

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 071537/2024

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

Date: 27 August 2024

Signature:

In the matter between:

L[...] Z[...] (Previously R[...])

Applicant

And

L[...] J[...] Z[...]

Respondent

JUDGMENT

NYATHI J

[1] This is an opposed Rule 43 application. The applicant and respondent (“the parties”) were married on 02 March 2002 out of community of property with the exclusion of the accrual system in Pretoria.

[2] Out of the marriage two children, were born namely, LJ and LS on 05 July 2004 and 23 March 2007 respectively.

[3] The parties separated on 9 July 2023 and are currently going through a divorce.

[4] The main issues for resolution between the parties in this application are:

4.1 the determination of the amount of maintenance claimed by the applicant on behalf of the children.

4.2 Personal maintenance claim by the applicant. And

4.3 Whether or not a redistribution of assets in terms of section 7(3) of the Divorce Act 70 of 1979 should be ordered, and if so, the percentage of the respondent's assets that ought to be transferred to the applicant.

4.4 The manner in which the parties' joint ownership in respect of an immovable property situated at 8[...] L[...], E[...] A[...] Estate, M[...] Park, Pretoria should be terminated.

[5] The applicant describes the situation regarding the children as complex. Although LJ the older of the two children is already 19 years old, he is unable to function like a normal 19-year-old, or care for himself. He has a very low IQ and does not have the capacity to finish school. He used to be enrolled in school but only progressed until grade 9. She believes that he suffers from autism.

[6] After LJ was taken out of school, he did some manual labour work on the farm of his paternal grandparents, however this was terminated after too many complaints were received from her parents-in-law.

- [7] LJ continues to stay with the applicant and keeps himself busy in and around the house. It should be beyond doubt to the respondent that he is unable to function on his own and requires special care (financially, emotionally and physically) for the rest of his life. He does not have the capacity to function independently and is unemployable.
- [8] LS is currently in grade 11 and attends M[...] hoërskool. He functions normally and has the capacity to pursue tertiary education after matriculating. The respondent undertook to pay for LS's tertiary education costs.
- [9] The respondent does not have a close relationship with the boys, especially LJ. He comes to the house to visit them, or to remove them to his house for short periods. The children and applicant are comfortable with this arrangement. The contact between the respondent and the children can be arranged with them directly.
- [10] The applicant and the children stay in a Townhouse (the former matrimonial home) for which the respondent pays the monthly bond instalments.
- [11] The respondent stays in the new luxurious house in M[...] Park which the parties had built as their dream home. The respondent seemingly has no plans to sell this house or rent it out. The house is 95% completed. To be able to afford this new house, the parties had planned to sell the townhouse and rent out the studio and the guest room at the new house, however their marriage broke down before these plans could materialize.
- [12] Initially when the Respondent left the erstwhile marital home, he moved into rental accommodation with his girlfriend, they recently moved into the newly built house. The bond instalment of the new house is in the region of R40 000,00 per month, which is unaffordable, considering the fact that there are

now two households (with 2 bond repayments) to maintain. The respondent according to the applicant, stubbornly refuses to put the new house on the market and sell it. Instead, he insists on living there, whilst reneging on his maintenance duty towards her and their children.

[13] The applicant states that the respondent is a Civil Engineering technologist and shareholder in a company. He earns a salary of R65 000.00 per month in cash and due to a 12% shareholding in the company, receives a profit share, taking his income to R110 000.00 per month.

[14] The applicant earns just under R23 000.00 per month. The respondent has stopped paying certain household expenses while he lives in luxury, according to the applicant.

[15] What is critical for determination, is the respondent's ability to pay as contrasted with his willingness to make the requested contributions.

[16] The applicant's listed items of relief are the following:

16.1 That the interim primary residency of the minor child, LS, be awarded to the applicant, subject to the respondent's rights of contact to him at all reasonable times, such contact to be arranged with the minor child directly;

16.2 That the respondent be ordered to continue payment of the following direct expenses of the applicant and the parties' children:

16.2.1 Bond instalment in respect of the Towerfluit townhouse;

- 16.2.2 Levy in respect of the Towerfluit townhouse;
- 16.2.3 Municipal rates & taxes of the Towerfluit townhouse;
- 16.2.4 Water and electricity bill in respect of the Towerfluit townhouse;
- 16.2.5 LS and LJ's cell phone costs;
- 16.2.6 M Choice premium;
- 16.2.7 Domestic worker's salary;
- 16.2.8 Gardener's salary;
- 16.2.9 LS's school fees and school clothes;
- 16.2.10 LS's extra maths classes;
- 16.2.11 LS's extra science classes;
- 16.2.12 IHappy Fibre costs;
- 16.2.13 Medical aid fund premium in respect of the Applicant and the parties' children;
- 16.2.14 Insurance of Applicant's motor vehicle and household insurance;
- 16.2.15 Discovery Life policy premium;
- 16.2.16 DSTV premium;

16.2.17 Disney Plus premium;

16.2.18 The costs of Leendert's glasses and eye tests;

16.3 That the respondent be ordered to pay maintenance to the applicant in respect of the parties' children in the amount of R16 700.00 (SIXTEEN THOUSAND SEVEN HUNDRED RAND) per month, payable on/before the 1st day of every month into the applicant's nominated bank account, and such amount to increase yearly at a rate equal to the average consumer price index for the preceding 12 (TWELVE) months.

16.4 The respondent be ordered to retain the applicant and the parties' children as beneficiaries of his medical aid fund, and to maintain them on the same plan with the same benefits. Additional to that, the respondent to be responsible for payment of all reasonable medical expenses of the applicant and the parties' children which are not covered by the medical aid fund;

16.5 That the respondent be ordered to make an initial contribution of R200 000,00 (Two hundred thousand Rand) towards the applicant's legal costs, such amount to be paid in equal monthly instalments of R25 000,00 (Twenty-five thousand Rand) each, payable on/before the 1st day of every month, the first payment to be made on/before the 1st day of the month following this order.

16.6 That the respondent be ordered to pay the costs of this application.

[17] The respondent generally makes common cause with the above demands, save for following conditions:

17.1 The respondent tenders to pay for the water and electricity bill in respect of the Towerfluit townhouse – but no more than R3 900.00. The logic for this limit is unclear, given the fluctuations that accompany consumable accounts.

17.2 The respondent raises issues of sharing of the duties rendered by the domestic worker, the gardener and respondent's need to log into the digital satellite television systems – this is beyond the remit of the court to entertain and arbitrate, the parties are free to negotiate around these.

17.3 As regards the minor child's school clothes, the respondent insists that the applicant should contribute 50% towards that. The respondent makes no tender to the costs of the Fibre service (presumably the wi-fi). It is undeniable that modern day living renders this a necessity rather than a luxury item.

[18] Ms. Vermaak-Hay SC elaborated on the respondent's income in relation to his Financial Disclosure Form (FDF), the bank statements illustrated his spending habits, providing the court with insight into the respondent's lifestyle.

[19] The respondent has various bank accounts attached and has not declared dividends for 2024, his explanation is that dividend income is not a certainty as it depends on the company's performance.

[20] It was argued on behalf of the respondent that the applicant's Rule 43 application was served together with the divorce summons on the same day and should therefore be dismissed with costs. The simultaneous service of the

two processes is of no consequence. In *G N S v L J*¹ the Rule 43 application was similarly served on the respondent together with the divorce summons and the relief sought was granted.

[21] In respect of the applicant's claim for contribution towards her legal costs, the respondent's view was that the application is premature since the divorce has been pending for less than a month. No legal impediment was highlighted, referred to or is apparent in support of this view.

[22] The law makes provision for the financially vulnerable spouse in a divorce to be put in a position to litigate on a basis of 'equality of arms' with her erstwhile partner. This is a constitutional imperative as confirmed in numerous decisions of our courts.²

[23] In determining the quantum of the contribution to costs which a spouse may be ordered to pay, the court has to exercise its discretion judiciously and with care having regard to among others, the proven facts, evidence led, parties' financial positions, the need for such contribution, the scale the parties are litigating on, reasonable litigation needs of both parties, and the ability of the person who is requested to contribute towards legal costs to make such contribution.³

[24] In *Taute v Taute*⁴ it was held that a Court will be far more inclined to allow an application made on reasonable grounds than one that contains extravagant demands and a respondent who shows a willingness to maintain his spouse and/or children will be heeded with greater sympathy than one who is shown as avoiding his obligations.

¹ (Case No: 2023/004861) [2023] ZAGPJHC 336 (12 April 2023).

² *Van Rippen v Van Rippen* 1949 (4) SA 634 (C);

³ *Van Rippen supra*; *Z.G v J.G.C.G* (77979/2018) [2024] ZAGPPHC 18 (12 January 2024) at para 41.

⁴ 1974 (2) SA 676 (E) at 676H.

[25] The current matter is not one where the respondent is obstinately shirking his responsibilities in order to spite the applicant at all, seeing that there is a large overlap in his acknowledgment of responsibility towards the applicant and their children.

[26] While the respondent does plead some impecuniosity it is not borne by his earnings and lifestyle. The applicant's claim is not extortionate in my opinion as well having regard to the documents filed.

[27] The applicant has made a compelling claim for the relief sought.

[28] In the result, the draft order⁵ filed on behalf of the applicant is made an order of court.

J.S. NYATHI

Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 12 August 2024

Date of Judgment: 27 August 2024

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⁵ Caselines 009.

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 27 August 2024.