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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO/~~YES~~
(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3) REVISED.

CASE No: 49307/2017

16/7/2019

In the matter between:

C[....] V[....]

PLAINTIFF

and

W[....] J[....] V[....]

DEFENDANT

JUDGMENT

MTATI AJ

Background

1. The Plaintiff and the Defendant were married to each other on 27 March 2009 out of community of property with the exclusion of the accrual system. 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. There are other reliefs sought by the Plaintiff and those are dealt with fully further below. Prior to this marriage the parties were married to each other previously in 1997 which marriage was dissolved in 2003. One child

was born out of the initial marriage which child has since attained the age of majority.

2. The Plaintiff seeks other maintenance related costs from the Defendant which can be summarised as being the following:
 - 2.1. Payment of maintenance in the amount of R30 000.00 per month payable on or before the 25th day of every month, which amount shall escalate by 10% per annum until she remarries;
 - 2.2. That Defendant retains her as a dependant on his medical aid scheme similar to Discovery Classic Comprehensive Plan and be responsible for all medical costs not covered by the medical aid until she remarries;
 - 2.3. Payment of resettlement costs constituted as follows:
 - 2.3.1. The purchasing of an immovable property of the Plaintiff's choice for an amount of no less than R3,000,000.00 excluding transfer costs;
 - 2.3.2. Furniture, curtains, linen, household appliances and goods of the Plaintiff's choice for an amount of no less than R500,000.00 within 30 calendar days from date of divorce;
 - 2.3.3. Purchasing a motor vehicle of the Plaintiff's choice for an amount of R450, 000.00 excluding licensing and registration and that same be registered in the Plaintiff's name within 30 calendar days from the date of divorce.
3. This matter was initially set down for trial on 23 May 2018 and on 19 April 2018 the Plaintiff amended her particulars of claim by inserting a claim for maintenance of the major child which later necessitated a postponement. On 23 May 2018 the parties agreed that the trial be postponed *sine die* and that costs be reserved. The maintenance claim of the major child was abandoned at the pre-trial conference held on 15 May 2019. I do not intend to burden this judgment with details of those claims since they do not form part of my ultimate conclusions.
4. On the first day of the hearing of this matter, namely 28 May 2019, the Plaintiff indicated that she seeks to amend her resettlement costs claim by reducing same to R1, 000,000.00 in respect of relocation and furniture. This amendment was not confronted with an opposition and the Court consequently granted the

relief sought.

Issues for determination

5. The issues that remained for determination are therefore the following:
 - 5.1. Whether the Plaintiff is entitled to maintenance, and if so, the amount and duration thereof;
 - 5.2. If Plaintiff is entitled to resettlement costs of R1,000,000.00 as per amended claim; and
 - 5.3. Which party should bear the costs of the proceedings.

6. It is not my intention to navigate the testimony of the parties in minute detail on the causes that led to the irretrievable breakdown of their marriage except where necessary. The parties are in agreement that their marriage has broken down irretrievably. What also emerged during the evidence is that not one of the parties can be solely blamed for the reasons of the breakdown of the marriage. That being the case, I shall commence by determining an entitlement of the Plaintiff to receive maintenance and the duration thereof.

Maintenance and duration

7. The parties appear, through their testimony, to have lived a comfortable life and each was assisting the other when a need arose. Defendant clearly had an increased capacity to receive earnings in comparison to the Plaintiff.

8. The Plaintiff possesses a secretarial qualification but through her intelligence and hard work moved up through the grids and joined the information technology (IT) sector where she did IT support. She moved up the ranks until where, before her resignation in 2007, earned herself a salary in the region of R44, 000.00 per month upwards. This amount was argued to be around R51, 000.00 per month and the Plaintiff did not deny this except to say that she could not remember. It is worth noting that, whilst this was before the commencement of the second marriage, she was already then staying with the Defendant. The reason for her resignation in her testimony was as a result of long working hours which caused

a strain in her relationship with the Defendant and availability at home for the children. The Defendant, on the other hand, disputed the reason for the resignation attributing same to the continued travel between Johannesburg and Pretoria which frustrated the Plaintiff. Nothing turns on this in my view.

9. Before her resignation the Plaintiff successfully attended training under the auspices of the Estate Agency Board to obtain a qualification as an Estate Agent. This qualification would have enabled her to provide and receive opportunities from the Defendant who is in the legal profession. After obtaining her qualification as an Estate Agent, the Defendant resigned his membership from one of his companies, namely, [...] Real Estates CC, and handed over the full ownership to the Plaintiff. This act would have enabled the Plaintiff to run and own her own company. The Plaintiff testified that the Defendant helped her a lot in establishing her estate agency business by making referrals to her, introducing her to Bond Choice and generally marketing her business.
10. It is not in dispute that the Defendant supported the Plaintiff financially as well at the commencement and during the operation of the estate agency business. This appear to have been the case until the marital problems between the parties commenced or even worsened. The Plaintiff also joined [...] where she worked for a period of approximately 6 months. This business also ran as an estate agency and there the Plaintiff rented one house out of which she received commission. She also received commission for one referral for a purchase.
11. Whilst at [...], she met a lady who was running a promotional company. She joined this lady and there worked together for some three to four months. They would apparently share proceeds of the business they generated equally. This led the Plaintiff to establish her own company called [...] Promotions. The Defendant once again was supporting the marketing of this business and assisting in obtaining clients for the Plaintiff. In fact, the Defendant's firm of Attorneys was one of the clients for the Plaintiff's business.
12. The Plaintiff also worked for the Defendant there earning a management fee for his private portfolio. The Plaintiff received a management fee for Willie [...] Family Trust as well as for Udumo Trading (Pty) Ltd.
13. According to the Plaintiff's evidence, business took a toll on her and due to lack of sufficient manpower she started losing support. Another contact of hers left

South Africa and she also lost the Defendant's firm as a client because of complaints on deliverables. The Plaintiff demonstrated that she lost quiet a lot in the business from the year 2018 compared to previous years.

14. She was cross examined extensively about the losses. It however remains my view that notwithstanding some gaps in her evidence, she still verified that she suffered some losses. For example, the Plaintiff was asked about differences in income between financial records that were later produced in Court with a variance of some R400 000.00. To this the Plaintiff testified that the difference could have been caused by rental income she received. I was not entirely convinced by this explanation especially as a result of the effort that it took the Defendant's team to extract same during the pleadings stage.
15. I have however already indicated that I am of the view that there has indeed been a reduced income received by the Plaintiff in the recent past.
16. The Plaintiff is currently employed by One Chain Capital where she earns an amount of R10 000.00 per month. It appears, through the testimony of Mr Van Eck (Plaintiff's employer), that there are some prospects for the Plaintiff progressing in her current employment. The progression is however dependant on the Plaintiff taking some efforts in developing herself at her own cost as the company will not pay for her training. This would require some form of additional income for the Plaintiff if she were to pursue her career further. The progression that was referred to can also only improve the Plaintiff's financial situation by some R5000.00 and nothing substantially more.
17. The Plaintiff also conceded that she makes approximately R2 281.29 per month in respect of [...] Promotions. Importantly, the Plaintiff appears to be running this business during her own time and often after hours. This becomes important in determining prospects of improved income in the future.
18. The evidence of Mr Van Eck was further that they have been fairly flexible in accommodating the Plaintiff in running her business for 4 Zyl Promotions. Whilst Mr Van Eck may have been compassionate to the Plaintiff, I do not think the level of benevolence should play any factor in determining availability of the Plaintiff to promote her business since the actual working time as testified is approximately eight hours. In other words, not a lot can be made about that portion of Mr Van Eck's evidence although it remains relevant.

19. Another witness that was called in relation to employment prospects of the Plaintiff was Mr Ben Moodie. He testified that the Plaintiff has reached her occupational ceiling with One Chain Capital. His evidence is in direct contrast with that of the Plaintiff's direct employer, Mr Van Eck. His evidence is not of great assistance to me as I am in possession of direct and relevant evidence of Mr Van Eck and I shall consider his evidence in coming to what I believe should be an order of this Court.
20. It was the Plaintiff's own testimony that the [...] Promotions was doing well when she had all the time to herself and when there was sufficient business for the company. It is of importance to note that the promotional business has little or nothing to do with manufacturing but the Plaintiff acts more as a "middle-man" earning income through the sale of promotional items. The question to me is whether marketing of the business itself can be done after hours. The Defendant testified, which testimony was not disputed, that the Plaintiff worked long hours on her business at home. The Defendant believes that the Plaintiff can proficiently pursue the [...] Promotions business whilst employed by One Chain Capital. Whilst this may be so, there clearly will be a concomitant cost attached to the business whilst the Plaintiff is employed by One Chain Capital.
21. The Plaintiff was cross-examined on her re-settlement claim of R1 000 000.00 and she explained the amount by stating that she will settle her bond in the region of R400 000.00 and pay for the balance of her motor vehicle which was estimated to be at R100 000.00 at the time of trial. Lastly, she also explained that she will buy some furniture for her new abode. On being confronted with an offer made by the Defendant that he will contribute an amount of R400 000.00 for the settlement of her bond, a further amount of R100 000.00 towards the settlement costs on her vehicle and lastly, that Defendant will share furniture with her, there was, at least in the Court's mind, no further justification for the claim of R1 000 000.00. I say this because she can always go back to her townhouse which will be bond free.
22. Cross-examination then continued to test her entitlement to her monthly expenses as she claimed an amount of R30 000.00 per month. This amount was calculated as per spreadsheet that was attached to her papers filed as an annexure. The following transpired during her cross-examination:

- 22.1. She is still under the medical aid of the Defendant;
 - 22.2. The rates and taxes for her townhouse are actually R1200.00 and not R2500.00 as appears on her spreadsheet;
 - 22.3. Items relating to home decoration (candles and linen) are not a regular expense and a monthly estimate can be agreed to at R200.00 per month;
 - 22.4. The holiday amount of R4000.00 can be removed since this was a once-off expense; and
 - 22.5. The auditor's fees of R1335.00 can be taken out as these are the company's expenses.
23. Taking into account the income of the Plaintiff and her own concessions during cross-examination, her monthly expenses were reduced by R11 877.57 leaving her with a monthly shortfall amounting to R16 756. 84.
24. The Plaintiff's other monthly expenses included e-toll expenses for R331.00, petrol for R2 508.27, groceries estimated at R3 988.98 as well as vitamins and skin care amounting to R1 666.09. Ms Vermaak-Hay for the Defendant argued that all the expenses fore-toll, petrol and groceries were as a result of the Plaintiff's intimate relationship at Cullinan. Counsel instead proposed different amounts for these expenses taking into account past patterns and the fact that the Plaintiff actually works in Pretoria. Receipts were produced to demonstrate the routes driven by the Plaintiff and places where groceries is sometimes bought at Cullinan. There was no convincing response from the Plaintiff except to mention that often when she goes to Cullinan she will be in the company of her friends and further that occasionally she drives through these routes when visiting her friends. If the Court accepts the argument by the Defendant's Counsel, then the Plaintiff's monthly shortfall amounts to R6 627.24 per month.
25. In conclusion, on the need for maintenance post-divorce, it is my view that the Plaintiff has put forward a convincing case that some form of maintenance is necessary for her upkeep. In consideration of the period and the amount I shall first consider the circumstances and the version of the Defendant and lastly reflect on the applicable law.

Defendant's ability to pay maintenance

26. The Defendant tendered to pay rehabilitative maintenance in the amount of R6 700.00 per month for a period of twelve months to the Plaintiff. He also tendered to register her on his medical aid fund again for a period of twelve months. In respect of the medical aid scheme, the Defendant indicated that he intends scouting for a cheaper scheme because of the cost of the current medical aid. As indicated earlier, the Defendant also offered to contribute R500 000.00 in respect of both the bond and the settlement amount on the Plaintiff's motor vehicle.
27. The Defendant is an attorney and a director at his firm. He is a majority shareholder with 64% shares at this entity. He also testified that he was previously involved in other businesses, namely, property development and money lending business, however as a result of change in legislation, he discontinued his other businesses. According to his testimony, his only income emanates from the legal practice and rental income from three properties. The Defendant confirmed his monthly income as appearing from the Rule 43(6) application with some few changes. This Rule 43(6) application was later abandoned by the Plaintiff and its only relevance is in interrogating the income and expenses of the Defendant.
28. The Defendant testified that some of his expenses are paid for by his attorney's firm directly and that he receives a direct income of R21 000.00 from the firm. Furthermore, he also receives an amount of R10 429.00 from the rental of three properties. His testimony was that his total monthly expenses are R46 750.66 which are clearly in excess of his income. In order to cover the deficit he testified that he makes use of his overdraft facility. It is somewhat strange that the Defendant would forever make use of his overdraft facility to pay the deficit on his expenses. Certainly, at some time or another there must be substantial income that would service the overdraft facility.
29. In cross-examination, it became apparent that he had, at least for one month, received a large sum of money from his attorney's firm. In response thereto the Defendant, whilst not very determined in his response, explained the extra income as a bonus. The Defendant could also not explain the reason for different payslips of the two that were filed of record. Ms Fabricius for the Plaintiff suggested to the Defendant that there is more than sufficient money to maintain the Plaintiff which was denied.

30. Ms Fabricius also confronted the Defendant on his involvement in the Willie Van Zyl Family Trust where in 2012 it appears that an amount of R7 000 000.00 was received by the trust after a sale of shares. The Defendant could not remember what happened or how the proceeds of this sale were expended. In 2017 the trust also sold a property for R4 200 000.00. The Defendant's response on the proceeds of this sale was that the money is still lying on his firm's trust account as there is currently a dispute which is pending between the parties in the sale agreement. It however also became clear that the Defendant is not the sole trustee nor beneficiary of the trust. At least one other beneficiary is the major daughter of both parties in this action. It has been Defendant's version that he has made loans to the trust and is currently not receiving any income from it. The only income that the trust sometimes receives is through renting a property in Amanzimtoti.
31. The Defendant has already made an offer during these proceedings and conclude that he is in a position to contribute to Plaintiff's maintenance post- divorce. The other remaining aspect for consideration is the amount of maintenance and the period thereof. The Plaintiff claims maintenance until she remarries and the Defendant's tender is for a period of one year. My starting point on this issue will be to move from the premise that any amount of maintenance shall be a minimum of R6 700.00. Added to this amount shall be inclusion of Plaintiff to a medical aid scheme with reasonable benefits.

The legal disposition

32. Section 7(2) of the Divorce Act 70 of 1979 provides that:
"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 insofar as it may be relevant to the breakdown 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 death or remarriage of the party in whose favour the order is given, which ever event may first occur."

33. I have already alluded to the fact that neither of the parties in their own testimonies can be absolved from the break-up of the marriage. I have also already concluded that the Plaintiff is entitled to maintenance and equally that the Defendant has the means to pay maintenance in one form or the other. I shall then not deal with these aspects again except to determine the amount and duration of maintenance. It is indeed so as argued by Ms Fabricius that a Court may consider "*any other factor*" which in its opinion should be taken into account in payment of maintenance. This, in my view, indicates the discretion that lies with the Court in coming to an equitable determination. In ***Nilson v Nilson 1984 (2) SA 294 (C)*** at 297 it was suggested that section 7 of the Divorce Act can and should be used by the court to ensure fairness between the parties.
34. In the matter of ***Rousalis v Rousalis 1980 (3) SA 446 (C)*** at 450G it was stated that:

"A wife of longstanding who has assisted her husband materially in building up his separate estate would in my view be entitled to far more by way of maintenance ... than one who did no more for a few years than share his bed and keep his house."
35. In the case before Court the parties were already married in the past which marriage was dissolved in April 2003. The Plaintiff and the Defendant married again in 2009. It is apparent that they stayed together as a couple before the second marriage. It is during this time of staying together that the Defendant assisted the Plaintiff in various ways by among others, transferring his shareholding from [...] Real Estate CC to the Plaintiff and also assisting the Plaintiff to pursue his business interests. The funds for the training of the Plaintiff as an estate agent were also paid for during this period. It appears to me that the Plaintiff was remunerated for all work that she performed for the Defendant. During her testimony she indicated that she would bill the Defendant (his legal firm and the [...] Family Trust) for the work she performed on monthly basis.
36. It is however evident that the Plaintiff can no longer generate the same income as she did previously hence the Court is of the view that she requires some form of maintenance. Furthermore, it was also not disputed that if the Plaintiff were to progress further in her employment position, she will have to attend training at

her own cost. In ***Buttner v Buttner 2006 (3) SA 23 SCA*** at paragraph 36, the court had the following to say:

"[Section 7(2)] requires the court to consider the factors listed ... in order to decide, first, whether a need for maintenance exists and, if so, by whom and to whom maintenance is to be paid; secondly, the amount to be paid. And thirdly, the period for which it is to be paid. This does not, however, mean that, in the exercise of its discretion in terms of s7(2), a court is not competent to make an award of token maintenance, provided of course that the circumstances of the case render it just in the light of the factors set out in s7(2) ..."

37. The evidence before Court is that the Plaintiff is a hard worker. She obtained promotions from her previous employment through hard work. At her current employment there appears to be opportunities for her to progress further. She still earns some income however minute, from [...] Promotions. It is my view that with additional effort, she can still generate more income for her company thereby increasing her income. The length of their marriage with associated problems from very early in its life, does not persuade me to make an order as sought. Accordingly, I am not of the view, in the light of all evidence before me that a lifelong maintenance or until re-marriage is deserved.
- 38.1 I have however looked at her added needs including possible training and other costs that may be required to increase her business through, for example, marketing costs and my view is that an amount of R7 600.00 as tendered by the Defendant should be increased. The Court is unfortunately not in a position to apply a mathematical calculation in the order arrived at.
39. Both Plaintiff and Defendant have also entered into an agreement in respect of the division of movable assets currently in possession of the Defendant. A list of all the assets and respective allocation to each of the parties was presented to the Court as agreed to by the Plaintiff and the Defendant.

Costs

40. The last aspect argued by the parties is an issue of costs. On behalf of the Defendant, it was argued that the matter should have long been disposed of but for the dilatory tactics of the Plaintiff. The Defendant argued that they have long

made an offer to the Plaintiff and this was rejected. The Defendant further argued that he did not know what case to meet since the particulars of claim for example, did not contain any maintenance claim of the major child but was later changed to include same. The very particulars of claim were amended again before trial reducing the resettlement amount and abandoning the maintenance claim for the child.

41. The Plaintiff on the other hand denies that they have delayed finalisation of the matter and attributes blame at the hands of the Defendant. On behalf of the Plaintiff it was argued that the Defendant did not provide full disclosure of his assets which made it difficult for the Plaintiff to properly set out her claim.
42. It is trite that ordinarily the costs of litigation follow the successful party. The discretion to award costs are however vested in the hands of the Court. In my view, each of the two litigants can be faulted for one aspect or another in the determination of costs. What is of importance though is that whichever party that is ordered to pay the costs, such costs will be borne by a portion of a party's estate. The order I make below is, in my mind the most equitable in respect of costs.
43. The Court is of the view that the following order is equitable and appropriate under the circumstances:

Order

1. *The marriage between Plaintiff and Defendant is hereby dissolved;*
2. *Defendant is to contribute a maximum amount of R400 000. 00 within 30 days from date of this order towards settlement costs of the Plaintiff's bond with her financiers;*
3. *Defendant is to pay a maximum amount of R100 000.00 within 30 days of this order towards settlement costs of Plaintiff's motor vehicle;*
4. *Defendant is to obtain and retain the Plaintiff in a medical aid scheme with ail comparable standard options for a period of 12 months from date of this order;*
5. *Defendant is to pay rehabilitative maintenance to the Plaintiff in the amount of R8000.00 per month with effect from 25 August 2019 for a period of 12 months;*

6. *Defendant is to release all the movable assets in his possession marked for the sole use and ownership of the Plaintiff as agreed to and contained in the annexure filed during the proceedings, within 30 days from date of this order*
7. *Each party shall bear his/her own costs.*

V.T. MTATI AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE PLAINTIFF: ADV M FABRICIUS

INSTRUCTED BY: SHAPIRO & LEDWABA INC

FOR THE DEFENDANT: ADV I VERMAAK-HAY

INSTRUCTED BY: VAN ZYL'S INC

DATE OF HEARING: 28 - 31 MAY 2019

DATE OF JUDGMENT: 16 JULY 2019