

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022/058116
NOT REPORTABLE
NOT OF INTEREST TO OTHER
REVISED
23/10/23

In the matter between:

M C A (born M)

Applicant

and

M, D W

Respondent

JUDGMENT

LIEBENBERG AJ

- [1] The separation of spouses in a single-income family necessarily involves a loss of economies of scale. When, after such separation, the children of the marriage are enrolled in a private school, having previously been home-

schooled, the loss is even greater. The parties to this application are such spouses.

- [2] The parties, who were married to each other on 21 August 2010, out of community of property subject to the accrual system, are the parents of two young daughters, K who is 11, and S who is 9. Until about 2 December 2022, when the applicant and the children moved out, the family lived in a home which is registered in the respondent's name, in Kosmos, next to the Hartebeespoort Dam.
- [3] At the commencement of the argument, I was advised that the parties had settled the very few disputes between them relating to the care and contact arrangements in respect of the children. I requested a draft order in this regard, which I incorporated into my order below.
- [4] Throughout the marriage, the applicant was the sole breadwinner, working in a close corporation of which his father holds 49% members' interest. There is no debate that throughout the subsistence of the marriage, the parties received substantial financial assistance from the respondent's family. Even in her Financial Disclosure Form, the applicant stated under oath that "[d]uring the marriage the respondent's family and family business made significant contributions to the income and welfare of the family. For instance, they provided a donation to allow the purchase of [the matrimonial home], they paid the [respondent] R 5000.00 a month, they also provided a credit card for the [respondent] to use as necessary for groceries, etc. They may have contributed to many more expenses unbeknownst to the [applicant]".
- [5] I accept that at no stage could or did the parties maintain a lifestyle funded solely by the respondent's income. Had it not been for the contributions of the respondent's parents and the 'family business', the parties' lifestyle would have been far less comfortable than it was. The separation of the parties brought about two households to be maintained, and additional expenses to be paid, all from the same income.

[6] Since the parties' separation, the respondent made at least the following contributions towards the maintenance needs of the applicant and the children, which he tenders to continue doing:

[6.1] By retaining them as dependants on his medical aid scheme at his cost, and paying those medical and the like expenses incurred in respect of the children which are not covered by the medical aid scheme.

[6.2] Paying the rental of R 14 300.00 per month in respect of their accommodation.

[6.3] By paying the costs of K's piano lessons and S's horse riding expenses.

[6.4] The children were previously home-schooled. Since May 2023, they have been enrolled in a private school, and the respondent has been paying the school fees and for their school uniforms. He also made payments in respect of stationery and the like.

[6.5] He continues to pay the applicant's cell phone account, as well as the monthly instalments, the insurance premiums and the tracking system subscription in respect of the Toyota Fortuner vehicle the applicant uses. This vehicle is registered in the respondent's name.

[6.6] Additionally, he made ad hoc cash payments towards groceries and similar expenses.

[7] The applicant accepts the respondent's tender, which, based on the amounts he lists, equates to about R 56 377.76 per month. It is calculated as follows:

[7.1] The premiums associated with the applicant and the children's dependency on the respondent's medical aid scheme and the medical excesses and levies in respect of the children, being an average of R 1 000.00 per month. The total monthly premium, which also includes the respondent's portion thereof, amount to R 9 584.00 per month.

- [7.2] The children's school fees, being an amount of R 18 571.67 per month, and the cost of their school uniforms of about R 500.00 per month. He also tenders to pay their stationery costs.
- [7.3] In respect of the Toyota, the monthly finance instalments (R 8 687.64), the short-term insurance premiums, the costs of vehicle maintenance (R 500.00), and the annual vehicle license (R 120.00 per month).
- [7.4] The applicant's cell phone account of about R 1 243.00.
- [7.5] K's piano lessons of R 940.00 and S's horse riding lessons of R 2 575.00.
- [7.6] The monthly rental in respect of the accommodation of the applicant and the children, in an amount of R 14 300.00. In this regard, the respondent tenders to pay the landlord directly whereas the applicant seeks the amount to be paid to her.
- [8] On a reading of the affidavits, and having heard argument, the only real issues for determination are the extent, if any, of the cash contribution towards maintenance the respondent ought to pay, and the extent, if any, of a contribution towards the applicant's legal costs.
- [9] The applicant contends that her and the children's monthly expenses amount to R 49 495.00. In his critique, the respondent suggests the amount of nearer to R 40 000.00 per month, excluding those expenses he tenders to continue paying.
- [10] Conceding that the applicant's prayers include some double accounting, counsel urged for an order obligating the respondent to pay a cash amount of R 38 395.00, inclusive of the rental amount of R 14 300.00. Thus, the applicant seeks an aggregate contribution towards her and the children's maintenance in the amount of R 80 472.76 per month.
- [11] The respondent explains that, at this juncture, in addition to his net salary of R 60 914.88, he receives R 18 000.00 per month from his father which he pays towards the children's school fees, and he has the use of a credit card on his father's account, with a monthly limit of R 10 000.00, which he uses to buy

groceries and the like. Thus, he has access to an aggregate of R 88 914.00 per month to pay his, the applicant and the children's reasonable monthly expenses.

[12] There is no debate that the respondent's net salary amounts to just short of R 61 000.00 per month. The applicant also accepts that the respondent has use of his father's credit card to the tune of about R 10 000.00. As such, I accept that the applicant's own bank statements cannot and will not demonstrate the extent of his monthly expenses.

[13] The applicant argues that, based on his bank statements, the respondent in fact has an average monthly income of R 102 870.54 plus the use of his father's credit card. The computation was based on adding up the credits into the respondent's cheque account. Counsel for the applicant conceded that the schedules attached to her supplementary heads of argument were not entirely accurate.

[14] I am not convinced the calculation is in fact correct, as it is equally clear that many of the credits are soon followed by debits in a very similar amount to what appears to be service providers relating to expenses of the applicant and the children. It would appear that, whenever an unexpected expense arises, the respondent obtains the necessary funds from his father and/or the family business, whether in the form of a loan, a donation, or some other transaction.

[15] Based on the respondent's exposition of his assets and liabilities, other than unit trusts of about R 115 608.15 and a small investment account of less than R 5 000.00, it does not appear that the respondent has much by way of liquid assets with which he can supplement his income in order to further contribute towards the maintenance needs of the applicant and the children.

[16] According to the respondent, his reasonably monthly expenses, including those he tendered to pay towards his family, amount to R 100 424.64. Accepting some of the applicant's criticism against the list, it is evident that respondent's expenses far exceed his net salary. And absent the generous contributions from his family, he would suffer substantial monthly shortfalls.

- [17] The conundrum is this: to what extent is the respondent to contribute to all or part of those maintenance needs not covered by his tender.
- [18] Counsel for the applicant advanced argument that the applicant is entitled to retain the standard of living the parties enjoyed during their cohabitation,¹ submitting that it is unacceptable that the applicant's parents should be burdened to provide her with financial support as that duty rests on the respondent.²
- [19] Whilst true as general propositions, these arguments are not supported by the common cause facts on the affidavits: (a) at all relevant times the parties' standard of living was funded by the respondent's family and family business; and (b) these family members and business continue to fund the parties' maintenance needs where the respondent's income falls short. The evidence does not bear out a husband and father who shied away from his maintenance obligations, expecting his in-laws to carry the proverbial can.
- [20] The respondent's family and the family business are not parties to this application, and I cannot make any order binding on them. Whilst I doubt that the respondent's family will cease their financial assistance where and when needed, I cannot make an order against the respondent which he is unlikely to be able to adhere to, based on a hope and a prayer that his family will come to his financial rescue. One cannot, after all, draw blood from a stone.
- [21] On the evidence before me, I am not persuaded that the applicant is unemployable. She is relatively young and the children no longer require her attention throughout the day. She holds a bachelor's degree, an honours degree, an LLB degree as well as a certificate in interior decorating, but has not worked throughout the parties' cohabitation. According to the respondent, referring to photographs on social media, there is reason to believe that the applicant is involved in her mother's business, earning some form of income. Whether this is so, I cannot determine on the evidence before me. What I can determine is that the respondent does not have the financial ability to contribute another R 38 395.00 per month over and above his tender.

¹ See *Taute v Taute* 1974 (2) SA 675 (E); and *Du Preez v Du Preez* 2009 (6) SA 28 (T).

² Referring to *Y.M v T.J.M* [2023] ZAGPPHC 582.

- [22] Rule 43 procedure, even with the assistance of Financial Disclosure Forms, do not allow for exact mathematical computations of litigants' financial affairs and their maintenance requirements. In the absence of oral evidence, I can make no credibility findings or draw conclusions from assumptions based on annotations on bank statements.
- [23] This Court also cannot order the parties to remove their children from a particular school, to discontinue the children's participation in expensive extramural activities such as horse riding, or to sell assets. Not that I was urged to do so. I can however caution the parties to take stock of their financial position, and make reasonable adjustments where needed. This includes the applicant taking all steps necessary to generate her own income.
- [24] The applicant's claim for a contribution of R 150 000.00 towards her costs in the action are not supported by any evidence. The founding affidavit does not contain an exposition of the applicant's costs already incurred or a suggestion of how the amount claimed has been calculated.
- [25] I am advised that as matters stand, pleadings are yet to close. Thus, the issues for determination are yet to be crystallised.
- [26] For purposes of the application, I accept that the respondent is in a stronger financial position than the applicant - after all, he earns a salary, and is possessed of a home (which is encumbered). I also accept that, as a general rule, litigants are entitled to litigate on a commensurate scale. However, I am not prepared to accept that the respondent's financial affairs are as intricate or convoluted as the applicant suggests.
- [26.1] He has put up documentary evidence to support his explanations regarding an employees' trust of which he is a trustee which owns 51% members' interest in the 'family business' with the respondent. As already stated, his father owns the remaining 49%. There is no suggestion that the respondent holds any members' interest in the business.

[26.2] I accept the respondent's explanation of how his mother bought and paid for a vehicle for his use, whilst the applicant continues to use the Toyota.

[26.3] By all accounts, the calculation of the accrual in each party's estate ought not to be too taxing.

[27] The parties, having sensibly agreed to interim care and contact arrangements in respect of the children, ought to be able to navigate their co-parenting roles in future.

[28] That said, the respondent can utilise some of his liquid assets to make an initial contribution towards the applicant's legal costs.

[29] In the result, I grant an order in the following terms *pendente lite*:

1. Both parties remain co-holders of parental responsibilities and rights in terms of section 18 of the Children's Act 38 of 2005 to the minor children, K[...] and S[...], with the children's primary residence vesting with the applicant and the respondent to exercise contact with the minor children as follows, by agreement between the parties:

- 1.1 Every alternate weekend from Friday when the respondent will collect the children from school or their extramural activities until Sunday 17:00 when the respondent will return the children to the applicant's home.

- 1.2 When the children are with the respondent for his weekend contact as set out in paragraph 1.1 above, the respondent shall attend to the necessary in assisting the children with their homework and/or assignments in order to ensure that all of their homework and assignments are completed prior to the children being returned to the applicant on a Sunday.

- 1.3 In the weekend following his weekend contact as provided for in paragraph 1.1 above, the respondent shall be entitled to have the children with him on either Tuesday or Thursday, when he shall collect the children from the applicant at 16:30 and return them to the

applicant's residence at 19:00. The respondent shall, by no later than 17:00 on the preceding Sunday, inform the applicant on which day he shall exercise contact. The respondent shall similarly inform the applicant if he is unable to exercise the contact.

- 1.4 The mid-term break from 26 October 2023 to 30 October 2023 shall be deemed a long weekend and the party in whose custody the children are in, in accordance with paragraph 1.1 above, shall have the children for that weekend.
- 1.5 The long school vacation from 5 December 2023 to 16 January 2024 shall be divided in a three-week split with Christmas and New Years alternating between the parties, provided that the children shall be returned to the applicant's care no later than 17:00 on the Sunday preceding the first day of the new school year in order to do final preparations for school.
- 1.6 The mid-term break from 23 February 2024 to 25 February 2024 shall be deemed a long weekend and the party in whose custody the children are in, in accordance with paragraph 1.1 above, shall have the children for that weekend.
- 1.7 The respondent shall have the children with him for the Easter weekend from 29 March 2024 until 1 April 2024.
- 1.8 The school vacation from 12 April 2024 to 5 May 2024 shall be divided equally between the parties, by agreement to be reached between them.
- 1.9 The mid-term break from 1 July 2024 to 5 July 2024 shall be divided equally between the parties, by agreement to be reached between them.
- 1.10 The long school vacation from 2 August 2024 to 1 September 2024 shall be divided equally between the parties, by agreement to be reached between them.

- 1.11 The mid-term break from 25 October 2024 to 27 October 2024 shall be deemed a long weekend and the party in whose custody the children are in, in accordance with paragraph 1.1 above, shall have the children for that weekend.
- 1.12 The children shall spend Father's Day with the respondent, and if the day does not fall on his contact weekend, in accordance with paragraph 1.1. above, then he shall have them from 9:00 until 17:00 on Father's Day.
- 1.13 The children shall spend Mother's Day with the applicant, and if the day does not fall on her contact weekend in, accordance with paragraph 1.1 above, then she shall have them from 9:00 onwards on Mother's Day.
- 1.14 K shall spend her birthday with the applicant in uneven years, and with the respondent in even years.
- 1.15 The weekend after K's birthday shall be spent with the parent in whose care the children are as provided for in 1.1 above.
- 1.16 As S's birthday falls in the long summer school vacation, the party in whose care she is in, in accordance with paragraph 1.4, shall have S on her birthday, subject to the day alternating between the parties annually.
2. The respondent is ordered to contribute towards the maintenance needs of the applicant and the two children as follows:
- 2.1 By payment to the applicant of the amount of R 20 000.00 per month, the first payment to be made on or before 1 December 2023 and monthly thereafter on or before the first day of each calendar month.
- 2.2 By retaining the applicant and the children as dependents on his medical aid scheme, and by paying of all reasonable and necessary medical, dental, hospital, prescribed pharmaceutical, therapeutic,

orthodontic, ophthalmic, optometric (including spectacles and contact lenses) and the like expenses incurred in respect of the children and not covered by his medical aid scheme.

- 2.3 By payment of the children's reasonable educational expenses, including school fees at agreed schools, school uniforms, prescribed books and stationery, the costs the children's agreed extramural activities, including the necessary kit and equipment.
- 2.4 By payment of the monthly finance instalments, the short-term insurance premiums, the annual license fee, and the costs of reasonable and necessary maintenance and repairs to the Toyota Fortuner vehicle which the applicant currently uses and shall be entitled to continue using.
- 2.5 By payment to the relevant service provider for the costs of the applicant's monthly cell phone account.
- 2.6 In the event of the applicant making payment of any expense for which the respondent is liable in terms of this order, the respondent shall reimburse the applicant within seven days from date of presentation of an invoice and proof of payment.
3. The respondent is ordered to pay, as an initial contribution towards the applicant's legal costs, the amount of R 15 000.00 which shall be payable by way of three equal monthly instalments, the first payment to be made on or before 1 December 2023 and monthly thereafter on 1 January and 1 February 2024.
4. Costs of the application shall be costs in the cause of the divorce action.

SARITA LIEBENBERG

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHASBURG**

Heard on 13 October 2023

Judgment on 23 October 2023

For the applicant: Adv R Adams

Instructed by: AKA Attorneys Inc, Bryanston

For the respondent: Adv T Terner

Instructed by: Kim Meikle Attorneys, Parkhurst