



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

**CASE NO: 20976/2017**

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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------|
| (1)                                                                                                                                                                                                                                                           | REPORTABLE: <b>NO</b>                   |
| (2)                                                                                                                                                                                                                                                           | OF INTEREST TO OTHER JUDGES: <b>YES</b> |
| (3)                                                                                                                                                                                                                                                           | REVISED:                                |
| <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: left;"> <b>28 February 2018</b> </div> <div style="text-align: center;"> <br/>             .....<br/>             SIGNATURE           </div> </div> |                                         |

In the matter between:

**Sc, R**

Applicant

And

**Sc, L**

Respondent

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**JUDGMENT**

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**SPILG, J:**

**INTRODUCTION**

1. This is a Rule 43 application in which the applicant sought maintenance for herself and the minor son who is sixteen years old in an amount of R36 870 per month in addition to rental (if any) and the payment of utility bills for the property in which she resides with their son. She also sought payment from the respondent of R20 000 as a contribution towards her costs. Primary residence and contact had been agreed.

2. The matter was originally set down on my motion court roll of 23 January 2018. I was dissatisfied with the extent of financial disclosure made by both parties and *mero motu* made an order under Rule 43(5) requiring certain limited financial disclosures, as I believe I was obliged to having regard to the circumstances of the case, including the rights of the minor child in terms of the Children's Act 38 of 2005.<sup>1</sup>
3. Since the issue of residence and contact had been resolved, the agreement reached between the parties also formed part of the order that was made.

Both parties were required to deliver a supplementary affidavit in which they were to provide full details, accompanied by copies of source documents where applicable, of:

- a. In the case of the applicant; her statements for a period of one year from every bank account, credit card account and investment account as well as her personal tax returns for the previous two years
  - b. In the case of the respondent; the same disclosures as required of the applicant and in addition bank statements in respect of the business operated by the respondent under a close corporation, that business' last audited set of financial statements and previous two year's tax returns, a summary of all loans made to the respondent by his brother, copies of all bank statements in connection with each loan and an explanation of the terms of the loan agreement with a confirmatory affidavit by the brother.
4. The reason for requiring depositions is that there may not only be a sanction for perjury but an untruthful statement may amount to a misrepresentation entitling the other party to undo any award made or settlement agreement ultimately reached.

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<sup>1</sup> See Ts v Ts [2017] ZAGPJHC 244

5. Both parties filed supplementary affidavits supported by the required annexures. The matter was then argued on 13 February 2018.

## **METHODOLOGY**

6. There are two main factors which indicate that in the circumstances of the case it is best to establish the amount of maintenance that is reasonable and then determine the extent to which it is affordable for the respondent and whether the applicant should contribute any amount, irrespective of whether the respondent can afford to pay the entire amount or whether there is a shortfall which the applicant should make up with any income she may have.
7. The first is that both counsel have applied themselves diligently to the task of considering the reasonableness of the maintenance claimed. Inter alia they did so by reference to the disclosed documents which demonstrated how much was actually spent on specific items (particularly if regard was had to the credit card usage and factoring in where applicable any cash withdrawals)<sup>2</sup>. In the result a number of concessions were made and there are only a handful of contentious items of expenditure. I am most grateful to counsel for their thoroughness.

The other is that the respondent is effectively the sole breadwinner while the applicant receives a monthly return on investment income derived mainly from her share of the proceeds out of the disposal of properties that the parties jointly owned.

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<sup>2</sup> I believe that the advantages of requiring financial disclosure is evidenced by the significant closing of the gap between the parties respective positions on the amount of maintenance and the court's ability to gauge the disposable income available from the respondent's available income stream through the business..

## AMOUNT OF MAINTENANCE

8. I do not propose to go through the contested amounts item by item. There are however some specific observations that I will make regarding items where the parties are far apart.
9. If regard is had to the standard of living enjoyed by the parties and taking into account that there is the extra expense of two households I consider a monthly grocery bill of R4500 for a sixteen year old son and the applicant to be too low. I consider an amount of R6 000 per month reasonable and not extravagant.
10. The applicant includes the cost of wi-fi access as part of the items claimed under the telephone and data costs. I accordingly give her the benefit of R2 600 per month.
11. To require of the applicant to spend no more than R6 000 per annum (i.e. R500 per month) on clothing even for herself alone let alone anything for their son fails to take into account the cost of a single basic item of wearing apparel, be it a skirt, a pair of running shorts or shoes or one reasonably smart item of clothing in the year.
12. Once again if regard is had to their lifestyle during the marriage setting aside R500 per month so that their son and the applicant can go on holiday, even if it is under a week, is unreasonable. They have holidayed along the East Coast and an actual amount of R24 000 was incurred then.
13. Entertainment is a contentious item. However if regard is had to the cost of attending a film, or a concert or eating out even once every second week an amount of R800 per month is inadequate having regard to their lifestyle.
14. The respondent contended that in addition to the costs which the respondent already pays for the son's education, the costs of occupying a residence and certain other amounts he pays directly, an overall additional monthly amount of about R18 600 was reasonable. I disagree. In my view an amount of

R22 100 per month is reasonable as the total overall amount for the applicant and their son.

15. I again wish to emphasise, as I did in *Ts v Ts*, that a presiding officer does not have regard to what is reasonable relative to his or her own lifestyle but rather to that of the parties.

### **THE RESPONDENT'S ABILITY TO PAY**

16. The respondent claims that the maximum he can afford to pay is R20 000 per month. Until now he has been paying R15 000 per month. The applicant contends that it is too little and that she has been forced to eat into savings and part of the capital realised from the sale of jointly owned property.
17. The court must accept that the respondent now has to provide for two households and I will also accept that his income in real terms has not increased. The parties have lived apart since March 2017 and the respondent has formed a relationship with another woman.
18. Since the parties were married in community of property the applicant is entitled to a division of the joint estate. The respondent has however sold some of the properties and the applicant received a net amount of approximately R1.25 million. Of this amount she still has an investment of some R800 000 and is able to draw a monthly amount of some R4 600 if I am not mistaken. The capital sum is however intended to provide security for her old age. In the past the monthly proceeds of investment income did not appear to be used for maintenance and it is necessary for her to build up reserves or to reinvest. At this stage I am not prepared to take the monthly return on investment into account.
19. The respondent contends that he used the bulk of the monies he received from the sale of assets to pay back an amount he had borrowed from his brother, Corrie, when he set up his business some eight years ago. He also

claims that Corrie used the money to buy a townhouse. This is the townhouse where the applicant now resides with their son. She says that the respondent told her that although it is effectively in the name of Corrie through a legal entity, that he, the respondent, is the true beneficial owner. The respondent denies this.

20. It however appears that at one stage the applicant was expected to pay her brother-in-law rental of R8 000 per month. It is evident that this has fallen away and the applicant will be entitled to reside there with their son free of rent, levies and utility bills.

21. The respondent conducts a drilling business which he had operated from the matrimonial home. The business is conducted through the vehicle of a close corporation of which the respondent is the sole registered member<sup>3</sup>. Historically the business has been the main source of the income used to provide for the family's needs.

22. A constant theme in the respondent's papers is that he has used joint estate money or its assets to now repay his brother for a debt that allegedly arose some eight years ago and, more recently in 2017 more debt has been incurred to the brother for additional sums allegedly borrowed.

In turn the applicant's constant theme is that the respondent is alienating assets of the joint estate to her prejudice, is restructuring a debt situation and that the alleged transactions with the brother are fictitious.

23. Although the applicant had worked until 2008 and by the time their son was seven years old she commenced to stay at home looking after him. She proceeded also to assist the respondent in the business during the mornings when their son was at school. The respondent would give her R20 000 per month which would be used to cover household expenses and a number of

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<sup>3</sup> The respondent claims that a Mr M is a co-member although not registered as such. For present purposes nothing turns on that since on the respondent's own version Mr M has been there even prior to the break-up of the marriage and his presence, or the payment of any amount to him would already have been taken into account when determining the family's spending patterns. Mr M's alleged membership also did not impact on the respondent's de facto say in the affairs of the company and how its funds were utilised.

debit orders. The respondent did however pay other expenses of the applicant such as petrol, meat, insurance and all the son's expenses. After July 2017 he reduced the amount to R15 000 per month.

24. The applicant assisted the financial wellbeing of the family in other ways as well. An amount of R580 000 of her pension pay out when she resigned from her employment in 2008 was used to settle the bond on one of their joint properties and to pay off her previous car. A further amount from her pension, of just under R276 500, was used to purchase a truck for the business while the remaining R75 000 odd was used for the family, including the provision of a holiday for all.
25. The respondent's lifestyle reveals that his income and benefits received from whatever source is greater than the amount he has been prepared to declare in these papers. At this stage, at least prima facie, it appears that he is either restructuring his affairs, particularly in relation to the assets and liabilities of the business or has in fact incurred an historic as well as a current liability to his brother. Only a full disclosure of his brother's financial affairs, the source of his income, his tax returns as well as source of funding for and the procurement of the a drilling machine which features prominently in the respondent's explanation of the businesses (and hence the respondent's own) financial situation will may reveal the truth.
26. It is obvious that the underlying source of each party's income is the starting point of any investigation. The underlying source is not necessarily, nor even predominantly, an amount deposited into a bank account at the end of each month. It can be other forms of benefits that have an economic value, such as the right to occupy a residential property indefinitely, the use of a motor vehicle or credit card facilities.
27. The mere fact that a party claims to earn a salary and produces a pay slip or even an IRP5 form tells a court very little unless it is self-evident that he or she is strictly a wage earner with no personal connection to the employer.

28. A pay slip or tax return is inadequate if the party operates a business through the vehicle of a legal entity or partnership, is involved in a family concern or is the donor, trustee or beneficiary of an inter vivos trust and the other party alleges that the disclosed income would be inadequate to support the lifestyle to which the parties had been accustomed before separation.
29. Each of these mentioned structures enables the deferment of income or its conversion into other forms of financial benefits, the ostensible incurring of debt and expenditure or a claim that it is just family benevolence that provides handouts or loans which in truth are never repayable and are no more than accounting entries with no actual financial consequences.
30. By way of example; salary can be converted in the books and retained as a loan account or converted into equity or an investment. The use of assets registered in the name of a legal entity or a trust, such as a residential home or motor vehicle can be used indefinitely for the *de facto* sole benefit of a party and recurring purchases or expenditure such as groceries, petrol, vehicle maintenance, clothing, entertainment and even utility bills can be put through the company, while school fees can be taken out of a trust which provides for such an expenditure.
31. In my respectful view a court should be astute in such cases to place proper weight on the external manifestations of the parties' disposable income by reference to the lifestyle enjoyed by them when they lived together, whether they lived debt free and were able to access ready sources of funds as and when needed unless proof is provided that the individual breadwinner or both of them lived beyond their means by reference to overdrafts, genuine loans or had disposed of a capital asset. In short these various structures are invariably established not simply to protect individuals from personal liability but serve legitimate tax structuring objectives to defer or convert income.
32. Of course there may be some structures that transgress the boundary between tax avoidance and tax evasion in which case it is hardly likely that

the party would provide full disclosure and a court is required to make an assessment by reference to the lifestyle led.

33. In the present case the respondent has effectively controlled the flow of monies within the joint estate and is able to restructure his affairs. His brother is a related party who may or may not have concluded genuine arms-length transactions including the borrowing of money. At present there are warning bells particularly in relation to the delay in repayment of the alleged loan made some years back that was claimed to have funded the business.

34. I am satisfied that at this stage the applicant's source of income or capital base should not be depleted to cover any part of the maintenance which I have considered to be reasonable. The respondent has in the past been well able to cover more than R20 000 of it whether directly, in the form of remuneration to the applicant or otherwise through the close corporation. For purposes of maintenance claims they are in fact all derived from the same ultimate source over which the respondent has been able to enjoy material benefits for himself and his family during the marriage, let alone that he is in de facto control of how its revenues are to be utilised.

## **CONTRIBUTION TOWARDS COSTS**

35. This has now become settled between the parties.

## **ORDER**

36. I accordingly order that the respondent:

- a. pay to the applicant for the maintenance of herself and their son an amount of R22 100 per month;
- b. pay school fees and all reasonable educational related expenses including but not limited to stationary not included in the school fees,

books, hiking, school tours, extra classes, extra murals, sport equipment, lockers and excursions;

- c. pay all expenses pertaining to the property where the applicant and their minor child presently reside;
- d. pay directly to the service provider all reasonable medical expenses of the minor child not paid by the medical aid and if the applicant does pay such costs then the respondent will reimburse the applicant within seven days of being provided with the relevant receipt and statement;
- e. pay a contribution to the applicant's legal costs in an amount of R10 000 in two equal instalments

and as further set out in the draft order which I have initialled.

37.Costs to be in the cause.



**SPILG J**

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|--------------------------|-------------------------------------------------|
| DATES OF HEARINGS        | 23 January and 13 February 2018                 |
| DATE OF DISCLOSURE ORDER | 25 January 2018                                 |
| DATE OF RULE 43 ORDER    | 28 February 2018                                |
| FOR APPLICANT:           | Adv JJW Hayes<br>Carol van Molendorff Attorneys |
| FOR RESPONDENT:          | Adv T Engelbrecht<br>Theron Attorneys           |