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

CASE NO: 1921/2018
Date heard: 26 June 2018
Date delivered: 28 June 2018

In the matter between

A E Applicant

And

J E Respondent

JUDGMENT

GOOSEN, J.

[1] The applicant, who is the defendant in a pending divorce action, seeks an order for maintenance *pendente lite* and a contribution to costs in terms of Rule 43. The parties were married in community of property on 18 May 2013. There is one minor child born of the marriage, a son aged 3 years. The child is in the primary care of the applicant, who lives in Port Elizabeth. The respondent resides in France where he presently pursues a career as a professional rugby player.

[2] The respondent instituted divorce proceedings claiming an order that the applicant forfeit the benefits of the marriage in community. It is not in dispute that primary care of the minor child be awarded to the applicant and accordingly the respondent tenders maintenance for the minor child. The applicant has filed a counterclaim in which she seeks division of the joint estate; rehabilitative maintenance for herself; maintenance for the minor child and certain ancillary relief.

- [3] The applicant is a qualified teacher. She is however presently employed as an intern estate agent. It appears that the applicant and respondent agreed that she devote herself to the full-time care of the minor child. It is for this reason that she gave up her teaching work. She has only recently commenced work as an intern estate agent. The applicant resides in the parties' matrimonial home with the minor child.
- [4] The respective earnings of the parties is not in dispute. The applicant's papers indicate that she presently earns commission which, based on average earnings since January 2017, amounts to R10 388.92 per month. She owns a flat in Walmer in respect of which she receives rental income, after deductions of levies and rates and taxes, in an amount of R2 279.00 per month. Her total average earnings therefore is R12 667.92 per month.
- [5] The respondent earns a gross amount of €7500 per month. This, based on the current exchange rate (of approximately R15.00 to €1.00) converts to R112 500.00 per month. It appears that the respondent also receives certain non-cash benefits, the value of which is unknown. I should say here that the respondent admits to receipt of certain benefits, but does not quantify them.
- [6] Attached to the applicant's affidavit is a schedule of a monthly expenses. The schedule reflects the total monthly requirements for both her maintenance and the maintenance of the minor child in an amount of R31 297.27 per month. The respondent presently makes payment of certain of the expense items, namely the Absa bond instalment; the DSTV subscription and the Atlas alarm. These amount to R3 254.27 per month. Based on this the applicant alleges that she has a monthly shortfall, after her income is applied, of an amount of R15 375.08 per month.

- [7] Premised on this, the applicant claims payment of monthly maintenance in respect of both herself and the minor child in the amount of R15 375.08. At the hearing of the matter the claim was adjusted to an amount of R16 000.00. The applicant also claims a contribution towards her legal costs, which I shall deal with separately hereunder.
- [8] The respondent, in dealing with the applicants claim for maintenance *pendente lite*, tenders payment of a cash amount of R5 000.00, together with continued payment of certain items which he states he pays directly. These, he says, amount to R9 075.00, so that his offer is in the amount of R14 075.00.
- [9] At face value it appears that the parties are not very far apart in relation to the admitted need for maintenance. As will be seen hereunder, this is not so, in as much, as the direct payment of certain items do not match the cash requirements claimed by the applicant to cover those same amounts and the respondent's failure to offer payment, or continued payment, of an outstanding loan due to the applicant's mother in respect of the purchase of the matrimonial home.
- [10] Before dealing with the applicant's need for maintenance it is appropriate to deal firstly with the respondent's ability to meet these needs. As indicated the respondent earns an amount of approximately R112 500.00 per month. He sets out a schedule of his current monthly expenses for living in France. His total monthly expenses amount to R62 350.00 per month. This includes an amount which is referred to as "SA Commitments" in an amount of R15 000.00. It is not clear what the expense comprises. It appears, however, that it includes some, if not all, of the direct payments made by the respondent in respect of the maintenance of the applicant and the minor child.

- [11] The schedule of expenses establishes that the respondent has a disposable income after payment of all of his current living expenses in an amount of approximately R50 000.00 per month. Accordingly, on the respondent's own version, there is no question that he is able to afford the monthly maintenance payment which the applicant claims. The only question, in relation to such claim, is whether the amounts claimed are reasonable and necessary.
- [12] In this regard the respondent takes the stance that he is only obliged to contribute half of the reasonable requirements for the maintenance of the minor child. In this the respondent is mistaken. The obligation to maintain a minor child is generally to be determined on a proportional basis, having regard to the respective earnings of the parties. In this instance the respondent's earnings are significantly higher than that of the applicant. The respondent is also possessed of considerable disposable monthly income. There is accordingly no basis to apportion the obligation in the manner in which the respondent contends.
- [13] That leaves the question as to the reasonableness of the applicant's monthly expenditure. It is apparent from consideration of the respondent's answering affidavit that he does not in fact dispute the reasonableness of most of the items set out by the applicant. The challenge is principally directed to the apportionment.
- [14] There are, in effect, only a few items in respect of which there is a dispute. In regard to the Absa bond the respondent tenders payment. He however disputes an obligation to effect payment in respect of an FNB flexi-bond in an amount of R3 800.00. This obligation however, arises from a loan made to the parties by the applicant's mother in an amount of R680 000.00 to facilitate the purchase of the common home. The loan was financed by an advance against the applicant's mother's bond

account. According to the applicant the respondent was paying this, but has since stopped doing so. It is suggested, in the respondent's papers, that the repayment of the loan is a matter to be addressed in the division of the joint estate at divorce.

[15] Mr *Williams*, on behalf of the applicant, argued, correctly in my view, that the obligation stands on the same footing as the loan by Absa bank. Since the obligation is a joint liability of the joint estate of the parties it must be brought to account. Accordingly the bond/lodgings obligation is to be calculated on the basis set out by the applicant. Insofar as the applicant is required to honour the loan obligation it is to be treated as a necessary maintenance expense for her and the minor child.

[16] The other item which the respondent challenges is excessive, is the amount provided for rates, taxes, water and electricity. It is submitted that the claim amount should be reduced from R2 000 to R1 000. The respondent tenders direct payment of the latter. There is however no evidence to gainsay the applicant's version as to the average expense and, if it is to be treated as part of the cash requirements of the applicant, then the amount set out by the applicant ought to be brought to account.

[17] In respect of certain expenditure items the respondent states that he makes direct payment and that he will continue to do so, namely the ADSL, crèche fees and the like. These are included in the schedule of direct payments. The applicant, however, claims these as part of the cash contribution required on the basis that she pays them. The applicant also claims retention on the respondent's medical aid scheme. She states that she was removed from the scheme by the respondent. She is now included in the medical cover of her partner. The respondent avers that the applicant requested that she be removed from his medical aid scheme. In my view this issue as well as the applicant's

claim for payment of a cellphone expense, part of which is tendered by the respondent, can be resolved by the adjusted cash contribution claimed by the applicant.

[18] As already indicated the dispute regarding the monthly requirements of the applicant is confined to the apportionment of the expense. The evidence establishes the need for these payments in the amounts claimed. I am satisfied that the expenditure claim as listed by the applicant is reasonable. I am also satisfied that the respondent is able to afford such payments. The applicant, on the other hand, cannot meet these obligations from her monthly income.

[19] In the circumstances the applicant has established, in addition to the direct payment of certain expenditure items, a need for a cash maintenance payment of R16 000.00 per month.

[20] I turn now to the claim for a contribution towards costs. The applicant's claim is for payment of an amount of R112 500.00. This includes a provision in respect of fees already incurred which are outstanding and a further amount for preparation of the matter. The latter amount is an estimate of the reasonable costs to be incurred to bring the matter to trial.

[21] The respondent tendered payment of R20 000.00 in his papers. At the hearing this was increased to an amount of R50 000.00. The applicant is not possessed of any savings nor any disposable income from which she is able to fund her legal costs. The applicant's assets are all the assets in the joint estate with the exception, it appears, of an immovable property in the form of a flat from which earns a rental income. She is accordingly not able to liquidate assets for the purposes of funding her litigation. The respondent, on the other hand, is possessed of certain savings and investments which, although they may form part of the joint estate, are capable of ready liquidation in order to

fund the litigation. The respondent is accordingly able to make a substantial contribution towards the legal costs of the applicant. He is also, as already indicated, possessed of disposable monthly income in a substantial amount.

[22] The only question is what amount would be reasonable in the circumstances. The applicant's schedule of the estimated legal costs to bring the matter to trial at the first day of trial, is not, in itself challenged as being excessive or unreasonable. That however is not the end of the matter. The litigation, whilst of considerable significance to the parties does not, in my view, engage very difficult or complex questions. The principal issue in the divorce action is whether the applicant should be ordered to forfeit the benefits of the marriage in community of property. The marriage itself was not one of a substantial duration. The other issue to be determined is that concerning rehabilitative maintenance payable to the applicant and, in the event that such order is made, the duration of such payment. In my view, given the relevant facts known at this stage of the proceedings, neither is presents as unduly complex and ought not to involve either lengthy or difficult litigation.

[23] Whilst the quantum of the estimate of fees for each particular item of pre-trial preparation may, in itself, be reasonable, the overall effect is to posit a claim of a very substantial amount, having regard to the nature of the litigation and the issues to be determined at trial. I am mindful also that the litigation has reached the stage where pleadings are not yet closed. In my view, an amount of R50 000.00, as tendered by the respondent, at this stage of the proceedings would place the applicant in a position to prosecute her claims and to undertake the necessary preparation. Should the ambit of the disputes expand to require further necessary preparation then in that event, the applicant may be entitled to approach the court for a further contribution towards costs should same not be provided by the respondent.

[24] In the result I make the following order:

1. The respondent is ordered to pay maintenance *pendente lite* for the applicant and the minor child in an amount of R16 000.00 per month commencing on the 1st day of July and on every successive first day of the month thereafter ;
2. The respondent is directed to continue to make direct payment of the monthly Absa Bond installment on the marital home and the monthly fees in respect of the DSTV subscription and Atlas Security payments;
3. The respondent is directed to retain the minor child as a dependent on his medical aid scheme and further to pay all reasonable medical and hospital expenses not covered by the scheme;
4. The respondent is ordered to pay an amount of R50 000.00, payable in five equal monthly installments, as a contribution to the applicant's legal costs.
5. The respondent is ordered to pay the costs of the application.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances: For the Applicant
Adv. K. Williams
Instructed by Lizelle Pretorius Inc.

For the Respondent
Adv. H. Bakker
Instructed by Brown Braude & Vlok Inc.