

REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE Number: 61155/2020

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES/~~NO~~

31/07/2024

In the matters between: -

**M[...]** **E[...]** **M[...]**

(ID: 8[...])

**APPLICANT**

And

**D[...]** **K[...]** **M[...]**

(ID: 7[...])

**FIRST RESPONDENT**

---

**JUDGMENT**

---

**BAQWA J.**

**Introduction**

[1] In this application the applicant seeks inter alia an order regarding parental rights, primary care and residency of the minor children, and the maintenance for both minor children and herself together with a contribution to her legal costs.

[2] The applicant is 38-year-old female medical officer in the employ of the

Department of Correction Services.

[3] The parties were married in community of property on 17 June 2017 according to customary rights.

[4] The applicant is the plaintiff in divorce proceedings instituted before this court on 19 November 2020.

[5] Two minor children were born of the marriage namely M[...] K[...] a girl born on 6 November 2013 (10) and L[...], a girl born 9 January 2018 (6) who are currently in the primary care of the applicant.

[6] The relief regarding the primary care and residency as well as contact rights are not being disputed by the respondent.

[7] Applicant is employed and earns a net income of R77 695 per month plus annual bonus of around R35 061.15. She also performs part time locum work where she earns an average of R8 193.75 per month. Prior to the divorce proceedings she was responsible for the support of herself and the children. This state of affairs has continued since the parties separation in February 2020 with the respondent making limited sporadic financial contributions.

[8] According to her financial disclosure form her monthly expenditure amounts to R71 036.56 per month whilst her children's expenses amount to R 39 167.00 per month.

[9] The applicant also seeks a contribution towards her legal costs in the sum of R350 000.00 payable in instalments of R25 000 per month supported by a pro forma bill of costs.

[10] The applicant submits that the respondent has a duty to a pay maintenance of the minor children which he fails or refuses to honour.

[11] She further states that during the course of the marriage respondent undertook

to take care of herself and the children financially but despite numerous promises he failed to honour them.

#### Respondent's case

[12] The gravamen of the respondent's opposition to this application is that he is financially unable to pay maintenance claimed by the applicant on behalf of herself and the children and to contribute to her legal costs.

[13] Respondent does not deny that during the subsistence of the marriage he did assist in the maintenance of the applicant and the children and that he mainly paid for the most of their day-to-day living expenses.

[14] The respondent admits that he is a businessman but claims that he only pays himself a monthly salary from one of his companies (DKM Property Development) in the amount of R40 000.00 per month. Over and above this salary he receives an amount of R20 000.00 per month for consultancy work.

[15] To support his alleged "inability to pay" the respondent has presented a financial disclosure form.

[16] The duty of support is based on the marriage relationship, a need to be supported and adequate resource on the part of the person who is called upon to provide support. The quantum does not depend on the desire of the party obligated, but must be determined in accordance with the requirements of the one to be supported and the ability of the one who must pay. See *Barlow Barlow*.<sup>1</sup>

[17] It is however incumbent upon both parties to make a financial disclosure of their respective financial positions, See *Buch v Buch*.<sup>2</sup>

[18] In *Cary v Cary*<sup>3</sup> the court expressed the position as follows regarding the duty to

---

<sup>1</sup> 1920 OPD 73.

<sup>2</sup> 1967 (3) SA 83 (T).

<sup>3</sup> 1999 (3) SA 615 (C).

contribute towards costs of the other party:

*“The claim for contribution towards costs in a matrimonial suit was sui generis.*

*The basis of such a claim was the duty of support which the spouses owed to each other. In assessing the quantum of the contribution to enable the party seeking the contribution to present her case adequately before the court, the court had to have regard to the circumstances of the case, the financial position of the parties and the particular issues involved in the pending litigation. The question of essential disbursements was a material factor to be considered, as was the scale on which the party from whom the contribution was required was litigating. In exercising its discretion in the determination of the quantum towards costs to be awarded, the court was bound by section 9 (1) of the Constitution of the Republic of South Africa 108 of 1996 to guarantee both parties the right to equality before the law and equal protection of law. This has to be interpreted in context to mean that applicant was entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against the respondent. The applicant would not be able to present her case fairly unless she was empowered to investigate the respondent’s financial affairs through a forensic accountant appointed by her.”*

[19] In *Du Preez v Du Preez*<sup>4</sup> the following was said regarding the information to be provided:

*A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done.”*

### Analysis

[20] The fact that the respondent bears the duty to pay maintenance for the minor children of the marriage needs no emphasis. Equally the applicant is legally

---

<sup>4</sup> 2009 (6) SA 28 (T) at 30 E-J.

entitled to be supported by the respondent.

[21] What I find regrettably is that the duty which the respondent bears in terms of Rule 43 to act with utmost good faith in disclosing the material information regarding his financial affairs has not been sufficiently carried out by the respondent.

[22] In his affidavit the respondent states that he resides at Equestrian Estate, Cara Avenue, Pretoria which is one of the affluent estates in Pretoria and that he owns another property at Mooikloof Ridge Estate, 2[...] H[...].

[23] It is also admitted by the respondent who is an engineer by profession that he is a director of DKM Property Development ("DKM Property Development") with regard to which he allegedly pays himself R40 000 per month.

[24] In regard to this company he attaches bank statements for a period of six months. What is notable are that these statements, which are supposed to be the company statements are in his personal name, "Mr DK Mokwena" addressed to his Mooikloof Ridge property. Nowhere is it explained how a registered company statements can be issued in the name of a private person.

[25] Needless to mention, there are no financial statement to indicate how his financial position has changed to render him unable to perform his responsibilities as a husband of the applicant and as a father of his children.

[26] The court is therefore rendered unable to properly assess the respondent's proper financial position and as stated in Du Preez (*supra*) this can only result in unfairness to the applicant and the children of the marriage.

[27] The respondent makes bold to state in his opposing affidavit that:

*"18.1 As can be gleaned from these bank statements:*

*18.1 There are instances where I pay myself an amount less than R40 000 as*

*a result of the financial position of the company;*

*18.2 The financial position of DKM Property Development is dire and therefore there are no dividends paid to Directors;”*

[28] The respondent has not taken this court into his confidence by submitting proper documents and making proper disclosures.

[29] The respondent cannot, therefore, in the circumstances expect his bare denials and assertions. The least the court would expect would be the company's financial officer to testify and file documents regarding the company's financial position. The omission by the respondent is so glaring as to undermine his own case.

[30] On the contrary the applicant has stated her case fully and sufficiently regarding both her expenditure and income both in her affidavit and her disclosure form.

[31] As stated above, the respondent owns a property at Mooikloof Ridge which is occupied by a tenant who pays a rental of R6 300 whereas he pays R7 100 for the bond in respect thereof.

[32] He pays tuition fees for his daughter, born before the marriage, in the sum of R250 000.00 per annum.

### Conclusion

[33] Due to the paucity of information furnished by the respondent regarding his income, the only conclusion I draw is that the respondent has understated his financial position in order to mislead the court.

[34] In the circumstances, I make the following order:

1. The parties shall retain full parental rights and responsibilities, as are provided for by Sections 18, 19 and 20 of the Children's Act, Act 38 of 2005.

2. The primary care and residency of the minor children shall be with the Applicant.
3. The Respondent shall be entitled to reasonable rights of contact with the minor children at all reasonable times, as recommended by the Office of the Family Advocate following an investigation into the best interests of the minor children as far as the non-custodian parent's contact to them is concerned.
4. The Respondent is ordered to pay maintenance in respect of the Applicant and the children born from the marriage relationship between the parties as set out below, until the minor children attain the age of majority or become self-supporting, whichever event shall last occur:
  - 4.1 The Respondent shall pay to the Applicant the sum of R 10 000.00 (TEN THOUSAND RAND) per month per child on or before the 1<sup>st</sup> day of every month by way of debit order into such bank account as the Applicant may nominate in writing from time to time.
  - 4.2 The Applicant shall retain the minor children as dependents on her hospital plan at her costs and the Respondent undertakes to pay the reasonable and necessary shortfalls not covered by the said hospital plan, which shortfalls shall include but not be limited to the private medical, dental, surgical, hospital, orthodontic and ophthalmological treatment needed by the minor children and not covered by the hospital plan, including any sums payable to a physiotherapist, occupational therapists, speech therapists, psychiatrist, psychologist and chiropractor, the costs of medication and the provision, where necessary, of spectacles and/or contact lenses.
  - 4.3 The Respondent shall effect payment of the children's educational costs, such costs to include without limiting the generality of the

aforegoing all school and/or tuition fees, additional tuition fees, the costs of extramural curricular school and sporting activities, school transport, school outings, camps and school tours (including the travel and accommodation expenses related thereto) and the costs of all extramural activities in which the children participate in, as well as the costs of all equipment and the attire relating to the children's education and their sporting and/or extramural activities engaged in by them.

- 4.4 The amounts payable in terms of prayers 4.1 above, shall be increased annually on the anniversary date of the divorce order, by the percentage change in the Headline Consumer Price Index ("CPIX) for the Republic of South Africa in respect of the Middle Income Group or in line with the Headline Inflation Rate, which is applicable, or any replacement Inflationary index should the CPIX be discontinued, as notified from time to time by the Director of Statistics or his equivalent for the preceding 12 months.
- 4.5 In the event of the children exhibiting an aptitude or desire therefore and for as long as they apply themselves with due diligence and continue to make satisfactory progress, the Respondent shall bear the costs of the children's tertiary education in respect of all university fees and/or fees due to an institution for higher learning attended by the children, such costs to include but not be limited to the costs of all books and equipment, required for their tertiary education (including the provisions of maintenance or computers) as well as their accommodation costs (in the event of the children residing in separate accommodation), reasonable transport and reasonable travelling costs.
5. The Respondent is ordered to make an initial contribution to the Applicant's legal costs in the amount of R 250 000.00, which amount shall be payable in monthly instalments of R 25 000.00 per month.



6. The Respondent is ordered to pay the cost of this application.

**SELBY BAQWA**

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

Date of hearing: 12 June 2024

Date of judgment: 26 July 2024

**Appearance**

**For the Applicant:** Adv. JA van Wyk (Instructed by Shapiro & Haasbroek Inc)

Cell: 0722235803

Email: [advjavanwyk@gmail.com](mailto:advjavanwyk@gmail.com)

**For the Respondent:** MOCHE ATTORNEYS

EMAIL: [kgotatso@mocheattorneys.co.za](mailto:kgotatso@mocheattorneys.co.za)

TEL: 012 567 6062