

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

CASE NO: 24888/2019

REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
15/09/2020

In the matter between:

N[....] V[....]

APPLICANT

And

S[....] A[....] V[....]

RESPONDENT

JUDGMENT: RULE 43

VUKEYA AJ

INTRODUCTION

1. This is an Application in terms of Rule 43 of the Uniform Rules of Court. The Applicant, who is the Plaintiff in the divorce action, seeks an order *pendente lite* in the following terms:

1.1. Maintenance for herself in the amount of R50 000, 00 per month;

- 1.2. Maintenance for her two children born on 07 July 2011 and 01 October 2013, (9 and 7 years old respectively) in the amount of R15 000, 00 per month per child;
- 1.3. An order for payment by the Respondent of her legal costs to the value of R150 000, 00;
- 1.4. An order for parental rights and responsibilities including contact and care of both children;
- 1.5. Payment by the Respondent to the Applicant of an amount in arrears for maintenance (R155 000, 00) in terms of a court order granted on 05 December 2019.

BACKGROUND

2. The Applicant and the Respondent were married on 12 December 2012 out of community of property by ante-nuptial contract subject to the Accrual System in terms of the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984. Two children were born out of this marriage. The marriage has, according to the Applicant, irretrievably broken down and is in such a state of disintegration that it cannot be restored. Divorce proceedings have been instituted and the divorce action is pending.

3. The parties are co-owners of a property called the H[....] Property situated at [...] H[....] Village, Short street Fourways, Johannesburg, Gauteng Province. According to the submissions the appellant and the children have vacated that property to live in a rented property.

4. The Applicant describes the Respondent as a person who is well able to afford the comfortable lifestyle he provided for her and her children when they lived together. She alleges that the Respondent contributed to the expenses of the matrimonial home as follows:

- 4.1. He maintained her and the two children and took care of all their expenses;

4.2. He took care of monthly bond payments in respect of the matrimonial home, rates, taxes, water and lights accounts;

4.3. He paid insurances; cell phone bills; bought groceries and clothing for her and the two children;

4.4. He paid expenses in respect of her motor vehicle; fuel and transport costs for her and the minor children;

4.5. He also paid for entertainment and overseas travel;

4.6. He paid all expenses in respect of school fees and other school relating expenses including extra-mural activities in respect of the minor children.

5. The Applicant alleges in her founding affidavit that she would receive from the Respondent an amount of R100 000, 00 for the household expenses mentioned above. She indicated in her Supplementary Affidavit that at the time of deposing to her Founding Affidavit, she worked at Perx Consulting as a Financial Manager but due to Covid-19 her contract was terminated and she became unemployed with no source of income. When she worked for Perx Consulting she first earned R40 000, 00 and later R50 000, 00. When she became unemployed she informed the Respondent of her situation but he did not help her with anything. She had to sell some of her belongings to look after herself and the two children, she even had to sell her immovable property and rent a place to stay with her children and her mother.

6. The Respondent is a businessman and a director of O[...] Project Services conducting its business at Goldfields Mine, Western Area, in the Gauteng Province. Subsequent to the institution of the divorce action the Applicant applied for a Rule 43 and the court granted an Interim order in terms of which the Respondent was ordered to pay R15 000, 00 per month per child starting on 28 December 2019 and thereafter on or before the 28th of each succeeding month and to continue paying school fees for the two children. The Respondent was further ordered to file his affidavit regarding the change in his financial circumstances before 13 December

2019. The Respondent failed to fully comply with the interim order in that he filed his affidavit in January 2020. This court granted him condonation for the late filing of his supplementary affidavits. He also failed to pay maintenance as directed to in terms of the Interim Court Order.

7. He submitted that during October 2019 when he deposed to his Opposing Affidavit the monthly income for him and his business was R338 861. 77, however some of the contractors elected not to renew their contracts. One of the companies named Goldfields, from whom his business earned a monthly income of at least R280 000, 00 terminated its contract and that resulted in him being unable to meet his financial obligations. He could also not secure new contracts.

8. The Applicant and the Respondent have both filed documents disclosing their financial commitments and supporting documents to prove their respective expenses.

ISSUES FOR DETERMINATION

9. The following issues are for determination in this matter:

- 9.1. The amount to be paid for maintenance of the two minor children;
- 9.2. Whether the Applicant is entitled to spousal maintenance and if so the amount to be paid;
- 9.3. Parental responsibilities and rights including contact and care of the two minor children;
- 9.4. Whether the Respondent should be ordered to pay the Applicant's legal costs for the divorce action;
- 9.5. Whether the Respondent is liable to pay the arrears emanating from the Interim order granted on 5 December 2019.

Maintenance of the two minor children

10. The Applicant prays for an order for payment of maintenance in the amount of R15 000, 00 per month, per child. This amount is the same as the amount tendered

by the Respondent and ordered in terms of the interim order granted in December 2019. The Respondent concedes that the two minor children are entitled to maintenance *pendent lite* but submits that the Applicant's claim is exorbitant and unreasonable; he cannot afford to meet it. He states that he can afford to pay R5000, 00 per month, per child (R10 000, 00); school fees for both children; his pro-rata share of the children's school related and extra-mural expenses and contribute towards the children's medical expenses that are not paid by the medical aid pro-rata, in accordance with his and the Applicant's income.

11. Children are entitled to maintenance *pendent lite*, depending on affordability element which the court is compelled to consider and draw inferences in other instances to arrive at a reasonable sum to be paid for maintenance. The court which deals with Rule 43 Applications, unlike the trial court, decides the matter on the papers and mostly on submissions made by counsel and it is sometimes very difficult to be accurate with the figures. In Taute v Taute 1974 (2) SA 675 (E) at 676 par B-C Hart AJ said the following: *"there are certain basic principles which in my view govern an Application of this type. As already indicated such maintenance is intended to be interim and temporary, and cannot be determined with that degree of precision and closer exactitude which is afforded by detailed evidence"*.

12. It is so that in the current Application the Applicant alleges that she has become unemployed and the Respondent alleges that his income has taken a nosedive since November 2019. However, the one party alleges that the other is not being truthful about his/her financial position. The court can only draw inferences from the documents presented before it in order to arrive at an interim arrangement for maintenance pending the divorce trial where evidence will be led and both parties cross examined about their income and liabilities.

13. The Applicant's expenditures are recorded in her financial disclosure form attached to her documents. She has recorded expenditures to the total amount of R150 250, 00 for herself and the two minor children; approximately R65 000, 00 for the two children and approximately R 90 000, 00 for herself.

The most remarkable expenditures for the children are the rent payments to the value of R10 000, 00 per month; groceries R8700, 00 per month; medication

R1000.00. Medical expenditures which are recorded as over the counter medicines are R1500, 00 per month; doctor's bills and medicine R2000, 00; provisions for dentists R3500, 00; and for Ophthalmologist for Kade R1500; it is not clear why these amounts are claimed on a monthly basis when they seem like provisional or occasional expenditures.

14. The Applicant claims for medical expenses and bills for medication to the total value of approximately R8500, 00 per month. These two claims have not been substantiated and it is not known how frequently incidents requiring additional funds to be paid towards the medical needs of any of the children occur. It will be unjust and unfair for the court to order that these medical expenditures be paid on a monthly basis by the Respondent while it is not clear why the total amount of R8500 is needed on a monthly basis as these are clearly occasional claims.

15. I am also of the view that the amount contributed by the two minor children for rental in a household with two adults is exorbitant. The Applicant stays with her two children and her mother who does not seem to be making much of a contribution in rental payments in that household. While the children in the household are paying an adult's share of the rent, the Applicant's mother is paying a child's share. Generally the child's share of household expenditures is determined by allocating one part per child and two parts per adult which would result in each child paying at least R4000, 00 and the two adults R8000, 00 each.

16. The Respondent submits that he cannot afford to pay the amount of R15 000, 00 per child, per month. His defence is that his business has lost clients and took a nose dive in the past few months. On the current contracts, his business derives income of approximately R105 000 per month from which he must still pay salaries and other expenses; provisional tax and medical aid contributions on a monthly basis. His net disposable income earned is therefore R81 000, 00 from which he must still cater for his expenses and pay maintenance and school fees. The Applicant on the other hand informs the court that she became unemployed after Perx Consulting terminated her service. She had to sell some of her property to make a living.

17. The court has a duty to grant a maintenance order which it finds just after having due regard to the prospective means of the parties and their respective needs and earning capacities. The Applicant has lost her job and the Respondent's income is lower than before and therefore the parties cannot expect to live the luxurious life they were accustomed to when they still lived together as a family. At that time they were both employed and the Respondent's business was also doing well. After thorough consideration of the circumstances, I am of the view that an amount of R10 000, 00 per month per child is reasonable for the maintenance of the two children.

Spousal maintenance

18. Section 7 of the Divorce Act 70 of 1979 deals with spousal maintenance in divorce matters. It allows the court to embark on an investigation in the financial affairs of the parties to look into their prospective means; their respective earning capacity; financial needs and obligations; the standard of living of the parties before the divorce; etc. The court must therefore strive to arrive at a conclusion that will be fair and just to both parties. It is important to note that a party may qualify for maintenance upon divorce but it by no means follows that the quantum thereof should be such as to enable her to live to the same standards as she enjoyed during the subsistence of the marriage. (See *Louis v Louis* 1973 (2) S 597 (T) at 5980).

19. The Applicant applies for spousal maintenance in the amount of R50 000, 00 and alleges that she has become unemployed after Perx Consulting terminated her service. It was argued that the letter she filed as proof of termination of her contract of employment was less formal and it also contained no date on which it was written. There has been no explanation regarding the filing of such a letter but the court will accept it because of its contents and relevance to the matter and further because there is no evidence to the contrary. She explains in her Founding affidavit that she has no earning capacity and has had to rely on the sale of some of her assets to be able to maintain her and the two children. According to the Respondent's submissions the Applicant is a highly qualified person who can secure a well-paying job without a struggle.

20. In *Davies v Davies* 1939 W.L.D.108 at par 114 Ramsbottom J pointed out that maintenance is an expenditure of a recurring nature which is usually paid out of income and that 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 questions of maintenance. Both the Applicant and the Respondent rely on their altered financial situations to support their cases. Being unemployed the Applicant records expenses to the value of R115 313, 00; these expenses include petrol and maintenance in the amount of R6125. 00. It is unclear why she uses so much petrol on a monthly basis and in my view that is an exorbitant amount for an unemployed person. For groceries the Applicant uses an amount of R5000, 00. It is important to mention that the two children use about R8700, 00 per month which is R4 350, 00 per child for groceries. The Applicant has indicated that her mother lives with her and her children in that household but there is no indication of how much her contribution is to the groceries and other household necessities.

21. In *Kroon v Kroon* 1986 (4) SA 616 (E) the court said that:

“The parties are no doubt aware that in most cases persons who have become divorced will be compelled by necessity to reduce their standard of living, for where the available means of support are not adequate to maintain both according to their former scale of living, each must of necessity scale down his or her budget... The fact of the matter is that two living together can live more cheaply than two living apart, for obvious reasons such as the need for two residences plus rates, maintenance, service charges, and all the rest of it, two cars plus concomitant expenses, two lots of household goods to buy and maintain and so forth. The problem of ‘indivisible expenses’ is a real one”

22. When looking at the affordability element in this matter it is clear that the amount of R50 000, claimed by the Applicant will not be affordable for the Respondent who has an income of R81 000, 00. He must still be able to pay maintenance for two children and also take care of his own necessary expenditures. What was said in the Kroon (supra) matter is more relevant in the case in consideration. The Applicant moved out of the common household with the children

and rented a place to stay. She has since become unemployed and the Respondent is the only person who has a source of income from which he is expected to maintain himself, the two children and the Applicant who now reside in another household where the head of that household is unemployed. It is important for the parties to realize the change in lifestyle and adapt to new conditions befitting of their current financial status and actually cut down on those expenses that are not necessarily a 'need' but a 'want'.

I am of the view that an amount of R50 000, 00 per months will not be affordable to the Respondent and am of the view that R20 000, 00 is fair and just award for spousal maintenance for the Applicant.

Parental responsibilities and rights of the children including contact and care

23. In terms of section 18 (2) of the Children's Act 38 of 2005 the parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to care for the child; to maintain contact with the child; act as a guardian of the child and to contribute to the maintenance of that child. This fulfils what section 28 (2) of the Constitution provides that "a child's best interests are of paramount importance in every matter concerning the child".

24. It is therefore not in the best interests of a child to be unjustly separated from his parent and for the child to be unreasonably precluded from maintaining contact with his parent or family. The court as a guardian for all minor children should always act in the best interests of a child especially in matters regarding contact and care of minor children.

25. It is apparent from the documents in this file that the parties are unable to find common ground more especially where it concerns contact and care of the two children. They accuse each other of unbecoming behaviour and make allegations of certain acts of domestic violence being committed by the one against the other. As a result of the conflict and misunderstanding that exists between the two there is no formal arrangement regarding the contact and care of the children by the Respondent while the children are in the care of the Applicant.

26. Though the Applicant concedes that it is in the best interests of both children to maintain contact with the Respondent she requests the court to refer the issue regarding contact and care to the office of the Family Advocate. The family advocate is to conduct an investigation and compile a report concerning the best interests of the two children and assist with the creation of a formal parenting plan. I am in agreement with this proposal as it seems the parties are unable to reach an amicable solution on their own. Furthermore, it is always advisable to refer matters involving children to the office of the Family Advocate to conduct an investigation regarding what could be in the best interests of the children before a final order is made. Nothing however, precludes this court from making an interim arrangement pending the report of the Family Advocate especially under the circumstances and the facts presented in this Application. The Applicant has alluded to the fact that the Respondent has always been in contact with the children and has conceded that it is in their best interest. She also mentions that she has never taken issue with the occasions on which the Respondent has had contact with the children. There are no reported incidents of abuse towards the children by the Respondent that may be a cause for concern in this regard.

27. The Applicant has requested the court to grant an order that the Respondent's contact with the minor children should be on condition that his state of sobriety is confirmed prior to him collecting the minor children. There is no basis for this prayer and there are no reported incidents that would raise a concern and persuade the court to grant such a prayer. The Respondent requests the court to order that he can have midweek contact/ visitation with the children and that he can have the children until Monday when it is his turn to have them for the weekend. The children still attend school and to interrupt their school week for a visit will cause unnecessary disruptions to their school programme. It is however fair to allow telephonic contacts at reasonable times and that they be returned on Sunday afternoon to prepare themselves for school the next morning.

Contribution towards the legal fees of the Applicant

28. In *Cary v Cary* 1999 (3) SA 615 (C) Donen AJ made the following observation:

‘...Applicant is entitled to a contribution towards the costs which would ensure equality of arms in the divorce action against her husband. The Applicant would not be able to present her case fairly unless she is empowered to investigate Respondent’s financial affairs through the forensic accountant appointed by her. That is, Applicant will not enjoy equal protection unless she is equally empowered with the “sinews of war”. The question of protecting Applicant’s right to and respect for and protection of her dignity also arises in the present situation, where a wife has to approach her husband for the means to divorce him. I therefore regard myself as being constitutionally bound to err on the side of the ‘paramount consideration that she should be enabled adequately to place her case before the court’. The papers before me indicate that Respondent can afford to pay the amount claimed and that he will not be prejudiced in the conduct of his own case should he be ordered to do so”

29. I am in full agreement with the views expressed and the approach adopted in the Cary matter as it was intended at promoting the spirit and purport of the Bill of rights entrenched in our Constitution. It is important to note also that Donen AJ balances the need for financial assistance for legal fees with the affordability element. It is impractical to burden the Respondent with the payment of legal fees of the Applicant if he cannot afford it. And if that is the case, it is inevitable that he will be prejudiced in the conduct of his own case.

30. In the present matter the appellant submitted that due to the Respondent’s failure to comply with the Interim Order she had to carry all the costs relating to the children’s maintenance and as a consequence she could not settle her legal costs which ultimately amounted to R110, 000. 00 as at 31 January 2020. She requests the court to order the Respondent to pay her legal costs which currently amount to R150 000, 00. According to the Respondent the Applicant is not entitled to this remedy because her latest bank statements indicate that she earns an average income of approximately R80 000, 00 per month. It is the Respondent’s submission that the Applicant can afford to litigate on equal footing with him. Not much is in dispute in the divorce action according to the Respondent’s submissions.

31. In *Senior v Senior* 1999 (4) SA 955 (W) at 963H-964A the court summarized the essential principles to be applied in order to determine the contribution towards costs as follows:

1. *The test is that the Applicant should be placed in a position to adequately present his case;*
2. *The fact that the Respondent may be wealthy does not entitle the claiming party to unlimited spending there being a difference between what he/she wants and what he/she needs;*
3. *What is adequate would depend on the nature of the litigation and the scale on which the party from whom a contribution is claimed is litigating with due regard being had to the financial position of the party against whom the contribution is sought;*
4. *The Applicant is not entitled to all his/her costs of the trial but merely a contribution towards his or her costs up to the first day of trial;*
5. *There is no reason in logical equity that such a contribution should be limited to disbursements only and to exclude them from the attorneys' reasonable fees.*

32. Counsel for the Respondent made submissions that there are only two issues to be decided in the divorce trial; namely; forfeiture of accrual sharing and maintenance for the minor children. She submitted that the ante-nuptial agreement concluded between the parties and the marital property regime is not in dispute. Her submission is further that there is a possibility to have the matter settled before the trial resumes depending on the circumstances.

On face value, the issues in the divorce action are not complex and the exorbitant amount of R150 000, 00 in legal fees is unjustified. The Applicant possesses assets to the value of R840 000, 00 comprising of a motor vehicle; Jewellery and Bags which she can dispose of and take care of her legal fees.

In my view the claim for payment of legal costs is not justified and should be refused.

Arrears in terms of the Interim Order dated 05 December 2019

33. It is common cause that an interim order was granted on 05 December 2020 in terms of which the Respondent was ordered to pay R15 000, 00 per child per month. It is also common cause that the Respondent failed to comply with this order. The Applicant avers that the Respondent is not bona fide when he tells the court that he cannot afford to pay as ordered because he agreed to pay the amount ordered by the court in the Interim Order. The Respondent submitted that the interim order was not granted by agreement but the Respondent made a tender which he encapsulated in his court papers. He avers that the court did not conduct an inquiry to determine if he could afford it.

34. Regarding his failure to pay in terms of the court order the Respondent submits that he was without income from Nov 2019 to March 2020 and could not afford to comply with the order. He however made payments between February 2020 and May 2020 totalling an amount of R60 000, 00. He was only able to earn a reduced income to the value of R81 000, disposable income. It was submitted that the Respondent did his utmost to comply with the interim order and he has always been willing to maintain his children.

35. The Respondent's argument that the interim order was not by agreement but was granted after he had made a tender for the amounts ultimately ordered does not make sense. The Respondent wants to give an impression that the court did not consider his financial position before granting the order in the interim. It is however surprising that he would make such a submission because he is the one who tendered those amounts and gave the court the impression that he would afford to pay. How can he tender to pay a certain amount and then turn around and say the court did not conduct an inquiry? If his tender was accepted as it happened in the matter on 5 December 2019, the court was not compelled to conduct an inquiry. If the Respondent was able to tender the amount he must have, on his own without the court's interference been able to determine from his expenditures and liabilities that he could afford it. I am inclined to agree with the Applicant that the Respondent is not bona fide, he is actually clutching on straws. My view is that he is not bona fide

because he states that in November some companies were already terminating their contracts with his company but in December he makes an offer of R15 000, 00 per child per month well knowing the circumstances of his company and well aware that he could not honour his own tender. He started defaulting on the order in the same month as the order was granted showing that he actually never intended to pay the amount he offered.

36. The Respondent on his own, started paying R5 000, 00 per child without approaching the court for a variation of the order as his financial position had changed. The Applicant had expected an amount of R30 000, 00 per month by only received R20 000, 00 short as and when the Respondent decided to pay. He only paid a total of R60 000, 00 and owes an amount of R155 000, 00 at the end of July 2020. This is money owing to the Applicant which she had to make means to replace in order to get by whenever the Respondent defaulted. The Applicant has made out a case for the payment of the arrear amount in terms of the court order granted on 5 December 2019. The Respondent also has disposable assets he can sell like the Boat and 2 Jet Ski's to settle the arrear amount of R155 000. 00.

37. In the premises I make the following order:

37.1. That full rights and responsibilities are retained by both parties as set out in Section 18 (2) (a), (b) and 18 (3) read together with Section 30 of the Children's Act 38 of 2005, subject thereto that the specific rights and responsibilities of primary residence and care be awarded to the Applicant, further subject to the Respondent's specific rights and responsibilities in respect of contact with the minor children will be awarded as follows:

37.1.1. Contact with the minor children on every alternate weekend from 17h00 on Friday to 17h00 on Sunday.

37.1.2. Contact every alternate public holiday that does not form part of the long weekend or school holiday;

37.1.3. Contact every 5 days between the parties during the school holidays for the duration of the holiday;

37.1.4. Contact on either minor child's birthday for a period of 3 hours on their respective birthdays or a day closest thereto;

37.1.5. Each party will have daily reasonable, unmonitored, telephonic contact via other electronic media, including Skype, Facebook, WhatsApp, and similar electronic communication platforms with the minor children until 18h00 when the children are under the other party's care.

37.1.6. Contact will be exercised in such a manner that will least encroach on the minor children's school, extra mural, religious, social and cultural activities. Both parties will ensure that the minor children shall attend their individual extra mural social and cultural activities in which they might be involved in whilst they are in the care of the other party;

37.1.7. Each party will monitor the minor children whilst in their care, when they use electronic devices including but not limited to cell phones; tablets; television; video games and computer games and will ensure that the minor children do not spend more than 2 hours per day using such devices;

37.1.8. Each party, when the minor children are under their care, shall first obtain permission from the other party before leaving the province, further thereto, should the National State of Disaster continue for the duration of this order, both parties shall abide by the Covid-19 regulations promulgated in terms of the Disaster Management Act 57 of 2002 specifically those relating to the movement of persons between provinces and borders.

37.1.9. The arrangement outlined above regarding contact with the minor children will be in effect immediately upon receipt of this order by both parties.

37.1.10. The issue regarding parental responsibilities and rights is referred to the office of the Family Advocate to investigate what is in the best interests of the children before the divorce matter goes to trial and if there are any issues of concern before then, either party may re-enrol the matter for variation of the order in 3.7.1 above.

37.2 The parties will contribute towards the minor children's maintenance needs as follows:

37.2.1 The Respondent is ordered to pay maintenance to the Applicant in the amount of R10 000. 00. per child, per month, from 30 September 2020 and thereafter on or before the last day of each succeeding month in a bank account of the Applicant's choice. The said maintenance amount will escalate annually at a rate equal to the Consumer Price Index as published by the Department of Statistics SA on the anniversary date of the Rule 43 order being granted;

37.2.2 The Respondent is ordered to pay for the minor children's school fees, after school fees and school holiday care fees, which payment will be made directly to the service providers.

37.2.3 The Respondent shall pay in full all reasonably incurred medical expenditures not covered by the medical aid which include, but are not limited to, over the counter medicines; doctor's bills and prescribed medicine; provisions for dentists; and Ophthalmologist for Kade. The Respondent shall reimburse the Applicant for any such costs she incurred within seven (7) days of receipt of the invoice or receipt.

37.3. The Respondent is ordered to pay maintenance to the Applicant in the amount of R 20 000,00 per month towards the Applicant's living expenses from 30 September 2020 and thereafter on or before the last day of each succeeding month into a bank account of her choice. The said maintenance amount will escalate annually at a rate equal to the Consumer Price Index as published by the Department of Statistics SA on the anniversary date of the Rule 43 order being granted;

37.4. The Respondent is ordered to pay to the Applicant arrear maintenance in the amount of R155 000, 00 together with *mora* interest thereon within sixty (60) days of this order;

37.5. The Respondent is ordered to pay the costs of this Application on the scale as between party and party

VUKEYA AJ

Honourable Acting Judge of the
High Court: Gauteng Local
Division Johannesburg

Date of hearing:

06 August 2020

Date of delivery:

15 September 2020, by email and by
uploading on caselines.

Appearance for the Applicant:

Adv. Henry Cowley

Instructed by:

Van Kaam Oberholster Attorneys

Appearance for the Respondent:

Adv. Bernette Bergenthuin

Instructed by:

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