

SOUTH AFRICA / JUDGMENT

C.E.M v H.M.M (79725/2019) [2021] ZAGPPHC 541 (20 August 2021)

[2021] ZAGPPHC 541

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

79725/2019

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REP IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

20

AUGUST 2021

CASE NO:

79725/2019

In

the matter between:

C[....]

E[....] M[....]

Applicant

(ID

NO.: [....])

and

H[....]

M[....] M[....]

Respondent

This

judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary.

The date

of this judgment is deemed to be 20 August 2021.

JUDGMENT

COLLIS J

INTRODUCTION

[1] This is an application in terms of Rule 43 of the Uniform Rules of Court. The respondent opposes the application on various grounds. The applicant is the plaintiff in the pending divorce action proceedings, launched on 25 October 2019.

[2] The applicant and the respondent were married to each other on 19 April 1997, with the marriage regime out of community of property

with the inclusion of the accrual system. Two children were born from their marriage, namely a girl (G[....]) who is currently 21 years old, and a boy (R[....]) who is 19 years old. Both children are now majors, but remain dependant as they are students. The parties have been married for 24 years. The aforesaid are common issues between the parties.

[3] The applicant and the children left the erstwhile common home on 20 July 2019, and since that date the parties have been living apart. The children are both residing with the applicant.

[4] The main dispute in the divorce action is which party's estate showed a larger accrual, as well as the calculation of the accrual.[1]

[5] The issues to be determined in this application can succinctly, be tabulated as follows:[2]

5.1 Whether the respondent should be ordered to continue to make payment of the insurance premium in respect of the major children's

vehicle;

5.2 whether the respondent should be ordered to continue making available the fuel card for the use of the major children which card allows them to buy fuel for a maximum amount of R 2400 per month;

5.3 an order that the respondent should continue to make payment of 100% of the shortfall in respect of the major children's study fees which are covered by the benefit that the applicant receives from her employer;

5.4 an order that the respondent continues payment of 50% of the shortfall on the major children's books and study material,

computer software and other educational expenses, which should be paid by the respondent within 7 days after being forwarded a request;

5.5 that the respondent be ordered to pay maintenance to the applicant and the parties' major children in the amount of R 35 000,00 per month, payable on or before the first day of every month directly into the bank account as nominated by the applicant;

5.6 that the respondent be ordered to make a contribution of R 50 000.00 towards the applicants' legal costs, payable in monthly instalments of R 5000.00 per month, the first payment to be made on before the 1st day of the month following the order;

5.7 that the respondent be ordered to pay the costs of this application.

[6] As per the respondents' tender and relief sought, he takes no issue with the relief sought as per paragraph 5.1, 5.2 and 5.4 mentioned above. He does, however, in respect of paragraph 5.4 request that he be given 30 days to pay such shortfall from date that correspondence in this regard is directed to him. As a result, it follows that the applicant should succeed in respect of the above relief sought in paragraphs 5.1, 5.2 and 5.4.

[7] What then remains for this court to determine, is the relief sought in paragraphs 5.3, 5.5 and contribution towards the applicant's

legal costs.

[8] Now it is trite that a Rule 43 application should be dealt with inexpensively and expeditiously. The prolixity in averments and proliferation of papers and affidavits ought to be avoided. I cannot say that this has been the position in the present case. That being said the factual allegations must be set out clearly and concisely. Those facts that the applicant relies upon to make a determination are to be self-contained in the application papers before the court. To this end, I reiterate the dictum in the locus classicus, where Mullins J stated:

'Without laying down any rule of practice in this regard, and despite the desirability of keeping the costs of Rule 43 applications as low as possible, I am of the view that the Court should not be required to search for and peruse another file of papers.....'

Furthermore, Rule 43(2) requires the applicant's sworn statement to set out 'the relief claimed and the grounds therefor'. This suggest that Rule 43 proceedings should be self-contained.....'[3]

POINT IN LIMINE

- [9] As a preliminary point counsel for the respondent submitted that the applicant has failed to make an accurate and full disclosure in the Financial Disclosure Forms that she completed. Furthermore, as the applicant is the holder of a number of bank accounts which are all overdrawn, it is wholly improbable and highly unlikely that these financial institutions would have granted her credit to the extent of her indebtedness, merely on her alleged net income of R 47 000 per month. On the basis of her failing to make accurate and full disclosure, counsel had argued that the application should be dismissed on this preliminary point alone.
- [10] In response counsel on behalf of the applicant had argued that it should be borne in mind that the first Financial Disclosure form of the applicant was filed on 20 February 2020. On 14 April 2021 she proceeded to file an updated Financial Disclosure form. Furthermore, that both these Financial Disclosure forms were filed prior to the filing of the Respondent's Opposing Affidavit, which was subsequently filed on 10 May 2021.
- [11] As such, counsel submitted that the respondent therefore, was already in possession of both Financial Disclosure forms of the Applicant when his Opposing Affidavit was prepared and filed.
- [12] Counsel further pointed out that it is important to note that the Opposing Affidavit is also silent on any assertion that the applicant has failed to make a full and accurate disclosure of her financial position. Neither is a single criticism levelled against any information or documentation contained in the said financial disclosure forms.
- [13] If indeed the respondent had made these averments in his Opposing Affidavit as he ought to have done; the applicant could in turn have exercised her right to request the Court for an opportunity to reply thereto by invoking the provisions of rule 43(5) and as this was not set out in the Opposing Affidavit, she now is being prejudice as no reply is thereby made by her under oath.
- [14] It is on this basis, that she contended that there is no merit in the point in limine and same should be dismissed by this Court.
- [15] Upon perusal of the Opposing Affidavit, it is correct as contended for by counsel for the applicant that the respondent did not take issue with what the applicant had recorded in her two Financial Disclosure Forms and as such it cannot be regarded that the point in limine taken is supported by any evidence under oath.
- [16] Consequently, this Court cannot find that the point in limine is indeed supported by evidence under oath and it must therefore follow that it ought to be dismissed with costs.

CONTRIBUTION TOWARDS LEGAL COSTS

[17] As mentioned, the applicant also seeks a contribution towards her legal costs. As per her founding affidavit she alleges that she requires a contribution towards her legal costs as the respondent's income and asset position is superior to hers. Further that there is a markedly inequality in arms between them.[4] She annexed her attorney's bill of costs in terms of which it shows that at 24 February 2021 she owed her attorney an amount of R25 182,72.[5] This amount increased with further legal fees incurred.

[18] Provision was also made for future estimated attorney's costs up until the stage when application can be made for a trial date. The combined effect comes to R87 448,27.[6] This amount is exclusive of counsel's fees. The applicant asks for a contribution towards her legal fees in the amount of

R50 000,00, payable in monthly instalments of R5 000,00.[7]

[19] In reply, and in his Opposing Affidavit, the respondent avers that as he is responsible for his own legal costs the applicant should also pay for her own costs. Furthermore, he seeks to justify his assertions and alleges that the parties respective income are very similar. Further to this he alleges that the applicant does not wish to settle the divorce action, whereas he is desirous to do so and that she is the one who is protracting the litigation and by extension the legal costs.[8]

[20] It is trite law that litigation costs are part of a spouse's reciprocal duty of support. The quantum which an applicant for a contribution towards costs should be given is something which is to be determined in the discretion of the Court.

[21] In the exercise of that discretion the Court should have regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation. The dominant object is that the wife must be enabled to present her case adequately before the Court.[9]

[22] In his opposing affidavit, the respondent does not deny the contents of Annexure G (the pro forma invoice) annexed to the applicants'

affidavit setting out the balance brought forward on her account and thus due by her to her attorneys, nor does he challenge the envisaged legal costs to be incurred by her in the future.

[23] As such, counsel for the applicant had argued, that there is therefore no justification for the respondent's stance that the applicant should not be allowed a contribution towards her legal costs merely because she refuses to settle the divorce action. There is further, so counsel contended, no rule that forces the applicant to settle the divorce action on the terms of the respondent.

[24] Counsel in addition submitted that in exercising its discretion in the determination of the quantum for the contribution towards costs to be awarded, the Court should also have regard to the provisions of section 9(1) of the Constitution of the Republic of South Africa, 1996, that guarantees both parties the right to equality before the law and equal protection of the law.[10]

[25] By contrast, counsel appearing for the respondent had submitted that the applicant is seeking a significant portion as a contribution

towards her legal costs, which costs relates to costs already incurred and that the applicant is not to be allowed a contribution

in respect of past costs. In the present matter the applicant does not allege that she cannot pay her own legal costs in future and also failed to file an affidavit from her attorney disclosing the legal costs already incurred or outstanding or required for further litigation.

[26] Counsel argues further that the applicant has sufficient means to pay her own legal costs having regard to her income and nett asset value and has in fact paid substantial amounts in respect of legal cost. This recently occurred in January 2021 when an amount of R62 493.13[11] was paid and in February 2021 an amount of R50 000.[12] Save for the aforesaid the following payments were also made to legal costs, 20 September 2019 – R5000, 2 October 2019 –

R6371.72, 31 October 2019 – R16 097.52, 18 December 2019 – R20 444.92 and on 24 January 2020 – R4810.40.

[27] In the present matter it is clear that the applicant has paid significant amounts to her attorneys and she has not alleged that she was unable to pay further invoices presented to her by her attorney which as a result remains unpaid.

[28] Furthermore, if indeed it is to be accepted that significant amounts in respect of her legal fees was already settled by her either in part or in full. She has failed to take the Court into her confidence by disclosing in her founding affidavit (as this is where her case in this respect ought to have been made) as to the amounts she has already spent towards her legal fees and that she has been presented with an invoice(s) that remains unpaid.

[29] As mentioned, a claim for a contribution towards legal costs is sui generis and is based on a duty of support spouses owed to each other. In order for the applicant to succeed she carries the duty to show that she has insufficient means of her own.

[30] In the present instance the applicant's affidavit is also not supported by a confirmatory affidavit by her attorney confirming the legal fees already spent by her and what proof of invoice(s) were presented to her that remains unpaid.

[31] In the absence thereof, I cannot but conclude that she has failed to discharge her onus, and as such she cannot be awarded a contribution towards her legal costs.

CONTRIBUTION OF 50% SHORTFALL IN RESPECT OF THE MAJOR CHILDREN'S BOOKS, STUDY MATERIAL, COMPUTER SOFTWARE AND OTHER EDUCATIONAL MATERIAL

[32] In turning to the next issue of contribution she seeks pendente lite, in her founding affidavit, the applicant alleges, that the shortfall on the study fees for 2020 was R42 646.50 and although the shortfall was paid by the respondent, he paid the shortfall in two instalments which presented her with some uncertainty. It is for this reasons that she is seeking an order that this shortfall should be paid by the respondent within a period of seven

(7) days of the request being presented to him.[13]

[33] In principle the respondent has no objection to pay for this shortfall, but he instead of seven days to pay the shortfall,

requests a period of 30 days to pay for same. In his Opposing affidavit, he alleges that the applicant fails to communicate with

him properly and fails to budget properly and ends up spending her income irresponsibly.[14]

[34] As the amount of the shortfall to be paid is unknown, it follows that the said amount cannot be budgeted for by either party. As such it is imperative, that the shortfall amount should be conveyed timeously to the respondent, and that sufficient time should also be given to him to pay for such shortfall. This will only be reasonable and will ultimately be to the benefit of the children who can continue with their studies without the concern of focussing on their outstanding study fees.

[35] The request made by the respondent to be afforded 30 days to pay for this shortfall to my mind, will afford him adequate and sufficient time to arrange his affairs and for him to make arrangements with the university, where necessary. The requested period affording him only seven (7) days, I consider it to be wholly insufficient and also inadequate.

[36] Consequently, in respect of this relief, he will be afforded 30 days to settle such shortfall.

CONTRIBUTION TOWARDS MAINTENANCE FOR THE APPLICANT AND MAJOR DEPENDENT CHILDREN

[37] In this regard and in her founding affidavit, the applicant states that she is a Director of the [...] and that she and the children vacated the matrimonial home on 20 July 2019.[15]

[38] She further alleges that herself and the children are in need of increased maintenance from the respondent, since his current

contributions are insufficient.[16] She further alleges, that since they vacated the matrimonial home she had to sell her vehicle during October 2019 and that she is currently without her own vehicle.

- [39] In her founding affidavit, she alleges that her monthly expenses in respect of herself and the major children amounts to R 111 096.00, whereas she only receives a net salary of R 47 467.87.[17] This has not been disputed by the respondent. It is furthermore not disputed that she does not receive a 13th cheque, or that the last time she received a bonus was in 2019.
- [40] The respondent in his Opposing Affidavit avers that his monthly income amounts to R49 017,87.[18] In paragraph 6.5 of his Opposing Affidavit, he avers that his and the Applicant's cost to company are awfully close.[19] In paragraph 41.2 he refers to his updated salary advice, as well as correspondence from the auditor which confirms the perks which he receives. He alleges that if one has regard to both parties' cost to company, he and the applicant's income are very similar.[20]
- [41] It is not disputed between the parties that both major children are busy with their tertiary education and are financially wholly dependent on the parties.[21] It is also not disputed that the respondent is tendering the payment of maintenance in respect of the children and states that he has no objection to maintain the children according to his means, however he objects to the payment of maintenance for the applicant and states that she is not entitled to maintenance for herself.
- [42] He further alleges that the applicant demands to continue living a very extravagant lifestyle. He alleges that if one has regard to her list of expenses most of the expenses claimed are luxury items and not reasonable or necessary expenses.[22] Furthermore, he alleges that he was advised that major children are not maintained as lavishly as minor children.[23] Annexed to his Opposing Affidavit, he has annexed annexure "M1", which depicts, his exposition as to what the children's
- reasonable and necessary expenses ought to be.[24]
- [43] In considering the amounts as listed in annexure "M1" it is significant to note that in many instances the expenses as claimed by the applicant are the same as what the respondent alleges that they ought to be, by way of example, these expenses include water and sanitation, cell phone allowances and lunches for the children. If one however has regard to others, it appears that the respondent has merely reduced some of these amounts without any proof to support such reductions. An illustration of this, is that he merely reduced the costs for a domestic worker, costs for electricity and grocery costs with no supporting premise for this.
- [44] Rule 43 maintenance pendent lite is not only available to children of the parties before court, but is also available to a spouse as she is entitled to support on a scale commensurate with the social position, life style and financial resources of the parties. It would be reasonable to maintain her in a position similar to that which she would ordinarily be accustomed while she was living together with the husband.[25] She is entitled to a reasonable amount according to her husband's means, not necessarily according to what he thought was

reasonable.[26]

- [45] A court when faced with an application of this nature, remains mindful of the provisions of sections 6 and 7 of the Divorce Act which obliges a court with discretionary power to give consideration to the maintenance arrangements to be made for a dependent child upon divorce and empower it with the necessary discretion to make any order which it may deem fit. The discretionary and empowering provisions of these sections in the Divorce Act are sufficiently wide to enable a court, on divorce, to make an order directing the one spouse to pay amounts to the other spouse in respect of expenses incurred to maintain the major, but dependent, child. A similar power has thereby inferentially been conferred upon the court to make such an order pendente lite in terms of rule 43, and the court's ability to do just that, and direct what is just and equitable, is expressly recognised in rule 43(5).[27]
- [46] In the present matter, it is not denied by the respondent that he has been making substantial financial contributions towards the applicant and the children's maintenance since they left the erstwhile common home.[28]
- [47] It is also not disputed that the respondent has not experienced a decrease in his standard of living. He still lives alone in a 4-bedroomed home that previously served as the parties' former common home. He drives a Mercedes Benz SL 500 Roadster motor vehicle, with complements of his employer. He still has the benefit of the full time domestic worker, as well as the gardener once a week. These are all luxuries that the applicant and the children currently do not enjoy.
- [48] As previously mentioned, it is not disputed that the applicant receives a net income of R47 467,87 per month, which leaves her with a shortfall of R56 628,13.[29] On any account this a huge shortfall and serious adjustments in future will need to be made by all concerned, including the children.
- [49] In order for this court to order the respondent to pay maintenance to his spouse and children, this court must be persuaded that indeed the respondent has the ability to pay such maintenance.
- [50] The respondent before this Court is an architect. He is a director of [...], which is a family business, and of which his brother and his father are the other directors.[30] It is so that the applicant annexed a salary advice of the respondent for January 2020 which reflected a net salary of R48 600,54, but if one considers the further document which was drafted by his accountant dated 17 January 2020, he averages a monthly income of R97 401,76, considering the various benefits which he receives.
- [51] Albeit, that he avers that [...] suffered great financial strains,[31] he annexes no evidence to his Opposing Affidavit to substantiate this averment. Upon a reading of his bank statements annexed to his Financial Disclosure form, it is evident that he receives additional payments from [...] (over and above his monthly salary payment and benefits) which he failed to declare or explain.

[52] In addition to the above directorship which he holds, he is also a director of 6 other companies (including [...]). One of these companies are called [...], which is another architectural business run by the respondent, his brother and his father. The business is not registered for VAT and offers preferential rates for family and friends.[32] The aforesaid is admitted by the respondent. The respondent failed to declare the income that he receives through [...].

[53] Having regard to the above, I am satisfied that the respondent indeed has the ability and means to pay spousal maintenance and maintenance towards his major dependent children and that the applicant duly discharged her onus that these expenses are reasonable and proven to be necessary given the parties' social standing and previous living conditions.

ORDER

[54] In the result the following order is made:

54.1 The Respondent's point in limine is dismissed with costs.

54.2 The Respondent is directed to continue paying for the insurance premium in respect of the major children's motor vehicle.

54.3 The Respondent is directed to continue making available the fuel card for the use of the major children which allows them to buy fuel for a maximum amount of R2 500,00 (TWO THOUSAND FIVE HUNDRED RAND) per month.

54.4 The Respondent is directed to continue making payment of 100% of the shortfall in respect of the major children's study fees which are not covered by the benefit that the Applicant receives from her employer.

54.5 The Respondent is directed to continue making payment of 50% of the shortfall on the major children's books & study material, computer software and other educational expenses, which is to be paid by the Respondent within 30 (THIRTY) days after being forwarded the request and proof of purchase.

54.6 The Respondent is directed to pay maintenance in respect of the Applicant and the parties' major children in the amount of R35 000,00 (THIRTY-FIVE THOUSAND RAND) per month, payable on/before the 1st day of every month directly into a bank account as nominated by the Applicant. The first payment is to be made on 01 SEPTEMBER

2021, and thereafter on the 1st of every consecutive month.

54.7 The Applicant's legal costs contribution is refused.

54.8 The Respondent shall pay the costs of this application.

COLLIS C

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Adv. I Vermaak-Hay

Attorney for the Applicant : Sanet De Lange Incorporated

Counsel for the Respondent : Adv. S Guldenpfennig SC

Attorney for the Respondent : WM Dixon Attorneys

Date of Hearing

: 01 July 2021 and 9 July 2021

Date of Judgment : 20 August 2021

Judgment

transmitted electronically

- [1] Founding Affidavit para 5 p 0005-7
- [2] Notice of Application
- [3] Carstens v Carstens 1985 (2) SA 351 (SE)
- [4] Founding Affidavit Record par 34 p 22
- [5] Index: Annexure G p 0005-37
- [6] Index: Annexure G p 0005-42
- [7] Founding Affidavit para 34 p 0005-23
- [8] Respondent's Opposing Affidavit para 57 p 0005-74
- [9] Van Rippen v Van Rippen 1949 (4) SA 634 (C) at p 639
- [10] Carey v Carey 1999 (3) SA 615 (C) at p621 B-D
- [11] Financial Disclosure Form 0003-267
- [12] Financial Disclosure Form 0003-270
- [13] Founding Affidavit para 12 Index p 0005-10
- [14] Opposing Affidavit para 18 Index p 0005-52
- [15] Founding Affidavit para 1 Index 0005-6
- [16] Founding Affidavit para 16 Index 0005-11
- [17] Founding Affidavit para 19 & 20 Index 0005-16
- [18] Opposing Affidavit para 6.2 Index 0005-46

- [19] Opposing Affidavit para 6.5 Index 0005-47
 - [20] Opposing Affidavit para 41-2 Index 0005-67
 - [21] Opposing Affidavit para 7 & para 13.1 Index 0005-7 & Index 0005-49 respectively.
 - [22] Opposing Affidavit para 13.1 Index 0005-49
 - [23] Opposing Affidavit para 6.3 Index 0005-46
 - [24] Opposing Affidavit para 6.4 Index 0005-47
 - [25] AF v MF (supra) on p 436, par 61
 - [26] Glazer v Glazer 1959 (3) SA 928 (W) at 930E
 - [27] JG v CG 2012 (3) SA 103 (GJ) at 111 par 31 – 112 par 32
 - [28] Opposing Affidavit para 9 Index 0005-8
 - [29] Founding Affidavit para 21 p 0005-17
 - [30] Founding Affidavit para 22 p 0005-17
 - [31] Opposing Affidavit p 41.1 p 0005-66 & para 44.2 p 0005-68
 - [32] Founding Affidavit para 30 p 0005-21
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