IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 538/97

IN THE MATTER BETWEEN

HANS HELMUTH HERMANN STEFFEN	PLAINTIFF
VS	
DOROTHEA SUSANNA STEFFEN	DEFENDANT
(Born Roats)	
CORAM	S.B. MAPHALALA - J
FOR PLAINTIFF	MR SMITH SC
FOR DEFENDANT	MISS KUPER S C

JUDGEMENT ON EXCEPTION

(20/10/98)

The plaintiff excepts to paragraph 4 of the defendant's counter claim on the following basis.

1. That does not exist a cause of action entitling the defendant to claim maintenance from the plaintiff after a final decree of divorce has been granted.

2. The facts pleaded by the defendant do not create a cause of action.

3. There is no legal basis entitling the defendant to claim maintenance from the plaintiff on divorce.

The matter came before me for arguments on the contested motion of the 26th June 1998 and after hearing arguments I reserved the passing of judgement. The parties filed exhaustive heads of arguments supported by numerous decided cases and writings by imminent jurists on the question. The crisp legal question to be determined by the court is whether or not in our law a divorced wife, even though she be the innocent party, has a legal claim under our common law to maintenance after the termination of the marriage.

Mr. Smith for the plaintiff submitted that the plaintiff, who is married to the defendant, has in terms of Rule 23 of the High Court Rules taken an exception to paragraph 4 of the defendant's counter claim in the pending divorce action between the parties. The defendant at paragraph 4.2 of her counter claim avers that she is entitled to claim, which, she hereby does, maintenance for herself in the sum of E10,000 per month. Mr. Smith contends that in terms of the common law, the courts do not have, save in terms of a voluntary agreement between the spouses in regard to future maintenance of one to the other spouse, any power to award the plaintiff spouse maintenance on divorce [other than in the exceptional case of divorce on the ground of incurable insanity]. That it was held by a full bench in the case of Schultz vs Schultz 1928 OPD 155 at page 159 and 162 thus:

"The right in question never formed part of the Roman-Dutch Law...". ".. .under all the circumstances I do not consider that the claim for alimony is supported by Roman-Dutch Authority"

Further he contended that in the case of Wilson vs Wilson 1924 N. P. D 473 similar sentiments were expressed by that court, thus:

".. .but I do not think, on principle, having regard to the basis of marriage and obligations which mutually exist between the parties that it can be accepted that, once the bond is gone, either spouse is under an obligation to maintain the other".

This view was supported in Colly vs Colly's Estate 1946 W. L. D. 83 and 85 where it was stated:

"It may be settled in our law at the present day that after divorce, in the absence of an agreement, a wife has no claim against her husband for maintenance".

Mr. Smith referred the court to a string of authorities where this principle was applied over the years, to wit Harrison vs Harrison 1952 (3) S.A. 636;(ok); Sadie vs Sapie Waldman vs Waldman 1953 (4) S.A. 39 (w); Berkowitz vs Berkowitz 1956 (3) S.A. 522 (sr); Bloom vs Bloom 1961 (3) S.A. 825 (d); Vale vs Vale 1966 (1) S.A. 541 (SA); Lincesso vs Lincesso 1966 (1) S.A. 747 (w); Knight vs Knight 1967 (1) S.A. 40 (k); Milne vs Estate Milne 1967 (3) S.A. 362 (k); Heyns vs Heyns 1978 (4) S.A. 530 (RAA), Portinito vs Portinito 1981 (2) S.A. 595 (T); Schutte vs Schutte 1986 (1) S.A. 872. He further submitted that there are a number of earlier cases in which the courts, particularly in the case, have taken the view that they were competent to order the guilty spouse to pay maintenance to the innocent spouse, Vide Clansen vs Clansen 1919 CPD 13; Maloney vs Maloney 1918 to 1923 GWL 147; Colley vs Colley 1920 EDL 218; Toms vs Toms 1920 CPD 455; Twig vs Twig 1921 WLD 75; Goldby vs Goldby 1921 NDD 298 and Miller vs Miller 1925 EDL 120 but these must now be taken to have wrongly decided.

Mr. Smith contended that the only common law writers to deal with maintenance on divorce are Voet and Arntzenius. Voet states that an innocent spouse does not have to maintain the guilty spouse after divorce, which creates the impression that, an innocent spouse may claim maintenance from the guilty spouse on divorce. To this effect he referred the court to Johannes Voet, Commentarius and Pandectas, 25 38 (Gane's Translation). Mr. Smith contends that Voet does not, however, mention any decision or other authority in support of the implied proposition that the guilty spouse can be compelled to support the innocent spouse after divorce and states nowhere that an innocent party may claim maintenance on divorce and he submits that Voet was confused between judicial separation and divorce, as he refers the reader to a passage, namely 24 2 18 where he deals with maintenance claimable on judicial separation and not on divorce (refer to Voet 24 2 18). This submission is supported by the decision in Schultz vs Schultz (supra) at 158 and 162 where it is said with reference to Voet:

"It may be that the learned author was momentarily confusing between judicial separation and divorce, indeed that possibility becomes more apparent in view of the fact that Voet in furtherance of his remark, refers the reader to an earlier passage [24 2 18] where he is undoubtedly dealing with maintenance claimable on judicial separation, not on divorce".

Arntzenius states that if the fruits of an innocent wife's property are insufficient for her maintenance, the husband is bound to furnish the shortfall, even if the wife had brought nothing into the marriage and he supports Voet's contention that a guilty wife cannot claim maintenance from the innocent husband. (Refer Arntzenius, Institutions Juris Belgici Conditione Hominum 3, 7, 15, 19, 31 - FP. van der Heever Translation). According to Mr. Smith Arntzenius fails, as Voet does, to differentiate between separation and divorce, however differs in that the marriage is not dissolved by separation and the duty to support the spouse and it can therefore not be said that separation and divorce are equal. In so far as his Lordships Mr. van der Heever supports the viewpoint taken by Voet and Arntzenius in Van Schalkwvk vs Van Schalkwyk 1947 (4) S.A. 86 (o). His Lordship Mr. Justice van der Heever's remarks are only obiter. The obiter dicta was not supported by the other members of the bench, namely the then Judge President of the Orange Free State Provincial Division, his Lordship Mr. Justice Fischer and his Lordship Mr. Horwitz. Mr. Smith cited a number of subsequent cases which did not support this obiter dicta either viz,

Sadie vs Sadie Waldman vs Waldman (supra), Berkowitz vs Berkowitz (supra); exparte Stein (supra), Bloom vs Bloom (supra) Vale vs Vale (supra).

The common law position that a wife cannot claim maintenance from her husband on divorce was altered by statute in South Africa and Rhodesia in that a spouse was granted the right to claim maintenance on divorce by statute (refer Matrimonial Affairs Act 37 of 1953) and Rhodesian Act No. 20 of 1943). Mr. Smith argued that as there is no similar statutory provision in Swaziland that a court may grant a spouse maintenance on divorce, it is submitted that the common law applies, namely that a spouse cannot claim maintenance and this court does not have the power to award maintenance to a spouse on divorce. Mr. Smith contends that in the premises paragraph 4 of the defendant's counter

claim does not create or disclose a cause of action in that the defendant is not entitled to claim maintenance [as a result of the common law] and the court is not empowered to grant such relief. In order to disclose a cause of action in her counter claim, the defendant in this instance has to see to it that the essential facts [i.e. the facta propanda] of her claim is set out with sufficient particularity and clarity that, if the existence of such facts is accepted, her legal conclusion would be confirmed and enable her to succeed with the relief claimed.

The plaintiff prays that the exception be upheld and defendant's claim for maintenance as set out in paragraph 4 of her counter claim be dismissed with costs.

This is the plaintiff's case.

Now I proceed to outline the defendant's case. Miss Kuper directed the court's attention to a discussion relating to the applicable law of a spouse's right to maintenance on divorce as set out in The South African Law of Husband and Wife, Hahlo (2nd) page 369 - 374. In amplification thereof: prior to the matter of Schultz vs Schultz 1928 ODP 155 the court granted orders in terms of which maintenance to the innocent spouse on divorce was awarded. Such orders were considered in Burnett vs Burnett 1917 EDL 218, Clunsen vs Clunsen 1919 CPD 13, Toms vs Toms 1920 CPD 438, Muloney vs Muloney 1920 (GWLD) 1918 - 1927 147; Goldby vs Goldby 1921 (42 NPD 298); Twigg vs Twigg 1921 WLD 75 und Miller 1925 EDL 120 at page 125/126. There do not appear to be any judgement against the proposition prior to 1928. The basis of the award was Voet 25: 3: 8 which reads as follows:

"Innocent spouse need not maintain guilty spouse after divorce. Clearly, if a divorce has taken place on the ground of the adultery or malicious desertion of a spouse who suffers from poverty, the position is rather that a wealthy innocent spouse is not compelled against his or her will to feed the guilty party, when the latter by his or her wickedness has so basely broken off and rent apart an indivisible and life long companionship.

Canon Law:

As to what is laid down by Julius Clarus and some others to the effect that maintenance is to be nonetheless provided, it rest on the well known ground that under Canon Law the bond of wedlock is by no means destroyed for such causes. But since the contrary rule holds good among us, a contrary view should also be approved as to maintenance never having to be provided for such a guilty party. Apart from this many paper writers also cherish the same view. They are reported by Berlichins"

That line of cases was disrupted by Schultz vs Schultz (supra). Subsequent thereto, decisions have gone both ways. Schultz decision was followed in Taylor vs Tuylor 1928 WLD 215 at 215 (subsequently criticised in Hankin vs Hankin 1931 WLD 265 at 267

which was in turn considered in Hankin vs Hankin (1932) WLD 190 at 192 the court (Greenberg J) simply

saying:

"In his judgement on the 14th September, 1931, Krause, J expressed doubts as to the correctness of the decision in Taylor vs Taylor (supra). I have read the cases referred to by Tindall and Krause JJ in their respective judgements and I think I am bound to follow Taylor's case"

Miss Kuper then cited a long line of cases starting with the case of Broodryk vs Broodryk 1934 © 275 at 277 Copelowitz vs Copelowitz 1969 (4) S.A. 64 © which followed the Schultz case (supra).

The cases subsequent to the passing in South Africa of the Matrimonial Affairs Act (Act No. 37 of 1953 (CF: The Matrimonial Causes Act, chapter 20 of 1943, Southern Rhodesia) simply state obiter as a proposition that it is generally accepted that the law in South Africa, after Schultz vs Schultz precluded the court from ordering maintenance for the innocent spouse subsequent to divorce, save by consent. Section 10 of the aforesaid Act reads as follows:

"10 (1) The court granting a divorce may, notwithstanding the dissolution of the marriage:

a) Make such order against the guilty spouse for the maintenance of the innocent spouse for any period until the death or until the remarriage of the innocent spouse, whichever event may first occur, as the court may deem just, or

b) Make any agreement between the spouses for the maintenance of one of them, an order of court and any court of competent jurisdiction may, on good cause shown (which may be a cause other than the financial means of either of the respective spouses) rescind, suspend or vary any such order

2. Any court of competent jurisdiction may at any time upon the application of either party to an agreement for the maintenance of one of them entered into prior to the date of commencement of this Act between the spouses who have been divorced, make such an agreement an order of the court.

The aforesaid cases were criticised in - Owens vs Stoffberg NO and Avo 1946 © 226 and Van Schalkwyk vs Van Schalkwyk 1947 (4) S.A. 86 (o). The court has to chose between Van Schalkwyk vs Schalkwyk and Schultz vs Schultz (supra)

Miss Kuper submitted on behalf of her client at the rationale for Schultz vs Schultz and the succeeding judgement are:

9.1 There is no basis in Roman - Dutch Law for maintenance subsequent to divorce. Maintenance is part of the obligation to support each other assumed by spouses on marriage. The severing of the marital bond dissolve such obligation [compare orders for judicial separation where the only marital obligation suspended is that of cohabitation].

It is submitted that Voet 25.3, 8 cannot simply be wished away.

9.2 To award maintenance is inimical to public policy in that it might tempt a guilty spouse to buy his divorce with an offer of maintenance.

However, this ignores the converse that, it has been generally accepted that where the parties enter into an agreement that one should pay maintenance for the other after divorce, the courts will make such agreement an order of court (see Berkowitz vs Berkowitz 1956 (3) S.A. 522 at 525. This is particularly so where the agreement is negotiated on a quid pro quo basis the consent is not given for motives of liberality. It seems clear that, argues Miss Kuper if a court has the power to make agreements relating to maintenance orders of court, such claims can, in fact must, be made otherwise there will be no issue in the lis between the parties to be settled or negotiated. In so far as the balance of authority may be against the proposition that an innocent spouse is entitled to maintenance on divorce, it is submitted subject to

the court's discretion [see Grgin vs Grgin (supra) that stare decisis will not avail a party where the previous decision was wrong. In conclusion Miss Kuper contended as follows:

1. That there is no inimitable authority that the innocent spouse is not entitled to maintenance on divorce;

2. That such spouse is, in any event, entitled to obtain such maintenance by agreement;

3. That if that is so, the claim should, and must, be made;

4. That stare decisis will not uphold bad law. This is the defendant's case.

I must say that I am greatly indebted to counsels' instructive heads of arguments and their insightful submissions. I must also add that my tardiness in not handing down judgement sooner in this case is in some large measure due to the voluminous cases and articles by imminent jurists I was referred to by counsel. I had to go through them very carefully for me to do justice to the case. As I have pointed out earlier in my judgement the crisp legal question to be determined by this court is whether or not in our law a divorced wife, even though she be the innocent party has a legal claim to maintenance after the termination of the marriage. There is no legal authority in this country touching on the matter that one is

forced to seek refuge in the South African decisions for guardiance. It must also be borne in mind that this country practices Roman-Dutch Law, which is also the common law which maintains in the Republic of South Africa. This issue has been dealt with in a number of cases in South Africa until the controversy was put to rest by the promulgation of The Matrimonial Affairs Act No. 37 of 1953 or rather as Miss Kuper contended until the right of the wife was put "beyond doubt" by the said Act.

In 1928 a two - judge court (De Villiers, JP and Mcgregor J) in the Free State decided that the right of an innocent spouse to claim maintenance from her erring husband in an action for divorce does not exist in South African common law (Schultz vs Schultz 1928 O. P. D. 155) and ignored Voet's none too clear statement to the contrary (25.3.28) because it was. not unsupported by authority. This decision was followed in Hodd vs Hodd 1942 N. P. D. 198 and since that case the doctrine received fairly general recognition by the courts in South Africa. In a case the question whether an agreement between the husband, who is plaintiff in the action and the defendant, his wife, whereby he promised to pay her 14 pound sterling a month for life, should be made an order of court by consent, came up for decision by the full bench of the O. P. D. (Van Schalkwyk vs Van Schalkwyn 1947 (4) S.A. 86). Van der Heever J availed himself of the opportunity this afforded to state roundly that Schultz vs Schultz (supra) was wrongly decided and that an innocent spouse who divorces her husband is entitled to claim maintenance from him. The other two judges do not appear to have associated themselves with this pronouncement, which was obiter for purposes of the decision.

It is not the decision itself and its possible effect which are interesting, but the trenchant argument which Van der Heever J, uses to drive his opinion home. After stating that the doctrine of stare decisis is not one which must lightly be departed from in matters in which people are entitled to regard the law as settled, he remarks that he doubts whether adulteress and malicious deserters can be allowed to invoke this principle and be heard to complain that they have been misled by it into thinking that they could sin with impunity; he then goes on to say:

"In spite of the emancipation of women and their greater participation in industry and commerce, by far the majority of them still find their vocation and niche in life, as well as their economic security, in marriage. The man in the majority of cases is still the breadwinner. It seems to me a hard rule that a woman who has given the best years of her life to her husband and his home, may see him go off with a younger woman and be forced either to stultify her existence by obtaining judicial separation and maintenance, or obtain a divorce without such protection and attempt to subsist in a world of competition for which, by reason of her devotion to her husband and their home, she is ill-prepared. The husband may

be, as one so frequently finds in present day life, a man with few assets but a large income. She was his helpmate in the struggle to attain to his present circumstances. He has joined her in a sacred union which implied maintaining her for life. In addition to casting off these obligations, he does her the greatest wrong a man can commit against a woman, yet she has no redress, but must

choose between stultifying her woman hood or going forth destitute. Not only is such a doctrine grossly unfair, it is obviously conducive to immorality....."

Miss Kuper's contention is based to a large extent on the above statement by Van der Heever J and she takes the view that the learned judge in that case correctly interpreted Voet (supra) on the subject. Further that the dicta in Schultz (supra) should not be followed as it was bad law. She submitted furthermore that there is hardly a modern system of law where the courts cannot make such an order.

Having listened to the arguments from both sides and having read the decided cases and texts from eminent jurists on the subject it is my considered view that in so far as his Lordship van Her Heever supports the view point taken by Voet and Arntzenius in Van Schalkwyk vs Van Schalkwyk (supra) his lordships remarks are only obiter dicta. The said obiter dicta was not supported by the other members of that bench, namely the then Judge President of the Orange Free State Provincial Division Fischer JP and Horwitz J. Subsequent case law in South Africa did not support this obiter dicta either vide; Sadie vs Sadie, Waldman vs Waldman; Berkowitz vs Berkowitz; Exparte Stein & another; Bloom vs Bloom and Vale vs Vale. I am persuaded therefore to follow the dicta in Schultz vs Schultz (supra) and the reasons advanced by their lordships as regards their interpretation of Voet 24.2.18 where there had this to say at page 138:

"It may be that the learned author was momentarily confusing between judicial separation and divorce, indeed that possibility becomes more apparent in view of the fact that Voet in furtherance of his remarks refers the reader to an earlier passage [24.2.18] where he is undoubtedly dealing with maintenance claimable of judicial separation, not divorce".

In the premise my view is that the dicta in Schultz (supra) maintains as the common law of this country. If there is any doubt in the matter, it is hoped that the legislature will resolve that doubt as soon as possible to make our law conform to the trend prevalent in the civilized world.

In the result, I uphold plaintiff's exception to paragraph 4 of the defendant's counterclaim.
Costs to be costs in the cause.

S.B. MAPHALALA

JUDGE