

SOUTH AFRICA / JUDGMENT

## S.M.M v M.S.M (A301/17) [2018] ZAGPPHC 607 (8 May 2018)

[2018] ZAGPPHC 607

COURT

North Gauteng High Court, Pretoria

BEFORE

A.M. Heystek, H. Fabricius

CASE / FILE NUMBER

A301/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER

JUDGES

(3)

REVISED.

APPEAL

NUMBER: A 301/ 17

COURT A QUO

REFERENCE

NUMBER:

14/3/3-00114MAI000982

8/5/2018

In

the matter between: S  
M  
M  
Appellant/Respondent  
and  
M  
S  
M  
Respondent /Applicant

## JUDGMENT

Heystek AJ

- [1] This appeal is directed against the entire judgment by the learned acting magistrate, Pretoria, in terms whereof he suspended with immediate effect the respondent's maintenance obligations towards the appellant, which included medical aid. The effect of the judgment by the court a quo therefore was to uphold the respondent's application for substitution or discharge of the existing maintenance order in terms of s 6(1)(b) of the Maintenance Act, Act No 99 of 1998.
- [2] By upholding the respondent's (applicant in the court a quo) complaint as aforementioned, the court a quo effectively also dismissed what was styled the appellant's 'counter-application for increased maintenance in terms of section 6(1)(b) of the Maintenance Act, 1998.

## Background

- [3] The parties were married in community of property for close to thirty-six years. At the time of their marriage, the parties enjoyed the status, benefits and income associated with the respondent's appointment as Ambassador to Nigeria.
- [4] At the time of their separation appellant was 59 years old and the respondent was 61. They apparently could not agree on a settlement upon their divorce. Their marriage was finally dissolved by a decree of divorce issued by the North Eastern Divorce Court on 26 May 2011, where the respondent was the plaintiff in the divorce action. The divorce order contained inter alia the following provisions:

"The plaintiff is ordered to pay maintenance, of R 7 000,00 a month for the defendant until her death or marriage, whichever event occurs first.

The plaintiff is ordered to retain the defendant on his medical aid scheme, or alternatively, responsible for all defendant's reasonable medical expenses.

That the plaintiff [be ordered] to maintain the matrimonial home and pay for all outstanding bond fees and pay the rates and taxes on the property, until the property is sold.

In terms of Section 7(7) and 7(8)(a)(i) and (ii) of the Divorce Act 70 of 1979 it is further ordered that 50% of the pension interest, due or assigned to the plaintiff, held in the Government Employees Pension Fund be paid to the defendant by the aforementioned fund when any such pension benefits accrue in respect of the plaintiff, up to the date of the granting of the decree of divorce ... "

[5] As at the time when the maintenance proceedings commenced before the court a quo on 25 May 2016, it was common cause that the joint estate had not yet been divided in full. It appears from the respondent's evidence that he left the appellant and their major children with the matrimonial home and household contents as he wanted to afford them time to adjust and to look for another property. There is no suggestion that he acted unreasonably towards the appellant but, be that as it may, a liquidator was later appointed by agreement between the parties to finalise the division of the joint estate. As at the time of the maintenance hearing, the matrimonial home was sold for R 1,7 million. The Ikageng property, situated in Potchefstroom, was valued at R 300 000,00 and each party would therefore roughly receive R 150 000,00 from the sale of this property. Appellant was also paid out the amount of R 1 229 095,43 from the respondent's pension fund. They also had two Mercedes Benz motor vehicles, where the appellant took possession of the E220 model (1995) vehicle, whilst respondent took possession of the E240 (2005) model vehicle. The remainder of the movable property has not yet been divided and the same situation prevails as far as any cash or cash investments are concerned.

[6] Close to the respondent's retirement and whilst he was still serving in Nigeria, appellant on 29 October 2013, applied for an increase of the monthly payment of maintenance in the amount of R 14 000,00.

[7] On 14 May 2014 the Magistrates' Court for the district of Pretoria made the following order in the absence of the respondent:

"Now, therefore, in terms of s 5(4) of the Maintenance Act, 1963 (Act 23 of 1963), read with \*s 8 of the Reciprocal Enforcement of Maintenance Orders Act, 1963 (Act 80 of 1963)/s 5 of the Reciprocal Enforcement of Maintenance Orders (countries in Africa) Act, 1989 (Act 6 of 1989), it is hereby ordered that [respondent] do pay to the Magistrate at Pretoria, South Africa, the sum of R 9 000,00 per month towards the maintenance of the complainant, namely [appellant] until her death or remarriage.

This order is made provisionally and shall have no effect unless and until it is confirmed by a competent Nigeria (Country/Territory)."

[8] It appears that the last-mention order did not come to the notice of the respondent, at least until much later or as at the time when the present maintenance proceedings proceeded before the Magistrate. It is, nevertheless, common cause that confirmation proceedings did not take place in Nigeria and that the South African order had therefore not been confirmed by a competent court in Nigeria.

[9] On 20 October 2014, respondent (as the complainant/applicant) applied for the substitution or discharge of the existing maintenance order in the Magistrate's Court for the District of Pretoria. The grounds

advanced for seeking a cancellation of the maintenance order were, in a nutshell, the following:

[9.1] The pay out of the pension moneys changed the status of the appellant to that of a millionaire, which warrants that he be released " from the clutches of the existing Maintenance Order'.

[9.2] That he will find it hard to maintain himself, let alone the appellant, from the monthly pension annuity of R 25 647,75 that he received.

[9.3] From the sale of the matrimonial home, appellant is expected to receive a sum of R 1,5 million.

[9.4] He is prepared to transfer his half-share in the joint Potchefstroom property to the appellant.

## Judgment

by the court a quo

[10] The maintenance proceedings commenced on 25 May 2016 and evidence was led by the appellant and respondent over some six days of testimony.

[11] In suspending the maintenance order and in effect dismissing the appellant's claim for an increase, the court a quo made the following key findings:

[11.1] The respondent, who the court observed to be a credible and reliable witness, has proved on a balance of probabilities that it is no longer necessary to continue paying maintenance for the upkeep of the applicant's extravagant and luxurious lifestyle;

[11.2] It is difficult for the court to rely upon the credibility of the appellant as to her expenditures; also that her testimony was not honest, credible, reliable or consistent;

[11.3] The appellant did not sufficiently distinguish her wants from her basic needs - as to which she referenced the cases of Botha v Botha 2009 (3) S A 89 (W) and Grasso v Grasso 1987 (1) S A 48 (C); and

[11.4] The total estimated monetary value of benefits the appellant received or was bound to receive out from the divorce exceeds R 3 million.

## Approach

[12] The nature of the enquiry into maintenance at divorce differs from that of the subsequent enquiry into variation. At divorce the Court embarks on a wide- ranging enquiry into the circumstances set out in s 7(2) of the Divorce Act, Act 70 of 1979. These are: 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; and any other factor which, in the opinion of the court, should be taken into account (see Reid v Reid 1992

- (1) SA 443 (E) at 446). It is trite that the Court then makes a maintenance order which it finds 'just' (see also the statements by Satchwell J in the Botha case (supra) at par 43). The enquiry is necessarily directed towards the interests of both spouses and the impact which the order will have on each. Justice must therefore be measured as between both spouses. In considering what is just, this in effect signifies that the court exercises a judicial discretion when coming to a conclusion what is correct and appropriate and fair and reasonable in the circumstances of the case. Of course, any just order must be well-founded on fact and reflect relevant and proper legal principles (Botha (supra) at para 45 and 46).
- [13] Even though a wife may qualify for maintenance upon divorce, it by no means follows that the quantum thereof should be such as to enable her to live to the same standards as she enjoyed during the subsistence of the marriage (Louis v Louis 1973 (2) SA 597 (T) at 5980).
- [14] In terms of s 16(1)(b) of the Maintenance Act, Act 99 of 1998, the maintenance court may - in the case where a maintenance order is in force
- (i) make a maintenance order in substitution of such (existing) maintenance order; or
- (ii) discharge such maintenance order.
- [15] The Maintenance Act does not provide for a test to be applied when application is made for the variation or discharge of a maintenance order. Provisions in other legislation, however, are instructive. In terms of S 8(1) of the Divorce Act, a maintenance order may be varied if the Court finds that there is 'sufficient reason' therefor. S 10(2) of Act 37 of 1953 (now repealed) required 'good cause' for a variation. The applicable case law on this subject demonstrate that
- the onus of showing good cause, sufficiently to justify variation, rests upon the party who seeks the variation.
- [16] As has been stated by Erasmus J in the case of Reid v Reid 1992 (1) SA 443 (E) at 4500, it is not the function of the maintenance court to achieve parity between the parties.
- [17] It has been accepted in a number of cases since the decision in Roos v Roos 1945 TPD (such as in the Reid case (supra) at 446) that in general a court will only order variation of an existing maintenance order where there has been a change in the conditions. Schreiner J thus had the following to say in the case of Roos v Roos (supra) at 88:

"Variation will be ordered not only in cases of breach by either party, but because there has been such a change in the conditions that existed when the order was made, that it would now be unfair that the order should stand in its original form."

[18] Likewise, in *Havenga v Havenga* 1988

(2) SA 438 (T) at 445C-F, *Harms J* (as he then was) held that in regard to an application by a divorced spouse to vary the maintenance payable to the former spouse, that, as a general proposition, in the absence of a real or substantial change ('wesentliche verandering') in circumstances, there would not be sufficient reason for a change.

[19] It can further be accepted, in line with the aforesaid legislation and comparable cases, that, in considering whether the onus has been discharged by the parties before the maintenance court may substitute or discharge the existing maintenance order, the matter is entirely in the discretion of the court. It should also be accepted that a variation order should not be granted as a matter of course, and that the discretion conferred upon the court to vary its order should not be too readily exercised. (See also *Van Wyk v Van Wyk* 1954

(4) SA 594 (W) at 595; *Hossack v Hossack* 1956 (3) SA 159 (W) at 164-165; *Louis v Louis* 1973

(2) SA 597 (T) at 597H). Thus it was held in the case of *Davis v Davis* 1993 (1) SA 293 (SE) that no invariable rule could be formulated in respect of the test to be applied when application was made for the variation of a maintenance order and that the Court always had to have regard to the circumstances of each case, but that the Courts were generally reluctant to vary orders for maintenance once given where difficulties to meet the obligations stemmed from a voluntary

undertaking of extra commitments.

[20] It has further been held that an increase in the cost of living does not by itself provide sufficient ground for an increase of a maintenance order (*Hossak* (supra) at 165H and *Louis* (supra) at 598-599).

[21] For purposes of the present appeal it should also be considered that a clause in the parties' divorce order that provides for payment by the one spouse of the other spouse's medical expenses qualifies as a 'maintenance order' that is susceptible to variation (see *Van Aswegen v Van Aswegen* 2006 (5) SA 221 (SE) and *Thompson v Thompson* 2010

(3) SA 211 (W)).

Appeal against a maintenance order

- [22] In terms of s 25(1) of the Maintenance Act, any person aggrieved by any order made by a Maintenance Court under the Act may, within such period and in such manner as may be prescribed, appeal against such order to the High Court having jurisdiction. In terms of ss (2), on appeal, the High Court or the Supreme Court of Appeal, as the case may be, may make such order in the matter as it may think fit. It is to be noted that for the purposes of ss (1), 'order' includes any discharge of such order (ss (b)).

#### Financial needs of the parties

- [23] In my opinion the court a quo placed too much emphasis on the capital or monetary value of the assets which the appellant has received or was due to receive under the division of the joint estate. I am aware that in *Davis v Davis* 1939 W.L.D. 108 at p. 114, Ramsbottom J pointed out that maintenance is an expenditure of a recurring nature which is usually paid out of income and that the circumstances may be such where the income is inadequate or non-existent that the value of the assets of the parties may become relevant and material in deciding questions of maintenance (also referred to by Jordaan J in the case of *Jodaiken v Jodaiken* 1978 (1) SA 784 (W) at 789 A-D). However, the principal duty to maintain a person depends upon the reasonable requirements or needs of the person claiming it and the ability of the party from whom it is claimed to furnish it. (*Jodaiken* (ibid) and the other cases cited by Joubert J).
- [24] The respondent was however entitled to rely, as he did, on his altered financial position. See the Reid case at 4468 and at 449 (generally).
- [25] Respondent retired at the age of 65 from the Department of Foreign Affairs with effect from 1 October 2013, which entitled him to a gross pension of R 30 395,00 per month. However, he remained on on a so-called contract basis until 31 December 2015. As at February 2016 he received a net pension amount of R 26,883.22 from the Department, as opposed to his net salary whilst employed in the amount of R48,771.00.
- [26] Since the divorce in 2011 and until the maintenance enquiry in 2016 he acquired a 4-bedroom house (said to be valued at R2,8 million). He has largely paid the bond on this purchase. He also has, on the face of it wisely, put his available cash in a Nedbank investment and in an Absa loan account. His total income, including the interests on his investments amounts to R37,414.24.
- [27] It has been argued at the enquiry that respondent has an excess of R5494.11 available, to which must be added the further sum of R5000.00 which he previously paid directly to the major daughter, Johanna, who suffers from dwarfism, whilst she still studied to qualify for a BA degree.
- [28] Although respondent's ability to pay maintenance is a relevant consideration, the court must also consider the remarks made by Margo J in the Louis case at 600-601, namely that the fact that a person does not live up to the hilt of his income, or chooses to live frugally, and has a monthly surplus, does not provide a ground for requiring him to hand over something of

what he saves to the other spouse. As pointed out by the learned author Van Zyl of the Handbook of the South African Law of Maintenance (2000) at p 50, an improvement in one's financial position after divorce is to one's own benefit, since the bonds of marriage no longer exists. It does not entitle one's divorces spouse to an increase in maintenance. Therefore, as was stated by Steyn J in the case of Joffe v Lubner 1972 (4) SA 521 (C) at 524F, the fact that a maintenance debtor is able to pay a reasonable amount of maintenance does not justify extravagant claims.

[29] Appellant bought herself a house for R800,000. From her proceeds of the pension fund, she invested R1 million in an investment account, from which she receives monthly interest in the sum of R3400. If maintenance is disregarded this is her only source of income. It is common cause that she was unemployed for the duration of the marriage. She met the respondent when she was still very young and she never obtained a qualification beyond standard 7, even though she undertook some studies during their marriage and even though appellant may have encouraged her to complete her education (but in respect of which there was a dispute due to a relocation, the practicalities surrounding night school attendances whilst she was a mother, and the respondent's insistence that she stay at home as alleged by appellant). She also studied dressmaking at a college in Ga-Rankuwa, but again it seems that circumstances stifled such a career path. She is now of relatively old age as well, being 2 years younger than the respondent. She has poor eye sight and there is no suggestion that she should take up dressmaking and start to work at this stage

of her life. Apart from her capital investments she has no other source to maintain herself.

[30] Considering the appellant's position, she has brought her application for an increase on the basis that she is currently unemployed and "cannot manage [her] life expenses" with the amount of R7000.00.

[31] Although one cannot ignore the material diminution of money due to inflation, and the increase in living costs on a yearly basis, it strikes at both sides (see Hossack v Hossack 1956 (3) SA 159 (W) at 165H). As pointed out by Margo J in the Louis case at 5998, such increase in the cost of living is therefore not by itself regarded as providing sufficient cause for an increase of maintenance.

[32] There can be no doubt that there had been a material change in the respondent's circumstances which, in principle, entitled him to approach the court for a variation or discharge of the maintenance order. On the other hand, the appellant has also shown that her reasonable monthly expenses are beyond that what she receives by way of her income (i.e. the interest on her investment). Although the learned Magistrate was correct insofar as he stated that in retirement the lifestyle of that associated of being . an ambassador fell away and that both parties assumed the lifestyle of ordinary citizens who are pensioners, it cannot be said that respondent was required to continue paying maintenance for the upkeep of what has been referred to by the court as the appellant's "extravagant and luxurious life style (sic)".

[33] The appellant was no doubt somewhat opportunistic in her approach in seeking an increase to the maintenance and the court a quo's criticism in this regard is fully warranted.

[33.1] In her 2013 application she claimed R14,000 maintenance, but could only substantiate a total of R9000.40 at the enquiry held on 14 May 2014.

[33.2] Two years later and during the 2016 hearing, being the subject of this appeal, she calculated her needs at R20,351.00, but which were later lowered to R16,000.00.

[33.3] The court a quo finally held that her "basic needs" were estimated to be about R4960.

[34] I am not persuaded on the evidence that appellant has shown sufficient reason for an increase, especially also taking into account the respondent's changing financial position on retirement from office. It will also be inequitable to permit the appellant to benefit from the fact that the respondent may have invested more wisely than the appellant from the proceeds that he received on division of the joint estate.

[35] I am satisfied therefore that the appellant's appeal directed at the court a quo's refusal to increase the maintenance order cannot succeed.

[36] The respondent, however, is still able to afford the original maintenance order. At the stage of the maintenance enquiry the respondent still maintained the appellant on his medical aid scheme, and stated that he is willing to continue doing so. The contribution in that respect amounts to R 2271.00. I am satisfied that it has been shown that the appellant is in need of maintenance and that the respondent has the means to pay in accordance with the original maintenance order.

## Conclusion

[37] The court a quo erred in finding that it is not just and equitable to order that the respondent continue to honour the maintenance order and therefor

erred in granting an order to the effect that the maintenance order is suspended.

[38] No case has been made out by the appellant for an increase of the existing maintenance order.

[39] It means that the appellant was partly successful in her appeal. In the circumstances it will be just and equitable if the respondent is ordered to pay 50% of the appellant's costs on appeal.

[40] In the result the following order is made:

### Order

(1) The appeal is upheld in part;

(2) The order by the court a quo is set aside and replaced by the following orders:

- a. Mrs Monaisa's application for an increase of the existing maintenance order is dismissed;
  - b. Mr Monaisa's application for the discharge or suspension of the existing maintenance order is also dismissed.
- (3) The respondent is ordered to pay 50% of the appellant's costs on appeal.

A. M. HEYSTEK

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

I AGREE

H. FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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