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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEAL CASE NO: A3046/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....	
DATE	SIGNATURE

In the matter between:

[L.....] [E.....] [M.....] (born [B.....])

Appellant

And

[M.....] [S.....] [M.....]

Respondent

Appeal – From Regional Court - Spousal maintenance – Insufficient evidence – Correct approach - Relevant factors in terms of section 7 (2) Of Divorce Act 70 of 1979 incorrectly applied – Correct approach that appellant entitled to spousal

maintenance in principle and issue of quantum to be referred to maintenance court for determination

JUDGMENT

WEPENER J AND CRUTCHFIELD AJ

[1] This appeal arises from a portion of a judgment granted in divorce proceedings between the parties, in the Regional Court for the Regional Division of Gauteng, held at Johannesburg (*“the regional court”*), on 31 July 2014 under case number 11/879 (*“the judgment”*).

[2] The appellant in this court was the defendant in the court *a quo*. The parties will be referred to herein as the appellant and the respondent respectively.

[3] Prior to the matter being called at 10h00, we were approached in chambers by counsel for both parties, whereupon the respondent’s counsel, who was recently appointed in the matter, requested that the matter stand down in order for him to consult with his client. We accommodated the request and the matter stood down until 11h30.

[4] Upon the matter being called, the respondent’s counsel rose to request a postponement of the appeal from the bar.

[5] Prior to dealing with the request for a postponement, the respondent’s counsel recorded that the respondent was willing to concede that:

- 5.1 In the first instance, condonation for the appellant’s late filing of the notice of appeal was no longer in issue; and

5.2 Secondly, the respondent's pension fund should be divided as at the date of the parties' divorce, and not backdated to the date of their separation.

[6] These concessions left only the question of spousal maintenance in issue between the parties.

[7] During the course of the hearing, the respondent conceded that the appellant was entitled to rehabilitative maintenance. This accorded with the position in the regional court, where the respondent only challenged the amount of the claim for spousal maintenance and not the principle of the appellant's need for maintenance.

[8] As regards the request that the appeal be postponed, the respondent's counsel submitted that the respondent had instructed him during the course of their earlier consultation, that he had information that the appellant was a director of company, (which he named), from which the appellant was obtaining income ('the new information').

[9] Assuming the new information to be correct, the respondent's counsel contended that it ought to have been disclosed by the appellant at the trial. Hence, the respondent sought a postponement in order to lead new evidence on appeal, that the opportunity to investigate the new information, the intention being to bring an application for lead further evidence on appeal, to the effect that the appellant is in a position to maintain herself.

[10] In support of the request, the respondent's counsel relied upon the potential prejudice to the respondent, in the event of a denial of the request for a postponement.

[11] The respondent's counsel was not certain when the new information was established by the respondent but conceded that if it had *come to light* after

the magistrate granted the judgment, there would have been nothing for the court to consider.

[12] The respondent's counsel was uncertain whether the reference in the record of the trial proceedings, that the appellant had intended to start a business operation, was the same business as that referred to in the new information.

[13] The respondent tendered the costs of the postponement.

[14] The appellant objected to the request for the postponement, noting that the request was made from the bar without recourse to formal affidavits or a shred of documentary evidence. Notwithstanding, upon the court's request, the appellant's counsel dealt with the merits of the postponement application.

[15] The appellant pointed to the substantive application previously before the opposed motion court, which arose out of the respondent's refusal to furnish an answering affidavit to the appellant's condonation application.

[16] Furthermore, a previous appeal date, during October 2015, had to be abandoned pursuant to the alleged refusal by the respondent to co-operate. The appellant's taxed costs pursuant to that postponement, amounted to in excess of R60 000.00, which the respondent had not yet paid. Hence, the appellant submitted, there was no consolation for the appellant in yet another postponement at the respondent's cost.

[17] Against that background, we requested the parties to address us on the merits of the appeal.

[18] Counsel for the appellant submitted that the magistrate had dealt correctly with the factors to be considered in terms of s 7(2) of the Divorce Act, 70 of 1979 ('the Act'), various of which were found by the magistrate to support the appellant's claim for spousal maintenance.

[19] Notwithstanding, the appellant submitted that in the light of the magistrate's findings, the evidence before the court was insufficient to determine the quantum of spousal maintenance.

[20] Thus, the correct approach would have been for the magistrate to find that the appellant was entitled to spousal maintenance in principle and refer the question of the amount thereof to the maintenance court for determination of the quantum.

[21] As regards the question of whether the appellant was entitled to rehabilitative or spousal maintenance, the appellant's counsel submitted that rehabilitative maintenance presupposed an ability on the part of the appellant to earn sufficient with which to maintain herself, at some stage in the future. The appellant argued that the appellant was entitled to spousal maintenance as a matter of principle and not only to rehabilitative maintenance.

[22] Turning to the Magistrate's findings in respect of the factors to be considered in respect of spousal maintenance, the Magistrate pointed to:

- 22.1 The duration of the marriage: In the light of the parties spending the last three years separately, the duration reduced from thirteen to ten years. Hence the magistrate considered it to be a marriage of *above average* duration, a factor that *tended to support* the appellant's claim for spousal maintenance;
- 22.2 The reasons for the breakdown of the marriage: The Magistrate found that those alleged by the respondent did not attribute misconduct to the appellant, and, were inconsistent with the respondent's evidence to the court, pursuant to which the evidence was inadmissible.
- 22.3 The appellant's averments as to the reasons for the breakdown of the marriage, tended to support her claim, and, the Magistrate

found that her evidence accorded with the pleaded grounds of the breakdown and were more probable.

- 22.4 The magistrate accepted the appellant's evidence that it was the respondent's adultery that caused the breakdown and, given the prevailing societal views, the averred adultery amounted to misconduct on a balance of probabilities.
- 22.5 The existing and prospective means and needs of each of the parties: The evidence before the court was insufficient to deal with these factors.
- 22.6 The parties' earning capacities, their financial needs and obligations: Again, the evidence was insufficient, and the appellant failed to justify the amount of R3 000.00 which she claimed as spousal maintenance. Nor did the appellant establish that the plaintiff was able to pay that amount.
- 22.7 The age of the parties. The marriage certificate revealed that the appellant was forty-nine (49) years of age. The magistrate considered that the appellant's age supported her claim.
- 22.8 The appellant's qualifications: Whilst these should enable the appellant to earn an income, the extent of that income earning ability was not explored with sufficient precision.
- 22.9 The parties' standard of living: Insufficient evidence was furnished in this regard and it was only the financial contribution of the appellant's eldest daughter (of a previous relationship), to the appellant's household that indicated a deterioration in the appellant's standard of living. Furthermore, whilst the appellant continued living in the erstwhile marital home, certain charges

fell into arrears but the reasons in respect thereof were not detailed in evidence.

22.10 The magistrate found that certain factors tended to support the appellant's claim. These included the duration of the marriage and the appellant's unemployed status during the last four years of the marriage, which rendered her dependent on the respondent for support.

22.11 Any other factor to be taken into account by the court: The appellant's envisaged receipt of the proceeds of the division of the joint estate, including the endorsement of the pension fund which was immediately payable, did not support the claim for spousal maintenance.

22.12 A further factor was that the respondent failed to maintain the appellant after the parties' separated, as a result of which the appellant accessed the bond registered over the marital home.

22.13 The court found as a fact, that the appellant had transferred funds for her own use, thus permitting her a degree of support from the joint estate. Moreover, the respondent conceded that he drew funds himself.

[23] The regional court concluded that if the parties had not separated for the four-year period prior to the trial, the appellant 'would have been entitled to an award of spousal maintenance', albeit that the duration and amount thereof would have required careful consideration.

[24] However, the appellant had survived the respondent's absence and earned 'some meagre income', pursuant to which the regional court favoured a clean break principle.

[25] No evidence was led in respect of any 'large liabilities or loans', other than the mortgage bond. The magistrate concluded as a result that the appellant's financial position would improve after the divorce, albeit that she would need to obtain appropriate accommodation for herself and the child, which would entail the payment of rent or a bond.

[26] The magistrate's statement in terms of Rule 51(8) of the Magistrate's Court rules, repeated the factors which supported the appellant's claim for spousal maintenance. In particular, the duration of the marriage, and the fact of the appellant's unemployment for some three to four years prior to the separation together with her unemployment thereafter, during which time she had been dependent upon the respondent who had failed to support her.

[27] The appellant's supplementary notice of appeal averred that in assessing the appellant's claim for spousal maintenance, the court *a quo* failed to take account, alternatively sufficient account, of the following: the age of the appellant. her limited tertiary qualifications, the appellant's dismissal from employment with the South African Revenue Services during 2008, the appellant's unemployed status for the four years prior to the parties' separation, the meagre income generated by the appellant, which amounted to no more than R1 200 per month, that the appellant had been financially dependent on her elder daughter from a previous marriage who contributed between R3 000 and R5 000 per month, since the respondent vacated the former home.

[28] In addition, the appellant had applied for employment but without success, and she had premised her claim of R3 000 on the basis that she would derive a substantial amount from the division of the joint estate.

[29] The record revealed that the respondent paid for a number of insurance/retirement policies, most of which were seemingly unnecessary.

[30] The court *a quo* incorrectly found that the appellant was not entitled to spousal maintenance due to the fact of the parties' separation.

[31] It appears to us that there is merit in the appellant's submissions regarding the factors to be considered in respect of spousal maintenance.

[32] It was established as a fact that the appellant relied upon her elder daughter, born of a previous relationship, to contribute a reasonably significant amount, towards the support of the appellant and the parties' child. That factor alone, establishes in our view that the appellant is in financial need.

[33] The obligation to contribute towards the appellant's upkeep, falls in the first instance upon the respondent, and not the appellant's daughter. It must be borne in mind that the respondent enjoys a reasonable monthly financial package and would seem to be able to make some contribution towards the appellant's financial needs.

[34] In the light of the appellant's approach to this appeal, that the quantum be referred to the maintenance court, (which would allow the respondent to pursue his investigation of the new information without the necessity of a postponement of the appeal), it is not necessary for this court to determine the quantum of the appellant's claim, or indeed the duration for which that claim operates.

[35] This court is called upon to deal only with the principal of the appellant's entitlement to spousal maintenance, or otherwise.

[36] Indeed, it appears to us that given the necessity for the appellant's elder daughter to contribute towards the appellant's support, together with the various factors found by the magistrate to support the appellant's claim, the appellant is entitled in principle to spousal maintenance, and we intend to make such an order.

[37] In addition, upon a cursory consideration of the limited evidence before the court, the respondent appears able for the interim, to pay at least R1 000.00 per month to the appellant with effect from 1 March 2016, and monthly

thereafter on the first day of each consecutive month, as a means to tide the appellant over until such time as the quantum is determined by the Maintenance Court.

[38] In this regard, the respondent's gross monthly salary is R20 594.05 as at 31 January 2014, which he conceded at the trial had increased by approximately R800 per month.

[39] After payment of his deductions of R13 115.19 which include the mortgage bond instalment and a host of insurance/retirement policies, the respondent is left with a net monthly salary of R7 478.86 which would have increased at this stage.

[40] In the circumstances, the respondent has some financial capacity to assist the appellant pending the matter being determined in the Maintenance Court as aforementioned.

[41] The following order is granted:

41.1 The application for a postponement is refused.

41.2 The appeal succeeds with costs.

41.3 The respondent's pension fund is to be divided as at the date of the parties' divorce.

41.4 The appellant is entitled to spousal maintenance.

41.5 The quantum of the spousal maintenance falls to be determined by the maintenance court.

41.6 Pending the determination by the maintenance court, the Respondent is ordered to pay R1 000.00 per month to the

appellant with effect from 1 March 2016, and monthly thereafter on the first day of each consecutive month.

W L WEPENER
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

A A CRUTCHFIELD
ACING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT

INSTRUCTED BY

COUNSEL FOR RESPONDENT

INSTRUCTED BY

DATE OF HEARING: 9 FEBRUARY 2016

DATE OF JUDGMENT: 12 FEBRUARY 2016