

SOUTH AFRICA / JUDGMENT

Van Der Westhuizen v Van Der Westhuizen (55831/08) [2011]

ZAGPPHC 30 (28 March 2011)

[2011] ZAGPPHC 30

COURT

North Gauteng High Court, Pretoria

BEFORE

B.R. Southwood

CASE / FILE NUMBER

55831/08

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Policy

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG

HIGH COURT, PRETORIA)

REPORTABLE

Date: 2011-03-28

Case Number:

55831/08

In the matter between:

JFH VAN DER

WESTHUIZEN.....Plaintiff

and

AJ VAN DER

WESTHUIZEN.....Defendant

JUDGMENT

SOUTHWOOD J

[1] This is a divorce action in which the plaintiff sues the defendant for divorce and ancillary relief and the defendant counterclaims for divorce and maintenance. The parties are agreed that the marriage has irretrievably broken down and that a divorce order should be granted. The only issues to be decided are whether the plaintiff is obliged to pay maintenance to the defendant and, if so, the quantum of such maintenance.

[2] In her counterclaim the defendant originally claimed as maintenance –

- (1) the sum of R68 794 per month;
- (2) an order that such maintenance escalate annually at the rate of 10 per cent per annum;
- (3) her reasonable medical expenses;
- (4) a resettlement allowance of R3 million alternatively an order directing the plaintiff to contribute to the cost of the defendant's

accommodation in the sum of R25 000 per month, escalating at 10 % per annum, plus an order that the plaintiff pay to the defendant the sum of R500 000 to enable the defendant to purchase the necessary furniture and household appliances for the defendant's new accommodation.

At the commencement of the hearing the defendant's counsel informed the court that the defendant seeks only an order that the plaintiff pay maintenance to the defendant in the sum of R44 502, alternatively, R42 102 per month and the sum of R500 000 to enable the defendant to purchase the necessary furniture and household appliances for her new home. The calculation of the monthly maintenance appears from the schedule of the defendant's income and expenditure in exhibit B87-88 which is the basis for the defendant's claim. During the hearing, after the plaintiff made a tender to the defendant in which the plaintiff agreed that the defendant could remove her property from the common home, the defendant reduced the second part of her claim to R275 601. The calculation of this amount appears from exhibit 'F'.

[3] The defendant claims maintenance from the plaintiff in terms of section 7(2) of the Divorce Act 70 of 1979 ('the Act') which provides:

'In the absence of an order made in terms of subsection (1) 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 divorce, their conduct insofar as it may be relevant to the break-down 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.’
- [4] In terms of section 7(2) of the Act the trial court has a wide discretion to determine the question of maintenance requirements – see *Beaumont v Beaumont* 1987
- (1) SA 967 (A) at 987E; *Katz v Katz* 1989
- (3) SA 1 (A) at 11A-C and *Swiegelaar v Swiegelaar* 2001
- (1) SA 1208 (SCA) para
7. The court is not limited to making an order for equal monthly instalments. The court may also order payment of an initial amount to enable a party to purchase household necessities to establish a new home – see *Swiegelaar v Swiegelaar* supra paras 12-15. The court must conclude that in the light of all the relevant factors (i.e. those specified in the subsection as well as any other which, in the opinion of the court, should be taken into account) it is just for the order/s to be made – see *Buttner v Buttner* 2006
- (3) SA 23 (SCA) para 36.
- [5] Before the commencement of the Act it was said that no maintenance will be awarded to a wife who is able to maintain herself and that a wife cannot expect to enjoy, after divorce, the same standard of living that she had as a married person – see *Hahlo Husband and Wife* 5 ed 361 and the cases there cited. However it is clear from the factors enumerated in section 7(2) and the wide discretion which is conferred on the trial court that it is not bound to refuse a wife’s claim for maintenance simply because she can support herself – see *Nilsson v Nilsson* 1984
- (2) SA 294 (C) at 297B-H; *Rousalis v Rousalis* 1980
- (3) SA 446 (C) at 450E-H; *Grasso v Grasso* 1987
- (1) SA 48 (C) at 52C-G and 58H; *Pommerel v Pommerel* 1990
- (1) SA 998 (E) at 1002A-D – and that the court may award her maintenance that will give her the same standard of living – see *Grasso v Grasso* supra at 52C-D. It will always depend on the facts and circumstances and what the court considers to be just in the light of these facts and circumstances. In this regard it is significant that the factors to be taken into account are not listed in any order of importance and that there is no indication of the weight to be attached to each of these factors. Furthermore, as already mentioned, the court is free to have regard to any other factor which, in its opinion, ought to be taken into account in coming to a just decision – see *Grasso v Grasso* supra at 52E-G.

[6] On 12 October 1991 the parties were married to each other out of community of property in accordance with an ante-nuptial contract

which expressly excluded the accrual system and provided that in the event of the marriage being terminated by divorce the plaintiff would pay to the defendant the sum of R10 000 per month for one year; the plaintiff would give to the defendant an average sedan motor vehicle not older than one year and the plaintiff would provide the defendant with accommodation for at least two months after the divorce. Shortly before trial, the defendant applied to court for an order that the plaintiff pay a contribution towards the costs of this action. At the pre-trial conference on 6 May 2010 the parties settled this application on the following basis –

- (1) the defendant withdraws the application;
- (2) each party pays his/her own costs;
- (3) the defendant accepted the plaintiff's offer to comply with his obligations in terms of the ante-nuptial contract by paying the defendant the sum of R300 000 on or before 25 May 2010; and
- (4) the defendant would vacate the common home on or before 31 July 2010.

It is common cause that the amount to be paid by the plaintiff to the defendant in terms of the ante-nuptial contract would have been R320 000 but that because the defendant would remain in the common home until the end of July 2010 the sum of R20 000 was deducted from the R320 000.

- [7] It must also be recorded that when the trial was not finalised in May 2010 the plaintiff permitted the defendant to continue living in the common home while he paid for the upkeep and paid the defendant the sum of R7 000 per month. Although no accurate calculation of these expenses was done they probably were in the vicinity of R25-30 000 per month. The defendant's counsel correctly described the plaintiff's actions in permitting the defendant to remain in the common home while he paid for the upkeep and paid the defendant R7 000 per month as extremely generous.
- [8] This is the plaintiff's third marriage and the defendant's second. When the parties married the plaintiff's two sons, P and J, then 14 years and 12 years old respectively and the defendant's two sons, B and A, then 10 and 6 years old respectively were already living with them. After the marriage the plaintiff and the defendant and the four boys lived together in the plaintiff's various houses in Waterkloof, Pretoria. The plaintiff's previous wife passed away in about May 1991 and the defendant's husband had passed away before the plaintiff and the defendant met. For all practical purposes the defendant became the mother of and J.
- [9] The defendant testified and tendered the evidence of Mr. Christiaan Hendrik O'Neil a chartered accountant and Mr. Trevor Clyde Cockayne, a financial planner and investment manager. The defendant did not testify but presented the evidence of Mr. Jacobus Petrus van Niekerk, an auditor and chartered accountant, and a number of the Protea Group employees: Mrs. Martha Roets, Mrs. Gretha Munnik and Mrs. Estelle de Kock (formerly

Lodewyk). The defendant testified again on the question of the cost of establishing a new home.

- [10] Neither party argued that the witnesses of the other party should not be believed. The criticism of their evidence was directed at the reliability and the weight to be given to their evidence. The defendant was the only witness to testify about the marriage relationship and its breakdown and while she sometimes argued instead of answering the question directly she generally gave a balanced and objective

description of the relationship. She is obviously a strong willed person and has her own mind. Where she drew inferences about the plaintiff's conduct, such as his role in the termination of Phambele's contract with Centurion Retirement Village and his relationship with Mrs. De Beer, which seemed to be based on insufficient information they were shown to be correct in the light of other evidence. Mr. Van Niekerk confirmed the plaintiff's role in the voting at Centurion Retirement Village and the circumstantial evidence of the other witnesses supports the inference that the plaintiff and Mrs. De Beer were already involved in a relationship before the plaintiff left the common home on 15 November

2008. Plaintiff's counsel correctly criticised the defendant for the unscientific way in which she investigated the cost of items and expenses for the purposes of her maintenance claim. The defendant obviously could have done a lot more to establish these costs and expenses. But her evidence must be considered in the light of what was put to her in cross-examination. It is clear that the plaintiff's counsel had very little, if any, information to suggest that the defendant's figures were inflated and did not accord with her and the plaintiff's standard of living. Mr. O'Neil obviously has the necessary accounting knowledge but he adopted a narrow approach and did not investigate all the underlying facts on which he expressed opinions. Mr. Cockayne is and sounded like a financial planner. He is obviously very knowledgeable and experienced in the field. He was clearly wrong about the PPS requirement that a member must take out life insurance in order to be able to take out disability insurance. The defendant's counsel did not contend otherwise. Mr. Van Niekerk is obviously a very competent and experienced professional and it would be difficult to fault his reasoning in respect of the various matters about which he testified. He is however clearly on the side of the plaintiff and it is significant that while he was the defendant's auditor he did not advise her to rearrange her estate as he testified she should now do. Mrs. Roets, Mrs. Munnik and Mrs. De Kock were all satisfactory witnesses and there is no reason not to accept their evidence. From

their evidence it appears that the plaintiff and the defendant sometimes became involved in heated arguments when in their company

and that the intensity of the exchanges made them uncomfortable. This always seems to have occurred in a business context and is consistent with the defendant's evidence that the plaintiff and the defendant sometimes had violent disagreements about business matters. Mrs. Munnik's alleged ignorance about the relationship between Mrs. De Beer and the plaintiff is not decisive

of the question and must be considered in the light of all the evidence.

[11] The following issues must be decided:

- (1) whether the plaintiff should be ordered to pay maintenance to the defendant; and if so
- (2) what amount is to be paid to enable the defendant to purchase household necessities in order to establish a new home – see *Swiegelaar v Swiegelaar* 2001
- (1) SA 1208 (SCA) paras 15-16;
- (3) what amount is to be paid to the defendant in equal monthly payments to enable her to support herself.

The same factors must be taken into account in determining both the defendant's entitlement to maintenance and the quantum thereof. The parties have diametrically opposed points of departure. The defendant contends that she is entitled to enjoy the same standard of living which she enjoyed while married to the plaintiff and that she is not obliged to rearrange her estate in order to maintain herself at that level. The defendant clearly emphasises the plaintiff's means and earning capacity as well as the plaintiff's conduct in the breakdown of the marriage. The plaintiff contends that the defendant is able to support herself and can support herself at the standard which she enjoyed while married if she reconfigures her estate so that she receives more income. The plaintiff emphasises the defendant's means and earning capacity: i.e. her ability to maintain herself. The resolution of these issues will require a determination to be made of the standard of living to which the defendant is entitled.

[12] The following facts are common cause or are not disputed:

- (1) The plaintiff was born on 11 July 1944 and when the trial commenced in May 2010 was 64 years old. He is a builder and property developer and has developed a number of residential complexes or villages including three retirement villages, Protea Heuwelsig, Protea Centurion and Die Wilgers. The plaintiff still owns a large number of the units in these villages, 91 in Centurion, 114 in Heuwelsig and a few in Die Wilgers.
- (2) The plaintiff was married twice before he married the defendant. He has three grown-up children from the first marriage and two grown-up children from the second marriage, P and J.
- (3) The plaintiff has become extremely wealthy as a result of his business activities. It is not in dispute that he would be able to pay maintenance to the defendant in the amount of R68 794 per month and the resettlement allowance of R3 000 000 (which the defendant originally claimed). The plaintiff conducts business through a number of companies which form part of the Protea Group. The plaintiff also created discretionary trusts of which he is both a beneficiary and a trustee. These trusts probably hold most of the assets which the plaintiff has built up. Whatever the position (the plaintiff did not disclose what his assets and income are) it is clear that he receives income directly or indirectly from the units in the retirement villages and that he owns these units or controls them directly or indirectly through trusts or

other legal entities.

- (4) The defendant was born on 14 February 1954 and was 56 years old when the trial commenced in May 2010. The defendant obtained a BSc in town planning from the University of the Witwatersrand in 1976. At various times thereafter she practised as a town planner, first for her own account and then as a director of Els & Van Straaten of Randburg and then again for her own account. She married Colin Watt and two children were born of the marriage, B, on 27 March , and A, born on 3 August . The defendant's husband died of cancer in December 1988 when B and A were 7 years old and 4 years old respectively. At that stage the defendant was a director of Els & Van Straaten.
- (5) The plaintiff and the defendant met in about June 1990 when the defendant, as town planner, assisted the plaintiff with a property development called Waterkloofvallei. They became friendly and entered into a relationship and after approximately 6 months the defendant moved to Pretoria to live with the plaintiff in a house in Club Avenue, Waterkloof. The defendant's sons moved with her and lived in the house with the plaintiff and the defendant. After the plaintiff's second wife passed away in May 1991 the plaintiff's two sons, P and J, moved in with the plaintiff and the defendant and B and A. When the plaintiff and the defendant married on 12 October 1991 they and the four children were living together in the Club Avenue house.
- (6) For a while after the marriage the defendant continued to practise as a town planner as a director of Els & Van Straaten. To do this she commuted daily from her home in Waterkloof to the Els & Van Straaten offices in Randburg. The defendant then resigned from Els & Van Straaten and started her own practice in Pretoria. She practised from an office in the office building occupied by the plaintiff's companies.
- (7) Before the marriage the plaintiff had bought a property at 369 Lawley Street, Waterkloof. The plaintiff demolished the existing house on the property and built a new one. The plaintiff built the house using subcontractors. The defendant was involved in designing and planning the house with the architect, Liselle Larson. When the house was completed the defendant was involved in laying out the garden, choosing tiles and assisting with the interior decorating. She was involved in every aspect of the new house. This house was a very large and imposing residence and extremely luxurious. It also had a beautiful garden and was featured in the magazine 'Garden and Home' (B1-2). The plaintiff and the defendant and the four children lived in the house at 369 Lawley Street for about 9 years until it was sold to the Danish Government to be used by the Danish Ambassador. The purchase price was R4,5 million.
- (8) After the defendant moved from Randburg to Pretoria she leased the house which she owned at Randburg. She kept the house in case the marriage was not successful. The defendant sold the house in about May 1993 and used the proceeds of the sale to purchase three townhouses (one in partnership with her son) at Die Wilgers, Pretoria: units 2, 14 and

15. The defendant leased these townhouses and at the time of the trial was still the owner (co-owner of unit 2) and was still leasing the townhouses. The position with regard to these townhouses is as follows:

Unit 2 Value R400 000 ½ share

Unit 14 Value R850 000 Bond R87 007

Unit 15 Value R750 000 Bond R103 818

The total income which the defendant receives from the three units is R11 800 and the total bond repayments and rates and levies amounts to R10

855. This gives the defendant a net income from the three units of R945 per month. The purchase price of unit 2 was R199 000 and of the other two units was R180 000 each. Each unit was bonded for R150 000.
- (9) When the plaintiff sold the property at 369 Lawley Street, Waterkloof, the family moved into a house in Eridanus Street, Waterkloof Ridge, which the plaintiff leased. They lived there for approximately 9 months before moving to another property at Bootes Street, Waterkloof (B3-4) while the plaintiff was building a new house at 230 Milner Street, Waterkloof. The plaintiff bought the Bootes Street property to develop for the parties' retirement. They lived at Bootes Street for approximately two years until the new house at 230 Milner Street was completed (B5-24). They moved into that house at the end of 2004.
- (10) Once again, the plaintiff employed an architect, Liselle Larson, to design the new house in Milner Street. As before, the defendant was involved in the planning and design of the house, choosing the tiles and assisting with the interior decorating. She was also involved in laying out and developing the garden. The intention was to develop the property and sell it. It was much too big for the plaintiff and the defendant once the four boys had left home. The house is very big and luxurious and caters for the occupants' every need. The plaintiff and the defendant lived there until the plaintiff left on 15 November 2008. The defendant continued to live in the house from then. The plaintiff paid all the costs of maintaining the house.
- (11) During the course of the marriage the defendant assisted the plaintiff in his business ventures and in addition ran the home and mothered all the children. The plaintiff's sons attended Afrikaans Hoër Seunskool and the defendant's sons attended Pretoria Boys High School. The plaintiff's sons had difficulties at school and did not fare well academically. The defendant's sons did well academically. The defendant ferried the children to and from school and made sure that they attended extra classes when this was necessary. She also made a point of involving the extended family in family gatherings and celebrations. She involved the plaintiff's three grown-up children from his first marriage in such gatherings and a great deal of the social activity of the plaintiff and the defendant was family orientated.

- (12) The defendant's own family were also involved in the plaintiff and defendant's family life. When the plaintiff was developing the garden in Bootes and Milner Streets he was assisted by the defendant's mother and father. When the plaintiff bought a farm in the Ermelo district he was again assisted by the defendant's mother and father. When P left school without writing matric and was experiencing personal problems the defendant arranged that he go and spend time with her sister in the United States. This proved to be beneficial for P and he matriculated and then obtained a BA degree at Hunter College.
- (13) Throughout the marriage the plaintiff continued to develop properties by building townhouse and/or retirement villages and he was involved in the development of the three retirement villages, Protea Centurion, Protea Heuwelsig and Die Wilgers. The defendant assisted the plaintiff in these activities and in 1995 became involved in selling the Centurion and Heuwelsig units for the plaintiff's company Superior Concepts Marketing (Pty) Ltd ('Superior Concepts'). After Superior Concepts terminated the mandate of its estate agent the defendant suggested that Superior Concepts appoint one, Fanie Swanepoel, who worked for her close corporation, Anet Watt Town Planners CC ('Anet Watt') to market the units. Superior Concepts did this. For every unit sold Superior Concepts charged a commission of 7,5 per cent of the selling price and where Swanepoel was involved paid Anet Watt a portion of this commission equal to 3,5 per cent of the selling price. During the period 1995 to 2007 Anet Watt received the following total commissions (A285):

Year's ending Total commissions

February 1996 R171 709

February 1997 R275 045

February 1998 R165 950

February 1999 R208 497

February 2000 R253 458

February 2001 R236 169

February 2002 R457 997

February 2003 R321 852

February 2004 R349 337

February 2005 R432 095

February 2006 R606 476

- (14) In 2002 the defendant and Heléne van Drimmelen commenced business in the close corporation, Phambele Property and Management Services CC. Phambele provided services related to property: town planning, selling property and managing retirement villages. Before Phambele was incorporated the defendant was appointed the chairman of one village

and managed it from 1998 until 2002 free of charge. After the defendant went into business with Heléne van Drimmelen Phambele obtained contracts to manage both Centurion and Heuwelsig retirement villages. Centurion consists of 202 units with approximately 300 people and Heuwelsig consists of 219 units also with about 300 people. By the second half of the 2010 tax year Phambele's management fee each month ranged between R37 000 and R41 000 for each village.

- (15) At first Phambele managed the two villages from an office at Centurion retirement village and then, in 2005, moved to an office which it purchased in an office complex called Chrystal Park. Phambele bought units 3 and 4 Chrystal Park for between R500 000 and R600 000 each. At Centurion Phambele had not had to pay rental for its offices and only paid for water and lights. At Chrystal Park Phambele paid all its own expenses. Phambele also appointed more staff to attend to the work. In 2006 Phambele bought unit 16 Chrystal Park. The defendant used the proceeds from the sale of a flat which she had purchased for her sons in Hatfield, Pretoria, to purchase the units in Chrystal Park.
- (16) Phambele earned management fees for managing Centurion and Heuwelsig retirement villages and a few other villages and earned commission from the sale of units which it effected in Centurion and Heuwelsig. Superior Concept received the full commission of 7,5 per cent of the sale price and then paid Phambele 3,5 per cent of the commission (i.e. 3,5 per cent of the sale price).
- (17) For about 15 years of the marriage the plaintiff and the defendant lived in two very large luxurious houses in the affluent suburb of Waterkloof, Pretoria. These houses have just about every conceivable facility and it seems that no expense was spared in the design and finishes of the houses and the interior decorating. The plaintiff is a builder and was obviously able to ensure that the houses are of a very high quality. He employed an architect to design both houses. The parties did not enter into an agreement relating to the cost of furnishing the houses and as the trial progressed it became clear that each of them purchased items of furniture which they were able to identify as their own property. This is reflected in annexure C to the tender made on 1 March 2011 (exhibit E). A large number of items are there identified as the defendants' property. The plaintiff sold the first house at 369 Lawley Street, Waterkloof to the Danish Government to be used as the Ambassador's residence. The purchase price was R4,5 million. The plaintiff developed the second house at 230 Milner Street, Waterkloof with the object of selling it as soon as possible. It has been in the market for about 6 years at a price of R12 million.
- (18) The plaintiff and defendant obviously entertained and the Milner Street house is designed and equipped for that purpose. The defendant is a keen cook and the plaintiff has a wine cellar which was always fully stocked until their marriage foundered. They were also accustomed to dining out at least two to three times a week, usually at Italian restaurants or steakhouses.

- (19) The couple also travelled overseas once a year and when they did flew business class. They also had a month holiday at the sea every Christmas. The plaintiff owns a luxurious seaside home at Port Alfred where the members of the family would get together.
- (20) The plaintiff and the defendant had arguments from time to time and hard words were exchanged. However this did not last and the parties continued with their marital relationship without any overt indication or warning that the marriage relationship was in serious danger of breaking down. Over a lengthy period the plaintiff sent the defendant birthday and mother's day cards in which he expressed his love for her and thanked her for everything she had done for the family. The defendant knew that the plaintiff and B did not get on well but not even this caused great concern. As far as the defendant was concerned her marriage was good and the relationship was sound. Most of their arguments seemed to be business related and when they disagreed they did so forcefully if not violently. The plaintiff did not abuse alcohol and he was generous towards the defendant. For a while he paid the defendant's credit card accounts and then he paid her an allowance of R7 000 per month. Quite often he gave her

expensive presents.

- (21) On 15 November 2008 the plaintiff and the defendant and about sixteen Protea Group employees including Mrs. Lodewyk (now Mrs. De Kock), the financial manager, and Mrs. Elfrieda de Beer, went on a Christmas outing by train from Pretoria to Cullinan. This was intended to be a Christmas celebration and the purpose of the outing was to have lunch in Cullinan. They arrived in Cullinan and had lunch. During the meal the members of the party drank wine and other alcoholic beverages. After lunch some members of the party purchased bottles of whiskey and other spirits to drink on the journey back to Pretoria. The journey passed uneventfully and the train arrived back in Pretoria in the late afternoon or early evening. No-one got drunk or was disorderly.
- (22) When the train arrived at the Pretoria station Mrs. Lodewyk invited the members of the party to go to her house for drinks. About 10 of the 18 accepted the invitation and went to Mrs. Lodewyk's home in Charles Street, Brooklyn. These included the plaintiff, the defendant, Mrs. Martha Roets, Mrs. Gretchen Munnik and Mrs. Elfrieda de Beer. Some of the party took their bottles of alcohol to Mrs. Lodewyk's house. Mrs. Roets and Mrs. De Beer had arranged with Mrs. Lodewyk to stay over at her house after the party. As the evening progressed the people present consumed alcohol including a bottle of Jaggermeister. Eventually, at about 10 pm, the plaintiff and the defendant left the party. They went home to their house at 230 Milner Street, Waterkloof where a heated argument took place. This started when the defendant asked the plaintiff why Mrs. De Beer's husband had not accompanied the party to Cullinan and commented on her drawn appearance. The argument ended when the plaintiff said he was leaving and went and packed a bag. He then left the house. During this argument the plaintiff told the defendant that he did not feel well.

- (23) The plaintiff drove directly to Mrs. Lodewyk's house where the party was still in full swing. There the plaintiff also complained about not feeling well. The plaintiff spent about an hour in the company of Mrs. De Beer and they then left the party together and drove to a guesthouse in Albert Street, Waterkloof, where they booked in and spent the night together. At that time Mrs. De Beer was in the process of getting divorced and was living with her sister. In about April 2008 while the defendant was travelling overseas with the plaintiff's sister, visiting her own sister in England, Mrs. De Beer and Mrs. Lodewyk underwent breast augmentation operations which the plaintiff paid for. The plaintiff did not tell the defendant that he had done this.
- (24) On 27 November 2008 the plaintiff instituted action against the defendant seeking a divorce and ancillary relief. On 27 February 2009 the defendant filed her plea and a counterclaim in which she sought a decree of divorce and payment of maintenance in the sum of R68 794 per month and a resettlement allowance of R3 million.
- (25) For about 3 months after their separation the defendant attempted to persuade the plaintiff to return to her and continue with the marriage. All her attempts proved unsuccessful and she eventually accepted that their marriage had broken down.
- (26) In August 2009 at the Annual General Meeting of Centurion retirement village the members voted to end Phambele's management contract on the grounds that it was too expensive. The plaintiff who holds 91 of the total votes (a majority) also voted in favour of the motion. If he had been so minded he would have been able to prevent the motion from being passed. As a result of the decision taken Phambele lost the Centurion management fee of about R40 000 per month. At the Heuwelsig Annual General Meetings in 2009 and 2010 the same thing did not happen. Nevertheless there is no certainty about what will happen in the future. Because of the loss of the Centurion contract Phambele has reduced its expenses and now conducts business from only one of the Chrystal Park units. It leases the other two.
- (27) This trial commenced on 25 May 2010 and ran until 28 May 2010 when it was postponed sine die. The trial resumed on 28 February 2011 and evidence was led until 1 March 2011 when the matter was adjourned until 3 March 2011 for argument. The plaintiff did not testify. On closing his case the plaintiff's counsel informed the court that the plaintiff would not be testifying for health reasons. No medical evidence or even a certificate was tendered to explain why the plaintiff could not testify. During his cross-examination of the defendant the plaintiff's counsel repeatedly put to the defendant what the plaintiff would say in evidence.
- [13] Against that background the various matters referred to in section 7(2) of the Act will be considered.

Means of the parties

- [14] The plaintiff is a very wealthy man. Although he has not placed the court fully in the picture about his income and assets and liabilities (this case has been conducted on the basis that the plaintiff will be able to pay whatever amount the court considers just) it is clear that the

plaintiff owns and/or controls very valuable assets. He owns and/or controls more than half of the unsold units in the Centurion and Heuwelsig retirement villages (more than 200 units) as well as a few units in Die Wilgers. He receives, directly or indirectly, the rental from the lease of these units. He owns/controls 230 Milner Street which is on the market for R12 million and he owns/controls a big and luxurious seaside house at Port Alfred. He recently purchased a very expensive Mercedes Benz SUV (B25) and a Cobra sports car (B26). The plaintiff spared no expense in designing, building and furnishing the house at 230 Milner Street. Although he built the house to sell the plaintiff has not reduced the selling price from R12 million to facilitate a quick sale. The assets owned/controlled by the plaintiff are probably worth between R150 and R250 million and the rental income is probably about R1 000 000 per month (see the defendant's units in Die Wilgers and the gross income she

receives). It is significant that when pleading to the defendant's claim for maintenance in the sum of R68 794 per month and a resettlement allowance of R3 000 000 the plaintiff admitted that he was able to pay such maintenance and alleged that the precise extent of his estate and his financial means are irrelevant in the light of his admission.

[15] The defendant's financial position at the commencement of the trial can be summarised as follows:

(1) Assets and liabilities (all values and figures have been agreed)

(i) Fixed Property (Die Wilgers)

Unit 2 (1/2 share) R400 000 Bond Son pays

Unit 14 R850 000 Bond R 87 007

Unit 15 R750 000 Bond R103 818

Net value R1 809 175.

(ii) Investments (liquid assets)

Bank balance R 17 865

Nedbank Call Account R 7 935

Listed shares R 986 860

Total R1 032 798

(iii) Interests in close corporations (Phambele and Bryand Investments) and loan accounts

R2 378 769

(iv) Motor vehicle

Net value R124 461

(v) Furniture and personal effects

Value R35 000

(vi) PPS Investment Account

Value R203

841. (Only available when the defendant ceases to be a member)

The total value of the defendant's assets is therefore R5 503 844.

(The capital value of the defendant's life annuity, R661 379, is not included in the defendant's assets as it does not constitute an asset in her hands).

(2) Income

The defendant received the following income:

(i) Pension (first husband) R7 500

(ii) Annuity R1 250

(iii) Salary and benefits from Phambele R29 233

(iv) Net income from lease of units at

Die Wilgers R945

(v) Dividends and interest R3 000

The defendant therefore has substantial assets and a good income.

A high proportion of the defendant's assets are growth assets which should increase in value over time. Although this is probable the precise extent of the growth cannot be calculated with any certainty.

Earning capacity

[16] The plaintiff is obviously heavily invested in fixed property which will continue to produce rental income for the plaintiff and/or his companies and/or his trusts. The overwhelming probability is that the value of the property and the plaintiff's earnings will increase substantially over time. The precise extent of this increase cannot be determined with any certainty.

[17] The defendant receives a salary and benefits (her motor vehicle and cellphone expenses are fully paid) from Phambele. It must be accepted that if the defendant reconfigures her estate she could increase her gross income substantially. This would involve increasing her salary and benefits from Phambele and liquidating assets and investing the proceeds to earn interest. Most of the debate between the expert witnesses related to this issue.

[18] The defendant has managed retirement villages for more than 12 years and has acquired a great deal of knowledge about the management of retirement villages. This is a niche market and there is a need for competent managers. She obtained a diploma in Property Management from the University of Cape Town in 2007. The evidence indicates that she is a competent business woman. Nevertheless I do not consider that her prospects of earning a large income in the future are as good as the plaintiff contends. I agree with the defendant that there is little likelihood of her practising again as a town planner. Her best prospects lie in the field of managing retirement villages. The defendant has built up a business selling units in and managing retirement villages which are owned or controlled by the plaintiff. The defendant's dependence on income from these sources is precarious and depends on the plaintiff's goodwill. The facts do not justify a finding that the defendant will continue to earn what she has been earning with Phambele. The plaintiff has already voted against Phambele retaining the contract to manage Centurion Retirement Village. There is no guarantee that he will not do the same with the Heuwelsig Retirement Village after the divorce is finalised. There is also no guarantee that Phambele will continue to earn commission for the sale of units in the retirement villages. It

lies within the plaintiff's power to terminate both sources of income. The plaintiff's tender to give Phambele a written

mandate to sell/resell units in the Protea retirement villages and to allow other right of occupation members to cast his votes at any meeting where Phambele's management contract is involved was made at the eleventh hour and for that reason is not convincing. The plaintiff obviously appreciates that his conduct is a matter for concern. If he had been genuinely concerned about ensuring that the defendant would continue to earn as she was this should have been dealt with earlier. Since his case is that the defendant can maintain herself with her income from Phambele he should have made sure that this was possible. If the plaintiff terminates these sources of income the defendant will be obliged to start from scratch in a depressed property market where she does not enjoy any protection.

Financial needs and obligations

[19] Nothing is known about the plaintiff's financial needs and obligations. In view of his success as a businessman and the way he has structured his estate he probably lacks for nothing and has few financial obligations.

[20] The defendant must only support herself. The defendant's case is that she will require at least R79 780 per month to maintain the same standard of living. This was the subject of much debate in the evidence and in argument.

Age of parties

[21] The plaintiff was 64 when the trial commenced and the defendant 56.

Duration of the marriage

[22] The parties were married on 19 October 1991 and have been married for 19 years.

Standard of living

[23] The parties enjoyed a very high standard of living. They lived in a very large and very luxurious house in an affluent suburb of Pretoria. They had four servants including a factotum who was paid R7 500 per month. They owned and drove expensive high quality motor vehicles. They took regular overseas holidays, usually flying business class, and a seaside holiday every Christmas which they spent in a very big and luxurious seaside house. They dined well at home and dined out regularly although they did not frequent expensive restaurants. They were members of a very good medical aid scheme. Materially they lacked for nothing.

Conduct relevant to the breakdown of the marriage

[24] The plaintiff made a number of allegations against the defendant relating to her conduct in relation to the breakdown of the marriage. Apart from agreeing that they sometimes had arguments when hard words were exchanged the defendant denied all these allegations when they were put to her in evidence. While it is usual for both parties to be at fault when a marriage breaks down and it is clear that the defendant is strong-willed and independent minded I accept her evidence that she thought she was in a good and stable marriage. There is no evidence that the plaintiff threatened to divorce her if she did not mend her ways. There is no evidence that the parties ever considered counselling to deal with their problems. There is no evidence that they became estranged prior to 15 November 2008. They were still sleeping in the same bedroom and sharing the same bed. On 15 November 2008 the defendant accompanied the plaintiff and his employees on a Christmas outing to Cullinan and she and the plaintiff enjoyed themselves. Every year the plaintiff gave the defendant birthday and Mother's day cards in which he expressed his love for and appreciation of her.

- [25] On the other hand the plaintiff paid R28 000 for Mrs. Elfrieda de Beer to have a breast augmentation procedure performed and despite his denials that he was involved in a relationship with her prior to 15 November 2008 the most plausible probable inference is that he was involved with her – see *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002
- (3) SA 765 (T) at 780G-781D and the cases there cited. The relevant facts are these. Apart from paying for the breast augmentation procedure for Mrs. De Beer the plaintiff insisted that this be kept from the defendant. On 15 November 2008 after the Cullinan outing the plaintiff and the defendant went to Mrs. Lodewyk's house for drinks. Mrs. De Beer was there without her husband and had arranged to stay over after the party. At that stage Mrs. De Beer and her husband were separated and in the process of getting divorced. The plaintiff and the defendant left the party and went home where an argument started because the defendant asked where Mrs. De Beer's husband was (she obviously did not know that Mrs. De Beer was getting divorced) and commented on Mrs. De Beer's drawn appearance. The plaintiff got into

a rage, packed a bag and left. He went straight back to Mrs. Lodewyk's house where he joined Mrs. De Beer. Within an hour of his arrival the plaintiff and Mrs. De Beer left the party, went to a guesthouse in Waterkloof and spent the night together. The plaintiff never returned to the common home and from 15 November 2008, or shortly afterwards, lived with Mrs. De Beer. The defendant attempted for about three months to persuade the plaintiff to return to the common home and continue with the marriage but he refused to do so.

- [26] Whether or not the plaintiff's relationship with Mrs. De Beer existed before 15 November 2008 it clearly brought an end to the marriage relationship. The defendant was prepared to forgive the plaintiff and to continue with the marriage despite his adultery and despite the fact that he was in a relationship with another woman.
- [27] These inferences and the conclusion are reinforced by the plaintiff's failure to testify. There was some argument about what the court should make of the plaintiff's failure to testify. It was noteworthy that during the defendant's evidence it was put to her what the plaintiff would say. The plaintiff's counsel contended that it was not necessary for the plaintiff to testify as the defendant had already conceded the matters on which she would testify and the facts pertaining to the parties' separation on 15 November 2008 were already on record. The defendant's counsel contended that the plaintiff's failure to testify justifies a finding that he cannot dispute the defendant's evidence and that he knows that he cannot explain what he did on 15 November 2008 other than by agreeing that he was already having an affair with Mrs. De Beer. In the absence of medical evidence that he cannot or should not testify (this was suggested when counsel informed the court that he would not testify) the inevitable inference is the one that the defendant contends for. There can be no doubt that the plaintiff would not be able to put forward a credible innocent explanation for what he did – see *Galante v Dickinson* 1950

(2) SA 460 (A) at 464-465.

- [28] In my view against the background of the marriage relationship and its duration the plaintiff's conduct in ending the marital relationship in this way was callous and cruel.

Other relevant factors

- [29] In my opinion the court should take into account the following additional factors:
- (1) As far as the plaintiff is concerned money is no object. It will be remembered that the plaintiff is possessed of or controls assets of great value and is in receipt, directly or indirectly, of a very large income. The plaintiff has not disclosed what his income and assets and liabilities are but admits that he is able to pay maintenance of R68 000 per month and a resettlement allowance of R3 million.
 - (2) The plaintiff's financial position will probably improve substantially over the next few years.

- (3) The business which Phambele has built up is dependent upon the plaintiff's goodwill and he has the power to terminate the flow of commissions and management fees which Phambele receives from the Protea retirement villages. If the plaintiff does this Phambele would have an uncertain future and the defendant's income from Phambele would become extremely precarious. Any assessment of the defendant's ability to earn an equivalent income from similar activities elsewhere would be pure speculation.
- (4) While contending that the defendant will be able to support herself properly inter alia from her own income the plaintiff has failed to guarantee or ensure that the plaintiff continues to receive such income by entering into appropriate agreements with either Phambele or the defendant.
- (5) The defendant has given the plaintiff 18 of the best years of her life. She brought up the plaintiff's children with her own and there is no suggestion that she was anything but a good mother to them. She actively involved the plaintiff's extended family in family gatherings and activities. She managed the plaintiff's home and she assisted the plaintiff in his business activities. She managed one of the plaintiff's retirement villages for a number of years at no charge. She was involved in the design and planning of the plaintiff's homes, the selection of tiles and finishes and the interior decorating. She also assisted in the design and development of the gardens.
- (6) The defendant built up a profitable business and, but for this divorce, the defendant would have looked forward to some years of conducting this business while she enjoyed a stable and loving relationship and every material comfort. She would have continued to enjoy a very high standard of living while she continued to develop her business and build up a large estate.
- [30] The plaintiff's counsel contended that the clause in the ante-nuptial contract which provided for certain benefits for the defendant in the event of divorce is an important consideration. I do not agree. There is no explanation for the inclusion in the ante-nuptial contract of this provision. It was clearly not intended to be the only maintenance which the defendant would be entitled to. The plaintiff did not understand the clause in this way and it was not raised as a complete defence to the defendant's claim for maintenance.
- [31] Taking all these factors into account I consider that it is just that the plaintiff be ordered to pay maintenance to the defendant to enable her to enjoy, as far as possible, the same standard of living which she enjoyed while married to the plaintiff. I do not consider it necessary for the defendant to reconfigure her estate so that she can earn more income so that the defendant need not maintain her. The defendant has received advice from a competent financial advisor and she is entitled to follow that advice and invest her assets to the best possible advantage. The maintenance to be paid to the defendant must include an amount to enable her to purchase the household necessities for her new home. The last mentioned part of the claim will be considered first.

- [32] The defendant claims payment of the sum of R275 601 to enable her to purchase the necessary items to establish a new home. The defendant initially claimed the sum of R500 000 for that purpose but in the light of the tender made by the plaintiff on 1 March 2011 (exhibit 'E') she reduced the amount claimed to R275 601. Annexure 'C' to the tender is a letter from the plaintiff's attorney informing the defendant that the plaintiff will not object to her removing from 230 Milner Street the items listed under 1-41 which the plaintiff acknowledges is her property. The letter also refers to items 42-44 which the plaintiff consents to the defendant removing. Finally the letter lists other items, 45-52, which the plaintiff acknowledges the defendant will require to furnish her new home which he contends will cost R80 000. The plaintiff does not acknowledge that he is liable to pay the sum of R80 000 and contends that the defendant can pay for this out of the R300 000 which she received pursuant to the settlement of her Rule 43 application on 6 May 2010.
- [33] In accordance with the ruling made when she testified the defendant was recalled as a witness to testify about the cost of the additional items she would require to furnish her new home. For this purpose she prepared a list (exhibit 'F').
- [34] The defendant accepted that she can remove her own property listed at 1-41 of annexure 'C' to exhibit 'E'. She pointed out that items 43 and 44 do not properly identify what she could take and this would require the cooperation of the plaintiff which has not been forthcoming. She testified in respect of item 43 that she would require an 8 seat dining room table and 8 chairs; in respect of item 46 that she would need 3 not 2 bedroom suites; in respect of item 47 that she would require shelving as well as a desk; in respect of item 48 that she would require a fairly big TV set (as priced in exhibit 'F');
- and in respect of items 49-52 that she did not have any of these items. She testified about the cost of the items listed in exhibit
- 'F' which are necessary to furnish her new house. These are standard prices for the items which are available at the types of retailers which the defendant usually frequents. She confirmed that the R300 000 received after the settlement of her Rule 43 application had been utilised to pay legal costs.
- [35] In cross-examination the need for most of the items listed in exhibit 'F' was not questioned, only the prices. The defendant testified that while she did not do any market research she checks prices in the newspaper. These were the prices at reasonably priced retailers. She did not employ anyone to go and get the cheapest quotes for the items. She was not confronted with any quotations and the cross-examination was on a vague and superficial basis. It was conceded by plaintiff's counsel that the defendant would require three new bedroom suites which would cost R8 000 each, a deep freeze for R1 900, a tumble drier for R3 700, a vacuum cleaner for R2 000 and curtains for R30 000. Finally it was put to the defendant that the plaintiff would agree that the cost of the additional items would amount to R145 000. The calculation of this amount was not disclosed and it appears to be a rough estimate. Although the evidence presented is not the result of a careful search for the best prices for the items

there is no reason to doubt that the items are necessary and that the prices are reasonable for the quality which the defendant is entitled to. The amount of R275 601 will therefore be allowed.

[36] As far as monthly maintenance is concerned I am satisfied that the defendant is entitled to monthly maintenance in the sum of R35 000 which is arrived at as follows:

- (1) The basis for the defendant's claim for monthly maintenance is set out in B87-88. It is clear from the evidence that the calculation of the defendant's income and expenditure is subject to a number of variables and it will serve no purpose to consider all the possibilities. I regard the calculation as a useful guideline and shall simply consider the important contentious items. These are the cost of accommodation, the cost of the servants, the cost of groceries, the cost of PPS life insurance, the cost of the defendant's motor vehicle and the cost of holidays. A number of the other items were not disputed and the rest

were not seriously challenged. As far as the defendant's income is concerned I shall consider the defendant's income

from Phambele, the income she receives from the life annuity and the dividends and interest she receives from her shares and cash

investments.

- (2) Accommodation

It is not disputed that the defendant is entitled to the accommodation she seeks, only the cost. It was not put to the defendant that what she seeks is available for a much lower rental and clearly the plaintiff has not obtained such evidence. Significantly, Mr. Van Niekerk considered that the defendant should purchase a house for R2,5 million. To judge by the figures used by Mr. Van Niekerk and the quotation obtained by the defendant the cost of leasing the house she seeks would fall within the range of R15 000 to R20 000 per month. The sum of R17 500 is reasonable and will be used in the calculation.

- (3) Servants

As a single person the defendant would not reasonably require the services of a general handyman and the cost of employing such a person will not be used. However the defendant is entitled to employ a full time domestic worker and the gardener, twice a week. The salaries of these employees will be used in the calculation.

- (4) Groceries

The defendant has not shown that as a single person she will spend R6 820 per month on groceries. If allowance is made for entertaining (and possibly providing the domestic worker and gardener with meals) a figure of R3 000 per month is reasonable. The amount for cash purchases was not challenged and is reasonable.

(5) PPS life insurance

There is no dispute about the necessity for and cost of disability insurance but it is not necessary for the defendant to have life insurance in order to take out disability insurance. The cost of PPS life insurance will therefore be excluded from the calculation.

(6) Motor vehicle

Phambele pays for the defendant's motor vehicle and this cost is accounted for in Mr. O'Neil's calculation of the defendant's income from Phambele. The cost of the motor vehicle will therefore be excluded from the calculation.

(7) Holidays

The cost of the holidays is reasonable taking into account the standard of living enjoyed by the parties. Obviously the cost of holidays can vary but there is no evidence that the plaintiff insisted on the cheapest options when travelling. This cost will therefore be included in the calculation.

(8) Unforeseen expenses

The defendant agreed that this figure should be reduced to R500 per month.

(9) Income

Mr. O'Neil's calculation of the defendant's gross income omitted the pension she receives from the life annuity (R1 250 per month) and the income from her cash and shares (R3 000 per month). His calculation of the shortfall on expenses over income also does not allow for income tax on the defendant's taxable income.

(10) To summarise: the following amounts must be deducted from the defendant's monthly expenses –

Accommodation R 1 500

Servants R 2 300

Groceries R 2 820

PPS life insurance R 3 000

Motor vehicle R 9 575

Unforeseen expenses R 500

Total R19 695

If this is deducted from the total the balance is R62 385.

(11) On the assumption that the defendant's income from Phambele remains the same the defendant's gross income would be calculated as follows:

Rental (Die Wilgers) R 945

Phambele salary R17 000

Phambele benefits: motor vehicle R 9 575

Cellphone R 2 685

Old Mutual pension R 7 500

Life annuity R 1 250

Dividends and interest R 3 000

Total R41 955

On the assumption that the dividends and interest are exempt from tax and the Phambele benefits are taxed, the defendant would pay tax on the sum of R38 955 per month (or R467 460 per annum). Accepting that the benefits are taxed at the same marginal rate this would attract tax of about R138 094 leaving an income after tax of R329 366 (R27 447 per month). With the dividends and interest the defendant would have R30 447 per month available to pay her expenses. (It must be emphasised that the assumptions are subject to variables, the most important of which is that Phambele's ability to earn income is not affected by anything which the plaintiff does.)

(12) The defendant would therefore have a shortfall each month calculated as follows:

Balance monthly expenses R62 385

Monthly income R33 371

Shortfall R29 014

(13) Taking into account all the circumstances surrounding the defendant's position with regard to income from Phambele and the parties' standard of living I am of the view that it would be just to order the plaintiff to pay monthly maintenance of R35 000 to be escalated annually in accordance with the consumer price index published in the Government Gazette.

[37] The defendant has achieved substantial success in this action in the face of a plaintiff who has persisted in his view that he should not pay maintenance and who was not prepared to testify in defence of that view or disclose to the court his full financial position. It would be just for the plaintiff to pay the costs which costs will include the costs of a senior counsel. The plaintiff was represented by two counsel and the defendant by a senior only. The counsel agreed that such an order should be made in order to facilitate the taxation of the defendant's costs.

[38] The following order is made:

I A decree of divorce is granted;

II The plaintiff is ordered to pay maintenance to the defendant in the following amounts:

(1) R275 601 to be paid within 10 (ten) days of this order;

- (2) R35 000 per month, the first instalment to be paid on or before 1 May 2011, and each subsequent instalment to be paid on or before the first day of each succeeding month and which amount is to be escalated annually on the 1st of May in accordance with the consumer price index as published in the Government Gazette, the first escalation to be calculated on 11 May 2012;

III The plaintiff is ordered to pay the defendant's costs of suit taking into account any amount the plaintiff has paid in accordance with any order in terms of Rule

43. The costs shall include the costs of a senior counsel.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

CASE NO: 55831/08

HEARD ON: 25 May 2010 to 28 May 2010, 28 February 2011, 1 March 2011 and 3 March 2011

FOR THE PLAINTIFF: ADV. J.L. VAN DER MERWE SC

INSTRUCTED BY: Ms. A.M. Laäs of Laäs Döman Inc

FOR THE DEFENDANT: ADV. D.A. SMITH SC

INSTRUCTED BY: Ms. B. Clark of Clarks Attorneys

DATE OF JUDGMENT: 28 March 2011

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