

SOUTH AFRICA / JUDGMENT

U v U (4739/2016) [2016] ZAFSHC 215 (28 November 2016) [2016] ZAFSHC 215

COURT

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

4739/2016

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 4739/2016

In the

application between:

M.
W. U.
Applicant
and
B.
D. U.
Respondent

JUDGMENT

BY: C REINDERS, J

DELIVERED ON: 28 NOVEMBER 2016

- [1] The marriage boat of the U. couple has been through rough storms, culminating in the applicant instituting divorce proceedings on 18 August 2016. The applicant in terms of Rule 43 of the Uniform Rules of Court moves for orders pending finalisation of the main action which include monthly maintenance, an amount in respect of relocation costs, an order that she be retained as a beneficiary on the respondent's medical aid scheme and a contribution towards her legal costs.
- [2] The respondent in his opposing affidavit moves for an order that the applicant's application be dismissed. It is trite that maintenance entails amongst others the provision of accommodation, food, clothing, a car and medical expenditure. Nowhere in his opposing affidavit is it denied by respondent that he provided the applicant with the aforementioned. In fact, respondent tenders in his papers that he will retain the applicant as a dependant on his medical aid scheme and I therefore do not have any uneasiness in granting the prayer in relation to the medical care of the applicant pendente lite.
- [3] It is not disputed that the applicant left the communal home in Mossel Bay on 5 August 2016 (the reasons therefore being disputed) with a 2008 Toyota Auris vehicle, the property of the respondent. She invites the respondent to consent to her keeping the motor vehicle as her property, but does not request such an order in her prayers as she includes expenses relating to the acquisition of a vehicle in her summary of monthly expenses. In reply the respondent indicates that he is "willing to transfer" the vehicle to the applicant. I am satisfied that an order be granted that the applicant retain usage of the Auris pendente lite, including the maintenance of the vehicle and paying the insurance and licensing fees in respect thereof. (See: *Van der Spuy v Van der Spuy* 1980 (3) SA 638 (CPA) at 642H-643A).
- [4] According to the respondent the applicant was employed until "at least 2002". From the papers it is thus clear that the respondent maintained the applicant at least for the last 14 years of their 23 year marriage. It is not disputed that applicant is currently unemployed and left the communal home with only the Auris and her personal clothing, finding accommodation with her family on a farm in Kroonstad. She avers that the present housing arrangement cannot continue indefinitely as she would have to move to a city like Kroonstad or Bloemfontein in order to obtain employment. Although respondent reacts to the listed expenses of applicant by indicating that they are exorbitant and that applicant "is well able to maintain herself", it was conceded by counsel for the respondent at the onset of the proceedings that the applicant is entitled to maintenance pendente lite. I am indeed satisfied that the applicant has made out a proper case that she is entitled to such maintenance. I do not intend dealing with every expense listed by applicant as it was canvassed fully during hearing of argument.

- [5] In support of her prayer for relocation costs pendente lite, the applicant lists expenses relating to furnishing a rental residence. These include a bed, sofa set, television, washing machine, crockery and cutlery. Respondent in reaction hereto insists that the applicant is not entitled to relocation costs in the present application and that the costs claimed by the applicant are excessive. That the respondent acknowledges that the applicant would be in need of furnishing her home can be gleaned from his introduction before dealing ad seriatim with the applicant's founding affidavit. He annexes correspondence relating to settlement proposals in which he tendered lounge, bedroom and dining room suites and a computer from the communal home "in order to assist" the applicant "with her relocation".
- [6] In pursuing his argument that I should include a separate order for relocation costs, I was referred by the applicant to *W v W* (32130/2014) [2014] ZAGPPHC 768. Kubushi J was prepared to grant under a separate heading a lump sum for relocation costs. I am not persuaded that I should follow the decision on that basis for the reasons stated herein later.
- [7] In supporting the submission that the applicant cannot claim for relocation costs pendente lite, counsel for respondent relied on *Greenspan v Greenspan* 2000 (2) SA 283 (C) where the learned judge held that lump sums cannot be awarded in terms of Rule 43 and accordingly dismissed, inter alia, the claim for cost of relocation. In coming to this conclusion, some reliance was placed on the full bench decision in *Zwiegelaar v Zwiegelaar* 1999 (1) SA 1182 (C) at 1184-1185. The High Court's decision in *Zwiegelaar* was overturned on appeal by the Supreme Court of Appeal and reported as *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA). Chetty AJA writing on behalf of the court found as follows at 1213 par [16]:

"Whilst the section may envisage periodic payments these need not be equal. In principle there can be no objection to an order which in effect makes provision for fixed monthly payments but in respect of one or more months makes provision for the payment of an increased amount, or provides for recurring, unquantified future amounts such as medical expenses or school fees - cf Schmidt v Schmidt 1996 (2) SA 211 (W). In doing so, the court must of course take into account the prospective means of the parties and the ability of the party in

respect of whom the order is made to comply therewith. By way of example, the sum of R50 000 awarded to the appellant could have been spread over the first ten months and the respondent ordered to pay R13 000 per month over that period and R8 000 per month thereafter. Mr Cloete did not dispute that Louw J could legitimately have done so to give effect to what he intended."

- [8] Not only does it go without saying that I am bound by this decision, but I am in respectful agreement therewith. I fail to see why the principle enunciated would not be applicable in Rule 43 applications. Although therefore I cannot award a separate amount for relocation costs I am entitled to order monthly payments (pendente lite) even though those amounts may not be equal. Should I therefore find (which I do) that the applicant as part of her maintenance needs an amount to relocate and the respondent can afford it, I cannot fathom why I should not make provision therefore in the order.

- [9] In as far as the respondent objected to the expenses listed by the applicant for relocation as being excessive, I am in agreement with him. I do not intend to deal with every expense individually, but where the applicant claims for instance an amount of R 699.00 for a kettle, R 8 000.00 for a washing machine and R 12 290.00 in respect of a mattress and base set, I am of the view that she would be able to purchase items at a more affordable price. I am satisfied that an amount of R 30 000,00 is appropriate.
- [10] The applicant's entitlement to maintenance pendente lite is dependent upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirement. The respondent, a property developer and sole proprietor of, inter alia, U. Ontwikkelings, avers that he earns a net monthly income of approximately R 29 527.00. He stresses that this is an "estimate". Applicant invited the respondent to fully deal with his income. He elected to do so by annexing the South African Revenue Service ITA34 documentation in respect of U. Ontwikkelings instead of banking statements reflecting his personal income. The respondent is the owner of several vehicles and properties, including the communal home which he alleges is worth between R4 and R5 million. The applicant annexes proof that the said property is marketed currently for R 13 750 000.00. I have my serious doubts whether respondent disclosed his full income to me and it suffices to say that I am satisfied that he would be able to comply with the orders I intend to make.
- [11] It is trite law that each case under this subrule should depend upon its own particular facts. (See: *Taute v Taute* 1974 (2) SA 675 (E)). Maintenance pendente lite cannot be meticulously calculated, but in all the circumstances I consider an amount of R 15 000.00 to be the applicant's reasonable monthly need for maintenance. I am further persuaded that in order for her to leave the farm and relocate she would have a further need for maintenance initially in the amount of R 30 000,00. Applying the principle laid down in *Zwiegelaar supra* I intend to have these needs reflected in the maintenance amount by ordering respondent to pay maintenance on a monthly basis albeit unequal amounts. I am also satisfied that the applicant has made out a proper case for a contribution towards her legal costs as prayed for.
- [12] Accordingly I grant the following order pendente lite:
1. The respondent to pay maintenance to the applicant as follows:
 - 1.1 R30 000.00 before or on 10 December 2016.
 - 1.2 R30 000.00 before or on 3 January 2017.
 - 1.3 R15 000.00 before or on 3 February 2017 and thereafter before or on the 3rd of every subsequent month.
 2. The respondent to retain the applicant as a beneficiary on his medical aid scheme and in addition thereto pay all reasonable medical costs not covered by the said scheme.

3. The respondent to make available the Toyota Auris motor vehicle to the applicant, maintain it and pay the insurance and licensing fees in relation thereto.
4. The respondent is ordered to make a contribution towards the legal costs of the applicant in the amount of R 5 500,00 on or before 7 January 2017.
5. Costs of this application is costs in the main cause.

C. REINDERS, J

On behalf of the applicant: Adv. A. Sander

Instructed by:

Hill, McHardy & Herbst Inc.

BLOEMFONTEIN

On behalf of the respondents: Adv.

Beukes & Sonja Nel Attorneys

c/o Wessels & Smith

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Prepared on 11 October 2026 · Esheria