

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 69227/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

18 JANUARY 2021

C.J. COLLIS

In the matter between:

H[....] L[....]

Plaintiff

and

J[....] E[....] L[....]

Defendant

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal

representatives by email. The judgement is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 18 January 2021.

JUDGMENT

COLLIS J

INTRODUCTION

[1] "Marriage as a social institution is not a business enterprise and parties thereto do not generally regard each other with calculated prudence as shrewd business individuals would each other when engaged in business transactions. They do not keep precise records of the favours they extend to each other, nor do they, as a matter of course and practice, reduce their daily undertakings to each other in writing. They are guided in their dealings with each other by trust and unquestioning acceptance that they would be together as husband and wife until death do them part. They generally remain guillible towards each other until their love for each other loses its flame and only then do they start to gaze around and tread with suspicion and care as against each other.¹"

[2] This is a defended divorce action.

[3] As per the particulars of claim, the parties married each other out of community of property, subject to the accrual system on 16 September 2006. The marriage still subsists.

¹ PGJ v AEJ Case No: 4949/2013 delivered 19 May 2016 Free State Division.

[4] From the subsistence of the marriage three minor children were born namely:

4.1 H, a minor female born 9 November 2007;

4.2 R.J, a minor male born 24 August 2009; and

4.3 H.E, a minor male born 3 February 2014.

[5] During October 2015, the defendant vacated the matrimonial home and two years later the plaintiff issued summons in this court for a decree of divorce, division of the accrual estate as per their marital regime and ancillary relief.

[6] The divorce is founded on the basis that the marriage relationship between the parties has irretrievably broken down and has reached such a state of disintegration that no reasonable prospect exists for the restoration of a normal marriage relationship between the parties.²

[7] In amplification of the plaintiff's particulars of claim, the plaintiff cited a loss of mutual love and respect, vacation of the matrimonial home and lack of communication between the parties which culminated in the disintegration of the marital relationship between the parties.

[8] The defendant defended the divorce action issued against him and in his plea he raises the following defences:

8.1 Albeit that the marriage relationship of the parties had broken down irretrievably the grounds for such break-up are the various false allegation of molestation of the minor children levelled against him by the plaintiff;

² Section 4 of the Divorce Act 70 of 1979.

8.2 the false allegation by the plaintiff that he in the past had engaged in an extra-marital affair;

8.3 considering the reasonable maintenance needs of the minor children and the obligation resting on both of them in proportion to contribute towards the minor children's maintenance needs, he sought an order from the court to pay maintenance towards the minor children of R6500,00 per month per child; the minor children's pre-school and school fees; to maintain the minor children as dependants on his medical aid fund and to pay the monthly premiums and to pay 50% of all reasonable medical expenses of the minor children that is not covered by the medical aid fund.

[9] Pending³ the finalisation of the main action I am informed by counsel for the defendant that the plaintiff was awarded *pendente lite* an amount of R8500 per month per child; ordered to pay maintenance to the plaintiff in the amount of R12 000,00 per month for a period of 6 months following the date of the order whereafter payment will cease and in addition, the defendant was also ordered to pay directly the school and nursery fees, medical aid premiums, all reasonable medical expenses not covered by the medical aid, MWEB, ADT security, DSTV household content insurance and the plaintiff's annuity at Sanlam.

[10] It is also worth mentioning that on the eve of the hearing of the trial, the defendant had made a tender in terms of Rule 34 on a with prejudice basis and that the defendant mainly presented his case within the ambit of the said tender.

³ Rule 43 order: Potteril J dated 18 December 2017.

ISSUES IN DISPUTE

[11] As I see it, the terms of engagement that this court was called upon to determine was whether the plaintiff on a balance of probability has discharged her onus of proving a division of the accrual estate, whether she is entitled to spousal maintenance and if indeed the amount of spousal maintenance to be paid to her and the amount of maintenance to be paid in respect of each of the minor children.

[12] Both the plaintiff and the defendant testified in their respective cases. During the proceedings the plaintiff appeared in person. She initially applied for a postponement. It was opposed by the defendant and given the fact that the application for a postponement was not properly motivated and premised on good and strong enough reasons exercising my discretion, it was refused.

COMMON ISSUES BETWEEN THE PARTIES

[13] *Ex facie*, the pleadings it was common cause between the parties that the marital relationship between them had broken down irretrievably. As such an order for a decree of divorce should follow. It was further common cause between them, that the primary care and residency of the three minor children should vests, with the plaintiff.

EVIDENCE

THE PLAINTIFF'S VERSION

[14] The plaintiff testified that she married the defendant on 16 September 2006. From this union three minor children, were born and that the marriage still subsists. She confirmed that her husband left the marital home with only his clothes during October 2015 and that they have been living separate lives since then. Albeit that attempts were made to save their marriage she was of the opinion that her husband no

longer wants to be married to her. It was further her testimony that she does not recall concluding the ante-nuptial contract but confirmed that her assets listed therein were correct. She testified that she wishes to be awarded custody of the minor children; maintenance for herself of R18 000 per month for the next two years and maintenance per child per month in the amount of R8500. During cross-examination she confirmed having qualified as an air hostess and that she was employed for approximately three years at the start of their marriage, and even on occasion earned more than the defendant. She further confirmed that the defendant pays the expenses as ordered in terms of the Rule 43 court order and in broad terms she requested the court to order the defendant to pay maintenance in line with the interim order. The plaintiff further conceded that she is desirous of becoming gainfully employed, and that she infact has taken steps to become employed, but that she had found it difficult to become gainfully employed as she lacks a support system at home to assist her with looking after the children.

THE DEFENDANT'S VERSION

[15] The defendant elected to testify and it was his evidence that he married the plaintiff on 16 September 2006. Prior to entering into the union himself and the plaintiff concluded an ante-nuptial contract, which terms of the contract was explained to them by the attorney tasked to attend to it. He testified that he vacated the matrimonial home around October 2015, and that this was not by choice but by virtue of a court order obtained by the plaintiff. He conceded however that prior thereto at around the beginning of 2014, they started experiencing marital problems when the plaintiff began to accuse him of having an affair. Their relationship thereafter gradually deteriorated with the plaintiff continuously having arguments with relatives; neighbours and mutual friends. On occasion the plaintiff also accused him falsely of sexually abusing his children, an accusation he strongly denies. Their marriage thereafter was

strained with instability. Amongst others, the children were removed from the plaintiff's care by the children's court and she was even hospitalized for psychiatric observation. He further testified that when he first met the plaintiff that she was employed and remained employed at different intervals in various capacities. Furthermore, that the plaintiff is an educated person having a degree in Psychology, a teachers Diploma and also having studied Tourism.

[16] It was his testimony, that he is desirous of the marriage being terminated as their relationship has broken down irretrievably and that all attempts made to save it, has failed. This marriage and the **deteoriating** state thereof not only has taken a toll on his relationship with his children but is also cumbersome and draining on his mental health, which he as a pilot can ill afford. At present he has had no physical contact with his children for over three years albeit that he complies religiously with the interim maintenance order in terms of Rule 43. He refuted the evidence tendered by the plaintiff that he should be ordered to pay maintenance as requested by the plaintiff in line with the Rule 43 order. He simply cannot afford same from his average monthly income of R76 092 he has deductions of approximately R72 900 which leaves him a residue of ± R4000 which he should use for himself. It was his testimony that their respective estates showed no accrual and given this fact he requested the court not to make an order as sought by the plaintiff. It is on this basis that he requested this court to make an order in line with his Rule 34 tender made on the eve of the hearing.

[17] During cross-examination he refuted the proposition made by the plaintiff as to the figures of the respective values of their assets as reflected in the ante-nuptial contract. He also refuted the allegation by the plaintiff that she never signed the ante-nuptial contract. He also denied being able to afford rehabilitative maintenance in the amount of

R18000 per month as sought by the plaintiff. He confirmed the various allegations of sexual molestation made against him by the plaintiff and even conceded having undergone and pass a lie detector tests on her insistence. Under cross-examination he re-iterated the fact that he had borrowed significant amounts from his father and brother, all of which he is requested to repay at some point in time. He further refuted the plaintiff's allegation that she and the children are living in rags as a substantial amount of his income is spent on maintenance for his minor children.

APPLICABLE LAW

[18] The Divorce Act 70 of 1979 regulates the division of assets, maintenance and forfeiture of benefits on divorce.⁴

[19] In terms of section 7 of the Divorce Act, the court granting a decree of divorce may make an order with regards to the division of assets of the parties, forfeiture of benefits or payments of maintenance by one party to the other.

[20] While a court is not restricted to a consideration of the division of the accrued estate before considering an award for maintenance, it is considered sagacious to deal with the division of the accrued estates before interrogating the claim for permanent maintenance on the basis of fairness and equity with a new of how justice may best achieved between the parties in relation to the means, obligation and needs of the parties and other relevant factors.⁵

[21] Section 3(1) and section 4(1)(a) of the Matrimonial Property Act 88 of 1984 also has application. Section 3(1) provides that at dissolution of

⁴ Section 9 of the Divorce Act 70 of 1979.

⁵ Beaumont v Beaumont 1987 (1) SA 967 (A) at 987; also Archer v Archer 1989 (2) SA 885 (E) at 895.

the marriage subject to the accrual system the spouse whose estate shows a smaller accrual than the estate of the other spouse acquires a claim against the other spouse for an amount equal to half of the difference between the accrual of their respective estates. Section 4(1)(a) of the same Act provides that the accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of the marriage.⁶

[22] It is trite that accrual only takes place after the decree of divorce is granted and is in accordance with the prayers contained in the summons. This also has the effect of buttressing the clean break principle.

[23] Now, it is also well established that the reciprocal duty of support spouses have towards each other when married terminates when a marriage comes to an end. However, section 7(2) of the Divorce Act confers a decree of divorce to make a maintenance order which it finds just having regard to the factors set out in the section.

[24] With regard to maintenance after divorce in the absence of an order made in terms of a written agreement between the parties, the court may having regard to those factors, make an order which it deems just in respect of maintenance by one party to the other for a period until the death or remarriage of the party in whose favour it is given, whichever occurs first. Hence, should the court decide to award maintenance to a

⁶ Section 3 (1) and Section 4 (1)(a) of the Matrimonial Property Act 88 of 1984.

Section 3: Accrual System

(i) At the dissolution of a marriage subject to the accrual system by divorce or by death by one of the spouses the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse or his estate if he is deceased acquires a claim against the estate of the other spouse or his estate for the amount equal to half of the difference between the accrual of the respective estates of the spouses.

Section 4: Accrual of Estate

(1)(a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of the marriage.

spouse, the factors enumerated ultimately determine the amount of maintenance payable.

[25] In addition to the above it is trite that each case must of course be considered on its own merits in light of the factors and circumstances peculiar to it and with regards to those factors set out in section 7(2) of the Divorce Act.

[26] It as a result follows that the determination of the inquiry embodied in terms of section 7(2) has as its purpose the determination of the just award. It requires of a court to ruminate a multiplicity of listed factors embodied in section 7(2) in the determination of firstly, whether maintenance is to be paid.

[27] These factors listed in section 7(2) are not listed in any particular order of importance or relevance. The inquiry a court is called upon to make requires one to go further than merely to determine a just financial need and obligation, existing means and earnings.⁷ The parties future earning capacities, their ages, an order in terms of the Divorce Act for the transfer of assets from one party to the other all relate to the criteria of need of support and ability to pay. It is patent that this section confers on the court a wide discretion which is absolute and the court may have regard to any other factor that in the opinion of the court should be taken into account.

[28] This discretion of the court should be exercised judicially according to established rules of law and practice and in making a determination of maintenance consideration of justice must prevail.

[29] In making a determination on the appropriate amount of maintenance to be paid a court must find a balance between the need for

⁷ B v B 2009 (3) SA 89 (W).

maintenance and the ability to pay maintenance on the other hand. These two factors are generally the predominant considerations.

[30] When it comes to award rehabilitative maintenance the ability to earn an income and support oneself and the potential to earn an income, does not disentitle a court from ordering rehabilitative maintenance.⁸

[31] A plaintiff's claim for maintenance is dependent *inter alia* upon the marital standard of living of the parties prior to the divorce. It is generally recognised that neither party is entitled to maintain the same standard of living as during the marriage and it follows it cannot be expected that after divorce the parties maintain the same standard of living that he/she had as before the termination of the marriage.

[32] As such it follows that they are expected to abate their requirements accordingly and as a result the needs of both parties must be balanced and the available income distributed fairly and equitably.

[33] It must also be borne in mind that the clean break principle after divorce has found resonance with our courts. The aim of this principle has as its basis the aim to ensure that the parties become financially independent of each other as soon as possible after divorce. A court in applying this principle will have due consideration of the particular circumstances of each case and if such circumstances permit.

ANALYSIS OF LAW AND THE FACTS

[34] The marriage between the parties on the evidence presented was acrimonious. The parties were both in agreement that their marriage was beyond salvation. That the marriage was emotionally, psychologically and at times financially abusive to both parties is patent. It however cannot

⁸ Joubert v Joubert [2004] 1 All SA 426 SA (C)

with equal measure be determined with any certainty. Their marriage relationship deteriorated over time resulting in the defendant vacating the matrimonial home during October 2015.

[35] As to the financial strain which was placed on the marriage it was undisputed that since 2009, when the plaintiff last worked that the defendant was the breadwinner of the family and to date that he had been the sole breadwinner of the marriage and was liable for all expenses. The defendant remained gainfully employed throughout and with regards to expenses payments were either deducted from his salary or paid by the defendant himself or by the plaintiff on behalf of the defendant.

[36] From the evidence presented it is clear that the defendant contributed more than 80% of his salary towards the expenses that he was ordered to pay in terms of the Rule 43 order. This evidence was not refuted by the plaintiff. It was also not refuted by the plaintiff, that the defendant since vacating the matrimonial home had been forced to borrow money from his father and his brother which loans both remain unpaid. It was also uncontroverted, that in addition to the medical aid fund contribution being deducted from his salary, that over and above this contribution, he is paying on average R10 000 per month for expenses not covered by the medical aid.

[37] Since the plaintiff seized working the evidence established that she contributed to the running of the household, but that she nevertheless received assistance in the form of various domestic workers and even a garden service for the rented matrimonial home. The evidence reveals that both parties made sacrifices, concessions and contributions consistent with the sanctity of marriage.

[38] The plaintiff was unable to articulate testimony in respect of her maintenance claims and that in respect of her children. Her testimony in this regard was merely to say that she requires R18 000 per month for herself for a period of two years post-divorce. How this amount was computed and whether it in fact constitutes reasonable and necessary monthly expenses for herself, she failed to provide any substantiation for. As per her particulars of claim this amount is less than claimed and in her particulars she certainly did not request rehabilitative maintenance for a period of two years' post-divorce.

[39] What is known and undisputed is that the defendant has complied with the Rule 43 order, whereby she has received maintenance of R12 000 per month for a period of the 6(six) months from date of that order.

[40] In determining an award for rehabilitative maintenance post-divorce as mentioned a court must balance the need to pay as against the ability to pay, and in exercising the wide discretion conferred upon this court with specific reference to the provisions of section 7(2) of the Divorce Act, I find it fair and equitable to order the defendant to pay the plaintiff an amount of R10 000 per month for the next 12 months' post-divorce.

[41] In turning then to the maintenance to be paid in respect of the minor children, the plaintiff again without articulation claims maintenance of R20 000 per month per child. From the evidence this amount as testified to by the defendant is unsustainable, if regard be had to his expenses which he has been paying in terms of the Rule 43 order.⁹ It was his evidence that in addition to these amount he also has his own expenses which brings him to a combined amount of R83 983,68. If one considers his current income of approximately R76 092,12 the defendant it is clear, already has a shortfall with the result that some of these expenses needs to be curtailed.

⁹ Trial Bundle 2. p 55

[42] That having been said, maintenance in respect of children is not just the responsibility of one parent but the responsibility of both. In the present instance the plaintiff is abled bodied, educated and needs to obtain employment. She needs to do so, not only to maintain herself, but also to maintain her minor children.

[43] As per the Rule 34 tender the defendant offered maintenance in a capital some of R6 000 per month per child and I am of the opinion that this amount would serve the best interest of the minor children in so far as their maintenance needs is concerned.

[44] As for the accrual of the respective parties' estates, no evidence in this regard was presented by the plaintiff. As far as the defendant's estate is concerned two notices in terms of section 7 of Act 88 of 1984 was served on the plaintiff. In respect of the first notice¹⁰ dated 2nd May 2019 the defendants' total assets amounted to R 1 081 318,53 and his liabilities to R 1 002 856,42. A further notice¹¹ dated 7 November 2019 depicts the defendant's total assets as R 1 109 526,92 and his liabilities at R 1 096 501,21. On the latest calculation thus, the value of the defendant's estate is R 13 061,71, which shows no accrual.

[45] In the absence of any accrual on either side it follows that no order be made in this respect.

[46] As to the best interest of the minor children and the fact that a lengthy period has lapsed since the defendant last had contact with his minor children and the pending criminal proceedings it will be appropriate under the circumstances to suspend the defendant's parental responsibilities and right, in terms of section 28 of the Children Act.

¹⁰ Trial Bundle – Notices 2 p 103-105.

¹¹ Trial Bundle – Notices 2 p 154-155.

[47] One further aspect requires mentioning during closing argument, the Legal Aid representative appointed on behalf of the children in the children's court proceedings informed this court that these proceedings remain pending and that this court should await progress made in the children's court as same will have an impact of maintenance to be paid. Subsequently, this court was presented with an order whereby the minor children were all removed from the care and custody of the plaintiff and defendant and placed in foster care. Both parties were also afforded supervised contact inclusive of parental guidance and reunification with the minor children.

COSTS

[48] In respect of legal costs to be awarded albeit that the plaintiff was legally represented during the proceedings and only terminated their service on the eve of the hearing given the order to be made by the court, both parties partially succeeded with their respected cases. In these circumstances the most appropriate award in respect of legal costs to be made is to order each party to pay its own costs.

ORDER

[49] In the result the following order is made:

49.1 The bond of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved.

49.2 The defendant is to pay rehabilitative maintenance to the plaintiff in the amount of R 10 000 (Ten Thousand Rand) per month from the first day of the month following the month on which the date of divorce is granted and thereafter on or before the first day of each month for a period of 12 months.

49.3 That the defendant's parental rights as regards care of and contact with the minor children as contemplated in section 18(2)(a) and 18(2)(b) of the Children's Act, be temporarily suspended in terms of section 28 of the Children Act, until such time as the suspension is uplifted by a court of competent jurisdiction.

49.4 The parental responsibilities and rights with regard to the guardianship of the minor children, as contemplated in section 18(2)(c) and 18(3) of the Children Act be retained by both parties equally.

49.5 Both parties shall retain equal parental responsibilities as regards contributing towards the maintenance of the minor children, as contemplated in section 18(2)(d) of the Children's Act.

49.6 The defendant shall contribute towards maintenance of the minor children as follows:

49.6.1 Payment in the amount of R 6000 (Six Thousand Rand) per month per child, payable into the trust account already in existence at Van Bruggen Attorneys payable on or before the first day of each and every month. The first payment shall be made on the first day of the month following the month in which the decree of divorce is granted.

49.6.2 The maintenance amount referred to above shall be increased on the anniversary date of granting of the final decree of divorce by a percentage increase in the weighted average of the Consumer Price Index as published from time to time in the government gazette or any substitute official publication based on the latest statistics available for the 12

month period immediately prior to the anniversary date("CPI").

49.6.3 Notwithstanding, the above each party may approach the Maintenance Court having jurisdiction to entertain an application to increase or decrease the maintenance payable immediately after the granting of the final decree of divorce, without having to prove any change in circumstances.

49.6.4 The defendant is liable for the payment of the minor children's reasonable school fees and agreed extra mural activities.

49.6.5 The defendant will retain the minor children as beneficiaries on his medical aid scheme and will make the benefits available to them.

49.6.6 The parties to each retain the motor vehicles in his/her possession as his/her sole and exclusive property.

49.6.7 It is recorded that neither party own any immovable property.

49.6.8 The parties retain the movable property in his/her possession as his/her sole and exclusive property.

49.6.9 Each party to retain his/her annuities pensions, provident funds, shares investments, life policies and business interest as his/her sole property.

49.6.10 The parties are responsible for his/her own debt.

49.6.11 It is recorded that neither parties' estate has shown any accrual.

49.6.12 Each party is ordered to pay its own legal costs.

C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff	: In Persona
Counsel for the Plaintiff	: In Persona
For the Defendant	: Arthur Channon Attorneys
Counsel for the Defendant	: Adv. C.V Schalkwyk
Date of Hearing	: 24 February 2020, 3 March 2020 31 July 2020, 06 November 2020 & 07 December 2020
Date of Judgment	: 18 January 2021

Judgment transmitted electronically.