

SOUTH AFRICA / JUDGMENT

## AJ v GJJ (10690/18) [2021] ZAGPJHC 151 (20 May 2021)

[2021] ZAGPJHC 151

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

10690/18

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

20 MAY 2021

Case No: 10690/18

In the matter between:

A J (BORN A E) Applicant

and

G J J Respondent

JUDGMENT: APPLICATION IN TERMS OF RULE 43

WILSON AJ:

1 The applicant (“Ms. J”) seeks an order directing the respondent (“Mr. J”) to pay interim maintenance, and an order regulating the care of their minor child (“L”), aged 8, pending the determination of an action for divorce.

2 Actions for divorce are by their nature emotionally fraught and potentially rancorous. The separation of two people who once loved each other - or who perhaps still do, but not in a manner that allows them to remain married – is a complex proceeding, one that requires the utmost care and attention.

3 One critical function of the courts in these proceedings is to ensure that neither party is prejudiced by a lack of resources – whether to pursue their claims in the action itself, or to look after themselves and their children while the action proceeds. Another function, of at least equal importance, is to ensure that appropriate arrangements are made for the interim care of affected minor children.

4 These are the two purposes of Uniform Rule 43 that are relevant to this application. Unfortunately, however, in the affidavits before me, each party has sought, to some extent, to introduce material that is not relevant to these issues, and which impugns the general honesty or good faith of the other party. In applications of this nature, that sort of conduct is not as rare as it should be (*E v E* 2019 (5) SA 566 (GJ), para 62).

5 Happily, it is not necessary for me to deal with these allegations in any detail, because counsel who appeared before me accepted, for the most part, that this material should be disregarded. After a brief debate, Ms. Carstens, who appeared for Mr. J, also abandoned a point in limine to the effect that Ms. J's affidavit had not been properly commissioned, and that, as a result, the entire application is a nullity. The abandonment was both wise (the point had no merit) and responsible, given that it is inherently undesirable for a matter of this nature to be determined on that sort of technicality.

6 It was ultimately agreed by both counsel that my focus should be on the appropriateness of the interim care and contact regime for L, the nature and extent of Ms. J's reasonable maintenance needs, and the ability of Mr. J to meet those needs, having regard to the parties' general standard of living. This is consistent with the relevant case law (on interim maintenance see *Taute v Taute* 1974 (2) SA 675 (E), 676D-H).

7 I will first address the care arrangements to be made for L, and then turn to the appropriate maintenance order.

#### Interim care of L

8 The interim care of L was largely agreed before argument commenced. The report of the Family Advocate records that the parties have reached agreement that L should reside with Ms. J, with Mr. J having supervised contact with L on Wednesdays, one day every weekend and by telephone three times a week. Unsupervised contact will be phased back in subject to the recommendation of Ms. Tanya Kriel, a social worker. If either party objects to Ms. Kriel's recommendation, they may approach the court for further relief at that stage.

9 This regime seems to me to be appropriate, having regard to the level of estrangement between Mr. J and L evidenced on the papers, and I will make an order on these terms. I hope that Mr. J and L will be able to resume ordinary contact as soon as possible, as it is obviously in L's best interests to have a normal, healthy and loving relationship with both parents.

#### Maintenance

10 There were substantial disputes between the parties relating to Ms. J's reasonable needs. Mr. J alleged that Ms. J had substantial capital from the sale of a property in Twist Street, Hillbrow. Mr. J also criticised the decision to sell the property, arguing that, if it had not been sold, the rental income from it would have substantially met Ms. J's maintenance requirements.

11 Whatever the merits of that claim, the fact is that the proceeds of the sale of the Twist Street property have now largely been dissipated in debt repayments, tax, and the reservation of funds pending the outcome of a dispute with the City of Johannesburg about the rates and utilities owing on the property. On the best evidence available, the proceeds of the sale now available to Ms. J amount to just over R19 000. It is beyond the scope of my role to consider whether the proceeds of the sale were used responsibly. Even if it were not, I can see no obvious profligacy evident on the papers.

12 It was suggested during argument that Ms. J had concealed the true value realised from the sale of the Twist Street property. Relying on an incomplete offer to purchase well in excess of the purchase price ultimately declared, Ms. Carstens sought to persuade me that the property had, in fact, been sold for around R1 million more than Ms. J had disclosed. When confronted by the fact that the offer to purchase did not refer to the Twist Street property – or indeed any other property at all – Ms. Carstens was constrained to accept that I could not reasonably infer that Ms. J had under-reported the proceeds of the sale. The point was not pressed further.

13 Ms. J says that she makes a small living (not more than R5 000 per month) from selling antiques from a Facebook page apparently set up for that purpose. Ms. Carstens submitted that Ms. J had under-reported that income. This was done on the basis of an examination of Ms. J's bank statements. However, when read as a whole and in the appropriate context, Ms. Carstens accepted that these statements did not disclose any under-reporting. The statements also satisfied me that Ms. J's accounts are significantly in overdraft.

14 Ms. J's financial position is to be contrasted with Mr. J's. A successful businessman, who, in addition to a recycling business, owns more than one rental property, Mr. J stated in his answering affidavit that his income is between R70 000 and R100 000 per month. However, after an examination of his bank statements, adduced as part of the financial disclosure required in matters of this nature, Ms. Strathern, who appeared for Ms. J, submitted that Mr. J's income was, on a conservative estimate, significantly more than that. On the bank statements produced, between March and September 2020, Mr. J's income was roughly double the amount alleged in his answering affidavit.

15 Ms. Carstens clearly lacked the instructions necessary to dispute this, and I am constrained to accept that Mr. J's income is well in excess of the amounts originally alleged. It is very difficult for me to tell how far in excess of the amount declared Mr. J's true income is, however. His income is erratic (sometimes his monthly income appeared to be as little as R75 000. At other times it appeared to be in excess of R300 000). I am accordingly reluctant to draw conclusions about Mr. J's means solely on the basis of six months' worth of bank statements. Ms. Strathern also noted that income from Mr. J's five immovable properties had not been fully disclosed. That, too, gives me pause when seeking to determine what Mr. J can reasonably afford.

16 A better starting point seems to me to be the obligations Mr. J has accepted until now. Mr. J accepts that he is obliged to maintain Ms. J and L. He alleges that he currently pays in the region of R56 000 per month towards their maintenance. He also pays, in addition to this, for L's school fees, school uniform, sports clothing, and her medical aid contributions. He undertakes to continue paying these amounts. His case is, in substance, that he should be required to do no more than he currently does, and that this application is fundamentally unnecessary.

17 The problem with this defence is that Mr. J's payments to Ms. J have been made in dribs and drabs. Ms J incurs an expense. She then asks Mr. J to reimburse her. He then does so. It hardly needs stating that this sort of arrangement is unsustainable pending the divorce action. Even if I were to conclude that Ms. J is entitled to no more than she currently receives, this application would be necessary to ensure that the amount is paid as of right and in advance.

18 In any event, the amount in maintenance Mr. J accepts is necessary was calculated on the basis that the parties will continue to share the matrimonial home. In a step that everyone accepts was necessary, Ms. J and L moved out of the matrimonial home in April 2021. Accordingly, the amount effectively conceded by Mr. J does not have regard to the rent Ms. J now has to pay, or to the additional expenses she will now incur because she no longer shares a home with him.

19 Some advance on the obligations Mr. J accepts accordingly seems reasonable. Murky though his financial disclosures are, it seems to me that a reasonable increment on his current obligations would be well within Mr. J's means.

20 Unfortunately, Ms. Carstens was unable to assist me with an estimate of what the Mr. J believes is reasonable and affordable to him, having regard to the augmented income revealed in his financial disclosure forms. Mr. J instead concentrated his opposition to the application on a series of assertions about Ms. J's character and trustworthiness, and not on a detailed engagement with what he considers her reasonable needs to be. As a result, I am constrained to rely on the documents tendered in the various financial disclosures, amplified where necessary with Ms. Strathern's submissions.

21 In her founding affidavit, Ms. J originally claimed just over R132 000 per month in maintenance for herself, for L and for another minor child ("D"), who has lived with Mr. and Mrs. J for the duration of the marriage. Ms. J is D's biological mother, but Mr. J is not D's biological father. I accept Ms. J's assertion that Mr. J has cared for and maintained D for a considerable period.

22 The figure in the founding affidavit concerns me, because it is unclear how that figure relates to the amount of R56 000 the parties agreed had been reimbursed to Ms. J for her expenses before she moved out of the marital home. There is nothing in the papers that indicates that either party thought that R56 000 per month plus schooling and medical aid costs for Ms. J and L was in any way inadequate. The figures that make up the R132 000 claimed in the founding affidavit appear to go well beyond the amounts that the parties apparently considered adequate before the application was brought.

23 Indeed, Ms. J no longer seeks the R132 000 figure first specified in her founding affidavit. Cutting her claim down to what she says is necessary to keep up with her current needs (a large portion of which involves servicing debt and looking after her children), Ms. J now seeks a range of contributions which add up to around R100 000 per month.

24 On the evidence before me, this amounts to over half of Mr. J's average monthly income.

25 In reconciling what Mr. J says he is prepared to do, with what Ms. J says she needs, a reliable path seems to me to start from the amount the parties appeared to be able to live with before Ms. J moved out of the marital home, before augmenting it by the additional expenditure Ms. J will now incur on her own.

26 The starting point, then, must be that R56 000 (excluding school and medical aid costs) was sufficient to support Ms. J and L when they lived with Mr. J. To this must be added the cost of renting the accommodation Ms. J and L now occupy. This is R15 171. That yields a total maintenance contribution of R71 171 per month for Ms. J and L (excluding L's school fees and medical aid).

#### D's position

27 Mr. J asserts that he is not in law required to continue to maintain D. It is not seriously disputed that D has lived with Mr. J throughout the marriage, and that, in substance, Mr. J acted in loco parentis of D for as long as they lived together. Mr. J has, in addition to providing support to Ms. J and L, maintained and supported D, paid for his medical aid contributions and paid his school fees. It is not directly alleged on the papers whether the R56 000 figure for which Mr. J accepts responsibility includes his contribution to D. However, since his undertaking to continue paying that amount is coupled with a strenuous denial of any obligation to support D, I must infer that the R56 000 figure excludes any contribution to D's maintenance and support.

28 It is accordingly necessary to consider whether the augmented amount I have reached based on Ms. J's needs now that she has left the family home ought to be enhanced by a contribution to D's maintenance.

29 I am sensitive to the fact that, in law, there is no clear duty of support that Mr. J owes to D, however generously Mr. J treated D when they shared a home. D is not Mr. J's biological child, and Mr. J. has not adopted him. Indeed, D has a biological father, who contributes to his upkeep in the sum of R3 000 per month.

30 During argument, Ms. Strathern referred me to the case of *NB v MB* 2010 (3) SA 220 (GSJ). In that matter, Brassey AJ made an order requiring MB to continue to pay NB's son's school fees, despite the fact that MB was not the child's biological father, and had not adopted him. Brassey AJ held that, despite never having adopted NB's son, MB had held himself out as the child's father, a representation upon which NB had relied. Brassey AJ held

that it was not necessary to conclude that MB had de facto adopted NB's son, but that he would have done so had it been necessary to enforce a duty of support between MB and NB's son.

31 I do not think that *NB v MB* provides a happy analogue with this case. NB's son's biological father had died by the time MB came on to the scene. MB changed NB's son's surname to his own, initially resolved to adopt NB's son (although never actually went through with it), and, finally, appears to have held himself out as NB's son's father in an application to have the boy admitted to a private school.

32 In this case, the allegation that Mr. J treated D as his son has not been substantiated beyond that fact that Mr. J provided D with maintenance and support. But D apparently has a father, and to suggest that Mr. J ever thought of himself as D's father is in these circumstances artificial.

33 However, I am conscious that my role in these proceedings is to make an interim order that will preserve a reasonable status quo while action for divorce, in which the rights and obligations of the parties will be finally determined, is finalised. To make an order that might have the effect of discontinuing the payment of D's school fees and medical aid at this stage of the proceedings would be inconsistent with that role, and highly prejudicial to D and Ms. J. I am also conscious of the fact that D is currently 17 years old. When he reaches his majority, there may well be reason to alter the arrangement as it now stands. But, for the time being, things, in my view, should stay as they are as much as possible.

34 It is nonetheless appropriate to reflect the maintenance payments Ms. J receives from D's biological father in the order I make. The amount that I will award in respect of D's maintenance will be reduced by the R3 000 Ms. J already receives from D's father.

35 This means that R7 000 per month must be added to the R71 171 figure to which I earlier referred (excluding D's school fees and other expenses, which must still be paid directly). This yields a grand total of R78 171 per month. This is made up of R46 000 per month to cover Ms. J's current liabilities and maintenance, R10 000 per month for L's maintenance (the amount that Ms. J says she needs), R7 000 per month for D's maintenance and R15 171 for rent.

36 I would have been happier if the parties were able to provide a more comprehensive framework for these calculations. However, the order that I am making appears to me to reasonably reflect both Mr. J's means and Ms. J's, L's and D's needs on the facts before me.

#### Costs

37 The parties agreed that, if the application was not dismissed, then costs should be reserved for determination in the main action.

#### Order

38 For all these reasons, I make the following order pendente lite –

38.1 In respect of L –

38.1.1 Mr. and Ms. J will exercise jointly the parental rights and responsibilities set out in sections 18 (2) (a), 18 (2) (c) and 18

(3) of the Children's Act 38 of 2005 ("the Act").

38.1.2 Mr. and Ms. J's parental rights and responsibilities in terms of section 18 (2) (b) of the Act will be apportioned as follows –

38.1.2.1 L will reside with Ms. J.

38.1.2.2 Mr. J will maintain in-person contact with L every Wednesday after school for a period of up to two hours; one day every weekend, Saturday and Sunday to alternate.

38.1.2.3 Mr. J will maintain telephonic contact with L three times per week, on Mondays, Wednesdays and Fridays, between 18h00 and 19h00.

38.1.2.4 Mr. J's in-person contact with L will take place under the supervision of Ms. Tanya Kriel at "Kidsbuzz", 1 Adriaan Place, Malanshof, Randburg 2194.

38.1.3 Unsupervised contact between Mr. J and L will take place to the extent that Ms. Kriel recommends it. Ms. Kriel will make a recommendation about the extent of unsupervised contact between Mr. J and L not later than 6 weeks from the date of this order.

38.1.4 If either party objects to Ms. Kriel's recommendation, they may apply to court for such further relief as may be appropriate.

38.1.5 The parties may vary or disregard Ms. Kriel's recommendation by agreement.

38.1.6 Mr. J will continue to pay for L's school fees, school uniforms, school outings, extra-mural activities, necessary extra lessons, stationary, books and medical aid.

38.1.7 Mr. J will contribute to L's maintenance in the sum of R10 000 per month.

38.2 In respect of D –

38.2.1 Mr. J will continue to pay for D's school fees, school uniforms, school outings, extra-mural activities, necessary extra lessons, stationary, books and medical aid.

38.2.2 Mr. J will contribute to D's maintenance in the sum of R7 000 per month.

38.3 In respect of Ms. J, Mr. J will pay R61 171 per month, in a contribution towards debt repayments, rent for Ms. J's, L's and D's accommodation, and Ms. J's general maintenance.

38.4 The costs of this application are costs in the divorce action.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 20 May 2021.

HEARD ON: 13 May 2021

DECIDED ON: 20 May 2021

For the Applicant: N Strathern

Instructed by Ulrich Roux and Associates

For the Respondent: T Carstens

Instructed by Olivier and Malan

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