

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

CASE NO: 4828/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES / NO

REVISED: YES / NO

20/04/22

In the matter between:

C[....] O[....] (Born P[....])

APPLICANT

AND

E[....] O[....]

RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on April 2022.

BAQWA J:

A. INTRODUCTION

[1] The applicant herein seeks an order regarding the primary residence and contact rights with regards to the children of the marriage, medical aid, spousal maintenance for the children as well as a contribution towards legal costs pending the finalisation

of the divorce action between them.

[2] The Respondent opposes the application and seeks condonation for the late filing of the respondents answering affidavit.

[3] The issue of primary residence for the children is common cause between the parties in that they agree to both parties retaining full parental rights and responsibilities and the applicant being awarded primary care and residency.

B. BACKGROUND

[4] The parties were married to each other in community of property on 22 November 2019 and two children were born now aged about 3 years and 10 months and 1 year and 6 months respectively.

[5] At the time of the institution of the Rule 43 proceedings the children were and presently remain in the primary care of the applicant. The nature and extent of the respondent's rights to contact remains in dispute.

[6] The applicant states that at the commencement of the Rule 43 proceedings she was employed as part-time real estate agent with *Keller Williams Edge* ("KW Edge"). Subsequent to deposing to her affidavit her employment was terminated resulting in her current status as an unemployed person who earns no regular income or alternatively earns a very limited income on an ad hoc basis.

[7] During the subsistence of the marriage and prior to the institution of divorce proceedings the applicant was reliant on the respondent for her personal as well as the minor children's monthly maintenance needs. The applicant is currently 26 years old.

[8] In December 2021 the respondent informed the applicant that she and the minor children should vacate the matrimonial home at the end of January 2022 because the respondent and in particular his mother had cancelled the lease agreement. Consequently, the applicant and the children were left destitute and had to rely on good Samaritans like Melandri Grobler ("Melandri") and her mother, Mrs Soreta

Grobler who provided them with temporary accommodation.

[9] During this period the respondent did not provide any maintenance to the applicant.

[10] He has however tendered a maintenance contribution as follows:

10.1 R2000 per month per child which amount shall be subject to an annual escalation according to the consumer price index;

10.2 The respondent shall retain the minor children as dependents on his medical aid subject to timely payment of the monthly premium;

10.3 The respondent proposes that each party be responsible for their medical needs and requirements.

10.4 He tenders to pay for their children's school fees.

10.5 He however proposes that each party be equally responsible for all reasonable scholastic expenses including school uniforms, books and extra mural activities.

[11] The tender by the respondent has not been accepted by the applicant on the basis that it does not accord with the needs of the children nor is it properly aligned with the respondent's financial means or lack thereof.

[12] The applicant has set out her monthly expenses in her founding affidavit and in light of the fact that she no longer earns any income, her shortfall is equal to her total monthly expenses.

C. CONDONATION APPLICATION

[13] Before considering the rest of the application it is necessary to deal with the respondent's application for condonation of his late filing of his answering affidavit contrary to the provisions of Rule 43(3) which require a respondent response within

ten days failing which he shall be barred.

[14] The respondent failed to file his response within the prescribed period and after being given a further indulgence of five days he still failed to comply.

[15] Some of the factors that a court has to consider is whether there will be prejudice caused by a failure to submit his answering affidavit timeously. The court has to consider also the period of delay in delivery the required document.

[16] I have considered the matter and I hold the view is that the delay period was not religious and that it has no significant moreover, refusing its admission will result in the applicant and the court not knowing the respondent's defence if any.

[17] In these circumstances where the court would only hear one side of warring parties, I consider it to be in the interests of justice to admit the respondent's answering affidavit and condone the late filing.

D. APPLICATION TO FILE A REPLY

[18] Ordinarily I would not accept further evidence from an applicant who has to make her case in her founding affidavit. In the present case I am persuaded that the events which applicant seeks to address occurred after she had filed her papers. I am referring to her loss of employment and the allegations by the respondent that she is being maintained as a "housewife" by Melandri'.

[19] In the result the new evidence by the applicant is admitted

E. MAINTENANCE

[20] Interim maintenance was discussed in

*Taute v Taute*¹ as follows: "...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 reasonable

¹ 1974 (2) SA 675 (E) at page 314.

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. I have found nothing however in the decisions to which I have been referred which justify in such maintenance the inclusion of extraordinary or luxurious expenditure even in the case, for example, of Glazer V. Glazer² where the husband is described by WILLIAMSON, J. (as he then was), as being “very wealthy” or “very rich”. The quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summarised facts contained in the founding and answering affidavits as indeed is contemplated and intended by Rule 43. It is also in my view helpful to take cognizance of the approach made in the affidavits by the applicant and the respondent respectively, bearing in mind that normally it is not the practice in these matters (although permissible) to test the evidence viva voce. A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands— similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them...”

[21] Bearing in mind the *dictum* in the *Taute* decision, the respondent cannot evade his responsibility by hiding behind people who, whilst seemingly supporting the applicant, have no legal obligation to do so.

F. CONTRIBUTION TOWARD COSTS

[22] The contribution toward costs which the applicant seeks is part of the duty of support which spouses owe each other and it was discussed in *r Cary v Cary*³

“The claim for a contribution towards costs in a matrimonial suit is sui generis. It has its origin in Roman Dutch procedure and has been sanctioned through many decades in our own practice (see, inter alia, Van Rippin v Van

² 1959 (3) S.A. 928 (W).

³ [1999] 2 All SA 71 (C); 1999 (3) SA 615 (C) at 619H-620H.

Rippin 1949 (4) SA 634 (C)). The basis of the claim is the duty of support the spouses owe each other (see Chamani v Chamani 1979 (4) SA 804 (W) at 806FH). The manner of assessment of quantum of the contribution was dealt with in the case of Van Rippin (supra) at page 639: "The quantum which an applicant for a contribution towards costs should be given is something which is to be determined in the discretion of the Court. In the exercise of that discretion the Court should, I think, have the dominant object in view that having regard to the circumstances of the case the financial position of the parties, and the particulars issues involved in the pending litigation, the wife must be able to present her case' adequately before the court".

G. THE APPROACH OF THE COURT

[23] Whilst the applicant may be entitled to a legal contribution as stated above it is incumbent on her to enable the court to reasonably assess what amount to award in that regard by providing a pro forma account or legal bill of costs as part of her evidence. In the absence of such an account I am not satisfied that the applicant has made out a case regarding a contribution to costs.

[24] I am however satisfied that the applicant has made out a case for spousal maintenance, maintenance for the children and related expenses. The children's primary residence will remain with that applicant subject to a reasonable right to access which will be more accurately defined in the following order.

[25] I have also considered the evidence of the respondent with regard to his income. In that regard I am not satisfied that he has been candid with the court especially regarding the companies that he runs or manage together with his mother. Some items which appear as company expenses would actually seem to be personal expenses.

[26] I have come to the conclusion that he can afford more than he has tendered to pay.

[27] In light of the above I make the following order:

1. Both parties shall retain full parental responsibilities and rights in regards to the care of the minor children born between the parties, as contemplated in Section 18(2) of the Children's Act, Act 38 of 2005;
2. The care and primary residency of the minor children be awarded to the Applicant;
3. Specific parental responsibilities and rights with regards to contact with the minor children as contemplated in Section 18(2)(b) of the Children's Act, Act 38 of 2005, be awarded to the Respondent, more specifically:
 - 3.1 From now until an investigation by the Family Advocate has been concluded and a report regarding recommendations pertaining to the Respondent's contact rights have been received: -
 - 3.1.1 The Respondent will be entitled to have contact with the minor children every alternative Saturday and Sunday from 09h00 to 15h00;
 - 3.1.2 During school holidays the contact will remain the same as stipulated during the school terms.
 - 3.1.3 The Respondent will be entitled to have telephonic contact with the minor children, which will include video calls, face time, and skype etc., every Monday, Wednesday and Friday from 18h00 until 18h30.
 - 3.1.4 The Respondent will be entitled to remove the minor children from 09h00 to 15h00 on their respective birthdays.
 - 3.1.5 The Respondent will be entitled to remove the minor children from 09h00 to 15h00 on Father's Day and on the Respondent's birthday.
 - 3.1.6 All contact with the minor children shall be exercised in such a manner as to not unreasonably interfere with the minor children's scholastic, religious and cultural activities.
 - 3.1.7 The parties shall jointly make decision regarding the minor children's education, medical, social, scholastic, extramural activities, religious and sporting activities.
 - 3.1.8 Neither party shall remove the minor children from the Republic of South Africa and/or Gauteng Province without the other party's consent, provided that such consent shall not be unreasonably withheld. Should the minor children be removed out of the Republic of South Africa with both parties' consent, the necessary and proper

medical precautions for the relevant country should be discussed well in advance (not being less than one month, unless otherwise agreed between the parties) and be taken prior to travelling. The medical costs associated therewith will be paid by the party who is responsible for taking the minor children out of the Republic of South Africa.

3.2 The right to contact will be adjusted according to the recommendations made by the Office of the Family Advocate, Pretoria after an enquiry in terms of Section 4 of the Mediation in Certain Divorce Matters Act, 24 of 1987 have been completed and the report has been issued.

4. The Respondent is ordered to reinstate the Applicant within 14 (fourteen) days on the same, alternatively another medical aid which offers the same benefits as what the Applicant had enjoyed prior to the parties becoming separated. The Respondent is also ordered to retain the two (2) minor children as beneficiaries on his medical aid and make such further contributions towards those reasonable medical costs not specifically covered by a medical aid, within 14 (fourteen) days of the demand thereto.

5. The Respondent be ordered to pay maintenance towards the Applicant in the amount of **R4 000.00** per month. The first installment must be paid on the 1st day of the month following the granting of this order and shall continue on the 1st day of each and every consecutive month.

6. The Respondent is ordered to pay maintenance towards the minor children in the amount of **R3 500.00** per month per child. The first installment must be paid on the 1st day of the month following the granting of this order and shall continue on the 1st day of each and every consecutive month.

7. In addition to the aforementioned maintenance amount, the Respondent has tendered payment of the minor children's school fees for pre-school, primary school and tertiary school subject thereto that the children are enrolled in public school. Consent of both parties is required to enroll the minor children in private schools. Reasonable scholastic expenses including school uniforms, books and extramural activities to be shared between the parties equally within fourteen (14) days of receipt of an invoice by the respective party.

8. Costs of the application, shall be costs in the main divorce proceedings.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 28 March 2022

Date of judgment: April 2022

Appearance

On behalf of the Applicants

Instructed by

Adv JA Wyk

Tsihlas Incorporated

Tel: 072 223 5803

Email: advjavanwyk@gmail.com

On behalf of the Respondents

Instructed by

Adv JW Wyk

Vogel Incorporated

Tel: 083 299 8811

Email: wejvanwyk@me.com