SOUTH AFRICA / JUDGMENT

A v A (3505/2014) [2014] ZAFSHC 162 (11 September 2014)

[2014] ZAFSHC 162

COURT
Free State High Court, Bloemfontein

BEFORE
E.K. Tsatsi

CASE / FILE NUMBER
3505/2014

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IN
THE HIGH COURT OF SOUTH AFRICA
FREE
STATE DIVISION, BLOEMFONTEIN
Case
No.: 3505/2014
In

the matter between:

A[...]
A[...]
.....Applicant

and
H[...]
W[...] A[...]
.....Respondent
HEARD
ON: 21 AUGUST 2014

JUDGMENT

BY: E.K. TSATSI, AJ

DELIVERED ON 11 SEPTEMBER 2014

[1] This is an opposed application for payment of maintenance pendente lite and contribution towards costs in terms of Rule 43 of the Uniform Rules of Court ("the Rules").

[2] The applicant instituted divorce action against the respondent under Case No 3134/2014, which action is still pending before this court.

[3] The parties are married out of community of property on 11 January 2003, the marriage still subsists. There are two minor boy children born from the union aged 14 and 10 years old.

FACTS

[4] The applicant is presently staying with her parents, together with the two minor children. The applicant's father used to maintain her and the two minor children, but he is no more able to do so. The applicant is diagnosed with depression, bipolar, obsessive compulsive disorder and she needs medication on a daily basis to manage the illness.

[5] The applicant used to work for a cosmetic company called Annique as a consultant since 1992. Her commission was about R1 000.00 a month until she resigned in 2013. The applicant also worked for the Department of Health until she was medically boarded. She currently lives on a disability grant of about R3 500.00.

[6] According to the applicant, respondent abandoned her, and the minor children including his responsibilities. The only thing that the respondent was paying for was the applicant's and the two minor children's cellphone bills. The respondent wanted to sell the household furniture to Nico Smith Auctioneers, in order to pay for his debts.

[7] The respondent is in car sales business, presently living with his mother since his father passed away on 29 June 2014. At the moment the respondent is paying his mother rental in the amount of R5 500.00.

[8] The respondent denied that the applicant was no more a consultant for Annique cosmetics. He alleged that the applicant was still working for Annique cosmetics and making between R1 500.00 to R2 000.00 per month.

[9] The respondent earns a salary of about R57 078.15 per month. Applicant has got no source of income except the disability grant of R3 500.00.

ISSUES

[10] The main issue in this application is whether or not the respondent will be able to pay maintenance pendente lite and other contributions toward costs.

[11] The applicant pleaded with the respondent to assist her and the minor children financially, but all in vain. In response to the applicant's request, the respondent paid an amount of R1000.00 in the applicant's bank account on 21 July 2014. The amount was not enough because the applicant had to pay the domestic worker R300.00 for a two day work, R300.00 diesel for the "bakkie", R100.00 for electricity, R300.00 for anti-depressant currently used by the children.

[12] The applicant estimated her monthly expenses in the amount of R30 569.00 and she has a shortfall of about R27 069.00,

this included using her disability grant.

[13] According to the respondent he paid an amount of R4 000.00 into the applicant's bank account on 29 July 2014. He also paid an amount of R1 597.00 for medical services. The respondent's nett income was about R38 376.07 on 31 August 2013 and R20 375.17 on 31 July 2014.

[14] The respondent's monthly expenses was said to be R305 599.18 which included various credit facilities, college fees and arrears. In addition his alleged reasonable expenses amounted of R28 958.39.

SUBMISSIONS:

APPLICANT

[15] It was submitted on behalf of the applicant that the court, as the upper guardian of children, should take cognisance of the best interest of the minor children. The court should intervene and make sure that the respondent was taking care of his minor children adequately. The respondent's children are suffering as respondent neglected them. The applicant was unable to take care of the minor children adequately, because her disability grant was not enough. The R5 500.00 that the respondent was paying to his mother, he could spend same on his children.

[16] Counsel for the applicant argued that, ever since the applicant instituted the divorce action against the respondent, the latter

decided to work less. As a result the respondent was earning very little commission compared to what he used to earn before the institution of the divorce action against him. Counsel for the applicant submitted a document in court showing a decline in the respondent's earnings. For example on 31 July 2013 the respondent's total earnings were R100797.00, incentive bonus of which was R69677.00 and on 30 July 2014 his total earnings were R38 620.00, incentive bonus of which was R5000.00. It was further submitted that for the respondent to earn commission as he

did before he needed to work harder.

RESPONDENT

[17] Counsel for the respondent denied that the respondent worked less to earn less commission due to the fact that a divorce action has been instituted against him. The commission started to decline from August 2013 to July 2014. Divorce summons were issued against respondent in July 2014. He would not have known that the applicant was going to divorce him. The reason for the decline in the commission was due to the bad economy in the country. A submission was made on behalf of the respondent that August 2013 to July 2014 car sales declined and this has affected the respondent's earnings. End of February is end of financial year and the respondent had to pay his income tax, which resulted in a drop in respondent's earnings. It was submitted on behalf of the respondent that the applicant misled the court. It was alleged that she claimed an amount of R30 000.00 for her expenses which was extreme and exaggerated. Therefore the court may dismiss the applicant's application with costs. The respondent cannot afford to pay for all the costs the applicant is asking for, due to the fact that his earnings were not enough.

THE LAW

[18] Section 7 of the divorce Act of 1979 ("the Act') empowers the court granting a decree of divorce to make an order of maintenance in favour of one of the spouses after considering the following facts: the existing or prospective means of the parties, the parties respective earning capacities, their financial needs and obligations, their ages, the duration of the marriage, the standard of living of the parties prior to the divorce, the parties conduct insofar as it may be relevant to the breakdown of marriage, an order for the division of assets and any other factor which may assist the court.

[19] In Levin v Levin and Another 1962 (3) SA 330 (W) at 331D the court said that maintenance pendente lite is intended to be temporary and interim and cannot be determined with the same degree of precision, as would be possible in a trial where evidence is adduced. A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. More weight will be attached to the affidavit of a respondent who evinces willingness to implement his lawful obligations than to that of one who is seeking to evade them. (See: Taute v Taute 1974 (2) SA 675 (E) at 676H.)

[20] The claim for a contribution towards costs is based on the duty of support the spouses owe each other. (See: Lyons v Lyons 1923 TPD 345 at 346.) The applicant, asking for contribution towards costs, must show that she has insufficient means of her own. (See: Engelbrecht v Engelbrecht 1944 NPD 186.) Our courts are generally inclined to award maintenance where there are minor children and the spouse asking for maintenance pendente lite is unemployed (See: Kroon v Kroon 1986 (4) SA 616 (E); and Pillay v Pillay 2004 (4) SA 81 SE.)

APPLICATION OF THE LAW

[21] Although this is a Rule 43 application, I have taken factors provided for in section 7 of the Divorce Act into account. The

applicant's claim is supported by reasonable and moderate details and it is not exaggerated or extravagant. I am reluctant to say the same thing about the respondent. I find the respondent's expenses to be excessive and exorbitant. For

instance, there are various credit facilities with huge instalment payments. In addition the respondent included cell phone payments as part of his expenses but omitted to mention that R620.00 of the alleged R1 000.00 for his cellphone bill is paid by his

employer.

[22] I am inclined to think that the respondent's willingness to implement his obligations is lacking (See: Taute v Taute, (supra.)The respondent alleged that his total expenses amounted to R305 599.18 and R28, 958.39, with a monthly salary of R19 674.00.

Based on the submissions made on behalf of the respondent, respondent's earnings fluctuated and was also dependent on commission which was affected negatively or positively by car sales.

[23] I am satisfied that the applicant has set out sufficient facts which would justify the court in granting her maintenance and contribution towards costs pendente lite.

[24] I accordingly make the following order pendente lite, in terms of Rule 43:

24.1The respondent is ordered to pay an amount of R6 600.00 for an accommodation for the applicant and the two minor children. The said amount to be paid with effect from 1 October 2014 and every month thereafter on or before the 7th day of each succeeding month.

24.2 The applicant is awarded custody of the minor children subject to the respondent's right of reasonable access, which shall include but not limited to the right to have the minor children visit him at times and places agreed to by both parties.

24.3 The respondent is further directed to pay R6 000.00 per month per child with effect from 1 October 2014 and every month thereafter on or before the 7th day of each succeeding month.

24.4 The respondent is ordered to put his two minor children on his medical aid with immediate effect. The respondent is also ordered to pay for all reasonable expenses regarding hospital, dental, eye and pharmacy services including related costs which are not covered by medical aid.

24.5 The respondent is ordered to pay an amount of R8 000.00 towards the applicant's maintenance with effect from 1 October 2014 and every month thereafter on or before the 7th day of each succeeding month.

24.6 The respondent is ordered to pay a contribution of R5 500.00 towards the applicant's legal costs. The said amount to be paid monthly at a rate of about R500.00 per month with effect from 1st October 2014 and every month thereafter on or before the 7th day of each succeeding month.

24.7 Parties can approach the court on the same papers, duly amplified, as soon as the family advocate's report is available.

24.8 The costs of this application are to be costs in the divorce action.

E.K. TSATSI, AJ

On behalf of the applicant: Adv Wessel Groenewald

Instructed by:

McIntyre & Van der Post

BLOEMFONTEIN

On behalf of the respondent: Adv S Tsangarakis

Rossouws Attorneys

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