IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 231/ 2017
Dates heard: 25 & 26 April 2018
Date delivered: 3 July 2018

In the matter between

N S (born A) Plaintiff

And

A S Defendant

JUDGMENT

GOOSEN, J.

[1] This is an action for divorce in which the principal issue to be determined concerns the cash component of maintenance payable by the defendant. Prior to the commencement of the trial the parties reached agreement in relation to the primary care of the minor children born of the marriage. The parties also reached agreement in relation to the appointment of a receiver to effect the division of the joint estate.

[2] The parties were married to each other in community of property on 25 March 2012. There are two children born of the marriage, both girls, aged 4 years and 1 year, respectively. The children are in the primary care of the plaintiff. Maintenance of the minor children is presently regulated by an interim order made by this Court, pursuant to Rule 43 on 7 December 2017. In terms of that order,

the defendant pays maintenance of R5 000.00 per month per child in addition to certain non-cash amounts relating to educational and medical related expenses of the children.

[3] In her particulars of claim the plaintiff claims payment of R6 500.00 per month per child. The defendant's plea contains a tender of payment of the amount of R3 500.00 per month per child.

[4] At the commencement of the trial, the plaintiff made a substantive application for postponement of the trial. The application for postponement was premised upon an alleged failure by the defendant to make further, and full, discovery, pursuant to a Rule 35 (3) notice dated 22 March 2018. The application was opposed. After hearing argument the postponement application was refused. The trial stood down on 25 April 2018 to commence 26 April 2018, when the trial concluded.

[5] I begin by stating, briefly, the reason for refusing the postponement application. As indicated, the plaintiff filed a notice in terms of Rule 35 (3) on 22 March 2018. In that notice the plaintiff sought discovery of a number of listed documents relating to tax assessments; IRP 5 certificates; bank statements; pay-slips; policy schedules and the like. The plaintiff also sought source documents in relation to certain transactions on the defendant's banking account and the provision of values of his pension fund.

[6] The defendant replied, on affidavit, to the plaintiff's notice on 19 April 2018. In it he states that all such documents as exist are available for inspection at the offices of his attorney. In relation to particular items, namely tax assessments for the year ending February 2017 and February 2018, he states that no such document exists. He also states that a value statement of his pension with his employer does not exist.

[7] The postponement was sought in order to obtain further documents which flowed from those provided by the defendant, which it was contended were provided late. At the outset, it is to be noted that this matter served on the trial roll-call on two occasions, namely 22 March and 29 March 2018. The purpose of the trial roll-call is to facilitate the management of cases which serve on the trial roll. A roll-call is scheduled four weeks prior to the trial date. This is to ensure that the necessary pre-trial procedures envisaged by Rule 37 have been fully complied with and to determine whether the enrolled matter is ready to proceed to trial.

[8] At the hearing on 22 March 2018 the matter stood down to 29 March 20 218. This was, so I understood it, to enable the parties to finalise certain trial preparations. It appears from the postponement application that what was then in issue was the further discovery required by the plaintiff. When the matter was again called on 29 March 2018, coincidentally before me, both parties were represented by counsel and they agreed that the matter could be certified as trial-ready.

[9] The postponement application must, in the first instance, be evaluated against this certification process provided for by the Practice Directive relating to trial roll-call. Ordinarily, where parties certify that the matter is trial ready, a postponement will only be granted if it has been necessitated by subsequent events which may have intervened. Parties will ordinarily be bound by their assertion that the trial is ready to proceed. There are sound reasons why this should be so. It is to be expected of the legal representatives that they comply with the Rules relevant to the preparation of matters for trial and, in particular, that they apply themselves to meet the objectives of Rule 37. Certification that a trial is ready to proceed signifies that the parties are prepared for the conduct of the trial. Late postponements or the late removal of matters from the trial roll necessarily result in delays, and

prejudice to other litigants whose matters await the allocation of judicial resources. For this reason, once a matter is certified as trial ready, it must, unless very good reasons are put forward, proceed on the allocated trial date.

[10] In this instance, the plaintiff sought further discovery at a late stage in the pre-trial period. The defendant replied to the notice on oath and provided access to those documents sought which he stated he had in his possession. The plaintiff's complaint, as I understood it, was that they were provided late and that the response was inadequate. This may be so, but in my view this flows from the initially late request for further discovery.

[11] The postponement was sought in order to obtain further documents, more particularly, what was referred to as a "suite of documents" referred to in defendant's letter of employment. The defendant argued that the alleged inadequacy of the responses are matters that the plaintiff's counsel would be free to take up in cross-examination. In my view, this is the appropriate manner in which to deal with such issues. In regard to the recent employment of the defendant and the availability of certain documents relating thereto, the defendant's counsel argued that the defendant's employer could be subpoenaed. He stated that the employer was in any event available to be consulted if necessary. Accordingly, there was no reason to postpone the matter.

[12] When plaintiff's Counsel was asked whether an adjournment of the trial, by standing down to commence after the employer had been consulted, would suffice, she stated that it would. The only question would be the period.

[13] In the light of this, and having regard to the basis upon which the application was brought, I refused the application. I directed that the trial stand adjourned to commence on the following day. The question of the costs of the postponement application were reserved. I shall deal with this hereunder.

[14] I turn now to the main issue to be decided in the trial, namely the cash component of the maintenance payable by the defendant.

[15] The plaintiff is employed as a trainee tax consultant at KPMG. According to salary advices tendered in evidence, she earns a gross amount of R17 088.65 per month. She stated that this amount has very recently been increased to R233 000.00 per annum, representing a monthly increase of approximately R1 000 per month. Her monthly income is therefore to be taken to be R18 000.00 per month.

[16] Her monthly expenditure is set out in a schedule to which she testified. It reflects a total monthly expenditure of R23 215.00 for both her requirements and those of the children. The schedule allocates expenses as between the plaintiff and the minor children in the ratio of 1/3 to 2/3. The plaintiff stated that the defendant should bear a proportionally greater burden of the maintenance needs of the children since his gross earnings of the parties is considerably higher than hers. According to the plaintiff the expenditure allocated to the children's needs is an amount of R18 816.00. The schedule to which she testified however, reflects an amount of R15 600.00.

[17] In cross-examination the plaintiff was challenged in relation to certain of the expense items. It was pointed out that at the time of signature of the affidavit confirming her expenses in the Rule 43 application, she was aware that her monthly rental income was less than that claimed, i.e. R6 050.00

as opposed to R8 000. She accepted this was so. In regard to the costs of the motor vehicle, the plaintiff stated that they were estimates. The actual cost would only be determined once the division of the estate had occurred. It was put to her that the estimate of R4 000.00 per month on an instalment was excessive in the circumstances and that an amount of R2 500.00 would be required.

[18] With reference to bank statements reflecting petrol purchases it was pointed out that her monthly expenses were no more than R1 100.00 per month, rather than the claimed R2 000.00. The response to this was that she often drew cash and also used this to pay for petrol and other expenses.

[19] The plaintiff was also challenged in regard to the estimated maintenance costs of the vehicle. When these monthly estimates are annualized the claim exceeds R5 000.00.The plaintiff conceded that the schedule is based on an estimate of what would be required, rather than the actual cost in relation to certain items. She nevertheless stated that the estimate reflects the reasonable costs of her monthly living expenses, both for herself and for the minor children.

[20] The defendant testified that he is now employed by Acoustex Pty Ltd. His gross earnings are in the amount of R77 079.28 per month. After deductions, he receives a net income of R50 385.35. He testified to his monthly expenditure, as set out in a “budget” reflecting both current expenditure and his anticipated “post-divorce” expenditure. He explained that the “post-divorce” calculation reflects no disposable income. It includes provision for the non-cash maintenance requirements for the children, which he has tendered, and an amount of R10 000.00 per month as a cash component. He stated however that he could not afford to make such payment.

[21] In regard to his overdraft loan repayments he explained that these amounts, more particularly, an amount of R2 000.00 paid to First National Bank, represents matrimonial debt. He stated that the matrimonial home, which has been sold, was sold at a loss and that he is responsible for payment of the shortfall.

[22] In cross-examination he was asked to explain expenditure, as reflected in his bank statements, indicating that he spent significant amounts on entertainment and eating out. He stated that initially, in the period after the parties were separated he did eat out a lot. That was because he was then staying with his brother. Now that he has established a household, this has been curtailed.

[23] In regard to deductions from his earnings, he stated that he had included a pension deduction of R5 500.00 which he does not presently have. He also made provision for an educational policy deduction for the children which he stated, is an estimate, since he does not currently make such payment.

[24] Matters such as this invariably involve fraught questions as to what constitutes a reasonable expense in the context of two separated households. What is reasonable is, more often than not, driven by the particular circumstances, both economic and social, of the parties to the divorce. A court dealing with the maintenance claim is required to determine, in the first instance, what the reasonable needs are for the children's maintenance. It does so on the basis of the parties' testimony regarding what is reasonably required. It is then required to consider whether those needs can be met. The parties' estimate of what is reasonable, serves to guide the court. Where it concerns the maintenance requirement of children, the court must, on the available evidence

determine, as best it can, what maintenance payment will meet the best interests of the minor children.

[25] As indicated, the plaintiff claims payment of R6 500.00 per month per child. This is based on a proportional allocation of the maintenance requirements of the children. It is trite that the burden of maintenance support which both parents bear is distributed according to their respective means (see *Farrell v Hankey* 1921 TPD 590 at 596; *Herfst v Herfst* 1964 (4) SA 127 (W) at 150).

[26] Based on this the plaintiff contended that the defendant should provide to the extent of 80% of the children's requirements. Since the maintenance requirements are in the order of R15 600.00 defendant should contribute approximately R12 500.00. This would place the claim in the order of that originally sought in the particulars of claim.

[27] There is, in my view, force in the submission. As will be seen from what follows however, it is not necessary to define the proportional contribution of the defendant with any degree of precision. This is so because, as will be seen, there is scope for reduction in the amount claimed by the plaintiff for the children to bring it in line with that which the evidence establishes, the defendant is able to pay. In my view the result will serve the best interests of the minor children in regard to maintenance.

[28] There are three principal items of expenditure which it seems to me, on the evidence, can reasonably be adjusted. The first concerns the estimated costs in relation to entertainment, holidays and gifts for which provision is made by the plaintiff. The second concerns certain claims in regard to miscellaneous educational needs and extra-mural activities. The third concerns the provision for payment of a personal loan on the part of the plaintiff.

[29] Although it was suggested that the plaintiff's estimate of her expenses in relation to a motor vehicle are excessive, there was no evidence presented as to what these costs would reasonably be. The plaintiff fairly conceded that it was an estimate. Although it was put to her that a substantially lower amount would suffice, both in respect of the instalment and maintenance, she did not concede the amounts put to her. It is worth noting that the present instalment on the vehicle she is using until division of the estate is in excess of R5 000.00 per month, as per the defendant's evidence. In the light of this her estimate does not strike me as unreasonable.

[30] In regard to the entertainment expenses, the amount allocated, when annualized, strikes me as excessive. While it is accepted that entertainment for young children may be costly, it seems to me that an amount of effectively R1 500.00 (R1 416.00 on the schedule) per month, is excessive. A reduction by R500 would still provide a reasonable amount for the children, given the exigencies of this matter and taking into account that the parties clearly need to trim their overall expenses. Then there is the allocated R1 000.00 for payment of a personal loan which is included in the schedule of expenses. It is not apparent what this covers and whether it has anything to do with the children's maintenance. It appears that the loan is one incurred by the plaintiff following separation in order to meet certain of her requirements. In my view this obligation is one could be addressed in the division of the estate. For this reason it should be discounted as part of the monthly maintenance obligation.

[31] Finally there is the provision for books, stationery and other incidental educational costs and extramural costs, such as ballet lessons and violin lessons. These, in my view, are adequately catered for in the non-cash maintenance obligations of the defendant.

[32] The effect of this is to reduce the maintenance requirements in respect of the children to an amount of approximately R13 600.00 per month.

[33] Turning to the defendant's means to pay a proportion of this, I am satisfied that the defendant is able to afford a total monthly payment of R10 000.00 per month by way of maintenance rather than his tendered R7 000.00. This is so because, as is apparent from the defendant's evidence, he has made provision in his monthly budget, "post-divorce", for payment of an amount of R10 000.00 as the cash component of maintenance payable by him. Although he stated that he was unable to afford that payment since the consequence is that he has no disposable income to meet any exigencies or emergencies should they arise, this evidence cannot be accepted. In his monthly budget he has discontinued certain payments in the so-called "post-divorce" scenario, namely payment of the instalment on the vehicle utilised by the plaintiff, which is an amount in excess of R5 000.00. He has, however, included certain further expenses which he resent does not have, namely a pension payment in an amount of R5 500.00 and an educational policy for the children in the amount of R2 000.00. These are amounts that he anticipates he will be required to pay in the post-divorce scenario.

[34] In regard to the pension payment, it was suggested that this is an obligatory requirement. That does not accord with the fact that such payment is not presently being made. Even if it accepted that he is obliged to contribute to a pension fund in that amount, there is still the provision made for payment of an educational policy. Whilst provision for an educational policy to cover the tertiary education of the minor children is, without doubt, a laudable and prudent step to take, such longer term investment in the interests of the children cannot, in my view, trump the immediate best interests of the children. Those immediate best interests of the children plainly require that provision be made for adequate

monthly maintenance to meet their needs. The evidence indicates that those reasonable needs require a maintenance contribution in the order of R13 600.00 per month. The evidence also establishes that the plaintiff earns considerably less than the defendant and that, having regard to the proportional distribution of the maintenance requirements of the children, a maintenance contribution in the order of R10 000.00 per month by the defendant is indicated. The defendant is, for the reasons set out above, able to afford that amount. He is in any event currently paying that amount pursuant to the interim order previously made. In the circumstances therefore, such order will issue.

[35] It is necessary briefly to address the form in which relief is to be granted before dealing with the question of costs. As indicated hereinabove the parties reached agreement in relation to the primary care of the minor children and matters related thereto. They also reached agreement in relation to the appointment of a receiver and the appropriate orders to be made in respect of the receiver's powers. All of these agreements are embodied in what is referred to as a "Note", which serves as an addendum to the Further Rule 37 Minute dated 26 April 2018. Although it is not formally framed as an agreement between the parties, it is apparent from the Rule 37 that the parties have so agreed and the "Note" is endorsed by the parties' respective legal representatives. For this reason, it will be appropriate to issue an order which incorporates the terms of the Addendum to the Further Rule 37 Minute, by which the parental rights and responsibilities of the parties are regulated and the terms of the division of the estate are to be determined. The further orders to be made need only regulate the question of the cash maintenance payable in respect of the minor children since the Addendum covers the agreed non-cash components of maintenance.

[36] Finally there is the question of the costs of the action. The plaintiff, as indicated, claimed R6 500.00 per month per child. Although this was pursued by her throughout the trial, the plaintiff nevertheless made an open tender in relation to her claim for maintenance shortly before the commencement of the trial in which the payment of an amount of R5 000 per month per child was sought. The defendant persisted in his opposition on the basis that he could not afford said amount. There can be no doubt, in my view, that the plaintiff has been substantially successful in her claim in relation to maintenance and there is, for this reason, that no reason why the costs should not follow the result.

[37] Insofar as the postponement application is concerned, the plaintiff failed in her bid to secure a postponement. Having regard to the further conduct of the trial and the outcome thereof, the postponement application was unnecessary. It brought about a delay in the commencement of the trial and its finalisation. In my view the plaintiff should bear the costs of the postponement application and the attendant wasted costs occasioned thereby.

[38] In the result I make the following orders:

1. A decree of divorce;
2. An order incorporating the terms of the agreement reached by the parties as set out in the Addendum to the Further Rule 37 Minute dated 26 April 2018;
3. The defendant is ordered to pay maintenance in respect of the minor children in the sum of R5 000.00 (Five Thousand Rand) per month per child. Payment of the aforementioned maintenance shall be made by the defendant on the first day of each month, commencing on the first day of the month following the date of this Order and thereafter on the first day of each consecutive month by debit order, free of exchange, and without any deduction or sett-off into such bank account as the plaintiff may nominate from time to time in writing.

4. The defendant is ordered to pay the plaintiff's costs of trial, payable from the defendant's half share of the divided estate;

5. The plaintiff is ordered to pay the costs the application for postponement and the wasted costs occasioned thereby, payable from the plaintiff's half share of the divided estate.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Plaintiff
Adv. S. Potgieter
Instructed by Anthony-Gooden Inc.

For the Defendant
Adv. B. Dyke SC
Instructed by BLC Attorneys