

SOUTH AFRICA / JUDGMENT

L.S v L.S (2511/2015) [2017] ZAECPEHC 37 (25 July 2017) [2017] ZAECPEHC 37

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

2511/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION – PORT ELIZABETH

Case

No.: 2511/2015

In

the matter between:

L

S (born ...)

Plaintiff

and

L

S

Defendant

JUDGMENT

REVELAS J:

- [1] The plaintiff instituted an action for divorce against the defendant in June 2015. The parties married each other on 28 June 1996 in community of property. Three children were born of the marriage. The youngest daughter aged 14, is still at school. The eldest son (26 years old) is a candidate attorney, and the 19 year old daughter is a university student. All three children live with the defendant in the former family home in Summerstrand and he takes care of their financial and other material needs at present. The plaintiff is a teacher by profession and the defendant is a medical doctor. The parties met while the plaintiff was still a scholar. The 63 year old defendant is fifteen years older than the plaintiff.
- [2] It is common cause between the parties that their marriage relationship had broken down irretrievably and the result was that the plaintiff left the common home in September 2014. The marriage relationship between the parties began to deteriorate after the plaintiff sustained multiple injuries in a motor vehicle accident during 2008. She spent four months in hospital and after her release struggled to regain her mobility and suffered from pain for a long time thereafter. During this period she became addicted to subscription painkillers, inter alia pethidine, which is a highly addictive drug. The defendant, a medical doctor who first qualified as a pharmacist, testified that the plaintiff was in so much pain after the accident that he, out of “kindness” gave her pethidine injections every third day for a period of two months, and did so against the advice of his colleagues. The plaintiff did not use any drugs or consume alcohol before the accident. According to the defendant, since her addiction manifested itself, the plaintiff also began abusing alcohol. Medical records discovered by the plaintiff and which formed part of the court record, show that the plaintiff was admitted on five occasions to mental health facilities (inter alia, the Elizabeth Donkin Hospital, Hunter’s Craig Mental Health Facility and Dora Nginza Hospital). A substance abuse problem on her part, was noted by the personnel who attended to her.
- [3] As is often the case in matters of this nature, each party blames the other for the breakdown of the marriage but that is hardly relevant since neither party pursued forfeiture of their joint estate against the other. The parties agreed to a division of their joint estate and to this end, they came to an agreement which was made an order of court on 18 November 2016. In terms of the order, the issue of the division of the joint estate was separated from the other issues (the question of maintenance for the plaintiff) which was postponed and are to be determined in the present proceedings. Mr Roland Meyer was appointed by agreement as the receiver and liquidator in the joint estate, tasked with investigating the existent extent and value of all the assets comprising the joint estate, with him being granted several extensive powers.

- [4] Mr Meyer was required to deliver a comprehensive inventory and valuation of the assets in the joint estate to the parties and the Court by 7 February 2017, but he was only able to provide a preliminary report since the accountants for both parties were not able to provide him the necessary financial statements particularly with regard to their liabilities and income. The following was listed in his provisional report as the assets of the joint estate:

“8.1 Immovable Property being Erf [...] Ibhayi with Improvements, held under Deed of Transfer No. T1940/96PE Market Value R420 000.00 8.2 Immovable Property being Erf [...] Amsterdamhoek with improvements held under Deed of Transfer No. T11278/2014 Market Value R895 000.00 8.3 Immovable Property being Erf [...] Summerstrand with improvements held under Deed of Transfer No. T16800/2014 Market Value R1 850 000.00 8.4 33.3% Member’s Interest in a property owing Close Corporation, Sombeka CC with Erf [...] Ibhayi Market Value of Property R450 000.00 (UNENCUMBERED ASSET) R150 000.00 8.5 Loan Account – Lunga Soga Trust, IT730/2000 (As at 28th February 2012) R1 171 324.00 8.6 Capital Account – Dr. L.N Soga (As at 28th February 2012 – Surgery) R75 550.00 8.7 Bophelo Setshaba – Health Care – Shares Value R126 110.80 8.8 PPS – Policy No. 2013287266331 R232 317.78 8.9 Furniture and Personal Effects at [...] G. Road, Summerstrand, Port Elizabeth R87 340.00 8.10 Furniture and Personal Effects at [...] H. Driver, Bluewater Bay R28 500.00 8.11 Chev Corsa R60 000.00 8.12 2014 Chev Spark R75 000.00 TOTAL R5 621 142.58”

- [5] The only issue to be decided in this matter is whether or not to award maintenance to the plaintiff in terms of the discretion conferred

upon courts by section 7(2) of the Divorce Act, 70 of 1979 and whether she should pay the costs of the divorce action. The plaintiff claims R8,000.00 per month as and for maintenance (in her particulars of claim she claimed R30,000.00 per month).

- [6] In order to succeed with a claim for maintenance, the plaintiff must firstly establish a need for maintenance with reference to the list of factors set out in section 7(2) of the Divorce Act. These include the existing means of the parties, their respective earning capacities, financial needs and obligations, their ages, the duration of the marriage, the standard of living prior to their divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, and any other factor which in the opinion of the court ought to be taken into account.
- [7] The defendant argued that since the plaintiff produced no evidence in the form of receipts, bank statements or any documentation to prove what her expenses were, she failed to prove a need for maintenance as foreseen in section 7(2) of the Divorce Act and therefore her claim ought to be dismissed with costs on this basis alone.
- [8] With reference to section 7(2) of the Divorce Act, I take into account the following factors: The parties enjoyed a very comfortable lifestyle, living in Summerstrand, Port Elizabeth. The plaintiff testified that she shopped at upmarket stores (Woolworths) and had her own car. The family, who wanted for nothing, also enjoyed travelling and one can say they maintained a fairly high standard of living.

- [9] When the plaintiff left the common home, she did so in a taxi. She went to live with her mother and still lives there. She finds this arrangement unsuitable as it compares poorly with her previous standard of living in the common home. The plaintiff testified that she now drives her mother's vehicle (an unreliable Ford Fiesta) and she is responsible for its maintenance. She also testified that she needed a vehicle. It is common cause that the plaintiff was involved in at least four motor vehicle accidents in a relatively short period. In the last accident she wrote off her Mercedes Benz. The defendant attributed the accidents to the plaintiff's present substance abuse problems.
- [10] Both parties contributed to the joint household. The defendant had his medical practice and the plaintiff ran a catering business and a guesthouse until 2008. With the proceeds of the plaintiff's damages claim against the Road Accident Fund ("the Fund"), which was settled, two houses were purchased and these form part of the joint estate. The Fund accepted 80% liability and undertook to pay 80% of the plaintiff's future medical expenses which included physiotherapy. The plaintiff also holds a 22% share in a close corporation called Yonke Installations CC. She still earns R24,000.00 per month from this business which has an asset value of R14 million. Her tax returns, however, show her monthly income as R32,000.00. The defendant earns about R52,000.00 per month nett.
- [11] During their marriage the parties did not have medical insurance. They were both reliant on the advice and assistance of the defendant's

associates in the medical field. The defendant has a hospital plan for himself. According to the plaintiff she needs

maintenance to pay for her physiotherapy as she lacks the necessary cash to pay for it upfront in order to claim later. Apart from a need for a vehicle of her own, the plaintiff has not presented any evidence as to how she arrived at the figure of R8,000.00 per month as post-divorce maintenance.

- [12] Unfortunately, the plaintiff and her attorney conducted the plaintiff's case as if the trial was concerned with forfeiture of the joint estate by concentrating on the fault principle, whereas the issue of the joint estate had already been dealt with in the manner referred to above. The defendant was portrayed by the plaintiff as a man bent on destroying the plaintiff emotionally and physically.
- [13] The plaintiff denied on the one hand that she has a substance abuse problem, but on the other hand she accused the defendant of giving her drugs to render her unconscious in order to visit his paramours. The defendant maintains that these utterances are the result of substance induced paranoia.
- [14] During his testimony, the defendant described how, even after the plaintiff left the common home, the plaintiff would be invited home to spend Christmas with them, just to make her feel that she was still part of the family. However, these events would always end in acrimony and even violent outbursts on the part of the plaintiff. On the last occasion the

assistance of the police had to be called. The plaintiff also sought a protection order against the defendants whilst they were living together. The plaintiff claimed that she had been assaulted by the defendant, who denied her claim. According to the defendant the children corroborated the defendant's version of the incident in question, and when all five of them had to submit to polygraph tests regarding the events that took place, she was the only one of the family who failed the test. According to the defendant, it was the plaintiff who assaulted him during her outbursts. The defendant described at length what the family went through as a result of the plaintiff's substance abuse. Based on the evidence before me, I have to accept that the plaintiff struggles with an addiction problem. Even though the defendant does not wish to be married to the plaintiff any longer, he appeared to be sympathetic to her in that he tentatively conceded that "she needs assistance". By this he did not mean maintenance. He was referring to her drug addiction problem. The defendant testified that the plaintiff used to come to his practice, desperately looking for drugs (pethidine) and that she also raided his doctor's holdall (suitcase) with the purpose of finding drugs. He also testified that presently she has a supplier who sells her drugs without a prescription.

- [15] I considered, even though it was not argued or pleaded, whether the plaintiff's need for assistance (the defendant's words) could justify an award for maintenance for a limited period, subject to her entering a drug therapy programme. However, this would amount to penalizing the defendant for something the plaintiff must take most of the responsibility for. In any event, that was not the relief sought by the plaintiff.

Discussion

- [16] A divorce terminates the reciprocal duty of support that existed between spouses.[1] No spouse in a divorce action has a right to post-divorce maintenance.[2] The discretionary language of section 7(2) of the Divorce Act confers a judicial discretion on a court deciding upon whether to award maintenance or not.[3] The purpose of the court's enquiry in terms of section 7(2) is to determine what award would be just. Therefor an award "must contain a moral component of what is thought to be 'right' and 'fair'. Fairness envisages that the order is 'appropriate' as between parties and when measured against all the factors specified in section 7(2) and those others which should also be taken into account." [4]
- [17] The plaintiff has not been rendered indigent by the breakdown of the marriage. The plaintiff has an existing income which she can

supplement by taking up her catering and guesthouse business. There is no reason why she, if she attends psychotherapy and physiotherapy

on a consistent basis, could not manage that. In any event, the plaintiff did not produce any evidence in the form of accounts from, or visits to, a physiotherapist or psychotherapist. In this regard, I take into account that the Fund has undertaken to pay 80% of her future physiotherapy and medication. The plaintiff is also much younger than the defendant (she is 48 years old) and has several economically active years ahead of her, given her abilities. She is also about to receive

an amount of R2,810,571.29 upon division of the joint estate. If she utilizes this money wisely she could continue her guesthouse and catering business.

[18] Apart from the fact that the plaintiff did not present sufficient evidence to substantiate her claim for maintenance in the amount of R8,000.00, her testimony in court was unreliable. Whereas the defendant's testimony was supported by the probabilities, the plaintiff's testimony was fraught with contradictions. For instance, the plaintiff testified that the Ford Fiesta she bought for her mother was inoperative. Later it transpired that she drove the same vehicle to court. She pleaded that the defendant forced her out of the common home. This is contradicted by her evidence in court that she left home by her own volition. I also gained the impression that the plaintiff embellished her evidence about the defendant's conduct towards her. He was also put through most unfair cross-examination on her behalf.

[19] For all the aforesaid considerations I am unable to find that the plaintiff has demonstrated a need for maintenance and her claim in this regard cannot succeed.

[20] The defendant argued that the plaintiff ought to pay the costs of the trial in accordance with the usual rule that costs should follow the event. Several grounds were set out, in particular that she persisted with her monetary claims for personal benefit. This is quite a common phenomena in divorce cases. In my view, there is no reason to depart from the general rule in divorce matters regarding costs, i.e. that the parties to a divorce action should pay their own costs.

[21] In the result the following order is made:

1. A decree of divorce is hereby granted.
2. The plaintiff's claim for post-divorce maintenance is dismissed.

E REVELAS

Judge of the High Court

Appearances:

For the plaintiff: Mrs Ndlovu of D.N. Ndlovu & Associates, Port Elizabeth

For the defendant: Adv Potgieter instructed by Mark Rossouw Attorneys, Port Elizabeth

Date heard: 31 May 2017 – 01 June 2017

Date delivered: 25 July 2017

[1] Hahlo : The South African Law of Husband and Wife (5th ed) at 354.

[2] Strauss v Strauss 1974

(3) SA 79 (A).

- [3] Portinho v Portinho 1981
- (2) SA 595 T and Botha v Botha [2008] JOL 21900 (W).
- [4] Botha para [46]. See also Friedman JP's definition of 'just' in Pienaar v Thusano Foundation and Another 1992
- (2) SA 552 (B) at 580 D – F (in the context of an insolvency enquiry).
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