

SOUTH AFRICA / JUDGMENT

M.M v M.A (Born N) (562/2021)

[2023] ZALMPTHC 8 (31 August 2023)

[2023] ZALMPTHC 8**COURT**

Limpopo High Court, Thohoyandou

BEFORE

IM Khosa

CASE / FILE NUMBER

562/2021

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Policy**HIGH COURT OF SOUTH****AFRICA****LIMPOPO LOCAL****DIVISION, THOHOYANDOU****CASE****NO: 562/2021****REPORTABLE:**

NO/YES

OF

INTEREST TO OTHER JUDGES: NO/YES

REVISED

DATE:

31/08/2023

In

the matter between

M[...]

M[...]

PLAINTIFF

And

M[...]

A[...] (BORN N[...])

DEFENDANT

JUDGMENT

IM KHOSA AJ

Introduction

- [1] The Plaintiff instituted action seeking a decree of divorce and ancillary relief relating to the primary care and residence, contact, guardianship, parental rights and responsibilities and maintenance of the minor children. The Defendant defended the proceedings and filed a counterclaim.
- [2] At the commencement of trial, counsel for the parties indicated that the only issue in dispute and for determination is the payment of spousal maintenance to the Defendant. The parties had reached an agreement on the irretrievable breakdown of their marriage and ancillary issues. The parties prepared a draft order outlining the terms of the said agreement and applied that it be made an order of court by agreement.
- [3] After hearing the evidence of the Defendant, I made an order dissolving the bonds of marriage between the parties and made the draft order an order of court. In terms of paragraph 9 of the previously mentioned draft order, the issue of spousal maintenance is reserved. In this judgement, I pronounce on the issue of spousal maintenance.

Factual Background

- [4] The parties entered into a civil marriage on the 26th September 2013. Their marital property regime was that of in community of property. Out of the said marriage, two minor children were born. Their relationship faced challenges leading up to the parties' separation during December 2020.
- [5] In her counterclaim, the Defendant seeks spousal maintenance in the sum of R 3500.00. The Plaintiff did not file a replication or a plea to the counterclaim. The Defendant testified in support of her claim for spousal maintenance.
- [6] Her evidence is that the parties married whilst she was studying. She dropped out of school during September 2014 because of pregnancy. The Plaintiff had expressed his desire to be part of the pregnancy and the parties were in the process of building their matrimonial home. The Plaintiff indicated that he cannot afford the new baby the parties were expecting, the building project and to pay for the Defendant school fees simultaneously.
- [7] As a married woman, the Defendant desired to have a family home and she acceded to the Plaintiff's proposition to first complete the building due to circumstances prevailing at the time as the Plaintiff was funding her studies. She still wishes to complete her studies, get employment and be independent.

- [8] For the duration of the marriage, she was financially dependent on the Plaintiff. The Plaintiff bought her groceries for a diet prescribed by her doctors for a bone illness she suffers from and was receiving treatment at a private medical facility financed by the Plaintiff's medical aid scheme.
- [9] The Defendant testified that she does not know the cost of her family's monthly groceries. She only wrote a list of groceries and the Plaintiff would buy the groceries. The Plaintiff did not disclose his income to her. At times, the Plaintiff would give her R 1500.00. The Defendant testified that she seeks maintenance in the sum of R 3500.00 to cater for her food, medication and toiletries until she secures permanent employment. The amount is based on estimates and excludes her clothing.
- [10] When the parties separated during December 2020, the Defendant went to live at the mother's homestead whilst the Plaintiff went to live at his brother's place. Subsequent to their separation, the Plaintiff has stopped supporting her and has removed her from his medical aid. Her father assist her financially with an amount ranging from R 400 – R 600 a month.
- [11] The Plaintiff further testified that she has commenced with studies of 3-year diploma this year and she desires to work upon completion of her studies. Her only work experience is from a 10 months temporary position she held from November 2021 until August 2022.
- [12] The Defendant was referred to the Plaintiff's salary advice for the month of January 2023 reflecting a nett income in the sum of R 26 563.94. During cross-examination, the Defendant was referred to documentary proof of the Plaintiff's debts and did not dispute the following debts, which the Plaintiff is currently servicing on a monthly basis. These expenses excludes the Plaintiff's groceries.
- a. Motor repayment R 9744.45 b. Children's maintenance R 3000.00 c. pension backed loan R 3097.98 d. FNB credit card R 3588.00 e. Tekkie town R 670.00 f. Fuel R 2400.00 g. Plaintiff's lunch meals R 1000.00. Total R 23 500.43
- [13] The Defendant further testified that the marriage relationship has irretrievably broken down; she has lost love for the Plaintiff and does not want to continue with the marriage. The Plaintiff did not testify.

The legal framework

- [14] A marriage create a reciprocal duty of support between spouses. This duty terminates upon death or divorce. Our law does not provide for a right to spousal maintenance when parties divorce[1]. Spousal maintenance is a creature of statute.
- [15] Section 7(2) of the Divorce Act[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.”
- [16] In *EH v SH*[3], the court held that ‘the person claiming maintenance must establish a need to be supported. If no such need is established, it would not be “just” as required by this section for a maintenance order to be issued’.
- [16] In *Van Wyk*[4], the court stated that a proper application of the Section 7(2) of the Divorce Act involves a balanced assessment of maintenance needs and ability to pay and that the starting point was the existing and prospective means of the defendant and her earning capacity, because, if she has the ability to support herself, she is not entitled to maintenance from the Plaintiff.

Evaluation

- [17] From the language of the enabling provision, it is clear that awarding post-divorce spousal maintenance is purely discretionary. This discretion of the court should be exercised judicially according to established rules of law and practice and in making a determination of maintenance, consideration of justice must prevail. The factors that a court will take into account when awarding maintenance are not exhaustive and the court has a very wide discretion whether or not to grant a maintenance, the amount payable and the duration of the maintenance.
- [18] If the circumstances permit, our courts will generally attempt to achieve a “clean-break” between the parties. The Defendant is currently unemployed and studying. She has no existing means to support herself. The Plaintiff has been in steady employment earning a nett income stated above. In this matter, a clean break is not possible.
- [19] The Plaintiff contends that he is financially strained and thus lack means to support the Defendant. As I have already mentioned above, the Plaintiff’s nett income as at January 2023 was R26 563.94. When one subtracts the undisputed total monthly expenses from the nett income, the Plaintiff remains with a balance of approximately R 3 063.51.
- [20] Further, the Plaintiff contends that the Defendant has prospective means as she will received 50% of the Plaintiff’s pension which has a total market value of R 1 621 127.00 and her equal share in the proceeds of the sale of the matrimonial home with a market value of R 740 000.00.

- [21] In K v K[5], it was found that the parties "means" would include property such as a matrimonial home that can be used to generate income.
- [22] The Plaintiff submits that in the event the court orders maintenance, the Defendant's prospective means be taken into consideration. The Plaintiff too, will receive his equal share from the proceeds of the sale of the matrimonial home. I will consider the proceeds of the sale of the matrimonial as a prospective means of both parties in determining the payment of spousal maintenance.
- [23] The Defendant is a middle-aged woman in the process of studying a diploma. She testified that she would like to be employed and portrayed a positive self-image, optimistic of obtaining some form of employment and be independent. She has very limited work experience. The evidence reveal that the Defendant assumed a typical homemaker role and her studies were not a priority. Be it by consent or otherwise, this arrangement had an effect of financially disadvantaging the Defendant.
- [24] Securing a formal qualification would give her a reasonable prospect of securing a gainful employment. Without a formal qualification, the Defendant still has prospects of securing employment in the informal sector. On the other hand, the Plaintiff has had a steady employment from the inception of the marriage to date.
- [25] When dealing with the parties financial needs and obligations, the court in K v K[6] stated that this factor means how much money each party needs for their day-to-day living, and how much of the income or resources of each has to be spent for some obligatory purpose.
- [26] In this matter, the amount of spousal maintenance sought by the Defendant is to cater for her food, medication and toiletries. In my view, these are needs. They are essential for human existence. It is the Defendant's case that the sum of R 3500.00 would cover those needs. The Defendant has no income. I find that the Defendant has established a need to be supported.
- [27] The Plaintiff's undisputed financial obligations are recorded above. From the evidence, it is clear that a substantial amount of the Plaintiff's income goes towards serving debts. What constitutes a need for a specific person will naturally depend on the standard of living of the couple during the marriage. Be that as it may, needs must be distinguished from wants.
- [28] The Plaintiff was born on the 26th August 1982 and thus 41 years old. The Defendant is a 35 years old woman. The parties have been married for 10 years. Their marriage was for a long duration. Although each case has to be decided on its own facts, I align myself with the following quotation from G v G[7] :-

"Middle-aged women who have for years devoted themselves full-time to the managing of the children of the marriage, are awarded rehabilitative maintenance for a period sufficient to enable them to be trained or retrained for a job or profession. Permanent maintenance is reserved for the elderly wife who has been married to a husband for a long time and is too old to earn her own living and unlikely to remarry".

- [29] The Defendant is not a candidate for permanent maintenance. The Defendant seeks maintenance until she secures permanent employment. It is uncertain when will that be. The Plaintiff submits that in the event court orders maintenance, an amount of R 500.00 per month will be fair and the maintenance should terminate when the Defendant receives her 50% share from the Plaintiff's pension.
- [30] When it comes to award rehabilitative maintenance the ability to earn an income and support oneself and the potential to earn an income, does not disentitle a court from ordering rehabilitative maintenance[8].
- [31] From the onset of their marriage, the Plaintiff was sole provider for the family. The Defendant's evidence is that the Plaintiff would at times give her R 1500.00 and lend it back from her. During their marriage, the Plaintiff would have lunch at home and he took out the pension-backed loan, which he is currently servicing. It is clear from the evidence that the parties never lived a luxurious life during their marriage.
- [32] For the duration of the marriage, she was dependent on the Plaintiff as she was unemployed. She requires maintenance to cater for her food, medication and toiletries. The Defendant lacks means to support herself post-divorce.
- [33] The Plaintiff has a steady employment for the duration of the marriage and was the sole provider for the family. Evidence shows that a substantial portion of his income goes towards servicing debts and he is financially strained. After payment of his proven monthly expenses, he remains with the sum of R 3 063.51.
- [34] In an ideal world, post-divorce, the parties should be able to retain their standard of living. Cases show that in reality, this is often impractical. In Kroon[9] at 637C-H, Baker J articulated the reality of divorce as follows:

'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.'

- [35] The present case is a typical example of this reality. The available resources necessitates that the parties reduce their standard of living.
- [36] The Defendant prays for the spousal maintenance for R 3500.00 until she secures permanent employment. The Plaintiff prays for refusal of spousal maintenance, in the alternative, an order for payment amount of R 500.00 payable until the Defendant receives pension payout. The amounts suggested by the parties are not substantiated.
- [37] Although the Defendant will receive pension payout and her share of the proceeds of the sale of the matrimonial home, as at when it is sold. It is not certain how much she will receive. The only evidence before court are estimates of the value of the pension and the house.
- [38] As to the duration of the payment, I find that it will be unjust to terminate the maintenance payment upon the occurrence of an uncertain future event, as this could potentially be permanent.
- [39] The Defendant is not unemployable. She is middle aged and currently in her first year studying a three year diploma. She has matric and has prospects of employment in the informal sector. It is just to order that the payment of maintenance be for a fixed period.
- [40] In my view, the amount of R 2000.00 would be a fair maintenance to cater for the Defendant's food, medication and toiletries. In the circumstances, it just that the Plaintiff be ordered to pay the Defendant spousal maintenance in the sum of R 2000.00 per month. The maintenance is payable for a period of 36 months. In the event the parties' circumstances change significantly, the maintenance order, which I make, may be reassessed, and, if necessary, varied.

[41] I therefore make the following order:-

41.1 The Plaintiff is ordered to pay the Defendant spousal maintenance in the sum of R 2000.00 per month, payable on or before the last day of every consecutive month for a period of 36 months.

41.2 Payment referred to in paragraph 41.1 above, be effected from the 30 September 2023 until 31 August 2026.

IM KHOSA

ACTING JUSTICE OF THE

APPEARANCES FOR THE PLAINTIFF: Adv. UB Makuya INSTRUCTED BY: T Nemalili Attorneys

FOR THE DEFENDANT: Adv. DE Sigwavhulimu INSTRUCTED BY: Madzhiga Attorneys HEARD: 23 and 24 August 2023

JUDGMENT:

31 August 2023

JUDGEMENT

DATE: Judgment handed down, and, electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 31 August 2023.

[1] Strauss v Strauss 1974(3)SA 79 (A)

[2] Act 70 of 1979

[3] 2012

(4) SA 164 (SCA) at para 13

[4] Van Wyk v Van Wyk

[2005] JOL17228 (SE)

[5] 1986

(4) SA 616 (E)

[6] *ibid*

[7] 1987

(1) SA 48 (C)

[8] Joubert v Joubert [2004] 1 All SA 426 SA (C)

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

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