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REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 0042146/17

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

.....

In the matter between:

M, S

APPLICANT

and

M, S

RESPONDENT

JUDGEMENT

NKOSI - THOMAS AJ

Introduction

[1] At issue in this application is the applicant's entitlement to relief, in terms of the provisions of section 8(1) of the Divorce Act 70, 1979 (***"the Divorce Act"***), varying the order of this Court granted on 26 April 2013 (***"the Court Order"***) in regard to the maintenance obligations of the applicant towards the parties' two major children.

[2] Section 8(1) of the Divorce Act, in its material parts, provides that:

"A maintenance order ... may at any time be rescinded or varied ... if the court finds that there is sufficient reason therefor..."

[3] The applicant and the respondent were married to each other out of community of property excluding accrual system. During the subsistence of their marriage two major children were born, namely, S (***"S"***) and L (***"L"***).

[4] On 26 April 2013 the parties' marriage was dissolved by the order of this Court incorporating a settlement agreement hitherto entered into between the parties (***"the settlement agreement"***). At the time of the dissolution of the marriage, S was a dependant major child as he was enrolled at the University of [...] and L was in matric. S had, however, stopped attending lectures at the University of [...] in his third year in 2012.

- [5] In terms of clauses 4.1 and 4.2 of the settlement agreement the applicant was ordered to pay maintenance in the amount of R25 000,00 in respect of both S and L. The applicant paid this amount into the respondent's banking account on a monthly basis until 24 April 2014, at which time the applicant stopped paying maintenance.
- [6] L passed her matriculation examinations in December 2013 and decided, thereafter, to simply stay at home and not pursue her studies any further.
- [7] During 2014 S re-registered at the University of [...] but subsequently dropped out, yet again. L, for her part, enrolled at a college in [...] for a graphic design course only to drop out, soon thereafter.
- [8] In April 2017 both S and L took up residence in [...], United States of America without saying a word to the applicant. However, S has since returned to South Africa, in December 2017, in order to pursue his studies at the University of [...].
- [9] During January 2018, S registered at the University of [...] for his third and fourth year modules in order to complete his degree. The applicant has been responsible for S's upkeep since his return from the United States of America, which upkeep includes the payment of tuition fees at the University of [...]:
- [10] The applicant relies on the common cause facts set out below in support of the proposition that there exists "*sufficient reason*" in terms of section 8(1) of the Divorce Act for relief for the variation of the Court Order.

[10.1] In the case of S, that:

[10.1.1] He is currently 27 years of age;

[10.1.2] He matriculated at [...], a private school, at the end of 2009

[10.1.3] The applicant paid for all his private school education and living expenses;

[10.1.4] In 2010 he registered for his first year of study at the University

of [...], enrolled for Electrical Engineering for a period of three years which he did not complete;

[10.1.5] The applicant made payment in respect of all the fees, textbooks

stationery and to the like required by S;

[10.1.6] The applicant took him to the University every morning;

[10.1.7] During his third year, when the parties' marriage broke down, he

stopped attending classes and simply stayed at home;

[10.1.8] The applicant offered him employment at his company and the respondent intervened with a refusal as in her opinion "*work is*

beneath her precious children" (including L) whose father

is allegedly a millionaire and whose father can and must support

them;

[10.1.9] The respondent maintained that the applicant should simply pay the adult children a monthly salary as he could afford to do

so

without both the adult children doing any work;

[10.1.10] The applicant arranged employment with a friend of his, for S, an arrangement that was, yet again, rejected out of hand;

[10.1.11] The applicant offered him a range of products to sell and his response thereto was that it was unacceptable inasmuch as he did not require the applicant's charity;

[10.1.12] He began drinking and smoking marijuana, which led to him exhibiting anti-social and aggressive behaviour to the extent that he threatened to beat the applicant up when he spoke to him regarding his conduct;

[10.1.13] The applicant, in an attempt to ensure that he completes his degree, arranged a meeting with the Dean of the relevant faculty in order to plead that he be allowed to continue and complete his degree;

[10.1.14] S was allowed to return to his studies only to drop out, yet again;

[10.1.15] S has not as yet completed his studies. He has returned

to South Africa but everything is still in the air as regards
 his
 future prospects of gainful employment as he has not
 acquired
 any qualification despite the applicant's efforts to ensure that
 he does so;

[10.1.16] He has, however, enrolled at the University of [...];

[10.1.17] The applicant is currently paying for his tuition and living
 expenses;

[10.2] In the case of L, that:

[10.2.1] She is currently 22 years of age;

[10.2.2] She matriculated at the end of 2013 from [...];

[10.2.3] She also attended a private school whose school fees
 and related expenses were paid for by the applicant;

[10.2.4] Despite the above, she elected to stay at home for a period of
 approximately two years after matric without doing any part
 time
 work and rendering herself solely dependent on the applicant
 for
 her clothing and social activities;

[10.2.5] She has achieved neither a degree nor a diploma and hence
 she
 is unable to work;

[10.2.6] She is currently in [...], United States of America;

[10.2.7] The applicant has not been informed as to what she is currently doing in the United States of America.

[11] The picture that emerges from the common cause facts is one of two adult children who were financially fully provided for by the applicant, who were given the best education money can buy but who, unfortunately, have failed to achieve what is reasonably expected of them in the way of self - sufficiency as adults.

[12] The question that therefore comes to the fore is whether it can be said, on these papers, that the applicant has shown “*sufficient reason*” for the variation of the consent order referred to above. That is the question to which I now turn.

[13] Before I do so, I propose to briefly deal with the objection *in limine* raised on behalf of the respondent that this Court should dismiss this application as the applicant ought to have approached the maintenance Court, instead, for relief.

Is the Maintenance Court the Appropriate Forum?

[14] The respondent, relying on the *dictum* in *Troskie v Troskie* ¹, maintained that this Court should dismiss this application with costs on the ground that it ought properly to have been brought in the maintenance Court by the applicant.

[15] The Court in *Troskie* held that:

¹ 1968(3) SA 369 (W)

“It seems to me, therefore, that this Court in the exercise of his discretion, should not entertain any application to enforce payment of the arrears of a maintenance order, unless there are good and sufficient circumstances warranting it.

In the present case I have not been informed of any such circumstances. No exceptional circumstances been brought to my attention. On the contrary, the parties do not appear to be wealthy; the respondent is an unrehabilitated insolvent; he has appeared in person to resist the application. Consequently, the parties appear to be the very kind of person for which the procedure under the maintenance act was designed.”

[16] *Troskie* is plainly distinguishable from the case at hand.

[16.1] First, *Troskie* was decided within the context of an application under Rule

45 (12), the applicable Rule at the time to enforce payment of the arrear maintenance in terms of the order of the Court in respect of a minor child.

Here, we are seized with a variation application that pertains to two major children who are reasonably expected to have been self-supporting by now.

[16.2] Second, the applicant in *Troskie* gave notice in terms of the Rule requiring

the respondent to appear before Court for an investigation into his financial position. Here, no investigation into the financial position of the

applicant is called for. The only issue is whether the applicant should continue paying an amount of R25 000,00 monthly to the respondent in respect of maintenance of their two adult children.

[16.3] Third, the parties in *Troskie* were impecunious. The parties *in casu* are anything but impecunious.

[16.4] Fourth, when *Troskie* was decided the maintenance Court was held to have been capable of providing “a simple, inexpensive and effective² procedure.” That does not appear to be the case currently and the Constitutional Court held in that regard that:

“... *there is evidence of logistical difficulties in the maintenance courts that result in the system not functioning effectively.*

The

CGE placed material before the Court, demonstrating

the

difficulties with the operation of the Act, including problems ranging from inadequately trained staff to insufficient facilities and resources.”³

[16.5] Fifth, the Court in *Troskie* held that there were no exceptional

² *Troskie* at 370 H

³ *Bannantyne v Bannantyne* (GCE Amicus Curiae) 2003(2) SA 363 at [26]

circumstances entitling it to entertain the enforcement application. In the case before me, there are exceptional circumstances which warrant this Court to entertain this matter, chief among them being the respective ages of the parties' adult children.

[17] The objection *in limine* must, accordingly, fail.

Sufficient Reason

[18] As stated above, section 8(1) of the Divorce Act provides, in material parts, that:

“ A maintenance order ... may at any time be rescinded or varied ... if the court finds that there is sufficient reason therefor...”

[19] It, accordingly, follows that in order to be entitled to relief, the applicant must demonstrate “*sufficient reason*” in terms of section 8(1).

[20] The applicant placed much store, in this regard, on the fact that the Court Order provides that the applicant must pay maintenance for the two adult children until they are self-sufficient. In this regard, reliance was placed on the *dictum* in *Burse v Bursey and Another*⁴ where the SCA held that:

⁴ 1999 (3) SA 33(SCA) at 38 D

“In my view, the present order fixed a time for its duration, i. e until John becomes self-supporting, and it will cease to operate when that event occurs (or conceivably when John becomes capable of supporting himself, a matter which I need not decide.) Whether that event has indeed occurred may be the subject of dispute but it is an objective fact capable of being established with sufficient certainty.”
[own emphasis]

- [21] The facts in *Bursey* are, however, distinguishable from those *in casu*. There, the major child involved was 21 years old, enrolled for his third year of study at Rhodes University and was completing his degree. The major child in *Bursey* was clearly not self-supporting and has not “*conceivably ... [become] capable of supporting himself*” in accordance with the above *dictum*. He was simply not the author of his predicament.
- [22] In this case, however, it would not be an exaggeration to state that the major children “*conceivably... [became] capable of supporting*” themselves and have only themselves to thank for being not self-supporting.
- [23] I find that to be so because, in the case of S, the applicant offered him employment at his company which was flatly refused as being “*beneath*” him. An attempt by the applicant to get S employment with the applicant’s friend was also rebuffed. A range of products to sell were offered to S by the applicant which were similarly met by a rebuff. Instead, S elected a life of “*drinking*”⁵ and substance abuse.

⁵ Founding Affidavit, para 30

[24] L has similarly exhibited irresponsible conduct which only resulted in her dropping out of a tertiary learning institution and she is currently in the United States of America and what she is doing there remains a mystery to the applicant. When an employment offer was made to the children the respondent refused on account of work being beneath her children.

[25] In my judgment, the parties' adult children are "*conceivably capable of supporting*" themselves and have only themselves to thank for the predicament in which they find themselves currently.

[26] I am fortified in the above conclusion by the judgment of this Court in *Gliksman v Talekinsky*⁶ where it was held that:

"A child, when it becomes of age, should normally be able to provide for himself or herself... [and] the liability on her father to support her only arises when it is shown that she cannot support herself, she being a major who should be able to provide for herself in normal circumstances..." [emphasis is mine]

[27] As stated above, in my judgment, the two adult children are quite capable of supporting themselves. Their cases are thus distinguishable from *Gliksman*.

[28] The two adult children did not only enjoy good quality private school education which has prepared them for all manner of economic activity, but they have flatly refused offers from the applicant for work in order to render them self-supporting.

⁶ 1955(4) SA 468 (W) at 469 F - H

[29] The two adult children's predicament, unlike that in *Gliksman*, was self-created. It can hardly be expected of the applicant, in the circumstances of this case, and no matter how wealthy, to maintain his adult children *ad infinitum*.

[30] Accordingly, and in my judgment, the applicant has shown "*sufficient reason*" as contemplated in section 8(1) of the Divorce Act for the variation of the order of 26 April 2013.

[31] In the result, I grant an order in the following terms:

[31.1] The settlement agreement dated 22 October 2012 and made an Order of Court on 26 April 2013 is varied as follows:

[31.1.1] by the deletion of clauses 4.1, 4.2, 4.3, 4.4, 4.5, 4.7, 4.8 and 5.9 thereof;

[31.1.2] by the renumbering of the current clause 4.6 to read 4.1;

[31.2] The above variation to the settlement agreement shall apply retrospectively from 1 April 2017;

[31.3] There shall be no order as to costs.

L.G NKOSI-THOMAS AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Heard: 2 August 2018

Judgment: 20 August 2018.

For the applicant: Advocate M Feinstein, with her, L Mnqandi

For the Respondent : Mr. D Sithole