



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

Case No: 043054/2023

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

31/08/2023
DATE

SIGNATURE

A.C.V.W

Plaintiff

and

C.J.H.V.W

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 August 2023.

JUDGMENT

PHOOKO AJ

INTRODUCTION

- [1] The outcome of a divorce process is often unpredictable. On one hand, the marriage can end peacefully wherein both parties try as far as possible to maintain a dignified dissolution of their marriage. On the other, divorce can be ugly when parties no longer support each other in any form. Usually, children become victims of any divorce action.
- [2] This is an unopposed divorce action wherein the Plaintiff *inter alia* seeks a decree of divorce, division of the joint estate, monthly spousal maintenance, and children's maintenance.

THE PARTIES

- [3] The Plaintiff is A.C.V.W,¹ an adult employed female person residing at [...] in the North-West Province.
- [4] The Defendant is C.J.H.V.W, an adult male person residing at [...] in the North-West Province, and whose further particulars are unknown to the Plaintiff.
- [5] The parties were married to each other in community of property on 6 June 2011 in Mooinooi. Their marriage still subsists.
- [6] There were three minor children born from the marriage between the parties namely, A, B, and C.

¹ The names of the parties and three children have been concealed for the protection of the minors.

[7] The Plaintiff requires spousal maintenance on the basis that during the duration of the marriage, she was *inter alia* not given an opportunity to further her education past matric.

[8] According to the Plaintiff, the marriage relationship between the parties has irretrievably broken down and there is no possibility that the parties could save the marriage in any possible ways including mediation.

[9] The Plaintiff asks this Court to grant her an order in the following terms:

“1. ..

2. The Defendant is ordered to pay monthly maintenance for the three minor children in the amount of R20 640.00, payable on the 1st day of every month.

3. The Defendant is ordered to pay maintenance for the Plaintiff in the amount of R13 730.00 per month, payable on the first day of every month.

4.....

5....”.

THE ISSUE

[10] The issue to be determined by this Court is whether the Plaintiff is entitled to spousal maintenance and if indeed the amount of spousal maintenance to be paid to her and in respect of each of the minor children.

APPLICABLE LAW

Parental responsibility

[11] The Constitution of the Republic of South Africa, 1996 (the Constitution)

ushered in clearly defined rights and responsibilities in so far as the protection of children is concerned. The Bill of Rights in the Constitution is widely celebrated for its extensive commitment to the plight of children among other rights. Section 28(2) of the Constitution requires that the best interests of the child be a primary consideration in all matters concerning the child.

[12] When it comes to maintenance, the basic legal principle is that both parents must maintain their children according to their respective means.² This duty is further reinforced by section 18(2)(d) of the Children's Act 38 of 2005 (Children's Act). All in all, children have a right to proper parental care from both parents.

[13] The "child's best interest must determine the outcome when a court has to make an order regarding a child".³ This is in line with section 6(2)(a) of the Children's Act which provides that all proceedings, actions, or decisions in a matter concerning a child must respect, protect, promote, and fulfil the child's rights set out in the Bill of Rights.

Spousal maintenance

[14] In South African law, spousal maintenance is regulated by section 7 of the Divorce Act 70 of 1979 (the Divorce Act). In terms of section 7(1) of the Divorce Act, a court may make an order about spousal maintenance if there is a written settlement agreement between the parties. If there is no such agreement, a court may in terms of section 7(2) of the Divorce Act make an order that one

² *Mentz v Simpson* 1990 4 SA 455 (A) 457; *Herfst v Herfst* 1964 4 SA 27 (W) 130C.

³ *Standard Bank of South Africa Ltd v Du Toit N.O and Others* (575/2022) [2022] ZAFSHC 51 at para 33.

spouse pay maintenance in respect of the other spouse after considering various factors including the earning capacity or prospective means of each party, their individual needs and obligations, the duration of the marriage and any other factor which the court may deem appropriate to consider.

[15] Section 7 of the Divorce Act confers on the court a wide discretion, and the court may have regard to any other factor that in the opinion of the court should be considered.

[16] The basis for spousal maintenance is that during the subsistence of the marriage, it may have occurred that one spouse was not in a position to build his or her estate because of one or more reasons such as a woman who might have spent her time to develop herself to be able to compete in the job market but spent her years caring for children, and looking after the household necessities.⁴ Even if this is the case, each case has to be dealt with according to its unique circumstances to ascertain whether the need for support has been established⁵ and that such a claim is within the means of the other spouse.

[17] It is apparent that spousal maintenance is not a foregone conclusion at the dissolution of the marriage. In other words, there is no spouse that has an automatic right to spousal maintenance. It is trite that the person claiming maintenance must establish a need to be supported.⁶

[18] In light of the above, I now turn to consider both oral and written submissions of the Plaintiff to determine a just financial need and obligation, existing means,

⁴ V v V (GP case no 52799/2016, 30-8-2017 at para 11 (unreported)).

⁵ *Strauss v Strauss* 1974 (3) SA 79 (A).

⁶ See for example, *EH v SH* 2012 (4) SA 164 (SCA) at para 13.

and earnings of the Defendant.⁷

SUBMISSION OF THE PLAINTIFF

[19] Most of the Plaintiff's submissions *inter alia* focussed on the fact that the Defendant was legally bound to maintain the children and financially support the Plaintiff. Specifically, the Plaintiff sought Twenty Thousand Six Hundred and Forty Rand (R20 640,00) payable on the 1st day of every month for three children as per minor children's expenses. The Plaintiff on further sought an amount of Thirteen Thousand Seven Hundred and Thirty Rand (R13 730,00) toward her spousal maintenance as per the monthly expenses.

[20] When counsel for the Plaintiff was asked about how much the Plaintiff was willing to contribute towards the entire amount sought in respect of the maintenance of the three children and her spousal maintenance, his response was that the Plaintiff was not in a position to do so because of her inadequate income of Five Thousand Four Hundred and Fifty-Five Rand (R5 455,00). Additionally, counsel for the Plaintiff directed this Court to the deficit of minus Twenty-Eight Thousand Nine Hundred and Fifteen Rands (R28 915,00) as per annexure "A"⁸ containing the Plaintiff's monthly expenses.

[21] Counsel further contended that it was for the Defendant to come and present his case before this Court as to whether he can afford the relief sought but the Defendant has opted not to do so.

[22] Furthermore, counsel argued that the Plaintiff sought spousal maintenance

⁷ *B v B* 2009 (3) SA 89 (W).

⁸ CaseLines: 006 at item 1.

because, during the duration of the marriage, she was “not awarded an opportunity to further her education past matric” and that she “was a house executive caring for the minor children and teaching the minor children as they were homeschooled until the parties separation”.

EVALUATION OF EVIDENCE

[23] From the onset, I must indicate that the absence of the Defendant has placed this Court in a difficult position as it does not have the benefit of the Defendant’s financial position and/or his side of the story. However, the absence of the Defendant does not entail that the Plaintiff is automatically entitled to the relief sought. This Court still must determine whether the amount claimed constitutes reasonable and necessary expenses for herself. The Plaintiff must establish the need for support.

[24] A perusal of the Plaintiff’s monthly expenses was unclear about how the total amount of Thirteen Thousand Seven Hundred and Thirty Rand (R 13 730,00) claimed for spousal maintenance was arrived at. How the amount was computed and whether it in fact constitutes reasonable and necessary monthly expenses for herself, she failed to provide any substantiation for it. In other words, the Plaintiff’s monthly expenses do not help this Court much.

[25] Concerning the children, the children unfortunately often become the collateral damage in divorce proceedings. The maintenance to be paid in respect of the three minor children, the Plaintiff again without articulation claims maintenance of Twenty Thousand Six Hundred and Forty Rand (R20 640,00) for all three

children. It is not certain what this amount is for. There is no breakdown whatsoever such as school fees etc. Even if this is the case, the best interests of the child remain a primary consideration.⁹

[26] In all the claims sought it is not enough to merely put amounts without a detailed breakdown of what each expense entails.

[27] Having carefully considered the relief sought by the Plaintiff, I cannot find there to be reasonable and just duty on the part of the Defendant in respect of the full spousal maintenance for herself. However, the Plaintiff is entitled to some form of maintenance so that she may be able to look for employment and rebuild her life. In fact, she already has an income no matter how little it is. I am also mindful that whilst the economic emancipation of women has been at the core of the agenda in South Africa, many women remain financially weak in marriages.¹⁰ The option of the Defendant not to take part in these proceedings will unfortunately not always work in his favour. This Court is persuaded that the Plaintiff spent most of her time *inter alia* caring for the children and supporting them with their educational needs as they were homeschooling.

[28] In so far as the children are concerned, in the circumstances of this case, I cannot find any grounds which would entitle the Plaintiff to the full amounts claimed on behalf of three children. Notwithstanding this, the best interests of the child must always be a primary consideration in all matters concerning the child.

⁹ *Centre for Child Law and Others v Media 24 Limited and Others* 2020 (3) BCLR 245 (CC) at para 37; *M.B v N.B* (CA&R60/2017) [2018] ZAECGHC 74 at para 17.

¹⁰ see *ST v CT* 2018 (5) SA 479 (SCA).

[29] The legal position is clear, both parties have a duty to maintain their three children albeit within their means.

[30] Concerning the divorce, this Court is persuaded by the Plaintiff's case as pleaded in the particulars of claim. In so far as the contact of three minor children is concerned, the role of the Family Advocate cannot be underestimated. I cannot find any fault in the report of the Family Advocate.

[31] Having already found that the Plaintiff is not entitled to the full amounts claimed in respect of herself and the children, other doors remain open for both the Plaintiff and the Defendant to explore such avenues if they are not satisfied with the order as made below.

COSTS

[32] The general rule is that the costs should follow the results.¹¹ However, in a divorce action, the court is not bound to make an order for costs in favour of the successful party.¹² It will consider the conduct of the parties and their financial means amongst other factors. I am of the view that costs should follow the results.

ORDER

[33] I, therefore, make the following order:

¹¹ *Van Zyl v Steyn* (83856/15) [2022] ZAGPPHC 302 at para 2.

¹² Section 10 of the Divorce Act.

- (a) A decree of divorce is granted with a division of the joint estate is granted.
- (b) Monthly, maintenance for the three minor children in the amount of Thirteen Thousand Five Hundred Rand (R 13 500,00) payable on the 1st day of every month.
- (c) Monthly, spousal maintenance for the Plaintiff in the amount of Seven Thousand Rand (R 7 000,00) on the 1st day of every month.
- (d) The Report of the Family Advocate in respect of the three minor children is endorsed.
- (e) The Defendant is ordered to pay the costs of this application on a party and party scale.

PHOOKO AJ

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

Counsel for the Plaintiff: Adv X van Niekerk

Instructed by: De Ridder Attorneys

Attorney for the Defendant: n/a

Date of Hearing: 14 August 2023

Date of Judgment: 31 August 2023