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

Case Number: 2021/9930
NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

10/08/23

In the matter between:

F, J (Born G)

Applicant

and

F, G

Respondent

JUDGMENT

Fisher J

[1] This is a Rule 43 Application in which the applicant seeks payment of maintenance in respect of the parties' two minor children L (a boy born on 6 June 2013, aged 10 years) and G (a girl born on 15 February 2016, aged 7 years) by way of payment in the amount of R8 500 per month, payment of their educational costs, an order that the respondent retain the minor children as

dependents on his medical aid scheme, a contribution towards costs of the action for divorce and other ancillary relief.

- [2] The parties were married on 23 August 2012 at Johannesburg, out of community of property with the application of the accrual system.
- [3] They separated during July 2019 and the children have resided primarily with the applicant since then.
- [4] The marriage relationship between the parties has irretrievably broken down and divorce proceedings were instituted by the applicant who caused a summons to be served on the respondent on 1 March 2021.
- [5] The respondent suffers from drug and alcohol addiction but is in recovery. He has been able to remain free of narcotics and was able to secure gainful employment with Vox Telecom with effect from 9 December 2021.
- [6] In his financial disclosure form the respondent states that he was recently promoted from the position of Business Development Manager to Sales Manager. He earns a gross monthly salary of R32 000,00 as well as a R 2 500 petrol allowance per month, R 1000 cell phone allowance per month and uncapped "Vobi" which is a call, video and text application offered by Vox Telecom. The Respondent's pay slips reveal that he earned commission of R 3 519 per month over and above his net salary during 2022.
- [7] The applicant is a Candidate Property Practitioner employed by Amour Properties. She is purely a commission earner and does not receive a basic salary. The applicant earns an average monthly from commission in the amount of approximately R 16 000.
- [8] It is not in dispute that the applicant has had to rely on contributions from a community-based welfare organisation, the *Chevra Kadisha*, in the following amounts:
 - [3.1] R 9000 per month towards her rental (which is currently R 11 500). This amount is paid by the Chevra Kadisha directly to the Applicant's landlord.

- [3.2] R 6000 contribution towards groceries and petrol which she receives on a debit card monthly.
- [9] This contribution is discretionary at the instance of the *Chevra Kadisha* and the applicant is obliged to re-apply for such assistance every six months.
- [10] The applicant is the beneficiary of a trust established by her late mother in 2019, the trust fund being R 765 000. These funds have been depleted over the past five years on her maintenance and that of the children such that an amount of a little over R 100 000 remains.
- [11] Through borrowings she has incurred an indebtedness of approximately R 625 000.
- [12] As at February 2022, the respondent's actual monthly expenses emerged as being R 4 000 per month on his own version. This allowed him a surplus of approximately R 19 000 per month after tax. Any commission earned would be over and above that.
- [13] This surplus was allowed for by reason of the fact that the respondent resided with his parents in their spacious family home in Bramley. He paid no rental and most of his living expenses were taken care of.
- [14] On 10 February 2022 a roundtable meeting was held between the legal representatives. An agreement was reached between the parties in terms of which the respondent undertook to pay R 10 000 per month as monetary maintenance.
- [15] The respondent later reneged on this undertaking and reduced the maintenance payment to R 4 000 and then stopped it completely.
- [16] The applicant was thus forced to bring this application for maintenance for the children. The application was delivered in March 2023.
- [17] The application seems to have presented a challenge for the Respondent in his then circumstances. As I have said, he was, at the stage at which it was delivered, residing with his parents free of charge. He was also using a motor

vehicle provided by his parents. In addition, his bank statements reveal payments into his account of amounts by his mother, Mrs H F.

- [18] It is not seriously in dispute that the respondent had excess income at his disposal at a stage where his wife and children were relying on welfare support.
- [19] Pursuant to the application and notwithstanding that his family were living in straitened circumstances and were being assisted with welfare grants, the respondent took the decision to increase his monthly expenditure so that it took up the lion's share of the funds which were available for maintenance.
- [20] This deliberate increase in monthly expenditure came about in that, after having lived with his parents in their spacious family home for three years, he suddenly decided to move out into rented accommodation at a monthly cost of approximately R 10 000 and after previously having used the motor vehicle made available to him by his parents, he acquired a new motor vehicle at a monthly cost of in excess of R 6 700. He does not go into how much was spent on furnishing and equipping the apartment. He now alleges that he is only able to tender R 2000 per child as maintenance.
- [21] The rule 43 application was delivered in March 2023 and these extra monthly expenses of nearly R17 000 were incurred from April and May 2023. This is hardly coincidental.
- [22] It is relevant that, although it appears that he resides in the rented accommodation, the lease is in the name of his mother.
- [23] The respondent appeared in person at the hearing. He did not argue in any convincing manner that the newly incurred expenses were strictly necessary. It seems to me that these expenses have been incurred, not out of need, but in a bid to avoid paying maintenance for his family. He complains that his contact with the children is being frustrated by the applicant. His recalcitrance as to the payment of maintenance seems to be a 'scorched earth' approach in the face of this complaint.

- [24] As I have said, the indebtedness incurred for the accommodation of the respondent has been incurred by his mother. It seems that he is able to rely to a large extent on the largess of his parents. Had he not abruptly sought to incur the further expenses, he could, no doubt, have continued to live rent free.
- [25] I do not believe it is necessary, at this stage, to make directives in relation to historical debts incurred by the parties as sought in prayer 7 of the draft order provided by Ms Segal SC. She and her attorney act *pro bono* for the Applicant.
- [26] Furthermore, I do not deem it appropriate, given the respective financial positions of the parties, to make an order for a contribution towards costs at this stage.
- [27] The applicant still drives the BMW motor vehicle. It is registered in the name of the respondent but beneficially owned and paid for by the applicant. It is proper that the respondent be ordered to allow for the registration of this vehicle into the name of the Applicant. He has been asked to assist the applicant in this respect but has failed to cooperate.

Order

- [28] In all the circumstances I make the following order *pendente lite* in terms of Rule 43:
- [1] The respondent is to make payment of maintenance to the Applicant in respect of the minor children, L Asher F and G Jamie F in the amount of R 7000 per month per child within five days of the date of this order and thereafter on or before the 1st day of each successive month.
- [2] The said maintenance shall be increased with effect from the anniversary of the date of this order, and thereafter on each anniversary thereof, in accordance with the Consumer Price Index for all urban areas (Headline Index) as published by Statistics of South Africa.

- [3] The respondent is liable for 100% of the minor children's educational costs, including but not limited to private school fees, books, stationery, uniforms, levies and extra mural activities to the extent that such expenses are not subsidised.
- [4] The respondent shall retain the minor children as dependants on his current medical aid scheme, at his cost, on the basis that the parties shall be equally liable for payment of the medical expenses in respect of the minor children, which are not covered by the respondent's medical aid scheme.
- [5] In the event that the applicant makes payment of any costs referred to in paragraphs 3 and 4 above, the respondent shall reimburse her therefor within seven (7) days of receipt of the relevant invoice and proof of payment.
- [6] The respondent is ordered to take all such steps and do all such things as are necessary to transfer the BMW motor vehicle into the Applicant's name, at his own cost, within one calendar month of the grant of this order and in this regard, to sign all necessary documents to give effect to the transfer of ownership to the applicant upon demand.
- [7] No order is made as to costs.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard: 7 August 2023

Delivered: 10 August 2023

APPEARANCES:

For the applicant:

Adv. L Segal SC

Instructed by:

EFG Incorporated

For the respondent:

The Respondent appeared in person