

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

NOT REPORTABLE

Case No.: 151/2019

Date Heard: 26 February 2019

Date Delivered: 5 March 2019

In the matter between:

MICHELLE PRETORIUS

Applicant

and

CHRISTO PRETORIUS

Respondent

JUDGMENT

GAJJAR AJ:

Introduction

[1] This is an application brought in terms of Rule 43 wherein the applicant, being the plaintiff in the divorce action, seeks the following orders *pendente lite*:

- 1.1 Regulating the respondent's contact with the parties' 8 year old minor daughter, J;

- 1.2 a monthly contribution of R4 919,22 towards J's maintenance, plus all her medical expenses and educational expenses including school fees and additional tuition, transport, remedial costs, school outings, camps, extra-curricular activities, club fees, sport tours as well as all school books, stationery, uniforms, equipment and attire;
- 1.3 a monthly contribution of R5 000,00 towards the applicant's maintenance plus medical aid and the payment of all medical costs not covered by such medical aid;
- 1.4 the return of certain movable items;
- 1.5 a contribution of R25 000,00 towards her legal costs; and
- 1.6 the costs of the application.

[2] The respondent opposes the application. In doing so, the respondent contended that the application was premature as the parties were engaged in settlement discussions a few days before it was brought. However, during argument, *Mr Van Rooyen*, who appeared on the respondent's behalf, did not take that issue further. Prior to the commencement of argument, the parties reached agreement in respect of the respondent's interim contact with J. The remaining claims remain in dispute.

The remaining claims

[3] I will address the claim for the return of certain movable items first. During argument I enquired from the applicant's counsel, Ms Rossi, whether it was competent for a party in Rule 43 proceedings to seek return of movable items. I was referred to the judgment in *Van der Spuy v Van der Spuy*¹, the relevant passage, as translated into English, reads as follows:

¹ 1981 (3) SA 639 (C) at 642E-G

“In principal I see no reason why a Court does not have the power to, for example, order a father to make available an empty house which belongs to him for his spouse and children pendente lite. It has always been accepted that even where the duty to maintain a spouse or children is in terms of an order for the monthly payment of money, the order remains one ad factum praestandum and not one ad factum solvendam (see Slade v Slade 4 ECD 243). The duty is to maintain. It need not be discharged by means of payment of money.”

[4] Mr van Rooyen submitted that an order for the delivery of goods is only competent in terms of Rule 43 proceedings if the goods claimed is *in lieu* of a monetary claim for maintenance. The applicant's claim for the return of certain movable items is set out as follows:

“Upon vacating the property, the respondent took with him the following items which I seek return of in this application, namely, a black glass dining room table and chairs – this was a gift to me from the respondent approximately two years ago; two Coleman tents; a double bed belonging to N which was purchased by my parents; a dressing table belonging to N and purchased by my parents; an X-Box. These items belong to my children and I require forthwith return thereof.”

[5] In my view, Mr Van Rooyen correctly submitted that upon a proper reading of the basis upon which the applicant claims return of the aforementioned items does not show that the movable items sought are required to maintain herself or J. Accordingly, the claim for the return of the listed movable items cannot be sustained and falls to be dismissed.

Maintenance: General Principles

In *Botha v Botha*² it was held that the purpose of interim maintenance is to supplement expenses which the applicant cannot meet and not to establish a lifestyle which the applicant and the children may previously have enjoyed. However, such maintenance must be reasonable in the circumstances; depending upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet the requirements. In doing so, the court must establish whether the respondent can further supplement the applicant's expenses which he/she apparently cannot meet.

[6] Maintenance *pendente lite* is by its nature temporary and cannot be determined with the same degree of precision as would be possible in a trial where evidence is adduced. It was held in *Levin and Levin and Another*³ that *"[t]o decide the issues I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously my findings are in no way binding on the trial Court and indeed after hearing the evidence it may emerge that some or all of the inferences I have drawn are wrong."*

[7] It is trite that the financial ability of a party is not determinative of a claim made for maintenance, whether interim, rehabilitative or permanent. A party making such a claim is required to firstly establish a need.

The facts and the respective claims for maintenance

[8] The parties are married in community of property. During their three year marriage the respondent, who is self-employed, has been the primary breadwinner.

[9] There is a dispute as to the parties' respective earnings. The applicant, who completed a course in bookkeeping and Pastel, is employed as an administration manager. On her version, she earns R6 000, 00 a month and has no other source of income. The respondent in his opposing affidavit states that the applicant also assists in her father's business, on a part-time basis, from which she earns approximately R3 000,00 a month. The applicant contends that the respondent has

² 2009 (3) SA 89 (WLD) at 106C

³ 1962 (3) SA 330 (W) at 331D

understated his monthly earnings. From the papers, it appears that the respondent's monthly earnings fluctuate given that he is self-employed. For present purposes I will accept that the applicant earns R9 000.00 a month whilst the respondent earns in the order of R27 000,00 a month.

[10] The impression gained from the papers is that the parties lived a modest lifestyle. Significantly, during the parties' marriage they were not able to realise their plan to purchase a house in a more established neighbourhood than in the neighbourhood where the matrimonial home, described as "*a RDP flat*", is situated. The applicant states this is due to the fact that they were unable to secure financing as the respondent did not qualify for life insurance "*as he is diabetic and has high cholesterol*".

[11] It seems to me that the parties do not fully appreciate that the consequence of them being married in community of property is that there is one joint estate. In the parties erroneously make reference to the property of the other as if there are separate estates.

[12] It is in the nature of Rule 43 proceedings to adopt a robust approach to claims made for maintenance *pendente lite*. I do not thus propose to undertake an analysis of the applicant's listed expenses, save to state that her largest expense is in respect of accommodation, totalling R3 000.00 a month, being R2 000.00 for herself and R1 000. 00 for J. She has also claimed R900.00 in respect of water and electricity, being R600.00 for herself and R300.00 for J. The applicant's claim for accommodation is made on the basis that she wishes to relocate to a suburb closer to where she works and where J schools. The respondent on the other hand argues that the applicant and J and, for that matter both N and the applicant's boyfriend, are residing at the erstwhile matrimonial home at no cost to them. He contends that there is no need for her to thus make provision for accommodation and water and electricity. There is merit in this contention.

[13] Insofar as the other items which the applicant lists in her list of expenses I am of the view that there are not necessarily unreasonable or exorbitant.⁴ If the amount of R2 000,00 is deducted from the applicant's listed expenses her total expenses will be reduced to R7 161,41. Against this I take into account what the respondent says regarding the additional income which the applicant earns from her part-time employment at her father's business, income which the applicant did not disclose.⁵ Accordingly, on my reading of the papers the applicant has not established a need for interim maintenance.

[14] Insofar as the applicant has claimed that the respondent puts her on a medical aid scheme I accept the respondent's contention that during the course of the parties' marriage the applicant never enjoyed medical aid cover. That being said, it is not unreasonable to order the respondent to pay for such medical expenses as the applicant may incur *pendente lite*.

[15] In respect of J the applicant has stated that he makes a monthly contribution of R3 000,00 towards her maintenance R2 800,00 towards her aftercare fees and he pays her school fees. There is, in my view, no reason why the respondent should not also pay for such additional expenses as may be incurred *pendente lite* in respect of her schooling as well as such medical expenses as may be incurred in respect of J.

Contribution towards costs

[16] The applicant seeks payment of the sum of R25 000,00 as a contribution towards her legal costs.

[17] It is trite that a claim for contribution towards costs in a matrimonial suit is *sui generis*. The basis of such claim is the duty of support which the spouses owe to each other. In assessing the quantum of the contribution to enable the party seeking the contribution to present his/her case adequately before the court, the court would have regard to the circumstances of the case, the financial position of the parties and

⁴ See Taute v Taute 1974 (2) SA 675 (E) at 676H

⁵ See Du Preez v Du Preez 2009 (6) SA 28 (T) at para [15]

the particular issues involved in the pending litigation.⁶ In *Senior v Senior*⁷ the essential principles in determining the contribution towards costs was summarised in the following terms:

- 18.1 The test to be applied in considering the amount is that the plaintiff should be placed in a position to adequately to present his/her case;
- 18.2 the fact that the respondent may be wealthy does not entitle the claiming party to unlimited spending, there being a difference between what his/she wants and what she/he needs;
- 18.3 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;
- 18.4 the applicant is not entitled to all his/her costs of the trial but merely a “contribution towards” his/her costs up to the first day of trial;
- 18.5 there is no reason in logical equity that such a contribution should be limited to disbursements only and to exclude therefrom the attorney’s reasonable fees.

[18] During argument Mr van Rooyen submitted that there are only two issues in dispute between the parties, namely the applicant’s claim for rehabilitative maintenance and the primary care of J. In respect of the latter issue, I have been advised that the Family Advocate had been requested to undertake an enquiry and following which will make a recommendation regarding J’s primary care and contact arrangements. The Family Advocate’s recommendation may very well lead to a resolution of J’s primary care and the contact arrangements. Thus, the only issue which may require adjudication is the applicant’s claim for rehabilitative maintenance. On the face of it, the issues in dispute are not complex and, in my

⁶ See *Cary v Cary* 1999 (3) SA 615 (C)

⁷ 1999 (4) SA 955 (W) at 963H-964A

view, present themselves as issues that can be readily settled. This much is apparent from the attempts that have been made thus far.

[19] Turning to the basis upon which the applicant has set out her claim for contribution towards cost no detail has been provided as to how she arrives at the sum of R25 000,00.⁸ All she has stated is that she paid a sum of R2 070,00 to her attorneys and that she has been called upon to make a further payment of R5 000,00 “*as an initial deposit for the preparation, issuing and service of the summons*”. On this basis the present balance is R2 930,00. All that the applicant presently seeks is an entitlement to a cost contribution to cover her “*initial expenses*”. I am constrained to determine the amount of contribution towards the applicant’s legal costs having due regard to the manner in which she has formulated her claim. That being said, I am of the view that the amount of R7 500,00 would not be unreasonable as a contribution towards her legal costs. It remains open to the applicant to seek a further contribution towards her legal costs should the matter not settle.

Conclusion

[20] In the result, the following order shall issue *pendente lite*:

- 28.1 In respect of J the respondent shall make a monthly contribution of R3 000,00 towards her maintenance, the first payment to be made on or before 29 March 2019 and thereafter on or before the last business of every successive month;
- 28.2 the respondent shall continue to pay the aftercare fees in respect of J;
- 28.3 the respondent shall continue to pay J’s school fees, plus any additional tuition fees, transport, remedial costs, school outings camps, the cost of school lunches, the cost of extra-curricular school and sport activities including the cost of club fees and sports tours (including

⁸ See Van Rippen v Van Rippen 1949 (4) SA 634 (C); Nicholson v Nicholson 1998 (1) SA 48 (W)

travel and accommodation expenses thereto), as well as the cost of all school books, stationery, school uniforms, equipment and attire (including computers) relating to her education and the sporting and/or extra mural activities (including music fees and equipment, tuition and exam fees);

28.4 the respondent shall bear the costs of all expenditure in respect of J's medical, dental, surgical and hospital expenses, not covered by such medical aid scheme of which the respondent may be the principal member and J the dependant member;

28.5 the respondent shall bear the costs of all expenditure in respect of the applicant's medical, dental, surgical and hospital expenses;

28.6 the respondent shall make a contribution of R7 500,00 as a contribution towards the applicant's legal costs which amount shall be paid in three equal instalments of R2 5000,00, the first payment to be made on or before 29 March 2019, the second on or before 26 April 2019 and the third on and before 31May 2019;

28.7 the costs of the application shall be costs in the divorce action.

G J GAJJAR

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv Rossi instructed by Anthony-Gooden Inc, Port Elizabeth

For Respondent: Adv van Rooyen instructed by Lessing Heyns Keyter & Van der Bank Inc, Port Elizabeth