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

Case No: 2021/34787

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES/NO

DATE: 12-01-2024

In the matter between:

J[...] V[...] H[...]

APPLICANT

And

W[...] V[...] H[...]

RESPONDENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 12 January 2024.

JUDGMENT

PHAHLAMOHLAKA A.J.

INTRODUCTION

1. The Applicant seeks an order, *inter alia*, in the following terms *pendente lite*:
 - a. That the applicant and respondent remain co-holders of parental responsibilities and rights in respect of H[...] and O[...] (the Minor Children) as envisaged in section 18(2) of the Children's Act (38 of 2005) (the Act). The respondent to be granted unsupervised and sleepover contact with the minor children but that same be phased out.
 - b. That the respondent be ordered to pay maintenance in respect of the applicant in the amount of R 24 600 per month.
 - c. That the respondent continues to retain the applicant on his fully comprehensive medical aid scheme and with immediate effect on the granting of this order, re-register the applicant as a dependent on his medical aid scheme and make payments of the monthly subscriptions in respect thereof.
 - d. Payment of the amount of R 23 600 in respect of the maintenance of the minor children.
 - e. That the respondent be ordered to pay for the maintenance and the tyres of the motor vehicle utilized by the applicant.
 - f. That the respondent pays an amount of R 120 000 as an initial contribution towards the applicant's legal costs.
 - g. That the respondent be ordered to pay costs of this application on a punitive scale including costs of counsel.

BACKGROUND

2. The parties were married out of community of property with accrual system on 30 November 2013. There are two minor children born of the marriage between the parties, two daughter who are presently 7 years of age. The parties are currently involved in a divorce action, hence the current Rule 43 application.

MAINTANANCE OF THE MINOR CHILDREN

3. The respondent is currently paying an amount of R20 000.00 per month towards the maintenance of the minor children. In the Heads of Arguments, the Applicant's counsel argues that R20 000.00 per month is insufficient to cover both applicant and minor children's reasonable needs, more especially in relation to the lifestyle the parties enjoyed throughout the marriage. I did not understand the applicant to argue that the R20 000.00 is insufficient for the two minor children. According to the applicant there is a shortfall of an amount of R 3 800 in respect of the maintenance of the minor children and therefore seeks an order that the respondent must pay an amount of R 23 800 towards the maintenance of the two minor children.

SPOUSAL MAINTANANCE

4. It is common cause that the respondent was paying the applicant an interim maintenance in the amount of R24 600.00 per month from October 2021 until about March 2022. The applicant argues that the Respondent unilaterally decided to stop paying the said amount. However, the respondent contends there was an agreement that the payment would only be for 6 months. The applicant contends that she agreed to the interim measure because she was desperate, but she later instructed her attorneys to write to the respondent to request him not to stop paying the amount for spousal maintenance.

5. The respondent argued that he will not pay anything towards spousal maintenance because the applicant is employed and thus can be able to maintain herself. Although the applicant initially claimed spousal maintenance in the amount of R58 000.00, in their

heads of argument, the applicant contends that an amount of R24 600.00 per month would be a fair and reasonable amount for spousal maintenance.

6. The respondent contents that he is not offering any amount for spousal maintenance because the applicant is employed and therefore is able to maintain herself. The applicant denies that she is currently employed by Trump foods. She argues that she is undergoing training and therefore is not earning an income. In his answering affidavit the respondent avers that the motor vehicle that the applicant uses is registered in his (respondent's) name and during February 2022 he logged into the website of Matrix tracking system and noted that the Applicant was travelling to 10 Ransworth Crescent, Longlake, Frankleenwald. He later discovered that this was the premises of Trump Food which is the workplace of the applicant. The respondent confirms that at least when he instituted the divorce action the applicant was unemployed¹.

7. Without proof in the form of bank statement or pay slips, it will be difficult for me to make a finding that the applicant is currently employed. In the absence of sufficient evidence that the applicant is employed, I am of the view that she is entitled to spousal maintenance *pendente lite*. I am in no way suggesting that the applicant is unemployed or that she is not earning a salary. That determination will be made at a later stage during trial where the respondent will be afforded an opportunity to prove his averment that the applicant is employed. Nor am I deciding that the applicant is employed. With the evidence presented before me I am not in a position to determine whether the applicant is employed or not. However, as I have already alluded to earlier, by agreeing to pay an amount of money towards spousal maintenance, albeit for six months, the respondent was conceding that the applicant needed maintenance.

8. In my view, the applicant has succeeded to make out a case that she needs to be maintained pending the finalization of the divorce action. What should be determined is the amount of money for maintenance that the applicant is entitled to. According to the Financial Disclosure from the applicant's sum total expenses are amounting to R62

¹ Answering Affidavit paragraph 129

106.08 per month. The Applicant claims to be spending an amount of R97 106. 52 per month for both herself and the children. In my view this is highly improbable because it is not supported by any evidence. The applicant has clearly inflated the amounts and made them so exorbitant and unrealistic.²

9. However, the applicant is only asking for R23 800.00 for the children and an amount of R24 600.00 for herself. It is not clear how she is going to fill the shortfall. In my view, as I said earlier, the applicant inflated her monthly expenditure. I did not understand the respondent to plead unaffordability, but this court cannot just order the respondent to pay any amount just because he can afford to do so. The court must evaluate the evidence and order an appropriate amount.

10. I have already found that the applicant is entitled to interim spousal maintenance *pendente lite* and therefore, in my view an amount of R10 000.00 per month will be appropriate.

MEDICAL AID COSTS

11. It is common cause that the respondent removed the applicant off his medical aid scheme. The respondent contends that applicant can afford her own medical expenses. This is premised on the fact that the respondent argues that applicant is earning an income. I have already found that there is no evidence that the applicant is employed and earning an income and therefore the respondent must contribute towards the applicants' medical expenses.

MOTOR VEHICLE MAINTENANCE AND COSTS

12. The applicant seeks an order that the respondent be liable for the maintenance and replacement of tyres of the vehicle utilized by the Applicant. In my view, these expenses may be covered by the amount of maintenance the applicant will be getting.

² Du preez v Du Preez (16043/2008) [2008] ZAGPHC 334 (24 October 2008) para 15

One must always be mindful of the fact that this is just an interim order pending the finalization of divorce action.

CONTACT WITH THE MINOR CHILDREN

13. The Applicant avers that she has no issue with the unsupervised and sleepover contact with the minor children but seeks that same be phased in. The applicant has not filed a report by the family advocate, or any expert report to support her contention. I am therefore not persuaded that the respondent's contact with the minor children should be restricted. I am mindful of the fact that divorce proceedings are in their nature acrimonious and therefore the court must always strike of balance between the two conflicting parties.

CONTRIBUTION TOWARDS LEGAL COSTS

14. The applicant seeks an order that the Respondent makes a contribution of an amount of R120 0000.00 towards legal costs. in the founding affidavit³ the applicant seeks an order "*that the respondent pay an initial contribution to the applicant's costs in the sum of R 120 000.00 to be paid within 10 days from the date of the granting of the order.*" A party seeking contribution towards legal costs by another party must substantiate why they are entitled to the amount they claim. In this case the evidence presented by the applicant is not persuasive enough for the relief sought. In my view, the applicant was not very candid regarding where she gets financial assistance, only going as far as saying she is assisted by her mother. In my view the applicant failed to make out a case in this regard.

CONCLUSION

15. After having considered the facts and evidence presented as well as arguments by counsel for both parties, I am satisfied that the applicant has made out a case for relief sought in terms of maintenance *pendente lite* in respect to both her and the two minor

³ FA Page 37 paragraph 14

children. However, as I alluded to above, the applicant was not candid about her earnings or lack thereof. In my view the applicant failed to justify the amount she is seeking for her own maintenance. Consequently, I will award the applicant an amount of R 10 000. 00. I am also satisfied that the applicant must be retained on the medical aid scheme of the respondent *pendente lite*.

COSTS

16. The applicant seeks an order that the respondent pay costs of this application on a punitive scale including the costs of counsel. The respondent submitted that the applicant be ordered to pay the costs of this application, alternatively that costs be in the cause.

17. It is trite law that the issue of costs is within the discretion of the court. However, it is an accepted principle that the successful party should be awarded costs.⁴ The applicant was only partly successful and therefore I exercise my discretion not to award any of the parties costs at this stage but to order that costs be in the cause.

18. In the result I make the following order *pendente lite*:

(a) The applicant and the respondent remain co-holders of parental responsibilities and rights in respect of Hannah and Olivia (the minor children) as envisaged in section 18(2) of the Children's Act, 38 of 2005 (the Act).

⁴ Ferreira v Levin NO and Others; Vryenhoek and Others v Povwell NO and Others [1996] ZACC 27; 1996(2) SA 621(CC) par 3" the supreme court has over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving the successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation."

- (b) The primary residence of the minor children be awarded to the applicant.
- (c) The parental responsibilities and rights as set out in Section 18(2)(b) and (3) of the Children's Act and in particular to act as joint guardian and to exercise contact with the minor children be awarded to the respondent, which contact including reasonable contact.
- (d) The respondent is ordered to continue to pay maintenance to the applicant in the amount of R 20 000. 00 per month for the maintenance of the two minor children, on or before the last day of each month.
- (e) The respondent is ordered to pay spousal maintenance to the applicant in the sum of R 10 000. 00 per month, the first payment to be made on or before the 31st day of January 2024 and thereafter before the last day of each succeeding month.
- (f) The respondent shall retain the minor children and bear all the costs of retaining the minor children as dependent members on his comprehensive medical aid scheme and by bearing all the medical expenses incurred in private healthcare in excess of the cover provided by the medical aid scheme, such costs to include all medical, pharmaceutical, surgical, hospital, orthodontic, ophthalmic, psychotherapeutic, occupational therapeutic, chiropractic, and similar medical expenses which are not covered by the medical aid scheme. The respondent shall reimburse the applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 7 (seven) days of the applicant providing the respondent with proof of payment and/or the relevant invoice.
- (g) The respondent shall make payment of all reasonable educational costs incurred in respect of the minor children, which shall include but not limited to the

costs of private school fees, after care fees, levies, admission/enrollment fees, books, stationary and equipment, uniforms and clothing, all sporting and extra mural activities together with the necessary outfitting and equipment in respect thereof, remedial and extra lessons, school outings, tours and transportation costs. The respondent shall reimburse the applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 7 (seven) days of the applicant providing the respondent with proof of payment and/or the relevant invoice.

(h) The respondent shall re-register the applicant as a dependent member on his comprehensive medical aid scheme and make payment of the monthly subscriptions in respect thereof.

(i) The applicant is entitled to continue using the 2018 Toyota Fortuner motor vehicle and the respondent is ordered to pay for the insurance in respect of the said vehicle as well as any reasonable repairs and maintenance to and in respect of the said vehicle insofar as such repairs and maintenance is not covered by the said vehicle's maintenance plan.

(j) Costs shall be costs in the cause.

**K.F PHAHLAMOHLAKA
ACTING JUDGE OF THE
HIGH COURT OF SOUTH AFRICA**

JUDGMENT DELIVERED ON:	12 JANUARY 2024
RESERVED ON:	07 SEPTEMBER 2023
FOR THE APPLICANT:	ADV R PUTZER
INSTRUCTED BY:	NICK XENOPHONTOS ATTORNEYS
FOR THE RESPONDENT:	DR G EBERSOHN
INSTRUCETED BY:	GERRIE EBERSOHN ATTORNEYS