

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

GAUTENG DIVISION, PRETORIA

Case number: 2023-057206

Date of hearing: 7 March 2024

Date delivered: 26 March 2024

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

DATE: 26/03/2024

In the matter between:

S. S[...]

Applicant

and

JUDGMENT

SWANEPOEL J:

[1] The applicant seeks an interim order for maintenance for her and the parties' three minor children, and further ancillary relief, in terms of rule 43 of the Uniform Rules of Court. I shall only deal with the issues which were controversial between the parties.

[2] The applicant seeks an order for:

[2.1] Maintenance for the minor children in the sum of R 9 000.00 per month per child;

[2.2] Maintenance for the applicant in the sum of R 10 000.00 per month;

[2.3] Arrear maintenance of R 200 000.00;

[2.4] That the respondent retains the applicant and the minor children on their medical aid and be liable for all shortfalls not covered by the medical aid;

[2.5] An annual increase of the maintenance in accordance with the **CPIX**;

[2.6] That the respondent shall continue to pay all the expenses that he is currently paying;

[2.7] Payment of R 60 000.00 towards relocation costs;

[2.8] A contribution towards the applicant's costs in the sum of R 100 000.00.

[2.9] Costs of the application in the event of opposition.

[3] The applicant is currently unemployed (although the respondent alleges the opposite, based on untested evidence of an anonymous person). The respondent is a senior manager earning slightly more than R 50 000.00 net per month. The applicant and the minor children live in a three-bedroom flat, whilst the respondent lives with his parents. The applicant claims maintenance for herself and the children in a cash sum of R 37 000.00. Having considered the applicant's expenses, I have no doubt that the claim has been substantially inflated. During the hearing of the matter, applicant's counsel argued that a more appropriate amount was R 20 000.00 per month. Respondent's counsel argued that R 16

000.00 per month was an appropriate sum. I have considered the respondent's expenses, and it seems clear that the respondent has disposable income of at least R 17 000.00 per month. This is comprised of R 8 500.00 for his alleged lodging costs, whilst he in fact resides with his parents, and R 8 5000.00 for medical aid costs, whilst the medical aid cost is already accounted for when the respondent receives his net salary.

[4] In these circumstances I believe that an appropriate amount for maintenance for the applicant and the children is R 20 000.00 per month. I also do not intend to make an order that the maintenance shall automatically increase annually, as it would, in my view, be more appropriate in light of the fact that his order is made *pendente lite*, for the applicant to apply again on new facts if an increase in maintenance is necessary.

[5] As for the relocation costs, that claim was abandoned at the hearing of the matter.

[6] The applicant claims arrear maintenance in the sum of R 200 000.00. Besides the fact that the applicant does not substantiate this claim in any meaningful manner, I also believe that it would be inappropriate to award arrear maintenance in this instance. In *S.N v S.R*¹ the Court held:

"[34] In common law, a claim for arrear spousal maintenance is barred by virtue of the principle *in praeteritum non vivitur* (one does not live in arrears), the argument being that if the spouse managed on her own resources, there was no need for support. An exception to this rule is

¹ (2023/0361222) [2023] ZAGPJHC 1298 (14 November 2023)

recognised where the spouse has incurred debts in order to maintain herself. However, in *Dodo v Dodo*² the Court made the following observations:

'...[A] person seeking a maintenance order, or a variation thereof for an increase or for a reduction or for a suspension of payments, should do so expeditiously in order to avoid the accumulation of arrears of maintenance that the spouse liable to pay may be burdened with, a substantial liability which he can ill-afford to pay. The same expeditiousness would be required in order to avoid a party, being subjected to the reduction or suspension, being incommoded for a period until that party knows of the Court order.

[35] The applicant has not provided any explanation for the delay. While the respondent would be compelled to pay all the arrears of maintenance that have accumulated up to May 2022 and, consequently, be saddled with a substantial liability which he cannot meet. In any event, I am not empowered under Rule 43(1){a} to order a lump-sum payment towards retrospective maintenance. This notion was well expounded in *Greenspan v Greenspan*³ where it was held that:

"Unlike in ordinary motion proceedings, where the parties are not so strictly limited in the number of affidavits they may file nor are they discouraged from setting out their versions fully in their papers, by contrast Rule 43 is designed to afford an inexpensive procedure for granting interim relief. The parties to Rule 43 proceedings are limited in the material they may place before Court, and the Courts actively discourage lengthy affidavits and bulky annexures ... Furthermore, the term '*maintenance pendente lite*'

² 1990 (2) SA 77 (W)

³ 2000 (2) SA 283 ©

means 'maintenance during the period of litigation'. Therefore, there is no distinction in principle to be made between the interpretation of the relevant words in s 7(2) of the Divorce Act and Rule 43(1)(a). Surely the framers of Rule 43(1) would not have contemplated the making of an order under Rule 43 which a Court could not competently make either under the Maintenance Act of 1963 or the Divorce Act of 1979. In my view, the framers of Rule 43 clearly contemplated orders which were capable of variation. This is so because of the provisions of Rule 43(6) in terms of which the Court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child. Once a lump sum payment has already been made it can hardly be varied. Surely this further militates against attributing to the framers of the rule any intention that claims for lump sum payments should be adjudicated upon under Rule 43. In my judgment, the answer to the above question is surely that a Court has no jurisdiction under Rule 43(1)(a) to award lump sum payments."

[7] As is *S.N.* above, this matter came before me more than a year after the parties separated. There is no explanation for the delay in instituting these proceedings, save to say that at some point the parties considered reconciling with one another. I consequently decline to make an order in respect of arrears maintenance.

[8] The final issue is that of a contribution to the applicant's costs. The applicant has provided a proforma statement which allegedly sets out all her legal costs from inception of the action, up to the first day of trial. It is trite that an applicant claiming a contribution towards costs must show that she has a *prima facie* case. In order to do so the applicant must at least outline the issues in the divorce action that would have to be adjudicated, and must show that in respect of those issues, the applicant has a *prima facie* case.

[9] In this application the applicant has not said what the issues are likely to be between the parties. She has acknowledged that the issues of parental contact and care are not in dispute. The applicant has not attached the pleadings, but has simply said that the summons is to be found on Caselines. There is no plea, and the Court cannot ascertain what is, and what is not in dispute.

[10] A party to an application must, if it relies on a document, attach the document to its affidavit, and must, furthermore, say upon which part of the document it relies. It is not sufficient to simply attach the document, and it is more especially not acceptable to say that the summons is on Caselines and the Court can peruse it if it wishes to do so. Unfortunately, this is an unfortunate practice that has crept into applications since the advent of Caselines.

[11] In these circumstances, I am not inclined to make any contribution to costs at this stage. Nothing prevents the applicant from bringing the application again when it is clearer what issues, if any, are to be litigated.

[12] In the premises I make the following order, pendente lite:

[12.1] The respondent shall make payment to the applicant in the sum of R 20 000.00 per month as maintenance for the applicant and the minor children.

[12.2] The maintenance referred to above shall commence on or before 31 March 2024, and shall then be paid on or before the first day of each successive month.

[12.2] The respondent shall maintain the applicant and the minor children on his medical aid scheme, and shall pay all reasonable shortfalls not covered by the medical aid, which shall include medical, dental, surgical, hospital, orthodontic and ophthalmological expenses, and spectacles and contact lenses.

[12.3] The respondent shall continue to pay all the fixed expenses of the applicant and the minor children including school fees and Madressa fees.

[12.4] The costs of the application shall be costs in the action.

SWANEPOEL J

JUDGE OF THE HIGH COURT GAUTENG

DIVISION PRETORIA

COUNSEL FOR APPLICANT: Adv A Coetsee

ATTORNEY FOR APPLICANT: S.M. Kader & Associates

COUNSEL FOR RESPONDENT: Adv. N Cheethai

ATTORNEYS FOR RESPONDENT: Dev Maharaj & Associates Inc

DATE HEARD: 7 March 2024

DATE OF JUDGMENT: 26 March 2024