

SOUTH AFRICA / JUDGMENT

B v B (58944/2021) [2022] ZAGPJHC 273 (3 May 2022) [2022] ZAGPJHC 273

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mahomed

CASE / FILE NUMBER

58944/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

No. 58944/2021

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

Date: 03/05/2022
In
the matter between
S[....]1
B[....]
Identity
number
[....]
Applicant
and
S[....]2
A[....] E[....] B[....]
Identity
number
[....]
Respondent

JUDGMENT

MAHOMED AJ

BACKGROUND

1. The applicant in this matter applies for interim maintenance for herself and her minor daughter, for her to be awarded primary residence of the minor child, a contribution to her legal costs and the costs of this application. She applies for the relief in terms of R43, the respondent opposes the application, however tenders R2000, for her meals per month.
2. The parties were married in 1999 and have two children, their daughter is a minor. As at the date of marriage, the applicant owned her home and a vehicle. She worked all along throughout their marriage until 2017 when she was diagnosed with cancer and was later retrenched. The evidence is that she underwent major surgery to treat the cancer and has had a long recuperation period.
3. She and her children have relied on the respondent for their living expenses. The evidence is that each time she pursued a business, the respondent would interfere with its management and eventually in her last business she handed it over to him to run. It did not operate for too long after as he could not get along with the staff who then refused to work with him. The parties are married out of community of property, including accruals and the family home is the applicant's home.

4. The further evidence is that she has suffered a long history of abuse, intimidation, and violence at the hands of the respondent who has a controlling personality. Early on in their marriage, he controlled their socialising with friends and family. In 2002, the respondent pointed a firearm at their minor child, she reported this to the SAPS, but nothing had come off that and she was advised that the “file had gone missing.” The respondent has threatened to kill her and set her alight. They lived in a very volatile home environment.
5. On 2 November 2021, she was forced to leave their home as she feared for her safety when he attempted to assault her. She left with a few of her belongings and without her minor child. She took refuge at her older daughter’s home, from a previous marriage. On 9 November 2021, she applied for an interdict at the Domestic Violence court, when that court issued a notice to show cause and the return date is in May 2022.
6. She launched this application in mid-December 2021 and the respondent’s reply was due on 30 December 2021. The respondent failed to file his answering papers to this application, until a day before the matter was heard in this court, on 22 March 2022. He filed a notice to oppose in February 2022 .
7. The applicant’s attorneys have written three letters to the respondent in which they requested a reply or an offer of settlement. The evidence is that the parties met with representatives however, they were unable to resolve their disputes. The Rule is clear that a party who fails to file answering papers timeously is ipso facto barred, see R43(3).
8. The respondent applied for condonation of the late filing of his papers the applicant opposed this application.

CONDONATION

9. Advocate C Gordon appeared for the respondent and submitted that the court must condone his late filing of his papers, as the applicant is not prejudiced by the late filing.
10. Counsel proffered that the matter appears before me today on the date that the registrar allocated and therefore there is no delay or prejudice to the applicant and the court, she is ready to argue the application.
11. I noted that the answering papers were signed off two days before the matter appeared before me and that they comprised fifty-five pages, including ten pages of financial statements in support of his opposition. In addition, a further twenty-one pages noted on caselines as his financial disclosure form, in compliance with the practise manual of this Division.
12. Ms Gordon proffered that the application is an abuse of process and that based on her papers, the applicant has no problems in her marriage to the respondent. Ms Gordon submitted that the applicant’s papers do not make out a case for the relief she seeks.

13. Counsel argued that the court had a discretion in the granting of condonation and that the respondent's application is bona fide and filed only two and a half months late. She submitted it was a reasonable delay and that her client will suffer a grave injustice if condonation is refused. There is no right to appeal an order under this Rule.

13.1. It was argued that the delay was not intentional, and this court must note that the applicant filed her papers in mid-December 2021 when most law firms are closed, and the respondent was of the understanding that the dies non applied in this instance as in all other matters.

13.2. The respondent instructed erstwhile attorneys to resolve the matter and they were unsuccessful. He appointed his current attorneys in February 2022 when again the respondent instructed them to resolve the matter instead of "wasting money on litigation". The matter remained unresolved.

13.3. Counsel argued that her client had done all to avoid confrontation and tried to adopt a conciliatory approach to the dispute between him and the applicant.

13.4. Since early March, the respondent has been away in Egypt which made it more difficult to consult with his legal representatives and to gather documentation and information whilst away from home.[1] His affidavit was prepared soonest as was reasonably possible.

13.5. The applicant cannot be seen to have waived his right to be heard and although he is noted to be ipso facto barred in terms of the rules, he had always demonstrated his intention to file a defence, he filed a notice to oppose on 3 February 2022. There is no reckless or intentional disregard of the Rules of court. Counsel submitted that the respondent made bona fide errors and omissions and should not be precluded in defending himself.

13.6. Counsel submitted that the respondent had good prospects of success and that our courts were lenient regarding a weak explanation for the delay in this instance, she referred the court to *VALOUR IT v PREMIER NORTH WEST PROVINCE AND OTHERS* [2]

13.7. Counsel submitted that it is in the interest of justice that her client's lateness be condoned. See *FERRIS AND ANOTHER v FIRST RAND BANK LIMITED* [3]

13.8. Ms Gordon addressed the court on the requirements set out in *STOCKS & STOCKS PROPERTIES (PTY) LTD v CITY OF CAPE TOWN*[4] for condonation.

13.9. She submitted the respondent had good prospects of success and must be allowed to argue his case.

14. Advocate J Khan appeared for the applicant and submitted that the applicant has made out a case for the relief she seeks. The respondent has stopped paying for various household expenses which she paid from her banking account through a debit order, and she receives no money from him since she vacated the family home.

15. Counsel submitted that the respondent was represented when the papers in this application were served on him, albeit in the matter for the domestic violence interdict. His attorney could have advised him about the time limits. She argued the notice is clear as to the timeframes that apply.
16. Ms Khan submitted further, that since early January 2022, the respondent instructed a second firm of attorneys, who although they placed themselves on record in early February 2022, when they filed a notice to oppose, the answering papers were only served on 22 March 2022, only one clear day before the date of hearing.
17. Ms Kahn emphasised that the respondent is ipso facto barred, and the very purpose of the rules are for the administering of justice and not hampering it.

17.1. Ms Khan reminded the court that up until one court day before the hearing of this matter, the applicant and her legal team were of the complete understanding that the matter was to proceed unopposed.

17.2. The court should also bear in mind, that the applicants attorneys had repeatedly called for a reply and the respondent failed to file one until a day before the hearing.

17.3. The applicant is seriously prejudiced, it is a flagrant disregard for the rules and should not be condoned.

17.4. The applicant has had only the day to prepare for an opposed argument and no explanation is forthcoming for the delay.

18. It was argued the timeframes in this Rule is specific to this rule. The court was referred to several judgments in her heads of argument and submitted that without a detailed explanation for the delay, the prospects of success are irrelevant. In that regard counsel referred the court to CHETTY v LAW SOCIETY TRANSVAAL[5] and NUM v COUNCIL FOR MINERAL TECHNOLOGY [6], where the court stated:

“there is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation must be refused.

19. I refused the application for condonation having considered the length of delay, the number of correspondences from the applicant’s attorneys calling for the reply, the times set for reply in those correspondences the importance of the matter to the parties and that throughout the past months the respondent has been represented by attorneys.
20. In my view the explanation for the delay is not persuasive and counsel’s submissions that the applicant is not prejudiced, is very disappointing, particularly in view of the lengthy papers and heads of argument which both the applicant and this court were to traverse in preparation for the hearing of the matter.

21. Furthermore, I am of the view that a delay in the life of a family cannot be viewed through the same lens as a delay in, for example, a commercial transaction, where a delay can be remedied by an order of costs.
- 21.1. Family relations are by their very nature dynamic, a delay could result in consequences that no amount of costs awarded would remedy the prejudice suffered.
22. Delay in family matters must be approached from the perspective that:
- 22.1. The situation is always compelling and always serious to warrant a priority by parties.
- 22.2. Obviously, our rules together with the practise directives seek to provide practical solutions.
- 22.3. However, in family disputes the rules apply together with common sense and a commitment to the resolution of disputes, particularly when there are children in the family.
23. In casu, the respondent has not demonstrated a commitment to resolution of his family dispute. Counsel's submissions that he was looking to resolving issues without wasting costs is noted but it does not excuse a party from complying with the Rules.
24. The application must fail. The matter must be heard without reference to the respondent's papers.
25. Ms Gordon informed the court that she will argue her client's defence on the applicant's papers. The point was noted.

I turn now to the main application for an order pendente lite.

26. Ms Kahn advised the court that whilst awaiting a hearing of this matter, the applicant returned to the family home when her minor child advised her that the respondent had left for Egypt and that she was at their home, with the employees and her twenty-year-old brother.
27. The evidence is that the respondent owns a farm in Egypt and he travels out to that country at least once a year. He left the minor child in the care of four employees: two body guards, a chef, and a domestic helper. Her brother who is 20 years old, live at the home with her.
28. She was concerned for the minor child's safety and returned to her home to care for her child.
29. Ms Khan submitted that based on the lifestyle the parties enjoyed over the years, the respondent can afford to pay the applicant her maintenance pendente lite.

MAINTENANCE

Affordability/Mean

30. The evidence is that the respondent has several income streams. He earns R40 000 from his employer Pro Roof, he is a spiritual guide, which the applicant observed is a sought after service and lucrative, he works with stockbrokers and earns an income from them, he owns a 7ha farm in Egypt which is a working farm, and he receives income from rental property he lets out in Egypt.
31. Furthermore, owns two homes in Egypt one along the Mediterranean. She estimated his property portfolio to be valued at R25 million. These are estimates as she submits that the systems in Egypt are all paper based and she is unable to access information, there being no official database to trace ownership.

Family Lifestyle

32. Although the respondent has a bank account, he transacts in cash and in fact he uses the applicant's bank account to pay expenses through debit orders. The respondent used to give her R7 495 monthly in cash, to meet those debit orders.
33. The applicant submitted that the respondent is a regular gambler and spends most weekends at the casino in Gold Reef City.
 - 33.1. On some weekends he would gamble from a Friday evening through to the Sunday all weekend.
 - 33.2. She and the children used to accompany him each weekend.
 - 33.3. Each time they visited the casino, he used to give her R5 000 in cash for her and the children's entertainment.
34. In 2020 he purchased two vehicles in cash for her and himself, a Jeep and Toyota Fortuner for her use.
35. The family has all their needs in their home.
36. She has seen substantial amounts of cash in the safe at their home, which he has now moved off to another premises in Sandton.
37. He enjoys dressing and spends substantial amounts on designer clothing and her children have enjoyed the high-end clothing and lifestyle together with him
38. She estimated the current household budget for their family to be at R85 000 per month.
39. They have a staff of four, which includes a chef at the respondent's demand, two body guards, a gardener, and a domestic helper.

40. She has not worked since 2017. She alleges the respondent has been obstructive each time she ventured into earning an income. She ran a beauty services business where she earned about R3 000 per week. The respondent constantly interfered with the management of the business to a point when she simply handed it over to him to run. The business closed in a brief time thereafter, as the respondent bullied the staff, and they no longer could work for him.
41. Both their children were at private schools and their older child has completed his schooling; however, their daughter continues to attend a private school.
42. The family enjoyed at least two holidays a year to international destinations, and they lived with his family for several weeks each year in Dubai. The children were not denied comforts and he has given them large sums of money for their entertainment throughout whilst on holidays.
43. Ms Kahn submitted that although all the luxuries have been available to her and their children, they have lived in a very volatile home environment, due to his temper and his controlling manner.
44. The applicant has endured this from the early days of their marriage and has lived in frustration and fear all along. She was 37 years old at the date of marriage and is unable to continue to live a life of degradation and to watch her young daughter grow in this environment.
45. She asks the court to order pendente lite that the minor child's primary residence be with her and that he continues to pay for her school expenses whilst she be allowed to manage their daily expenses.
46. Ms Gordon argued that the applicant has conceded that all the family expenses are met, and that the applicant has failed to make out a case for the relief she seeks.
47. Ms Gordon argued she did not understand what the applicant needed money for when her needs are met.
48. Ms Khan submitted that the applicant's papers were drafted on the basis that she would continue to live in her home, as owner and that the respondent would pay for her and the minor child's maintenance when they returned to their home. However, the respondent refuses to leave the home.
- 48.1. Counsel reminded the court that her client did not anticipate an opposed hearing and the late filing has severely prejudiced the applicant.
49. Ms Gordon submitted that the respondent was going to return to their home when he returns from Egypt as he had no other home, and he has a right qua marriage as spouse.

50. Counsel argued that he cannot be evicted from his home as he is a spouse, she referred the court to *DU PLESSIS v DU PLESSIS*[7] and *BAKER v BAKER*. [8] It was further argued that if she evicts him, she has to offer him alternate accommodation.
51. Ms Gordon further argued that the Court had not granted a domestic violence interdict when she applied for one because she failed to prove a prima facie case. There is no problem in this family.
52. The respondent would rather spend his money on the family expenses than meet additional expenses which the applicant chooses to incur, and he is unable to afford those costs. He cannot maintain two households.
53. The respondent tendered R2000 for the applicant's maintenance therefore he clearly acknowledged that she needs maintenance. However Ms Gordon argued that her needs are met she does not require money. She already has adequate accommodation.
54. I disagree with counsel, that on the papers applicant conceded that she does not need maintenance. Ms Khan took the court to her founding papers in which she sets out that the amount of R7 495 for debit orders which pay for household expenses have not been paid since November 2021. She has not received any money for her personal maintenance.
55. The applicant is close to the usual retirement age and will find it difficult to gain employment at this stage. One must be realistic, as the employment challenges in our country are oppressive and the applicant has not worked for a long while. Her long absence from the work environment is another factor that is against her.
- 55.1. Moreover, the respondent was interfering with her business progress. This may be due to his controlling personality.
- 55.2. There is no evidence that he had been demanding she work and contribute to the household expenses after 2017.
56. I read with interest the respondent's attorneys letter dated 8 February 2022[9] addressed to the applicant's attorney in which the respondent acknowledges that
- “in light of the temperamental and volatile nature of the relationship between the parties, it would not be advisable for the parties to reside at the property together.”*
57. I disagree with Ms Gordon, that the applicant has nothing to complain about. No mother who has dutifully nurtured her children for this long would readily abandon them to go off on a frolic of her own. She has problems, the respondent concedes as much. She must be accommodated and afforded the privacy she deserves.

58. Ms Kahn also advised the court that the minor child is at a time when she needs her mother most, as she enters adulthood and according to her religious and cultural practises, there are certain rituals she must learn and adopt as part of her practise for the rest of her life. They are obligatory on every Muslim woman; they are personal and only her mother can assist her in that regard.
59. Ms Gordon argued that she is not an infant and that she could ask for assistance or things if she needed them. Ms Gordon further submitted that the respondent could go out and pay for any other help that she might need. There is no evidence that the minor child's needs are not met whilst she lives her father in their family home. There is no evidence that supports the applicant

to be granted primary residence.

60. She has a mother who can assist her. The respondent is resourceful, and if he can afford to pay for services then he can afford to pay maintenance for both the minor child and the applicant.
61. All that the respondent is called upon to do is to "pay over monies that he already expends in respect of both the applicant and her minor child." The only "additional" expenses that he incurs is the accommodation costs, and that is simply because he refuses to move out of the home. He must pay a contribution to legal costs which is a once off payment.
62. Ms Khan proffered that the respondent has other accommodation, where he has moved his safe to, however the applicant cannot provide more details.
63. I noted that there is no dispute about the payment of medical aid premiums on behalf of all members in the family and to the applicant's continued use of her motor vehicle.
64. It remains is for me to determine the amounts to be awarded in respect of maintenance pendente lite.
65. Ms Gordon submitted that it is unnecessary for the applicant to change the guardianship regime at present. Counsel submitted that although guardianship is shared, in the event of any emergency pertaining to the minor's safety and health, in the absence of one spouse, the other spouse is expected to adopt a practical approach and can make decisions without the other.
- 65.1. I also noted from counsel's submissions in the application for condonation, that the legal team struggled to obtain information from the respondent whilst he was away. Therefore, it is critical that the spouse who needs to decide can in fact do so without having to consult the other in the case of emergencies.
66. Ms Khan informed the court that the applicant will require a contribution toward her costs of the divorce proceedings. It is trite that such costs are permissible up to the first day of trial and a court must consider whether the parties are litigating on the same scale.

67. Ms Gordon submitted the proceedings are at an early stage and that the parties are litigating at the same scale.
68. However, I noted that, no divorce action has been instituted to date. Rule 43 applications are brought in relation to a divorce action. This is relevant particularly when the applicant seeks a contribution toward costs. Although the respondent's attorneys have mentioned the issue and service of the divorce papers in their correspondence referred to above, I have not found any papers on file.
69. If a contribution is to be awarded it presupposes that an action is underway. In this regard the authorities are divided as to whether a divorce action should be pending. See *MOOLMAN v MOOLMAN*[10] and *AD v ZD*.[11]
70. Furthermore, a party seeking a contribution to costs is obliged to set out details of its bill of costs. See *GLAZER v GLAZER*[12] and *SENIOR v SENIOR*[13]

Maintenance pendente lite

71. A court when awarding maintenance must consider, the lifestyle of the applicant during the marriage, the affordability of the amount by the party ordered to pay maintenance and the reasonable needs of the applicant.
72. I considered the list of expenses and items that the applicant claims maintenance for and consider them to be reasonable.
73. The respondent can afford to pay in the amounts prayed for as they are expenses that he incurs in any event. Furthermore, a party who is a regular gambler, must have the necessary investment capital to spend as much time in the casino. He must prioritise his family.
74. The respondent's staff complement and property portfolio is impressive and must cost and earn him a sizeable amount each month. He used to give the applicant R5000 every weekend when they visited the casino.
75. The applicant's reasonable cost of accommodation is the only additional item he is to pay for, until the final determination of the divorce. A contribution toward costs is a once off payment, that the applicant will require.

I make the following Order:

1. The respondent shall pay the applicant pendente lite, the following:
 - 1.1. Maintenance for herself R20 000 per month
 - 1.2. Maintenance for the minor child R15 000 per month
 - 1.3. An amount of R9 625 per month for medical aid premiums for the entire family
 - 1.4. An amount of R7 495 per month being household costs

1.5. An amount of R15 000 for accommodation costs for the applicant and the minor child

2. The primary residence of the minor child shall be with her mother,
3. An amount of R10 000 as a contribution toward costs, payable within 10 days of this order.
4. The applicant shall retain her motor vehicle, which is to be maintained by the respondent.
5. The respondent is to exercise his reasonable rights of contact with their minor child as follows:

5.1. Every alternate weekend from Saturday at 09h00 until Sunday at 17h00, when the respondent shall return her to applicant

5.2. every Wednesday evening from 15h00 to 19h00, when the respondent will return her to the applicant, and depending on the minor child's school diary.

5.3. Half of every long vacation, by agreement between the parties on dates to be confirmed at the end of January each year

5.4. the parties shall share the religious holidays of Eid between them, and each parent shall have the minor child on their respective birthdays or the weekend following those days.

5.5. the respondent shall enjoy full telephonic access to the minor child, with accommodations for her sleep times and school commitments

6. The respondent shall continue to pay the minor child's school fees and all related costs including extramural expenses, clothing for school, sports, and extra lessons.
7. The applicant is ordered to issue a divorce action within 20 days of this order.
8. This order is suspended pending the issue of the divorce action.
9. The respondent shall pay the costs of this application.

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. 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 3 May 2022.

Date of Hearing: 24 March and 30 March 2022

Date Delivered: 3 May 2022

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[1] Caselines 016- 7 to 8

[2] 2021

(1) SA 42 (SCA) ap 54 par 38

[3] 2014

(3) SA 39 (CC) 43 G- 44 A

[4] 2003

(5) SA 140 (C) at 143-144 para 14

[5] 1985

(2) SA 756 (A) at 765

[6] 1999

(3) BLLR 209 (LAC) at 211 G-H

[7] 1976

(1) SA 284 (W) at 287 B-C

[8] 2021 JDR 0038 (KZN) at 4 para 5-7

[9] Caselines 009-51

[10] 2007 JDR 1165 T 1

[11] Case No. 23031/2017, date 29/6/2017

[12] 1959

(3) SA W at 932

[13] 1994

(4) SA 955 at 962-964

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