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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: 44446/2021

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

.....

SIGNATURE

.....

DATE _____

In the matter between:

$$\mathbf{M}[\dots] \mathbf{N}[\dots]$$

Applicant

And

L[...] **R[...]** **N[...]**

Respondent

JUDGEMENT

NQUMSE AJ

INTRODUCTION

[1] This is an opposed application *pendentelite* in terms of Rule 43. The applicant who is the defendant in the divorce action against the respondent seeks an interim relief for maintenance in the amount of R20 000.00 per month for herself and R20 000.00 per month for each of their two children, a contribution towards legal costs in the amount of R30 000.00; specific contact rights to be amended to the respondent and that costs of this application to be costs in the divorce action.

[2] In its opposition, the respondent raised a point in limine on the following grounds:

[2.1] That the applicant did not utilize the correct form 17 required in the launch of this application.

[2.2] The court's jurisdiction is not evident from the applicant's sworn statement.

[3] I need not spend time dealing with points in limine since both were dismissed before submissions were made on the merits of the application.

FACTUAL MATRIX

[4] The parties were married on 11 June 2011 out of community of property with accrual as provided in chapter 1 of the Matrimonial Property Act 88 of 1984. Out of their marriage two children who are both girls were born with their ages as 6 and 3 years old.

[5] The applicant runs a business from which she earns R43 000.00 per month. Her expenses of R16 500.00 leaves her with a net income of R26 500.00.

[6] The applicant in her affidavit alleges that she is under pressure from the respondent to vacate their common property and she can be able to do so when her expenses which will total R89 506.00 can be met from a contribution of R63 000.00 by the respondent, to add to her net income of R26 000.00. In support of her claim for maintenance she prepared an expenditure table which for sake of convenience shall reproduce hereunder:

Expenditure	Self	Children	
Baby Food		600.00	600.00
Lunches		1000.00	1000.00
Cell phone		666.00	666.00
Domestic worker	2300.00	3000.00	5300.00
Clothing	1000.00	2000.00	3000.00
Transport Maintenance	1600.00	1600.00	3200.00
Taxi / Uber	100.00	200.00	300.00
Stationary			3000.00
Outings	1000.00	1000.00	3000.00
Sports	1000.00	1000.00	3000.00
Medication		1060.00	1060.00
Pocket Money		200.00	200.00
Holidays	2500.00	2500.00	5000.00

Gym	1880.00		1880.00
Entertainment	2000.00	2000.00	4000.00
Edgars	2000.00	2000.00	4000.00
TOTAL:		35 706.00	

[7] The applicant disputed that the respondent earns a salary of R30 000. 00 as alleged by the respondent. She enclosed the financial statements of the respondent's business ([....] CC) in which the business income for the year ending 29 February 2020- was R19 641 937.39 and a retained income of R2 914 454.09.

[8] In response, the respondent refers to a mediation process that was to be held on 24 November 2021 in order to resolve the calculation of their accrual which according to him would effectively dispose of the pending divorce between them. Whilst he was still looking forward to the mediation appointment, he was served with this application which according to him would inevitably create an acrimonious attitude between them and further complicate the settling of their matter. It is on this ground that the respondent rejects the claim against him to contribute towards the legal costs of the applicant.

[9] The respondent further claimed that the applicant has not taken this court into her confidence through her failure to support her financial position with corroborated bank statements or any supporting factual

documentation. This is at the backdrop of her conducting five separate bank accounts as can be gleaned from her financial disclosure form; instead she responded with a “*n/a (not applicable)*” where she was required as per the form to indicate the income of her business.

[10] The respondent alleged that applicant conducts her business from premises that she rented from her uncle at the cost of R15 000.00 which was submitted by the applicant. Further, the applicant is not contributing a cent towards maintenance of the children, whereas he is solely responsible for their maintenance. He lists the items he is responsible for as follows:

1. Food, groceries, cleaning materials and toiletries;
2. Baby food;
3. Lunches;
4. Clothing and shoes;
5. School uniform;
6. Sport clothes;
7. Insurance;
8. All educational expenses;
9. Medical expenses for the minor children including medication.
10. Pets food.

He estimates the expenditure of the groceries, cleaning products, lunches and toiletries to be approximately R5 000.00.

[11] His attitude towards his responsibility is that in the event he is liable to pay maintenance towards the applicant he views the items below as luxury and will have to be excluded. The items are:

1. Cellphone;
2. Domestic worker;

3. Gardener;
4. Personal care; hair, make up and cosmetics;
5. Clothes;
6. Parking;
7. Pocket money;
8. Holidays;
9. Replacement of kitchen and linen/towel;
10. Dstv
11. Entertainment and recreation;
12. Gym
13. Religious contributions and charities;
14. Gifts and
15. Clothing accounts.

[12] According to the respondent, the exclusion of the above items will decrease the applicant's expenses by approximately R26 000.00 and effectively bring her expenses, albeit inflated to R63 116.00. The respondent sought to illustrate the extent to which the applicant has inflated her expenditure by annexing a quotation as 'LN 2' on his papers in which the service of the applicant's vehicle is indicated as approximately R500 per month as opposed to the R3 200.00 per month which the applicant claims. Similarly, he estimates that the monthly expense for fuel given that the school of their children is 7 km away from their home be R1000.00 per month. His calculations of the applicant's income and her actual projected expenses leaves the applicant with a surplus of R11 054.00. Whilst the respondent confirms that he had requested the applicant to vacate their commune home he has also tendered an amount of R5000.00 per month towards the accommodation of the children.

[13] Rule 43 (1) reads as follows:

- 1) This rule should apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
 - a) Maintenance *pendentlite*;
 - b) A contribution towards the costs of a matrimonial action pending or about to be instituted;
 - c) Interim care of any child;
 - d) interim contact with any child.”

[14] The factors that should be taken into account with regard to the maintenance of a spouse by another in divorce actions are set out in **Section 7(2) of the Divorce Act**¹ and include the existing or prospective means of each of the parties, their respective earnings capacities financial needs and obligations, the age of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, and any other factors which in the discretion of the court should be taken into account. Although the section above applies to the divorce action there is no reason why the same principle laid down in the section cannot be of good use in an application under Rule 43. I shall therefore consider the application and the determination to be made through the prism, of **Section 7 of the Divorce Act**.

[15] During argument, Ms Basson counsel for the applicant submitted that the rental of R10 000.00, which is R5 000.00 for the applicant and R10 000.00 for both the children is not unreasonable. She also submitted

¹ Act 70 of 1979

that the expense for the children is anything between R20 000.00 and R22 000.00, excluding school fees extra-mural activities and school related costs. It is worth noting that the figure that is proposed by Ms Basson is excluding maintenance for the applicant. Her stance is no surprise given that the applicant makes no contribution from her income towards the maintenance of the children, contrary to the legal principle that parents depending on their levels of income are responsible for the maintenance of their children (**see Section 18. (2) of the Children's Act 38 of 2005**).

[16] The applicant's failure to make any contribution towards her children is at the backdrop as was argued by Ms Van Schyff for the respondent, that a closer look at her financial activities and position it appears that she has a surplus in her income which she failed to disclose.

[17] I am of the view that the respondent should not be called upon and be saddled with carry the maintenance of the applicant.

[18] Undoubtedly, the applicant has unjustifiably inflated the expenses in her expenditure table above. By way of example she claims the following amounts which were clearly thumb sucked; a lunch of R1 000.00 whereas she has made provision of R5000 for groceries, R2 000.00 for entertainment and recreation whilst at the same time claiming R 2 000.00 for pocket money. She makes provision for R1 500.00 for an Edgars account for the children, whereas she also claims R2 000.00 for clothing and shoes. I also find it very difficult to understand how children of ages six and three should have a cellphone allowance of R666.00 per month.

[19] Notwithstanding my criticism of the applicant's lavish and extravagant amounts she claims, there is sufficient justification that the children require maintenance for their needs. A vexed questions is always the issue of quantum. And in a majority of cases the dispute is over the reasonable amount to be paid by one to the other.

[20] Having regard to the items the respondent has tendered to pay for; I am of the view that a monthly payment of R16 000.00 per month towards the maintenance of both children will be adequate, and will meet the need for their general living expenses in accordance with the affordability of the respondent.

[21] I now turn to deal with the applicant's demand for a contribution of R30 000.00 towards her legal expenses. In keeping with the principle of equality of arms and access to courts. Our courts have tendered to order a party who is financially stronger to contribute towards the legal costs of the one who is financially disadvantaged. The purpose of the remedy has consistently been recognized as being to enable the party in the principal litigation who is comparatively financially disadvantaged in relation to the other side to adequately place her or his case before the court.²

[22] It therefore follows that a party who requires the court to come to her assistance in ordering the other to contribute towards her or his legal expenses, ought to present convincing evidence that justifies the demand. As alluded earlier the applicant derives an income from her business. With some level of financial prudence and astuteness needed by the applicant it is apparent that she is not financially disadvantaged. Without her giving a detailed breakdown to justify the amount required for the aid

² Van Rippen v Van Rippen 1994 (4) SA 634 (c) at 639 - 640

that is sought, it is extremely difficult for the court to come to her assistance.

[23] Further, the issue that appears to be outstanding the divorce between the parties does not appear to be a complex one, particularly that their application was brought in the process of mediation which the parties had agreed to and which may have narrowed their differences.

[24] For the reasons above I am not persuaded nor inclined to order the respondent to make a contribution towards the legal expenses of the applicant.

[25] Finally, is the issue of interim contact arrangements. There appears no major dispute between the parties regarding the rights of the respondent to contact the minor children who are in the care of the applicant. The only issue that has arisen and which requires the court's intervention is caused by one-day difference, whether the respondent should on the alternative weekend fetch the children on a Wednesday or Thursday. I have found no tangible reason why the respondent should not be allowed to have access to his children every alternative week from a Wednesday at 17:00 until Monday before school.

[26] In light of the foregoing I make the following order:

26.1 Pending the determination of the divorce action between the parties, the respondent shall maintain his minor two children born of the parties marriage by payment to the applicant an amount of R18 000.00 per month;

26.2 The parental responsibilities and rights with regard to guardianship and care are retained by both parties but that the permanent residence of the children should vest with the applicant subject to the respondent's parental responsibilities and rights with regard to contact to be exercised as follows:

26.2.1 The respondent shall be entitled to have the children every alternative Wednesday from 17:00 until the Monday before school when it shall be respondent's responsibility to ensure that the children are delivered at their respective schools on the said Mondays;

26.2.2 Both parties shall enjoy unfettered telephonic and/or electronic communication with the children when the children are with the other party;

26.2.3 The children shall spend Mother's day with the applicant and Father's day with the respondent;

26.2.4 The children shall spend the respondent's birthday with him and the applicant's birthday with the applicant.

26.2.5 Both parties should be allowed equal access/contact with the children on their birthdays.

[27] The costs of this application to be costs in the divorce action.

M NQUMSE AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT PRETORIA

For the Appellants : H J Basson
Instructed by : Bernhardt Van Der Hoven

For the Respondent : A Korf
Instructed by : Chyrise Smith Incorporated

Heard on : 7 February 2022
Judgement handed down on : 18 February 2022