

SOUTH AFRICA / JUDGMENT

I.S v H.C.P.S (CA38/2020; 3075/2020) [2021] ZAE CGHC 16 (16 February 2021)

[2021] ZAE CGHC 16

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E Smith, F Dawood, T.V. Norman

CASE / FILE NUMBER

CA38/2020; 3075/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

no: CA38/2020 &

3075/2020

Matter

heard on: 25/01/2021

Judgment

delivered on: 16/02/2021

In

the matter between:

I[...]

S[...]

Appellant

and

H[...]

C[...] P[...]

S[...]

Respondent

JUDGMENT

SMITHJ:

Introduction

[1] This is an appeal against the judgment of Majiki J, delivered on 4 July 2019. The learned judge granted a decree of divorce and, in addition, ordered that: the respondent must pay the sum of R1.1 million to the appellant in respect of accrual; the common home must be sold as soon as possible and the appellant must vacate the property by 31 August 2019; the operation of the Rule 43 order was extended until 31 August 2019; and the respondent must maintain the appellant at the rate of RS 000 per month, for a period

of 12 months. The learned judge made no order as to costs, thereby effectively ordering each party to pay his or her own costs.

[2] The appeal is only against the order limiting the maintenance to a period of 12 months (the appellant contending that she had established entitlement to maintenance until her remarriage or death), and the failure of the court a quo to order the respondent to retain the appellant as a member on his medical aid, or to order him to pay her medical expenses. She also challenges the costs order, contending that she had been substantially successful and that the court should therefore have ordered the respondent to pay her costs of suit.

Factual

background

[3] The parties were married to each other on 22 November 1997, out of community of property and with the accrual system. The respondent issued summons against the appellant in the court a quo for a decree of divorce and other ancillary relief. The appellant counterclaimed for a share of the accrual and spousal maintenance.

[4] There is one child born of the marriage, who was already a major at the time of the trial. The parties had agreed that he would continue to live in the matrimonial home with the appellant and that the respondent would be financially responsible for him.

[5] Both parties were of the view that the marriage had irretrievably broken down and had been living apart since January 2017. They were both 44 years old at the time of the trial and had been married for 21 years.

[6] The issue of the accrual was settled on the first day of the trial, on the basis that the appellant would be paid the sum of R1.1 million from the respondent's pension fund. The respondent also made an "open tender" to pay the appellant's medical expenses for a period of 12 months. This offer was rejected by the appellant.

- [7] The issue which accordingly remained for decision by the trial court was the appellant's claim for spousal maintenance until her death or remarriage. The respondent opposed that claim.
- [8] The appellant has a B.Com Business Marketing Degree, with the main subjects being Marketing Management, Business Management and Statistics. The respondent has no formal tertiary qualifications. The appellant had been gainfully employed for most of her adult life and during the course of the marriage. When the parties moved to Port Elizabeth during 1998, they started a local branch of UCS Technology Services, a company owned by Business Connection. The respondent was employed as manager and the appellant as the office manager. The appellant was employed in this capacity for more than 15 years. During that time she also earned a second income from a related company, for a period of about six years.
- [9] She claimed lifelong spousal maintenance in the amount of R15 000. As mentioned above, the trial court only awarded rehabilitative maintenance for a period of 12 months, in the sum of R8 000 per month. The appellant was employed by an Office Supply company at the time of the trial and her net salary was R9 246 per month. This was after she had increased her income by taking on additional duties and responsibilities.
- [10] The appellant also adduced the evidence of an expert witness, one Mr. David Williams, a Human Capital Resources specialist. He testified that she would probably not have been able to find full time employment, and if she were_ fortunate enough to do so, she could expect to earn in the range of R12 000 to R15000 gross, per month. He said that the appellant's employment prospects were limited because of the depressed state of the economy, the high unemployment rate and the trend on the part of employers to employ persons from a previously disadvantaged background. It was also to her detriment that she had limited work experience, while being overqualified. He concluded that it was therefore improbable that she will be able to increase her income substantially. His research was limited to the Port Elizabeth and Uitenhage areas.
- [11] It was common cause that the parties were accustomed to a reasonably comfortable lifestyle during the course of the marriage. This had continued after their separation. The respondent had paid maintenance in the sum of approximately R39 000 per month, pendente lite, by virtue of the Rule 43 order, which was granted by consent.
- [12] The appellant submitted a schedule of expenses which reflected the sum of R32 276. Taking into account her net salary, this left her with a shortfall of R23 030 per month. If the respondent were to retain her on his medical aid scheme, an amount of R4 509 would have fallen away, leaving a monthly deficit of approximately R18 820.

- [13] Respondent's monthly salary was R98 054.73. He also earned an additional sum of R6 275.82. He submitted a schedule of expenses totalling R82 553.28, which was inclusive of the amount that he paid in respect of the Rule 43 order. He claimed to have a monthly deficit of approximately R27 000, which he funded through credit facilities.
- [14] While contending that the court a quo correctly found that the appellant has established a need for maintenance and that the respondent could afford it, the appellant asserts that the trial court has erred in limiting the maintenance to a period of 12 months. She also contends that the court failed to give reasons for its finding that she would be "able to find her feet in a period of about one year".
- [15] She asserts that the aforementioned finding was as a result of clear errors on the part of the court. First, in assuming that she would receive an amount of approximately R750 000 from the sale of the common home, when the evidence has established that there was no significant equity in the property. As a result of this error the trial court has erroneously found that she would in effect receive the sum of R1 850 000 shortly after the granting of the decree of divorce. Second, the court erroneously found that the facts of another decision of this division - on which the appellant relied heavily - namely, *Prousaloglou vs Prousaloglou* [2019] JOL 43960 (ECG), were distinguishable. She contends that if the court correctly understood the facts of that matter, it would have regarded the case as persuasive authority. Third, during the course of the evidence the appellant explained that she had always been on the respondent's medical aid while she was married to him even when she was employed, and the respondent conceded that he was financially able to retain her on his medical aid. During the course of the proceedings the respondent had made an "open tender" to pay her medical expenses for a period of 12 months. This was effectively an admission of liability on the part of the respondent and the court a quo has erroneously - albeit apparently inadvertently - failed to order the respondent to retain her on his medical aid, or to pay her medical expenses. Fourth, appellant contends that the trial court had been under the erroneous impression that the parties had been married for 17 years instead of 21 years. Since the duration of the marriage is one of the important factors to be considered in the determination of the period of rehabilitative spousal maintenance, this was a material misdirection on the part of the learned judge. And fifth, regarding the issue of costs, she contends that the court erred in effectively ordering the parties to pay their own costs, when she had clearly been substantially successful with her counterclaim.

The legal principles

- [16] Section 7(2) of the Divorce Act, No. 70 of 1979, provides that a court granting a decree of divorce "may make any order which the court finds just, in respect of payment of

maintenance by the one party to the other for a period until the death or remarriage of the party in whose favour the orders is

given". In making such an order the court must have regard to the following factors: the existing or prospective means of each of the parties; their respective earning capacities; their financial needs and obligations; the age of the parties; the duration of the marriage; the standard of living of the parties prior to the divorce; their conduct insofar as it may be relevant to the breakdown of the marriage; an order for the redistribution of assets in terms of section 7(3) of the Divorce Act; and any other factor which in the opinion of the court should be taken into account.

[17] It is established law that the aforesaid section vests a discretion in the trial judge. A court of appeal will thus only be at large to interfere with the decision of the trial court if there has been a material misdirection or the discretion had for one of the other reason not been properly exercised. (*Beaumont v Beaumont* 1987 (1) SA 967 (A), at page 1002 B-E)

[18] In *Grasso v Grasso* 1987 (1) SA 48 (A), the Court held that:

"In setting forth, in s 7(2) of the Divorce Act 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 in 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."

[19] Thus none of the factors mentioned above is dominant and it is essentially 'the question of requirement and need on the one hand and the ability to pay on the other which are two important considerations which must be considered together with other factors relevant. It is in essence section 7 of the Divorce Act should be seen in the context of ensuring fairness between the parties'. (*Prousaloglou* - supra, at para. 37)

[20] The trial court similarly has a discretion in the awarding of costs. In this regard section 10 of the Divorce Act provides that:

"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 insofar as it may be relevant, make such order it considers just, and the court may order the costs of the proceedings be apportioned between the parties".

The findings of the court a quo

[21] In her judgment, Majiki J, after giving careful consideration to all the factors mentioned in section 7 (2) of the Divorce Act, concluded that:

"in my view, she has not established a need for life long maintenance. I will frame the order I make, such that it assists her for a reasonable time, for her to build her life. I do not accept is entirely true that she is unemployable. For example, no comparison has been made for job like

the ones she had been doing, if she were to work full time. The history that UCS reveals that she always preferred to work flexible hours. When she could no longer enjoy that, she quit. She has to realise that she no longer has so much of that liberty now. There is no evidence that she is not able to keep a full day job. I would not like to fault (sic) the fact that the employment research has been confined to the Port Elizabeth area. That may be her area of choice. However, I do take into consideration the fact that the defendant has never tried to look for better employment opportunities."

- [22] In arriving at this finding the learned judge appeared to have given due consideration to the parties' respective financial positions, the fact that the appellant had graduated with a B.Com degree; she had been gainfully employed for all her adult life; at some stage during the 15 years employment as a branch manager, she was able to generate a second income; the appellant did not appear to have made a serious attempt to pursue more lucrative employment opportunities commensurate with her education, age and qualification; and in her view the appellant had the potential to find better employment.
- [23] Although the learned judge mistakenly assumed that the appellant would be paid an additional amount of R750 000 out of the proceeds of the sale of the common home, that consideration did not appear to weigh heavily in her decision that the appellant had failed to establish entitlement to lifelong maintenance. It does, however, appear that it was an important consideration in her decision to limit the rehabilitative maintenance to 12 months.
- [24] The appellant has also contended that while the learned judge has mentioned that the "open tender for medical expenses for 12 months made by plaintiff during the hearing was rejected by the defendant", she did not further address this issue in her judgment, neither did she explain why she did not order the respondent to retain the appellant on his medical aid or to pay her medical expenses, when it was manifest that he could afford it and that the appellant had established a need for it.

Discussion

- [25] In my view there are no grounds on which this court can interfere with Majiki J's decision not to award lifelong maintenance. The learned judge has given due consideration to all the relevant factors and has given extensive reasons for her decision. Those reasons cannot be faulted, neither is there any evidence of a misdirection on her part. This court is therefore not at large to interfere with the exercise of her discretion in this regard.
- [26] I also disagree with the appellant's contention that Majiki J has erred in distinguishing the facts in Prousaloglou (*supra*). In his judgment in that matter Lowe J provided the following justification for ordering lifelong spousal maintenance for the plaintiff:

"Not only is the Plaintiff relatively far from being young, but she has two, still young children, previously enjoyed a high standard of living and is currently doing her best to work at her limit but earning far short of what she reasonably needs. There can be no reasonable prospect that she

is able to retrain, or has the ability to do so nor is there, on the probabilities, a prospect of a greater earning capacity. In reality in the trial, and for good reason, this was not even put to her. Her financial need is more than established on a reasonable basis, and is not such as to place her in nearly the same standard of living as was previously the case."

- [27] The appellant's circumstances are, however, substantially different. It is evident from Majiki J's judgment that she considered as compelling that: the appellant has a degree in marketing; that she had preferred to work flexible hours while there was no evidence that she would not be able to work a full day; and that she had made no attempt to look for better employment opportunities.
- [28] I am also of the view that there is no merit in the submission that Majiki J's erroneous understanding of the duration of the marriage amounted to a misdirection. There can be little doubt that the learned judge had been aware of the date when the parties got married. The reference to a period of 17 years was accordingly a bona fide mistake that had no impact whatsoever on her reasoning.
- [29] It appears, however, that the decision to limit the rehabilitative maintenance to 12 months was based on an incorrect understanding of the factual position. There can be little doubt that the learned judge erroneously assumed that the appellant would be paid the sum of R750 000 from the proceeds of the sale of the common home. It was, however, common cause that there was no significant equity in that property and that she would therefore not have benefited from the sale. It was on the basis of the erroneous assumption that the appellant would have the sum of R1.85 million available to establish herself (instead of R1.1 million), that the learned judge found that a period of one year would be sufficient for this purpose. This, in my view, was a clear and material misdirection
- which had a major influence on the exercise of her discretion regarding the period of the rehabilitative maintenance.
- [30] In my view, taking into account that: the appellant was never able to pursue a career commensurate with her tertiary qualifications; the parties had been married for a considerable period of time, namely 21 years; the lifestyle that the parties had become accustomed to during the course of the marriage; their respective earning capacities; and that the appellant will have to acquire a new home and vehicle, I am of the view that a period of 12 months was wholly inadequate to allow her reasonably to establish herself.
- [31] I am also satisfied that the expert testimony (even though it was limited to the economic circumstances and employment prospects in the Port Elizabeth- Uitenhage conurbation) established that there are certain real challenges to the appellant finding alternative employment where she can put her degree to better use and increase her earning capacity. While I am not convinced that Williams's testimony supported the appellant's claim for lifelong maintenance, there can be little doubt that it established, at the very least, that a period of one year would be wholly insufficient to allow the appellant reasonable opportunity to achieve these objectives.

- [32] Thus, in my view, having regard to the abovementioned factors, a period of 48 months would be fair and just in the circumstances.
- [33] In addition, I agree with Mr. Niekerk, who appeared for the appellant, that it appears from her judgment that Majiki J has inadvertently omitted to order the respondent to retain the appellant on his medical aid or to pay her medical expenses. As I have mentioned above, the respondent's tender in this regard was no doubt rejected by the appellant because it was at odds with her claim for lifelong maintenance. However, there can be little doubt that the tender was made on the assumption that the respondent was able to afford the medical aid and the appellant had established a need for it. The fact that she had rejected the tender under these circumstances is accordingly neither here nor there. In my view it is therefore fair and reasonable to order the respondent also to pay the appellant's medical expenses for the period of the rehabilitative maintenance.

Costs

- [34] Regarding the issue of costs, the trial court's reasons for the order is encapsulated in the following remark:

"As regards costs, I am of the view that the outcome of this matter justifies that no party ought to be burdened with an order of costs. The no cost order shall apply even to previously reserved costs."

- [35] It is evident from this comment that the learned judge was of the view that neither of the parties was substantially successful, thus justifying an order that each must be responsible for his or her own costs.
- [36] As I have mentioned above, section 10 of the Divorce Act vests in the court a discretion to make an order in favour of the successful party, having regard to the means of the parties and their conduct insofar as it may be relevant. And the court may order that the costs of the proceedings must be apportioned between the parties. The learned judge has unfortunately not expatiated on her finding that neither party was successful.
- [37] I am, nevertheless, of the view that the appellant was substantially successful with her counterclaim. In reaching this conclusion I have considered that: the respondent instituted the action for divorce in the court a quo and the appellant counterclaimed for the accrual sum (which was only settled on the first day of trial); the appellant has succeeded with her maintenance claim, albeit only for rehabilitative maintenance; and the substituted order this court intends to make will grant her such maintenance for a period of 48 months. And having regard to the respective earning capacities of the parties, I am of the view that it will be just and equitable for the respondent to pay appellant's costs, both in the court a quo and on appeal.

Order

- [38] In the result the following order

issues:

1. The appeal succeeds, with costs, and in the following respects.
2. Paragraphs 4 and 5 of the order granted by Majiki J on 4 July 2019 are hereby set aside and the following orders are substituted:

"4. The plaintiff is ordered to maintain the defendant at the rate of R8 000 per month for a period of 48 months, with effect from 1 September 2019.

4.1. The plaintiff must, in addition, and for a period of 48 months with effect from 1 September 2019, pay to the defendant the sum of R4 509 per month, in respect of her medical expenses.

4.2. The plaintiff must pay the aforesaid amounts on or before the first day of each and every month, by way of a debit order into such bank account as the defendant may nominate from time to time, the first payments to be effected on or before 1 September 2019.

5. The plaintiff is ordered to pay the defendant's costs of suit."

J.E SMITH

JUDGE OF THE HIGH COURT

I agree,

F DAWOOD

I agree.

T. V. NORMAN

ACTING JUDGE OF THE HIGH COURT

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