

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3024/15

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

.....
DATE

.....
SIGNATURE

In the matter between:

VILAKAZI, SELINA

Appellant

And

NTSHANGASE, JULIUS

Respondent

J U D G M E N T

KEIGHTLEY, J:

- [1] This is an appeal against an order of the maintenance court. The parties are the parents of a boy, "T", who was seven years old at the time the maintenance inquiry was held. The appellant, who is T's mother, lives in Johannesburg with T. The respondent, who is T's father, lives in Durban.
- [2] Both parties are medical doctors in the employ of Provincial Health Departments. The appellant's net salary from her employment with the Department is R39 500 per annum, and the respondent's is R47 000. I will say more about their respective means later.
- [3] In initiating the maintenance inquiry, the appellant sought an order that the respondent pay a cash amount of R15 000 per month as a contribution to T's expenses, as well as retaining T on the respondent's medical aid, and paying a further amount of R2000 per month into a fixed investment account for T's benefit. The court ordered respondent to:
- [3.1] pay an amount of R5 000 as a monthly cash contribution towards maintenance,
- [3.2] keep T on his medical aid,
- [3.3] pay an amount of R2000 per month into the investment account, and
- [3.4] pay for T's school winter uniform.

[4] The order of the maintenance court was not clear whether the latter order was intended to be a once-off purchase of T's winter uniform, or an annual obligation. However, in the hearing before us the parties were agreed that they understood the latter to be the case. The parties are also agreed that the R5 000 ordered by the learned Magistrate was intended to include the cost of T's school fees.

[5] The principles governing the parental responsibility for maintenance are well established. Both parents have a joint responsibility to support their child, and to provide him or her with everything he or she reasonably needs for his or her upbringing (see *Herfst v Herfst* 1964 (4) SA 127 (W) at 130C). The extent of each parent's duty is determined by their respective means, their standard of living and their station in life. In addition, the contribution that each parent is obliged to make depends on each parent's resources and their circumstances. Based on this, the maintenance obligation is apportioned respectively between them.

[6] The appellant's complaints on appeal are that:

[6.1] The Magistrate failed to take into account all relevant items when assessing T's needs. In particular, she did not take into account the financial provision made the appellant for T's accommodation, and related expenses, such as the cost of home security services. In addition, the Magistrate did not take into account the financial provision that the appellant makes for T's transport, by way of

including in the assessment of his needs an amount based on his proportionate portion of these expenses.

[6.2] As regards the issue of means, the appellant contends on appeal that the Magistrate erred in two major respects:

- (a) in the first instance, in failing to take into account the respondent's evidence that his monthly income is boosted by an amount of R40 000 that he earns by carrying out locums every weekend; and
- (b) in the second instance, the respondent has other financial resources at his disposal to meet his maintenance obligations, viz. a flat, that could be rented out for extra income, and ownership and use of two vehicles, when one could be sold to reduce his monthly costs in favour of contributing to maintenance for T instead.

[6.3] Finally, the appellant contends that the Magistrate erred in proceeding on the basis that the apportionment between the parties should be fifty/fifty between them. The appellant submits that the respondent earns more than two times the appellant's monthly salary, and T's maintenance needs should be apportioned between them on this basis, and not on a fifty/fifty basis, as determined by the Magistrate.

[7] The appropriate place to start is with T's maintenance needs. The record of the maintenance inquiry indicates that an attempt was made to make some calculation of T's reasonable expenses, and that between the Magistrate and the maintenance officer, they arrived at an amount of R10 000 per month. However, it is also clear that in arriving at this figure the Magistrate did not take all reasonable expenses into account. Critically, while she referred to the costs of T's accommodation (as he lives with the appellant), the Magistrate expressly stated as follows, when challenged by the appellant as to why she had not included this cost:

“No deliberately I have done it deliberately. It does not include the accommodation ..., I did not include it yes. Because there is a medical aid which he is paying as well. You are not contributing for the child is that correct.”

[8] In other words, it appears that the Magistrate effected some sort of trade-off between the cost of accommodation and the cost of the medical aid, and then elected to exclude the accommodation costs from the calculation of T's needs on that basis. In my view, the Magistrate erred in this regard. She ought properly to have assessed all of T's reasonable needs as a first stage of the inquiry. From there she could have calculated and made a determination of each party's relative obligation, based on their means, and then worked out what the respondent's cash component of his maintenance obligation ought to have been.

- [9] The appellant submitted that the total cost of T's reasonable needs, based on the undisputed evidence was just over R20 000 per month. Some of the component amounts making up the total figure brook no dispute. T's schooling and associated costs (bus to and from school, after-care costs, extramural costs and summer school uniform) fall into this basket. These costs alone amount to just over R7 000 per month (including the aggregated monthly cost of T's summer school uniform)
- [10] In addition to this, the appellant made provision for T's school lunch money (R1000), his proportion of accommodation and associated costs (being a one-third proportion of the bond repayments - R2 666, rates, electricity, and ADT security). T's proportion of these costs is estimated on the basis of evidence at the inquiry to be approximately R3 100. Added to this, the appellant claims the cost of an Old Mutual education policy for T (R1 500), and his proportion of the appellant's car and transport costs, including car insurance, tracker etc. She also includes his proportion of a monthly amount of R5 000 in respect of which the appellant is paying off a loan for the purposes of buying furniture for her home.
- [11] The appellant did not include the cost of general groceries, home maintenance, or her personal expenses, such as her clothing costs. She did include T's clothing costs in the amount of R333 per month.
- [12] In the main, most of these items do not appear to me to be unreasonable for a family (albeit one that does not co-habit) of professionals. However, I do tend to agree with the respondent's contentions at the hearing that certain

items included in the appellant's list of expenses ought properly to be excluded. I include in this the loan repayments in respect of the furniture. This is regarded as an ongoing commitment. However, at some stage the obligation must come to an end. It ought not properly to be included in the monthly needs of T, as it is by nature not one that will recur for the whole of his childhood.

[13] There is also some merit in the respondent's contention that given that the cost of paying for T's transport to school and back (R1 240 per month) is already factored into the equation, the cost of T's reliance on the appellant's own motor vehicle should be brought down proportionately. There is also an argument that the R700 per month provision for birthday parties and outings is over-generous.

[14] I do not intend to make a detailed calculation of each of these items that in my view should be reduced or excluded. Suffice it to say that I am satisfied that the Magistrate erred in underestimating T's monthly maintenance needs. She left out key factors that ought to have been taken into account. The appellant is the primary caregiver and home-provider for T. She must meet at least his basic necessities for accommodation and related services. Even with transport to school being paid for, she must drop T at the bus, and transport him after hours and over weekends. Some provision ought to have been made for this in the Magistrate's calculation.

[15] On my estimation, and taking the above discussion into account the reasonable cost of T's maintenance needs is R16 000 per month.

- [16] This takes me to the question of the means of the parties. Did the Magistrate err in this regard, as submitted by the appellant?
- [17] As regards the respondent's earnings, the clear evidence of the respondent was that he earned an additional R40 000 per month doing locums. He did not claim that this was a once-off, or ad hoc arrangement. Indeed, his list of expenses demonstrates that he could not provide for his own needs unless he was able to depend on this amount as an additional monthly income. Further, he would not have been able to obtain finance from the bank for his motor vehicles and bonds unless he placed reliance on this extra income.
- [18] I conclude in this regard that the Magistrate erred by failing to take this additional income into account. She ought to have assessed the respondent's means, in terms of his net monthly income, at the time of the inquiry, as R87 000 per month. Should the respondent's position change in this regard it is open to him (as it would also be open to the appellant) to seek a variation of the maintenance order based on his changed circumstances.
- [19] The respondent submitted that his net monthly income is not the only factor to take into consideration. He submitted that before apportioning the parties' respective maintenance obligations between them, I must consider the respondent's own monthly expenses. Respondent submitted that if this is taken into account, he cannot afford an increase in the amount of cash maintenance he must pay.

- [20] The Respondent's list of monthly expenses is lengthy and, in my view, in certain respects excessive. He has two vehicles, one of which carries with it instalments of R18 000 per month. He has two bonds on immovable properties, but has elected to allow family members to stay in the smaller property free of rental, rather than to derive a commercial income from the property.
- [21] On the evidence, the respondent not only derives more monthly income than the appellant, but he clearly has more earning potential than she does. Even if his monthly expenses are more than those of the appellant, in my view there is no reason why he cannot structure his current income and additional earning potential to meet both his own needs and his proportionate share of T's needs. If he needs to cut his cloth accordingly, he must do so. If he needs to reduce his vehicle fleet to one vehicle, this ought not to be too much of a hardship.
- [22] For all of these reasons, I conclude that the Magistrate erred in assessing the parties' means and their respective proportional obligations to meet T's needs on a 50/50 basis. The Magistrate ought to have made her determination on the basis that the respondent's means are 2.23 times those available to the appellant.
- [23] The ultimate calculation based on my determinations must take into account that certain amounts should be deducted from the respondent's proportionate obligation, viz:

[23.1] the amount of R2 000 he has been ordered to pay towards T's investment account (the appellant's contribution of R1 500 has been included in the needs calculation);

[23.2] the value of T's winter uniform (based on the same amount estimated by appellant to be the monthly amount accrued for his summer uniform, being R352); and

[23.3] the aggregated monthly cost of T's reasonable travel expenses to visit the respondent four times a year in Durban. I estimate the reasonable cost of a return flight to Durban for T to be R2 500 (assuming it can be booked reasonably well in advance), taking the total annual amount to R10 000. Insofar as the respondent claims additional expenses when T visits, such as additional clothes and treats etc, in my view, this is adequately set off against the hidden costs of appellant's ongoing parenting throughout the year.

[24] I accordingly find that the respondent's proportion should be calculated on the following basis:

The respondent's monthly net income, in the amount of R87 000 x T's reasonable monthly expenses, in the amount of R16 000;

Divided by R126 590, being the joint income of the parties;

Less the sum of R2 000 + R352 + R833 (the latter being the aggregated travel costs for T to visit the respondent in Durban) = R3185

TOTAL = R7 811, rounded off to R7 800

[25] Accordingly, I make the following order:

- (a) The appeal succeeds with costs.
- (b) The amount of R5000 in paragraph 1(a) of the Maintenance order in terms of Section 16 of the Maintenance Act, 1998 granted by the Vereeniging Maintenance Court on 5 February 2015 under Reference No. 14/3/2-787/14, Case No. 787/14, is set aside and is substituted with the amount of R7 800. 00.

R KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree/disagree

M MBONGWE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 10 May 2016

Date of Judgment: 13 May 2016

Counsel for the Applicants: Adv S Georgiou

Instructed by: George Wolfe Attorneys

Counsel for Respondent: Adv S Martin

Instructed by: Fiona Marcandonatos Incorporated