

SOUTH AFRICA / JUDGMENT

# M G v R G (AR 461/09) [2010] ZAKZPHC 105 (8 February 2010)

[2010] ZAKZPHC 105

## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

Gabriel, Ndlovu

## CASE / FILE NUMBER

AR 461/09

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: AR 461/09

In the matter between:

M G

.....Appellant

and

R D G

.....Respondent

**JUDGMENT**

GABRIEL AJ

This appeal emanates from the North Eastern Divorce Court in Durban. The appellant sought a decree of divorce, maintenance in the sum of R1,000 per month, a division of the joint estate and forfeiture of the benefits of the marriage, being the matrimonial home and a motor vehicle. The 48-year old appellant contended that her husband's conduct, addictions and squandering ways justified such relief. The matter was unopposed despite proper service on the respondent. The only evidence led was that of the appellant.

The Court a quo granted a decree of divorce and dissolved the joint estate but refused to grant maintenance, not even token maintenance in the amount of R1.00 per annum to the appellant and refused to grant a forfeiture of benefits as sought in terms of section 9 of the Divorce Act 70 of 1979 ("the Act").

The appellant appealed to this Court against the refusal to order maintenance and forfeiture of benefits.

When the appeal was first called Mr Shapiro, who appeared for the appellant and instructed on a pro bono basis by the Campus Law Clinic of the University of KwaZulu Natal, was in agreement that the issues presented warranted the appointment of a friend of the Court for it to have the benefit of full argument.

With the assistance of the Society of Advocates of KwaZulu-Natal Mr Pistorius appeared as amicus curiae and presented written and oral argument for which we are grateful, as are we for the assistance provided by Mr Shapiro.

The appellant testified that she sought a divorce, inter alia because her husband of almost 28 years was an alcoholic, a gambler, was abusive and had squandered a pension fund payment he had received in 2007 of approximately R1.2 million, instead of paying the mortgage bond on the family home and despite promising to do so. Mrs G testified that she had to borrow approximately R15, 000.00 to meet arrear instalments on the bond.

The appellant was a machinist at the time of the divorce and the respondent was unemployed. She testified that she was in need of maintenance but, in response to a question from the presiding officer, said that she was not sure if the respondent could pay that amount. Thereupon her attorney sought a claim for token maintenance in the sum of R1.00 per annum so as to keep that claim alive and asked that the matter of maintenance be referred to the Maintenance Court for the determination of maintenance.

The presiding officer did not grant the maintenance requested, nor token maintenance, finding that:

- (a) no evidence was presented on the respondent's ability to pay maintenance;
- (b) no evidence was provided as to why the appellant required maintenance in terms of section 7 of the Act, why the appellant was

in need of maintenance and for how long; and

- (c) the prayer for maintenance was "not properly put before" the Court, ostensibly because the body of the particulars of claim made no reference to maintenance whereas the prayer did.

The plaintiff testified that the matrimonial home had been acquired in 1993 and she sought an order that the respondent forfeit the benefits in and to the matrimonial home and the motor vehicle. In response to a question from the presiding officer the appellant

testified that she and her husband had acquired the immovable property jointly. No other evidence was led on these issues.

The presiding officer found that she could not grant the forfeiture order because no evidence had been tendered on the market value of the property, no valuation certificates had been provided and no documentary evidence had been provided. Similarly, she declined to grant a forfeiture

order in respect of the motor vehicle on the basis that there was no evidence on whether it was freehold or whether instalments were still due. In her reasons for judgment the presiding officer amplified this to say that the provisions of section 9(1) of the Act had not been “widely canvassed”. The presiding officer also held that no evidence had been provided on other assets in the joint estate.

#### THE SPECIAL ROLE FULFILLED BY THE NORTH EASTERN DIVORCE COURT

It is necessary to examine the legislative setting underpinning the evaluation of this appeal. What sets this case apart from countless others recorded in our law reports is that it emanates from the North Eastern Divorce Court. As Mr Pistorius demonstrated, this Court which is one of three in the country commenced through the machinery of section 10 of the Black Administration Act, 1927, as a court for Black people (as then classified) to obtain divorces and ancillary relief. Various amendments followed and these divorce courts were subsequently extended with the onset of democracy to service all South Africans.

The preamble to the Divorce Courts Amendment Act 65 of 1997 provides, inter alia, for the following:

*“The recognition of the said rights and the application of the said democratic values require that all people in the country should be dealt with on an equal basis in relation to the status, standard and accessibility of judicial institutions which have been established in the country.”*

The North Eastern Divorce Court is a creature of statute by virtue of the fact that it is constituted by the Administration Act 9 of 1929 and Rules promulgated thereunder. It does not have inherent jurisdiction, is analogous to the Magistrates’ Court and has been held in this sense to be an “inferior court”: *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1963 (1) SA 737 (SR at 739 G); *Ntuli v Zulu and Others* 2005

(1) SA 456 (N) at 460B. See also, *Ntuli v Zulu and Others* 2005 (3) SA 49 (N) at 53B-G.

Mr Pistorius submitted from the Bar that the North Eastern Divorce Court hears approximately 60 matters a day and that it continues to serve poor people who cannot afford the luxury of a divorce in the High Court, nor the luxury of protracted legal proceedings. The appellant is one of these countless numbers. Standard forms are available for people to complete at the North Eastern Divorce Court and they are otherwise assisted through the proceedings if they are unrepresented. These courts therefore fulfil a critical need to society in keeping with the Constitutional commitment to access to justice enshrined in section 34 of the Bill of Rights. See generally, *Ntuli v Zulu and Others* 2005 (3) SA (N) at 53C-H, as to the applicability of the section 34 guarantee to the court quo in this matter.

#### THE ISSUES ON APPEAL

When the matter was argued counsel were in agreement that the appeal had to succeed. They differed on the relief that ought to be granted. Mr Shapiro contended that maintenance ought to have been granted, even token maintenance and that sufficient evidence had been led on the issue of forfeiture. He claimed in the alternative that the matter be remitted to the court a quo solely on the issue of forfeiture of benefits.

Mr Pistorius contended that token maintenance ought to have been granted but said that insufficient evidence had been led on the issue of forfeiture of benefits, complicated by the fact that contradictory relief for the division of the joint estate had also been claimed. He argued that the matter ought to be remitted to the court a quo for a determination of the forfeiture issues.

I consider each of these issues in turn.

## MAINTENANCE

It is settled law that divorce dissolves the bond of marriage and unless maintenance is granted at the time of divorce, the duty of care between spouses ceases to exist: *Ex Parte Standard Bank Ltd and Others* 1978 (3) SA 323 (R); *Copelowitz v Copelowitz* 1969 (4) SA 64 (C) at 67. An order for the maintenance of a spouse must be made at divorce and cannot be made thereafter: *Schutte v Schutte* 1986 (1) SA 872 (A) at 881.

It is equally settled law that the need for maintenance and its duration must be established. It is not simply there for the asking: *Qoza v Qoza* 1989 (4) SA 838 (Ck) at 843C.

However, our courts have recognised, particularly in this Division that token maintenance, most often in the form of R1.00 per annum is sometimes necessary despite an absence of a present need, to preserve the right to approach a court for increased maintenance in the future if a spouse's personal circumstances change: *Ford v Ford and Another* 1965 (1) SA 264D-266; *Brink v Brink* 1983 (3) SA 217 (D) at 219G-221A.

This approach has been criticised in other divisions primarily on the basis that a claim for token maintenance ought not to be a free insurance policy against the risks of life: *Qoza*, supra.

Despite those criticisms, I am of the view that this case is different. The state of our law is that claims for token or nominal

maintenance are recognised and capable of being granted as a matter of judicial discretion having regard to the factors listed in section 7(2) of the Act: *Buttner v Buttner* 2006 (3) SA 23 (SCA) at paragraph 36. The appellant is obviously a woman of little or no means and sought maintenance for that reason. Her evidence as to need was uncontested as was her evidence as to the respondent's behaviour. The alternative claim for nominal maintenance could not have held any prejudice to the respondent given his lack of opposition to the divorce.

The approach developed in this Division towards token or nominal maintenance is, in my view, perfectly consistent with the

jurisprudence developed by the Constitutional Court in our democratic era that women are a vulnerable group in society and that

courts and government must be particularly aware of and responsive to such vulnerability: See, for example, the remarks of Sachs J in *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC), at paragraph 22 (in the context of the Intestate Succession Act 81 of 1987 and Maintenance of Surviving Spouses Act 27 of 1990):

*“...Although the Acts are linguistically gender-neutral, it is clear that in substantive terms they benefit mainly widows rather than widowers. The value of non-sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-back social practices. This in turn, necessitates acknowledging the*

constitutional goal of achieving substantive equality between men and women. The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property. ...”

In one of its earliest cases, the Constitutional Court reminded us of the duty placed on judicial officers to ensure that rights in the Bill of Rights are protected, particularly in cases where because of particular vulnerability those who approach courts for relief might not fully understand their rights or court processes. In *S v Williams* [1995] ZACC 6; 1995 (3) SA 632 (CC), Langa J as he then was stated:

*“[8] Courts do have a role to play in the promotion and development of a new culture 'founded on the recognition of human rights', in particular with regard to those rights which are enshrined in the Constitution. It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that, as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored. One of the implications of the new order is that old rules and practices can no longer be taken for granted; they must be subjected to constant reassessment to bring them into line with the provisions of the Constitution.”*

I agree with Mr Pistorius that by and large people approaching the North Eastern Divorce Court are not people of substantial means or education. In those circumstances there is a particular duty on presiding officers, indeed on those who represent them, to take divorces seriously, to remain vigilant and to ensure that sufficient and proper evidence is elicited and presented.

Mr Pistorius correctly reminded us that marriage was no ordinary contract. In *Campher v Campher* 1978 (3) SA 797 at 802D it was held:

*“In my judgment, however, it remains certain that these rights of a spouse, whether it be man or woman, can never stante matrimonio be judged as though no marriage subsists without the danger of doing an injustice to the marriage itself, for the institution of marriage all over the world, whether it be a Christian marriage, a ritual or a customary union between man and wife, remains the cornerstone of society and is prima facie responsible for that complex whole which includes morals, knowledge, belief*

*and all other capabilities acquired by man as a member of society. Cf Frankel's Estate and Another v The Master and Another 1950 (1) SA 220 (A) at 249 and Carter v Carter 1953 (1) SA 202 (A) . In Carter's case CENTLIVRES CJ pointed out at 205 that:*

"Marriage is not like an ordinary contract which can be terminated by the mere consent of the parties and the reason why this

tie is so is because it is in the interest of the State that the marriage tie, which involves a matter of status of the parties and the interests of the offspring, should not be lightly dissolved."

The termination of this important contract brings about profound implications for status and if there are children involved for their future well-being.

This is what makes the presiding officer's reluctance to grant token maintenance very difficult to understand in this matter. The presiding officer's reasons are not easy to follow. The refusal to grant this relief, even though it was moved from the Bar and accordingly could have been regarded and accepted as an amendment to the particulars of claim, is perplexing. The failure to grant token maintenance put an end to any possible claim that the appellant would have against her husband in the future if her circumstances changed. The consequences in such scenario are self-evidently disastrous for the appellant.

Even more perplexing is that, but for the question from the presiding officer, the appellant's evidence on her need for

maintenance would otherwise have remained unchallenged. On eliciting the answer that she did the presiding officer ought to have probed more to ensure that all relevant factors were canvassed prior to declining to grant any relief at all.

In my view, the presiding officer's approach to and on the issue of maintenance constituted a material misdirection warranting

interference on appeal.

I am accordingly of the view that the appeal must succeed on the issue of token maintenance. This will ensure that the appellant's

right to claim increased maintenance in the future is protected, if the respondent's circumstances change. That claim can be pursued through the Maintenance Court in the future if necessary.

Having regard to the facts in this case, I would uphold the appeal on this issue and order that the respondent be directed to pay the appellant token maintenance in the sum of R1.00 per annum.

#### FORFEITURE OF BENEFITS

Mr Pistorius correctly argued that claims for forfeiture of matrimonial benefits must not only be properly pleaded but sufficient evidence must be led on these issues: *Koza v Koza* 1982 (3) SA 462 (T) at 465 D-H; *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601H.

Although Mr Shapiro could not fault the reasoning in these cases he sought to distinguish the present matter from the foregoing cases arguing that sufficient evidence had been led and that from the “tenor” of the appellant’s evidence there must have been equity in the matrimonial estate. I disagree. As Mr Pistorius correctly pointed out, no evidence was led to establish a “benefit”, nor was any evidence led as to who contributed to the purchase or maintenance of these assets during

the marriage. In fact, the question as to whether the respondent would be unduly benefited should the forfeiture order not be made was not canvassed in evidence. Such evidence is, in the light of the foregoing authorities, essential to establish and prove a claim for forfeiture of benefits in terms of the Act.

The problem arising, however, is that which arose in the issue of the appellant’s maintenance. Neither her representative nor the presiding officer canvassed or took efforts to ensure that these matters were properly addressed in evidence.

Matters were complicated by the fact that the particulars of claim sought contradictory relief in the form of forfeiture of benefits

and a division of the joint estate, relief which is ordinarily claimable in the alternative. The particulars of claim sought

forfeiture in respect of the home and motor vehicle. It ought to have been a simple matter to elicit such evidence in the unopposed

proceedings if it was the appellant’s case that a partial forfeiture was sought. This was not done.

Counsel were ultimately in agreement that for justice to be done in the matter, this issue be referred back to the court a quo for proper and adequate evidence to be led on this aspect. I am in agreement with such an approach, particularly having regard to the fact that the divorce was unopposed and the appellant’s evidence as to the respondent’s behaviour was unopposed. I am not persuaded that the claim for division of the joint estate extinguished the claim for forfeiture of benefits.

## CONCLUSION

In the result, I propose the following order:

- (a) The appeal is upheld;
- (b) That part of the order of the presiding officer granted in the North Eastern Divorce Court on 7 November 2008 under case number

5463/2008, directing that the joint estate of the parties be divided is set aside and replaced with the following:

- (i) The defendant is directed to pay the applicant nominal maintenance in the sum of R1.00 per annum;
- (c) The matter is remitted to the North Eastern Divorce Court for a hearing de novo on the issue of forfeiture of benefits as contemplated in section 9 of the Divorce Act 70 of 1979, in accordance with the directions and guidelines issued in this

**judgment.**

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I agree and it is so ordered.

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NDLOVU J

Appeal heard on : 5 November 2009

Counsel for the appellant : Mr WN Shapiro

Instructed by : University of KwaZulu Natal, Campus law Clinic

Counsel for the defendant : Mr LD Pistorius

Amicus curiae

Judgment handed down : 8 February 2010

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