

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2665/2015
Date heard: 1 March 2016
Date delivered: 3 March 2016

In the matter between

K. A. T.

Applicant

And

J. D. T.

Respondent

JUDGMENT

GOOSEN, J.

1. The applicant and respondent are married out of community of property. Their marriage is subject to the accrual regime. There are three minor children born of the marriage, a son aged 8 years and twin daughters aged 4 ½ years. The respondent has instituted divorce proceedings against the applicant. The respondent seeks an order that the primary care of the children be awarded to the applicant. In this respect he tenders payment of maintenance in an amount of R5000-00 per child per month. In respect of the proprietary aspects respondent tenders payment of 50 % of the accrual which he alleges has taken place in the value of his estate.

2. The applicant, is a counter claim, seeks in addition to that which is tendered payment of a larger amount in respect of the accrual and R10 000-00 per month in respect of rehabilitative maintenance payable to the applicant. The question of the care and residence of the minor children is not in dispute.
3. The applicant resides in Port Elizabeth. The respondent is employed by a company based in Ireland. The parties both lived in Ireland for 11 years prior to the institution of divorce proceedings.
4. According to the applicant the parties reached an agreement in relation to the maintenance payable by the respondent. It was agreed that the respondent would deposit an amount of R20 000-00 into the applicant's South African banking account to cater for applicant and minor children's needs. This was based on an agreed budget. After the respondent vacated the common home it was agreed that he would continue to provide for the applicant's and the children's monthly maintenance by paying an amount of R5000-00 per month for each of them (i.e. R20 000-00 per month) and in addition he would pay the rental on a townhouse (R11 660-00 per month) as well as monthly water usage and car insurance. The respondent continued to make payments in accordance with this agreement from September 2014 to 2 December 2015. All of this is admitted.
5. In November 2015 the respondent ceased to make payments in accordance with this agreement claiming that the applicant has entered into a co-habitative relationship with another man and that he is therefore no longer obliged to maintain the applicant. Since then he has continued to pay only the R15 000-00 cash in respect of the maintenance of the children. He has also continued to pay for the children's schooling, extra-mural activities, medical aid and

motor vehicle insurance. In these proceedings the respondent has also tendered to pay the increased rental in respect of the property but only in respect of the children i.e. an amount of R7 500-00 per month.

6. It is appropriate to mention here that it is common cause that the parties enjoyed a high standard of living whilst they were living in the United Kingdom. It is also common cause that the respondent earns a very substantial monthly income. He states in his affidavit that he is “certainly able to pay whatever this High Court finds is my obligation”.
7. What is in dispute is the extent of that obligation. The starting point in Rule 43 proceedings is what amount of maintenance, if any, a party reasonably requires *pendente lite*. The determination is not a final one. That is for the trial court to decide once it is apprised of all relevant facts. At the stage of a Rule 43 application the court is concerned with a determination based on fairness and often upon a robust appraisal of matters still to be decided at trial. That determination takes cognizance of what is in issue; how the parties have conducted their affairs prior to the separation and what is required in order to keep them – as far as is reasonably possible – in the same position until the matter may be finally adjudicated.
8. A central issue to be decided at the trial is whether the applicant is entitled to rehabilitative maintenance i.e. maintenance payable for a period of time until the applicant is able to maintain herself. This court will therefore be astute to avoid in any manner prejudicing that enquiry and determination.
9. The respondent has admitted the existence of a detailed agreement to pay maintenance not only for the children but also in respect of the applicant.

That agreement was based upon an agreed budget to cover the necessary expenses of the applicant and the children. The respondent has admitted also that he has unilaterally withdrawn from the agreement based - as his answering affidavit makes clear - upon the contention that he is no longer obliged to support applicant because she has entered into a co-habitative relationship. The suggestion is that the person she is now in a relationship with must shoulder the obligation to support applicant's maintenance needs/rehabilitative maintenance. In answer to the claim based on the requirement of R5 000-00 per month he now alleges (a) that her expenses are excessive and/or (b) that she can afford to pay for herself from her earnings.

10. The stance adopted by the respondent is untenable. It is without legal foundation. His ongoing maintenance obligation is still to be determined. Respondent's termination of the agreement to pay maintenance is furthermore opportunistic inasmuch as it is founded on the existence of a relationship between applicant and another man.
11. Firstly the applicant denies that they are co-habiting. The only evidence that respondent can offer is that her partner has frequently 'slept-over' or that he is 'often around'. There is no basis to find that the relationship is one of cohabiting. Even if that is accepted there is no basis to find that he is not contributing, for that matter, or that he is benefiting from the applicant's maintenance. Why the applicant's monthly expenses should reduce by reason of her entering into a relationship with someone else is beyond me.
12. When regard is had to the applicant's monthly expenses they are not unreasonable taking into account the lifestyle that the parties enjoyed prior to the separation. Much of the respondent's complaint relates to the incurring of

expenses relating to efforts made by applicant to qualify herself for future employment - a matter that is at issue at trial.

13. The applicant is presently earning a fixed income of R6 000-00 and a further R4 000-00 as commission for *ad hoc* coaching and tutoring of maths after hours. She says this is not permanent and that it is sporadic. Her need for maintenance must, in my view, be assessed on the basis of her fixed and permanent income namely R6 000-00 plus R15 000-00 cash by way of maintenance for the children. Against this must be weighed her expenditure. According to applicant this amounts to R36 290-00 per month. If the rental amount is excluded (an amount which respondent tenders to pay) then the total expenditure is R24 630-00. This leaves a deficit of R3 630-00 without any provision being made for any general or out of pocket incidental expenses.
14. Seen in the light of this the applicant's claim for payment of R5 000-00 per month is reasonable. As already indicated the respondent can afford this obligation.
15. Taking into account the above and the tenders made by the respondent, I make the following order:
 1. The Respondent is ordered to pay R5 000 per month maintenance in respect of the applicant from 1 February 2016 thereafter on first day of each month;

2. The Respondent is ordered to pay maintenance for the 3 minor children at a rate of R5 000.00 per month per child from the 1st of February 2016 thereafter on the first day of each month;
3. The Respondent shall be liable for payment of the monthly rental for the rental property to a maximum amount of R12 300.00;
4. The Respondent shall be liable for payment of the water usage at the rental property;
5. The Respondent shall be liable for the payments of monthly insurance premium on the applicant's motor vehicle;
6. The Respondent shall be liable for the payment of the minor children's school fees and all related scholastic expenses.
7. The Respondent shall retain the applicant and the minor children as dependants on his medical aid.
8. The costs of the application shall be costs in the divorce action.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: Adv. Zietsman
For Applicant
Instructed by Greyvensteins

Adv. Ronaasen
For Respondent
Instructed by Spilkins Attorneys