



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: A535/2010

In the matter between:

GERALD BRIAN TAYLOR

Appellant

and

JANE MARGARET TAYLOR

Respondent

JUDGMENT DELIVERED ON 9 FEBRUARY 2012

SABA, AJ

[1] This is an appeal against a variation order of maintenance made by a magistrate sitting in Wynberg on 10 November 2009. The parties were divorced on 6 December 2011 in terms of an order of this court which incorporated a consent paper.

[2] The relevant clause of the consent paper is as follows:

"MAINTENANCE FOR THE PARTIES PERSONALLY

3.1 *Plaintiff hereby agrees to pay maintenance to defendant until her death, remarriage or cohabitation with another in a relationship akin to that of husband and wife whichever event shall first occur, monthly in advance on or before the seventh day of each calendar month and into such account as defendant may from*

time to time nominate in writing, the sum of R4 000-00 (Four Thousand Rand only), per month”.

[3] On 5 March 2009 the appellant made an application in terms of section 6 (1) (b) of the Maintenance Act, 99 of 1998 (“The Act”) for a discharge or variation of his maintenance obligation. The basis, upon which the application in the maintenance court was brought, was inability to pay.

[4] After holding an enquiry in the maintenance court, the magistrate made the following order:

“The maintenance order granted in favour of respondent on 6 December 2001 is subjugated as follows:

1. *The Applicant is ordered to pay a nominal or token payment of R1 per month maintenance pending applicant’s recovery from his illness. In the event that the applicant recovers from his illness and he finds a permanent job, the respondent may apply for an increase.*
2. *Applicant is ordered to pay respondent half of the net proceeds from the sale of his house, No. 87 Crasula Road Table View, once the house is sold.”*

The appeal is only against paragraph 2 of the above order.

[5] It is common cause that the appellant was boarded medically unfit and stopped working in 2005. It is also common cause that before he brought the application for a variation or discharge of the maintenance order, he was two months in arrears with his maintenance payments of R 5 720 per month. That before that, he had religiously complied with his monthly maintenance obligations.

[6] According to the appellant, he used all the money that was paid out to him in insurance policies and retirement annuities because he had been told by the doctors that he had an incurable illness and had very little time to live. He

contended that he relies, financially, on monies he receives from his brother and sister-in law.

[7] It is not in dispute that he was boarded medically unfit and had been out of employment during hearing in the trial court. It is also not in dispute that the only asset he owns is an immovable property situated at no. 87 Crassula road, Tableview, Cape Town. It is not in dispute that the respondent was not seeking a division of proprietary regime.

[8] The main ground of appeal is that the trial court was not empowered to make an order resulting in a lump sum payment for maintenance , in terms of section 16 (b) (i) of the Maintenance Court Act, 99 of 1998,.

[9] The issue for determination in this court is whether the trial court had the authority to make the order it made in paragraph 2.

[10] In her heads of argument, counsel for the respondent, Ms Holderness, averred that the second part of the trial court's order is not in lieu of maintenance; that it forms part of the maintenance that the appellant was ordered to pay to the respondent. For this proposition she relied on **Zwiegelaar v Zwiegelaar** 2001 (1) SA 1209 (SCA) where the Appeal court found that the trial court was empowered to make an order for a lump sum of money, payable in addition to monthly spousal maintenance payments.

[11] Counsel for the applicant, Ms Maas, argued that that case is no authority for the proposition that a maintenance court is permitted to award lump sum maintenance. I agree that **Zwiegelaar** supra is distinguishable from the case before us, in that, in **Zwiegelaar**, a lump sum was ordered in respect of household necessities as the appellant had been ordered out of her home and needed provision for such necessities.

[12] Ms Holderness further argued that the appellant had a duty to utilize available capital, (a house in this case), if he was not in a position to meet his maintenance obligations. For this proposition counsel relied on **Dodo v Dodo** 1990 (2) SA (W) at 93. I agree with Ms Maas that that case is distinguishable from this case because in Dodo, the relief sought was for an increase in maintenance *pendente lite*, which is a relief granted in pending matrimonial disputes.

[13] Ms Holderness sought to further rely on the following passage from **Jodaiken v Jodaiken** 1978 (1) WLD 784 at 789A-D.

"A duty to maintain a person depends on the reasonable requirements and needs of the person claiming it and the ability of the party from whom it is claimed to furnish it.... Maintenance is an expenditure of a recurring nature which is usually paid out of income but 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 the question of maintenance".

The dictum above does not address the issue at hand; which is whether a maintenance court is permitted to make a lump award for spousal maintenance in addition to an award of periodical payments.

[14] In **Kroon v Kroon** 1986 SA (4) SA 616 at 625, also relied upon by Ms Holderness, Baker J said the following when he referred to property as 'means of support':

"Plaintiff has no means in the sense of a regular income. But she does have property registered in her name which is too big for herself and three children, one of whom will in the normal course be leaving home in the coming year, unless he enters the local university as a day student, in which case he will require housing for several years to come. Whether the eldest offspring leaves home or not, the present house is too much of a luxury for defendant to have to maintain after divorce. The plaintiff must sell it and rent or buy a smaller house....And if the present property can be sold and some part of the proceeds

be used to produce income, that part represents "means" in my opinion. "Means of support is an expression covering not only income but property that can be used to produce income".

Ms Maas submitted that the facts in Kroon are also distinguishable from those of the present case. I agree because property became an issue in Kroon when the court was dealing with the patrimonial aspects of divorce, unlike in the present case when the patrimonial aspect was not subject of an enquiry in the maintenance court and that aspect had been dealt with by the court which granted the order of divorce. The relevant portion of that judgment relied upon by respondent, deals with the party claiming maintenance liquidating her assets.

[15] Ms Maas argued that section 16 (1) of the Act does not make any provision for a lump sum award for maintenance. She submitted that a court may make an order for payment of **sums of money** not a lump sum. That an exception to making an order for a sum of money would be to make an order for payments relating to medical expenses. Section 16 reads as follows:

- (1) After consideration of the evidence adduced at the enquiry, the maintenance court may;
 - (a) in the case where no maintenance order is in force-
 - (i) *Make a maintenance order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such person, officer, organization or institution, or into such account at such financial institution, and in such manner, which manner may include that an arrangement be made with any financial institution for payment by way of a stop order or similar facility at that financial institution, as may be specified in the order, of the sums of money so specified, towards the maintenance of such other person, which order may include such order as the court may think fit relating to the payment of medical expenses in respect of such other person, including an order requiring such other person, if the said other person*

- qualifies therefore, to be registered as a dependent of such person at a medical scheme of which such person is a member;*
- (ii) Make an order against such person, if such other person is a child, for the payment to the mother of the child, of such sum of money, together with any interest thereon, as that mother is in the opinion of the maintenance court entitled to recover from such person in respect of expenses incurred by the mother in connection with the birth of the child and of expenditure incurred by the mother in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry; or*
- (b) in the case where a maintenance order is in force-*
- (i) make a maintenance order contemplated in paragraph (a) (i) in substitution of such maintenance order; or*
- (ii) discharge such maintenance order; or*
- (c) make no order.*

[16] Ms Holderness argued that a maintenance order, which is defined in section 1 of the Act, as 'any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic...', is not limited to the payment of 'sums of money', but also provides for an order of lump sum payment of maintenance. Ms Maas disagreed and argued that in this particular case, there was no basis for an order made in paragraph 2 of the trial court order.

[17] I am of view that, after finding that the appellant was not able to pay maintenance and after making an order for a token maintenance of R1, the trial court misdirected itself in making the second order for lump sum maintenance for reasons that follow:

- 17.1—The appellant who had brought an application for a variation or discharge of the order had not requested the trial court to make any order for lump sum maintenance;
- 17.2 There is no basis upon which the trial court made an order for a relief which was never sought by the applicant;

- 17.3 The trial court did not state what the lump sum payment would be for as the evidence reveals that the appellant was only two months in arrears when he brought the application for the variation or discharge of the then existing order.
- 17.4 Section 16 of the Act which deals with the power of the court to make maintenance orders does not make any provision for an order for future maintenance of spouses.
- 17.5 The order being challenged could only have been made in lieu of maintenance as the court is not authorized to give Respondent more than what was sought and obtained as maintenance initially.
- 17.6 Having found that appellant is unable to pay maintenance and having varied the amount of maintenance, it was not open to the court *a quo*, to order division of an asset when it was seized with varying the amount of periodical payment of maintenance only.

[18] In the result, the following order is proposed:

- 18.1 The appeal is upheld with costs.
- 18.2 Paragraph 2 of the order of the court *a quo* is set aside in totality.



N SABA

Acting Judge of the High Court

I agree and it is so ordered.



R ALLIE

Judge of the High Court