

SOUTH AFRICA / JUDGMENT

Zwiegelaar v Zwiegelaar (607/98) [2000] ZASCA 68; 2001 (1) SA 1208 (SCA) ; [2001] 1 All SA 261 (A) (28 November 2000)

[2000] ZASCA 68

COURT

Supreme Court of Appeal

BEFORE

Smalberger, Zulman, Melunsky, Mthiyane, Chetty

CASE / FILE NUMBER

607/98

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IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

REPORTABLE

Case number : 607/98 In the matter between : PHILENE ZWIEGELAAR Appellant and CORNELIOUS JOHANNES ZWIEGELAAR Respondent
CORAM : Smalberger, Zulman JJA, Melunsky, Mthiyane and Chetty AJJA

HEARD : 3 November 2000

DELIVERED : 28 November 2000 Summary: Section 7(2) of the Divorce Act No 70 of 1979 - what constitutes maintenance. _____

JUDGMENT

CHETTY AJA/

CHETTY AJA : [1] In a contested divorce action brought by the appellant (in reconvention) against the respondent in the Cape of Good Hope Provincial Division, the trial court (Louw J) dissolved the marital regime between the parties and made certain ancillary orders including an order for maintenance. Paragraph 2 of the order as formulated reads:

“Verweerder word gelas om, as onderhoud ingevolge die bepalings van artikel 7(2) van die Wet:

- (a) Die bedrag van R8 000-00 per maand aan eiseres te betaal vanaf 1 Januarie 1997 tot haar dood of hertroue welke ookal eerste mag plaasvind;

- (b) die bedrag van R50 000-00 voor of op 15 Januarie 1997 aan eiseres te betaal vir die aankoop van huishoudelike benodigdhede.”[2] The respondent unsuccessfully applied for leave to appeal against certain of the orders granted, including paragraph 2(b). On petition to this Court the respondent was granted leave to appeal to the Full Court of the Provincial Division solely on the question whether the trial court was in law competent to make the order as set forth in paragraph 2(b) thereof.[3] The Full Court (Hlophe J with Selikowitz et Kuhn JJ concurring) allowed the appeal holding that s 7(2) of the Divorce Act 70 of 1979 (the “Act”) precluded the trial court from making the said order. The judgment is reported - see 1999 (1) SA 1182 (C). This Court thereafter granted the appellant special leave to appeal against the whole of the order of the court a quo, hence the present appeal.[4] The question of law which arises for determination is whether the trial court was empowered under s 7(2) of the Act to order the respondent to pay to the appellant, as part of her maintenance requirements, the sum of R50 000 for the purchase by her of household necessities, together with an order for monthly maintenance.[5] Before advertng to the merits of the legal issue raised in the appeal it is to be observed that the trial court accepted the appellant’s evidence that having been ordered out of the common home she was obliged to acquire certain household necessities to render the home habitable. It also found that the respondent was financially able to provide these.[6] Section 7(2) of the Act provides:

“In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, 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.”

- [7] This Court has recognised that in determining the question relating to maintenance requirements, the section confers a wide discretion upon a trial court (see *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 987E; *Katz v Katz* 1989 (3) SA 1 (A) at 11A-C).[8] It was submitted on behalf of the respondent that in as much as the term maintenance is not defined in the Act its proper meaning is to be gleaned from the definition of the words “maintenance order” in the Maintenance Act 23 of 1963 where it is defined as:

“... any order for the periodical payment of sums of money towards the maintenance of any person made by any court (including the Supreme Court of South Africa) in the Republic ...”

Consequently, where s 7 of the Divorce Act refers to maintenance it must be understood to mean periodic payments and specifically excludes the payment of a lump sum.[9] In dealing with the argument advanced on behalf of the respondent, the trial court stated:

“Ek is van mening dat die betaling van ‘n eenmalige bedrag, nie instelle van nie, maar tesame met ander periodieke bedrae, as deel van ‘n onderhoudsbevel in terme van artikel 7(2) van die Wet gelas kan word.”

- [10] The argument that maintenance in terms of s 7(2) is restricted to periodical payments is supported by the academic literature. Hahlo in *The South African Law of Husband and Wife*, 5th ed at 357 stated with reference to ss 7(1) and (2) of the Act respectively:

“An agreement for the payment of a lump sum, even where it is expressly stated that the lump sum is to be paid in lieu of maintenance, is not an agreement for the payment of maintenance in terms of s 7(1). Section 1 of the Maintenance Act 23 of 1963 defines a maintenance order as ‘any order for the periodical payment of sums of money towards the maintenance of any person made by any court ...’ (My emphasis.) It may, however, amount to an agreement as to the division of assets, which the court may embody in its order.”

And:

“Section 7(2) envisages periodical payments. It does not allow the court to make an award of a lump sum, in lieu of maintenance.”

(See also Lesbury Van Zyl, *Family Law Service* C36 and *The Law of South Africa*, Vol 16 first reissue at para 191.) For the purposes of this judgment I shall assume, without deciding, that s 7(2) envisages periodical payments.[11] In advancing his argument Mr Cloete, for the respondent, submitted that in adjudicating whether it was permissible for the trial court to make the order, a clear distinction ought to be drawn between the common law obligation of support stante matrimonio and the statutory duty of support post-divorce.[12] Ordinarily, the reciprocal duty of support stante matrimonio ceases upon dissolution of the marriage. However, the duty of support i e maintenance, may be extended after divorce if the court is satisfied having regard to the jurisdictional requirements laid down in s 7(2) of the Act that it is just to do so.[13] It was not submitted, nor indeed could it be argued, that the term “maintenance” should be narrowly construed. Sinclair in *The Law of Marriage* Vol 1 at p 443 correctly refers to maintenance in the matrimonial context as a reciprocal duty of support which

“entails the provision of accommodation, food, clothing, medical and dental attention, and whatever else the spouses reasonably require.”

- [14] Upon dissolution of the marriage, the word cannot attract a different meaning. Where a court is satisfied that the one spouse is entitled to maintenance and the jurisdictional requirements as laid down in s 7(2) of the Act have been met, then it is entitled to make an order which is just. Just, in the context of s 7(2) entails a recognition in an appropriate case that the accommodation requirements of the one spouse have to be met as part of such spouse’s reasonable maintenance needs. To hold otherwise would be to render nugatory the clear requirement that the maintenance award be just.[15] It is implicit from the judgment of the trial court that, notwithstanding the imprecise formulation of the order, the learned judge intended to award the appellant a sum of money as part of her maintenance

requirements for the purchase by her of household necessities in order to establish a home - she having been ordered out of the common home. This sum was awarded not in lieu of, but in addition to, what she reasonably required for her monthly maintenance needs.[16] The effect of the order does not offend against s 7(2) and seen in proper perspective (i.e. having regard to its substance rather than its form) the order is clearly valid. Mr Cloete was constrained to concede that a reformulation of the order which in effect achieves the same result would not offend against s 7(2). 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.[17] It appears from the judgment of the Full Court (at 1185D-G) that Hlophe J laboured under the misapprehension that the appellant could have applied for a redistribution of assets in terms of s 7(3) of the Act and by not doing so and applying for a lump sum payment under s 7(2) the appellant attempted to achieve the result of a s 7(3) award, which she was not entitled to do.[18] The fallacy underlying the reasoning arose as a result of a failure to appreciate that the appellant could not have applied for a redistribution order under s 7(3) of the Act as the section was not of application. In terms of the antenuptial contract concluded between the parties, the accrual system under Chapter 1 of the Matrimonial Property Act 88 of 1984, was made applicable to their marriage. In addition each party excluded all their declared assets in the antenuptial contract from the operation of the accrual.[19] The intention of the trial court in making the order as evinced from the judgment is clear. It sought, as it was empowered and entitled to do, to provide for the appellant's reasonable maintenance requirements, including provision for household necessities. This court is entitled to give effect thereto. A reformulation of the order is not warranted given the clear import of the judgment of the trial court.[20] The following order is made:

1. The appeal is allowed, with costs.
2. The order of the court a quo (the Full Court) is set aside and there is substituted in its stead the following:

"The appeal is dismissed, with costs".

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D CHETTY ACTING JUDGE OF APPEAL Concur: Smalberger JAZulman JAMElunsky AJAMthiyane AJA

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