

SOUTH AFRICA / JUDGMENT

A.M v L.M (2022-054818) [2023] ZAGPJHC 1249 (1 November 2023)

[2023] ZAGPJHC 1249**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

2022-054818

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Source record**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG DIVISION,****JOHANNESBURG****Case Number: 2022-054818**

In the matter between:

AM

Applicant

And

LM

Respondent

JUDGMENT

Nkutha-Nkontwana J

Introduction

- [1] The parties are married in community of property since 16 July 2005, a marriage that was covenanted in Johannesburg. The respondent vacated the matrimonial home in June 2011. On 24 January 2023, the applicant instituted a divorce action against the respondent. In these proceedings, the applicant seeks maintenance of the parties' children pendente lite in terms of Rule 43 of the Uniform Rules[1].

Background

[2] There are three children born of the marriage between the parties:

2.1 PM, a dependent major male child who is currently 20 years old;

2.2 KM, a minor male child who is currently 16 years old; and

2.3 LM, a minor male child who is currently 13 years old.

[3] The three children primarily reside with the applicant. The respondent pays the monthly rental in respect of the applicant and children's accommodation in the amount of R14 500.00 per month. He is also making payment towards the minor children's school fees in the amount of R 8 600.00 per month.

[4] The applicant contends that the respondent had reneged on his undertaking to pay R7000.00 per month towards the children's maintenance. The last payment he made towards maintenance was in May 2022 in the amount of R3500.00. Hence in these proceedings, she is seeking a maintenance contribution of R7000.00 per month.

[5] The applicant earns R 17 999.15 net income per month. She has to resort to loans in order to make ends meet every month. The maintenance contribution by the respondent would cover expenses in relation basic needs like to water and electricity, groceries, toiletries, clothing and related expenses and the children. She is also seeking that the respondent contributes 50% of the monthly medical aid costs for the children who are currently covered by the applicant's the medical aid.

[6] The applicant contends that he earns more than what he has disclosed in his Financial Disclosure Form (FDF) as he is the sole member of his close corporation. As such, he is in a position to afford the maintenance required.

[7] The respondent is a business man and a sole member of his close corporation. He avers that he earns about R40 500.00 per month. He is opposing the application and, in limine, takes issue with the applicant's locus standi to seek maintenance on behalf of PM. He contends that PM can institute his own action for maintenance as a major child.

[8] On the merits, the respondent is pleading poverty. He contends that his business was negatively impacted by the Covid-19 pandemic. Consequently, he had to downsize his business operations and he is currently operating his business from his residential property. His current liabilities are standing at R13 721 724.00 with an income of R8 951 724.00. He also has four other children, excluding the children he has with the applicant, that he is taking care of.

Legal principles and

analysis

[9] In terms of Rule 43(2), a party seeking an interim relief in a matrimonial matter is required to do so on notice with a “sworn

statement in the nature of a declaration, setting out the relief claimed and the grounds therefor...” While a respondent

wishing to oppose the application is required by Rule 43(3) to deliver “a sworn reply in the nature of a plea.”

[10] It is trite that in Rule 43 applications, the court is called upon to intervene on an interlocutory basis and grant an interim relief to mostly woman litigants and their minor children who may be penurious when litigating against their spouses, who were often in a stronger, financial position than themselves in divorce proceedings.[2]

[11] The applicant’s eligibility to reasonable maintenance pendente lite is dependent upon the marital standard of living of the parties; her actual and reasonable requirements; and the capacity of her husband to meet such requirements which are normally met from income, although in some circumstances inroads on capital may be

justified.[3]

[12] In the present case, it is conceded that the respondent is paying rental and school fees for the minor children. What he is being asked for is a contribution towards maintenance of the children as well. The applicant’s modest income is not disputed, nor her expenses seriously challenged.

[13] On the other hand, the respondent seeks to be excused from fully providing for his children with the applicant but has failed to provide the necessary details about his income. The bank statements attached to his FDF show that his Nebank business account is the main account he uses to transact despite his assertion that he earns an income. That account always has a positive balance and enough funds to meet the maintenance contribution for his children with the applicant.

[14] I have noted also that his FNB private account statement has only one transaction of R20 000.00 that was transferred from his business

account. That, therefore, begs a question — what informs his salary of R40 500.00? Especially because conspicuously absent from the respondent’s FDF is the information pertaining to the respondent’s personal income in a form of a payslip and/or personal income tax information (IRP5).[4]

[15] Listed also in the respondent's FDF is a Range Rover and M3 BMW motor vehicles; and two Harley-Davidson motor bikes. The respondent contends that the vehicles belong to the close corporation. This contention is flawed given my observation that the affairs of the close corporation are obviously intermingled with his private affairs. In my view, the respondent cannot accuse the applicant of refusing to downgrade her standard of living when he, on the other hand, is living large.

[16] The respondent tells this court that he has other children he is providing for and chronicles the expenses as follows, I suppose in respect all of his children:

Expenditures Children Lodging (rental) R 14 250.00 Food, Groceries and cleaning material R 8 000.00 School Fees R 16 021.67 Baby food R 2 000.00 Sporting Clothes R 4 000.00 Pocket Money R 10 000.00 Medical Expenses R 4 000.00 Creche/Day Care R 3 000.00 Other Educational Expenditure R 5 000.00 After School Fees R 1 800.00 Total R 68 071.67

[17] What is curious from the above schedule is that a paltry amount is expended towards the to the applicant's children in rental and educational expenses (including school fees). Yet, despite pleading poverty, the respondent seemingly expends an amount of R10 000.00 in pocket money and R8 000.00 in groceries in respect of his other children without affording the same level of provision to his children with the applicant.

[18] In my view, this is a typical case where, because of the respondent's failure to make a full and frank disclosure of his financial affairs, the apportionment of the burden of child support is obviously skewed. The effect is that the applicant has had to resort to loans in order to support herself and the children while the respondent's

burden is congruently eased and in turn unfairly shielded at the expense of the applicant.[5]

[19] It cannot be overemphasised that in every matter concerning minor children invokes the constitutional imperatives regarding their best interests, including a right to parental care. The applicant requires a contribution towards the daily requirements which clearly implicate the constitutional rights of the minor children.[6] Accordingly, the respondent should contribute towards the costs of putting bread on the table for his children over and above the other expenses which he is already providing for.

[20] When it comes to PM, the major child, the respondent's in limine impugn of the applicant's locus standi is untenable. In *Z v Z*, [7] the Supreme Court of Appeal referred, with approval, to the following views expressed by Professor M de Jong [8] and the court in *AF v MF*: [9]

"Professor M de Jong also advocates a similar interpretation of inter alia s 6 of the Divorce Act. In doing so, she persuasively advances the view that-

'In the context of family law, policy considerations therefore include the values of equality and non-discrimination and the obligation of parents to maintain their children in accordance with their ability, as well as the needs of the children. Other policy considerations

that should accordingly be taken into account are the following: the fact that adult dependent children's general reluctance to get involved in litigation against one of their parents and institute their own separate maintenance claims upon their parents'

divorce may perpetuate and exacerbate women's social and economic subordination to men and real inequality of the sexes; the fact that the duty to support their minor children should be borne equally by both parents; and possibly the fact that it could have negative repercussions for adult dependent children if their maintenance claims were to be adjudicated in isolation or after the date of their parents' divorce . . .'

In AF it was correctly observed that,

' . . . courts should be alive to the vulnerable position of young adult dependants of parents going through a divorce. They may be majors in law, yet they still need the financial and emotional support of their parents. The parental conflict wrought by divorce can be profoundly stressful for young adult children, and it is particularly awkward for the adult child where the parents are at odds over the quantum of support for that child. Moreover, where one parent is recalcitrant, the power imbalance between parent and child makes it difficult for the child to access the necessary support. It is unimaginably difficult for a child to have to sue a parent for support — the emotional consequences are unthinkable.'

I also agree with the conclusion reached that,

' . . . it is important to protect the dignity and emotional wellbeing of young adult dependants of divorcing parents by regulating the financial arrangements for their support in order to eliminate family conflict on this score and create stability and security for the dependent child.'"

[21] Despite the fact that the respondent is pleading poverty, it is clear that he has not totally abdicated his duty of care as he is continuing to pay for the rental and school fees for the minor children. Even so, the respondent is in a better financial position to pay for the maintenance as well. The WhatsApp communication between the respondent and the minor children, which he places reliance on to prove that he still communicates with his children, is, conversely, supporting the applicant's contention that she cannot afford to maintain the children. Most of the messages are about the minor children asking the respondent to buy them food as they had nothing to eat. In response, the respondent would buy them fast food.

[22] The respondent has means to contribute towards maintenance of his children. In my view, R7000.00 per month for all the children is reasonable; representing R2500.00 per month for each minor child and R2000.00 per month for the dependent major child. This amount is over and above the amount the respondent is currently paying towards rental and school fees for the minor children. He should also contribute 50% towards medical expenses for all the children.

[23] When it comes to the claim for PM's tertiary fees, there is no evidence to show that he is registered as a tertiary student. Accordingly, this claim must fail.

Conclusion

[24] In all the circumstances, and in the light of the reasons alluded to above, I deem it appropriate to make an order in the following terms:

Order

1. Pending the determination of the divorce action between the parties; the respondent shall pay maintenance for the children as follows:

1.1 By paying cash maintenance for the children in the sum of R 7

000. 00 (seven thousand rand) per month, payable in advance and

directly to the applicant, without set off or deduction, into a bank account nominated by the applicant from time to time, on or before the first day of every month, to commence within 7 (seven) days of date of this order and to operate retrospectively for that month, and thereafter on the first day of each month and increasing on the anniversary of the first payment, by the average weighted consumer price index;

1.2 By paying R14 500.00 (fourteen thousand five hundred rand) per month towards the rental of the premises occupied by the applicant and the children, which amount shall increase annually in terms of the lease agreement entered into from time to time or any other similar lease agreement should the applicant and the children relocate;

1.3 By paying R1 450.00 (one thousand four hundred and fifty rand) per month towards the children's medical aid; the children will be retained on the applicant's medical aid;

1.4 By paying half of all reasonable and essential medical expenses not covered by medical aid, additional expenses, and excess payments, including but not limited to dental, surgical, hospital, orthodontic, and ophthalmological medical-related expenses;

1.5 By paying half of all upfront payments for medical consultations, procedures, or half of all upfront payments for medical consultations, procedures or medication paid by the applicant and not covered by medical aid within 7 days after receipt of the invoice in regard thereto;

1.6 By paying for all educational expenses for the minor children, such which include but not limited to, private school fees, textbooks, stationery, tuition for extra mural activities, school tours and other school related expenses.

1.7 In the event of the applicant incurring any of the expenses as referred to in prayers 1.1 to 1.6 above, the respondent shall reimburse the applicant within 5 (five) calendar days of receiving proof of payment, invoice or any bill of such expense being paid.

2. The respondent is to pay the costs of the application.

P Nkutha-Nkontwana J

Judge of the High Court,

Johannesburg

Heard on: 06 October 2023

Handed down on: 01 November 2023

Appearances:

For the Applicant:

Adv S Meyer

Instructed by:

Paul Friedman & Associates

For the Respondent:

Adv N Mohlala

Ngoetjana Attorneys

[1] Rule 43 provides: “(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- (a) Maintenance pendente lite;
- (b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;
- (c) Interim care of any child;
- (d) Interim contact with any child.”

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[2] See S.K v J.L.K

[2023] ZAWCHC 62 at para 15.

[3] See Taute v Taute 1974

(2) SA 675 (E) 676 D-E; C.M.S.C v N.C

[2021] ZAWCHC 227 at para 14.

[4] TS v TS supra fn 9 at para 12.

[5] See TS v TS 2018 (3) SA 572 (GJ) at para 18-9.

[6] See: Section 28(2) of the Constitution and section 9 of the Children's Act; see also Kotze v Kotze 2003 (3) SA 628 (T) at 630G and endorsed by the Constitutional Court in Mpofu v Minister for Justice and Constitutional Development and Others [2013] ZACC 15; 2013 (9) BCLR 1072 (CC) at para 21.

[7]

[2022] ZASCA 113; 2022 (5) SA 451 (SCA) at paras 19-21.

[8] M de Jong "A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce" 2013 THRHR 654 at 655.

[9] AF v MF 2019 (6) SA 422 (WCC) (AF) paras 71-7.

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Prepared on 11 October 2026 · Esheria