

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG PRETORIA)

6/11/2012.

CASE NO: 28166/2012

(1) REPORTABLE: YES / ☒ NO

(2) OF INTEREST TO OTHER JUDGES: YES / ☒ NO

(3) REVISED.

6/11/2012

EM Kubushi

In the matter between:

M.

M.

APPLICANT

and

J.

M.

RESPONDENT

J U D G M E N T

KUBUSHI, J

[1] This is an application in terms of rule 43 of the Uniform Rules of Court. The applicant has approached this court for an interim order *pedente lite* in terms of the following:

- 1.1 payment of maintenance in respect of herself in the amount of R46 003 *per month*;
- 1.2 the respondent to continue paying the monthly instalment on the applicant's motor vehicle, the bond on the common home, levies and taxes and all other payments to keep all assets in place and in proper and good condition.
- 1.3 the respondent to pay relocation cost in the amount of R15 000 towards the applicant, fourteen days prior to her relocation and on her notice to the respondent.
- 1.4 the respondent to pay a contribution of R50 000 towards her legal costs.
- 1.5 the costs of the application to be costs in the main action.

[2] During the hearing of the application, applicant's counsel also prayed for an order that:

- 2.1 the respondent allow the applicant the use of the Mercedes Benz motor vehicle which is part of the joint estate.
- 2.2 the respondent to keep the applicant as a beneficiary on his medical aid.

- [3] The respondent has raised a plethora of technical defences pertaining to procedures in respect of the application. In the interest of justice and as a matter of exigency I found it not necessary to dwell into such technicalities but to deal directly with the issues at hand.
- [4] The parties are married in community of property and their marriage still subsists. The applicant has filed for divorce. During the subsistence of the marriage three children were born two of which are currently majors. Applicant had in her application claimed for their maintenance but her counsel had at the hearing of the application conceded that such claim cannot succeed.
- [5] Although the applicant in her founding affidavit alluded to the fact that the children wanted to leave the common home with her, she did not specifically indicate her intention to leave the common home with the minor child. As a result she did not pray for an order that the *primary residence* of the minor child be awarded to her. This issue was also not canvassed by either of the parties at the hearing of this application.
- [6] It is common cause that the parties are presently staying together under the same roof. It is also common cause that the respondent is paying for all the household necessities and as such maintaining the applicant as well. The applicant has indicated her intention to move out of the common home. She alleges that the respondent

is verbally abusing her, which allegation the respondent denies. The respondent is resisting the applicant's claim on the basis that the application is premature because at the moment there is no need for the applicant to claim maintenance and that the applicant may only require maintenance once she has moved out of the common home. I do not agree.

- [7] At law the duty to maintain is based on the following: the relationship; a need to be maintained; and adequate resources on the part of the person called upon to provide the maintenance. See Lesbury Van Zyl: HANDBOOK OF THE SOUTH AFRICAN LAW OF MAINTENANCE 3ed at p4.
- [8] The purpose of interim maintenance as is claimed by the applicant in this instance is to supplement expenses which the applicant cannot meet. See BOTHA v BOTHA 2009 (3) SA 89 (WLD) at 106C.
- [9] In order for the applicant in this instance to succeed with her claim for maintenance she must establish a need to be maintained. My view is that the applicant has been able to establish same. It is common cause that she has been retrenched from her work and does not have means as a result of which she cannot meet her monthly expenses. The respondent's counsel submitted in argument that the applicant is speculating by saying that she will not receive an income at the end of the month. This submission to

me has no basis. What is speculative in my view is the counsel's submission. To my mind, it cannot be expected of a person who has been retrenched to continue to earn a salary from that employer.

- [10] I also do not agree with the respondent's contention that this application is premature. The contention by the respondent's counsel that the applicant can only claim maintenance when she has moved out of the common home, places the applicant in a catch 22 situation. The applicant cannot claim for maintenance because she is still residing in the common home, on the other hand she cannot move out because she does not have the means. My view is that, for whatever reason, the applicant should not be forced to remain in the common home if she is not happy to continue staying there and the fact that she does not have means should not be an impediment. In my opinion, in circumstances such as these, a need for maintenance would arise. My finding therefore is that in these circumstances the applicant is entitled to maintenance for herself *pendente lite*.

- [11] The term maintenance entails the provision of accommodation, food, clothing, medical and dental attention, and whatever else the spouses reasonably require. Maintenance also includes the cost of legal proceedings by or against the spouse claiming same. The scale of which maintenance must be rendered depends upon the social position, financial means and style of living of the spouses. It is not limited to necessities in the strict sense of the word. See

ZWIEGELAAR v ZWIEGELAAR 2001 (1) SA 1208 (SCA) at 1212 para [13] and H.R. Hahlo: **THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE** 4ed at p113.

- [12] The needs as stated in the applicant's founding affidavit are to me reasonable however, certain amounts in respect of specific needs are too excessive and must be reduced. The applicant's claim for maintenance is R46 003 per month, in addition to R15 000 for relocations costs, a motor vehicle and a contribution towards her legal costs.
- [13] In the amount of R46 003 the following amounts must be deducted, namely, the amount of R7 200 claimed in respect of the two major children; an amount of R7 303 in respect of R2 000 for petrol, R4 744 for car insurance, and R559 for Multichoice which the parties agree is being paid by the respondent and the amount of R3 000 in respect of the minor child. The amount left after the aforesaid deductions is R28 498. As already stated certain of the amounts must be reduced. She claimed R5 000 for groceries which was for a minimum of three people, a fair amount for one person would in my view be R2 000. A fair amount for the following items per month should be: cleaning material R250; clothing R700; hair and personal care R1 000; telephone R700; entertainment R500.

[14] As regards the amount claimed for the credit card it is not clear from the founding affidavit how much is still owed. It is therefore difficult for me to make an order for R4 000 per month without knowing for how long this amount is going to be paid. The applicant did not provide any prove of the validity of this claim and has as such not persuaded me otherwise. I have no option but to reject this claim.

[15] It appears from all the evidence before me that the Applicant has made out a case to justify an order for maintenance for herself. I therefore find that an amount of R15 000 as monthly maintenance *pendente lite* for the applicant is a fair and reasonable amount which is not excessive in the circumstances.

[16] The accommodation requirements must be met as part of a spouse's reasonable maintenance needs. Relocation costs are therefore part of the maintenance requirements for the purchase of household necessities to enable the spouse claiming such costs to establish a home. Consequently the respondent must, in this instance, be ordered to pay for the relocation of the appellant as well. See ZWIEGELAAR v ZWIEGELAAR 2001 (1) SA 1208 (SCA)

[17] It is common cause that there were four motor vehicles in the joint estate. But that at the time of the hearing of this application one of the motor vehicles, a Golf had been sold. At the hearing of the

application the applicant's counsel prayed for an order for the applicant to be allocated one of the motor vehicles, a Mercedes Benz. I am of the view that this motor vehicle should be allocated to her. See VAN DER SPUY v VAN DER SPUY 1980 (3) SA 638 (CPA) at 642H – 643A.

[18] Medical attention is also part of maintenance the respondent should as a result keep the applicant registered as a beneficiary on his medical aid *pendente lite*.

[19] As regards contribution for costs, the applicant is claiming an amount of R50 000 as a once off contribution to her legal costs. The applicant is claiming this amount because according to her, she will require to evaluate the assets in the estate and also be able to litigate at the same level as the respondent. Respondent's counsel on the other hand submitted that the respondent did not disclose the nature of the parties' dispute to this court in order for me to be able to determine whether the applicant requires such an amount for litigation. He referred me to the judgment in DODO v DODO 1990 (2) SA 77 (W). I agree with this submission.

[20] From the reading of the DODO –case it clear that an award for contribution for litigation costs must be based on facts and circumstances which show that it is justifiable to grant same. From where I am sitting I am not able to determine what are the issues involved in the divorce case and I cannot speculate. The applicant

is however entitled to a contribution towards her costs of litigation. She should also be allowed to litigate on the same scale as the respondent and in my discretion a fair amount in the circumstances of this case is a once off payment of R10 000.

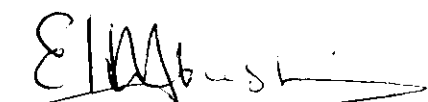
[21] A duty to maintain a person depends upon the reasonable requirements or needs of the person claiming it and the ability of the party from whom it is claimed to furnish it. See JODAIKEN v JODAIKEN 1978 (1) SA 784 (WLD) at 789B

[22] Indications are that the respondent will be in a position to pay the amounts I have indicated above. The applicant's requirements are in my view reasonable and not luxurious. The respondent is operating businesses from two close corporations which from the evidence before me appears to be lucrative and are providing a sufficient stream of income to the respondent from which these claims can be met.

[23] In the circumstances I make the following order:

23.1 Respondent is to pay maintenance *pedente lite* to the applicant in the amount of R15 000 per month. The first payment must be on the 1 November 2012 and thereafter on the 1st of each month until finalisation of the divorce action;

- 23.2 The Respondent is to pay to the applicant a once off payment of R15 000 payable immediately to enable the applicant to vacate the common home;
- 23.3 The Respondent is to maintain the applicant *pendente lite* as a beneficiary in his medical aid;
- 23.4 The respondent is to allow the applicant the immediate use of the Mercedes Benz motor vehicle;
- 23.5 The respondent must make a once off payment contribution towards the legal costs of the applicant in the amount of R10 000;
- 23.6 Order 1, and 2 are subject to the applicant moving out of the common home; and
- 23.7 Costs of this application are costs in the main action.



E.M. KUBUSHI

JUDGE OF THE HIGH COURT

HEARD ON THE	: 17 OCTOBER 2012
DATE OF JUDGMENT	: 06 NOVEMBER 2012
APPLICANT'S ATTORNEY	: MARAIS & PARTNERS C/O SCABORT INC
APPLICANT'S COUNSEL	: ADV MITCHELL
RESPONDENT'S ATTORNEY	: SN MOLELE INC
RESPONDENT'S REPRESENTATIVE	: MR MOLELE