

SOUTH AFRICA / JUDGMENT

L.M v G.J.M (10339/2006) [2009] ZAWCHC 137 (21 July 2009)

[2009] ZAWCHC 137**COURT**

Western Cape High Court, Cape Town

BEFORE

Yekiso

CASE / FILE NUMBER

10339/2006

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT, CAPE TOWN****Case****No: 10339/2006****In**

the matter between:

L

M Plaintiff

vs

G

J M Defendant

JUDGMENT**DELIVERED ON 21 JULY 2009****YEKISO, J**

- [1] This is an action for a divorce in which the plaintiff, Mrs "M", in her particulars of claim seeks an order for dissolution of the marriage, post-divorce maintenance as well as costs of suit. The defendant, Mr "M", on the other hand, has in his claim in reconvention similarly sought an order for dissolution of the marriage as well as costs of suit. The defendant has since abandoned its claim in reconvention so that the only issue which calls for determination is whether the defendant, post-divorce, is liable to maintain plaintiff and if so, the quantum and duration of such maintenance or, put differently, whether plaintiff has made out a case for a post-divorce maintenance award.

- [2] In pursuit of a relief for maintenance it is contended on behalf of plaintiff that the defendant is a person of substantial means, whilst plaintiff has no means at all; that plaintiff has no fixed income; that the only income she has comprises irregular donations derived from her missionary work; that her missionary work has always been her lifetime calling; that missionary work is all she knows; that the donations which she receives from time to time are inadequate to maintain her and that without the defendant's assistance she will not be able to survive. Her savings, from which she in the interim had had to rely on, have almost been depleted.
- [3] On the other hand, and to substantiate that the defendant is a man of substantial means, it is contended on behalf of plaintiff that the defendant is the sole shareholder and director of GJ "M" Ondernemings (Pty) Ltd; that the defendant receives a fixed salary of approximately R21,000.00 per month from his company; that the company, of which the defendant is the sole shareholder and director, is possessed of unbound assets with a fair valuation of R14,466,331.00; that the value of the defendant's interest in his company is in an approximate amount of R6,2m; that the defendant's property in Gordon's Bay, currently on the market for R5m, is bonded in an approximate amount of R2m and that, therefore, the defendant is possessed of means which would enable him to comply with the maintenance order in the event of the relief sought being granted. In order to examine all these issues, it is necessary to sketch a brief background of the parties and the circumstances that led to their marriage and the subsequent deterioration thereof.

FACTUAL

BACKGROUND

- [4] The plaintiff and the defendant were married to each other out of community of property, profit and loss in which is excluded the accrual system. The marriage was concluded at Paarl on 30 July 1994. No children were born of the marriage. The plaintiff was 48 years of age (having been born on 20 March 1946) whilst the defendant was 62 years of age (having been born on 20 December 1931) when the marriage relationship was concluded. Both parties were married twice before, the current marriage relationship being each party's third marriage. The plaintiff was divorced from her first marriage during 1984. She was subsequently married in 1988 but that marriage was of a very short duration. She was divorced from her second husband in 1989. Three children were born of her first marriage. In 1987 plaintiff qualified as a pastor at the Rhema Church in Cape Town. She has since then been doing missionary work, preaching and serving the christian communities in several overseas countries and at such places as the Lowveld in what used to be the Eastern Transvaal, now the province of Mpumalanga and Napier, in the province of the Western Cape. She had managed to raise her three children born of her first marriage whilst doing missionary work. It was whilst she was doing missionary work in the Lowveld when she met her second husband. When that marriage did not work, she came back to Cape Town. After a brief sojourn in Cape

Town she went to live in Napier where she continued with her missionary work.

[5] In the course of her missionary work she started a church in Gordon's Bay, Western Cape. The church had in the course of time grown to about 70 people. It was whilst Plaintiff was doing missionary work at Gordon's Bay that the defendant commenced attending her church. At that stage the defendant used to live in Paarl. The defendant used to travel all the way from Paarl to attend her church twice a week, being on a Wednesday and a Sunday. It was in the course of these church meetings that plaintiff met the defendant. The defendant proposed love to her. Eighteen days after the defendant proposed love to her they concluded a marriage relationship. The marriage relationship was concluded at Paarl on 30 July

1994.

[6] Once the parties were married, they undertook various overseas tours these being a 1994 honeymoon tour of England, Scotland, France, Benelux, Osterreich, Italy and Israel. Subsequent overseas tours undertaken, within the scope of plaintiff's missionary work, included such countries as Ukraine, Egypt, India to name but few of the countries the parties visited. Not long after their marriage, the relationship started to show signs of disintegration. According to plaintiff it was in London on their honeymoon tour, and after only 18 days of their marriage, that the marriage started showing signs of disintegration. Plaintiff subsequently undertook various other tours during the period 1996 upto and including 2006 visiting such places as Holland, Israel, Ghana, India and Madagascar doing missionary work in all such countries. Some of the tours were financed by the defendant and some by the host organisations in such countries where she was invited to.

[7] In the course of the marriage, the defendant acquired a property in Gordon's Bay which the parties subsequently occupied as a common home. In the meantime, the marriage continued to show signs of disintegration. The main contributory cause towards the deterioration of the marriage relationship appears to be the defendant's reluctance to make a testamentary disposition in favour of plaintiff. The plaintiff stated in her evidence that she had repeatedly pleaded with the defendant, for the most part of their marriage, to include her in his will but that the defendant flatly refused to do so. What appears to have broken the camel's back was when, during August 2006 after the plaintiff had been on a trip to Israel, she discovered that the defendant had still failed to include her in his will. Once she discovered this, she, without prior notice to the defendant, simply packed her goods, left the common home and went to live in Yzerfontein where she still currently lives. The defendant's subsequent plea that she returns to the common home fell on deaf ears. When the parties were in separation, plaintiff continued to undertake overseas tours, having visited such countries as Portugal and India. When at home, she continued with her missionary work visiting various places in the country. Shortly after she left the common home she instituted divorce proceedings in which she claims a decree of divorce, an order that the defendant pays her maintenance at the rate of R21,000.00 per month as well as costs of suit. It is on the basis of the aforementioned background that I have to determine if the plaintiff is entitled to the relief she seeks in the form of a post-divorce maintenance order as

well as an order as to costs.

POST-DIVORCE MAINTENANCE: DISCRETIONARY

[8] The principle that neither spouse is entitled to maintenance, as a matter of right, after dissolution of a marriage, has long been established in our law. The reciprocal duty of support, which is one of the invariable consequences of a marriage, comes to an end on dissolution of a marriage. This principle is affirmed in a number of authorities such as *Portinho v Portinho* 1981(2) SA 595(T) and, until fairly recently, in *Botha v Botha* 2009(3) SA 89 (WLD). Such statutory regimes as the Matrimonial Affairs Act, 37 of 1953 and the current Divorce Act, 70 of 1979 did not change the common law position. It has been accepted in a number of authorities such as *Portinho v Portinho*, supra, and *Qoza v Qoza* 1989(4) SA 838(CkGD) that sections 10(1)(a) of the Matrimonial Affairs Act as well as section 7(2) of the Divorce Act confer a discretion on the court in the award of post-divorce maintenance. In terms of the aforementioned pieces of legislation it is clear that post-divorce maintenance awards are a matter of discretion and not solely dependant on the common law requirement of need and ability. It is only in extraordinary circumstances, such as those set out in authorities such as *Rousalis v Rousalis* 1980(3) SA 446 (C), where a wife of longstanding who had, by working, helped her husband to build up his estate, would be entitled to far more maintenance in terms of section 7(2) of the Divorce Act than the one who had merely shared his bed and kept his house for a few years. If, on dissolution of the marriage, the court makes no order as to maintenance, the reciprocal duty of maintenance lapses and cannot be revived at a later stage.

[9] In instances where a dispute revolves around post-divorce maintenance, the matter is regulated by the provisions of section 7(2) of the Divorce Act. Section 7(2) of the Divorce Act sets out factors which the court has to take into account in considering whether to make a maintenance award or not. These factors relate to the existing or prospective means of each of the parties; their respective earning capacities; their financial needs and obligations;

the parties' age; the duration of the marriage; the standard of living prior to the divorce; their conduct insofar as it is relevant

to the breakdown of their marriage; an order for the division of their assets and any other factor which, in the court's opinion,

should be taken into account. The evidence presented by plaintiff at trial was with a view to place evidence before court on those factors without which the court cannot exercise a discretion whether to grant maintenance or not. These factors are obviously not a numerus clausus and the court is entitled to take any other factor into account, apart from those factors set out in section 7(2), in the exercise of its discretion whether maintenance should be granted. One can go and consider other factors over and above those identified in section 7(2). With these factors in mind, I shall proceed to analyse evidence tendered at trial with a view to determining if the plaintiff has

made out a case for the relief she seeks. I shall first deal with the evidence regarding the means of the parties.

THE MEANS OF THE PARTIES

[10] Some of the factors referred to in section 7(2) of the Divorce Act tend to be interrelated resulting in evidence overlapping on some occasions. Evidence relevant to a consideration of the means of the

parties would, on occasions, overlap with evidence relevant to a consideration of the parties' earning capacities, their financial

needs and obligations to mention but some of such instances. The plaintiff states in her evidence that she qualified as a pastor at the Rhema Church, Cape Town sometime during 1987. This was somewhat three years after she was divorced from her first marriage. She states further that she has no means at all; that she has no fixed income; her missionary work, so states plaintiff in her evidence, has always been her lifelong calling and that is all she knows; she was last gainfully employed some forty years ago and that there are no prospects of her re-entering the labour market at all. She receives irregular contributions and donations on her missionary work from which she is able, from time to time, to buy clothing, have her hair done and buy some cosmetics. She states that these donations are inadequate to maintain her and, thus, without the defendant's support, she will not be able to survive. It is mainly through her savings that she has been able to survive. However, these savings have since been depleted and there is no way she can survive, post-divorce, without assistance from her husband. It has, however, emerged in her evidence under cross-examination that she is possessed of an expensive equipment from which to cut CD's, produce DVD recordings and make TV programs which, on the face of it, appear to be income bearing projects.

[11] Whilst it is contended on behalf of plaintiff that the defendant is a person of substantial means, the defendant, on the other hand, contends in his evidence that the picture is not as rosy as the plaintiff portrays it to be. As has already been pointed out, the defendant is the sole shareholder and director of GJ "M" Ondernemings (Pty) Ltd. The defendant's company, on the other hand, is the owner of the Laborie Shopping complex with an estimated valuation in an amount of R14m. Furthermore, the defendant is the owner of the Gordon's Bay property which used to be the parties' common home. It emerged in the course of evidence that the Gordon's Bay property has, for a considerable time, been on the market at a price in an amount of R5m. Despite the property being on the market for quite some time, as at the date of hearing of these proceedings, no offers had as yet been received. The Gordon's Bay property is currently bonded to an amount of R2m. The Laborie Shopping complex, whose earning capacity has been compromised by a shopping mall which recently opened nearby, is running at a loss of approximately R50,000.00 per month and, thus, compromising its commercial value. It was suggested in evidence that because of competition arising from the presence of the shopping mall nearby, a substantial number of the defendant's tenants had to close down because of stiff competition or had to relocate

elsewhere. It is because of these factors that the defendant placed the Laborie Centre on the market. Although both properties had been on the market for sometime, as at the time the trial commenced, no offers had come forth. This, in a nutshell, is a brief account of the parties' means. What next needs to be examined is the parties' respective earning capacities.

THE EARNING CAPACITY OF THE PARTIES

- [12] The plaintiff seems to rely on the potential investments of proceeds of sale of Laborie Shopping complex as the basis of the defendant's income. It is contended on behalf of plaintiff that the defendant, without having to work, will be able to earn a considerable sum of money arising from the proceeds of sale of the Laborie Shopping complex. It is only once the defendant shall have succeeded to sell the shopping complex that he will be able to comply with the maintenance order plaintiff seeks. The plaintiff seems to acknowledge in her evidence that although the defendant, through his company, is possessed of this massive asset, the defendant has a liquidity problem. This is evidenced by a suggestion by plaintiff herself in her evidence under cross-examination that the defendant could arrange with his sons to liquidate the balance outstanding in respect of the bond and once that happens, the defendant could then give the Gordon's Bay property to her. The plaintiff further seems to accept that although the defendant still derives some income from the four tenants who are still in occupation of portion of the premises, such income is inadequate for the defendant to make ends meet. This probably explains why plaintiff projects the defendant's earning capacity on the potential investment of the proceeds of sale of the shopping centre. The plaintiff thus seems to rely more on the defendant's prospective means rather than his existing earning capacity.
- [13] The defendant, on the other hand, maintains that the plaintiff's earning capacity is such that she is and will continue being able to maintain herself. The defendant bases this contention on the fact that plaintiff is a qualified pastor in the Rhema Church; that over the years prior to her marriage to the defendant she has been able to survive doing missionary work; that she managed to raise her three sons from her first marriage doing missionary work; that her three sons have since come of age and without the obligation to maintain her three sons, she will be in a much more better position to maintain herself than the position she was prior to her marriage to the defendant.
- [14] The defendant further contends that the plaintiff is not involved in missionary work for the love of it as she claims in her evidence. Ministry is her career. The defendant states in his evidence that plaintiff's ministries and missionary work generates good income by way of contributions, cash donations, remuneration for TV programs, sales of CDs and DVD recordings. The defendant cites the Sylvania-tour as an example, when, at the end of that tour, she paid Sylvania Mechado an amount of R60,000.00; the Koiingnaas and Carnavon tours where amounts of R18,000.0 and R16,000.00 respectively, were raised. It was out of the proceeds of the Koiingnaas and Carnavon tours that she bought herself a laptop and an overhead projector; various donations and contributions into her personal account such as monthly contributions in amounts of R500.00 by Kobus and Sandra Pieterse; contribution

and donation in an amount of R1,000.00 by Estelle Kitching; and various other donations and contributions suggested to her, which she did not seriously refute, in her evidence under cross-examination.

- [15] It was further suggested to plaintiff under cross-examination that she is actively involved in missionary work. The suggestion goes that this is evidenced by her undertaking various trips abroad and through extensive travelling throughout the country covering distances as much as 40,000 km per year. It was further suggested to plaintiff under cross-examination that she is actively involved in missionary work; that missionary work is her career; that this is underscored by various trips abroad she has undertaken; and her extensive travels throughout the country covering distances as much as 40,000km per year. It was thus suggested to plaintiff that these extensive tours are not consistent with doing missionary work for the love of it, but that plaintiff embarks on these tours, with all the contributions and donations that go with it, in pursuance of a career. Based on plaintiff's frequent travels abroad, various donations and contributions from several persons and organisations, TV programs, sales of CDs and DVD recordings, the defendant contends that plaintiff is very well capable of maintaining herself and will be able in a position do so after dissolution of marriage. What I have outlined in this and the two previous paragraphs is, in broad terms, what appears to be the parties' respective earning capacities as testified in evidence at trial. What next needs to be examined is the parties' financial needs.

FINANCIAL NEEDS AND OBLIGATIONS OF THE PARTIES

- [16] It would appear that plaintiff's need of paramount importance is roof over head. In addition thereto plaintiff stated in her evidence that she will require maintenance for daily and monthly expenses such as food, insurance, telephone, motor vehicle expenses, diesel and medical aid cover. It further would appear that plaintiff currently rents the premises she presently occupies. She similarly would require maintenance to cover her monthly rentals. But how much rental she pays in respect of the premises she presently occupies does not seem that clear. In her evidence at trial she says her monthly rental is in an amount of R2,950.00. According to exhibits B35-B41 her monthly rental is stated as being in an amount of R3,000.00. In her affidavit in support of an application for maintenance pendente lite dated 13 November 2006 her monthly needs for rental is stated as being in an amount of R5,000.00.
- [17] Plaintiff has a savings account, a cheque account, a money market account as well as a credit card, all with Absa Bank. At the beginning of the current year her savings account was in credit in an amount of R973.76; her cheque account was in credit in an amount of R17,718.17; her money market account was in credit in an amount of R102,936.57 and her credit card was in credit in an amount of R6,182.41. As at the time her testimony in court she had approximately an amount of R1,000.00 in her money market account and a further amount of R1,000.00 in her credit account. It does not seem clear in her evidence under cross-

examination how the rest of the money was spent in between the beginning of the year when she had substantial credit in some of these accounts and the period the trial commenced.

[18] The defendant, on the other hand, states that at present he does not have the financial resources to meet his own financial needs. The shopping complex, which is his only source of income, is operating at a loss. His overdraft facility, because of poor trading conditions, has had to be reduced from an amount of R300,000.00 to an amount of R50,000.00. He further states in his evidence that presently, his company is trading at a loss to the tune of R50,000.00 per month. The defendant states in his evidence that it is because of this state of affairs that he, reluctantly, was forced to place the Shopping Centre as well as his Gordon's Bay property on the market. The defendant concludes his evidence by stating that he presently is unable to nor will he in future be able to comply with the maintenance order envisaged by the plaintiff in her particulars of claim.

THE DURATION OF THE MARRIAGE

[19] As has already been stated elsewhere in this judgment, the plaintiff is currently 63 years of age (having been 48 years at the time the marriage relationship was concluded) and the defendant is 78 years of age (having been 62 years of age when the marriage relationship was concluded). It would appear that plaintiff was already beyond normal child bearing age at the time the marriage relationship was entered into.

[20] As for the duration of the marriage, it is common cause that the marriage relationship was concluded on 30 July 1994; that the marriage started showing signs of disintegration as early as 18 days after consummation of the marriage; that, ostensibly, the marriage was not a happy one; the parties' consortium came to an end during 2002; that throughout the marriage the plaintiff has not, as it were, been a housewife: extensive travels abroad (not of short duration) and extensive travels throughout the country tend to explain this, and, ultimately, the plaintiff moved out of the common home on 26 September 2006. What is clear, though, on basis of the evidence tendered at trial, is that the marriage relationship between the parties was not a happy one either because of jealousy on the part of the defendant or a feeling of lack of security on the part of the plaintiff.

THE STANDARD OF LIVING

[21] The evidence of plaintiff tends to suggest that the parties enjoyed and maintained a good standard of living during the marriage. This the plaintiff bases on the fact that each one of the parties enjoyed use of a luxury motor vehicle; the parties frequently undertook overseas trips and frequently toured the country on plaintiff's missionary work; that the parties lived in a large four-storey

dwelling/house in Gordon's Bay which the defendant maintained and that the defendant would pay the plaintiff's medical bills as and when these would arise.

[22] As for household necessities, it would seem these were purchased and paid for by the defendant himself. The plaintiff testified that she was never allowed to do shopping and buy groceries because, as she puts it in her evidence "I was criticised that women cannot work with money".

Although she initially did do the defendant's washing, the defendant complained that she did not do his washing properly and ended up doing his own washing. That each one of the parties did his or her own washing would not be consistent with high standard of living. The defendant did not always buy food she wants with the result she ended up having to provide for herself. As for her allowance, this ranged between R1,000.00 and R3,000.00 per month. Apart from this the plaintiff had to fend for herself for such items as clothing, cosmetics and to have her hair done.

THE PARTIES' CONDUCT

[23] Much has been said of the relationship between plaintiff and Victor Bello; of the fact that Victor Bello overstayed his stay when he visited the parties during December 2005; of Victor Bello having joined plaintiff in Israel during her three months' stay from June to August 2006; of Victor Bello having joined plaintiff in Yzerfontein shortly after she left the common home; of plaintiff having shared a tent with Victor Bello on a camping weekend at Gansekraal and her visit to Portugal for a month the following year where she once again met with Victor Bello. These series of meetings between plaintiff and Victor Bello are, at best, a basis for suspicion of the existence of a relationship between the two but I cannot, on the basis of evidence tendered at trial, make a positive finding that there indeed existed a love relationship between plaintiff and Victor Bello. It is thus on the basis of the body of evidence outlined in paragraphs [10] to [23] of this judgment that I have to determine if plaintiff has made out a case for the relief she seeks in her particulars of claim.

BALANCING OF FACTORS

[24] In order to determine whether plaintiff is entitled to a post-divorce maintenance she seeks, I have to balance all those factors I have to take into account, and the evidence tendered in support of those factors, identified in section 7(2) of the Divorce Act, and make an order that is just and fair to the parties. What is just has been interpreted in such authorities as *Pienaar v Thusano Foundation & Another* 1992(2) SA 522(B) at 580 to mean if the Court, in exercising its discretion judicially, comes to the conclusion that it is correct, appropriate, fair and reasonable to grant the order it gives.

[25] Prior to her marriage to the defendant, plaintiff was a single parent who was actively involved in her missionary work simultaneously

raising her children born of her first marriage. She subsequently married the defendant, out of community of property, profit and loss in which is excluded the accrual system. She did not bring with her any assets of substantial value which would justify compensation arising from devaluation thereof through use by both parties or out of consumption. She continued with her missionary work after marriage and still continues to do so. She continued with her missionary

work even after she left the common home. She continued with her extensive tours throughout the country using the vehicle registered in the name of the defendant's company. The defendant constantly receives tickets for traffic violations arising from these tours. At marriage she was already beyond normal child bearing age. The plaintiff did not, during marriage, devote herself to the keeping of the household and the upbringing of children on basis of which she could justify the relief she seeks. She, for all intents and purposes, conducted herself as a public mercatrix. The marriage does not appear to have been a happy one from the onset. Cracks started to show on their honeymoon trip in London, hardly 18 days after the marriage was consummated. In my view, it cannot be said, on the basis of evidence before me, she has given the best years of her life to her husband.

- [26] It appears that throughout her marriage she had been bent on seeking a pound of flesh: she had consistently and frequently asked the defendant to include her in his will. When she ultimately discovered that this was not likely to happen, she opted out and chose the route of instituting an action for a divorce in which she claims maintenance for life. She continued her relationship with Victor Bello in circumstances which excite suspicion despite the defendant's reservation about this relationship. Their standard of living does not appear to have been of the highest category. The defendant did not always buy food she wants with the result she ended up having to provide for herself. Her monthly allowance, ranging from R1,000.00 to R3,000.00 per month is not suggestive of a high standard of living.
- [27] The plaintiff is not infirm. I observed her in the witness box during her testimony which lasted somewhat two days. She stood on her feet in the witness box throughout the time she tendered her evidence. At no stage did she complain of discomfort. The ailments she complained about do not appear to be supported by medical evidence. She admits that she will be able to continue with her missionary work except that the pending divorce action places her in a moral dilemma, but that after the divorce action is over, she will continue with her ministry. She probably will continue receiving contributions and donations as has happened in the past. Her career is thus not compromised.
- [28] The defendant, on the other hand, states in his evidence that his income is solely derived from his company. Its major asset, Laborie Centre, no longer generates income it used to do in the past. The recently established shopping mall nearby has compromised the commercial value of the centre. Because of this state of affairs he has had to put both the Laborie Centre and his property in Gordon's Bay on the market. His evidence that his company, his sole source of income, is trading at a loss was not refuted. He states in conclusion that whilst he is amassed with assets of some considerable value, his means are not as substantial as the plaintiff portrays them to be.
- [29] I have not referred to the evidence of Mr Swart, called in as an expert in support of the quantum of plaintiff's claim. In the light of the conclusion I reach in the matter it is not necessary for me to analyse his evidence in any great detail except to say I doubt if his report and evidence would have been of assistance in the light of the duration of the interview he had with plaintiff prior to compiling his report; and the apparent failure to conduct a proper

and thorough investigation into plaintiff's circumstances. He did not, for an example, enquire if the contributions and donations plaintiff receives are subject to taxation; he did not enquire if plaintiff is a taxpayer and did not even know that plaintiff is possessed of a tertiary qualification.

[30] In conclusion I cannot find, on the basis of the evidence tendered at the trial of this matter, that the plaintiff has succeeded to establish those extraordinary circumstances referred to in *Rousalis v Rousalis*, supra, on basis of which I can exercise my discretion in her favour. The plaintiff has thus failed to set out circumstances which would

justify an order of maintenance, post-divorce, in her favour. All factors thus taken into account, I am of the view that the order I give hereunder is not only correct and appropriate, but that it is also fair and reasonable. In the result, the order I give is the following:

[30.1.] The decree of divorce is granted.

[30.2.] The plaintiff's claim for maintainance, post divorce is dismissed with costs.

NJ YEKISO, J

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