

SOUTH AFRICA / JUDGMENT

S.T.H v A.T.H (060610/22) [2024] ZAGPPHC 1237 (28 November 2024)

[2024] ZAGPPHC 1237

COURT

North Gauteng High Court, Pretoria

BEFORE

GN Moshwana

CASE / FILE NUMBER

060610/22

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Policy

FLYNOTES:

FAMILY – Maintenance –
Lifelong –
Parties were married for 25 years
– Onus on plaintiff who was seeking lifelong maintenance –
Plaintiff worked
for duration of marriage – Was financially
irresponsible – Failing to disclose earnings for certain
period –
Defendant's business not doing well and he
has serious health issues – Both parties have existing and
prospective
means to deal with consequences of breakdown of
marriage – Claim for spousal maintenance dismissed –
Divorce Act 70 of 1979, s 7(2).
REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Case
Number: 060610/22
(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED: NO

DATE 28/11/2024

SIGNATURE

In the matter between:

S

T[...] H[...]

Plaintiff

and

A

E T[...] H[...]

Defendant

Delivered:

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 28 November 2024.

Summary: Divorce

action – marriage irretrievably broken down. Spousal maintenance sought by the wife. No satisfactory evidence was led by the wife to demonstrate that she requires maintenance for the rest of her life. The factors set out in section 7(2) of the Divorce Act not met. Held: (1) The divorce decree is issued. Held: (2) The claim for spousal maintenance is refused. Held: (3) Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] During the subsistence of a marriage, both husband and wife attract the reciprocal duty to support each other. However, on application of the so-called ‘clean break’ principle that duty falls away upon dissolution of the marriage. Given the social realities, section 7(2) of the Divorce Act 70 of 1979 (Divorce Act) was introduced to endow a divorce Court with discretionary powers to make an order, which the Court finds just in respect of payment of maintenance by the one party to the other for any period until death or remarriage of the party in whose favour the order is given. Based on the above statutory provision, it does not axiomatically follow that a party is entitled to maintenance by virtue of having been married to the other party.

- [2] This is a divorce action instituted by Mrs S[...] T[...] H[...] . The action is defended by Mr E[...] T[...] H[...] . Both parties are in agreement that their marriage has irretrievably broken down. Therefore, this Court is satisfied that the marriage has reached a state of disintegration and there is no reasonable prospect of the restoration of a normal marriage relationship between them. At the conclusion of this judgment, this Court shall not hesitate to exercise its discretionary powers contemplated in section 4(1) of the Divorce Act.

Pertinent background facts and the evidence tendered.

- [4] On 1 August 1997, the plaintiff, Mrs S[...] T[...] H[...] married the Defendant, Mr A[...] E[...] T[...] H[...] out of community of property and without an accrual system. There are no children born out of the marriage. The T[...] H[...] s tendered evidence of themselves and they called one witness each in support of each other's case. A summary of the testimony tendered before Court shall be outlined hereunder.

Mrs S[...] T[...] H[...]

- [5] She is the plaintiff in the present action. She and Mr T[...] H[...] agreed that a decree of divorce be granted by the Court. She is claiming maintenance from Mr T[...] H[...] and she seeks to be retained on his medical aid since she has hearing difficulties and uses two hearing aids. She did not dispute that she has one or two and sometimes five glasses of whisky daily. She disputed being an alcoholic as averred by Mr T[...] H[...] . She drinks because she works with children all day and she relaxes with whisky after hours.
- [6] She considered their marriage relationship to be a toxic one. She did not dispute that Mr T[...] H[...] is a chronic diabetic patient. He also had a back operation during the Covid 19 period. She and Mr T[...] H[...] worked

together at Nashua Vaal. She relocated to Nashua Bethlehem. Around 2000, she left employment at Nashua and she was paid some money, the value of which she does not remember. Around the same period, she and Mr T[...] H[...] opened a restaurant business, which did not flourish.

- [7] After the demise of the restaurant business, she obtained employment at Gestetner, which later became Ricoh. She was employed as a salesperson. She left Ricoh and was paid her pension monies. In 2007, she joined SAPHOR, a financing company as an account executive, equivalent of a sales representative.
- [8] In March 2021, she semi-retired. She however retained her employment at SAPHOR and worked as a freelancer earning a commission instead. She testified that Mr T[...] H[...] had asked her to look after the children of his daughter at a salary of about R10 000.00. This testimony was disputed. Whilst looking after those children (M[...] and L[...]) Mr T[...] H[...] would at time give her cash for those functions. Mr T[...] H[...] also given her a credit card to use.

- [9] She testified that Mr T[...] H[...] used to buy food for the household. On or about 14 December 2022, she left the common home as she could no longer take the abuse from Mr T[...] H[...] , who in her evidence was an abusive and racist person. He despised the fact that her sister was married to a “dark” person (meaning an African man). At some point she purchased an apartment at Emfuleni. Her late mother used to stay there until she fell ill and moved to their matrimonial home.
- [10] She testified about her expenses and with reference to some of her salary slips she demonstrated the commission she earned, which fluctuated over a period of time. She also receives income from the rental of the apartment. She also received some money after the passing of her mother. She admitted to having been financially irresponsible. She cannot afford to leave the place she acquired after leaving the matrimonial home in December 2022. Although the place is unaffordable, her reasons being that she cannot afford to move to any other place that cannot accommodate her worsie dog. Her other reason being that she does not want to leave her apartment because it is close to where Mr T[...] H[...] lives. She will travel for an hour to her workplace as opposed to a less than 15 minutes’ travel.
- [11] She testified at length about her financial quandaries. It is unnecessary to narrate in this judgment all the expenses she tabulated. She testified that Mr T[...] H[...] ran a golf cart business, which started as a hobby for him. The business made enough money and that money was kept in a safe. She confirmed that some of that money from the golf cart business was used to pay staff at the company ran by Mr T[...] H[...] and a partner. Her testimony that the golf business made enough money was disputed.
- [12] She continuously made loans and sought assistance from her family members. She launched a rule 43 application and this Court awarded her alimony pendente lite in the tune of R17500.00. As at the trial of the action she was continuing to receive the alimony, yet she continued to struggle financially. Because she was unable to manage her finances, she became blacklisted and had maxed all her various credit cards. As at the trial of the action, her sources of income were the rule 43 alimony, rental from the apartment and her commission from SAPHOR.
- [13] She testified that with the R28 000.00 she was claiming she will try to survive. She left the matrimonial home because Mr T[...] H[...] made her life a living hell. During cross-examination she testified that she had no discussions with Mr T[...] H[...] before leaving the matrimonial home. She actually obtained a protection order against him. She conceded that the decision for her to retire from her work was not discussed and agreed to by Mr T[...] H[...] . She confirmed that she had always worked and always received an income. For the period November 2023 to April 2024, she did not place before Court
- her earnings. It was suggested to her by counsel for Mr T[...] H[...] , that where she received more commission she was hiding that information to the Court. She agreed that she did not place before Court her efforts to better her alleged financial struggle.

[14] She also testified that the apartment was put on the market. When sold, it will ameliorate some of the financial struggles she allegedly has. She could not dispute, because she was not aware, that Mr T[...] H[...] 's business was struggling and his R40 000.00 salary was reduced to R30 000.00 a month. She had not looked into the financial standing of Mr T[...] H[...] . She is unable to confirm that Mr T[...] H[...] will be able to afford what she claims. She has a fully paid up

vehicle and petrol benefits from her employer. She further testified that given her skills, if they are used optimally, she will be able to survive on her own.

Nolleen Egwatu

[15] She is the sister of the plaintiff. She had known Mr T[...] H[...] for many years. She had visited the matrimonial home of the T[...] H[...] s several times. She had experienced the verbal abuse on her sister. The abuse used to happen in front of her late mother. Mr T[...] H[...] hated the fact that she was married to an African man. She testified that he is a racist. In cross-examination it was put to her that Mr T[...] H[...] was against the drugs dealing of her husband. In retort, she testified that she has evidence of the racist conduct on the part of Mr T[...] H[...] .

Mr A[...] E[...] T[...] H[...]

[16] He is the defendant and was married to the plaintiff. As to the reasons for the breakdown of the marriage, he testified that the plaintiff abused alcohol which always led to an unbearable situation at the matrimonial home. On 14 December 2022, whilst at his business premises, he was served with a protection order. It came as a shock to him and only learned from people that the plaintiff was moving assets from their matrimonial home.

[17] He denied allegations of physical assault and verbal abuse. He also denied the racist allegations. The plaintiff was always in employment and she never retired. She actually worked from home. He provided her with facilities to work from home. He had provided the plaintiff with R10 000.00 for food in the house as well as a discovery card. She always paid for her personal needs and was in control of her finances including her late mother's pension monies.

[18] He is self-employed and he is involved in three interrelated businesses. In one business he is a 50% shareholder and in another a BEE company owns 51% whilst he owns 32% and his partner owns 12%. He receives a salary from the business and for the longest of time, the salary was fixed at R40 000.00. When the business took a knock because of cancellation of contracts his salary was reduced to R30 000.00 a month. As benefits from the company, he receives a medical aid, a company vehicle (2014 Land Cruiser) and fuel. No dividends were ever declared. The business is struggling and it retrenched employees.

[19] As his personal assets, he owns a house valued at R1.5 million which is bond free. He also owns another house from which he receives rental of about R6000.00. The said house is still bonded. Additionally, he owns a motor bike valued at about R90 000.00. He also has pension

fund benefits valued at around R1.5 million. He had a third property, which he had to sell in order to meet the rule 43 order obligations. He referred the Court to the bank statements of his only personal account. His total monthly expenditure amounts to R54 300 exclusive of the rule 43 alimony order.

- [20] He confirmed that the business is not doing well and the PPC and Omnia Fertilizers contracts were placed on hold. The audited financial statements of the business for the year ending 28 February 2023 reflects a profit of about R117 000.00. Where the business account reflects huge payments, it is because of advance payments from companies like Hullet Tongaat which was placed under business rescue. The money does not belong to the business. He is not in a position to pay spousal maintenance. According to him, the plaintiff is in a position to maintain herself.
- [21] In cross-examination, he testified that the golf cart business is not profitable. The profit margins are between R10 000 and R15000. Despite an apparent ferocious attempt during cross-examination to demonstrate that the golf cart business expends close to R6 million, he remained steadfast that the business is not profitable at all. Due to passage of time and without the aid of source documents, he was unable to point out in the bank statements, the money from the golf cart business against which the expenses were made. When confronted with a figure of over R5 million, attributed to the golf cart business, he testified that if the cost of sale is

taken into account the profit margin still remains small.

- [22] He testified that over the months he would move funds from a money market to pay for expenses and every month reconcile those payments and get refunded. He testified that where there are monies paid to him by the company besides his salary, those represents the reconciliations. On average, over a period of time the safe will keep in it around R108 000. Some of the cash would be used to pay for the business expenses. He does not keep any money for himself.

Ms Bianca De Jager

- [23] She is the biological daughter of Mr T[...] H[...] . Her daughter who was born in 2020 was minded by one Patricia, the helper. She had no agreement with the plaintiff that she will look after her daughter. She is aware that the plaintiff is still employed. The plaintiff had a drinking problem. She will start drinking after 14h00 almost daily. This drinking problem had caused a friction between the T[...] H[...] s.

Legal submissions

- [24] At the conclusion of the evidence stage, legal representatives of both parties made oral submissions in an open Court. Both representatives were afforded a further opportunity to augment their submissions in writing by 22 November 2024. They obliged, and this Court is thankful for their well-researched written heads. This Court found them extremely helpful in preparation of this judgment. In summary, Mr Coetzee submitted that Mr T[...] H[...] as

compared to Mrs T[...] H[...] is sufficiently resourced and should be ordered to pay spousal alimony. He is cash flushed and had hidden some of his income, so went the argument. On the other hand, Ms Fabricius argued that Ms T[...] H[...] has failed to establish the need for spousal maintenance. She elected not to call an expert to evaluate her position, capacity and skill, so the argument went. As an alternative to spousal maintenance until death, it was submitted that a rehabilitative spousal alimony of R15000.00 for a period of 12 months would be just.

Analysis

[25] When regard is had to section 7(2) of the Divorce Act, the default position with regard to alimony is that the divorcing parties should make an effort to reach an agreement instead of a Court deciding the issue on their behalf. Section 7(1) specifically provides that a written agreement between the parties will inter alia be with regard to the payment of maintenance by the one party to the other. Once the parties fail to reach an agreement, a Court retains discretionary powers to make a just order with regard to the payment of maintenance.

[26] Absent from the provisions of the section is the right to maintenance payment as a legal consequence of having been married to someone. Section 7(2) sets out various factors that a Court may have regard to in order to make a just order of payment of maintenance to the other party. Those factors are:

- Existing or prospective means of each of the parties;
- Their earning capacities;
- Their financial needs and obligations;
- The age of each of the parties;
- The duration of the marriage;
- The standard of living of the parties prior to divorce;
- Their conduct in so far as it may be relevant to the breakdown of the marriage;
- An order in terms of subsection (3);
- And any other factor.

[27] Any or all of these factors, in so far as they may be relevant to a particular case would be regarded in order for Court to make a just order. This begs the question whether any party bears a specific onus to establish any of those factors. In *EH v SH*[1], the SCA held that a person claiming maintenance must establish a need to be supported by the other spouse. Should the need not be proven, it would not be just for a maintenance order to be made. On the strength of this authority, it must follow axiomatically that the claimant, in this instance, the plaintiff, bears the onus to show the need.

[28] This concept of the need seems to arise from the Canadian jurisprudence. In *Pelech v Pelech* (*Pelech*)[2], Wilson J confirmed that in order to obtain support, a claimant must prove (a) need; (b) that the need arises for a legally acceptable

reason; and (c) that the need/inability is causally connected to the marriage. As indicated at the dawn of this analysis, chiefly, it is the responsibility of the parties to make an effort to reach an agreement. In support of this view, Wilson J echoed the following apt sentiments in *Pelech*: -

“I believe that every encouragement should be given to ex-spouses to settle their financial affairs in a final way so that they can put their mistakes behind them and get on with their lives...”

It seems to me that where the parties have negotiated their own arrangement, freely and on the advice of independent legal counsel,

as to how their financial affairs should be settled on the breakdown of their marriage, and the agreement is not unconscionable in the substantive law sense, it should be respected. People should be encouraged to take responsibility for their own lives and their own decisions...”[3]

[29] This Court is in full agreement with the sentiments expressed by the erudite Wilson J. In *Moge v Moge* (*Moge*)[4] it was confirmed that marriage per se does not, however, automatically entitle a spouse to support. It is apparent that our Divorce Act was modelled on the Canadian Divorce Act of 1970. Unlike our Divorce Act, the Canadian one expressly provides that the needs ought to be taken into consideration. Section 15(5) of the Canadian Act provides the following:

“(5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including

- (a) The length of time the spouses cohabited;
- (b) The functions performed by the spouse during cohabitation; and
- (c) Any order, agreement or arrangement relating to support of the spouse or child.”[5]

[30] It is apparent that the Canadian Divorce Act compels a Court to take into consideration four factors; namely; (a) conditions; (b) means; (c) needs; and (d) other circumstances of each spouse for whom support is sought. In *Moge*, it was held that these four factors are viewed as an attempt to achieve an equitable sharing of the economic consequences of a

marriage or marriage breakdown. It was also emphasised that at the end of the day however, Courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act.

[31] *Moge* continued to expressly and insightfully stated the following:

“Spousal support orders remain essentially a function of the evidence led in each particular case. In some cases, such evidence might come in the form of highly specific expert evidence which enables parties to present accurate picture of the economic consequences of marriage breakdown in their particular circumstances[6]

- [32] It must be so that the onus lies on the claimant to adduce evidence in support of the claim for spousal support. For present purposes, the plaintiff was obligated to conduct evidence in support of the order she seeks.
- [33] Turning to each of the factors which makes an order just, the means of the parties are both existing ones and prospective ones. In casu based on the evidence before Court the plaintiff has as existing means, her commission, her rental, her pension annuities, her late mother's pensions[7]. As prospective means she has the proceeds of the sale of the apartment and the optimal usage of her skills. On the other hand, the defendant has as existing means, his salary and his investments in a money market account. Prospectively, his pension pay-out and proceeds from the house if placed on a market. On the available evidence it cannot be found that equity demands a balancing exercise in favour of the plaintiff. When the evidence is considered objectively, both parties have existing and prospective means to deal with the consequences of the breakdown of the marriage.
- [34] With regard to the earning capacities, the evidence showed that the plaintiff is economically independent. Regard being had to all her sources of income she is able and will be able to meet her own maintenance needs. She conceded that she was reckless financially and once that speckle of irresponsibility is removed she will be able to maintain herself. She has no child of her own. Therefore, the only person she is duty bound to support is herself. The troubling fact for this Court is that she did not disclose all her earnings for a period of about six months. In order to determine her earning capacity, this Court needed to be provided with credible evidence. In the absence of such evidence, this factor may not be weighed in her favour. Her evidence that the golf cart business of the defendant generated more income for the defendant is nothing but speculation. It is denuded of probative value. On the probabilities, the evidence of the defendant must be accepted. She also corroborated the version of the defendant that the cash kept in the safe was used for business purposes as opposed to personal purposes.
- [35] With regard to the financial needs and obligations of the parties, it is clear to this Court that the needs that the plaintiff is required to cater for is her own needs. The fact that she brings into the equation her dog, such is not an obligation within the meaning of the section[8]. Accordingly, regard being had to the financial needs and obligations, those of the defendant, in the counter-balancing act outweighs those of the plaintiff. The defendant is a chronic diabetic and has serious health conditions as opposed to the hearing difficulties of the plaintiff. The health conditions of the defendant put a serious financial strain and obligations on him.

[36] With regard to the ages of the parties, although the plaintiff is a woman of an advanced age, the defendant is older than the plaintiff. It is indeed so that the parties have been married for 25 years. However, the plaintiff had been working for those 25 years. In *Grasso v Grasso*[9] quoting *Baker J in Kroon v Kroon 1986*

(4) SA 616 (E) at 362, it was said: -

“Middle-aged women who have for years devoted themselves full-time to the managing of the children of the marriage, are awarded rehabilitative

maintenance for a period sufficient to enable them to be trained or retrained for a job or profession. Permanent maintenance is reserved for the elderly wife who has been married to a husband for a long time and is too old to earn her own living and unlikely to remarry.”[10]

[37] Perspicuously, the plaintiff does not fit the bill mentioned above. She worked for the duration of the marriage, she has no children of her own and most importantly she is skilled in the area of sales and she is capable of using her skill optimally to support herself.

[38] With regard to the standard of living during the marriage, other than hearing evidence of the defendant making the plaintiff's life a living hell, there was no proper evidence led to the effect that during marriage she lived a higher standard of life. Other than the evidence that on odd occasions, the defendant would give her money for food and a credit card to buy household effects, there is no evidence that the plaintiff lived a different life than what she lives now. At the moment since she voluntarily left the common home she continued since 2022 to feed and clothe herself. This standard is no different from the one she lived during the marriage.[11] This Court in the absence of proper evidence of the living standard is unable to postulate any difference of lifestyle.[12] Counsel for the plaintiff conceded during oral submissions that there was no evidence led with regard to the living standard during the marriage.

[39] With regard to the conduct of the parties, same will only be taken into account in so far as it may be relevant. In my view, the conduct of the parties is irrelevant in this matter. In Canada, the Divorce Act is specific. In subsection (5), the following is legislated:

“(5) In making an order under this subsection, the court shall not take into consideration any misconduct of a spouse in relation to the marriage.”

[40] Considering that divorce is no longer based on matrimonial fault, post-divorce spousal maintenance should and can no longer be considered a form of penalty for misconduct. This Court takes a view that the Canadian legislated position is more apt and appropriate and should be considered in South Africa. In *Moge*, the following was suggested when a Court exercises a discretion, which suggestion makes the consideration of the conduct of the

parties even more irrelevant:

“The exercise of judicial discretion in ordering support requires an examination of all four objectives set out in the Act in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown. This implies a broad approach with a view to recognizing and incorporating any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse....”[13]

- [41] Of significance, in exercising its discretion, a Court is seeking to achieve equitable sharing of the economic consequences of the marriage breakdown. In my view, the conduct of the parties will not assist in achieving an equitable sharing of the economic consequences if taken into consideration. It is accordingly an irrelevant consideration. The legislature, in my view, must consider removing this factor from the letter of the law as spelled out in section 7(2).
- [42] With regard to the catch-all phrase of any other factor, this Court may take into account that the plaintiff on her own version she was financially irresponsible. She continued with this irresponsible path even after the rule 43 order. She simply looked at the defendant as a wealthy person without any insight into the financial position of the defendant and his companies. Without any cogent evidence, she suggested that the defendant was hiding his earnings. On the contrary she failed to disclose to the Court her

earnings for the period of six months. She sought to falsely create an impression that the defendant had asked to stop working and become a nanny, as it were, when in truth she took a decision to work from home. Taking those factors into consideration, this Court is unable to exercise its discretion in favour of ordering maintenance for her for life. It will simply not be just and the equitable sharing of the economic consequences of the breakdown will not be achieved thereby.

The issue of costs

- [43] The general approach is that a Court is loath to make cost orders in divorce proceedings. Counsel for the defendant forcefully argued that a cost order is warranted in this matter. She submitted that the plaintiff had actually abused the rule 35 procedures and requested disclosure of documents she never used. The plaintiff abandoned the redistribution claim at the tail end of legal

submissions.

Although this Court was tempted consider a costs order, when it comes to costs, a Court possesses a very wide discretion. In the exercise of my discretion, I am of a fervent view that an appropriate order to make is that of each party paying its own costs.

- [44] For all the above reasons, I make the following order:

Order

1. The divorce decree is granted.

2. The claim for spousal maintenance is dismissed
3. Each party to pay its own costs.

GN MOSHOANA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Plaintiff:

Mr P J Coetzee

Instructed by:

Stegmanns Inc, Pretoria

For the Defendant:

Ms Fabricius

Instructed by:

Shapiro & Ledwaba Inc, Pretoria

Date of the hearing:

11-12 November 2024

Date of

judgment:

28 November 2024

[1] 2012 (4) SA 164 (SCA) at para 13.

[2]

(1989) 4 C.F.L.Q 115

[3] Id at 849-850.

[4]

[1992] 3 R.C.S 813.

[5] Id at 839.

[6] Id at 871 also see Ormerod v Ormerod (1990) 27 R.F.L (3d) 225 (Ont. U.F. C.t) and Elliot v Elliot (1992) 42 R.F.L (3d) 7 (Ont. U.F. C.t).

[7] Kroon v Kroon 1986 (4) SA 616 (E).

- [8] See B v B 2009
- (2) SA 421 (C), where it was found that two adult children is an obligation within the contemplation of the section.
- [9] 1987 (1) SA 48 (C).
- [10] Id at 57.
- [11] Pommerel v Pommerel 1990
- (1) SA 998 (E).
- [12] MB v NB 2010 (3) SA 220 (GSJ).
- [13] See Moge above at 866 to 867.
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