Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 699/2008

In the matter between:

[C…….] [S…..] [S……] Plaintiff

And

[P…….] [M…….] [S……..] Defendant

JUDGMENT

REVELAS J

[1] The parties to this divorce action were married to each other on 1 October 1994, and entered into an ante-nuptial contract which provided for the patrimonial consequences of the marriage to be out of community of profit and loss and with exclusion of the accrual system. Although both parties were *ad idem* that their marriage relationship had broken down irretrievably, the parties were unable to agree on the patrimonial consequences of the divorce. In her counterclaim, the defendant sought a declarator to the effect that a universal partnership existed between herself and the defendant. She also claimed for the dissolution of the

universal partnership and the appointment of a liquidator to take charge of the assets of the partnership and its distribution between the parties.

[2] In addition to the aforesaid (Claim 1), the defendant claimed transfer of certain immovable property into her name (Claim 2). In the alternative to the claims 1 and 2, the defendant claimed:

(i) Maintenance in the amount of R12 500.00 per month;

(ii) Payment of her reasonable medical expenses;

(iii) A resettlement allowance of R2 500 000.00 which comprised the reasonable cost of purchasing and furnishing a house, as well as purchasing a new vehicle.

[3] The defendant amended her plea on several occasions as a result of an exception raised by the plaintiff to the effect that the existence of a universal partnership was at variance with their marital regime and the express wording of their ante-nuptial contract.

[4] During October 2008, the defendant launched an application in terms of Uniform Court Rules 43 for interim maintenance and she was awarded R15 000.00 per month.

[5] In August 2010 the plaintiff made an unconditional offer for maintenance in the amount of R750 000.00 payable in five instalments and retaining her on his medical scheme. The defendant persisted in her claim relating to the existence of a universal partnership and during the

week preceding the trial, the defendant withdrew her counterclaim in relation to the existence of a universal partnership, transfer of property and a resettlement allowance. The trial then proceeded only in respect of the question defendant's alternative claim for maintenance in the amount of R16 235.63 which was calculated as follows:

EXPENSES MARCH 2014 TO APRIL 2015

Fuel	R 696.33
Electricity	R 198.33
Groceries, foodstuff, etc	R 1 165.75
Airtime	R 30.33
Toiletries, cosmetics, etc	R 975.58
Medical (non-medical aid)	R 136.24
Clothing	R 293.33
Entertainment	R 247.41
Hardware	R 139.33
Sub Total	R 3882.63
Accommodation (estimate)	R 12 000.00
Motor vehicle (estimate)	R 3 400.00
Medical Aid (actual)	R 1 453.00
Sundry (estimate)	R 500.00
Sub Total	R 21 235.63
Less average monthly income from business	R 5 000.00
Total	R 16 235.63

[6] Counsel for the plaintiff informed me from the bar, that the plaintiff and his present partner have child aged 5 years. The aforesaid fact, the evidence presented by the defendant and the allegations contained in the plaintiff's particulars of claim, can leave one in no doubt about the irretrievable breakdown of the marriage between the parties. Therefore a decree of divorce was granted on 14 May 2015, after conclusion of the arguments presented. The parties also agreed to a draft order in respect of the costs of withdrawal of defendant's counterclaim in so far as her claims for the dissolution of the universal partnership, the settlement allowance and the transfer of property was concerned. The cost order agreed upon was to the effect that the defendant be ordered to pay the plaintiff's costs incurred in respect of the institution and withdrawal of the defendant's main counterclaim, such costs to include:

1. Costs of the amendments made from time to time by the defendant to her counterclaim;
2. The costs of the two exceptions taken by the plaintiff to the counterclaim.

3. The reserved costs in regarding of the postponements of the matter on 19/08/2011 and 25/02/2013.

[7] The remaining issue for determination is whether or not the plaintiff is entitled to maintenance, and if so, what amount would be appropriate.

The Applicable Legal Principles

[8] A spouse has no right to, or automatic claim for maintenance[1]once the marriage has been dissolved. A spouse claiming maintenance has to demonstrate a cause of action and persuade the court to exercise its discretion in her or his favour[2]. Section 7(2) of the Divorce Act, 70 of 1979, which confers that discretion on a court is couched in clear discretionary language and it reads as follows:

" ***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, the 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 divorce, their conduct is so far as it may be relevant to the breakdown of the marriage, an order in terms of subsection***

[1]*Portinho v Portinho* 1981(2) SA 595 (T) at 596G – 597B
[2]*Botha v Botha* 2009 (3) SA 89 (W) at paragraphs [31] - [35], *AV v CV* 2011 (6) SA 189 KZN at 192, paragraph [9]

(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."

[9] Satchwell J, in Botha v Botha (*supra,)*[3] added the following comments after reiterating the aforementioned principles in her judgment:

"[*38] Indeed, it would seem to me that the very factors to which a court shall or may have regard to in making a section 7(2) determination would require a court to ensure that no 'unjust' results frowned upon or prohibited by the Constitution eventuate.*

[39] I am mindful that our courts have been quick to proclaim the need for former spouses to be financially independent of each other whilst not fully cognisant of the many experiential barriers and familial responsibilities which render such security no more than a chimera for many women. However, substantive equality has not necessarily followed upon theoretical equality"

[10] Section 7(2) does not envisage a fixed number of factors a court may take into account when determining whether or not to award

[3] At 90

maintenance. The wording of section 7(2) of the Divorce Act requires consideration "of a multiplicity of identified factors" and a court is therefore enjoined to go further than the "financial needs", "existing means" and "earning capacities" of the parties concerned, in order to avoid an unjust approach of "I need and you can pay."[4]

Factual Background

[11] Only the defendant gave evidence at the trial and her testimony, particularly with to the history of the marriage, was largely left unchallenged. The following is a short summary of the relevant facts: The defendant met the plaintiff during 1992, in Kirkwood, when he was living with his parents on a farm in the Kirkwood district where the plaintiff's family members own several farms. At that time the plaintiff was in the process of being sequestrated, and the defendant had been the manager of PG Glass at its Grahamstown branch for eight years. In her capacity as manager, the defendant gained substantial experience in the building business and dealt with, *inter alia*, the tenders for installing window panes for the Department of Works. One of the tenders was for the installation of windows at certain sites in the Eastern Cape occupied by the South African Police Services. Because she knew that the plaintiff had experience in the building construction business, she engaged his services as a sub-contractor and thus provided him with the means to generate income for himself. When Grahamstown endured a hail storm, she also

[4]Satchwell J in *Botha*, at page 98, paragraph [49]

engaged in services when the ensuing need for repairs generated a demand for her services. They worked very well together.

[12] During February 1993, the plaintiff and the defendant became engaged. In the same year the defendant also obtained a business diploma in middle management. Other than a matric, the plaintiff has no other formal qualifications. In April 1994 the defendant left her employment with PG Glass to devote her time to the development of a construction business with the plaintiff. The parties married each other in October of that year. The defendant was then 34 years old. Both parties had been previously married. The plaintiff had three children born of his previous marriage who resided with their mother in Durban. The defendant, who had married at a very young age, had three children born from her previous marriage, who initially lived with her and the plaintiff, but soon became independent and moved out of the parties' common home.

[13] As stated before, the defendant left her employment during 1994 to start a construction business with the plaintiff. The business was called Hillside Construction and it was named after the farm Hillside, owned by the plaintiff's mother, where the parties intended living after their marriage. The construction business was formed during 1994 as a close corporation. The pension fund and unemployment insurance fund payments received by the defendant when she resigned from PG Glass, was used as start-up capital. The defendant held an 80% interest in the

close corporation. The remaining 20% was held by the construction foreman, Mr. Langbooi. The plaintiff, due to his status as an insolvent, was not eligible to become a member of a close corporation.

[14] As a construction business, Hillside Construction CC was a success. The combination of the plaintiff's building skills and the defendant's past experience and contacts in the building industry proved to be very advantageous. They started with small tenders at first but the business grew stronger. The plaintiff conducted the actual construction work, dealt with the employees concerned, ordered materials and performed all the tasks associated with the physical construction. The defendant ran the administrative side of the business, which included seeing to the wages, liaising with architects, attending site meetings, preparing the documentation required for the tender processes, dealing with the Department of Works and other necessary chores. She was not paid a salary for her services, because it was a joint venture as I understand it. Both parties had signing powers in respect of the business' bank account.

[15] Business was going so well during 1997, that a substantial amount of money could be used to develop a guest farm on the plaintiff's farm *Uitkyk.* A lapa and chalets were built which were used for entertainment, leisure, wedding receptions, conferences and other activities. The defendant ran an entertainment business under the name "Look-Out Guest Farm". A loan of R520 000,00 was advanced to the plaintiff's mother, through Hillside Construction. In return, she placed her farm

"*Miskraal*" at her son's disposal for purposes of developing citrus orchards on the farm. The defendant also assisted the plaintiff with that project and it is presently another successful business run by the plaintiff.

[16] During 2000, Mr Langbooi left to work at the Volkswagen factory in Uitenhage and the defendant became a 100% member in Hillside Construction. According to the defendant, a hefty tax payment to the South African Revenue Services caused the deregistration of Hillside Construction and its assets were transferred to a new close corporation, Pambile Construcion CC, which is as successful, if not more so, than its predecessor. The plaintiff performed the same duties at Pambile as she had done at Hillside. It became necessary to hired someone to help out in the office because the business was doing so well. The plaintiff had also become rehabilitated. The parties had also bought a property at Boggomsbaai which was sold for a profit at a price of R560 000,00.

[17] The defendant testified that she and the plaintiff started their lives together, living plainly with the businesses growing and gradually began to enjoy a very comfortable standard of living, with luxuries such as each party owning his and her own motor vehicle. They lived in a four bedroomed house with two bathrooms, a large kitchen and an entertainment area. The parties jointly contributed to the household. According to the defendant, she earned a good income from her entertainment business. During the existence of the marriage four immovable properties, of which two were farms, were acquired. The

following assets were also acquired: Cash and equipment in the construction business, the vehicles, a herd of mixed game, as well as 150 goats, 18 lambs and 20 head of cattle.

[18] The defendant testified that when she married the plaintiff, his children were estranged from him in that he never heard from them and their mother permitted no access to them. The defendant then made efforts to establish contact between the plaintiff and his three children (a girl and two boys). Then she assisted him with obtaining rights of contact, and as a result in the children were permitted by their mother to visit the farm during school holidays. However, during the school holidays in September 2002, when the plaintiff returned from fetching his children from the airport, he informed the defendant that the two boys will not be returning to Durban, but will be living with them. The defendant had no prior warning of this development and was not even consulted about it. The two boys were in grades 6 and 9 respectively. Heloïse, his daughter would continue living with her mother in Durban. The defendant's life changed drastically from then on. She testified that she was required to see to all the daily needs of the children. She fetched and ferried them between school, their extra-mural activities and the farm. In turn, the children behaved disrespectfully and rude towards her to her and the plaintiff did nothing about it. The defendant held no authority over them. Over time, the defendant began to resent, not unjustifiably, her treatment by the plaintiff and his sons. Her position in general in the common home had become an unenviable one. The parties started arguing and the

defendant told the plaintiff in 2006 that they will have to work on their marriage if they wanted to save it. The plaintiff laughed it off and even told her once that if she was so dissatisfied with the marriage she should take her things and leave. The final straw for the defendant was one night in November 2007 when returned to the farm, at about midnight. The plaintiff had been entertaining friends since much earlier in the day. The house was in disarray and she could no longer tolerate the situation and just left. As I understood the plaintiff, she felt that she had made a great effort to please the plaintiff, assist with the smooth running of the businesses and the common home, but had no other value as a person. Despite the plaintiff's pleas for her return and the promises he made (all of a material nature) she could not face going back to the life she was living. She did however, to honour a prior business commitment, a lunch function to be held at Look-Out, go to the farm. She said the plaintiff arrived and fought with her to the extent that people came to investigate and she was unable to function properly. According to her, the plaintiff had broken down all her confidence, used and abused her emotionally.

The Defendant's Efforts Towards Financial Independance

[19] When the defendant left the common home in November 2007, she went to live with her daughter, Ronel, in Port Elizabeth. She assisted Ronel in her gardening and landscaping business and worked at a golf club in town where she assisted with the catering. Her income was negligible. The plaintiff then agreed that the defendant could live on her own in a flat which he financed for six months. Thereafter she was locked out, but

made arrangements through her attorney to continue the lease until August 2008. In the interim the defendant befriended a Mr. Steenkamp while she was still living in her flat. Steenkamp had plans to relocate to China during that time and they then entered into an agreement beneficial to both of them. The defendant would move into Steenkamp's house in Bluewater Bay after he had left for China, and live there as an *au pair* and housekeeper for his daughter, Michelle, until the end of 2009, Michelle's matric year. She was to earn no salary but Steenkamp would pay all the household expenses and expenses regarding his daughter. She largely fulfilled a maternal role in the house. While she lived in Bluewater Bay the defendant obtained the order in terms of Uniform Court Rule 43 referred to hereinbefore, and she was paid R15000,00 per month in terms thereof. Some of the items claimed in the Rule 43 application were not necessary while she lived in someone else's house where all expenses were covered - a fact stressed with vigour by the plaintiff's counsel - but when she moved out into her own accommodation, which she was intending to do in any event the following year, such expenses would not have been reasonable. The plaintiff stopped paying her interim maintenance at one point and the defendant brought an application for his sequestration when the Sheriff reported that the plaintiff had advised that he has no funds.

[20] The defendant left the house in Bluewater Bay during 2009. She had no employment except running errands for her daughter at her gardening business. She also had a nervous breakdown and was on medication. She

could find no employment position. She knew the plaintiff would not allow her to continue her entertainment business at Look-Out. In 2011, the defendant moved to Cape Town to live with Ronel, who had relocated there and had started working for a company which specialized in frameless glass (WBHO). Through her contacts, Ronel found her mother a position with a HVJ Projects where she only earned R7000,00 per month, after deductions. She was unable to make ends meet on this salary without Ronel's assistance.

[21] The defendant said she had posted her *curriculum vitae* on the internet with little results. She was always advised that her age, which then was 51, counted against her as she was too old for any company or business to invest in. She later found new employment with a company, Go Green, where she earned a similar salary as at HVJ. The company specialized in revamping restaurants and shops. This experience led her to the idea of starting a coffee shop. At the end of April 2014 she left Go Green and started a coffee shop, *Urban Spoon*, in Stellenbosch with money Steenkamp had lent her. Things did not go well for her. Business was slow and due to a recent back operation, she was unable to keep the shop open at nights due to back ache. She then one again found herself in a position where she could not support herself.

Conclusion

[22] The defendant is a woman who had worked all her adult life and made the best of her insubstantial formal qualifications to improve her lot

and that of her family, including the plaintiff. Since he met the defendant, the plaintiff's circumstances improved dramatically. She helped him to rise from insolvency into the life of a successful businessman. His attempts to woo her back were all premised on promises of a very material nature, which gave the impression that the defendant's input and financial contribution to his business and life style were sorely missed.

[23] It must also be accepted that the defendant made serious efforts to earn a living after she left the common home. She is not physically capable of running a restaurant. She also has had three back operations and cannot keep the required long hours on her feet to run a restaurant at night. That evidence was never challenged. In the business sector in which she is proficient, she is unable to find employment where she can earn even R10 000,00 per month. She has thus far obtained work at very low salaries and was only appointed as a favour to her daughter. Her greatest earning capacity lay in the entertainment business at Look-Out which was intrinsically tied up with the plaintiff's businesses and farms. Due to the prevailing circumstances, she can no longer conduct that business or continue it anywhere else. Thus she is presently incapable of generating income sufficient to keep a roof over her head unless she drops her standard of living very far below anything she was ever used to. Even the low income jobs are, due to her age, an uncertainty in the future. Given her contribution to the plaintiff's business interests which are not covered to their full extent in this judgment, and his present life style, it would be unfair to expect her to live without any financial assistance

whatsoever as the plaintiff wishes her to do. In *Rousalis v Rousalis*[5] the court held that that a wife of long standing (which the defendant was) who had assisted her husband materially in building up a seperare estate would "*in justice be entitled to far more by way of maintenance, in terms of this section* (section 7(2) of the Divorce Act), *than one who did for a few years than share his bed and keep his house".* The defendant contributed far more to the plaintiff's estate than Mrs. Rousalis had done for her husband's estate.

[24] In my view, the defendant has established a need for maintenance. The remaining question is in what amount. In this regard I take into account that the plaintiff is capable, for some time in the future, albeit a short period, to earn a small income. Also, while she was living in Bluewater Bay, she was earning interim maintenance in respect of items she was for that period, not entitled to. The fact which weighed most with me in exercising my discretion in the defendant's favour is her financial contribution to the plaintiff's business. In my view a just amount would be slightly less than what she received as interim maintenance, the amount being R14 000,00 per month.

Order

[25] In the circumstances and for the reasons given, the following order is made:

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[5] !980 (3) SA 466 (C) at 632 G-H

1. The plaintiff is to pay the defendant maintenance in the amount of R14 000,00 per month until her death or remarriage, whichever event occurs first.

2. The plaintiff is to pay the defendant's cost of suit.

3. The defendant is to pay, by agreement, the following costs as set out in paragraph [6] above:

3.1 Costs of the amendments made from time to time by the defendant to her counterclaim;

3.2 The costs of the two exceptions taken by the plaintiff to the counterclaim.

3.3 The reserved costs in regarding of the postponements of the matter on 19/08/2011 and 25/02/2013.

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E REVELAS
Judge of the High Court

Counsel for the plaintiff Adv P Jooste instructed by Joyzel L Obbes.

Counsel for the defendant Adv G Gajjar instructed by BLC Attorneys.

Date Heard: 13-14 May 2015

Date Delivered: 2 July 2015