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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 10644/2019

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

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Date ML TWALA

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In the matter between:

K: A

APPLICANT

AND

K: R

RESPONDENT

JUDGMENT

TWALA J

- [1] In this opposed application, the applicant seeks an order against the respondent for maintenance for herself and the two adult children born of the marriage together with other ancillary orders.
- [2] It is common cause that on the 28th of June 1996 the applicant and the respondent were married to each other out of community of property in terms of an antenuptial contract. Further, two children were born of the marriage and are presently residing with the applicant. It is not in dispute that the parties have not been living together as man and wife since March 2017 when the applicant left the common home. It is further not in dispute that during the course of the marriage whilst the parties were living together, the applicant was running a catering business and that she left her catering equipment at the common home when she left in March 2017.
- [3] The respondent make issue with the applicant in that it brought a Rule 43 in the form of a Rule 6 application and argues that the application should therefore be dismissed for non-compliance with the rules of Court. Further, so it is contended by the respondent, that the applicant failed to attach its bank statements to its founding papers to show what her earnings are and where and how much money she receives as assistance as she alleges. There will be the reduction in the maintenance she requires for the children if the children were allowed to live with the respondent and the respondent wants the children to come back and live with him.

- [4] Counsel for the respondent contended further that the respondent's employer has started preparations for retrenchments and the respondent might be affected thereby since he has been with the company for only 4 years. The expenses as listed by the respondent are necessary living expenses. The respondent tenders the return of the catering equipment to the applicant to alleviate the problem of her income.
- [5] In *Khunou & Others v Fihrer & Son 1982 (3) SA (WLD)* the Court stated the following:
"The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner."
- [6] In *Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)* which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla & Another (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014)* the court stated the following:
"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be

permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

- [7] I understand the above authorities to say that the Rules of Court are the most important element in the machinery for the administration of justice. However, in the absence of substantial prejudice to be suffered by the other party, a slack in the observance of the Rules can be allowed by the Court exercising its discretion to expedite and, in an inexpensive manner, the finalisation of the real merits of the case. It is my respectful view therefore that, although the applicant brought the application in terms of Rule 6, the respondent is fully aware of the issues he has to meet. I therefore conclude that the respondent has failed to establish that it will suffer any prejudice if the non-compliance with the rules is condoned. It is my considered view therefore that it is not in the interest of justice that this Court should prefer form over substance and dismiss the application.
- [8] I find myself in agreement with counsel for the applicant that, the applicant seeks an order pendente lite and that the children cannot be uprooted and be forced to live with the respondent. Further, I accept that the applicant is not employed and does not earn an income. It is on record that the catering equipment for her catering business is in the possession of the respondent who has now tendered its return to the applicant.
- [9] It is trite that both parents have a duty to maintain their children even if the children are of age as long as they are not self-supporting. It is further trite that the other spouse can institute maintenance proceedings on their behalf if they are still attending school. It is on record that the two children of the parties are still attending school and therefore I hold the view, that the

applicant is competent to act on their behalf in these maintenance proceedings.

- [10] I am in agreement with counsel for the applicant that the respondent has the means to afford buying the applicant a motor vehicle. It appears from the bank statements of the respondent that he transfers between R8000 – R9000 per month to an investment account. Further, he owns 3 properties and has sold one and has invested R400 000 from the sale of one of his properties.
- [11] It is undesirable for parties in divorce proceedings to drag the case longer than it is necessary for it is costly to run such cases in the High Court. It is on record that the divorce proceedings were instituted in May 2017 and the parties are still involved in mediation. The respondent alleges that he has been paying his legal fees at the rate of R3000 per month as it appears on his bank statement. However, he argues that the applicant would always want senior counsel to preside on the mediation process and therefore the applicant has the means and does not need any contribution towards her legal costs. It is further submitted that the applicant has received a large sum of money from her mother's estate.
- [12] I do not agree. It is on record that the applicant receives assistance from her brother although she does not state how much exactly and from her eldest son who was born before the marriage to the respondent. She testified that she used all her savings and paid the enrolment fees for the children in the sum of R15 000 at beginning of 2019. She denied having inherited large sums of money from her mother's estate since, in terms of Islam only male issues are entitled to inheritance.

[13] I agree with counsel for the applicant that both the brother and her son do not owe a duty to maintain the applicant. The respondent does not dispute that she paid a sum of R15 000 for the enrolment of the two children at school but says there is no proof thereof. However, the respondent does not deny that the children are so enrolled nor does he say that he paid for the enrolment of the children. The irresistible conclusion is therefore that the applicant paid for the children and that she is entitled to be refunded her money by the respondent.

[14] I am in agreement with counsel for the respondent that once the applicant receives the catering equipment she will be able to earn a living. I am of the respectful view therefore that the applicant will be able to maintain herself except for the motor vehicle and accommodation. However, I accept that she will not be able to immediately secure business that would pay her that much but would do so after some time and a period of 6 months is not unreasonable in the circumstances.

[15] In the circumstances, I make the following order:

The draft order marked “X” as amended and annexed hereto is made an order of Court.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 29th July 2019

Date of Judgment: 14th August 2019

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