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

Case No: 292/2014

In the matter between:-

M[...] B[...] R[...]
 (Born S[...])

Applicant

and

M[...] H[...] R[...]

Respondent

JUDGMENT BY: TSATSI, AJ

HEARD ON: 9 OCTOBER 2014

DELIVERED ON: 30 OCTOBER 2014

INTRODUCTION

- [1] This is an opposed application for payment of maintenance, contribution towards costs, awarding of parental responsibilities and rights with regard to the care and custody of the minor children *pendente lite* in terms of Rule 43 of the Uniform Rules of court (“the Rules”).
- [2] The applicant instituted divorce action against the respondent under case number 292/2014, which action still pending before this court.

- [3] The parties are married in community of property on 10 December 1996, in Bloemfontein and the marriage still subsists. There are two minor girl children born from this marriage aged 17 and 7 years.

FACTS

- [4] The applicant left the communal home in November 2011, to live in Pretoria due to her work commitments. She returned permanently to Bloemfontein during July 2013. When she returned from Pretoria to Bloemfontein, she stayed with her mother. She did not go back to the communal home. It was alleged at the hearing of this application that she bought her own home. The applicant is currently employed as an agent in the service of the Motor Industry Bargaining Council with a net salary of R9 480, 00. As an agent of the Motor Industry Bargaining Council, the applicant travels a lot. She receives an allowance of R3 588, 00 per month. She spent R2 000, 00 of this money when she is out of town and she is usually left with R1 500, 00. This was added to her salary of R9 480, 00. She alleged that her expenses amounted to R15 420, 00.
- [5] The respondent is a deputy principal at one of the High Schools in Bloemfontein. He is presently living in the communal home with the younger daughter. He took care of the couple's two minor girl children when the applicant lived in Pretoria. The 17 year old daughter left the communal home to live with the applicant at the latter's mother's home. The respondent's net income is said to be

R14 361, 94. His expenses amount to R13 892, 00.

ISSUES

- [6] The issue is whether both applicant and respondent can be awarded parental responsibilities and rights with regard to the care, maintenance and custody, of their minor children.

SUBMISSIONS

- [7] It was submitted on behalf of the applicant that the family advocate recommended that the minor children not to be separated. A further submission was that primary care of the two minor children be awarded to the applicant. The applicant has moved into a new house which is within walking distance of the minor child's school. The applicant's expenses of R15 420, 00 were concluded to accommodate three people, meaning the applicant, and the two minor children. The respondent has access to the communal home which the applicant did not have. It will be in the best interest of the minor children to be in the care of the applicant. The respondent can afford maintenance of R3 000, 00 per child, per month. The applicant's mother will be able to look after the minor children when the applicant was not there.
- [8] A submission on behalf of the respondent was that the applicant left the communal home in November 2011 at the time the youngest daughter was only four. Counsel for the respondent

referred me to Erasmus Superior Court Practice, page 316, Rule 43(1) (c) which provides that the court will be generally reluctant to upset the status *quo* concerning the custody of the minor children. The principles of preserving the status *quo* is subject to the considerations that the paramount interest of the children must prevail and the status *quo* must not constitute an unreasonable state of affairs. Counsel for the respondent further submitted that uprooting the 7 year old on the wishes of the older sister was not a good thing to do. Besides the 17 year old girl was in boarding School, therefore she will not be staying with her younger sibling. There was a magistrate court maintenance order which the respondent was taking care of by complying. A further submission was that if the applicant's R15 420, 00 expenses were based on three people, this should be reduced. The reason being that the elder child is in boarding school and the younger child stays with her father. Counsel for the respondent argued that the family advocate's report contained recommendations and the court is entitled to deviate from such recommendations if it deems fit.

THE LAW

[9] In **Kroon v Kroon** 1986 (4) SA 616 (E) the court said that:

“The parties are no doubt aware that in most cases persons who have become divorced will be compelled by necessity to reduce their standard of living, for where the available means of support are not adequate to maintain both according to their former scale of living, each must of necessity scale down his or her budget ... The fact of the matter is that two living together can live more cheaply than two living

apart, for obvious reasons such as the need for two residences plus rates, maintenance, service charges, and all the rest of it, two cars plus the concomitant expenses, two lots of household goods to buy and maintain, and so forth. The problem of “indivisible expenses” is a real one.”

[10] Section 28(2) of the Constitution provides that “A child’s best interest are of paramount importance in every matter concerning the child.”

[11] Section 18(2) of the Children’s Act, Act 38 of 2005 provides that:
 “The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right: -
 (a) to care for the child
 (b) to maintain contact with the child
 (c) to act as guardian of the child; and
 (d) to contribute to the maintenance of the child.”

[12] Section 7 of the Child’s Act provides that:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
 (a) the nature of the personal relationship between-
 (i) the child and the parents, or any specific parent; and
 (ii)
 (b) the attitude of the parents, or any specific parent, towards-
 (i) the child; and
 (ii) the exercise of parental responsibilities and rights in respect of the child;
 (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-

- (i) both or either of the parents; or
- (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child-

- (i) to remain in the care of his or her parent, family and extended family; and
- (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's-

- (i) age, maturity and stage of development;
- (ii) gender;
- (iii) background; and
- (iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(a) the nature of the personal relationship between-

- (i) the child and the parents, or any specific parent; and
- (ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards-

- (i) the child; and
- (ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development; (ii) gender;
 - (iii) background; and (iv) any other relevant characteristics of the child; (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;..."

APPLICATION OF THE LAW

[13] It is trite that Rule 43 is designed to give parties fast and affordable relief in terms of interim disputes regarding maintenance care and access of minor children.

[14] The amount of R15 420, 00 of the applicant expenses required further scrutiny. It has been said that the said amount was based on expenses for three people. The applicant indicated that the groceries amounted to R2 300, 00. At the same time she included an amount of R2 040, 00 for the elder minor child. There

is a Standard Bank personal loan of which the outstanding amount is R24 000, 00. Another Standard Bank overdraft with a balance of R11 000, 00 was said to be money used on renovating the communal home. The respondent disagreed. He indicated that it was not possible for the applicant to renovate the communal home as the applicant left the communal home in November 2011. There was also a Nedbank amount with an outstanding balance of R9 000, 00. The applicant did not inform the court about the purpose of this expense. The elder minor child will turn 18 years In November 2014 and she will be ready to go to University. The R2 040, 00 boarding fee will fall away, even though it will be replaced by the University fees. I am of the view that the applicant exaggerated her expenses regarding loans and credit cards. She worked on a wrong principle by trying to maintain the same standard of living she had when she was still living in the communal home with the respondent. My view is that the applicant equated “want” with “need”. She basically included her “wants” in a list of her “needs”.

- [15] What does the applicant want and what does she need? Wants and needs are two different things. People usually want more than they need (**Kroon v Kroon** *supra*). The applicant may not expect to have the same standard of living she had when she lived with the respondent. I agree with counsel for the respondent that 1/3 of the applicant’s expenses would fall away if the status *quo* was not disturbed. This means that if the minor child remained in the respondent’s care.

- [16] The respondent's R13 982, 00 expenses also needed further consideration. In addition to the R13 982, 00 monthly expenses, there are other deductions on the respondent's payslip. A concern was raised by counsel for the applicant that the respondent's car instalment was R5 500, 00, which he considered unnecessary and exorbitant. There was an amount of R1 327, 00 deducted from the respondent's salary on behalf of First Rand. The respondent's salary is R28 517, 00 and after deduction the net salary is R14 361, 94. It is not evident on the papers whether or not the respondent had any personal loans and or overdraft facilities. There was no exaggeration regarding credit card or overdraft facilities.
- [17] There was a magistrate court maintenance order dated 7 February 2014, which was attached to the court papers. According to this order both the applicant and the respondent were ordered to be responsible for both children's secondary and university fees. The order further provided that each party will be responsible for medical expenses and upbringing of the child living with such party. I have taken this order into account.
- [18] Both the applicant and respondent are entitled to parental rights and responsibilities as specified in the Act. They are both capable and competent parents. I have no doubt that both of them love their minor children very much. It will be in the best interest of the minor children if both parents are granted parental rights and responsibilities equally. This can be achieved by not upsetting or disturbing the status *quo* concerning custody of the minor children. The elder daughter who is 17 was going to turn

18 in November 2014. Despite that she will still need parental guidance and supervision.

[19] I am of the view that the applicant is not entitled to be granted contribution towards her legal costs. The respondent's net salary is almost the same as that of the applicant. For the applicant to succeed with legal costs she must demonstrate that she has little or no means of her own to pay for the legal costs (Nicholson v Nicholson 1998 (1) SA 48 (W)).

[20] I have taken the family advocate and the family counsellor's reports into account. This is despite the fact that I only received the said reports at lunch time on the day of the hearing. I have had regard to the provisions of section 28(2) of the constitution, including provisions of the Children's Act and the magistrate court maintenance order. Based on the submissions made in court, including the preceding, I am not inclined to disturb the status *quo* concerning the permanent residency of the minor children. I am mindful of the fact that normally young children should go to the mother. Although this may not be tradition any longer, as men are also domesticized and have become good child minders. I am also mindful of the fact that separation of children from one another should be avoided where possible. I am influenced by the fact that, the respondent even though he is the father, he has taken care of his daughters alone since 2011, when the youngest one was only four. I am aware of the criticisms the respondent levelled against the applicant and *vice versa*.

- [21] I am mindful of the fact that the younger minor child expressed concern that the respondent at this stage involved his girlfriend in the upbringing of the younger minor child. This was despite the fact that the younger minor child regarded the respondent's girlfriend as a third party and a stranger. The younger minor child should not be forced to have a mother-child relationship with the respondent's girlfriend. This can be confusing for a child as her mother is still around. It is my view that the respondent should rather make sure that he is the one involved in the care and supervision of the younger child and he should keep the girlfriend's involvement at a minimum.
- [22] I am satisfied that both the applicant and respondent have set out sufficient facts which would justify them in being awarded parental responsibilities and rights with regard to the care, maintenance and custody of their minor children, *pendente lite*.
- [23] I accordingly make the following order *pendente lite*, in terms of rule 43:
- 23.1 Both parties to be the holders of parental rights and responsibilities as contemplated in section 18 of the Children's Act.
 - 23.2 That the permanent residency of the elder minor child be awarded to the applicant and that of the younger minor child be awarded to the respondent.
 - 23.3 That the respondent employ the services of a nanny on a full time basis to take care of the younger minor child,

including afterschool, and Saturdays when the minor child is in the care of the respondent.

23.4 That specific parental responsibilities with regard to the contact of the minor children as contemplated in section 18(2) of the Children's Act be awarded to both parties in the following manner. The arrangement should be such that the two minor children are with the same parent with one is visiting:

23.4.1 Contact on alternative weekends from 17H00 on a Friday to 17H00 on a Sunday of the younger minor child with the applicant and the elder minor child with the respondent.

23.4.2 Public holidays to alternate between the parties: younger minor child to visit the applicant and elder minor child to visit the respondent

23.4.3 Short school holidays to alternate between the parties: younger minor child to visit the applicant and elder minor child to visit the respondent and school holidays to be shared equally;

23.4.4 Christmas day to alternate between the parties: the minor child to visit the applicant and the elder minor child to visit the respondent

23.4.5 Reasonable telephonic contacts between both parties and their minor children;

23.4.6 The applicant to have the younger minor child with her every mother's day and on the applicant's birthday and the respondent to have the elder minor child with him on father's day and on his birthday

23.4.7 The applicant to have at least three hours contact with the younger minor child on the child's birthday and the respondent to have at least three hours contact with the elder minor child on the child's birthday .

23.5 That each party is responsible for the care and maintenance expenses of the child they are living with.

23.6 That each party contributes fifty (50) percent of the minor children's school fees and extra-mural activities.

23.7 That both parties be responsible for the payment of the medical related expenses of the minor children.

[24] That costs of this application are to be costs in the cause.

E. K. TSATSI, AJ

On behalf of the applicant: H. J. Stander

Instructed by:
Stander and Partners
BLOEMFONTEIN

On behalf of the respondent:

Adv. A. P. Berry
Instructed by:
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