

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

Case No. : 5039/2014

In the matter between:-

A. S. Applicant

and

R.C.S. Respondent

JUDGMENT BY: MOCUMIE, J

HEARD ON: 4 JUNE 2015

DELIVERED ON: 18 JUNE 2015

JUDGMENT

MOCUMIE, J

- [1] This is an application in terms of Rule 43 of the Superior Courts Uniform Practice Rules. The applicant and respondent are married out of community of property. Out of the marriage two children were born. The applicant has filed for a divorce under case no 5039/2014. The action is still pending. The applicant applies for maintenance for herself and her minor child; a girl aged [...] years, who she resides with after she separated from the respondent late 2014. The second minor child; a [...] year old boy, is residing with the respondent. The couple have not been living together in the marital home since October 2014.

POINT IN LIMINE

- [2] From the onset, Mr Van Aswegen, relying on several decisions of our courts¹ raised as a point in limine the fact that the applicant had filed more affidavits than is ordinarily allowed under Rule 43. He argued that the applicant used this process as a fishing expedition to get information that she did not have on how much assets the respondent had in his possession. In all the communication between her lawyers and the respondent's not once did she ask for maintenance. He argued further that the fact that the applicant stayed from October 2014 without any financial support from the respondent was indicative that she and the daughter did not need such support from the respondent.
- [3] It is trite that an application in terms of Rule 43 must be short and to the point. The purpose of the rule is to deal with applications of this nature as inexpensively and expeditiously as possible. The rule achieves this object by (a) requiring the applicant to deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds thereof (Rule 43(2)) and (b) requiring the respondent to deliver a sworn reply in the nature of a plea (Rule 43(3)). The filing of more than two sets of affidavits or supporting affidavits may constitute an abuse of the process if the court does not exercise its discretion in terms of Rule 43 (5) It is only in special circumstances that a departure from this rule will be countenanced.²
- [4] In an application of this nature, the respondent is bound to disclose all his earnings and the sources from which he receives them in specific details as the applicant invited him to. Not for the applicant's benefit or her alleged sinister motives but to put this court in a better position to make an informed decision on whether indeed he can or cannot afford to pay maintenance pending the divorce action. And what amount will be suitable to pay. Without such information from the respondent, the applicant was obliged to do her own research and company search

¹ *Nienaber v Nienaber* 1980(2) SA 803 (OPD) at 805F-H; *Visser vs Visser* 1992(4)SA 530(SE); *Patmore vs Patmore* 1997(4) SA 785(W) at 785.

² Joffe et al: *High Court Motion Procedure: A Practical Guide* [Issue 5] 3-4 and cases cited therein.

and come up with all the proof that the respondent thereafter could hardly refute. If these are not special circumstances, I do not know what other circumstances will be more special. Even if I may be wrong in my approach, in the worst case scenario, it's the last resort that the applicant had at her disposal to show this court that the respondent is not a man of straw as he claimed and maintained since the divorce action was instituted and during the negotiations for a settlement of the divorce action. Besides this, this application, by its very nature, needs a speedy resolution considering the best interests of the children as provided for by section 28 of the Constitution³. It is on that basis and as well as to avoid any prejudice that the respondent may suffer from disclosure of the documents in dispute, that I ruled that, pages 22 to 71, forty nine pages, be disregarded. These pages were in any event not as much as in some of the cases Mr Van Aswegen referred to.

- [5] These pages were annexures appended to the papers by the applicant to show the number of companies and close corporations on which the respondent sits is a director. The respondent in any event did not refute that he was a shareholder of seven companies and a member of two close corporations. He confirmed the allegations but indicated that these companies were dormant and thus not generating income as much as the applicant seemed to believe.
- [6] Coming to the merits, the applicant is currently residing with the couple's daughter on her parental home premises, in a 'kothuis'. She is employed and earns R19 951.73 per month after the necessary deductions as per her salary advice dated 25 August 2014. From her salary of R19 957.36 she pays in total R9 751 on herself and the minor daughter. This is divided up as follows: R3 400 medical fund; R 2 800 motor vehicle instalment; R3 026 motor vehicle insurance and R3026 on groceries and the rest on food, school clothes, sports clothes ,casual clothes as well as pocket money, TV licence. She

³ Section 28 of the Constitution of South Africa, 1996.

alleged she needed R45 036, 55 per month for herself and the two minor children.

- [7] Although Mr Coertzer acknowledged that the applicant's expenditures clearly included the minor child who was not staying with her, he nonetheless persisted to seek such maintenance. His argument was that considering that the applicant sought that this court makes it an order that she has contact with the particular minor child, so, the child will need items such as pocket money when he visited her. But then she could not explain the casual clothes, school clothes, sports clothes and other items. Mr Coertzer was at pains to explain the logic behind this, without success.
- [8] The applicant further alleges that when the couple stayed together as a family, the respondent provided for all the family needs including what can be described as exotic holiday trips every year.
- [9] In his reply, the respondent confirmed that he is employed as a director at the companies and is a member of the closed corporations mentioned. But all these entities were dormant and not generating any income except one. In his defence he alleged that he is staying with one of the children, the boy, who does not want to stay with the applicant. He provides for all this child's needs on his own without any contribution from the applicant. Since the applicant moved out of the marital home voluntarily in October 2014, he has been paying for the bond at R10 500 per month. His defence is that he does not earn a sufficient income to pay maintenance for both the applicant and their daughter as he used to while they all lived under one roof.
- [10] In a detailed income and expenditure list⁴, he indicates that he earns R11 000 every month from his income from the one company and commission from Sanlam and he spends R 30 730 on the two children and himself. He does not say where he gets the money he spends

⁴ Pages 85-86 of the paginated papers.

every month. Nor does he say whether he ever suffers any shortfall from his income every month. If so how does he augment that shortfall. So, I will assume, with the limited information that he has provided, that he does generate income from some other undisclosed source. Otherwise how does he pay for these expenditures every month?

- [11] The dispute between the parties is whether the respondent is as well off as the applicant alleges and whether he can afford to maintain her and their daughter and contribute towards the costs of the divorce action (R5000).
- [12] It is common cause or at least not seriously refuted that at all times when the parties were staying together as husband and wife the respondent maintained the entire household apart from the applicant paying for the bond and the medical aid. The parties led a relatively comfortable life. The respondent has made no reference to what could have changed so drastically since December 2014 to date because he has not been maintaining the applicant. I am convinced from a number of indications including his overboard list of monthly expenditures that the respondent is not and can never be a man of straw as he strenuously attempted to convince this court.
- [13] Because I have been left to second guess the respondent's income, at his own peril, I must add, I have to accept as the applicant has argued that he earns sufficient enough to afford a life style of a relatively high standard than he has claimed on the papers. This is the difficulty that women ,in most instances, who are not in charge of the family business or businesses have to endure to prove that their spouses actually earn more than they claim. Surely the fact that they lived longer with their spouses must put them in a better position to say that they experienced a life of luxury, and the money that catered for such luxurious life could not have disappeared overnight unless shown otherwise. They in turn must be forced to go to town to show this much and at a huge cost when the spouse can simply say,

although we lived such a life, in fact we could not afford it. Courts are expected to accept that. That cannot be correct. Courts must look at the life style the couple lived. In the absence of any malice or mischief on the part of the applicant accept that that is the life that the couple led. This is not to say courts should make orders will amount to a meal ticket for the applicants in applications of maintenance pendente lite. A balance must be struck. And only necessities must be paid by the respondent if so proven.

- [14] That is however not the end of the enquiry. The question remains if the applicant has established that she needs maintenance from the respondent. On the papers before me, the applicant is no longer paying the R10 000 for the bond, she is not paying for the maintenance of the child who is staying with the respondent. Once the bond payment and the one child's maintenance fall off her list of expenditures, surely the amount claimed should be reduced with those amounts.
- [15] Once she no longer pays R10 000 but R2 500 for the kot huis then surely she is left with sufficient money to pay for her own car and its insurance as well as water and electricity and rates where she is staying. There is simply no basis for her claim for R45 036, 55 per month for herself and the two minor children. In fact if one considers what the respondent has been doing when they were living together, it is clear that he provided for the family.
- [16] Having said that, I am satisfied that the applicant has shown that the minor child living with her needs maintenance from the respondent and that the respondent can afford to contribute towards this child's maintenance as he used to. But, I can however not find the same in her respect.
- [17] The decision I have reached is influenced by the fact that I am convinced that the respondent does have money he can use to pay

maintenance for both his children. If he cannot on his current salary/commission from Sanlam and dividends or returns from Meerland Twintig (Pty) Ltd and whatever sources he has preferred not to disclose which makes him afford to spend at least R 30 730 on himself and one child every month, then he must sell off any asset(s) including shares and other commodities he has to make up for his children's maintenance.

[18] As far as costs are concerned, these should be part of the main action.

[19] In the circumstances the following order is granted.

ORDER

1. The application for maintenance in respect of the applicant is dismissed.
2. The respondent is ordered to pay maintenance in respect of the minor child, J. S., with effect from 30 June 2015.
3. The respondent is to pay for the following in respect of the minor child, J. S. into the applicant's account:
 - 3.1 Civilian clothes
 - 3.2 School uniform
 - 3.3 Sports clothes
 - 3.4 Pocket money
5. 4. All payments to be made into the applicant's bank account to be provided to the respondent through the parties' legal representatives except payment in respect of J. S.'s school fees which is to be made directly to the school she attends.
6. That *pendente lite* specific parental responsibilities and rights as set out in s18(2)(b) of the Children's Act 38 of 2005, and in particular, the right to maintain contact with the minor child, is awarded to the applicant, which contact includes, but is not limited to, the following:
 - a. Every alternate weekend from the Friday 18h00 to Sunday 18h00.

- b. Every alternative long and short school holiday (Christmas to rotate)
 - c. Reasonable telephonic contact at all reasonable times.
7. Costs of this application to be costs in the main action.

B. C. MOCUMIE, J

On behalf of the appellant: Adv. J. C. Coetzer
Instructed by:
Matsepes Inc
BLOEMFONTEIN

On behalf of the respondent: Adv. A. W. van Aswegen
Instructed by:
McIntyre & Van der Post
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