant testified to the importance which the two of them attached to her being able to look after the children. The appellant also submitted that she was totally dependant upon the respondent financially and at the time of the trial, had no source of income.
- [24] It is significant that in the cross-examination of the appellant the following was put to her :-
- "I am going to argue that on your presentation as a witness that you present as a presentable, highly articulate, intelligent person who is capable of digesting fairly large volumes of information, putting them in chronological sequence and dealing with them logically and that you have every prospect of getting employment in the future. Would you disagree with that assessment of you?"*

Her reply to that question was :-

"I would not disagree but the fact remains that I have three children which makes it a little bit difficult to be in the same position as a young student."

- [25] It is clear from the detailed description of her working life that the appellant is an extremely competent and able person who has a high probability of succeeding in whatever tasks to which she chooses to apply herself. Before and during the marriage she showed great flexibility in being able to learn various difficult tasks and to apply herself to the practical application of them. She also seems capable of being able to do jobs in her own time and at her home. Evidence was led that she had tried to obtain a job via Kelly Girl, an employment agency, but had been unsuccessful because of the limited range of jobs they were able to offer. It is also unclear precisely how much effort was made in this regard.
- [26] In summary then, the factors which have hampered her ability to work in the past have been her illness and her need to care for the children. The evidence at the trial was that her illness is now a thing of the past.
- [27] It was the evidence of the respondent that he agreed that the appellant should be at home if possible and whilst circumstances allowed when the children were young, but he did not envisage that that should endure indefinitely whilst the children grew up during their teenage years and during their schooling.
- [28] It is no doubt an ideal situation that a mother be able to devote herself exclusively to the raising of her children insofar as that would benefit them, more particularly where those children may have medical problems. In the case of the parties in this matter, however, there are practical difficulties which stand in the way of such a situation :-
- the divorce will inevitably lead to the establishment of two homes and a consequent substantial increase in the monthly costs of the parties; and
- the situation in which the respondent finds himself, have led to his marketability as an accountant being severely undermined, and it seems clear that he will not in the future be able to obtain employment at the same level as he was previously able to do;
- the possibility of the ultimate prosecution of the respondent cannot be ruled out, nor can the possibility of his being struck from the roll of accountants.
- [29] These factors add to the very real unlikelihood of the respondent adequately to be able to provide for all the financial needs of his family. This need not necessarily be a conclusive reason for denying the appellant indefinite maintenance, and it would really only affect the quantum of the maintenance which the respondent is able to pay to the appellant, but it is a factor which has to be considered in the overall decision.
- [30] The age of the appellant (41 years at the trial) does not in any way seem an insurmountable obstacle to someone with such diverse skills as she possesses.
- [31] In our view she has not made out a case for maintenance for an indefinite period. The decision of van Heerden AJ to award the appellant maintenance for a period of four years until July of 2012 is in all the circumstances a correct one and not one with which this Court should interfere on appeal.

- [32] That period, properly used by the appellant, should be more than sufficient to enable her to qualify herself to undertake an occupation more rewarding and profitable than those in which she has previously functioned.

The donation of the matrimonial property :

- [33] As pointed out by van Heerden AJ the importance of deciding whether or not the respondent donated the matrimonial property to the appellant is the fact that if it is found to have been a donation, then the matrimonial property will not form any part of the respondent's accrual claim in terms of s 5 of the Matrimonial Property Act, 1994.
- [34] As pointed out by van Heerden AJ it was the uncontested evidence of the respondent that he initially wished to have the property registered in the name of a family trust. His reason for doing so was to protect the property against potential creditors of his. He failed to establish the family trust in time to reflect it as the registered owner of the property, and he had decided to register the property in the appellant's name. In so doing he had never intended the appellant to become the sole and exclusive owner of the property.
- [35] That his intention was to retain a proprietary interest in the property is demonstrated by the fact that after divorce proceedings had been instituted against him by the appellant, the respondent proceeded to use the security of the property in order to fund substantial expenditure in sub-dividing the property. He also used the matrimonial home as security for funding legal expenses incurred in obtaining legal advice regarding his role in the Tigon companies.
- [36] For those reasons, van Heerden AJ found that there was insufficient evidence to infer a donation of the property by the respondent to the appellant on any basis. He regarded this as being a strategic afterthought on the part of the appellant.
- [37] It seems clear from the evidence led at the trial that the decision to register the property in the name of the appellant was one clearly intended by the respondent to protect the principal asset of the family. That decision obviously involved the protection of his own interest in the matrimonial property.
- [38] There was accordingly no basis for holding that the respondent had donated the matrimonial property to the appellant, and because it was registered in her name, it must form part of her estate in the calculation of the accrual of the parties' estates.
- [39] Given the finding that the matrimonial property was not the subject of a donation by the respondent to the appellant, it is not necessary to consider the issue of revocation of the donation and whether the matrimonial property fell within excluded donations referred to in s 5 of the Matrimonial Property Act, 1994.

The forfeiture of the benefits of the marriage in terms of s 9 of the Divorce Act, 1979

- [40] S 9(1) of the Divorce Act, 1979 provides that :-

“When a decree of divorce is granted on the ground of the irretrievable breakdown of the marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”

Van Heerden AJ correctly relied on the authority of *Wijker v Wijker* 1993(4) SA 720 (A) in determining the approach to be adopted.

[41] It is clear that the first issue to be decided, a purely factual one, was to determine whether the respondent, against whom the forfeiture order is sought, would in fact be benefited. In this matter, given that the immovable property was registered in the name of the appellant, the respondent would clearly be benefited in the calculation of the accrual of each party's estate.

[42] What falls to then be considered is whether or not the respondent would be unduly benefited in relation to the appellant if a forfeiture order is not made. In this regard :-

Van Heerden AJ was perhaps unduly generous in viewing the marriage as being of 12 years duration. We do not disagree with his conclusion that in the circumstances the duration of the marriage is a neutral factor because the marriage was neither a short one nor a marriage long enough to play a role in the determination of the forfeiture claim.

Whilst the conduct of the respondent was clearly a factor leading to the complete breakdown of the marriage relationship between the parties, it was not the only factor. There is no doubt that the respondent was at fault in being unable to satisfy the appellant's wishes for a more immediate and sincere expression of remorse and satisfaction of the detailed explanation which she sought regarding his conduct.

[43] However as pointed out by van Heerden AJ, there was credible evidence that he had fallen under the powerful influence of Mr Porritt and that is evidenced by the fact that many others were misled and persuaded by the authoritarian and persuasive nature of Mr Porritt. It is also clear that the respondent found himself in the position of a reluctant employee without the necessary mental strength to withstand the domination of his employer. As was found by van Heerden AJ, it does not appear that the respondent was the architect of the schemes in which he became involved and he derived no personal gain from them. It also seems clear from the record that the appellant had for a long time anticipated problems arising from the respondent's employment, but would not allow him to leave his employment until he had a suitable alternative available to him.

- [44] A further significant factor in this regard is the attitude of the appellant when faced with the truth of the respondent's conduct. Despite her avowed religious beliefs and criticism of the respondent's failure to uphold his matrimonial vows, the appellant was unable to forgive the respondent and, from the time she was handed the s 204 statement, reacted to him in an extremely confrontational and hostile manner, such that he was wholly unable to deal with her or accede to her demands.
- [45] In all those circumstances it was not surprising that van Heerden AJ found that the substantial misconduct on the part of the respondent was not sufficient to persuade him to make an order of forfeiture in favour of the appellant on the basis that the respondent would be unduly benefited.
- [46] In our view van Heerden AJ correctly found that the appellant should be ordered to pay to the respondent the sum of R793 000 in satisfaction of his accrual claim.

Costs

- [47] The question of costs is one which falls within the discretion of the judge in the Court a quo and is not one with which an appellate court will lightly interfere. Having considered the various factors relevant to the question of costs, van Heerden AJ was of the view that a fair and just outcome would be that each party should bear their own costs. That is not a decision with which we disagree.
- [48] In all the circumstances we would dismiss the appeal and uphold in full the decision of van Heerden AJ in the Court a quo.

VAN ZYL J

STEYN J

LOPES J

Date of hearing : 17th September 2010

Date of judgment : 7th October 2010

Counsel for the Appellant : In person

Counsel for the Respondent : M D C Smithers SC (instructed by Barkers Inc)

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