

SOUTH AFRICA / JUDGMENT

K.N v B.A.N (1513/2020) [2022] ZAECQBHC 38 (18 October 2022)

[2022] ZAECQBHC 38**COURT**

Eastern Cape High Court, Gqeberha

BEFORE

J W Eksteen

CASE / FILE NUMBER

1513/2020

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Policy**FLYNOTES:****MAINTENANCE – ABILITY TO WORK**

Divorce

– Maintenance – Employment prospects of ex-wife –

Aged 46 and was married for 22 years – Little
work

experience and lacking qualifications or training –

Prospects slim – Realities of divorce and available
funds of

ex-husband – Monthly maintenance of R6,000 awarded.

IN THE HIGH COURT OF

SOUTH AFRICA

EASTERN

CAPE DIVISION, GQEBERHA

Case

No.: 1513/2020

Date

Heard: 12-14 September 2022

Date

Delivered: 18 October 2022

In

the matter between: K[....]
N[....]
Plaintiff
and
B[....]
A[....]
N[....]
Defendant

JUDGMENT

EKSTEEN J:

[1] The parties were married to one another, out of community of property and with the application of the accrual system[1], on 3 February 2000. The marriage relationship has broken down irretrievably and, accordingly, the plaintiff sought a decree of

divorce and certain ancillary relief. It was common ground, and the evidence established, that there is no reasonable prospect of the restoration of a normal marriage relationship. There is one minor son, J[....], currently 16 years old, and one major daughter,

E[....], who was still dependent on the parties at the time of the trial, born of the marriage.

[2] At the start of the trial it was agreed that the primary care of J[....] should be entrusted to the plaintiff, with the defendant to have reasonable access to him. E[....], as I have said, is an adult woman, 21 years of age, and in her final year of tertiary study. She is expected to qualify and obtain employment at the end of 2022, whereafter it is anticipated that she would not require maintenance.

[3] The accrual was, to an extent, distributed prior to the trial and it was agreed at the hearing that the plaintiff is entitled to a further amount of R1 501 401,00, after tax, which would be sourced from the defendant's pension interest in the Massmart Provident Fund.[2] In this regard, it is common cause that he is a member of the Massmart Provident Fund, managed by Sanlam, with membership number

[....] and that he has acquired a pension interest in the Fund, as envisaged in the Divorce Act[3], as amended. The agreements are reflected in the order which is recorded at the conclusion of this judgment.

[4] What remained in issue at the trial, was, first, the extent of the defendant's liability for the maintenance of J[....] and, second, the issue of spousal maintenance for the plaintiff. The defendant contended that she had means of her own which, together with the distribution of the accrual, was sufficient for her to maintain herself and to contribute to the maintenance of J[....]. On behalf of the plaintiff, on the other hand, it was argued that her prospects of gainful employment were slim and that she reasonably required some supplementation of her resources. Neither party contended for rehabilitative maintenance to be paid for a

limited period.

- [5] Spousal maintenance after divorce is regulated by s 7 of the Divorce Act, which sets out the considerations to be taken into account in making maintenance orders. Section 7(2) stipulates that:

“... 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.”
- [6] In Van Wyk[4] this court observed that a proper application of the section involves a balanced assessment of maintenance needs and ability to pay and that the starting point was the existing and prospective means of the plaintiff and her earning capacity, because, if she has the ability to support herself, she is not entitled to maintenance from the defendant.[5]
- [7] In consequence of the agreements reached in respect of the remaining distribution of the accrual, and the division of certain joint assets which have previously been distributed, the plaintiff reduced her maintenance demands from the proportions claimed in the pleadings. In respect of J[....] she sought an order that the defendant contribute as follows to his maintenance, until such time as he becomes self-supporting:
- (i) by payment of an amount of R8 000 per month, payable on the 25th day of each consecutive month;
- (ii) by retaining J[....] on his medical scheme, at his expense, and by covering the costs of all J[....]’s reasonable and necessary medical expenses that are not covered by the medical aid, and
- (iii) by payment of J[....]’s scholastic expenses in full, including, but not limited to school fees, school uniform, school stationery, text books, extramural activities, sporting activities, school tours, sports tours and sporting equipment.
- [8] She further sought an order that the defendant pay to her an amount of R12 000,00 per month on the 25th day of each consecutive month as and for maintenance. In support of these claims she handed in a schedule reflecting her anticipated

monthly expenditure after divorce, which amounted to R25 861,03 per month. She said that the figures contained in the schedule were based primarily on actual expenses incurred in the last 12 months and she contended that it represented her reasonable need. A similar schedule was prepared in respect of J[....]'s expenses. It was compiled on a similar basis and amounted to R10 455,19 per month. The schedule excludes medical or educational expenses, which had been paid thus far by the defendant.

- [9] The plaintiff is 46 years old and she has been married to the defendant for 22 years. She is not a wealthy woman in her own right. As I have said, the parties had divided some of their joint assets prior to the action. Thus, the plaintiff has some furniture. The common home was sold and the proceeds equally divided between them. She received an amount of R420 000,00 from this transaction. They also had a herd of cattle which was kindly managed by her brother on his farm in Maclear. The herd was sold and the proceeds thereof divided with each receiving R73 566,66. She has spent some of her share of these distributions to meet necessary expenses subsequent to the separation and retains an amount of R380 000,00, which is invested.
- [10] She said that she had received an estimate of legal expenses due to her attorney in the amount of R150 000,00 in respect of the divorce proceedings. In addition, her parents have advanced money to her on loan in the amount of R175 700,00 in the period leading up to the action. She has rented accommodation from her brother, where she and J[...] reside, and currently owes him an amount of R102 000,00 in arrear rental. These debts were not challenged during evidence. Thus, after the redistribution of the accrual has been effected, she will have available the amount of R1 453 701,00.
- [11] The plaintiff currently drives a Toyota Hilux vehicle which is the property of the defendant and he has indicated that he requires the return of the vehicle. She said that she would be obliged to obtain a reasonable secondhand vehicle which was essential to her, inter alia, to convey J[...] to school and back and to other extramural activities which he is required to perform. Ms Gagiano, for the plaintiff, suggested that an amount of R300 000,00 should be provided for this purpose. While no market based evidence was provided for this figure, I am satisfied that it represents a sensible conservative estimate for a reasonable purchase, and Mr Jooste, for the defendant, did not challenge it. The plaintiff would therefore have at her disposal an amount of R1 153 701,00 to invest

and the parties have agreed that she could obtain a return of 9% from it, which equates to R8 652,75 per month. I do not consider this to be sufficient for her maintenance.

- [12] That brings me to her earning capacity. She has no formal qualification or training subsequent to matriculating in 1994. From the inception of the marriage until August 2019 she was not engaged in any form of employment. She testified that she had considered seeking employment when J[...] proceeded to primary school, but in consultation with the defendant they decided that she should not do so as she had no work experience and, as she put it, "the cost of the wardrobe required would be more than (her) earnings". Throughout

the marriage she had dedicated herself to the housekeeping, homemaking and cooking, most of the time without domestic assistance.

- [13] In August 2019 she decided to take up the position of an administrative assistant at the “Unity in Africa Foundation”, initially for three mornings in a week, which was later expanded to five mornings per week. It was a part-time position as a backup administrative assistant to tertiary educational students to assist in needs such as applications for bursaries. In January 2020 she became a permanent employee and her role was expanded to a student co-ordinator offering guidance, advice, support and events

planning. She earned R13 304,90 per month before she eventually resigned with effect from 1 December 2021. She explained that the

environment at the work had become toxic and hostile and the home situation was difficult as a result of the disintegration of her marriage, and she was struggling to manage her own emotions. It was at this time that her parents agreed to advance money to her, in lieu of her salary, which was being lost, for a period of one year in order to stabilise her life. Hence the indebtedness to her parents to which I have referred.

- [14] Prior to her resignation she did attempt to obtain alternative employment with Capstone School as a secretary. She was afforded a final interview but did not secure the position. She has since applied for at least 45 different working opportunities which she considered to be relatively compatible with her very limited work experience. She has not been invited to a single interview.
- [15] Although the plaintiff said that she would like to be employed and portrayed a positive self-image, optimistic of obtaining some form of employment, I am satisfied that her prospects of securing a rewarding position are very slim indeed. As I have said, she has very limited working experience and she is no longer young. She has no post school qualification nor formal training in any field of employment. She has made numerous applications, without success, and the conclusion to which one is ineluctably driven is that she will be at a significant disadvantage against an oversupply of younger applicants in the labour market.
- [16] This is not to say that she is unemployable. She is a presentable, intelligent, healthy, well-spoken woman and, as adumbrated earlier, portrays a positive self-image. Her own evidence suggests that she may be able to find some form of employment in future, but, realistically, the expectation is that it would yield a modest income. I have accordingly come to the conclusion that she will require maintenance until her death or remarriage. If her circumstances change significantly, the maintenance order which I make may then be reassessed and, if necessary, varied.

[17] The defendant has been in steady employment with the same company for 25 years. The shareholding in the company, and its name, changed from time to time and it is currently known as Finro's Cash and Carry, owned by Massmart. The defendant holds the position of a store manager at a large outlet in North End, Gqeberha. He earns a basic salary, together with allowances, of R76 000,00, which translates to a net salary, after deductions and tax, of approximately R44 000,00. In addition, he explained that since he

joined the company, approximately 25 years ago, he had received an annual incentive bonus in March of each year. The bonus paid in 2022 amounted to R56 800,00.

[18] He said that the structure for the calculation of bonuses has been amended and ventured to suggest, initially, that no further bonuses will be paid. However, when pressed on this issue, he was constrained to acknowledge that he had not been advised of such a development, but he said that he perceived it to be unlikely that he would receive an incentive bonus in 2023. This, he said, was for reasons which he suggested that I would not understand. Again, when pressed, he advanced two reasons for this perception of the future prospects of bonuses. One, he said, could be ascribed to the implementation of a new IT system which has resulted in what he described as a massive customer defection from the company stores. The second, he ascribed to inflation on food stuffs and the Ukrainian war which has resulted in a scarcity of certain products. While I understand that retail business in South Africa and, indeed, across the world, currently experience considerable financial constraints, I am unable to find any foundation for the anticipation

that no future incentive bonuses will be paid to senior management staff. I am satisfied that it is fair to assume that future bonuses will continue to accrue, as they have done in every year, through the past 25 years of employment, albeit that the extent thereof may vary from time to time, depending on trade conditions. I, accordingly, take into consideration the expectation of an annual incentive bonus in evaluating the defendant's prospective means.

[19] The defendant produced in evidence a schedule of his monthly expenses which he said were mostly based on estimates, as opposed to actual invoices. He reflects his monthly expenses in an amount of R45 107,56, which includes provision of R6 000,00 as maintenance for J[...] and R4 700,00 as school fees, as well as provision for J[...] on his medical aid. It also includes an allowance of R1 200,00 for E[...], R628,99 as a telephone expense, due to Vodacom, in respect of the plaintiff's telephone account. As adumbrated earlier, it is contemplated that E[...] will be self-supportive from the end of the current year and the expenses in respect of the plaintiff's telephone would fall away. The expenses reflected in the schedule reflect his current expenses,

rather than his anticipated post-divorce expenses.

[20] Self-evidently the available funds are insufficient to maintain the plaintiff and the defendant at the standard at which they have lived thus far. That brings me to the sad reality of divorce proceedings. In Kroon[6] at 637C-H, Baker J articulated the reality thus:

‘The parties are no doubt aware that in most cases persons who have become divorced will be compelled by necessity to reduce their standards of living, for where the available means of support are not adequate to maintain both according to their former scale of living, each must of necessity scale down his or her budget. In the case of most of us divorce brings a measure of hardship or at least some degree of deprivation. To say that two can live as cheaply as one is not true. The fact of the matter is that two living together can live more cheaply than two living apart, for obvious reasons such as the need for two residences plus rates, maintenance, service charges and all the rest of it; two cars plus the concomitant expenses; two lots of household goods to buy and maintain; and so forth. The problem of "indivisible household expenses" is a real one: ... The fact that each former spouse now has to pay for things formerly enjoyed in common places a heavier burden on the finances than was formerly the case. It is therefore clear that in most cases both parties will have to reduce their standard of living to some extent.’

The present case is a typical example of this reality.

[21] As I have explained earlier there was no significant dispute about J[...]'s reasonable needs. The defendant contended, however, that he should not be required to pay all of J[...]'s expenses and that the plaintiff should be required to make a contribution to those expenses in accordance with her means. The difficulty which arises from this argument is that the greater the contribution which is required from the plaintiff is, the greater the need for her increased maintenance. In the circumstances I consider that it is fair that the claims in respect of the education and medical needs of J[....] which I have set out earlier must be accepted.

[22] Finally, an assessment must be done of the maintenance payable to the plaintiff. I have recorded earlier that she would require maintenance until her death or remarriage, whichever occurs first. When due consideration is given to the return which she is able to generate from her investment, after the deduction of a reasonable sum for the purchase of a vehicle, and making some allowance for the possibility of a modest income from employment, I consider that an award of R6 000,00 per month represents a balanced assessment of her maintenance needs and the defendant's ability to pay.

[23] In the result, I make the following order:

1. A decree of divorce is issued.
2. By agreement between the parties the plaintiff is entitled to receive payment of the sum of R2 106 877,00, before tax, from the defendant, being half of the difference between the accrual of the parties' respective estates, which payment shall be made in the manner stipulated in paragraph 3 below.
3. The defendant is ordered to ensure that the Massmart Provident Fund:

3.1 endorse its records to reflect that the plaintiff is entitled to receive payment of an amount of R2 106 877,00, before tax, from the defendant's pension interest; and

3.2 make payment to the plaintiff of an amount of R2 106 877,00 from the defendant's pension interest. The plaintiff shall be liable for the income tax levied on the aforementioned amount.

4. The primary care of the minor child, J[...], born of the marriage is awarded to the plaintiff, subject to the defendant's right to reasonable contact.

5. The defendant shall contribute as follows to the maintenance of the parties' minor child, until such time as the minor becomes self-supporting:

5.1 By payment of an amount of R8 000,00 per month, with the first such payment to be made to the plaintiff on 25 October 2022 and thereafter on the 25th day of each consecutive month;

5.2 by retaining the minor on his medical scheme, at his expense, and by covering the costs of all the minor's reasonable and necessary medical expenses that are not covered by the medical aid; and

5.3 by the payment of the minor's scholastic expenses in full, including, but not limited to, school fees, school uniforms, reasonable and necessary school stationery, textbooks, extramural activities, sporting activities, school tours, sports tours and sporting equipment.

6. The defendant shall contribute R6 000,00 per month towards the maintenance of the plaintiff until her death or remarriage, whichever occurs first, with the first such payment to be made on 25 October 2022, and thereafter on the 25th day of each consecutive month.

7. The defendant shall pay the costs of the action.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv L Gagiano instructed by Joyzel Obbes Inc, Gqeberha

For Defendant: Adv P Jooste instructed by Gregory Clark and Associates Inc, Gqeberha

[1] Section 3 of the Matrimonial Property Act, 88 of 1984.

[2] After completion of the trial the parties agreed that she would be entitled to payment of R2 106 877,00, before tax, which would be taxable in her hands in the amount of R605 476,00. They jointly requested, accordingly, that this agreement be reflected in the order I make.

[3] Act 70 of 1979

[4] Van Wyk v Van Wyk

[2005] JOL17228 (SE)

[5] Van Wyk para [6]

[6] Kroon v Kroon 1986 (4) SA 616 (E)

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