

SOUTH AFRICA / JUDGMENT

L.H.M v M.E.M (Born R) (DIV 182/2020) [2023] ZANWHC 234 (12 October 2023)

[2023] ZANWHC 234**COURT**

North West High Court, Mafikeng

BEFORE

Maakane

CASE / FILE NUMBER

DIV 182/2020

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NO: DIV****182/2020**

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In the matter between: L[...]
H[...] M[...]
Plaintiff
and
M[...]
E[...]
M[...]
Defendant
(BORN
R[...])

JUDGMENT

MAAKANE AJ

Introduction

- [1] The defendant seeks in her favour, costs of the divorce action between her and her husband, the plaintiff. The divorce action

between the parties was settled on the morning of and just before the commencement of the trial on 23 January 2023. However, the parties could not agree on the issue of costs.

Background

- [2] Plaintiff and the defendant were married in community of property on 2 April 2003. They have two (2) sons, who although having attained the age of majority, are not yet self-supporting and therefore still financially dependent. One of the sons is their natural child born between them. The other, they raised from age 5 as their own. He is a son of the plaintiff's relative.

- [3] On 23 December 2020, plaintiff issued summons against the defendant seeking among others a decree of divorce, and also, forfeiture of benefits arising out of their marriage, specifically in respect of two (2) specified immovable properties known and described as

3.1 B[...] 3[...] J.Q. Rustenburg

3.2 Erf 6[...], W[...] situated at Hartbeespoortdam

- [4] Defendant filed a notice of intention to defend and later a plea as well as a counterclaim. In her plea, she admitted and agreed that the marriage relationship between them is broken down irretrievably but placed in dispute the grounds of breakdown alleged by the plaintiff. In her counter claim, she prayed for division of the joint estate.

- [5] During the pleading stage, there was also correspondence exchanged between the parties' respective legal representatives, which primarily was all about attempts at reaching settlement of the matter.

[6] The matter was initially set down for trial on 19 September 2022, but could not be heard as the court was on recess at the time. It was finally set down and heard on 23 January 2023. On that day, shortly before the commencement of the trial, the parties reached and signed a settlement agreement. They however could not agree on the issue of costs. A decree of divorce incorporating the settlement agreement was granted. Parties through their counsel then went on to argue and make submissions regarding the issue of costs.

The issue

[7] The issue is whether the defendant is entitled to a costs order in her favour or, if not, what an appropriate costs order should, under specific circumstances of this case, be.

Parties'

submissions

The defendant

[8] In her submissions, counsel for the defendant argued that she is entitled to costs of the divorce action, mainly due to the conduct of the plaintiff which conduct was the cause of the delay in the finalisation of the matter.

[9] In the first place, so goes the argument, the plaintiff in his particulars of claim prayed for forfeiture of benefits of the

marriage against the defendant. He persisted in this attitude throughout the pleading stage, and also in correspondence exchanged

during negotiations. It was only in the morning of the trial day that he had a change of heart and the matter was settled. She submitted that in this regard, plaintiff was throughout unreasonable.

[10] Secondly, the plaintiff was not co-operative. He failed to answer or respond to correspondence, including formal requests to attend pre-trial conferences. In this regard, defendant also attached to her heads of argument detailed schedule with columns indicating relevant dates, manner and respects in which she alleges plaintiff failed to co-operate. Had he co-operated, the matter could long have been settled and finalised.

[11] Finally, while the plaintiff is dominis litis, it is in fact the defendant who on two occasions filed and served on the plaintiff tenders in terms of Rule 34, in an attempt to settle and finalise the matter. For these reasons, she submits that plaintiff must pay her costs of the divorce action.

The plaintiff

[12] Counsel for the plaintiff submitted and denied that he was unreasonable. Regarding forfeiture of benefits, plaintiff admits that he did initially in his pleadings pray for same. However, this was not a prayer of forfeiture of benefits in a general sense or in respect of the entire joint estate. He asked for forfeiture of benefits specifically and only in respect of two immovable properties he specified and described in his particulars of claim. These are the properties mentioned in paragraphs 3.1 and 3.2 hereof.

[13] Secondly, plaintiff had in any event, long abandoned this prayer. He never persisted therein during the exchange of pleadings and also in correspondence exchanged between the parties. In this regard, he referred to a letter dated 22 July 2022 written and addressed by the defendant's attorneys to his attorneys of record. The letter reads in part:

"1. The above matter and...your email...dated 17 May 2022 refer...

2. We are delighted to make note that your client is abandoning any claims of forfeiture and in essence confirm that our clients has accepted your clients' terms of resolving the matter in the following manner:

2.1 The parties agree to an order of divorce.

2.2 Equal division of the joint estate and in the event of the parties being unable to agree on the terms of such division, that a Referee be appointed to attend to the division...

2.3 The costs of the action to be from the joint estate."

[14] He submitted that it is not true that the plaintiff was either obstructive or uncooperative and or delayed finalisation of the matter. He argued that on the contrary, it is in fact the defendant who by her attitude and conduct throughout displayed unreasonableness

which conduct was the cause of the delay in finalising the divorce. This he submitted, is fully demonstrated by the contents of the two

(2) "with prejudice settlement tenders" in terms of rule 34 served and filed by the defendant.

[15] With regard to the first settlement tender dated 13 May 2022, he referred firstly to clause 4.2 thereof which reads:

"4.2. The Plaintiff shall make an ex-gratia payment of R2 500 000-00... within six (6) months from date of the final divorce order..."

[16] He went on and referred in the second place to clause 8.3. thereof in terms of which the defendant demands, over and above the R2 500 000-00 ex gratia payment, that the plaintiff purchases her a Mercedes Benz V-class as her sole and absolute

property. The relevant clause reads:

"8.3. The parties further agree that the plaintiff agrees to... purchase for the Defendant, as her sole property... within a

period of thirty (30) days...a 2022 Mercedes Benz V-class, unencumbered to the value of not less than R1 000 000-00

and agrees to pay any and all costs associated with the transfer of the said vehicle into the name of the Dependant.”

[17] He further referred to clause 8.4 of the same document which requires of the plaintiff to buy and replace the said luxury vehicle every four (4) years at an escalation value of 10% per annum. The clause reads:

“The aforesaid motor vehicle (2022) Mercedes-Benz V-class is to be replaced by the plaintiff every four (4) years with a similar vehicle of the Dependant’s choice and of equivalent, adjusted value, with the said value to escalate annually by 10%, on the anniversary of the divorce order.”

[18] Finally, he referred to the second settlement tender dated 27 December 2022. This document, is substantially a repeat of demands to which I have referred. However, in this document, the ex-gratia payment has been reduced to R1 500 000-00 and clause 8.4 it does not appear. The demand for a luxury Mercedes Benz V-Class is however, still repeated.

[19] In conclusion, he submitted that the conduct and attitude of the defendant as evidenced in these documents, demonstrate that she was throughout unreasonable in her negotiations and was therefore the cause of the delay in finalising the matter

The law and analysis

[20] When dealing with the issue of costs, there are two important basic general rules and considerations. The first is that costs follow the result. Secondly, costs are primarily in the discretion of the court, which discretion has to be exercised judicially, taking into account all relevant facts and circumstances of the case.

[21] With regard to costs specifically in divorce actions, this discretion is also widened and confirmed by the legislature in section 10 of the Divorce Act 70 of 1979, (“the Divorce Act”). The section provides as far as necessary that the court shall not be bound to award costs to a litigant merely because such a litigant happens to be a successful party. The section also provides guidelines and factors that the court should have regard to, in exercising its discretion. Specifically mentioned in the section are two factors; the means of the parties, and to the extent relevant, their conduct.

[22] With reference to this specific provision, I have been referred to the case of AC v JC C 13116/13 [2018] ZAGPJHC 535 (10 September 2018) where Meyer J said the following:

“[4] The general rule, it is trite, is that costs follow the event. A court, however, is not bound to make an order for costs in favour of the successful party in a divorce action.

Section 10 of the Divorce Act 70 of 1979 provides as follows:

“In a divorce action 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 in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.”

- [23] Having regard to the guidelines as well as the provisions of section 10 of the Act, I now deal with and consider all facts as well as material made available to me in this matter.

The conduct of the parties

- [24] I have already dealt with and analysed this aspect. There are allegations and counter allegations by and against each party. It is clear from the allegations that each party blames the other for the delay in the finalisation of the matter. I do not find it necessary to deal with this aspect in any further detail, save to the extent only relevant to the issue before me at this stage.
- [25] In *Meyr v Provincial Department of Health and Welfare & Others* 2006 (1) Case No: 9092\05 Mavundla J said the following:
- “Negotiations conducted without prejudice, are of course, designed to resolve disputes between the parties and if the negotiations result in a settlement, then logically evidence about settlement and the negotiations leading up to it should be available to the trial court because the whole basis of the non-disclosure has fallen away.”*
- [26] In their submissions to the court on this issue, both Counsel for the parties made mention of a letter dated 2 September 2022. The existence of this letter appears to be common cause. What is however, in dispute is the contents thereof. Unfortunately, the letter was not discovered by either party nor does it form part of the trial bundles. It was therefore not before court.
- [27] Counsel for the defendant submitted that despite this, the letter lost its privilege after settlement was reached. In essence, she submitted, the contents of that letter confirms that the plaintiff was persistent in his prayer of forfeiture of benefits against the defendant. In other words, the plaintiff was unreasonable throughout the negotiations and did not change his stance as he now suggests.
- [28] On assumption that the contents of the letter are as alleged by the defendant, then the letter would be in direct conflict with and a contradiction of an earlier letter dated 22 May 2022 to which I have earlier referred in paragraph 13 hereof. It is important to mention that the settlement agreement reached by the parties and made an order of this court, is to a large extent consistent and in line with the said 22 May 2022 letter. In essence therefore, the matter could have been settled at that stage, and on the same terms as it happened on the morning of the trial day.

[29] Be that as it may, this alleged unreasonableness on the part of the plaintiff, must also be considered and weighed against the same counter allegations made by the plaintiff against the defendant. More specifically, the fact that the defendant, as evidenced by her Rule 34 tenders, was persistent in her demand from the plaintiff, of a large amount of money as ex gratia payment. Over and above that, she persisted in her demand of a luxury German vehicle, being a 2022 Mercedes Benz V-Class. She also in both tenders, demanded that the plaintiff pay an amount of R100.000-00 as contribution towards her legal costs.

[30] In MB v DB 2013

(6) SA 86 (KZD) the court said the following:

“[39] In my view, litigation is not a game where parties are able to play their cards close to their chest in order to obtain a technical advantage to the prejudice of the other party. This is even more so in matrimonial matters where the lives of the parties have been inextricably bound together, as in this case...”

[31] Taking all of these into account, it is my finding that there was a degree of unreasonableness on the part of both parties. Such conduct was the cause of delay in finalising this matter. Both of parties are therefore equally to blame for the delay.

The means of the parties

[32] This is an important factor to be taken into account in this case. It is also, an important feature which clearly distinguishes this matter from a series of authorities and other cases to which I have been referred.

[33] In this case, each of the parties is well off and financially independent. Both parties are graduate professionals in the medical field. The plaintiff is a Medical Doctor and the defendant a Dentist. None of them is a man of straw. It was never suggested nor did I get an impression during the arguments that any of the parties, in particular the defendant cannot or is unable to pay her legal fees.

[34] In a series of cases to which I had regard and been referred, the court made relevant costs orders after finding among others, that there were huge disparities in the financial means of the parties. For example, in AC v JC (Supra) Meyer J ordered the husband to pay 50% of the wife's legal costs. This order she made after making a finding that there was substantial disparity between the parties' financial means. In this regard she, said the following:

“It is clear on the evidence presented in this application that Mr C's means are more substantial than those of Ms C”.

[35] In my view, this case is different and, on the facts, distinguishable. There was no evidence, nor submission or suggestion of any meaningful or substantial disparity in the financial means of the parties. As I have pointed out, both of them are graduate professionals in the health sector, financially independent and well off. Over and above that, in terms of the settlement agreement, a liquidator has been appointed to ensure equal division and distribution of the joint estate between them.

Other considerations

[36] It is common cause that the parties were married in community of property. In terms of the settlement agreement reached, a receiver and liquidator has been appointed to ensure fair, equal division and distribution of the joint estate between the parties. The joint estate is fairly substantial and consists of both movable and immovable property. Each party will therefore have and get his or her fair share and portion of the joint estate.

[37] However, in terms of the settlement agreement, the plaintiff has further and additional financial obligations. In terms of clause 3 thereof, the husband shall be liable for all maintenance and needs of the parties' two

(2) sons. I have referred to these sons and their status in paragraph 2 hereof.

[38] Both sons have already attained the age of majority. However, both of them are not yet financially independent. They still have maintenance needs and therefore dependent. As at 2022, the natural son was busy upgrading and improving his matric results. Given the professional and social standing of the parties, the importance of education in this age and time cannot be emphasised. For both sons to have a better future, they will in all probability have to receive tertiary education. These is every parents wish for their children. For all these the plaintiff will specifically be financially responsible and in terms of the settlement agreement and court order, indeed obliged to do so. This obligation will remain for as long as the two sons are not financially independent. The settlement agreement does not in any specific terms, impose such an obligation on the defendant.

[39] In my view, this financial obligation on the part of the plaintiff is a factor to be considered and taken into account, particularly given the fact that the defendant is a natural mother of one of the sons.

Conclusion

[40] I have taken into account the totality of the material and information at my disposal, the general and factual circumstances of the case, applicable legal principles, the marriage regime of the parties, the terms of the settlement agreement and the fact that the joint estate will be divided and distributed equally between the parties. I have also taken into account to the extent relevant, the conduct of the parties throughout, each party's financial means and status as a graduate professional, and the fact that each is financially independent and well off.

[41] Taking into account all of these factors I am of the view that it will be fair and just that each party pay his or her own legal costs.

Order

[42] Consequently, the following order is made:

Each party shall pay his or her own legal costs.

S.S MAAKANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Date Heard : 20 January 2023

Date of Judgment : 12 October 2023

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