

SOUTH AFRICA / JUDGMENT

A.W (Born G) v R.A.W (469/10) [2010] ZAECELLC 1 (7 September 2010)

[2010] ZAECELLC 1

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Smith

CASE / FILE NUMBER

469/10

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SHEET FOR EASTERN CAPE DIVISION EAST LONDON

PARTIES:

A[...] W[...] (BORN G[...])

v

R[...]

A[...] W[...]

Case

Number: 469/10 ECD: 469/10

High

Court: Eastern Cape – EAST LONDON

Date Heard: 23 AUGUST

2010

Date Delivered: 07

SEPTEMBER 2010

JUDGE(S):

SMITH J

LEGAL

REPRESENTATIVES –

Appearances: .
For the
Applicant(s): Ms Marais
for
the Respondent(s): Adv Richards
Instructing

attorneys: .

Applicant(s): Marais Attorneys

Respondent(s): Cooper Conroy Attorneys
CASE
INFORMATION –
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Nature of

proceedings: Key

Words: IN
THE HIGH COURT OF SOUTH AFRICA
EASTERN
CAPE DIVISION, EAST LONDON
CASE
NO: 469/10

ECD: 469/10
Date Heard: 23/8/2010
Date
Delivered: 07/09/10
In

the matter between: A[...]
W[...] (born G[...])
.....
....APPELLANT
Versus
R[...]
A[...] W[...]
.....
..RESPONDENT

JUDGMENT

SMITH J:

INTRODUCTION

- [1] This is an application for pendente lite relief under Rule 43 of the Uniform Rules of Court. The applicant seeks maintenance in the amount of R3000 for the minor child born of the marriage, R2000 for herself and a contribution towards her legal costs in the amount of R20 000.
- [2] The parties are married out of community of property. The accrual system has been included in terms of the ante nuptial agreement.

There is a minor child born of the marriage, namely L[...], who is three years old. The applicants' daughter from a previous relationship, H[...], who is seven years old, has also been living with them.

LEGAL PRINCIPLES

- [3] The approach which our courts adopt in these matters is by now trite and can be summarised as follows:
1. The relief granted in terms of rule 43 is interim in nature and cannot be determined with the same degree of accuracy allowed by detailed evidence adduced at a trial. See in this regard *Taute v Taute* 1974 (2) page 675 (E), at page 676.

The applicant's entitlement to maintenance pendente lite depends on the marital standard of living of the parties. *Taute v Taute* (supra) at page 676D-F.

The court will have regard to the reasonable and actual expenses of the applicant and the respondent's capacity to meet such requirements from income. In certain circumstances inroads may be made into capital. *Taute v Taute* page 676 at D-G. See also *Botha v Botha* 2009 (3) SA 89 W at 105C-106J

- (d) In order to succeed with a claim for contribution towards legal costs the applicant must establish that she has insufficient means of her own to pay legal fees and that the amount sought is reasonably necessary to enable her to pursue her defence. See *Nicholson v Nicholson* 1998 (1) SA 48 at page 50C-E where Wunsh J said the following:

"The question to be considered is what the applicant needs for reasonable proceedings. The cases were reviewed in Dodo v Dodo 1990

- (2) SA 77 (W) The applicant is entitled, if the respondent has the means and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the respondent is litigating and the scale on which the applicant intends litigating (I would have qualified this by reference to what is reasonable having regard to what is involved in the case), with due regard being had to the respondent's financial position."

See also *Glazer v Glazer* 1959 (3) 928 (W) at page 928 A-C where Williamson J said:

“The scale upon which she is entitled to litigate is in my view is a scale commensurate also with the means of the parties. People in this position are not expected to litigate upon the basis that they have to watch every penny that is spent in litigation. Litigation can be conducted luxuriously or economically. I do not say that she is entitled to every luxurious expense in litigation, but she is entitled to litigate upon the basis you would expect rich people to litigate. She is the wife of a rich man who is obviously going to litigate against her on a luxurious basis. In this comparatively simple preliminary application he has appeared through senior counsel and junior counsel. I think she is entitled to litigate upon somewhat the same sort of scale as that upon which he can be expected to litigate.”

THE PARTIES' EARNING CAPACITIES

- [4] It is common cause that the parties are of modest means. The respondent is employed as an educare teacher and earns a gross salary of R3 300 per month.
- [5] The Respondent is employed as a joiner and earns a nett salary of R9
- 018. 93. His salary advice indicates that an amount of R1 939. 94 is deducted for a vehicle; R1 680 for medical aid; R500 for attorneys Kirchmans Inc and R400 for “creditworks (S&V)”. This leaves a nett amount of R4 498. 99.
- [6] The applicant suggests rather tentatively in her affidavit that it is possible that the respondent holds a member’s interest in the joinery business which used to be owned by his deceased father. There is however no evidence to this effect and in the event this was denied by the respondent who stated that the business is owned by his mother and uncle.
- [7] It is also common cause that the respondent recently received an amount of R700 000 in respect of a claim against the Road Accident

Fund which he used to purchase a property in Gonubie.

APPLICANT’S EXPENSES

- [8] The applicant states that she requires an amount of R3 300 rental in respect of her three bedroom flat. Her mother had previously paid the rental on her behalf and has now indicated that she is no longer in a position to continue with this arrangement. The applicant’s schedule of expenses however reflects an amount of R2 700 for rental. I accept for the purposes of this application that the latter amount is the correct one. It appears that the parties have in the past lived in that flat and have not been charged any rental by the applicant’s mother to whom the flat belongs. The respondent contends that for this reason the applicant is not entitled to include the amount in respect of rental. In my view it is not legally tenable for the respondent to insist that the applicant and the minor child continue to live on the largess of third parties in order for him to escape his legal responsibility. The applicant’s mother has no legal responsibilities towards either the applicant or the minor child. In my view therefore this is a reasonable and necessary expense. An amount of R800 has been claimed in this regard in respect of the minor child.

- [9] The applicant claims an amount of R900 per month for electricity. Of this an amount of R300 is allocated for the minor child. The respondent contends that this amount is unreasonably excessive as he used to spend an amount of R250 per month on “pay as you go” electricity purchases. He states furthermore that the water account is paid by the applicant’s mother. In my view this amount is not unreasonable. As I have stated before, it is legally untenable for the respondent to suggest that the applicant’s mother must continue to subsidise the maintenance of his minor child.
- [10] In respect of groceries and food the applicant claims an amount of R4 500 per month and has allocated an amount of R1 500 thereof to the minor child. I agree with respondent’s contention that this amount appears excessive. The respondent however suggests that R1 750 would be sufficient in this regard because the minor child is only 3 years old. In my view an amount of R 3 000, of which R 1 000 should be allocated for the minor child, would be reasonable.
- [11] In respect of toiletries the applicant claims R400 for herself and R400 for L[...]. She states that L[...] uses nappies at night which costs about R100 per month. The amount of R50 per month suggested by the respondent would in my view be woefully inadequate. In my view an amount of R200 should be allowed in this regard.
- [12] The applicant has claimed an amount of R400 per month in respect of petrol expenses. Of this amount R300 is allocated for L[...]’s use. The applicant states that she uses her own vehicle to drive to Beacon Bay where the minor child’s school is located. She travels in excess of 100km per month. The respondent contends that the amount is excessive if regard is had to petrol usage and suggests that a total allowance of R600 would suffice. I do not agree. If regard is had to the distance which the applicant is required to travel on a monthly basis this amount seems eminently reasonable.
- [13] Regarding the costs relating to the employment of a domestic worker there is not much difference between what the respective parties regard as reasonable. The applicant claims an amount of R700 of which she allocated R234 for L[...]. The respondent on the other hand contends that R600 should be allowed in this regard. In my view the amount of R700 claimed by the applicant is reasonable if regard is had to the fact that the applicant works full time and would therefore require a domestic worker to assist her with, inter alia, cleaning and washing duties.
- [14] The applicant claims an amount of R2 400 in respect of medical aid contribution for herself and the minor child. She states that the respondent had removed both her and H[...] from his medical aid without any notice to her. She fears that the respondent may do the same in respect L[...] and would rather prefer to have her own medical aid and have L[...] added as a dependant. The respondent contends that this amount is excessive and cannot be afforded by the parties. He suggests that an amount of R200 should be allowed overall for medical expenses. It appears to be common cause that the minor child is still on the respondent’s medical aid. If indeed the applicant has established that she is entitled to some maintenance

pendente lite, then in my view an amount of R1 200 for medical aid for herself would be reasonable. The amount of R1 600 claimed by the applicant in this regard appears to include the contribution for H[...]. I deal later on in my judgment with the issues pertaining to the applicant and H[...]'s entitlement to pendente lite maintenance.

- [15] The applicant claims an amount of R600 in respect of clothing of which R200 is allowed for L[...]. The respondent suggests that this is not an item that should be included in the claim for interim maintenance. I do not agree. The respondent cannot seriously suggest that the minor child should wait until the finalization of the main action before purchasing necessary items of clothing. L[...] is at an age where he grows very rapidly and may require items of clothing to be purchased on a regular basis. The amount claimed by the applicant in this regard is therefore in my view reasonable.
- [16] In respect of entertainment the applicant claims an amount of R400 of which R200 is allocated for L[...]'s use. In my view having regard to the parties' earning capacity, this amount appears excessive. An amount of R100 in respect of the minor child would in my view be reasonable and necessary.
- [17] Finally the applicant claims an amount of R74 for the minor child's swimming lessons. In my view this is a reasonable and necessary expense. The applicant states that the minor child has requested to take extra swimming lessons. She is keen to encourage him to do so because it will be beneficial to his development and physical health. This is in my view a legitimate reason for the expense and it can therefore not be regarded as a luxury.

EXPENSES IN RESPECT OF H[...]

- [18] The applicant also included an amount of R2 765 in respect of the educational expenses of the minor child, H[...]. The respondent

argues that he is not liable for this expense as H[...]'s biological father is maintaining her adequately. Ms Marais, who

appeared on behalf of the applicant, argued that because the respondent accepted the responsibility to maintain H[...] during the

time when the parties were living together, the applicant is entitled to include medical and educational expenses relating to H[...].

- [19] I am constrained to accept the respondent's averment that H[...] is being maintained by her natural father. The applicant's

affidavit is silent in this regard and I have no doubt that if this was not the case she would have sought leave to file a further

affidavit to gainsay this allegation.

- [20] The amount of R2 765-00 in respect of H[...]’s educational expenses relates to remedial lessons, occupational therapy and didactic aid which H[...] requires as a result of “learning challenges”. The applicant states that, in the opinion of the psychologist, H[...]’s learning problems can partly be attributed to the emotional and psychological harm caused by the respondent’s conduct. She states that these expenses impact directly on her ability to pay for L[...]’s and her living expenses.
- [21] Ms Marais referred to the matter of *Heystek v Heystek* 2002 (2) SA 754 TPD in support of her submission that the respondent is liable for these expenses.
- [22] In that matter the minor child’s father was deceased and the applicant apparently received no maintenance from his estate. The applicant contended that she was claiming maintenance for herself and not for the minor child. It was clear however that the maintenance she sought also included items which related to expenses in respect of her minor child. In answering the question as to whether or not a stepfather has an obligation to maintain his stepchild Patel AJ remarked as follows:

“I am of the view that the inevitable concomitant of a marriage in community of property is the shared responsibility of both spouses

for the maintenance of the common household, which, in this case, certainly includes the applicant's children since the respondent had and has consortium with the children's mother. Whilst the marriage subsists and until divorce is decreed the consortium prevails. In the circumstances, the respondent is to provide maintenance for the applicant even if portion of that maintenance is utilised for the children.”

- [23] He relied in this regard on the case of *Wilkie – Page v Wilkie*- Page 1979 (2) SA 258 (R) where Gubbay J said:

“Where the marriage is in community of property, the duty of support owed by the mother to the child becomes a charge upon the joint estate and the stepfather becomes civilly liable by reason of his administration and control of the common purse. Upon the dissolution of such a marriage, the obligation to maintain reverts to the mother, who is personally liable.”

In that case also the minor child had not been maintained by its natural father. Gubbay J’s comment therefore at page 262C-D where he stated that:

“Indeed, even if such child is being maintained by its natural father, the inevitable concomitant of the marriage is that the husband supports it as well.”

was obiter.

- [24] In my view the facts of this matter are distinguishable for the various reasons. First of all the parties are married out of

community of property. Secondly H[...] is being maintained by her natural father. The claim for educational and medical expenses is in respect of specific items which are paid by her natural father. These expenses are in fact not being paid by the applicant and they can therefore not qualify as expenses which the applicant can legitimately include in her claim for maintenance pendente lite. I could find no authority for the proposition that a stepparent would under these circumstances be liable for expenses which are already paid by the stepchild's natural parent.

APPLICANT'S ENTITLEMENT TO PENDENTE LITE MAINTENANCE

[25] Regarding the issue of the applicant's entitlement to maintenance pendente lite, my views are as follows.

A needy spouse is entitled to maintenance from the financially able spouse to enable her to maintain the standard of living established

during the marriage. See *Botha v Botha* 2009 (3) SA 89 at page 106I-J.

[26] In this matter however it is common cause that the parties have always been of meagre means and would necessarily have been compelled to live a relatively spartan life-style if they were to survive on their combined income.

[27] The applicant has therefore in my view not been able to prove a standard of living which would generally entitle her to maintenance

pendente lite. The respondent however appears to have maliciously and without notice to the applicant removed her from his medical aid. This is in my view one aspect of their standard of living to which the applicant would have become accustomed to. I have already found that R1200 would be reasonable in this regard. If regard is had to the respondent's income and his considerable equity in the Gonubie property which he has recently purchased, then it is an expense which he can afford.

MAINTENANCE IN RESPECT OF THE MINOR CHILD

[28] The respondent has tendered an amount of R1000 per month as maintenance for the minor child. He stated that he is unable to

afford an additional amount. He makes that submission obviously on the basis that his salary is not considerably more than that of the

applicant. In the light of my findings above I am of the view that an amount of R3 208 is reasonably necessary for the maintenance of the minor child.

[29] In my view, having regard to the respective earning capacities of the parties and in particular the respondent's considerable equity in the Gonubie property, it is not unreasonable to expect the respondent to contribute the major share. I am accordingly of the view that pendente lite maintenance for the minor child in an amount of R1 800 would be reasonable under the circumstances. The respondent is clearly in a financial position to afford this amount.

CONTRIBUTION TO COSTS

[30] Regarding the applicant's claim for contribution to cost, it is trite that she is entitled to such contribution provided that it is commensurate with the scale on which the parties will be expected to litigate, taking into account their financial resources. I have already alluded to the limited financial means of the parties. They will therefore be compelled to litigate frugally and in my view the amount of R20 000 claimed by the applicant is excessive. I am of the view that an amount of R5 000 would be appropriate and sufficient.

ORDER

[31] In the result I make the following order:

1. Respondent is ordered to pay an amount of R1 800 per month pendente lite maintenance in respect of the minor child, L[...], with effect from 30 September 2010;
2. Respondent is ordered to pay R1 200 per month pendente lite maintenance to the applicant with effect from 30 September 2010;
3. Respondent is ordered to pay to the applicant, on or before 30 September 2010, an amount of R5 000, as contribution to her legal costs;
4. Costs of the application will be costs in the main action.

J. SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Ms. Marais Attorneys for the Applicant : D. J Marais Attorneys c/o Tecoma Street Berea East London
Counsel for the Respondent : Adv. Richard Attorneys for the Respondent: Cooper Conroy Attorneys 4 Epsom Road Stirling East London
Date Heard : 23 August 2010
Date Delivered : 7 September 2010

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