

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Case No: 68554/2012

Date heard: 05 - 06 November 2014

Date of judgment: 19 November 2014

Not reportable

Not of interest to other judges

**In the matter between:**

C[...] C[...] S[...] (née d[...] T[...])

Plaintiff

And

L[...] S[...] S[...]

Defendant

**JUDGMENT**

**A.M.L. PHATUDI J:**

**Introduction**

[1] This is a divorce action. Both parties claim dissolution of their marriage entered into on the 30 July 1988. They married each other in community of property. Out of the marriage three children were born. The first is N[...] C[...] S[...] (N[...]), a girl born on [...] 1992, the second is D[...] J[...] S[...] (D[...]) born on [...] 1997 and the third is N[...] M[...] S[...] (N[...]) born on [...] 2002.

[2] The parties limited the issues by having agreed to a number of issues pertain to the divorce action but for the duration of rehabilitative maintenance payable to the plaintiff. The defendant tendered an offer with

prejudice to pay to the plaintiff rehabilitative maintenance for a period of 12 months on the one hand, and on the other, the plaintiff insists on maintenance in perpetuity.

### **Factual background**

[3] The plaintiff was still a student when she got married to the defendant. She obtained B.A. degree in Social Sciences and Honours in Psychology with University of Pretoria and UNISA respectively. She never had a fixed full time employment. She took care of the children and household necessities. She home schooled the children. She would, however, be requested by local schools to do psychometric tests and career guidance to scholars on self-employed contractual part time basis.

[4] She earned some income generated by the part time work she did. She now earns, on average, R3500.00 - R4500.00. She testifies that the said average income is reasonable. She is keen to have a full time employment or fixed long term contractual work that can sustain her. She applied online, at various places for employment but to no avail.

[5] The defendant has since the *pendente lite* order of this court paid R5000.00 maintenance to the plaintiff. She sets out her monthly expenses which show a shortfall of R10 960-00. She testified that the R5000.00 plus R3000.00 the defendant is paying towards maintenance of herself and N[...] *pendente lite* makes a vast difference to her monthly needs. She testified under cross-examination that should she secure an employment that will pay her handsomely; she certainly will not have a shortfall. She further confirmed that she would not need any maintenance from the defendant.

[6] The defendant, an engineer employed by Telkom as software data analyst testifies that he is prepared to pay to the plaintiff rehabilitation maintenance in the amount of R5000.00 for 12 months. He testified further that should he continue to pay R5000.00 for a longer period, he is afraid the plaintiff may not seek employment to sustain herself. He will not be in a position to maintain two households. He resides with D[...] and N[...] will be joining them on her return from London.

### **The Law**

[7] As a general rule, the duty of support between spouses comes to an end when the marriage is terminated either by death or divorce.<sup>1</sup> There are, however, two exceptions to the rule. The first is when one of them agrees to pay maintenance to the other. This is normally reduced to writing in what is known as settlement agreement. The court may, in terms of section 7(1) of the Divorce Act 70 of 1979 (Divorce Act), make such an agreement an order of court.<sup>2</sup> Secondly, in the absence of any agreement concluded to that effect, the court may grant a maintenance order in terms of section 7(2) of the Divorce Act. Section 7(2) provides: 選n

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.’

[8] Satchwell J stated in **Botha v Botha**<sup>3</sup> that section 7(2) of the Divorce Act 71 of 1979 confers discretion upon the court to make a maintenance order in favour of one spouse against the other.<sup>4</sup> In exercising its discretion, which must be judicial, the court must take into account the jurisdictional factors set out in section 7 (2)<sup>5</sup>

## **Evaluation**

[9] Upon perusal of the provisions of section 7 (2) of the Divorce Act, I find it inevitable to consider the jurisdiction factors set out thereat.

### **(i) The existing or prospective means of each of the parties**

[10] The plaintiff is a qualified Social Worker and a Psychometrist, duly registered as such with HSPCA.<sup>6</sup> She also completed short courses in Developing and Applying Interpersonal Skills, HIV/AIDS Care and Counselling, Freelance Journalism as well as Protocol and Business Etiquette. She is a self-employed independent contractor who markets, manage and administer her own business.<sup>7</sup>

[11] The plaintiff is presently earning R3500.00 to R4500.00 per month. She testified that other months the business booms while others are down. Clients and or patients are referred to her mostly by the existing clients. As mentioned earlier in my judgment, she does more of psychometrics and career guidance at schools.

[12] The plaintiff testified that in the event of her business being correctly marketed and attracts more clientele from which she may earn handsomely or secure a well-paying full time employment; she may not need the defendant’s maintenance. She is presently surviving out of the R5000.00 the defendant is paying her as maintenance *pendente lite*. This sustained her for 18 months.

[13] The defendant, on the other hand, is a salary earner from Telkom. He earns an average net salary of R31 000.00. He will continue to earn the said salary for as long as his services at Telkom are still welcomed.

[14] The plaintiff's counsel submits that the plaintiff has no prospects of securing sustainable employment taking into account her unsuccessful efforts of doing so. He emphasises that the plaintiff's online application did not bear any fruit and she is likely not to be so employed considering her age. She is 48 years of age. I unfortunately cannot agree with his submission.

[15] The services of a professional in the position of the plaintiff are still in demand. The services of a Psychometrist<sup>8</sup>, an HIV/AIDS counsellor are essential. The plaintiff, being so qualified and registered with HPCSA as such, has prospects of earning sufficiently to enable to support herself. She still has 12 years of working life. There is no evidence of the plaintiff's ill-health or incapacity tendered that will hinder her from securing employment. She is in fact, earning some income. The plaintiff, in my view, has prospective earning capacity to sustain herself. She may, however, take time to break even which renders her legible for "token"<sup>9</sup> maintenance.

[16] The question to be determined is the duration of the said rehabilitative maintenance. The defendant offered her, which offer she accepted, R5000.00 per month. The defendant offered 12 months of such rehabilitative maintenance. The defendant's counsel submitted that the plaintiff had already enjoyed 18 months of the said maintenance to date. A further 12 month period is an added advantage to the plaintiff. He further submitted that the offered 12 months will assist the plaintiff while she gets her feet on the ground up to her breaking even to her monthly needs as set out in her list of expenses. I cannot agree more with the defendant's counsel. The defendant's offer is, in my view, more than generous considering the principle that maintenance between spouses comes to an end when the marriage is terminated by divorce. Put differently, if one takes into account the so called "lean break" principle, there is no automatic right to maintenance after divorce.<sup>10</sup>

(ii) The age of the parties and duration of marriage

[17] It is common cause that the plaintiff is 48 years while the defendant 50 years of life age. They have been married for 26 years. Both testified that their marriage relationship has been "normal". They encountered challenges normal to any marriage relationships.

[18] The plaintiff's qualifications and her age coupled with the fact that she had not worked regularly in a full time capacity for approximately 26 years makes it improbable that she would be able to improve her employment prospects to a great extent.<sup>11</sup> The plaintiff has prospects of securing employment or of becoming the employer herself.

[19] I noted with appreciation the parties' "settlement" that settled the amount the defendant is to pay "token"

maintenance to the plaintiff. I find no reason to interfere with the amount agreed to. The said “token” or rehabilitative maintenance should be for a period sufficient to enable her to secure sustainable employment.

[20] The determination of the duration of rehabilitative maintenance, the person’s earning capacity should be a factor to consider. As it being trite that no maintenance should be awarded to a person who can support him or herself, the court may award such maintenance in perpetuity to a person who has no notional earning capacity attributed to him or her upon divorce. The plaintiff, in my view, is not such a person.

[21] Considering the offer made by the defendant with prejudice<sup>12</sup> in respect of the duration of maintenance payable, I find such offer reasonable. I am inclined to make such offer as far as the period of the rehabilitative maintenance is concerned an order of court. Either party may, however, apply for such an order to be rescinded, suspended or varied at any time in the future by a competent court should the change in the circumstances of either of them be justified.

(iii) The parties’ conduct in so far as it may be relevant to the break-down of the marriage.

[22] I already indicated earlier that both parties testified that their marriage was normal. They disagreed to agree. They managed to overcome numerous marital challenges without one physically abusing the other save for the incident where the defendant slapped the plaintiff once with an open hand. The plaintiffs testimony is that the defendant slapped her once with the open back hand. The plaintiff revealed the occurrence of the incident only during her cross examination. She looked surprised when confronted with what led to her slapping on the one hand.

[23] On the other hand, the defendant had outright set out what transpired. He testified that on his arrival at home on the day in question, he found D[...] and N[...] in tears and very angry at their mother (the plaintiff). He summoned the plaintiff to their bedroom and confronted her with N[...] and D[...]’s version of what had happened. Within seconds of their discussions pertaining to the issue, the defendant slapped the plaintiff. The defendant testified that that’ was a mistake on his part to which he regrets as it cannot be erased. Immediately thereafter, the plaintiff told the defendant that she wants a divorce.

[24] No marriage counsellor or the parties’ parents were approached with the view to settle the dispute or to save their marriage. It is not that there is a legal duty on the part of the parties to engage marriage counsellors to save their marriage. Single incidences of this nature stands to be resolved quickly towards restoration of the marriage more especially where there is no evidence of physical abuse on the part of the one party against the other. It is not that I condone the defendant’s conduct. The incident, in my view, is not a worst case scenario that warrant mulcting the defendant with token maintenance in perpetuity considering the prospects the plaintiff has in securing employment.

## **Division of estate**

[25] The parties have already divided the movable assets between themselves. The plaintiff is entitled to 50% of the pension interest as at the date of divorce in the Telkom Retirement Fund, 50% of Vodacom and Telkom Shares respectively. The plaintiff is further entitled to 50% of the amount exceeding R50 000.00 in the Money Market Account held at Nedbank. These issues have already been settled between the parties.

[26] As far as the immovable is concerned, the defendant testified that he is most willing to pay the plaintiff 50% of the net value of the common property at 513 Veldskoen Road, Die Wilgers. The defendant's willingness thereto is occasioned by his stay with two of their children born of the marriage. Each party may appoint his or her valuator and the highest value of the two be accepted as the value for purposes of determining the net value of the property and the amount the defendant will have to pay to the plaintiff. Each party to be responsible for the costs of the valuator he/she has appointed. Alternatively, the costs of the valuations may be deducted from the gross value of the immovable property.

## **Medial Aid in respect of the Plaintiff**

[27] The defendant was ordered *pendent lite* 奏o retain the [plaintiff] as a beneficiary on his medical aid...to continue paying all reasonable expenses related there (including excess payments) • . <sup>13</sup>Retaining a spouse as a beneficiary on the other's medical aid after divorce is tantamount to maintenance after divorce which, as I said earlier in this judgment, is not an automatic right to maintenance after divorce. <sup>14</sup>The plaintiff does not seek to be retained as a beneficiary on the defendant's medical aid but to have her own medical aid at the defendant's costs. I find no basis for this contention submissions made on behalf of the plaintiff to that effect. The clean break principle operates and the plaintiff has no right to obligate the defendant for her own medical expenses. I am persuaded by the defendant's counsel that R5000.00 token maintenance the defendant offered to pay is inclusive of the plaintiff's medical expenses. The provisions of the order *pendent lite*, automatically comes to an end on the fall of the hammer in this divorce action. In the absence of evidence of need of the provision for contribution for medical expenses levelled against the defendant, I find no reason to grand an order to that effect.

## **Defendant's counter claim**

[28] What the defendant seeks in his counter claim is what the plaintiff sought in convention but for a blanket order for division of the joint estate. The major portion of the said counter claim has been settled between the parties and requires no further consideration.

## **Costs**

[29] Section 10 of the Divorce Act provides that ‘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.’

[30] Considering that both parties made offers in terms of Rule 34 (1) of the Uniform Rules of this Court, I find it appropriate not to make an order as to costs.

### **Draft Orders**

[31] Both parties favoured me with draft orders. On my perusal of such draft orders, I find the parental responsibilities of either party being well spelt out. I bent some of the provisions in the draft orders either way to suit my reasons for the judgment and the parties’ circumstances.

The following order is thus made.

### **Order:**

1. Decree of divorce is granted
2. That the parental rights, responsibilities, rights and care as envisaged by the provisions of Section 18, 19 and 20 of the Children’s Act, Act 38 of 2005 in respect of the minor children born from the marriage relationship between the parties, shall be awarded to both parties to the specific proviso that:
  - 2.1.1 The primary residency in respect of the minor child D[...] J[...] S[...] born on the 13<sup>TH</sup> of MAY 1997, shall be awarded to the defendant subject to the plaintiff’s rights of reasonable contact to the said minor child at all reasonable times, which rights of contact shall include, but not be limited to:
    - 2.1.1.1 The right of the plaintiff to remove the minor child for every alternate weekend from 17:00 to Sunday 18:00;
    - 2.1.1.2 The right of the plaintiff to remove the minor child for every alternate short school holiday with the specific understanding that the Easter holidays shall rotate between the parties;
    - 2.1.1.3 The right of the plaintiff to remove the minor child for 50% of every long school holiday with the specific understanding that the Christmas portion of the December school holiday shall rotate between the parties;

2.1.1.4 The right of the plaintiff to remove the minor child for every alternate public holiday, every alternate birthdays of the minor child, every birthday of the plaintiff and every mother's day with the specific understanding that the minor child shall spend every birthday of the defendant and every father's day with the defendant;

2.1.1.5 The right of the plaintiff to reasonable telephonic contact to the said minor child at all reasonable times.

2.1.2 That the primary residency and care of the minor child N[...] M[...] S[...] born on the 14<sup>TH</sup> of MARCH 2002 shall vest with the plaintiff subject to the defendant's rights of reasonable contact to the said minor child at all reasonable times, which rights of contact shall include but not be limited to:

2.1.2.1 The right of the defendant to remove the minor child for every alternate weekend from Friday 17:00 to Sunday 18:00;

2.1.2.2 The right of the defendant to remove the minor child for every alternate short school holiday with the specific understanding that the Easter Holiday shall rotate between the parties;

2.1.2.3 The right of the defendant to remove the minor child for 50% of every long school holiday with the specific understanding that the Christmas portion of the December school holiday shall rotate between the parties;

2.1.2.4 The right of the defendant to remove the minor child for every alternate public holiday, every alternate birthdays of the minor child, every birthday of the defendant and every father's day with the specific understanding that the minor child shall spend every birthday of the plaintiff and every mother's day with the plaintiff;

2.1.2.5 The right of the defendant to reasonable telephonic contact to the said minor child at all reasonable times.

3. That the defendant undertakes to pay maintenance in respect of the minor daughter, N[...] M[...] S[...], at the rate of R3 000,00 per month from the 1<sup>st</sup> day of the month subsequent to the granting of a final decree of divorce and thereafter on or before the 1<sup>st</sup> day of each and every successive month which maintenance shall be paid by the defendant directly to the plaintiff or at such other place as the Plaintiff may, from time to time, notify the defendant in writing where such maintenance is to be paid.

4. Over and above the payment of maintenance as aforesaid, the defendant shall retain the two minor children



as dependants on the defendant's medical aid scheme at his costs and to pay all reasonable and necessary shortfalls not covered by the said medical aid scheme on demand.

5. Over and above the payment of maintenance and medical expenses as more fully provided for above, the defendant is liability for payment of the two minor children's reasonable school fees [at the schools which the minor children currently attend, alternatively, at a school of similar standing], prescribed school books, prescribed school stationery, prescribed school uniforms, prescribed school tours, reasonable extra lessons, reasonable after care school fees, reasonable extramural activities [limited to two extramural activities per child per annum] and reasonable extramural activity equipment on demand.

6. The maintenance as more fully referred to above shall increase with an amount equal to the weighted average of the Headline Consumer Index [for all urban areas] as published by the Department of Statistics for the preceding 12 months, the first of such increase to be effected on the 1<sup>st</sup> day of December 2015 and annually thereafter.

7. The defendant shall pay rehabilitative maintenance in respect of the plaintiff at the rate of R5 000, 00 per month for a period of twelve (12) months, calculated from the 1<sup>st</sup> of December 2014 and on or before the 1<sup>st</sup> day of each and every successive month thereafter, which maintenance shall be paid by the defendant directly to the plaintiff or at such other place as the plaintiff may from time to time, advise the Defendant in writing where such maintenance is to be paid.

8. The joint estate of the parties shall be divided between the parties in equal shares. It is recorded that the parties have divided all the assets of the joint estate save for the immovable property and the defendant's pension interests as more fully provided for hereunder.

9. The defendant must ensure that the Volkswagen Polo, registration number RNP 105 GP, is registered in the name of the plaintiff and that the defendant will be responsible for the costs in this regard.

10. The defendant will ensure that 50% of his 2213 shares in Vodacom are transferred to the plaintiff within a reasonable time from the date of this order.

11. The defendant will cause transfer of 50% of his 1300 shares in Telkom to the plaintiff within a reasonable time from the date of this order.

12. The defendant will pay to the plaintiff an amount equal to 50% of the net value (appreciated value minus amount of bond still outstanding and the costs of valuers, but excluding any further encumbrance on the property by the defendant after 01 December 2012) of the common property at 513 Velskoen Road, Die Wilgers, within a reasonable time after date of this order. The appreciation of the property will be done by

two independent property appraisers. The costs relating to the property appraisals will be borne by both parties equally. Should the defendant not be inclined to pay the plaintiff an amount equal to 50% of the above net value, the property may be sold on the open market for a market related price to be determined by two independent property appraisers.

13. The Plaintiff is awarded 50% of the value of the defendant's pension interest in the Telkom Retirement Fund, as at the date of this order and payable to the plaintiff in terms of the provisions of section 37D (1) of Act 24 of 1956 to which the defendant consented to the registration of an endorsement against the records of the aforesaid pension fund scheme to that effect. The defendant will notify the appropriate Pension Fund immediately after granting of the decree of divorce and this order for this stipulation. The defendant must sign necessary documents and must take all steps to ensure that the plaintiff is paid over by the Telkom Retirement Fund the said proceeds within a reasonable time from date of this order in an account of Plaintiff's choice.

14. The Plaintiff is awarded 50% of the amount exceeding R50 000,00 as at the date of this order the defendant's Money Market account held at Nedbank, which is to be paid over to the plaintiff within three months from date of this order.

15. There shall be no order as to costs.

On behalf of the Plaintiff: Ross & Jacobs Inc.

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Adv. J. Du Plessis

On behalf of the Defendant: Shapiro and Shapiro

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[footnote1](#)