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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 10534/2020

In the matter between

B B K

APPLICANT

[ID Number:[...]]

vs

T L M

RESPONDENT

[Identity Number(...)]

JUDGMENT

SARDIWALLA J:

Introduction

[1] This is a rule 43(1) application for maintenance, access towards minor children and contribution towards costs.

[2] The Applicant/Plaintiff, is **B B K** , an adult female employed as a cleaner by the Department of Public Works and currently residing at[...], Mamelodi East¹.

[3] The Respondent/Defendant is **T L M**, an adult male employed as Deputy Director Disposals at the Department of Public Works and currently residing at[...], Mamelodi East².

Background

[4] The parties were allegedly married to each other on 24 September 2010 in terms of the Zulu customary marriage and that such marriage is recognised in terms of the Recognition of Customary Marriages Act 120 of 1998.

[5] There are two minor children born of the marriage namely

5.1 G, a boy born on 14 November 2014; and

5.2 G, a girl born on 11 August 2014;

Common cause issues:

[6] The following is common cause between the parties:

- 6.1. The two minor children were born from a relationship between the parties, and the Respondent is their biological father.

¹ Summons, Page 1

² Summons page 1

- 6.2. The Respondent is employed as the Deputy Director: Disposals at the
Department of Public Works.
- 6.3. The Respondent earns significantly more money than the Applicant.
- 6.4. The Respondent still enjoys the comfortable lifestyle the parties had during the subsistence of their marriage relationship and to which the minor children have become accustomed, as follows:
- 6.4.1. He resides in the common home, being an unincumbered three (3) bedroom house, with two (2) bathrooms and double garage; and
- 6.4.2. He owns at least two (2) unincumbered motor vehicles.
- 6.5. The Applicant and minor children relocated and moved out of the common home.
- 6.6. The Applicant no longer has use of the BMW motor vehicle.
- 6.7. The Applicant and minor children took possession of some furniture upon moving from the common home.
- 6.8. The Applicant currently has the benefit of the Respondent's medical aid.
- 6.9. The Applicant's nett salary is R8,695.93 and that the Respondent earns substantially more than the Applicant.

6.10. The Respondent merely notes (and therefore does not dispute) the following relief sought by the Applicant:

6.10.1. That both parties retain full rights and responsibilities in respect of the minor children, including guardianship in accordance with the provisions of sections 18,19 and 20 of the Children's Act 38 of 2005 ("the Act").

6.10.2. That primary care and residence of the minor children be awarded to the Applicant.

6.10.3. That the Respondent be awarded specific parental rights and responsibilities in respect of the minor children as envisioned in section 18(2)(b) of the Act as follows:

6.10.3.1. Contact with removal every alternate weekend from Friday at 16h00 to Sunday at 17h00.

6.10.3.2. Contact with removal every alternate long weekend from 18h00 on the first day of the long weekend to 17h00 on the last day of the long weekend.

6.10.3.3. Contact with removal for half of every alternate short school holiday, including

public holidays, with the understanding that Easter shall rotate between the parties.

6.10.3.4. Contact with removal for half of every long school holiday, with the understanding that the shared halves, including Christmas and New Year's, shall rotate between the parties.

6.10.3.5. Contact with removal on the minor children's birthdays. Should the birthdays fall on a school day, the Respondent shall be entitled to contact with removal of the minor children from 14h00 for a period of four (4) hours, subject to the minor children's scholastic routines. Should the birthdays fall on a non-contact weekend, the Respondent shall be entitled to contact with removal from 08h00 for a period of four (4) hours and should the birthdays fall on the Respondent's contact weekend, the Applicant shall be entitled to contact with removal from 08h00 for a period of four (4) hours.

6.10.3.6. Contact with removal on the Respondent's birthday from 08h00 for a period of six (6) hours. Should the Respondent's birthday fall on a weekday

and the weekend following a non-contact weekend, the Respondent shall be entitled to remove the minor children on the Saturday from 08h00 until 14h00.

6.10.3.7. Contact with removal on Father's Day from 08h00 for a period of four (4) hours, should it fall on a non-contact weekend. Similarly, the Applicant shall be entitled to contact with removal on Mother's Day from 08h00 for a period of four (4) hours, should it fall on a weekend that Respondent is exercising contact.

6.10.3.8. Contact with removal during the week on prior arrangement with the Applicant, subject to the minor children's scholastic needs and routines and which consent shall not be unreasonably withheld.

6.10.3.9. Regular telephonic contact between 18h00 and 20h00, which shall include Skype and/or other forms of electronic media contact.

6.11 The Respondent admits that he shall pay the minor children's school fees, including but not limited to any costs for uniforms, extra mural activities, books and stationery.

6.12 The Respondent admits that he shall retain the minor children on his medical aid and to pay for all any additional medical expenses.

6.13 The Respondent admits that the Applicant shall retain the furniture and other movable assets obtained from the common home and currently in her possession.

Disputed issues pertaining to maintenance

[7] The remainder of the relief sought by the Applicant remains in dispute, as follows:

7.1. That the Respondent be ordered to pay maintenance in respect of the minor children in the amount of R5,000.00 per child per month, to escalate in accordance with the consumer price index on the anniversary of the Court order;

7.2 That the Respondent pay maintenance towards the Applicant in the amount of R3,000.00 per month, to escalate in accordance with the consumer price index on the anniversary of the Court order;

7.3 That the Applicant is entitled to retain possession of the BMW 528 motor vehicle with registration numbers FV 42 DJ GP and that the Respondent

shall be liable for the maintenance, licencing
and Insurance in respect of such motor vehicle.

Applicant's/Plaintiff's case

[8] The Plaintiff's case is that the marriage has irretrievably broken down and that there is no prospect of a normal relationship being restored. There is no meaningful communication between the parties, the Respondent physically and emotionally abuses her and she has taken out a protection order against him. Further that the Respondent leaves the common household for days without informing the Applicant of his whereabouts and that she has lost love, respect and affection for him. The Respondent has on several occasions thrown the Applicant out of the common household and the Respondent has threatened to kill the Applicant on several occasions.

[9] The Applicant has requested that the care and residency of the minor children be placed with her but that both parties retain full parental rights and responsibilities including guardianship in accordance with the provisions of Section 18, 19 and 20 of the Children's Act, 38 of 2005.

[10] It is the Applicant's submission that she is entitled to the same lifestyle as the Respondent, which the Respondent still enjoys, including access to the BMW 528 motor vehicle. The Applicant has requested that the Respondent contribute towards her legal costs.

Respondent's/Defendant's case

[11] The Respondent denies that a customary marriage existed between the parties and claims that it was merely a romantic relationship. He further states that he takes care of the children, including transporting them and that the Applicant goes away almost every weekend without his knowledge. He indicated that the Applicant expenses are unreasonable and that she has inflated the costs. He further avers that the Applicant fails to assist in the upbringing and transportation of the minor children. That the Applicant is employed and therefore does not require maintenance and can afford her own legal costs.

[12] The Respondent conceded that he lives in the unincumbered common home but denies that his income is sufficient to justify the relief claimed and submits that his net income is R30 980.69 despite the fact that his bank statements show an amount of R82 038.99 on 15 March 2021.

Law and Analysis

[13] It is common cause the Rule 43 proceedings are interim in nature pending the resolution of the main divorce action. In *Taute v Taute*³, the court stated that there is no general principle upon which an application under Rule 43 can or must be based. Each case must depend on its own particular facts. *Taute supra* also reiterated that a claimant for maintenance *pendente lite* was not entitled, as of right, and without more, to maintenance sufficient to keep him or her in the same lifestyle as that enjoyed during the marriage. Hart AJ stated:

‘The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, her actual and

³ 1974 (2) SA 675 (E)

reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified’.

[14] **Taute** at paragraph 676 C-D also referred to LUDORF, J. in the case of **Levin v Levin and Another**⁴, who said the following:

“To 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. On this basis I now turn to the issues as they emerge from the papers.”

[15] Our courts have always emphasised the need for utmost good faith by both parties in rule 43 proceedings and the need to disclose fully all material information regarding their financial affairs⁵.

[16] In **B v B**⁶ the Supreme Court of Appeal stated the following regarding the non-disclosure of the respondent:

'[39] The attitude of many divorced parties, particularly in relation to money claims where they control the money, can be characterised as “catch me if you can”. These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be “caught” and have to disgorge what is in law due to the other party.'

⁴ 1962 (3) SA 330 (W) at p 331D

⁵ *Du Preez v Du Preez* **2009 (6) SA 28** (T) para 16

⁶ (700/2013) **[2014] ZASCA 137** (25 September 2014)

[17] In view of the dicta in *Taute Supra* I am compelled to determine this matter on the papers that are before me. Bearing in mind that these are merely interim proceedings and that these allegations would ultimately be ventilated in the normal course during the trial, I am mindful of the dicta in *Levin supra* and am of the view that the allegations raised by the Applicant cannot simply be ignored in these proceedings. I am also of the view that a potential forfeiture claim by a party where interim maintenance is being sought is a factor that could militate against, or at the very least mitigate, the granting of an interim maintenance order.

[18] In *casu*, in the application, the Respondent states that he does not earn a substantial amount despite the fact that he is a Deputy Director of a state department and has alleged that there are disciplinary proceedings by his employer pending against him. He has also denied that a customary marriage existed and has counter-claimed that the Applicant forfeit her 50% share in the matrimonial property due to her conduct.

[19] The Applicant states that she is a cleaner and had to move out of the common household and a substantial portion of her income goes towards rental. She states that she is unable to support herself given that she earns just under R9000 per month and now has to pay rental. The Respondent however due to his position and earnings has the capacity to support her as he resides in the three bedroom unincumbered house which is fully paid for. She lived there too until she was ejected from the home. She also enjoyed the use of a BMW 528 motor vehicle during the marriage which she no longer has access and use.

[20] In ***Strauss v Strauss* 1974 (3) AD**, the court held that it was not enough to merely state that a claimant is entitled to more maintenance just because their spouse is able to afford same. A claimant is also not entitled, as of right, to enjoy in the same standard of living and lifestyle as their spouse. (at 83D). *In casu*, on the papers before me the Respondent has failed to show why he incurs an expense of R5000 for accommodation when the house is fully paid for. The Respondent has also failed to take this court into his confidence as to why the amount from his employer on 15 March 2021 shows R82 038.99 in his bank statements if he avers that his net income is substantially lesser. On the Applicant's version, the Respondent is intentionally misleading this Court as to as his financial position. The Applicant however as fully set out the expenses that she incurs on the income she has. In *Strauss* (at 83D-E), the Defendant had failed to provide a cogent explanation as to why his maintenance cannot be supplemented by his own income. The papers before persuade me that the Applicant's income does not afford her the capacity to support herself and I am not persuaded that the Respondent is being truthful of his financial circumstances.

[21] In my view, given the particular allegations raised on the papers of serious domestic violence abuse, and where it is the Applicant that has had to incur legal expenses in order to protect her life and her rights justifies her entitlement to interim maintenance and costs. In my view, the probabilities lay more in favour of the Applicant having a reasonable prospect of success in her claim, which is a factor that I am taking into consideration to grant a contribution of costs in this instance. In ***Nilsson v Nilsson* 1984 (2) SA 294 (C) at 295F**, stated that a rule 43 order is not meant to provide an interim meal ticket to a person who quite clearly at the trial will not be able to establish a right to maintenance. *In casu*, I am satisfied that the Applicant would be able to establish a right

to claim maintenance at the trial. On a conspectus of this application, I find that there are grounds which would entitle the Applicant to maintenance *pendente lite*.

ORDER

[22] I, therefore, make the following order:

- 1. Both Parties retain full rights and responsibilities in respect of the minor children, including guardianship in accordance of the provisions of section 18, 19 and 20 of the Children's Act 38 of 2005 "The Act").**
- 2. The primary care and residence of the minor children is awarded to the Applicant.**
- 3. The Respondent is awarded specific rights and responsibilities of the minor children as envisioned in section 18(2)(b) of the Act as follows:**

3.1 Contact with removal every alternate weekend from Friday at 16h00 to Sunday at 17h00.

3.2 Contact with removal every alternate long weekend from 18h00 on the first day of the long weekend to 17h00 on the last day of the long weekend.

3.3 Contact with removal for half of every alternate short school holiday, including public holidays, with the understanding that Easter shall rotate between the parties.

3.4 Contact with removal for half of every long school holiday, with the understanding that the shared halves, including Christmas and New Year's, shall rotate between the parties.

3.5 Contact with removal on the minor children's birthdays.

Should the birthdays fall on a school day, the Respondent shall be entitled to contact with removal of the minor children from 14h00 for a period of four (4) hours, subject to the minor children's scholastic routines. Should the birthdays fall on a non-contact weekend, the Respondent shall be entitled to contact with removal from 08h00 for a period of four (4) hours and should the birthdays fall on the Respondent's contact weekend, the Applicant shall be entitled to contact with removal from 08h00 for a period of four (4) hours.

3.6 Contact with removal on the Respondent's birthday from

08h00 for a period of six (6) hours. Should the Respondent's birthday fall on a weekday and the weekend following a non- contact weekend, the Respondent shall be entitled to remove the minor children on the Saturday from 08h00 until 14h00.

3.7 Contact with removal on Father's Day from 08h00 for a period of

four (4) hours, should it fall on a non-contact weekend. Similarly, the Applicant shall be entitled to contact with removal on Mother's Day from 08h00 for a period of four (4) hours, should it fall on a weekend that Respondent is exercising contact.

3.8 Contact with removal during the week on prior arrangement

with the Applicant, subject to the minor children's scholastic

needs and routines and which consent shall not be unreasonably withheld.

3.9 Regular telephonic contact between 18h00 and 20h00, which shall include Skype and/or other forms of electronic media contact.

- 4. The contact rights aforesaid shall be exercised subject to the understanding that the parties can make alternative arrangements and to that extent the parties are directed communicate any alterations amicably and effectively with each other and to not withhold consent for such alterations unreasonably.**
- 5. The Respondent is ordered to pay maintenance in respect of the minor children in the amount of R5,000.00 per child per month, which amount shall escalate in accordance with the Consumer Price index on the anniversary of this order.**
- 6. The Respondent shall pay the minor children's school fees, including but not limited to any costs for uniforms, extra mural activities, books and stationary.**
- 7. The Respondent shall retain the minor children and the Applicant on his comprehensive medical aid scheme with GEMS.**
- 8. The Respondent pay any reasonable additional medical expenses for the minor children, not covered by his medical aid scheme, upon demand and proof thereof having been submitted by the Applicant.**
- 9. The Respondent pay maintenance towards the Applicant in the amount of R2, 000.00 per month, which amount shall escalate in accordance with the Consumer Price index on the anniversary of this order.**

10. The Applicant is entitled to retain possession of the BMW 528 motor vehicle, with registration number[...].
11. The Applicant is entitled to retain the furniture and other movable assets obtained from the common home and currently in her possession.
12. That the Respondent pay a contribution towards the Applicant's legal costs, in the amount of R50, 000.00, which amount shall be payable in monthly instalments of R5, 000.00, for a period of ten (10) months.
13. That the costs occasioned by the postponement of the application of 01 July 2021 be borne by the Respondent.
14. The costs for the hearing of the application on date hereof shall be costs in the cause.

SARDIWALLA J

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:

Adv ACC Barreiro

Instructed by:

B Bezuidenhout Inc

For the Respondent:

Adv. H Nkabinde

Instructed by:

Maluleke Seriti Makume Matlala Inc