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

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

Case number: **2941/2018**

In the matter between:

M B

Applicant

and

W B

Respondent

HEARD ON: 10 AUGUST 2018

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 23 AUGUST 2018

- [1] This is an application in terms of Uniform Rule 43(1) of this court for maintenance of the applicant and the children of the parties pending an action in which the applicant is suing the respondent for a divorce. Applicant also applies for certain parental rights and residency. The application is opposed.
- [2] The parties are married to each other out of community of property with the inclusion of the accrual system. As indicated above they are in a process of a divorce. There are four children born between the parties, three of which are still minors. The Applicant stays with two of the minor children while the respondent stays with another minor child. The elder child is in the employment of the respondent.
- [3] The evidence of the respondent is that she is employed as a *locum* by a practise of Physiotherapists. She earns 50% commission on the consultations relating to patients she consults with. Her average nett income in the practise of her profession as a physiotherapy is R 5 107 .87. She also gives Pilates classes and her average income was R 2 028.00 per month.
- [4] It is her evidence that she sold her property in June 2017 for a total amount of R 1 348 645.00. This money she says that, on instructions of the respondent she, *inter alia*, paid to various family trusts and also made a payment in a mortgage account.

She avers that she has no amount of money left from these sales. Applicant further avers that she sold a land for R 257 458.00 and paid the proceeds on instructions of the respondent to various trusts. According to her also in respect of this sale, no funds are left. She further receives rental income in the amount of R 12 600.00 in respect of her other two properties.

- [5] Applicant acknowledges that the respondent currently pays her short term insurance. Her expenses relating to the service, maintenance and repairs to her vehicle and her medical aid in the amount of R8 133. He also makes certain payments to the expenses of the children.
- [6] Applicant contends that her monthly expenses and those of the two minor children with whom she stays amount to R 54 078.00. She argues that having regard to her income of R 19 735.87, her shortfall is R 34 342. 37.
- [7] The Applicant submits that the respondent is in a position to make a contribution towards the maintenance as sought as he is in a position to do so. According to her the respondent is the trustee of six trusts. These trusts according to her own 18 properties worth approximately R 30 000 000.00. She submits that the trusts rent out property for a total gross amount of R 219 000.00 per month. She contends that the respondent is the *alter ego*, so to speak, of the said trusts as he is in full control of the said trusts and utilises the money of the said trusts for himself as and when he chooses.

- [8] On the other hand respondent contends that he is a salaried employee whose primary source of income is from property rent. Of the 23 properties he manages, eight are his own while the rest belong to various trusts. The rental income of the properties are paid, except some of his own, into the account of a certain entity known as Accommodation Solutions CC. Respondent avers that his total income per month is R35 740.00 and his personal expenses were R36 745.33 and the expenses for the trusts were R26 554.33. He further indicates that his total shortfall was R42 234.46.
- [9] According to the respondent the rental income of some of his properties was paid into a bank account to which applicant has unlimited access and transactional powers. The respondent contends that the applicant has not made a full and frank disclosure of her financial position. He further avers that if same was done, it will reveal that there was no shortfall. Respondent also submits that he simply cannot afford to meet the maintenance that the applicant claims.
- [10] The applicant bears the onus to satisfy the Court that:
1. There is an obligation to maintain her and the minor children;
 2. That the respondent has failed to maintain her;
 3. That because of the failure of the respondent to maintain her, she is in need of being maintained by the respondent;
 4. Lastly, that the respondent has the financial means to maintain her.

- [11] At the onset it has to be indicated that the applicant acknowledges that the respondent is already paying an amount of R12 621.28 of some of her expenses and those of the children in her care. Over and above these expenses the respondent pays for the expenses relating to the service of her vehicle and repairs.
- [12] This application is brought on the basis that the respondent should continue to effect the expenses as more fully set out in paragraph 18 of the applicant's founding affidavit. [See paragraph 18.2 of the founding affidavit.]It is clear that the applicant has concerns that the respondent will continue to make the said payments. In The South African Law of Husband and wife, 5th Edition, by H.R Hahlo at page 432 the learned author says:
- "As long as the husband maintains his wife and children **adequately**, the mere apprehension that he might no longer do so in the future is not sufficient ground for granting an order of maintenance."(My emphasis)
- [13] Because of the nature of this application, the parties are obliged to play open cards with the court about their financial position. This will enable the court to make an assessment of the situation of the parties and to determine if there is a need for payment of maintenance, and if so how much maintenance and indeed any contribution towards legal costs which must be made.
- [14] On the version of applicant, it is clear that the respondent is contributing some maintenance towards the expenses of the applicant and the two minor children of the parties who stay with the applicant. Applicant on the other hand makes no allegation

that she also contributes any amount to the parties' children in the care of the applicant.

- [15] One of the requirements to be satisfied as indicated above is that the applicant must satisfy the court that as a result of the failure by the respondent to maintain her, she is in need of being maintained. Both parties in this case have been less than candid with the court about their financial positions.
- [16] The applicant conveniently failed to indicate in her founding affidavit that she had a combined balance of R 59 419.21 in her accounts. There is nothing wrong in having such an amount standing to one's credit as the money might be earmarked for certain projects. What, however, is the cause for concern is the reason why it was not disclosed in the founding affidavit.
- [17] Upon perusal of the bank statements of the applicant, Annexure WJB4, the following become clear: On the 8th March 2018 there was transfer to the tune of R 70 000.00. On the 26th March 2018 there was a payment into the account of the applicant in the amount of R 20 000.00. On the 27 March 2018 there was a further transfer to an account labelled 'Vakansies'. This amount was transferred back and paid over to an account labelled 'Egskaiding'. It is unnecessary at this stage to analyse smaller amounts in the account of the applicant. A clear indication is that there has been huge amounts being transferred in and out of the accounts of the applicant. The applicant failed to deal with these amounts in her founding affidavit. There is an explanatory note in

the form of Annexure WJB5 attached to the opposing affidavit of the respondent. The source of this document is unknown and I will make no reference to it. Applicant failed to deal with these amounts in her founding statement. It is unknown what their source is. It is unknown why they were transferred to those accounts.

[18] As alluded above applicant bears the onus to satisfy the Court that she is in need of maintenance. Due to the fact that she has been less than candid with the Court about her finances I am unable to make any that applicant is need of maintenance and as such her claim for maintenance *pendent lite* must fail. Specifically I am unable to find that the contribution the applicant is already making is inadequate for herself.

[19] With regard to the parenting rights there seems to be no dispute. I do not believe that in circumstances where the parties at peace with the arrangements they already made and which arrangements have been working, the Courts should intervene.

[20] An amount of R 80 000.00 was transferred to an account known as 'Egskeiding'. In the absence of an explanation as to this money was intended for I am tempted to suspect that it was meant for a divorce action. I can find no reason to order the respondent to make any contribution towards the legal costs of the applicant.

[21] In view of the fact that the applicant failed to show that she is in need of maintenance, I find it unnecessary to traverse further

issues herein including in what respect the respondent was also less frank and candid with the Court.

- [22] With regard to the children, on the other hand, both parents have a legal duty to maintain them in accordance with their respective means.

I accordingly make the following order.

ORDER

1. The full parental responsibilities and rights in respect of the minor children, A, P and T as contemplated in section 18(2) of the Children's Act 28 of 2005, is awarded to both the applicant and respondent.
2. That it be ordered that P and will primarily reside with the applicant whilst T will primarily reside with the respondent.
3. That the specific parental responsibilities and rights in respect of contact by the respondent with A and P, and the applicant with T, be awarded in the following manner:
 - 3.1 the applicant and the respondent will have the right to take the respective minor children with them on alternate weekends from 14h00 on Friday until 17h00 on the preceding Sunday;
 - 3.2 the applicant and the respondent will have the right to take the respective minor children with them for

alternate school holidays, provided that the long school holiday be divided equally on the basis that the Christmas school holiday shall rotate annually between the parties;

3.3 the applicant and the respondent will have contact with the respective minor children on the minor children's birthday, the birth of the applicant or the respondent, Father's Day or Mother's Day for at least 3 hours if the aforesaid periods fall outside the normal contact periods of the applicant and the respondent;

3.4 reasonable telephonic contact.

4. The contact rights as referred to in paragraph 3 above shall be exercised by the applicant and the respondent in such a manner that all the minor children simultaneously have contact with each of the respective parties during the aforesaid contact periods.

5. The respondent is ordered to pay maintenance to the applicant in respect of A in the amount of R6000.00 per month.

6. The respondent is ordered to pay maintenance to the applicant in respect of P in the amount of R6000.00 per month.

P.E. MOLITSOANE,J

On behalf of applicant : Adv WJ Groenewald
Instructed by:
Symington and De Kok
Bloemfontein

On behalf of 1st respondent : Adv Van Aswegen
Instructed by:
Phatsoane Henney
Bloemfontein