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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case number: 712/2015

Date heard: 24 & 25-10-2018

Date delivered: 23-11-2018

In the matter between:-

E L H

PLAINTIFF

and

E H

DEFENDANT

Coram: Groenewaldt, AJ

JUDGMENT

GROENEWALDT AJ

INTRODUCTION

1. This is an action for divorce in which the plaintiff prays for an order incorporating the following terms:

- 1.1 A final decree of divorce.

- 1.2 An order that the defendant renders to the plaintiff an account supported by documentary proof containing full particulars of the value of the defendant's estate in order to determine the difference in the accrual between the parties' respective estates, within twenty days of date of service of the summons.
 - 1.3 Debatement of the aforesaid account.
 - 1.4 Payment to the plaintiff of any amount to which the plaintiff may be entitled in terms of the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984.
 - 1.5 That the defendant be ordered to pay maintenance to the plaintiff in respect of herself at the rate of R16 070 - 00 per month until her death or remarriage, whichever date occurs first.
 - 1.6 Costs of suit.
 - 1.7 Further and/or alternative relief.
2. The defendant filed a counterclaim in which he claims the following relief:
 - 2.1 A decree of divorce.
 - 2.2 Forfeiture of the plaintiff's right to share in the accrual of the estate of the defendant.
 - 2.3 Costs of suit in the event of opposition.
 - 2.4 Further and/or alternative relief.
3. The defendant abandoned his forfeiture of the accrual claim and the parties concurred that the determination of the right to share in the accrual be adjourned for later adjudication. In addition hereto the parties were ad idem that the marriage relationship has broken down irretrievably such that there are no prospects of the restoration of the relationship and that it be dissolved. The only issue which requires determination therefore is whether the plaintiff is entitled to alimony, if so the period and amount thereof.

APPLICATION FORA POSTPONEMENT

4. The matter was previously set down for trial on 8th and 9th of May 2018. On

25 April 2018, the plaintiff's erstwhile attorneys withdrew as attorneys of record. The plaintiff appeared in person on 8 May 2018 requesting postponement of the matter to 24 and 25 October 2018 for hearing and for the purposes of obtaining legal representation. The matter was henceforth postponed.

5. On the day of the trial, the plaintiff moved for another postponement citing the need to appoint a legal aid attorney. She appeared in person to move for the postponement of the matter and was later joined by Mr B Sampson of the Legal Aid Board in Kimberley. He was not prepared to go on record until such time that the plaintiff's application for legal aid had been properly assessed.
6. The plaintiff submitted that she had approached the Legal Aid Board in Kuruman where she resides for legal assistance who then referred her application to their Kimberley branch. Mr B Sampson conveyed to the Court that the plaintiff had only approached the Kuruman Legal Aid Board on 23 October 2018 for assistance. The said application had however not been considered yet. No relief was sought by Mr Sampson.
7. The plaintiff contended that she had suffered a heart ailment recently as well as a lower tract infection and depression. For the latter illnesses (infection and depression), she relied on a note issued by the Kimberley Hospital Complex dated 11 October 2018.
8. The veracity of these illnesses and how it incapacitated the plaintiff, were not expounded upon neither were her conditions used as an excuse for not appointing attorneys timeously.
9. It serves mention that during the course of litigation in this matter, the plaintiff had enlisted the services of three sets of attorneys who at some point in time withdrew as her attorneys of record.
10. She had more than five months to employ attorneys to assist her in this matter and waited a day before the trial before she acted. The only reasonable inference the Court can draw is that she twiddled thumbs to the prejudice of the defendant.
11. A costs order issued against the plaintiff when the matter was postponed at her instance on 8 May 2018, remains unsatisfied. Hence another costs order will not remedy further prejudice the defendant will suffer if the matter is

postponed again.

12. It is trite that a litigant has a constitutional right to have a dispute that can be resolved by the application of law decided in a fair public hearing¹. This includes the right to have the dispute adjudicated upon without delay. Fairness also dictates that due regard should be made to the prejudice a litigant suffers where litigation continues without end. In the end justice delayed is justice denied.
13. After careful consideration of the circumstances of the parties, the issue in dispute and the inordinate delay to date, it would not be in the interest of justice that the matter be delayed further. The plaintiff's request for another indulgence was denied.

FACTUAL MATRIX

14. The parties were married on 22 February 2002 out of community of property with the accrual and that marriage still subsists. The plaintiff testified and painted a dim picture of a marriage between her and the defendant that was not made in heaven. She testified that the parties started experiencing marital tension when the defendant saw fit to engage in an extra marital affair with a certain Joey. The plaintiff forgave the defendant for his infidelity much to her despair as the defendant engaged in another affair thereafter. No children were born out of the marital relationship between the parties.
15. The tension escalated with charges of domestic violence and assault being laid by the parties against each other. The plaintiff came to Court armed with documents to demonstrate a pattern of physical abuse. She however intimated that the defendant was never convicted on any of the charges that were proffered against him. It is not clear whether any of those cases went on trial.
16. In her testimony, the plaintiff intimated that she would be satisfied with maintenance of R5 000 - 00 per month until her death or remarriage although she became accustomed to spending R15 000 - 00 per month during the subsistence of the marriage.
17. The plaintiff revealed the following monthly living expenses to support her

¹ Section 34 of the Constitution of the Republic of South Africa.

claim for maintenance:

Food	-	R 3 000-00
Water and Electricity	-	R 2 000-00
Pharmacy	-	R 1 500- 00
Petrol	-	<u>R 2 000-00</u>
Total expenses	-	<u>R 8 500-00</u>

18. The plaintiff testified that the only income she currently enjoys is a state subsidised pension of R1,600-00 per month and that she further lives off hand-outs from family members. A property she owns on the Wild Coast in an area known to as Umgazana is yielding no income.
19. According to the plaintiff, she erected on the premises of the defendant in Kuruman flats from her own finances and that she derived a monthly income from the rental of those flats. It was due to this business venture that she was able to spend R15 000 - 00 per month during the marriage. On 30 June 2015, the parties entered into an agreement as part of a settlement held in the domestic violence Court in Kuruman in terms whereof the defendant was entitled to the rental income derived from the aforesaid flats.
20. The plaintiff testified that her work experience included nursing, running an antique business in East London and being a secretary to the defendant at SA Crane. She was however dismissed from the secretarial position at the behest of the defendant.
21. According to the plaintiff, she holds a standard seven (grade 9) school qualification. On completion of her standard seven qualification she started nursing though she never qualified for it. After that she ventured into the antique business in East London which she describes as "a successful business". The business came to an abrupt end after the untimely death of her daughter which caused her to sell the lucrative business for next to nothing. She then moved to Kuruman in the Northern Cape where she met the defendant. She lived with the defendant in a love relationship for two years whereafter they married.

22. She testified that she suffers from asthma, hypertension, cholesterol, allergies and suffered a light heart attack a month or so ago.
23. The plaintiff testified that the defendant forbade her to start another antique business in Kuruman. She in any event stressed the view that the economic climate in Kuruman is not conducive to such a business venture.
24. The plaintiff then called her daughter C A S as a witness. She testified how unhappy the plaintiff was in the marriage and that she had to provide her mother with food parcels to sustain herself.
25. The defendant chose not to testify. His attorney merely placed his defence on record by putting it to the plaintiff. He also stated his defence to the allegations of physical abuse by putting it to the plaintiff that she used the assault charges and the domestic violence interdicts as leverage to make his marital life intolerable and unbearable.
26. In an open offer to Court, the defendant's attorney conveyed a proposal from defendant to pay to the plaintiff the sum of R5 000 - 00 per month in the form of rehabilitative maintenance until the immovable property on which the flats are erected and which is registered in the name of the defendant, is sold and the net proceeds thereof are divided equally between the parties. The plaintiff rejected this offer as she insisted that the rental business has a goodwill value for which she must be compensated for.

LEGAL FRAMEWORK

27. The right to claim maintenance post-divorce is regulated by Section 7 of the Divorce Act No 70 of 1979. Sections 7(1) and 7(2) of the Divorce Act declares as follows:

27.1 "(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 the assets of the parties or the payment of maintenance by the one party to the other.

27.2 (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 the existing or prospective means of

each of the parties, their respective earning capacity, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the breakdown of the marriage, an order in terms of section (3) and any other factor which in the opinion of the Court should be taken into account make an order which the Court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur".

28. From the reading of the aforesaid provisions, it is clear that the factors to be considered by a Court are not exhaustive and the Court is enjoined with a wide discretion whether or not to grant maintenance and the period for which maintenance can be granted. This discretion should be exercised judicially and supported by the facts of the matter.
29. The defendant's offer of R5,000-00 per month as a form of rehabilitative maintenance until the immovable property is sold and the net profits thereof are divided between the parties is not sustainable. This Court is unable to predict what the proceeds of the sale of the immovable property would yield and I am therefore not persuaded to grant such an order. It is however trite that a maintenance order in a divorce matter, whether arising from an agreement or from an order of Court, may be rescinded, varied or suspended if there is justification for doing so. There is therefore no reason why any maintenance order I make cannot be revisited or discharged at a later stage if the circumstances changes or warrants it.²
30. I am inclined to accept the plaintiff's evidence that save for her government pension aid she receives no other income nor does she derive an income from the Umgazana property despite the respondent's aspersions that the property is a holiday mecca. In essence, the plaintiff's testimony in this respect was not rebuffed by any evidence to prove the contrary. I therefore find that the plaintiff has a need for maintenance and in light of the

² Richardson v Richardson [2013] JOL 31025 [ECG]in para.18

defendant's offer, that he is in a position to pay the sum of R5 000 - 00 per month. I am also satisfied that the amount of R5 000 - 00 per month that the plaintiff was prepared to accept is adequate to meet her needs.

31. I have taken into account that the plaintiff is 67 years of age and the defendant 53 years old. She has no formal educational qualification and the parties have been married for 16 years. Prior to these years they were living together for 2 years in a love relationship. The plaintiff is in the sunset years of her life and is in frail health. I am satisfied that a maintenance order of R5 000 - 00 per month until her death or remarriage would be a just order.

COSTS

32. As the parties are in agreement that the marriage be dissolved and further that the issues in dispute were limited, I am of the view that no order for costs is justified under the circumstances.

I MAKE THE FOLLOWING ORDER:

1. **THAT THE BONDS OF MARRIAGE SUBSISTING BETWEEN THE PLAINTIFF AND THE DEFENDANT BE AND ARE HEREBY DISSOLVED.**
2. **THAT THE DEFENDANT PAYS TO THE PLAINTIFF MAINTENANCE IN THE SUM OF RS,000-00 PER MONTH UNTIL HER DEATH OR REMARRIAGE WHICHEVER EVENT MAY OCCUR FIRST.**
3. **THAT LEAVE BE GRANTED TO THE PARTIES TO APPROACH THE COURT ON THE SAME PLEADINGS, AMENDED IF AND AS REQUIRED TO ADJUDICATE ON A CLAIM AS ENVISIONED BY SECTION 3 OF THE MATRIMONIAL PROPERTY ACT 88 OF 1984.**
4. **THAT THE DETERMINATION OF PARAGRAPH 3 ABOVE BE POSTPONED SINE DIE.**
5. **NO ORDER AS TO COSTS.**

S J GROENEWALDT
ACTING JUDGE

Northern Cape Division, Kimberley

On behalf of Applicant: In person

On behalf of Respondent: Mr Fletcher (Instructed by Fletchers Attorneys)