

SOUTH AFRICA / JUDGMENT

B[....] v S[....] (HCA02/2020) [2020] ZALMPPHC 87 (18 September 2020) [2020] ZALMPPHC 87

COURT

Limpopo High Court, Polokwane

BEFORE

R.P Mdhuli, E.M Makgoba

CASE / FILE NUMBER

HCA02/2020

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(LIMPOPO****DIVISION, POLOKWANE)****(1)**

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

CASE

NO: HCA02/2020

In

the matter between: S[....]
 S[....] B[....]
 APPELLANT
 And
 M[....]
 S[....]
 RESPONDENT

JUDGMENT

MDHLULI: AJ

[1] The appellant is appealing against an order made on the 11th October 2019 by the learned Magistrate, Ms AMM van der Merwe in a maintenance enquiry held in the Maintenance Court, Polokwane in respect of the maintenance of the parties' minor child A[....] a boy born on the 06th December 2016 of the prior Muslim marriage between the parties.

[2] The Appellant's counsel submitted that the issue to be determine by this court is whether an amount of R1500 per month is an adequate

maintenance to ensure that the minor child is properly maintained. This emanates from the judgment of the learned Magistrate which

ordered as follows:

1. The Respondent must pay an amount of R1500.00 per month into the bank account of the Applicant for the monthly maintenance needs of the child.
2. The Respondent must contribute an amount of R2000.00 per month for the said lddat period.
3. Seasonal clothes to be bought to the value of R1000.00 per season. Clothes to be bought for summer on or before the 15th December and for winter on or before the 31st May annually.
4. Respondent to retain the minor child on his medical aid.

[3] Appellant's counsel, submitted during the hearing that the learned Magistrate erred in not granting an order for the therapy which was submitted to be R500.00 per week which was not disputed by the Respondent as well as an order that food and grocery is a future need. She submitted further that she did not know if the circumstances of the Appellant had changed as she is only involved in this appeal only. She however prayed that the amount which would be reasonable under the circumstances should be R2500.00 to be added on the already R1500.00 to make it R4000.00 per month which amount will account for the grocery, the weekly therapy sessions as well as playground fees.

[4] The appeal is opposed based on the following reasons submitted by counsel for the Respondent during the hearing of this matter:

1. That the learned Magistrate took into account all the proven facts and expenses which related to the needs of the child during the enquiry.
 2. That the discretion lies with the judicial officer ceased with the enquiry, and that this court should not interfere with that discretion as its scope is limited.
 3. That based on the evidence on record the Appellant was extravagant in her claims and could not even substantiate her alleged claims based on the needs which at some time during the enquiry amounted to R22, 000.00.
 4. That the orders granted were fair given that the Respondent was providing for the 100 % needs of the minor child and taking into account the parties' standard of living which even then when they were married, their families played a huge role in assisting them.
 5. That appellant failed to give proof of the estimate of the grocery needs of the child, albeit, he said that could be so, because she is unemployed and same expenses are incurred by her family members and that of the Respondent who are involved in the raising of the minor child.
 6. That the court did not misdirect itself when it did not order future needs as those can always be revisited in the Maintenance Court and should the need arise be claimed retrospectively.
 7. Lastly, that the Respondent's circumstances had not changed to warrant an increase beyond R500.00 to R1000.00 being the maximum.
- [5] It is common cause that both parents must maintain the child, albeit according to their respective means[1]. From the record it is clear that the Appellant does not want to get employment for the reason that the child needs her more. She is qualified as a teacher's assistant as well as a graphic designer. She left employment in obedience to her husband's call for her to stop working when they got married as it is their custom. But, the parties have divorced now and nothing should be stopping her to seek for gainful employment especially given the dire needs of the child which she has outlined during the enquiry which needs amongst others are based on her training as an early child development qualified personnel.
- [6] I accept that the Appellant's election to be unemployed is done for the benefit of the child. However, equally I find that the appellant getting employment would be in the best interest of the child too. More so, that because the child is receiving therapeutic professional help. It is expected that his condition is or should be improving given that the order was made some eleven (11) months ago. If not the expense would not be justified under the circumstances. The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education[2].
- [7] I agree with the learned Magistrate that the minor child does not present any special or peculiar behavior to any child his age when left with other people away from their parents. One has to go to any foundational phases schools to observe this normal daily behavior

when children are dropped off every morning. Children adapt easily and quickly generally without any assistance as it comes naturally. A[....] is a potential candidate for improvement given the help he is receiving from therapy and from her mother who has sacrificed her life for all these time to care for him. If appellant was to be employed, she would earn a salary of around R3000.00. She is currently residing with her mother and sibling since 2016.

[8] The Respondent qualified as a mechanic in 2016, at the time of the hearing he was gainfully employed as a service advisor at M[....] in Polokwane, residing with his parents and earning a nett salary of about R15, 942.00 per month based on incentives as well as money received from two investments monthly. In the assessment of maintenance for children their needs and the parents' ability to pay are the primary factors but the criterion of the "best interests of the child" must also be considered.[3]

[9] The minor child's needs were put as follows:

Food, grocery and toiletries

R2000.00

Water and electricity

R200.00

Domestic worker

R500.00

Clothes and shoes

R500.00

Day care

R600.00

Therapy

R2000.00

Other medical expenditure

R200.00

Outings

R500.00

Toys

R350.00

TOTAL

R6, 850.00

Over and above these the appellant claimed a need for accommodation and transport which the Respondent criticized. However, the above list were not disputed nor challenged by the Respondent. The Respondent in his testimony even alluded to the fact that on a month he was spending more than the ordered amount of R1500.00 towards the child to the tune of R2500.00 at times. This being the case, it points out to the fact that the Respondent is capable and has the means to pay more than the ordered amount taking his evidence into account and that the needs of the child were not disputed. . The record does not indicate that the minor child's expenses are beyond the Respondent's ability.

[10] It is clear that in terms of Section 28

(2) of the Constitution, a child's best interests are of paramount importance, in every matter concerning the child. This is echoed in Section 9 of the Children's Act No. 38 of 2005 (the Act) which provides as follows:

"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied".

In terms of Section 18 (2) (d) of the Act the parental responsibility, includes the obligation to contribute to the maintenance of the child. I agree with the submissions made by the Appellant attorney that grocery cannot be a future need and as such I find that the learned Magistrate erred in arriving at the conclusion that it was. Moreover the learned Magistrate erred also in arriving at a decision that therapy was R500.00 when it is clear from the record that it was R2000.00 per month and the minor child was attending a session per week at R500.00 per session.

[11] As stated by van Zyl J in *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708 J

"As upper Guardian of all dependent and minor children, this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded".

[12] Having considered the above I make the following order:

1. The appeal succeeds.
2. The order of the court aquo for maintenance payment of R1500.00 per month is set aside and replaced with R3000.00 per month payable into the bank account of the appellant for the monthly maintenance needs of the child effective from the date of this order
3. The following orders of the court aquo against the Respondent are confirmed:
 - 3.1 Respondent to retain the minor child on his medical aid.
 - 3.2 Seasonal clothes to be bought to the value of R1000.00 per season. Clothes to be bought for summer on or before the 15th December and for winter on or before the 31st May annually.

4. There shall be no order as to costs of the appeal.

R.P MDHLULI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I agree

E.M MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT

LIMPOPO DIVISION

DATE HEARD:

11th SEPTEMBER 2020

DATE JUDGEMENT DELIVERED: 18TH SEPTEMBER 2020

ELECTRONICALLY

APPEARANCES

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IVYPARK, POLOKWANE

[1] Farell v Hankey 1921TPD 590 596, Maintenance Act No. 99 of 1998section 15 (3) (a) – (b).

- [2] Maintenance Act No. 99 of 1998section 15 (3) (2)
- [3] Family Law Service, LexisNexis, Service Issue 72, Division C, Maintenance by Lesbury van Zyl, CS, page 3.
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