

SOUTH AFRICA / JUDGMENT

V v V (52799/2016) [2017] ZAGPPHC 545 (30 August 2017) [2017] ZAGPPHC 545

COURT

North Gauteng High Court, Pretoria

BEFORE

E.M. Kubushi

CASE / FILE NUMBER

52799/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 52799/2016

Not

reportable

Not

of interest to other judges

30

August 2017

In

the matter between:

D

V PLAINTIFF

and

A

V DEFENDANT

JUDGMENT

KUBUSHI ,J

INTRODUCTION

- [1] This is a divorce matter in which both parties have claimed for the dissolution of their marriage. All the other issues in the divorce have been settled by agreement between the parties and were made an order of court on 18 August
2017. What remains for adjudication is the issue of spousal maintenance claimed by the defendant in her counterclaim. The spousal maintenance sought by the defendant is for an amount of R7 395 per month until her death or to terminate upon her remarriage. However, during her oral evidence she reduced the period of such maintenance to 10 years.
- [2] Oral evidence was led by both parties and it is on the basis of that evidence that I have to decide whether the defendant is entitled to spousal maintenance.
- [3] The plaintiff is opposing the defendant's counterclaim in relation to the payment of spousal maintenance but has in the main action tendered rehabilitative maintenance in- favour of the defendant in the amount of R2 500 per month for a period of 12 months.

EVIDENCE

- [4] The parties were married to each other on 27 November 1998 and were at the time of divorce married to each for almost 19 years. .Out of the marriage two children (boys) were born. The eldest is already a major but is still dependant on the parents because he is attending school. The youngest is in matric. The children are staying with the plaintiff since the defendant vacated the common home over two years ago.
- [5] It is common cause that the defendant is employed as an after school teacher at a nursery school and currently earns a salary of R5 800 per month plus occasional bonus. She starts work at 13h00 and works until 17h30. The defendant has in fact been so employed in her current

position for almost two years. She, however, has ten years' experience in this type of work. This is the work she is trained for and because of her low school qualification

- matriculation she is unable to get any other job. She has not been able to get full time employment in a nursery school. There was, however, no convincing evidence of the effort undertaken to look for alternative employment.
- [6] There is also evidence that the defendant is artistic and able to use her hands to do what I can refer to as handwork which she has been able to sell. In particular she is able to bake and has on numerous occasions baked birthday cakes for her friends' children at a fee. She contends, however, that she has not been asked by any of her friends to bake, recently. This

she attributes to the bad economic climate prevailing in the country. She also denies that she could earn income from these activities as the orders happen randomly and depends on the pocket of her friends.

- [7] The defendant contends also that she cannot make ends meet with the meagre wages she earns which are presently augmented by the monthly interim maintenance of R3 000 awarded to her in terms of the Rule 43 proceedings. The amount is still not enough and she is further assisted by a family friend to pay for the monthly rental of her accommodation. Apparently the apartment she is renting cost her R5 200 per month, she pays R3 000 thereof and the balance is paid by her family friend. The apartment is convenient in that it is nearer her place of work and, as such, she is able to walk to work and cuts on transport costs. She claims that her monthly expenses amounts to R10 564 and she requires the R7 395 to augment the difference - in her oral evidence she asked for R5 000 to R6 000 per month. This according to her is for her to maintain the lifestyle at which she was accustomed to whilst living with the plaintiff. They did not have a luxurious lifestyle but it was better than the lifestyle she is presently living, so she says. The defendant could not explain why she has claimed an amount of R7 395 which is R2 631 more than the amount she says she needs every month. Neither could she furnish a satisfactory explanation why she should be paid that amount for a period of 10 years.
- [8] The plaintiff on the other hand contends that he cannot afford the amount claimed by the defendant for maintenance or any amount at all. He is an engineer by profession and earns a salary of about R30 000 per month plus occasional allowance for site visits. This is inclusive of the amount of R3 000 he receives every month for the rental of the garden cottage occupied by his parents. He uses this money to support their children
- the defendant does not contribute to the welfare of the children, and himself. His monthly expenses amount to R34 092 which leaves him with a shortfall every month. The defendant conceded under cross-examination that the plaintiff's monthly expenses are reasonable.
- [9] The defendant submits that the plaintiff can reduce his expenses by procuring a smaller motor vehicle and renting out the garden cottage at R6 000. But this, in my view, will not significantly reduce the plaintiff's expenses to be able to afford the amount the defendant alleges she requires as maintenance. Besides, the plaintiff's evidence is that the garden cottage requires renovations and does not have a bathroom thus it is not fit for rental to the general public. Plaintiff also testified that he travels extensively in his employment, for site visits, and requires the motor vehicle in order to do so.

THE ISSUE

- [10] The issue for determination is whether on the evidence tendered the defendant has established her entitlement to the spousal maintenance.

THE LAW APPLICABLE

- [11] It is a trite principle of our law that neither spouse has a right to spousal maintenance upon divorce.[1] The court does, however, have the discretionary power to make an award for spousal maintenance if necessary. In deciding whether a party is entitled to spousal maintenance the court considers the need for maintenance by the one party on the one hand and the ability to pay maintenance by the other party on the other hand.[2]
- [12] Our Supreme Court of Appeal in the case of EH v SH[3] found that a person claiming maintenance must establish a need to be supported by the other spouse and that if no such need is established, it would not be "just" for a maintenance order to be issued. Therefore proving a need for maintenance is vital for obtaining maintenance.
- [13] Where a woman is able to maintain herself because she is in fact working or in fact has assets from which she can support herself or where a notional earning capacity is attributed to her, it may not be expected of the husband to maintain her after divorce.[4] But, this depends on the circumstances of each case.
- [14] The Divorce Act, 70 of 1979 ("the Act") makes provision for courts to make orders relating to maintenance. Section 7 (2) thereof provides that in the absence of an order made in terms of subsection (1) [settlement agreement] with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, 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 the 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 which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

APPLICATION OF THE LAW TO THE FACTS

- [15] The issue of maintenance is said to be based on a contextualisation and balancing of all those factors considered to be relevant in such a manner as to do justice to both parties. As such, considering all the factors envisaged in s 7 (2) of the Act, the defendant has not provided sufficient evidence to persuade me to exercise my discretion to award spousal maintenance in her favour. The onus is on the defendant to prove her entitlement to the maintenance she claims and having failed to establish such entitlement her claim

stands to be dismissed.

- [16] In this instance the defendant relied on three grounds to establish her right to the spousal maintenance. The three grounds are:

Lifestyle

[17] It is generally recognised that neither spouse is entitled to maintain the same standard as during the marriage unless money is no object. The lifestyle the defendant is contending for is simply not sustainable because of the parties' finances. In their instance it cannot be said that money is no object. Even if money was no object, there is no evidence before me depicting the lifestyle that the parties enjoyed whilst staying together. The evidence of the defendant is only that they enjoyed a better lifestyle without providing details of what she actually means by that.

The Defendant's Need for Maintenance

[18] When considering the existing or prospective means of each party, the court looks at how much income and how many assets each party has, including property, if any, that can be used to produce income. In her own version, the existing income of the defendant is what she has been earning for the past two years and the only main expense she has to add is the rental for accommodation since she does no longer live at the common home. She does not provide sufficient evidence about her expenses which makes her evidence vague and unsubstantiated. As stated earlier in this judgment the defendant has not been able to satisfactorily show why she requires the plaintiff to augment her income with an amount of R7 395 per month or why that maintenance should be payable for a period of 10 years.

[19] The defendant is a relatively young and healthy woman. She has the ability to earn better income if she can put some effort into it. As she has admitted, she does not have the responsibility, which has been single-handedly taken over by the plaintiff, of looking after the children. She can earn more income by getting alternative employment or get full time employment as a nursery teacher or harness her artistic skills. Without the burden of having to take care of the children, she can be able to work full time or she can utilise the morning time available to her to practise her art and in the process bring extra income.

[20] Her evidence does not convince me that she has seriously looked for alternative employment or full time employment at a nursery school or tried to make income from her artistic capabilities. She has just not made enough effort. In regard to alternative employment she made no effort at all her reasons being that as a matriculant she cannot find better employment

than what she is presently doing, which, to me, is not persuasive. She has sent out a few curriculum vitae and made no follow-ups. The only challenge she has, in regard to her artistic abilities, is that she does not have money to start a business but she does not say what are the efforts undertaken to source funds. She works in an environment where her artistic abilities may be marketed but there is no evidence that she ever marketed these services to other mothers of the children attending the nursery or to other members of the public except her friends. She has not considered the fact that she may request a deposit from a prospective client to provide a service. There is evidence that she is able to earn up to R19 000 for a single job. These artistic capabilities can be exploited to her advantage.

The Plaintiff's Ability to Pay

[21] I find it not necessary to make a finding of whether the plaintiff has the ability to make any contribution towards the defendant's

living expenses because no basis has been established why the plaintiff should be "forced to augment her income".[5] The defendant's evidence does not convince me that she is entitled to maintenance from the plaintiff after divorce. The defendant's counterclaim should, as a result, be dismissed.

REHABILITATIVE MAINTENANCE

[22] As earlier said in this judgment, the plaintiff has tendered an amount of R2 500 rehabilitative maintenance for 12 months, to the defendant. This, in my view is the maintenance that must be awarded to the defendant. Twelve months is enough time for the defendant to be able to look for alternative employment or to look for work as a full time nursery teacher. Her evidence is that ten years- experience in the nursery school is a requirement for employment as a full time nursery school teacher, and she has the ten years-experience. This is also enough time within which the defendant can harness her artistic capabilities. The place to start is the nursery school where she works.

[23] But I do not agree with the plaintiffs submission that the amount paid by him in terms of the Rule 43 award should be deducted from this amount. The amount of R2 500 must be payable from the date of this order for 12 months.

NOTICE OF AMENDMENT

[24] At the commencement of the trial, the plaintiffs counsel applied for the amendment of the particulars of claim. There was no objection from the defendant and I granted the application.

ORDER

[25] As a result I make the following order

1. The defendant's claim for spousal maintenance is dismissed.
2. The plaintiff is to pay to the defendant monthly rehabilitative maintenance of R2 500 for twelve (12) months.
3. The first payment is to be made on the 1 October 2017 and every subsequent month thereafter.
4. Each party to pay own costs.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE: 18 AUGUST 2017

DATE OF JUDGMENT: 30 AUGUST 2017

PLAINTIFF'S COUNSEL: ADV.T.COOPER

PLAINTIFF'S ATTORNEY: BARNARD ATTORNEYS

DEFENDANTS' COUNSEL: ADV. M MYBURGH

DEFENDANTS' ATTORNEYS: UNIVERSITY OF PRETORIA LAW CLINIC

- [1] See *Strauss v Strauss* 1974 (3) SA 79 (A).
- [2] See *Botha* 2009 (3) SA 89 (W).
- [3] 2012 (4) SA 164 (SCA) para 13.
- [4] See *Pommerel v Pommerel* 1990 (1) SA 998 (E) at 1002A - C
- [5] See *lincesso v Lincesso* 1966(1) SA 747 (W) at 750.
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Prepared on 23 October 2026 · Esheria