

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 4973/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

Y[....] S[....]

Applicant

And

C[....] M[....]

Respondent

HEARD ON: 24 NOVEMBER 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 14 April 2023.

[1] The parties are the biological parents of two minor children aged 10 and 7 years old

respectively. They were divorced on 23 June 2016 by the Regional Court, Sasolburg and the divorce order incorporated a deed of settlement signed by the parties in terms of which the children's primary residence was awarded to the applicant subject to the respondent's right to have contact at all reasonable times, the respondent undertook to pay an amount of R1 500.00 per month per child into the applicant's bank account in respect of the children's maintenance. It was also agreed that the payments of maintenance will increase annually on the anniversary of the date on which the deed of settlement was concluded in accordance with the prevailing Consumer Price Index "(the CPI)" inflation rate.^[1]

[2] On 10 August 2019, pursuant to the applicant's remarriage and her impending relocation to the United Arab Emirates ("the UAE") the parties concluded a Parenting Plan^[2] with the assistance of a mediator essentially amending the court order in order to regulate the circumstances pertaining to the applicant's relocation to the UAE with the children.

[3] In terms of the parenting plan, the applicant retained primary care of the children subject to the respondent's right to have contact with the children at all reasonable times which includes electronic contact (email, SMS, Skype etc.). With regard to maintenance, the respondent was exempted from paying maintenance till July 2020 where-after the agreed maintenance would be reviewable subject to a change in the respective parties' financial circumstances or the needs of the children. The parties also agreed that:

"neither party will seek to obtain or renew a passport for the children without the prior written consent of the other parent" ^[3]

[4] During June 2020, approximately a month before the respondent's exemption from paying maintenance was due to expire, the parties underwent mediation duly assisted by a mediator (Ms van Aswegen) with the result that the respondent undertook to resume his maintenance obligations and agreed to pay R3000.00 per month per child which payment would be subject to an annual increase in line with the CPI and 50% of the costs of the children's flight tickets from the UAE to South Africa for the purpose of exercising contact with the children. The respondent also undertook responsibility for 100% payment towards the children's medical expenses incurred within South Africa.

[5] It is the applicant's case that the respondent has not honoured his maintenance

obligations since July 2021. In this application, the applicant seeks:

5.1. Payment of R60 101.27 being arrear maintenance together with interest and the costs of this application on an attorney and client scale;

5.2. An order that the parenting plan concluded by the parties on 10 August 2019 be made an order of court;

5.3. Increase of maintenance to R5000.00 per month per child alternatively, payment of the agree R3 379.88 per month per child to increase in accordance with the CPI every year on the date of this order and to be paid electronically into the applicant's bank account; and

5.4. The amendment of clause 7.2 of the parenting plan by substituting the entire paragraph with the following paragraph:

"7.2. Neither party will seek to obtain or renew a passport for the children without the prior written consent of the other parent, who shall not unreasonably withhold such consent."

[6] The applicant states that her referral of the dispute to the mediator did not yield a favourable result. The mediation was declared unsuccessful.^[4] A series of correspondences were addressed to the respondent's attorneys by the applicant's attorneys dated 21 April 2022, 14 June 2022, 5 July 2022, 19 July 2022 and 11 August 2022 demanding the outstanding payment to no avail instead, the respondent unilaterally elected to pay maintenance into a bank account to which the applicant has no access to. Annexure "YS13" of the applicant's founding affidavit are copies of the respondent's bank account reflecting that the respondent was depositing the maintenance payments into his other bank account.

[7] The applicant's application for maintenance increase is premised on the grounds that her financial circumstances and the needs of the children have significantly changed, the agreed amount of R6 759.76 (R3000.00 per month per child including CPI) is no longer sufficient and this is based on the fact that the children's monthly expenses amount to R31 643.00 per month whilst she earns only R53 675.00 per month as a school teacher.

The applicant contends that the respondent has sufficient means to afford the increase and the amount that would be appropriate under these circumstances would be an amount of R5000.00 per month per child.

[8] The applicant also complains that the respondent has unreasonably hindered the renewal of the children's passport by refusing to provide his obligatory consent. On 22 August 2021 the respondent was requested to attend to the renewal of the children's passports. He refused to cooperate citing personal reasons without elaborating. It was only two months later on 15 October 2021 that the respondent went to the Department of Home Affairs to complete and submit the required documents as a result, the children could not travel over the December holidays as the renewed passports only became available in February 2022. Accordingly, clause 7.2 of the parenting plan must be amended by substituting the entire paragraph with the following paragraph:

"7.2. Neither party will seek to obtain or renew a passport for the children without the prior written consent of the other parent, who shall not unreasonably withhold such consent."

[9] It is common cause that the respondent is in arrears with maintenance payments. The provisions of the parenting plan concluded by the parties pursuant to the court order are also indisputable.

[10] The application is opposed on the basis that the applicant is not entitled to the relief she seeks because she has approached this court with unclean hands. According to the respondent, both parties have breached the terms of the parenting plan in that, the applicant has curtailed his contact rights. He barely has any physical or proper telephonic contact with the children when he does, it is only for a limited time. He is also not informed about the children's school activities and their holiday plans. His failure to pay maintenance is also attributable to the applicant's refusal to open a joint savings account into which both of them can have access to, to enable him to calculate all the expenses relating to the children.

[11] With regard to the amounts claimed, the respondent contends that the applicant has relied on a parenting plan which purportedly amends the provisions of the court order by increasing maintenance from R1500.00 per month per child to R3000.00 per month per

child however, this court has no jurisdiction to make the parenting plan an order of court or to vary its provisions. The parties are also not *ad idem* to its provisions and it has not registered by the family advocate or the children's court.

[12] The respondent states that he is amenable to the variation of the parenting plan for the increase of the maintenance provided, he can afford the increase. He blames the applicant for his failure to pay the increase requested by the applicant on the basis that it is the applicant who delayed to provide him with all the expenses relating to the children including the details of which school they were attending and their extra mural activities to enable him to assess his affordability and this is important because his financial circumstances and the needs of the children have changed. It is in that regard that he intends to launch a counterapplication to these proceedings or seek variation of the parenting plan at the maintenance court.

[13] The respondent denies withholding his consent for the review of the children's passports and states that the WhatsApp communication between the parties attest to the fact that there was nothing he could have done to speed up the process.

[14] It is the respondent's case that the appropriate forum to adjudicate these disputes is the maintenance court which is better equipped to conduct maintenance enquiries to determine the affordability of the parties and the needs of the children. The services of the of the Family Advocate are also required to conduct an investigation pertaining to the best interests of the children, primary care and contact including a qualified therapist to evaluate the parties and the children in order to assist the parties with parental guidance and communication measures for the purpose of co-parenting. The respondent is also prepared to take over the primary care of the children as it seems the costs of living in the UAE surpasses the South African's standard of living thus based on all these reasons, the application must fail and an order must be granted in his favour on the following terms:

14.1 The application for an order that the parenting plan is made an order of court and its variation is dismissed;

14.2. The respondent to pay the arrear maintenance as per the deed of settlement;

14.3. The parties to conclude a new parenting plan accompanied by the family

advocate's report and thereafter made an order of court; and

14.4. The applicant to pay the costs of this application on the scale of attorney and own client.

[15] The respondent's assertions with regard to his reasons for failing to pay maintenance are unsound and in total disregard of the principle applicable in the adjudication of matters involving children which provides that: A child's best interests is of paramount importance in every matter concerning the child, see section 28(2) of the Constitution Act.^[5]

[16] The respondent's obligation to maintain his children arises from a common law duty to provide for his children's financial needs and support.^[6] It does not impose a reciprocal duty on the applicant as the custodian of the children in the sense that she would be disentitled to receive the children's maintenance if there is curtailment of the respondent's contact rights.

[17] Section 35(1) of the Children's Act ("The Act")^[7] provides sufficient penalties against a custodian parent who contravenes a court order or a parental responsibilities and rights agreement for hindering the non-custodial parent's rights to exercise his contact rights over a child.^[8] It is also clear from the parenting plan that the mode of payment that was agreed upon by the parties in the order was not amended therefore, to attribute his failure to pay maintenance to the applicant's refusal to open a joint savings account is absurd.

[18] The fact that the respondent admits to paying maintenance into his other bank accounts clearly indicates that his failure to pay maintenance is not due lack of means but merely motivated by malice.

[19] It was pointed out by the Constitutional Court in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*^[9] that "S28(2) wisely anticipates possibilities of conduct that are actually or potentially prejudicial to the best interests of a child." In my view, this includes a parent's disregard of a court order or an agreement to maintain a child which is not only prejudicial to the best interests of a child but also a criminal offence. See also *Bannatyne v Bannatyne and Another*.^[10]

[20] Section 34 (1) and (3) of the Act sets out the formalities to be met for the validity of a

parenting plan to become an order of court namely: the parenting plan must have been signed by the parties and concluded with the assistance of a mediator.

[21] I'm satisfied that the requirements have been met in that, both parties have signed the parenting plan and it was concluded with the assistance of the mediator, Ms Aswegen. Annexure "YS4" of the applicant's founding affidavit is a copy of the mediator's confirmation as contemplated in subsection (b)(ii).

[22] On the facts germane to this matter both parties seek the variation of the parenting plan essentially based on the grounds that there has been a material change in their respective financial circumstances and the needs of the children.

[23] Section 15 of the Maintenance Act^[11] provides:

"(3)(a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration –

- (i) that the duty of supporting a child is an obligation which the parents have incurred jointly;*
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and*
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first subsequent marriage.*

(b) Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case."

[24] The provisions of section 15 provide a framework for the investigation and presentation of evidence in respect of maintenance claims proceedings. The primary caregiver must provide proof of her own income, expenses and the needs of the children. In this matter, on the applicant's own submission she is employed and earns R53 675.00 per month. The applicant has simply attached a schedule of her expenses and those of the children without providing proof of her income namely a salary or payslip as proof of her earnings including proof of the children's expenses such as invoices or letters from the

school regarding the school fees and other related expenses.

[25] Similarly, the respondent also pleads poverty without providing the details which constitute the alleged material change of his financial circumstances. Despite having averred that same will be set out in a counter-application and/or in a variation application at the time this matter was heard, no counter-application had been filed and there is also no evidence that a variation application has been launched at the maintenance court.

[26] It is trite that the party seeking a variation bears the onus of proving a material change in his /her financial circumstances. [\[12\]](#) Based on the limited evidence proffered by the parties I am unable to determine whether the applicant is entitled to increased maintenance or whether the respondent is entitled to reduced maintenance in respect of the children.

[27] In terms of section 18(3) of the Act, parental consent is required for a minor's application for a passport. The respondent's denial of having refused to provide the required consent when requested is gainsaid by the WhatsApp communications between the parties.[\[13\]](#) It is clear that despite having been requested to present himself to the home affairs to provide the required consent in during August 2021 he only went there in October 2021 after having been reminded and requested to follow up on his online application on several occasions. The respondent has indeed neglected his responsibilities as a parent. The court must come to the children's assistance and accede to the requested amendment. (Paragraph 7.2 of the parental plan).

[28] In conclusion, there is no merit to the respondent's contention that this court lacks jurisdiction to adjudicate this matter. The high court, as the upper guardian of all children has the inherent jurisdiction to adjudicate any matter involving children.[\[14\]](#)

[29] I am satisfied that the applicant has made out the case she seeks for the granting of the order in respect of arrear maintenance and the enforcement of the parenting plan. The applicant has failed to discharge her responsibility to prove that there is a good cause to increase maintenance.

[30] On the issue of costs, I have come to the conclusion that the applicant is entitled to

costs as she substantially succeeded with the application. I have highlighted the fact that the respondent's grounds for opposing the application are based on dilatory and flimsy defences for that reason, a punitive cost order is warranted.

[31] In the result, the following order is made:

1. The parenting plan that was concluded by the parties on 10 August 2019, marked as Annexure "A" is made an order of court.

2. Paragraph 7.2 of the parenting plan is amended by the substitution of the whole paragraph to read as follows:

"7.2. Neither party will seek to obtain or renew a passport of the children without the prior written consent of the other parent who shall not unreasonably withhold such consent."

3. The respondent is ordered to make payment to the applicant in the amount of:

3.1. R58 043.27 in respect of the arrear maintenance including the CPI since January 2022 to September 2022 and any other amounts that are due owing and payable after issue of this application;

3.2. R2 058.00 in respect of the CPI on the maintenance from July 2021 to December 2022; and

4. Interest on the aforesaid amounts at the applicable interest rate from the date of issue of this application to the date of final payment.

5. The payments shall be paid into the applicant's bank account:

First National Bank

Account number: 6[....]9

Branch Code: 2[....]"

6. Paragraph 9.3 of the parenting plan is amended by the substitution of the whole paragraph to read as follows:

“9.3. The father shall contribute an amount of R3 379.88 per month per child in respect of the children’s maintenance which shall increase in accordance with the Consumer Price Index (“CPI”) every year on the date of this order, with payments to be made electronically into the mother’s bank account or an account nominated by the mother, the details of which are as follows.

First National Bank

Account number: 6[....]9

Branch Code: 2[....]”

7. The respondent shall pay the costs of this application on the scale of attorney and client.

NS DANISO, J

APPEARANCES:

Counsel on behalf of the applicant:

Instructed by:

Adv. N. Strathern

Ulrich Roux & Associates

C/O Symmington De Kok

AllysseWhitehead@symok.co.za

BLOEMFONTEIN

Counsel on behalf of the respondent:

Instructed by:

Adv. N van der Sandt

Van Heerden De Wet Inc.

C/O Webbers Attorneys

pm@webberslaw.com

BLOEMFONTEIN

[\[1\]](#) Clauses 2, 4 and 5 of the deed of settlement.

[\[2\]](#) Annexure “A” of the applicant’s founding affidavit.

[3] Clauses 6,7 and 9 of the parenting plan.

[4] In Annexure “YS5” of the applicant’s founding affidavit dated 7 February 2022 the mediator wrote:

“It seems as if the parties are not adhering to the parenting plan. I am no longer in a position to mediate if the terms of the mediation/parenting plan is not adhered to by the parties. I therefore declare the mediation unsuccessful. The matter can be dealt with as an opposed matter by your respective attorneys.”

[5] Act No, 108 of 1996.

[6] S15(1) and (2) of the Maintenance Act No, 99 of 1998.

[7] Act No, 38 of 2005.

[8] S35 “**Refusal of access or refusal to exercise parental responsibilities and rights.**

(1): Any person having care or custody of a child who, contrary to an order of any court or to a parental responsibilities and rights agreement that has taken effect as contemplated in section 22(4), refuses another person who has access to that child or 50 who holds parental responsibilities and rights in respect of that child in terms of that order or agreement to exercise such access or such responsibilities and rights or who prevents that person from exercising such access or such responsibilities and rights is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.”

[9] 2020 (1) SACR 113 (CC) at para 61.

[10] (CCT18/02) [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) (20 December 2002).

[11] Act 99 of 1998

[12] In *Roos v Roos* 1945 TPD 84 at 88.

[13] Annexure “YS2” of the applicant’s founding affidavit.

[14] S45(4) of the Act.