



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 575/2022

In the matter between:

T[....] S[....] Applicant

and

M[....] A[....] S[....] Respondent

CORAM: RAMOS, AJ

HEARD ON: 03 MARCH 2022

DELIVERED ON: 14 MARCH 2022

JUDGMENT BY: RAMOS, AJ

INTRODUCTION

- [1] This is an application brought in terms of Rule 43 on behalf of the applicant. Advocate Johnson represents the applicant and Advocate van der Merwe represents the respondent.
- [2] The parties have come to an agreement concerning the terms of parental responsibilities and rights of the two minor children aged 14 and 4 years old. The applicant has agreed to relief sought by the respondent. The agreed terms will form part of the courts final order
- [3] What remains in dispute are the applicant's claims for:
- i) maintenance pendente lite in respect of the two minor children
 - ii) spousal maintenance for Applicant
 - iii) contribution to the Applicants legal fees.
- [4] The Respondent opposes the application and avers that he does not have the financial means to comply with the extent of the relief sought by the Applicant.

BACKGROUND

- [5] The parties were married in community of property on 28 March 2009 and the marriage still subsist. During February 2020, the applicant has instituted divorce proceedings in this court, which remains pending. The parties have been living apart since June 2020. They have not been able to settle the terms of the divorce settlement.
- [6] The Applicant and the two minor children are currently living in the communal home and the Applicant had agreed to continue with the bond repayments, as she is desirous of retaining the house and paying the respondent's half share in the property.

- [7] Since the separation the respondent had agreed to pay R2500 in respect of maintenance for the two minors girls. In addition, he paid the school fees and retained the girls on his medical aid which on covers hospitalisation.
- [8] The applicant managed to maintain the household until her unfortunate dismissal in February 2021 from ABSA bank where she worked as the bank manager. She received UIF payments from August 2021 until January 2022. She has since not secured permanent employment and have been living off loans made by her family in order to meet her monthly financial obligations.
- [9] The applicant confirms that the respondent continued to make maintenance payments but refused to make additional contributions to the household after she became unemployed.
- [10] The applicant avers that she has no income at this stage. She denies having a business as alleged by the respondent in his replying affidavit. She avers that her monthly expenses¹ amounts to R 37 500 and the children's expenses amount to R14 000 which amounts to a total of R 51 500. The combined shortfall after the R2500 maintenance payment amounts to **R 49 000**.
- [11] The applicant claims that the respondent is ordered to pay:
- (a) R37 500, 00 in respect of maintenance for the applicant
 - (b) R14 000, 00 maintenance to be paid in respect of the two minor Children
 - (c) the children to be retained on the respondent's medical aid
 - (d) the respondent to pay for the reasonable and necessary medical, dental, optometric and hospital cost not covered by medical aid
 - (e) R7500 in contribution to the applicant's legal costs.
- [12] The respondent is presently employed at Vodacom and earns a net income of

¹ Page 20 Annexure "A"

R 21 644.79². The respondent's monthly expenses inclusive of his maintenance obligation amounts to R 27 063.00.

- [13] The respondents avers that as part of the divorce settlement the applicant will receive R650 000.00 of his pension interest.
- [14] The respondent is further of the view that the applicant is unemployed due to circumstances of her own doing. He further contends that she has no basis for a claim for maintenance for herself as this was never claimed for in her divorce particulars of claims.
- [15] The Respondent further disputes the Applicants claim for a contribution to her legal cost as he avers that the application is unnecessary and that it could have been settled rather than pursuing further litigation in this regard.
- [16] Advocate Van der Merwe on behalf of the respondent argues that the applicants claim far exceeds the respondent's means. In an attempt to show good faith, the respondent has offered an additional R 500 added to the order he seeks in his papers. In essence, the respondent offers to pay maintenance for the children in the amount of **R 8692, 00** which includes his medical aid contribution for both children. His contribution will thus be as follows:
- (a) School fees : R 4692
 - (b) Medical aid : R1350
 - (c) Maintenance : R 2500
 - (d) Additional offer : 500
- | | |
|--------------|--------------|
| Total | R9192 |
|--------------|--------------|

ARGUMENTS

- [17] Advocate Johnson on behalf of the Applicants concedes that the applicant claims far exceeds the respondent income. He argues that the applicant was

² Respondents replying affidavit page 33 para 11

unsure of the Respondent's monthly income and merely stated her claims based on her and the children's needs. Having now had in sight into his income and expenses her argues that she will not be unreasonable with her relief sought.

- [18] He raised the concern that the school fees are in arrears and as such proposes that the applicant rather ensure that the fees are paid to avoid further arrears. He request that the amount payable towards school fees be include the maintenance amount payable to her.
- [19] The Applicant maintains her claim that the Respondent retains the children on his medical aid and pays all the incidental medical expenses not covered by the medical aid hospital plan.
- [20] Advocate Johnson argues that the Respondent is willing to reduce her claim for maintenance for herself to the amount of R 2500, 00. She request R7500, 00 contribution to her legal cost.
- [21] Advocate Johnson further address the issue surrounding the applicants alleged business venture and vehicles in her possession as a possible means of income. He submits that his client denies the existence of a business venture which was alluded to by the respondent in his replying affidavit. She concedes to possession of a BMW, which the respondent made reference to, but avers that it is not possible to sell and argues that the respondent has three vehicles in his possession, so why should she be compelled to sell her vehicles if retains ownership of the three vehicles in his possession presently.
- [22] Advocate Van der Merwe further argues that the applicants is not forthcoming with the extent of her income and expenditure. He argues that either her expenses are inflated or she must have found an alternative source of income to fund her expenses since she became unemployed. The court raised the fact that she avers that family members loaned her money to pay her bond

and vehicles. He retorted that it still does not explain how she funds the balance of her commitments.

[23] He argues that the respondent is in fact offering nearly 50% of his net income to cover his maintenance obligation to his children. He argues that the applicant is not entitled to maintenance as it firstly was never claimed in her particulars of claim and secondly that in essence she was never reliant on the respondent to maintain her. Throughout the years of the marriage, she maintained herself and was gainfully employed. He argues that in the absence of a claim in the main action the court is not entitled to make an interim order.

[24] He further argues that the applicant has provided basis for her claim for a contribution to her legal cost.

THE LAW

[25] **Rule 43. Interim relief in matrimonial matters**

(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters—

- (a) Maintenance pendente lite;
- (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.

[26] It is trite law that from its beginning until its termination, marriage imposes a reciprocal duty of support upon spouses, provided that the spouse who claims maintenance is in need of maintenance and the spouse from whom it is claimed is able to provide it.³ The extent of the duty of support is determined by the social status of the parties, their means or income, and the costs of

³ See *Oberholzer v Oberholzer* 1947 (3) SA 294 (O).

living.⁴ The applicant's entitlement to maintenance *pendente lite* depends on the marital standard of living of the parties.⁵ The court will have regard to the reasonable and actual expenses of the applicant and the respondent's capacity to meet such requirements from respondent's income.

[27] In an application of this nature, the applicant must show that she has insufficient means and that the respondent can afford to meet the amount she seeks. The applicant is not entitled to everything she wants but to what she needs.⁶ The fundamental principle applicable in cases of maintenance is that the applicant must prove the need of maintenance and an ability to pay on the part of the spouse from whom maintenance is sought.⁷ In other words, the court will have regard to the reasonable and actual expenses of the applicant and the respondent's capacity to meet such requirements from respondent's income.

[28] 'The claim for a contribution towards costs in a matrimonial suit is *sui generis*. An application for a contribution towards costs must show that, if she is the plaintiff in the main action, that she has a *prima facie* case; if she is the defendant that she is defending in good faith. The applicant must further show that she has insufficient means of her own to pay legal fees and that the amount sought is reasonably necessary to enable her to pursue her defence.⁸ The contribution is towards the costs of the action and the costs of interim applications are excluded. The sum to be contributed is determined by the court's view of the amount necessary for the applicant adequately to put her case before the court. The applicant is not entitled to all the anticipated costs,

⁴ See Cronje, 'South African Family Law' (2004) at 52.

⁵ *Taute v Taute* 1974 (2) SA at 676 D-F.

⁶ *Van Vuuren v Van Vuuren* [2009] JOL 23751 (GNP) at Para 13.

⁷ *Qozo v Qozo* 1989 (3) SA 838 (Ck).

⁸ See *Nicholson v Nicholson* 1998 (1) SA 48 at 50 C – E, where the court stated: "The question to be considered is what the Applicant needs for reasonable proceedings. The cases were reviewed in *Dodo v Dodo* 1990 (2) SA 77 (W), the Applicant is entitled if the Respondent has the means, and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the Respondent is litigating and the scale on which the Applicant intends litigating (I would have qualified this by reference to what is reasonable having regard to what is involved in the case), with due regard being had to the Respondent's financial position."

even though the respondent can well afford to pay them. An applicant is not entitled to have her attorney and client costs covered or substantially covered. The contribution to the applicant's costs may include the applicant's attorneys' fees.

- [29] 'In determining the *quantum* of the contribution, the court will have regard to the circumstances of the case, the financial position of the parties and the issues involved in the pending litigation. The question of essential disbursements is a material factor to be considered, as well as the scale on which the party from whom the contribution is required was litigating.

EVALUATION OF THE EVIDENCE

- [30] The applicant initially claims payment of R 51 500, 00 in respect of maintenance of herself and the two minor children. Her expenses are contained in her founding affidavit. The applicant avers that she has a shortfall of R 49 000, 00 per month in order for her to maintain the standard of living she and the minor child have been accustomed to.

THE MINOR CHILDREN

- [31] I will first deal with the maintenance in respect of the two minor children. It is common cause that the minor child currently resides with the applicant. It is further common cause that the respondent has been making payment in the amount of R2500, 00 for both children since December 2020 and a further payment of R4692, 00 towards school fees and payment of R1350 for medical aid for the two children. These payments amounts to R 8542 In respect of his contributions to the two children.
- [32] Both parents have the primary obligation to maintain minor children. Children have a right to proper parental care. The Bill of Rights in the South African Constitution is celebrated for its extensive commitment to the protection of the

rights of children in section 28(2) which emphasise that the best interest of all minor children is of paramount importance.

- [33] It is prescribed by the common law that the child's best interest must determine the outcome when a court has to make an order regarding a child. In other words, in all matters concerning the care, protection, maintenance and **well-being of a child** the stand that the child's best interest is of paramount importance, must be applied. Section 6(2)(a) of the Children's Act 38 of 2005 provides that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote, and fulfil the child's rights set out in the Bill of Rights and must respect the child's inherent dignity.
- [34] The two minor children's expenses according to the applicant amounts to R 14 282, 00. The applicant's expenditure list, sets out their necessary and reasonable expenses as well as some luxury items which the children might have been accustomed to whilst both parents shared the expenses of the joint household. The children unfortunately often become the collateral damage in divorce proceedings and in most cases the parties are not able to maintain standard of living prior to break up. This is clearly the case here. The parties have to manage their expectations of what is necessary and what is not. As was illustrated in the respondent's list of income and expenditure it is impossible for him to cover the applicant's list of expenses for the children and her. The law is trite that there will be instances where the parties would have to make a standard of living adjustment if their previous standard of living cannot be maintained.
- [35] The Respondent has demonstrated his willingness to maintain his children and have made payment as listed above. In addition to the existing payments he has offered and additional R500, 00. The court is mindful that the applicant is unemployed presently but she cannot expect the Respondent to carry the full burden of the maintenance of the children without having the financial means to do so.

After careful consideration, the court finds that the respondent pay and amount of R9200, 00 towards the maintenance of the two minor children will be just and reasonable.

MEDICAL CONTRIBUTIONS TOWARDS THE CHILDREN

[36] The applicant has failed to provide any details with regards to how the amount of R1100.00 is derived at, for the additional medical cost of the two minor children. It is common cause that the respondent is paying R1350, 00 for the two children in respect of a hospital plan. This hospital plan does not cover the day to day medical expenses related to doctors and dentist visits or any medication related thereto. In light hereof, it would be fair for this court to grant an order directing that both parties are equally responsible for any medical care related to the children, not covered by the hospital plan.

MAINTENANCE TOWARDS APPLICANT

[37] The divorce court may, in the absence of an order in terms of a written agreement between the parties, take certain factors into consideration in making a maintenance order. In terms of Section 7(2), the court is to take the following factors into account , namely, the existing or prospective means of the spouses; the respective earning capacities of the spouses; the financial needs and obligations of the spouses; the ages of the spouses; the duration of the marriage; the standard of living of the spouses during the marriage; each spouse's conduct in so far as it may be relevant to the breakdown of the marriage; any redistribution order in terms of section 7(3) of the Divorce Act

and any other factor which, in the court's opinion, should be taken into account.⁹

[38] If the court decides to award maintenance to a spouse, it is also these factors that will determine the amount of maintenance. The amount cannot therefore be treated as a separate question.¹⁰ It is important for the court to decide what is just in all the circumstances of the case.

[39] It is trite that when the court considers applications for interim maintenance that regard is to be had to the reasonable and actual expenses of the applicant, coupled with the respondent's capacity to meet such requirements.¹¹

[40] It is common cause that the applicant has been unemployed since February 2021. The reasons for her dismissal were not provided. She avers that she managed to meet her monthly financial obligations by making loans from family members to the extent of R 97 000, 00 (house, vehicle and legal fees). She confirms that there is a pension pay out due to her in the amount of R 175 000.00. She will use these funds repay the loans to her family members. In addition, as part of the divorce settlement she is entitled to a pay out in the amount of R 650 000, 00 from the Respondents pension fund.

[41] Prior to her dismissal the applicant was able to maintain the lifestyle she and the children were accustomed to. Since the inception of their marriage the applicant was employed and made her contributions to the parties' joint estate. She is an educated, skilled woman with many years of experience in the financial sector. Whilst she is still embroiled in litigation with regards to her dismissal she has not managed to secure permanent employment. However,

⁹ Ibid pages at 147-148; See also *Swart v Swart* 1980 (4) SA (O).

¹⁰ Van Zyl 'Handbook of the South African Law of Maintenance' Second Edition, Lexis Nexis at page 26.

See also Section 7(2) and (3) of the Divorce Act.

¹¹ See *W (born G) v W* (469/10) [2010] ZAECELLC 1 (7 September 2010); see also *Botha v Botha* 2009 (3) SA 89 at 105C-106J

given her age, experience and skill there should be no reason why she cannot become gainfully employed again.

[42] In making the determination for the fair and reasonable amount for maintenance the court has to weight the financial means of the parties. The unfortunate consequence of divorce is that the parties are faced with maintaining two separate households as it were. They lose the benefits which came with maintaining a joint household from a joint income.

[43] It is common cause that the Applicants claim far exceeds the Respondent's net income let alone his disposal income after he has paid his necessary expenses. The respondents list of expenses can hardly be described as lavish or exorbitant. Whilst the Applicants list¹² is quite extensive and some expenses are extravagant given their current financial situation The Applicant concedes that in light thereof she has to amend her expectation of what can be claimed from him. The ideal situation would have been for the parties to discuss their individual needs and expectations without having to resort to costly litigation.

[44] The Respondent makes a bold allegation that the applicant has an income derived from a business whereof she tenders for Government contracts. The Applicant denies this averment and feels no need to make a disclosure if in fact she was engaged in a business enterprise. The court is thus not able to take this alleged income into account as the applicant is not forthcoming.

[45] Advocate Van der Merwe on behalf of the respondent goes so far as to argue that she must be engaged in a business in order to maintain the list of expenses and lifestyle she sets out in her application.

[46] From the information gleaned in the divorce action it appears that not much is in dispute. The Applicant wants to keep the common home but the respondent

¹² Applicants affidavit Page 20 "A"

rightly points out that if they cannot afford to maintain the bond the only solutions is to sell the property. The parties strangely own six vehicles between the two of them. The Applicant makes no mention of a BMW 380i which she has in her possession in the list of movable assets¹³.

[47] In addition to the BMW she also has a Nissan Qashqai and a Toyota legend 45. The Respondents has in his possession a Volkswagen Golf 5 , Volkswagen Polo Playa and a Toyota Hilux bakkie which is still subject to an instalment sale agreement for which he pays R 6 791.00 per month. Neither of parties provide reasons as to why they would need six cars between themselves, especially given that these vehicles require maintenance and added insurance expenses. In my view these additional vehicles are excessive and an unnecessary expense for both parties who are arguing that they cannot meet the financial demands of maintaining their two minor children.

[48] The Applicant will have to reassess her expenses and the joint assets to make provision for her personal needs. As part of the divorce settlement she will be receiving a substantial amount of the respondent's pension funds in addition to her own pension pay out. She therefore will have means available to support herself until such time as she secures employment. I am further unconvinced that she has no additional income derived from a business venture.

[49] Having carefully considered the applicants claim which she subsequently reduced to R2500, 00, I cannot find there to be reasonable and just duty on the part of the respondent in respect of spousal maintenance for the applicant. It is further clear from his income and expenditure that he is not able to maintain the Applicant.

CONTRIBUTION TO COSTS

¹³ Applicants affidavit Page 11 of the bundle

[50] In order to succeed with a claim for contribution towards costs, the applicant must establish that she has insufficient means of her own to pay legal fees and that the amount sought is reasonably necessary to enable her to pursue her defence. In **Nicholson v Nicholson**¹⁴ **Wunsh J** stated as follows:

*'The question to be considered is what the Applicant needs for reasonable proceedings. The cases were reviewed in Dodo v Dodo 1990 (2) SA 77 (W), the Applicant is entitled if the Respondent has the means, and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the Respondent is litigating and the scale on which the Applicant intends litigating (I would have qualified this by reference to what is reasonable having regard to what is involved in the case), with due regard being had to the Respondent's financial position.'*¹⁵

[51] In this application, the Applicant prays for a contribution of R7500 towards her legal cost. As mentioned previously there does not appear to be much in dispute in the main action. The respondent had made reasonable offers with regards to the Rule 43 application in contrast to the applicant's almost ridiculous claims. With regards to the relief in respect of costs, the court finds that the respondent has defended this matter in good faith. The applicant has failed to prove that the amount she seeks is a reasonable amount towards the costs for litigation.

ORDERS

[52] The court has considered all the evidential material as well as the arguments of both legal representatives and hereby grants the following orders:

a) CARE AND CONTACT

(i) An order directing that the parties shall act as co-guardians of the minor children born of their marriage as provided for in Sections 18 (2)(c), 18(3), 28(4) and 18(5) of the Children's Act 38 of 2005;

¹⁴ 1998 (1) SA 48.

¹⁵ At 50 C-E.

- (ii) An order directing that the parties shall be co-holders of parental responsibility and rights in respect of the two minor children as referred to in Sections 18(2)(a) and 18(2)(b) of the Children's Act 38 of 2005;
- (iii) An order directing that the two children shall primarily reside with the Applicant who shall be their primary carer.
- (iv) The Respondent is awarded reasonable rights of care and contact of the minor children which shall be exercised as follows:
 - a) The children will sleep over at the Respondents home one weekend per month from **Friday 18:00 to 16:00 Sunday**.
 - b) The children will visit with the respondent every alternative weekend from 08:00 to 17:00 on Saturday and Sunday.
 - c) The children will visit with the respondent on alternative public holidays from 08:00 to 17:00
 - d) Contact on Father's day and birthdays for two hours
 - e) Reasonable telephonic or electronic contact with the children at reasonable times

b) MAINTENANCE FOR THE CHILDREN

The Respondent is ordered to pay maintenance pendente lite for the two minor children as follows:

- (a) School fees including arrear amounts paid directly to the schools
 - (b) Medical aid in respect of the two children
 - (c) Maintenance : R 3000 paid directly to the Applicant per month with effect from the 01st of April 2022, and thereafter on or before the last day of every succeeding month into an account nominated by the Applicant in writing, pending the finalisation of the divorce action between the parties. This amount shall be paid free from deduction or set-off of whatsoever nature.
- c)** An order that Applicant and Respondent are equally liable for the costs of the minor Children's reasonable medical, dental, surgical, hospital, orthodontic, pharmaceutical expenses.

- d) An order that Defendant is to retain the two minor children registered as dependants on his medical aid scheme as beneficiaries.
- e) Prayer 5 of the applicants prayers are dismissed
- f) Prayer 8 of the applicants prayers are dismissed

COSTS

[53] The costs of this application shall be costs in the cause.

A RAMOS, AJ

APPEARANCES

On behalf of the Applicant

**ADVOCATE JOHNSON
LHW CATO
McINTYRE VAN DER POST
12BARNES STREET
BLOEMFONTEIN**

On behalf of the Respondent

**ADVOCATE VAN DER MERWE
MAREE & PARTNERS
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