

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

CASE NO. 989/2020

Date heard: 29 April 2021
Date Delivered: 07 May 2021

In the matter between:

L[...] H[...] (Born C[...])

Plaintiff

and

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

Defendant

JUDGMENT

RUGUNANAN, J

[1] The parties hereto were married to each other on 25 August 2012. The marriage was contracted out of community of property subject to the accrual system in terms of an antenuptial contract.¹ They have one child born of the marriage, a minor female born during June 2015. In circumstances set out hereunder a deed of settlement was entered into and concluded on 28 April 2021 wherein the parties agreed *inter alia*, that their marriage relationship has irretrievably broken down and that a decree of divorce be granted in dissolution of their marriage. The action was set down for trial on 28 April 2021. The trial preparation checklist (“the checklist”) filed on 19 April 2021

¹ Particulars of claim, Annexure POC1

duly signed by the parties' legal representatives identified the following issues to be determined at the trial:

- “1.2.1 the primary care and residency and contact in respect of the minor child;
- 1.2.2 the duty to pay maintenance in respect of the minor child and the extent of such maintenance to be paid by the party who will not have primary care of the minor child;
- 1.2.3 whose estate accrued more during the subsistence of the marriage;
- 1.2.4 costs of suit of the action for divorce;
- 1.2.5 costs of the urgent application brought in December 2020.”

[2] Following a meeting in chambers with the parties' counsel on 28 April 2021, the matter stood down until 29 April 2021 for attending to the finishing aspects of the deed of settlement. Except for paragraph 1.2.4 of the checklist, the parties resolved all issues. Accordingly, when the matter proceeded to trial on 29 April 2021 it was on the limited issue of the “costs of suit of the action for divorce”.

[3] For the plaintiff, the argument, essentially, was that the defendant, owing to his conduct, ought to be ordered to pay the costs of the action - the defendant, on the other hand, contending that each party pays their own costs; alternatively, that there be an apportionment in accordance with section 10 of the Divorce Act². On the facts, no submissions were made as to what apportionment would constitute a reasonable exercise of discretion if this court were of the opinion that an apportionment would be justified. At the conclusion of the matter and after hearing the plaintiff's oral evidence and the arguments presented by counsel for the parties, a decree of divorce incorporating the terms of the deed of settlement issued but judgment on the costs issue was reserved.

[4] Section 10 of the Divorce Act³ provides as follows:

² Act 70 of 1979, as amended

³ Act 70 of 1979

“10 Costs

In a divorce action the Court shall not be bound to make an order for costs in favour of the successful party, but the Court may, having regard to the means of the parties and their conduct insofar as it may be relevant, make such order as it considers just, and the Court may order that the costs of the proceedings be apportioned between the parties.”

- [5] Only the plaintiff testified and except for aspects of her testimony considered relevant for purposes of this judgment, not much turns on her evidence. A resolution of the issue, I think, is best served by recourse to the objective material contained in the documentation before me. It is stated at the outset that the plaintiff was substantially successful in her claims for a medical aid contribution for herself (albeit for a few months until the end of July 2021) and for the minor child for the duration of her financial dependency on the defendant, including maintenance for the child and expenses related to her school fees and other apportioned educational expenses (excluding school fees).⁴
- [6] To begin with, in considering the means of the parties the exercise is not undertaken with mathematical precision. The documentary evidence⁵ indicates that the defendant earns a nett monthly income of R25 642.31 and that he receives an annual bonus of R45 534.30.⁶ His estate has a positive accrual value of R1 137 522.61 whereas the plaintiff's has attained a negative value of R117 676.24. Although the evidence indicates that both parties are gainfully employed⁷ no evidence was elicited regarding the plaintiff's earnings, save for the settlement award of R641 761 from the defendant's pension fund. The plaintiff testified that approximately 18% thereof will be taxed and the remainder - without having proffered any specific detail - will be utilised to pay off debts and liabilities amounting to

⁴ As per Deed of Settlement

⁵ Exhibit C, Accrual calculation, 11

⁶ Exhibit C, 12 -13

⁷ Exhibit E, report by family counsellor, 6

some R90 000 which she stated was incurred when she resettled in Port Elizabeth after having left the parties' matrimonial home in Pretoria. The settlement award, she stated, will also be utilised to acquire a motor vehicle and for putting up a deposit for the purchase of a house. Plainly, the defendant has a significantly greater accrual than the plaintiff notwithstanding the settlement award to her as regards his pension fund.

[7] Alluding to the conduct of the parties during the subsistence of their marriage, the plaintiff's uncontradicted testimony is that she was subjected to episodes of emotional and verbal abuse by the defendant.⁸ Sometime during December 2019 she sought psychiatric assistance in Port Elizabeth when she, and the defendant, and the minor child were visiting family. The intervention brought her to the realisation that the parties' marriage was "*on the rocks*" with there being no prospect of returning to the matrimonial home in Pretoria. Thus began resettlement of her life and that of the minor child pending finalisation of these divorce proceedings that were instituted during May 2020.

[8] As for the defendant's conduct in the course of the proceedings, this precipitated an urgent application during December 2020 in which the plaintiff sought the leave of the court to permit the child to undergo eye surgery and to permit the plaintiff to have the child registered for schooling in Port Elizabeth. It is not intended to delve into the merits of that application save that the defendant withheld his consent that surgery be undertaken in Port Elizabeth, he preferring rather that the relevant procedure be performed in Pretoria.⁹ As for the child's schooling, when the parties' efforts to enrol the child in a Christian school came to naught, the plaintiff was obliged to opt for an alternative school to which the defendant objected on religious grounds.¹⁰ Although the costs issue in respect of the urgent proceedings has been resolved, in argument the defendant's conduct was accentuated on the premise that it was unreasonable.

⁸ This is detailed in Exhibit E, report by family counsellor, 9

⁹ Exhibit E, report by family counsellor, 12

¹⁰ Exhibit E, report by family counsellor, 11

[9] This portrayal of the defendant's conduct was similarly articulated in the context of the minutes of a rule 37 conference held on 25 March 2021. As at that date the issues detailed in paragraph 1.2.1; 1.2.2 and 1.2.3 of the checklist remained unresolved until 28 April 2021 (it being the date on which the deed of settlement was concluded). The minutes indicate that the issues affecting primary care, residency and contact with the minor child were not conceded by the defendant; this notwithstanding the availability of the reports of the family advocate and the family counsellor as early as January 2021. It is accepted in principle that the parties in contesting these issues on the pleadings were acting in what they believed to have been in the best interests of the minor child,¹¹ but by the time the reports became available, a full investigation of the issues had been done. The cumulative thrust of the reports induced an overall settlement of the issues. Except for what is contained in the defendant's pleadings prior to the involvement of the family advocate and the family counsellor, and absent the placing of any other information considered to be in the best interests of the minor child subsequent to their reports, the stance adopted by the defendant, as indicated in the minutes, effectively prolonged settlement of the matter until it reached the doorstep of the court. The contentions to the contrary for seeking to rationalise the defendant's stance are unpersuasive and speculative.

[10] A further aspect relevant to the conduct of the defendant concerns his failure to have filed his discovery affidavit by 23 March 2021 on pain of a court order. Far from mitigating prejudice suffered by the plaintiff, such failure merely exacerbated it. The ample series of emailed correspondence directed to the defendant's attorneys¹², clearly imputes unreasonable conduct to the defendant. Indeed, even more where no explanation for such

¹¹ Where parties bona fide believe that in contesting a case they act in the best interests of their child, the general rule is that, it is frequently, by reason of the circumstances of a case, inappropriate to make an order for costs. see *Bethell v Bland and Others* 1996 (4) SA 474 (WLD) at 473I, 474A and 476C

¹² Exhibit C, 1-10

conduct has been proffered, nor any attempt made in argument to persuade the court to the contrary.

[11] In the circumstances, and ancillary to having made an order granting the plaintiff a decree of divorce incorporating the terms of the deed of settlement dated 28 April 2021, the following order issues:

“The defendant shall pay the plaintiff’s costs of suit as taxed or agreed.”

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

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For the Defendant: Adv. S. Bands, Instructed by, Jurgens Bekker Attorneys (Ref: Irene Welling) email irene@jurgensbekker.co.za, c/o Lexicon Attorneys, Cnr Westbourne & Clevedon Roads, Central, Port Elizabeth, (Ref: Mr P. D. Abernethy), Tel (041) 373-7434, email paul@lex-icon.co.za

This judgment was handed down electronically by circulation to the abovementioned legal representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Friday 07 May 2021.