<u>IN THE KWAZULU-NATAL HIGH COURT, DURBAN</u>
<u>REPUBLIC OF SOUTH AFRICA</u>

<u>CASE NO: 4948/2009</u>

In the matter between:

K S **Plaintiff**

and

S S **Defendant**

JUDGMENT

Henriques J

<u>Order:</u>

1. That the bonds of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved.

2. That the Defendant pay all the Plaintiff's medical, dental and optical costs reasonably incurred, including all costs of hospitalization, surgical treatments, spectacles, prescribed medication and allied expenses, and to this end that the Plaintiff be retained as a dependant on the Defendant's medical aid benefit scheme and that the Defendant pay the premiums therefor, but that in respect of the Plaintiff's medical expenses, the Plaintiff is directed to pay any medical surcharges and medical excesses

consequent thereon.

3.

3.1 That the property situate at 1020 Kensington, 311 North Ridge Road, Durban ("the property"), be sold by private treaty on terms and conditions acceptable to the Plaintiff and the Defendant;

3.2 That, in the event that the property is not sold by private treaty within sixty days of the date of this order, then the property be sold by public auction, without reserve, and upon such conditions as the Plaintiff and the Defendant shall agree;

3.3 That the expenses incurred in advertising the property for sale by public auction and incurred in the sale by public auction shall be paid from the proceeds of the sale;

3.4 That the nett proceeds from the sale are to be divided equally between the Plaintiff and the Defendant.

4 That the Plaintiff is entitled to one-half of the Defendant's pension interest, determined at the date of divorce, in the Transnet Retirement Fund administered by Metropolitan Retirement Administrators, of which the Defendant is a member with Membership No CFC933R, Employee No 44344.

5. That the Managers of the Transnet Retirement Fund are directed to:

5.1 endorse the records of the said fund and to reflect the Plaintiff's entitlement as aforesaid;

5.2 pay to the Plaintiff any accrual of interest thereon as provided for in Section 37D(i)(e)(v) of the Pension Funds Act No 24 of 1956 ("the Act") as amended;

5.3 pay to the Plaintiff within a period of sixty days of the date of the Plaintiff exercising an election either to be paid the said funds directly or that the said funds be transferred to an approved pension fund on her behalf, on receipt of this order, as provided for in Section 37D(i)(e)(v) of the Act.

6. Each party is directed to pay his or her own costs of suit, including the costs occasioned by the Rule 43 application, which costs are limited to those allowed by Rule 43 (7) and 43 (8).

7. That the Registrar of this court is to transmit a copy of this Order and the judgment to the defendant via email at Captsen@telkomsa.net and Sanjoy.Sen@transnet.net.

Introduction

1. This is a divorce action, in which the plaintiff seeks inter alia the relief set out in the *Draft Order Prayed*, annexed as “A”.

2. The defendant terminated the mandate of his legal representatives and indicated that he would conduct his own defence. This was after an application for a further adjournment was refused by the Judge President at trial roll call.

3. Before the trial commenced, I was advised by Mr M Naidoo, who appeared for the Plaintiff, and Mr Govender, who had represented the defendant, that the parties had narrowed some of the issues in the divorce action and that the only issues to be determined were:

   3.1 the plaintiff’s right to maintenance in the sum of R5000.00 per month until her death or remarriage;

   3.2 the plaintiff’s right to be retained on the defendant’s medical aid scheme and the payment by the defendant of any excesses not covered by his medical aid scheme.

4. At a pre-trial conference the parties had settled the issues relating to the endorsement in the records of the defendant’s pension fund, and the sale of the immovable property. In addition, the defendant had abandoned his counter-claim for a forfeiture of benefits by the Plaintiff. This was formally recorded in the minutes of the pre-trial conference held and is reflected in Exhibit “D”.

5. During the course of the trial the defendant was provided with an opportunity to again secure legal representation and with a sufficient opportunity to have access to any documentation that he wanted to use and

which was of relevance to the issues in the trial. The matter stood down on several occasions and also ran over two days for this purpose.

The issues for determination

6. At issue before me is:

6.1 whether the marriage has irretrievably broken down;

6.2 the circumstances leading to the breakdown of the marriage;

6.3 whether the plaintiff is entitled to maintenance in the sum of R5000.00 for the remainder of her life or until she remarries;

6.4 whether the defendant ought to retain the plaintiff as a dependant on his medical aid and pay any excess not covered by his medical aid.

The Evidence

7. The plaintiff testified that she married the defendant in a religious ceremony in Kolkata, India on 8 December 1978, the civil ceremony having occurred on 14 July 1978. The parties have been married for approximately 34 years and they have two sons.

8. She testified further that she did not have a happy marriage as, in India, the defendant abused alcohol and abused her physically. She had left the marital home on two occasions and lived with her parents. Their parents intervened and mediated a settlement between them and she returned to the matrimonial home on the understanding that alcohol would not be kept in their home.

9. Whilst in India the marriage seemed to work. They arrived in South Africa during December 1994 and lived in Brickfield Road in Durban. In March 1995, they purchased the matrimonial home, being the flat in North Ridge

Road, Durban. She secured employment and would travel to India frequently to visit her family.

10. Whilst in South Africa, she testified that the defendant would belittle her, abused alcohol, and would be verbally and physically abusive towards her. He was not a supportive husband at all and would blame her for the abuse he inflicted upon her.

11. At the end of 2007 she visited her family in India and made a decision to finally leave the defendant. She did not have access to her bank account or any money that she earned. She would give her paycheque to the defendant.

12. As indicated earlier, she had travelled to India on a number of occasions prior to this and on some of these occasions she was accompanied by the Defendant's aged mother. She testified that she looked after his mother and cared for her whilst she was alive and she lived with them until she was no longer able to care for her.

13. On her return to South Africa in early 2008, she lived with friends for a while and in March 2008 she took occupation of a "bachelor" flat, and has lived apart from the Defendant continuously since then.

14. The Defendant testified that the breakdown in their marriage was due to the fact that the Plaintiff had engaged in an extra marital affair with her former employer. He testified that her trips to India were to visit her family and her new partner. He also testified that the Plaintiff not only lived with her new partner in India, but he also visited her in South Africa and would stay with her.

15. The Plaintiff denied the accusations of being involved in an extra marital affair and reiterated that the Defendant was the cause of the breakdown of the marriage. She did not, however, dispute receipt of a letter sent to her by the defendant's former attorney's regarding the relationship. She testified that she handed the letter to her attorney for him to deal with. The Defendant's evidence that she was engaged in a relationship and that their

respective families knew of this was not disputed. From the pleadings it is clear that the Plaintiff is involved in a relationship, the only issue in dispute relates to when the relationship commenced.

16. The Plaintiff confirmed that she had expended huge sums of money to cover legal fees which she says were necessitated by the previous adjournments of the matter. She testified that she had no investments and no insurance policies from which to derive an income and that, when she retires from her current employment, she would not receive a pension. She confirmed that the Defendant is in receipt of a bonus incentive from his employers and that he will receive a pension on retirement. She also said that their eldest son lives with the Defendant and that the Defendant supports him. She did not dispute the Defendant's evidence that their son is mentally "challenged" with the consequence that he cannot take care of himself financially. She did not dispute that the Defendant takes care of their son's financial needs and receives no contribution from her.

17. The Plaintiff testified that her monthly income was the sum of R10 192.50, that her monthly expenses totalled the sum of R15 192.50, and that consequently there is a shortfall of R5 000.00 per month. The Defendant challenged the Plaintiff's list of expenses and indicated which items, in his view, were not necessities, but instead were luxurious.

18. The Defendant also provided details of his income and expenditure. His evidence that he supports their mentally "challenged" son financially was not disputed, nor was it disputed that he paid for the Plaintiff's overseas trips and that the incentive bonus was used to settle any debts which they had incurred and to enable them to travel to India to visit their families.

19. The Plaintiff did not dispute that she owns property in India, but disputed that she derived an income therefrom. The affidavit filed in support of her Rule 43 application confirms she derived rental income until September

2008.

Has the marriage irretrievably broken down?

20. Section 3, of the Divorce Act, 70 of 1979 ("the Divorce Act") provides for a court to dissolve a marriage where there has been an irretrievable breakdown of the marriage as contemplated in Section 4 of the Divorce Act. Section 4 of the Divorce Act provides that the Court must be satisfied that the marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

21. Among the factors which are indicative of the irretrievable breakdown of a marriage are that the parties have not lived together as husband and wife for a continuous period of at least 1year prior to the institution of the divorce action[1].

22. It would appear from the evidence that the marriage relationship between the parties has irretrievably broken down and that there is no prospect of the restoration of a normal marriage relationship between them. The parties have lived apart for a considerable period of time.

23. The reasons for such breakdown become relevant to the issue of the defendant's obligation to pay maintenance to the plaintiff.

Maintenance

24. On divorce the reciprocal duty of support between spouses terminates.

25. Section 7(2) of the Divorce Act provides:

> '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,

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1 Section 4(2) (a)

their respective earning capacities, 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 insofar as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factors 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 re-marriage of the party in whose favour the order is given, whichever event may first occur.'

26. A party claiming maintenance must establish a need to be supported and the duration for which such support is required.

27. The Plaintiff has been employed since 1995. Since 2007, she has lived on her own and, it appears, has managed to support herself from her income.

28. The Defendant has maintained the payments on the mortgage bond in respect of the matrimonial property and the levies charged thereon. He has also financially supported their son without any contribution from the Plaintiff.

29. The Plaintiff will continue to work after the divorce and on retirement will not receive a pension. She will however, on divorce, receive half the Defendant's pension interest immediately. In addition to her salary, she receives an annual bonus. Whilst the Plaintiff does not have a pension interest of her own, she does own life and retirement annuity policies.

30. Our Courts have also given recognition to the "clean break" principle in considering matters of maintenance and the division of a joint estate – ultimately it depends on the facts of a case and the Court's assessment of what would be just[2].

31. The Plaintiff seeks maintenance for the rest of her life she and relies on the defendant's treatment of her throughout their marriage and his financial position for such claim.

32. It would appear that our Courts have considered that "permanent maintenance" is reserved for a woman who is considered "elderly", "unlikely

to remarry" and who is "too old to earn her own living"[3].

33. Despite the duration of a marriage, Courts do not readily award maintenance where a party claiming such is capable of working after divorce[4].

34. In determining whether to grant the Plaintiff maintenance until her death or remarriage, the following must be considered:

34.1. the parties have lived apart continuously since December 2007;

34.2 the Plaintiff is engaged in an extra marital relationship since at the very least the end of 2008;

34.3 the Plaintiff is employed and self-supporting and appears to have been self-supporting during the marriage;

34.4 the Defendant supports and financially maintains their son;

34.5 both parties will suffer hardship once the divorce is granted;

34.6 the Plaintiff will have access to some capital resources once the matrimonial property has been sold and on divorce is entitled to half the Plaintiff's pension – payment of which will occur once the divorce order is granted and the necessary claim documents submitted;

34.7 both parties have incurred debt to fund their legal expenses;

34.8 the parties own immovable property in India from which income can be derived;

34.9 the parties do not appear to have enjoyed a lavish lifestyle apart from the overseas trips to India which were paid for by the Defendant;

34.10 given the Plaintiff's age and her pre-existing medical condition she may have difficulty in obtaining medical aid of her own;

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2 1987 (1) SA 967 (A)

3 *Grasso v Grasso* 1987 (1) SA 48 (C) at 57 H-I

4 *Kroon v Kroon* 1986 (4) SA 616 (E) at 632 G

34.11 the Plaintiff obtained an interim maintenance Order on 7 September 2009, but did not seek to enforce same.

35. I align myself with the remarks of Satchwell J in *Botha v Botha*[5] **where it was held that one is required to go further than "financial and need" and 'existing means' and " earning capacities" to do justice between the parties.**

36. This approach is also in keeping with the "clean break" principle and that adopted by the Full Bench of this division in the matter of *Venter v Venter*[6]**.**

Given the facts of this matter, I am of the view that to do justice between the parties no order in respect of maintenance for the Plaintiff must be made against the Defendant.

Costs

37. In so far as the costs of a divorce action are concerned, Section 10 of the Divorce Act is apposite. It provides that "… [i]n 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 in so far 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".

38. The question of costs is a matter which falls largely within the discretion of a Court based on the facts of each matter. The general rule is that costs follow the result. The costs which have to be determined are the costs of the action and the Rule 43 application.

5 2009 (3) SA 89 (WUD) @ 98 G-H
6 AR 561/09 delivered on 2 September 2011 (NPD).

Costs of the action

39. The matter was initially enrolled for trial on 26 October 2011. It was adjourned to 28 October 2011 and the Defendant was directed to pay the wasted costs of the adjournment on an attorney and client scale. On 28 October 2011, the trial was adjourned *sine die* with no order as to costs. That then leaves the costs occasioned on 22 and 23 October 2012. I am of the view that the Defendant was entitled to oppose the Plaintiff's claim for maintenance until death or remarriage. Give this, and considering section 10 of the Divorce Act, I am of the view that a just order would be to direct that each party bear her or his own costs insofar as the trial is concerned.

Cost of the Rule 43 application

40. Insofar as the costs of the Rule 43 application are concerned, on 7 September 2009, *Mokgohloa* J reserved the costs for decision of the trial court as is the practice. Despite the fact that the Defendant opposed the Rule 43 application, when the matter came before *Mokgohloa* J, there was no appearance by the Defendant and an Order was granted in terms of the relief sought by the Plaintiff.

41. I was advised by Mr Sichel, that despite the issue of the Order, the defendant has not complied therewith and the plaintiff has not sought to execute upon that order. This is due to the fact that a dispute arose regarding whether the Defendant received service of the notice of set down of the rule 43 application.

42. The costs of the rule 43 application are regulated by the tariff as I am of the view that the provisions of rule 43(7) and 43 (8) ought to apply. That would limit those costs. Consequently, a just order would be to also direct that each party bear his or her own costs occasioned by the rule 43 application.
In the result the orders I make are the following:-

1. That the bonds of marriage subsisting between the plaintiff and the

defendant be and are hereby dissolved.

2. That the Defendant pay all the Plaintiff's medical, dental and optical costs reasonably incurred, including all costs of hospitalization, surgical treatments, spectacles, prescribed medication and allied expenses, and to this end that the Plaintiff be retained as a dependant on the Defendant's medical aid benefit scheme and that the Defendant pay the premiums therefor, but that in respect of the Plaintiff's medical expenses, the Plaintiff is directed to pay any medical surcharges and medical excesses consequent thereon.

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3.2 That, in the event that the property is not sold by private treaty within sixty days of the date of this order, then the property be sold by public auction, without reserve, and upon such conditions as the Plaintiff and the Defendant shall agree;

3.3 That the expenses incurred in advertising the property for sale by public auction and incurred in the sale by public auction shall be paid from the proceeds of the sale;

3.4 That the nett proceeds from the sale are to be divided equally between the Plaintiff and the Defendant.

4 That the Plaintiff is entitled to one-half of the Defendant's pension interest, determined at the date of divorce, in the Transnet Retirement Fund administered by Metropolitan Retirement Administrators, of which the Defendant is a member with Membership No CFC933R, Employee No 44344.

5. That the Managers of the Transnet Retirement Fund are directed to:

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6. Each party is directed to pay his or her own costs of suit, including the costs occasioned by the Rule 43 application, which costs are limited to those allowed by Rule 43 (7) and 43 (8).

7. That the Registrar of this court is to transmit a copy of this Order and the judgment to the defendant via email at Captsen@telkomsa.net and Sanjoy.Sen@transnet.net.

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HENRIQUES J

DATE OF HEARING:	22 & 23 OCTOBER 2012
DATE OF JUDGMENT:	21 DECEMBER 2012
PLAINTIFF'S ATTORNEYS:	RETHA MEIRING ATTORNEYS 8 ON EIGHTH AVENUE MORNINGSIDE DURBAN
PLAINTIFF'S COUNSEL	R SICHEL
DEFENDANT:	IN PERSON