

**REPUBLIC OF SOUTH AFRICA**

**NORTH GAUTENG HIGH COURT, PRETORIA**

CASE NO: 52871/2008

DATE: 24 FEBRUARY 2010

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

R[...] K[...]

Applicant

and

D[...] K[...]

Respondent

**JUDGMENT**

MAKGOKA. J.:

[1] This is an opposed application in terms of rule 43 of the Uniform Rules of Court. The parties are married to each other in community of property, out of which a minor child, N[...], a girl aged 5, was born. A divorce action is pending before this court.

[2] The applicant in her supplementary affidavit claims the following:

- (a) Primary residency of N[...];
- (b) Parental responsibilities with regard to care of the minor child be awarded to both parties jointly;
- (c) That the respondent be ordered to pay arrear maintenance to the applicant in the amount of R18 000.00, payable in instalments of R3000.00 per month;

- (d) The respondent to have reasonable rights of contact with N[...] and spent time with her every alternate weekend from Friday 18H00 to Sunday 18H00;
- (e) Payment of an amount of R3 288.05 as maintenance for N[...];
- (f) That the respondent be ordered to maintain N[...] on his medical aid scheme;
- (g) Contribution towards her legal costs in the amount of R3000.00.

[3] Before I consider the merits of the application, I have to deal with an aspect argued by counsel, that of arrear payments allegedly owed by the respondent. What triggered this prayer, contained in the applicant's replying affidavit, is the following: the application was initially enrolled for 2 December 2008. The respondent's opposing affidavit was served on 1 December and filed on 2 December 2008. Apparently the affidavit did not find its way to the presiding Judge. On the day of the hearing, 2 December 2008, there was no appearance for the respondent, and the respondent's affidavit was not on file. It appears that the learned Judge was not informed that the respondent had served an opposing affidavit, albeit late. The application was thus considered on a unopposed basis. The late Vilakazi AJ, ordered the respondent to pay an amount of R3 288.05 per month to the applicant as maintenance for N[...] On 3 September 2009, the order of Vilakazi AJ was rescinded.

[4] The application for rescission of the order by Vilakazi AJ, was served on the applicant's attorney on 13 January 2009. The application was not opposed. For some reason, which is not explained on the papers, the application was only heard on 3 September 2009, over 8 months after the application was launched. In my view, the launching of the applicant for rescission did not affect the operation of the order of Vilakazi AJ.

[5] Section 25 (3) of Maintenance Act, 99 of 1998, provides that an appeal against an order for maintenance, shall not suspend the payment of maintenance in terms of an order by the maintenance court. By way of analogy, I do not see any reason why an order made pursuant to a rule 43 application, should be placed on a different footing to an order made by a maintenance court. In my view therefore, the service of the application for rescission of the order of Vilakazi AJ, did not suspend its operation and until the order was rescinded on 3 September 2009, the respondent was obliged to comply with the terms thereof. See in any event, *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463 J-464 B.

[7] It seems to be common cause that, for the duration of the operation of the order, the respondent made payments totalling only R5000.00. Counsel for the applicant, Mr. *Schoeman*, has put forth an amount of R18 000.00 as the "arrear" amount. In my calculation I come to an amount of R24 500.00, which is higher than that requested by the applicant. As a result, I would stick to the amount claimed, being the lesser amount. Given the views expressed above regarding the enforceability and validity of the order of Vilakazi AJ, I find

that the respondent is in arrears in the amount of R18 000.00 being maintenance payable for the period January 2009 to 1 September 2009.

[9] I turn now to consider the application in terms of rule 43. The applicant is employed, earning a nett salary of R8 779.66. Her and N[...]’s monthly expenses are stated as amounting to R10 982.00. She alleges that she used to earn over-time remuneration, but as a result of her new position, this is no longer the case.

[10] The respondent is also a salaried employee earning a nett salary of R13 276.00 per month. His estimated monthly expenses amount to R15 980.00. This amount is inclusive of R1000.00 which he offers as maintenance for N[...]. The four items of expenditure open for criticism are, in my view, clothing accounts (R1 100) and credit cards (R2 750.00).

[11] In my assessment of the reasonable and fair amount payable by the respondent, I would apportion the applicant’s expenses from that of the minor child, as she is not claiming maintenance for herself. I would allow an amount of R1000.00 of accommodation, R30.00 for hair, R400.00 for transport, R500.00 for food, R200.00 for milk , fruits etc, R100.00 for medication not covered by the medical aid, R100.00 for car insurance, R100.00 for clothes, R70.00 for toys, outings and entertainment, as well as R250.00 for the creche programmes. The total amount of fair and reasonable expenses is, to my mind, R2 750.00, based on the above calculations.

[12] Taking into account the earning capacities of the parties, their financial obligations and the reasonable needs of their minor child N[...], I deem it fair that the respondent be ordered to contribute an amount of R1 200.00.

[13] With regard to contribution towards costs, the issues in dispute between the parties in the main divorce action have not been set out. The parties are married in community of property. There is no suggestion that there is a prayer for forfeiture or any other potentially contentious claim filed by any of the parties. The dispute relating to the permanent residency of the minor child having been conceded by the respondent (at least in this application) there does not seem to be any reason why this matter should not be settled. I also take into account that the order I am about to make against the respondent with regard to arrear maintenance, would put added pressure on his finances, which he would radically have to adjust.

[14] Given these considerations and what I deem fair, I do not intend to make any order at this stage, for contribution towards costs in favour of the applicant.

[15] Lastly, I need to say something about the conduct of both the applicant and respondent’s attorneys. In my view, the order granted in default by Vilakazi AJ resulted from dereliction of duty on the part of both attorneys. First, the respondent’s attorneys, having received the notice in terms of rule 43, clearly stipulating

that the application was set down for 2 December 2008, failed to ensure that there was appearance on behalf of the respondent at the hearing. It does not matter what his views were about the supposed defect in the notice in terms of rule 43. Whatever his views, he should have ensured that the respondent was represented at the hearing. On the other hand, there was a duty on the applicant's attorney, to instruct counsel to convey to court, that an opposing affidavit had been served the previous day, which most certainly would not have found its way to the court file.

[16] Having considered all the relevant factors in this application I make the following order, *pendete life*:

1. Joint parental rights and responsibilities of the minor child N[...] is to be vested in both parties, with primary residency of the minor child to be with the applicant;
2. The respondent is awarded rights of reasonable contact with the minor child to be exercised as follows:
  - 2.1 Spending time with the minor child every alternative weekend from Friday at 18H00 to Sunday at 18H00;
  - 2.2 Spending time with the minor child every alternative long and short school holidays, with Christmas to alternate between the parties;
3. The respondent is ordered to pay maintenance in respect of the minor child, to the applicant in the amount of R1250.00, with effect from 1 March 2010.
4. It is declared that the respondent is in arrears in the amount of R18 000.00, arising from his failure to comply with the order of this court made on 2 December 2008.
5. The respondent is ordered to pay the said arrears in monthly payments of R750. 00 per month with effect from 1 March 2010.
6. The costs hereof are to be costs in the main action, inclusive of the costs reserved on 28 September 2009:

**T M MAKGOKA**

**JUDGE OF THE HIGH COURT**

**DATE HEARD: 1 DECEMBER 2009**

**JUDGEMENT DELIVERED: 24 FEBRUARY 2010**

**FOR THE APPLICANT: ADVZSCHOEMAN**

**INSTRUCTED BY: *PIERRE KRYNAUWATTORNEYS*,**

**PRETORIA**

**FOR THE DEFENDANT: ADV J POTGIETER**

**INSTRUCTED BY: *ERASMUS INC*,**

**PRETORIA**