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

CASE NO: **707/2018**

Date heard: **03 June 2019
to 06 June 2019**

Date delivered: **18 June 2019**

In the matter between:

A[...] A[...]

Plaintiff

and

L[...] A[...]

Defendant

JUDGMENT

LOWE, J:

INTRODUCTION

[1] In this matter A[...] A[...] in an action, seeks a decree of divorce, division of the joint estate, primary care of the parties' minor child, I[.] (seven years of

age), maintenance for herself until death or remarriage, maintenance for I[...], 50% of Defendant's pension retirement fund and costs.

[2] Defendant places in issue only Plaintiff's claim for life maintenance (tendering rehabilitative maintenance for 24 months at R4,000.00 per month and medical aid expenses (counterclaim prayer (e)); the question of the quantum of maintenance for ILKE (tendering R4,000.00 per month and medical aid expenses) and costs.

[3] Each blame the other for the breakdown of their marriage which they agree has occurred.

BACKGROUND

[4] In essence then at the trial the issues were:

[4.1] Whether Plaintiff is entitled to lifelong maintenance or only rehabilitative maintenance;

[4.2] The quantum of Plaintiff's claim whether lifelong or rehabilitative;

[4.3] The quantum of I[...]'s maintenance;

[4.4] The fault issue as to the marital breakdown; and

[4.5] Costs.

[5] In her evidence Plaintiff reduced her maintenance claim somewhat from the pleaded claim of R20,000.00 per month (together with medical expenses), with R6,000.00 per month for I[...] (plus medical expenses and school expenses), to R9,000.00 per month for herself and R5,000.00 per month for I[...] together with the retention of both on his medical aid at his expense, any top up on medical expenses required and I[...]’s school fees and related school expenses including clothes, stationery and extra mural expenses. It appears to be common cause that at least I[...]’s expenses and maintenance will increase annually by the Consumer Price Index.

[6] The division of the estate as agreed will render a return to Plaintiff of between R600,000.00 and R650,000.00 (at best), being her portion of Defendant’s Pension Fund after tax (R460,000.00) and her portion of the parties’ jointly owned property in Dispatch, if sold (the sum of approximately R200,000.00 less expenses). Defendant in turn retaining his share of the fund not yet realisable, and his half interest in the Dispatch property.

[7] Neither of the parties have any other appreciable assets which bear significantly on the issues.

[8] Whether the Dispatch property is to be sold is not yet agreed. It is presently rented to Defendant’s parents with whom Defendant now lives at a rental of R7,500.00 per month accruing to the parties as a matter of law in equal

shares, although presently collected and kept entirely by Defendant to which Plaintiff has no objection, providing he meets her maintenance claim.

[9] Plaintiff is unemployed. She has no appreciable assets (other than as set out above) and no income (apart from the half rental referred to above in theory). She has a matric qualification and nothing else and has worked for a total of eight months in her life, six as a Butchery cashier and two as a childminder.

[10] She has no qualifications other than the above and in essence having married at 21 years of age devoted the remainder of her time and effort to the parties three children, home and family. It should be said that it is uncontested that she did this in an outstanding way without any paid or unpaid help. She held the family together and saw to their comfort and sustenance. She did all the household and garden chores single handed, cooked, washed and did the home improvements and repairs herself. On an occasion she painted the family home inside and out. None of this was challenged and it must be accepted that she put herself second, her family first, and did an admirable job of supporting all including Defendant, a Construction foreman, away from home a good deal of the time. They lived well and wanted for nothing having a good standard of living and occupying a desirable home, they also each having a good quality motor vehicle.

[11] To his credit Defendant acknowledged her effort and success in this regard saying in summary she had made it possible for him to do what he needed to.

- [12] The parties have three children, the two older children being girls, majors and still not self-supporting. All three live with Plaintiff in an extremely small two bedroom flat. The parties sensibly co-operate in respect of sharing I[...] between them at weekends and the like. To both their credit they show care and understanding in respect of their parental responsibilities towards I[...].
- [13] It transpired during the evidence that there was not, nor could there be, any real criticism of Plaintiff as a wife or mother over the 21 years of marriage.
- [14] Defendant's anger, resentment and frustration, vigorously expressed in his evidence, was simply that in late 2017 Plaintiff informed him that she wanted a divorce. This, he said, pulled the carpet from under his feet and his view is that the divorce, being her idea, is thus her fault and that this being so she must literally pay the price financially and otherwise.
- [15] Attempting to step into my shoes as Judge, he pronounced with fervour that she would get no more than twenty-four months rehabilitative maintenance, or as he put it *"not one day more"*.
- [16] As to Defendant's contributions to this breakdown, Plaintiff said that in the last few years of the marriage, after they had moved to a new home which needed considerable repairs and refurbishment for which she was solely responsible, Defendant began to make unreasonable intimate demands on her in exchange for consenting to and providing financially for the house refurbishment. She said this caused her to want a divorce allied to her previously, finding Defendant communicating intimately with a friend of hers.

She later trapping him again in this (having overlooked the earlier transgression). In essence her evidence, again not significantly challenged on this, was simply that she felt intimately used for Defendant's own pleasure and not as a loving husband.

[17] As is apparent hereafter this is all that need be said in respect of both relevant to the breakdown.

[18] Plaintiff's earning capacity can be simply dealt with. Against her eight month employment more than twenty years ago and her lack of qualification she is, though theoretically employable, but in reality in the modern workplace in a position in which her chances of finding any employment are remote in the extreme. She may indeed be able, given time, to take some courses in computer use and software programs to give her computer literacy but even then will only place herself as a competitor in the "*lower level occupational echelons*", which will inevitably on the probabilities be filled by what was referred to as "*equity candidates*" and most probably she would not then gain employment. Even were she to obtain employment, against all odds, this would at best be an entry level position earning R2,000.00 to R3,000.00 per month.

[19] This factual position was set out by expert David Williams of Executive Recruitment clearly well versed in the relevant employability assessment of Plaintiff. His evidence went effectively unchallenged by Defendant as it was in fact unchallengeable.

- [20] In the result for all intents and purposes in this matter, Plaintiff must be treated on the probabilities as being extremely unlikely to gain employment, and if she did, this would render a return of at most R2,000.00 to R3,000.00 per month.
- [21] That this is in fact so, is borne out by her unsuccessful attempts to gain employment on several occasions – this no surprise.
- [22] What remained in dispute against this background was simply the question as to whether or not maintenance for Plaintiff should be limited to rehabilitative maintenance; the quantum of her maintenance claim and that of I[...], as adjusted (which was persisted in); as also the question of the costs of the action.
- [23] I must say that on the facts I should make it clear that the sums claimed above will not serve to maintain Plaintiff in the same style or to the standard she enjoyed during the marriage, by any means.

THE RELEVANT FURTHER FACTS

Defendant's financial position, earning capacity and income

- [24] Defendant, so it transpires, holds a 50% members interest in Anderson's Process Instrumentation CC ("API") formed in 1996, the other member being his father Leon (Snr). He became a 50% member in 2006.

- [25] On the discovered documentation Defendant attempted to lay the basis for an argument that this holding was in a family business for “*estate purposes*” and that he did not share “*in profit or losses*”.
- [26] In an API document, admittedly signed by Defendant, it was said that on 3 April 2018 (one month after summons) he resigned as member and that he had not benefited from any profit “*unless paid from specific vendor of....*” (*sic*) API – this all supported by an API resolution to the same effect concerning his resignation of the same date.
- [27] In his evidence however Defendant admitting his signature, improbably said he had no knowledge of this document and vigorously maintained that he was still a 50% member of API.
- [28] This was extraordinary evidence to say the least having regard to the documentation and lays the basis for Plaintiff’s argument that Defendant, and his now employer API, were attempting to paint a false picture of his position and holding in API, which fell apart in cross-examination.
- [29] It was clear that API was a profitable business and one which there can be no real doubt benefits Defendant as member and employee. The fact that his interest therein was obfuscated redounds to his prejudice – and it can only be so that his financial position was more advantageous than he would have this Court believe.

- [30] Apart from this the only remaining asset the parties have is their jointly owned house in Dispatch already referred to above worth at most R500,000.00 (and which is debt free) rendering a rental of R7,500.00 per month.
- [31] For the rest there is simply furniture and personal effects and in Defendant's case a Ford Ranger LDV which has been held out unconvincingly to have effectively been taken over by API.
- [32] This itself was a deeply flawed unconvincing piece of evidence from Defendant.
- [33] He said that as he could not afford the vehicle repayments due to the bank monthly, API was making these, as a loan to him, and had taken over the vehicle for its business use and that as he still used it privately from time to time his API salary was debited as to R1,280.00 per month.
- [34] This all makes no sense at all. If the vehicle was taken over for business use there can be no sense in an allegation that he still had to repay payments as a loan and still also had to pay for the private use thereof. In cross-examination he could not explain this at all.
- [35] Again the only conclusion that can be reached is that this was a further attempt to mislead as to his true financial position as a joint effort between himself and API, of which his mother is responsible for accounts and salary slips.

- [36] His API April 2019 salary slip shows a gross salary of R20,000.00 per month with deductions of R4,472.00 giving a net salary after tax of R15,528.00. This includes the LDV deduction and R325.00 for cellphone, tax and UIF.
- [37] Against the API documents and clear intention to mislead this salary slip is hardly convincing. Further from the evidence I accept that Defendant earned substantial cash sums monthly from his father by supplying piping to the business paid in cash which suddenly allegedly dried up after summons.
- [38] Defendant is a construction foreman apparently expert in concrete. He had worked as such for many years earning a substantial income which kept the family in fine style all through the years, they enjoying a high standard of living. This was not contested in any way.
- [39] At the time of the issue of the summons he worked for WBHO in construction as a foreman. To round out the numbers he earned a net income of approximately some R46,000.00, a gross income of R58,616.75 per month. Prior to this he had more than this since 2014 when working for Haw and Inglis Civils.
- [40] He resigned from WBHO on 28 February 2018 as a result he said, mainly of the issue of divorce summons, he wanting to work on his marriage and suffering from stress and depression.
- [41] He then took up his current position with API.

- [42] Plaintiff says credibly which was hardly contested, that Defendant, when she told him she was to divorce him, said she would suffer financially as a result and that he would see to it she did so. Indeed this has come to pass.
- [43] Defendant in his evidence made it very clear, as I have said, that as Plaintiff wanted a divorce, and not he, that she would and should gain no financial benefit as maintenance beyond 24 months rehabilitated maintenance.
- [44] I have no doubt whatsoever that Defendant set out to do all in his power to make good on his threat to the extent of being complicit in reducing his income (or holding out falsely that it is less than in fact it is) and effectively failing to be either forthcoming or honest about his true financial position and real income.
- [45] Not only did he dramatically reduce his income by resigning but then was complicit in failing to honestly disclose his real earnings from API and his interest and financial gain therefrom.
- [46] Apart from what I have pointed out above counsel for Plaintiff in her heads correctly pointed out that:

“17.3 He was unable to explain why he stated in his first Rule 43 affidavit, dated 14 August 2018, that he was earning a gross income of R20 500 per month from his employment with API and that deductions were made in respect of a medical aid and pension, whereas his salary advices of June to August 2018 all show that he earned a gross income of R20 000 and that deductions were made in respect of a

cellphone and the use of his bakkie (and not in respect of a medical aid or pension).

- 17.4 He was unable to adequately explain why he completed a list of income and expenditure, which he signed on 25 April 2018, on which he stated that he earned a gross salary of R20 500 and that deductions were made in respect of a medical aid, pension and “other” when, on his version in court, he only commenced working for API on 1 June 2018 and at a gross salary of R20 000.
- 17.5 He was unable to explain why his first, pre-amended plea (dated 18 April 2018), state that *“he has been employed by Anderson Process Instrumentation CC from the 1st of April 2018 at a salary of R24 000 per month”*. His explanation that the amount of R24 000 could have referred to his nett salary and the rent which he receives, is nonsensical because his nett monthly income from these two sources is R23 028 and not R24 000 and the plea does not refer to rental income at all.
- 17.6 He was unable to explain why his amended plea (dated 31 July 2018) states that *“he would be employed by Anderson Process Instrumentation CC from the 23rd of April 2018 at a salary of not more than R24 000 per month”*.
- 17.7 He was unable to explained why he stated during the evidence in chief that he received *“nothing”* from the proceeds of the sale of the Framesby home, when an amount of R26 333.12 was paid into his account on 5 February 2019 from the proceeds and he was entitled to receive a further R105 481 from the proceeds, which he used to pay his former attorneys.
- 17.8 During evidence in chief, he testified that the cash deposits that were made into his account were in respect of two loans which he had made to his father. During cross-examination, he stated that both loans had been settled fully in 2017 already. He was unable to explain what the source was of the R2000 that was deposited in cash

into his account on 5 February 2018 or the R17 500 that was deposited in cash into his account on 10 February 2018.

...

18. In the letter in which the defendant tendered his resignation as a member of API and which he signed, he stated that he did not benefit from any profit of API *“unless paid from a specific vendor of Andersons Process Instrumentation...”*. On his version, he is again a member of API and it is submitted that he is benefitting from its profit, at least to some extent, based on this letter.

19. According to the defendant’s trial particulars, he earned a nett monthly salary of R17 300 from his employment with API when he was employed with them in the same position from February 2016 to May 2016. The plaintiff testified that she does not believe that the defendant would be paid a lower salary by API now than what he was paid by them three years ago.

...

22. Considering:

- 22.1 the plaintiff’s evidence that the defendant receives an additional income in cash (which cash deposits he was unable to explain);
- 22.2 the fact that the defendant pleaded that he receives a gross income of R24 000;
- 22.3 the fact that the defendant received an income of approximately R2000 more from the same employer three years ago;
- 22.4 the fact that the defendant’s resignation letter from API’s membership states that he shares in some of API’s profit; and
- 22.5 the fact the defendant is clearly being untruthful about his true income

it is submitted that this Honourable Court can reasonably find that the defendant receives a nett income of at least R20 000 per month, as well as a rental income of R7 500.”

[47] I can only but agree with the above. Whilst I must deal with the reality of Defendant's reduced income from his days as construction foreman, it is clear that he has been complicit in attempting to mislead and it clearly must be accepted that his actual income is considerably more than he has disclosed and clearly as counsel for Plaintiff has suggested, at least R20,000.00 per month net with rental income of R7,500.00, a total net of R27,500.00 of which technically Plaintiff is due half rental of R3,750.00, though it seems all except that this should be treated as part of his income.

[48] In short Defendant, unlike Plaintiff, was a poor witness to say the least, clearly angry and determined Plaintiff must suffer financially and prepared to tailor his evidence to see to it that this happens.

[49] I should say that I accept his version of stress and anxiety, but formed the view that even this is somewhat exaggerated and used in an attempt to bolster his alleged limited financial means.

[50] Again in summary the parties' respective financial position and circumstances are set out below, but it must be said that it is essentially common cause that Plaintiff is at least currently unable to support herself either in the same style as previously was the case, nor even in a style approximating this, she having a substantial shortfall between her limited claim and her reasonable needs.

[51] Plaintiff earns a rental income of R3,750.00 per month as set out above, and has an essentially admitted need of R14,000.00 per month for herself and I[.]

together with medical aid, school expenses and the like. She owns no assets of any description, save the furniture in the home and the motor vehicle, and the proceeds from the pension fund which is a relatively small sum and which will assist her for a limited time into the future.

[52] In marked contradiction Defendant is in a far better financial position.

[53] He has a 50% members interest in a close corporation which was not valued.

[54] It was alleged, and not successfully contested, that his member's interest in the close corporation remains so.

[55] It should be said immediately that against this background, it was clearly Plaintiff's case that she was unlikely to improve her income earning ability in the future, nor was it seriously contested that this was the case, it not being put or challenged in any meaningful way, nor was it suggested in what form or how she would ever become self-supporting – even at the reduced style in which she now lives.

[56] Whilst there can be no doubt that the Defendant is a hard worker and more than competent construction foreman, his suggestion that he had a limited net income of R15,500.00 per month did not stand careful scrutiny. He certainly has the real ability to earn more even though he downplays his ability to secure such employment in the future.

[57] In summary, against this background, Plaintiff's financial monthly needs are as set out hereafter, there being no evidence to suggest, even remotely, that she would be able to earn anything like this herself at any time in the future.

This was established in my view, and I find accordingly she has a continuing reasonable need that she would be unable to meet herself at anytime in the future, on the probabilities. Indeed I do not understand this to have been seriously contested and the contrary was certainly not put to Plaintiff.

[58] Whilst, as I have said, Defendant contended unconvincingly for a limited net income of R15,500.00 per month and no recourse to other sources, he clearly has the ability to grow his income, and probably access to funds from the business.

[59] It was not suggested that Plaintiff would reasonably be able to reduce her monthly needs, and indeed it cannot be gainsaid that she lives at a standard considerably less than she used to do so.

THE FAULT ISSUE

[60] A detailed analysis was made of conduct as a factor in the award of maintenance under the Divorce Act in **Swart v Swart**¹. In his judgment Flemming J made the following important observations:

[60.1] As far as marriage is concerned, an overall picture must be formed. The court must not try to assess the moral blameworthiness of the parties' conduct but try to identify that conduct which has really caused

¹ 1980 (4) SA 364 (O)

the breakdown. Thereafter considerations of justice must prevail in the determination of maintenance;

[60.2] The Court rejected the argument that only serious conduct was a factor which the Court should consider, stating that this was not indicated by the relevant clause. He pointed out that the legislature has not prescribed how much weight any factor was to carry;

[60.3] It would be regrettable if conduct, which was no longer the determining factor in granting a divorce, was nevertheless to play an important role in, *inter alia*, the determination of maintenance, and that the court should not engage in a close analysis of the parties' conduct during a long period prior to the divorce, but this does not justify the premise that conduct is now irrelevant. The view that both are usually to blame for the breakdown, leads to a more fluid and therefore more equitable approach;

[60.4] In the English case of **Wachtel v Wachtel**² it was held, with reference to analogous legislation, that only "gross and obvious" conduct should be taken into account. In **Swart** (*supra*), however, the learned Judge found that the legislature had not indicated such a restriction; and he preferred to apply the test of what would be just, but conceded that frequently the two approaches would lead to similar results.

² 1973 1All ER 829 (CA) 835

[61] See also **Grasso v Grasso**³ with regards to misconduct, where the Court stated that where misconduct was gross, fault assumed a greater relevance.

[62] I have carefully considered **Botha v Botha**⁴. The matter is easily distinguishable on the facts and is not analogous. Of course I accept what is set out therein as to neither spouse having a right to maintenance⁵; that the Court has a general discretion⁶ in this regard; that a just result must be achieved⁷. I have some difficulty with the proposition at paragraph [46] that what is just carries a moral component, though I accept completely that fairness and justice must be achieved as best possible. In this matter I have avoided moral judgment on the breakdown issue as opposed to simply identifying conduct which really led to the breakdown – then applying considerations of justice in the determination of maintenance. I also accept that there is no entitlement, without the facts justifying same, for a spouse to be maintained at the same standard as during the marriage⁸.

[63] In short, in this matter, I have no intention, on the evidence before me, of attempting to assess the moral blameworthiness of the parties' conduct, but rather look at the conduct itself to establish if there was any substantial conduct on either side which was a substantial reason for the breakdown. From what I have already said above, it becomes apparent that at this stage

³ 1987 (1) SA 48 (C)

⁴ 2009 (3) SA 89 (WLD)

⁵ paragraph [29]

⁶ paragraph [31]

⁷ paragraphs [34] – [40] and [42] – [49]

⁸ **Louis v Louis** 1973 (2) SA 597 (T). **A V v C V** 2011 (6) SA 189 (KZP) paragraph [9] and [17]. **B S v P S** 2018 (4) SA 400 (SCA) 403 [5] – [10]. **Kroon v Kroon** 1986 (4) SA 616 (ECD) 617 N – I and 637 C – F.

in the marriage between the parties, which had been happy for some time, the marriage relationship and their previous friendship had broken down.

[64] In my view however, it would be entirely wrong to lay any particular emphasis on the conduct of either of the parties as the primary or main reason for the breakdown of the marriage (as opposed to the decision to end same). They were both parties to what caused the breakdown of the marriage, and in my view, the considerations of justice which must prevail in the determination of maintenance should not be affected either way in this regard. Both were to blame for the breakdown, for different reasons and I would err if I were to find that one or other solely caused this.

MAINTENANCE

[65] Section 7(1) of the Divorce Act, 70 of 1979 (*“the Act”*) determines as follows:

“(1) A Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of assets of the parties or the payment of maintenance by the one party to the other.” (Own emphasis)

[66] Accordingly, in the absence of an order for payment of maintenance in terms of subsection (1) the provisions of Section 7(2) of the Act becomes relevant:

“(2) 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 (a) the existing or prospective means of each of the parties, (b) their

respective earning capacities, (c) financial needs and obligations, (d) the age of each of the parties, (e) the duration of the marriages, (f) the standard of living of the parties prior to the divorce, (g) their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and (h) 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 in whose favour the order is given whichever event may first occur.”

[67] In the matter of **Grasso** (*supra*)⁹ the Court held that not one factor is more important than the others, as follows:

“In setting forth, in s 7(2) of the Divorce Act 1979, the various factors to which the Court is to have regard when considering the payment of maintenance upon divorce, no particular stress was laid on any one or more of these factors, and they are not listed in any particular order of importance or of greater or lesser relevance. The proper approach, it seems to me, is to consider each case on its own merits in the light of the facts and circumstances peculiar to it and with regard to those factors set out in this particular section of the Divorce Act – which list of factors is clearly not exhaustive of what the Court is to have regard to in deciding what maintenance (if any) is to be paid upon divorce by one spouse to the other, for 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 fair and just decision.”

[68] Taking into account the factors referred to above in respect of those issues which must be considered in ordering maintenance, it is clear from the authorities that none of the factors relevant are dominant. Essentially it is the question of requirement and need on the one hand and the ability to pay on the other which are two important considerations which must be considered

⁹ at p 52 E – G

together with other factors relevant. It is in essence section 7 of the Divorce Act should be seen in the context of ensuring fairness between the parties. See *Nilsson v Nilsson*¹⁰. I refer also to what I said about *Botha* (*supra*).

[69] Insofar as Plaintiff's financial needs are concerned she will be using her household budget to run a family home albeit for herself, the minor I[...] and two adult but dependent children. In my view, Plaintiff in this regard incurs an obligation as envisaged in Section 7(2), even though the major daughters have an independent claim to maintenance from Defendant. The cost of providing for dependents can and should, in my view, be brought into account¹¹. In this matter only one of the major two children will earn any income at all, presently this a very small sum. Plaintiff will effectively maintain them and her claim could legitimately have included this as an obligation for the purposes of Section 7(2).

[70] It does not, but the evidence nevertheless establishes that at least part of her rental claim should be apportioned to the major children as she reduced this accordingly. Also it is clear she provides a home and sustenance. In the result this makes her claims even more reasonable than they already are.

[71] As to the consequences of not being frank about one's financial position, as was Defendant, this is certainly relevant to the overall decision in favour of Plaintiff¹².

¹⁰ 1984 (2) SA 294 (C) 297 and *Swart v Swart* 1980 (4) SA 364 (O) 376; *Kroon v Kroon* 1986 (4) SA 616 (E); *Pommerel v Pommerel* 1990 (1) SA 998 (E) 1002; *Archer v Archer* 1989 (2) SA 885 (E) 895; *Beaumont v Beaumont* 1985 (4) SA 171 (W).

¹¹ *Butcher v Butcher* 2009 (2) SA 421 (C) [17] and *MB v NB* 2010 (3) SA 220 (GSJ).

¹² *Kooverjee v Kooverjee* 2006 (6) SA 127 (C) [11.8.2]

[72] In this matter, it cannot be said that Plaintiff, a wife of long-standing, had merely shared Defendant's bed and kept house. She cared for the children and did everything required for the family contributing, quite apart from her having maintained the joint home, by supporting the ability of her husband to do what he did at work, when away from home for long periods. It should be said, in my view, that the facts of this matter in no way bring Plaintiff within an argument that a wife who has not worked during the marriage is entitled to no more than rehabilitative maintenance. *Cf Grasso (supra)*.

[73] Not only is the Plaintiff relatively far from being young, but she has a young child and previously enjoyed a high standard of living. There can be no reasonable prospect that she is able to meaningfully retrain, or has the ability to do so nor is there, on the probabilities, a prospect of a greater earning capacity. In reality in the trial, and for good reason, this was not seriously even put to her. Her financial need is more than established on a reasonable basis, and is not such as to place her in nearly the same standard of living as was previously the case.

[74] I have fully considered the existing and prospective means of each of the parties, their respective earning capacity, their financial needs and obligations, their age, the duration of the marriage and the standard of living prior to the divorce as also all other relevant factors. I have considered their conduct and expressed my view on such as it may be relevant to the breakdown of the marriage, and have traversed the parties' current financial situation. This is relevant both to the principle of an award of maintenance as

opposed to rehabilitative maintenance only, and the quantum thereof. In this matter there will be no really meaningful transfer of assets between the parties, Plaintiff remaining in straitened circumstances with no capital assets of any description, save the pension fund and say R225,000.00 interest in the Dispatch property. I have not treated any of the factors above as dominant, and taking all the above into consideration have also had regard to the reasonable need of the Plaintiff and the ability of the Defendant to meet same¹³.

[75] In my view, taking all these factors into account, and to effect fairness and justice between the parties, there can be no question but that Plaintiff has established an entitlement to maintenance until her death or remarriage.

THE PARTIES FINANCIAL NEEDS AND OBLIGATIONS

[76] Defendant's claimed personal monthly expenses:

Discovery Medical	R4,564.00
Momentum Retirement Annuity	R605.00
Electricity	R400.00
Cape Union Mart Clothing Account	R450.00
Church Offerings	R400.00
Gym on Doctors recommendation	R260.00

¹³**Swart** (*supra*) at 377

Absa funeral plan	R42.00
Building Insurance	R145.40
Minor Daughter Future Plan Policy	R350.00
Pills for 2x Major daughters	R400.00
Fuel	R1 000.00
Phone	R300.00
Food, Toiletries	R1 000.00
<u>Total</u>	<u>R9 916.40</u>

[77] Of this I intend to disallow the following as non-essential expenses in the light of Plaintiff's and I[...]’s needs:

Momentum Retirement Annuity	R605.00
Church offerings	R400.00
Gym	R260.00
Phone (already deducted from his salary)	R300.00
<u>Total</u>	<u>R1 565.00</u>
Defendant's Needs Total	<u>R8 351.40</u>

[78] Of the medical aid a sum of R1,790.00 should further be deducted as I[...]’s part of medical aid giving total need of R6,561.00 as claimed in his evidence.

PLAINTIFF'S AND I[...]’S NEEDS:

[79] These have been very modestly stated.

Rental	R1 285.00
Lights and water	R171.42
Groceries	R3,000.00
Petrol	R1,000.00
Hair Care	R200.00
Toiletries and Cosmetics	R750.00
Household Cleaners	R200.00
Casual Clothing and Shoes	R600.00
Entertainment	R600.00
Motor Vehicle Insurance	R335.00
Motor Vehicle Maintenance	R200.00
Additional Medical Expenses not covered by Medical Aid	R200.00
Cell Phone	R100.00
DSTV	R250.00
Reading Materials	R100.00
Replacement of Household Items	R200.00
<u>Total</u>	<u>R9,191.42</u>

- [80] From Plaintiff's list of monthly expenditure, the amount of R200.00 in respect of additional medical expenses must be deducted, as a separate order is prayed for in respect thereof. This reduces Plaintiff's monthly expenses to R8,991.42 (excluding her medical aid and medical expenses not covered by the medical aid), which should be rounded off to R9,000.00.

[81] Plaintiff is claiming an amount of only R1,285.00 in respect of herself for rental and an amount of R642.50 for rental in respect of the minor. This amounts to a total of R1,927.50, even though the monthly rental is R5,500.00.

[82] The parties' dependent children reside with Plaintiff and are not contributing to the rent. Plaintiff's undisputed evidence was that Defendant is not contributing anything towards the dependent children's expenses, other than paying for their medical aid and R400.00 towards their medical expenses and that she has been maintaining them. The parties' eldest daughter has not obtained employment where she will earn R25.00 an hour and work eight hours a day on four days a week. She will thus earn roughly R3,200.00 per month.

[83] From the minor's child's list of expenses, the following amounts must be deducted because Plaintiff seeks a separate order in respect of these expenses:

Additional medical expenses	R200.00
Hip Hop	R116.00
School outings	R300.00
School extras	R150.00
School clothing	R200.00
<u>Total</u>	<u>R966.00</u>

[84] This reduces the minor child's monthly expenses (excluding her scholastic expenses, medical aid and medical expenses not covered by medical aid) to

R5,321.37, which Plaintiff rounded off to R5,000.00. This claim for I[...] as set out in the evidence is very reasonable.

[85] The claim in respect of Plaintiff and I[...] is thus moderately placed as follows:

	Per month
Plaintiff	R9,000.00
I[...]	R5,000.00
Plaintiff Medical Aid	R1,190.00
I[...] Medical Aid	R1,760.00
Additional Medical Expenses Plaintiff	R200.00
Additional Medical Expenses I[...]	R200.00
I[...] Estimated School Expenses	R760.00
School fees	R1,300.00
<u>Total Needs I[...] and Plaintiff</u>	<u>R19,410.00</u>

[86] The school fees have been paid for 2019, thus until January 2020 the sum needed is thus reduced to R18,110.00 and will be R19,410.00 from January 2020.

[87] The result for Defendant is as follows:

Estimated Real Net Income at least	
(including the full R7,500.00 rental income)	R27,500.00
Less Plaintiff & I[...] Needs (to December 2019)	R18,110.00

Less Defendant's Needs	R8,351.40
Surplus (Defendant)	R1,038.60
From January 2020 with the addition of school fees	
a notional shortfall	-R261.00

COSTS

[88] As to costs, there can be no doubt that the Defendant put Plaintiff in the position where she had to proceed with the trial in order to succeed in her substantial maintenance claim as to its principle, and the quantum thereof for both herself and I[.]. The trial proceeded, notwithstanding that I urged upon the parties to spend the litigation costs more sensibly on the family, which sadly bore no fruit.

[89] At the end of the day, I consider Plaintiff to have been substantially successful in all her claims – this was a substantial matter hard fought by experienced counsel and justifiably brought in the High Court. The Plaintiff was met with an angry, intransigent, uncooperative and in respects deceitful Defendant and sadly had no choice but to proceed in the face hereof. Whilst I have a wide discretion as to costs especially, in matrimonial litigation, there can be no doubt in this matter that justice and equity greatly favour a costs order in Plaintiff's favour.

[90] In the result, I make the following order:

1. A decree of divorce dissolving the marriage between the parties is granted.
2. A division of the joint estate is ordered.
3. Plaintiff and Defendant shall be co-holders of parental responsibilities and rights in respect of the minor child, I[.] A[...], as provided for in Section 18(2) and Section 31(1) of the Children's Act 38 of 2005, subject to the provisions set out below:
 - 3.1 The minor child shall have her primary place of residence with Plaintiff, who shall be the minor child's primary caregiver.
 - 3.2 Defendant shall have reasonable contact with the minor child, having regard to her social, school and extra-mural activities.
4. Plaintiff and Defendant shall make joint decisions as to major decisions regarding the minor child's schooling, mental and medical healthcare, religious and spiritual upbringing and any decisions as to their residence likely to change her living conditions significantly or have an adverse effect on her wellbeing, as provided for in Section 31 of the Children's Act 38 of 2005.

5. Defendant shall contribute as follows towards the maintenance of the parties' minor child I[...] A[...], until such time as she becomes self-supporting:
 - 5.1 payment of the sum of R5,000.00 per month, which shall be paid into Plaintiff's bank account, nominated by her in writing from time to time, by no later than the 1st day of every month, commencing on 1 July 2019;
 - 5.2 payment of 100% of the minor child's school fees;
 - 5.3 payment of 100% of the minor child's reasonable scholastic expenses, including but not limited to her school uniform, school stationery and textbooks, extra-mural, extra-curricular and sporting activities and school outings;
 - 5.4 Defendant shall retain the minor child as a dependent member on his current medical aid scheme, or on a medical aid scheme with similar benefits, at his costs; and
 - 5.5 payment of the sum of 100% of the minor child's reasonable and necessary medical expenses that are not covered by the medical aid.

6. Defendant shall contribute as follows towards the maintenance of Plaintiff, until her death or remarriage, whichever may occur first:
- 6.1 payment of the sum of R9,000.00 per month, which amount shall be paid into Plaintiff's bank account, nominated by her in writing from time to time, by no later than the 1st day of every month, commencing on 1 July 2019;
- 6.2 Defendant shall retain Plaintiff as a dependant member on his current medical aid scheme, or on a medical aid scheme with similar benefits, at his costs; and
- 6.3 payment of 100% of Plaintiff's reasonable and necessary medical expenses that are not covered by the medical aid.
7. The amounts payable in terms of paragraphs 5.1 and 6.1 above shall escalate yearly on the anniversary date of the divorce order with an amount commensurate with the Consumer Price Index for the previous years¹⁴.
8. Plaintiff is entitled to fifty percent of Defendant's pension interest in the Momentum Retirement Annuity, policy no. MP90[.], calculated as at date of this order, which is payable to Plaintiff at her election. An

¹⁴ (This was included in Defendant's draft order handed up in argument and is thus common cause.)

endorsement to this effect is to be made in the records of Momentum Group Limited.

9. Defendant shall pay the costs of the action.

M.J. LOWE
JUDGE OF THE HIGH COURT

Obo Plaintiff: Adv L Gagiano

Instructed by: Joyzel Obbes Incorporated, Port Elizabeth

Obo the Defendant: Adv M Olivier

Instructed by: Eugene Raymond Inc., Port Elizabeth