IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: **A284/2018**

In the Appeal between:

L M Appellant

and

E M Respondent

CORAM: MOLITSOANE, J, POHL, AJ *et* MOENG, AJ

HEARD ON: 05 AUGUST 2019

JUDGMENT BY: POHL, AJ

DELIVERED ON: 08 AUGUST 2019

INTRODUCTION:

[1] This is an appeal and a cross appeal to the full bench from a single Judge of this division in a divorce matter.

[2] There was also an unopposed application for condonation by the Appellant for

the late filing of his heads of argument and the late filing of the Court a quo's judgment. The said condonation was granted by this Court at the outset of the argument of this appeal..

[3] The Appellant, Mr Maree, was represented herein by Advocate Heymans and the Respondent, Mrs Maree, was represented herein by Advocate Van Aswegen.

THE COURT A QUO'S ORDER:

[4] The Court a quo's order dated 30 July 2018, reads as follows:

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

2. That the Defendant to pay rehabilitative maintenance to the plaintiff in the amount of R8000 (Eight 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 following month for a period of 24 months.

3. That the defendant to retain the plaintiff on his medical aid and shall be responsible for all medical, dental and ophthalmic expenses reasonably incurred by plaintiff, such to include but not limited to, all costs of hospitalization surgical treatment, spectacles, contact lenses, prescribed medication and allied expenses for a period of 24 months from date of decree of divorce.

4. That the plaintiff to ensure that all chronic medication be registered as such under the applicable medical aid scheme.

5. That the plaintiff is entitled to 50% of the defendant's pension interest, calculated at date of divorce.

6. That the defendant is ordered to ensure that that an endorsement is made in terms of section 7(8) of the Divorce Act of 1979 in the records of the defendant's Pension Fund to the effect that the plaintiff is entitled to half of the pension interest of the defendant as at date of divorce.

7. That the Pension Fund that the defendant belongs to is ordered to make payment to the Plaintiff of 50% of the defendant's pension interest calculated in accordance with the rules of the Fund, as at date of the decree of divorce, being 30 July 2018.

8. That the plaintiff is entitled to 50% of the accrued estate of the defendant as per the marital contract (ANC with accrual), inclusive of but not limited to the matrimonial home, policies and annuities.

9. That the plaintiff's claims insofar as they do not accord with what is contained in this order, is dismissed.

10. That the defendant's counterclaim insofar as it does not accord with what is contained in this order, is dismissed.

11. Each party to pay their own costs."

THE ISSUES ON APPEAL:

[5] Although, *ex facie* the appellant's notice of appeal and the heads of argument filed on behalf of the appellant, a number of the paragraphs of the Court a quo's order referred to in paragraph 4, supra were attacked, Mr Heymans however confined the appellant's appeal, at the hearing of the appeal, to an attack on paragraphs 2, 3 and 8 of the said Court Order. He also opposed the cross appeal on behalf of the appellant.

[6] The counter appeal by the respondent, was an attack on the order as to costs as contained in paragraph 11 of the Court a *quo's* judgment. In essence, the submission on behalf of the Respondent was that the Court a qua should have ordered the appellant to pay the costs of the divorce action.

A COURT OF APPEAL'S APPROACH:

[7] Before I deal with certain of the factual issues and submissions, made on behalf of the parties, I deem it necessary to deal with the principles which should guide an Appellate Court in an appeal such as the present. The decision, that to my mind, remains the *locus classicus* in this regard, is **REX vs DHLUMAYO AND ANOTHER, 1948 (2) SA 677 (A).** At page 705 to 706 the following crisp summary appears:

"1. An appellant is entitled as of right to a rehearing, but with the limitations imposed by these principles; this right is a matter of law and must not be made illusory.

2. Those principles are in the main matters of common sense, flexible and such as not to hamper the appellate court in doing justice in the particular

case before it.

3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.

6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.

7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.

8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

9. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.

12. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-

embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.

13. Where the appellate court is constrained to decide the case purely on the record, the question of *onus* becomes all- important, whether in a civil or criminal case.

14. Subject to the difference as to *onus,* the same general principles will guide an appellate court both in civil and criminal cases.

15. In order to succeed, the appellant has not to satisfy an appellate court that there has been 'some miscarriage of justice or violation of some principle of law or procedure"'

[8] The evidence adduced at the trial, the submissions of counsel and the judgment of the Court a quo will thus be evaluated by this Court with the abovementioned principals in the **Dhlumayo-** decision in mind.

THE ISSUES OF MAINTENANCE AND MEDICAL AID:

[9] When dealing with the issue of maintenance, it is first of all necessary to have regard to Section 7(1) and (2) of the **Divorce Act,** Act 70 of 1979, which reads as follows:

"7 **Division of assets and maintenance of parties**

(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.

(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 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 in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (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."

[10] As is clear from the Court order, the Appellant was ordered to pay rehabilitative or bridging maintenance of R8 000.00, for a period of 24 months. It is important to have regard to the fact that the appellant in evidence conceded in cross examination that the respondent is entitled to bridging maintenance after the divorce, because, the rule 43 interim order of R6 500.00 would fall away and she is not employed and has no other source of income.

[11] Mr Heymans who acted for the Appellant, submitted that the Court a qua erred to order the said bridging maintenance for a fixed period of 24 months. His argument in essence was that when the respondent receives her portion of the appellant's pension fund and/ or her portion of the accrual in his estate, her need for maintenance will fall away and the respondent would then be unduly benefitted. He thus submitted that the maintenance order should have been crafted in such a way that the obligation to pay maintenance will fall away upon receipt of the pension monies and/or the portion of the accrued estate.

[12] I do not agree with these submissions. It is clear that Section 7(2) of the **Divorce Act,** gives the Court a wide discretion. The Court a quo clearly took all relevant factors into account in the exercise of her discretion. She, *inter alia,* took into account that the marriage between the parties lasted for over 23 years. the fact that the plaintiff, given her age would be in a position to obtain employment in future, the concession of the appellant as to the bridging maintenance, the parties' existing means and financial needs. The Court a quo made this order, well knowing that the respondent would be entitled to a portion of the appellant's pension monies and a portion in his accrued estate. Within that context. she exercised her discression to limit the duration of the maintenance order to 24 months.

[13] On the maintenance issue, I cannot find that the Court a *quo* exercised its discretion wrongly, capriciously or based on any wrong principle or factual position. (See also: **Grasso v Grasso,** 1987 (1) SA 48 Cat page 52 E-H.) The Court a quo thus made an unbiased decision on the issue at hand and thus acted for substantial reasons. In any event, should there be a material and substantive change in the

factual circumstances of the parties in future, they could, if so advised, approach the maintenance Court for the appropriate relief.

[14] As indicated in paragraph 4, *supra.* the Court a *quo* also ordered the appellant to keep the respondent on his medical aid scheme and ruled that the appellant remains responsible for the respondent's medical, dental and ophthalmic expenses reasonably occurred for a period of 24 months from date of divorce.

[15] Mr Heymans submitted that the evidence suggests that during the subsistence of the marriage, the respondent abused the medical aid and in the process incurred unnecessary expenses in this regard. His argument was further that the respondent did not adduce any expert evidence that she suffered from any particular medical condition, which may have necessitated the order the Court a *quo* made. He thus submitted that the Court a *quo* should have curbed the respondent's ability to spend so much on medical expenses and that the Court a *quo's* order should therefore be interfered with and altered to achieve same.

[16] Although, generally, a maintenance order may, and sometimes do, include and encompass an order as to the recipient's need to be retained on the medical aid scheme, there is in principal no problem if a Court, in its discression, separates the two, as the Court *a quo* did in this instance.

[17] It matters not that the respondent did not adduce any expert evidence as to any particular medical condition she may suffer from. It is clear from the evidence, which the Court *a quo* correctly accepted, that the respondent is a lady of over 50 years of age, who previously had some medical problems, which included brain surgery and who is unemployed. She is therefore not in a position to afford her own medical aid scheme and has no other means. The Court *a quo* however accepted that she may be able to secure a job in the future which would enable her to maintain herself, including her medical needs. In the premises the Court *a quo* exercised its discretion to order the appellant to keep her on his medical aid scheme, but for a limited period of 24 months. The order furthermore clearly stipulates that the appellant is only liable for the expenses "reasonably incurred".

[18] In the premises I am satisfied that the Court a *quo* also exercised its discretion correctly in this regard, as is the case and for the same reasons as set out in paragraph [13], *supra.*

THE PROPORTION OF THE ACCRUAL:

[19] Mr Heymans submitted that the Court a *quo* erred in ordering that the respondent is entitled to 50°/o of the appellant's accrued estate. He submitted that given the particular circumstances and facts of this case, the order should have been that the respondent is only entitled to 20o/o or 25%, of the appellant's accrued estate.

[20] Section 9(1) of the **Divorce Act,** act 70 of 1979, provides as follows:

> "9 **Forfeiture of patrimonial benefits of marriage**
>
> (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

[21] In essence Mr Heymans submitted that the evidence shows that the respondent had an extra marital "affair" and that the "affair" constituted "substantial misconduct" within the context of Section 9(1) of Act 70 of 1979. His argument then entailed that such misconduct, would lead to the respondent being unduly benefited, unless she forfeits the difference between 50% and the 20°/o to 25°/o suggested by him.

[22] I disagree with these contentions of Mr Heymans. The evidence presented in the Court a *quo* also shows that the appellant had a similar extra marital "affair". I do not think that the evidence suggests that any of the extra marital relationships which any of the parties may have had constitutes 11affairs" in the true sense of the word. To my mind, even if accepted, they constitute no more than neutral factors. I agree

with Mr Van Aswegen's submission that the duration of the marriage, being 23 years in this case, forms the dominant factor in determining whether there should be forfeiture or not. The longer the marriage, the more likely it is that the benefit will be due and proportionate and conversely, the shorter the marriage the more likely the benefit will be undue and disproportionate. If this proportionality test is applied to this marriage of 23 years, it is clear that the benefit of the accrual was and is due to the respondent, as the Court a *quo* correctly ordered.

THE COUNTER APPEAL:

[23] The counter appeal is levelled at the Court a *quo's* order as to costs. The respondent prays: 1) That the appellant's appeal be dismissed with costs; and 2) That the respondents counter appeal be upheld with costs and that the Court a *quo's* order be substituted with the following: "The defendant is ordered to pay the plaintiff's costs."

[24] Section 10 of the **Divorce Act,** Act 70 of 1979, reads as follows:

> "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 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."

[25] In essence, Mr Van Aswegen submitted that the respondent was substantially successful with her claim for maintenance and her resistance to the appellant's claim for forfeiture. He thus submitted that the Court a *quo* should have exercised its discretion in favour of the respondent and ordered the appellant to pay the respondents costs of suit.

[26] I am not persuaded by Mr Van Aswegen's submissions. It is clear that the Court exercised its discretion properly. The Court took all the relevant factors into account, such as the fact that the irretrievable breakdown of the marriage was never an issue, the fact that the relative success of the respondent does not necessarily mean she is entitled to a cost order in her favour, the individual means of the parties.

Based on that, she ordered that each party should pay their own costs. I cannot fault her reasoning and I find that on this aspect too, she exercised her discretion properly.

[27] In the premises, I have come to the conclusion that the following orders should be made in respect of the appeal and the counter appeal:

ORDER:

[28] 1. The appeal is dismissed.

2. The counter appeal is dismissed.

3. Each party to pay their own costs in respect of both the appeal and the counter appeal.

_____

L. LE R. POHL, AJ

I concur,

_____

P.E. MOLITSOANE, J

I concur,

_____

L.B.J. MOENG, AJ

On behalf of appellant: Adv. P. J. Heymans
Instructed by:
N. C. Oosthuizen
EG Cooper Majiedt Inc.
BLOEMFONTEIN

On behalf of the respondent: Adv. W. A. Van Aswegen
Instructed by:

G. H. Bradshaw
McIntyre & Van der Post
BLOEMFONTEIN