

SOUTH AFRICA / JUDGMENT

C.S.M v F.Y.G (94700/19) [2020] ZAGPPHC 211 (5 May 2020)

[2020] ZAGPPHC 211

COURT

North Gauteng High Court, Pretoria

BEFORE

P H Malungana

CASE / FILE NUMBER

94700/19

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE

NO: 94700/19

5/5/2020

In

the matter between: C[....]
S[....] M[....]
Applicant
and
F[....]
Y[....]
G[....]
Respondent

JUDGMENT

MALUNGANA AJ

- [1] This is an application for relief pendente lite in terms of Rule 43 of the Uniform Rules of Court. The applicant and the respondent are parents to their two minor children aged between four(4) years and one (1) year old, born out of their alleged marriage relationship which is the subject of acrimonious litigation before this Court.
- [2] In the rule 43 application the applicant seeks access and contact with the minor children. He also tendered to make a contribution of R1 800 per month, per child, retain the children on his medical aid, pay half of the medical expenses, and reasonable schooling and extra-mural costs.
- [3] The application is opposed by the respondent, who in turn filed a counter-claim for an order pendente lite in the following terms:
- 3.1 Return by the Applicant of a VW motor vehicle with registration number:[....]within 48 hours of the order;
- 3.2 That the Applicant reinstates her to his medical aid and furnish proof to her attorneys within 48 hours of the order;
- 3.3 That the Applicant retains the minor children on his medical aid;
- 3.4 That the Applicant pays school fees for the minor child Matilda in the amount of R2 650;
- 3.5 That the Applicant pays maintenance in the amount of R5000.00 per child per month until the divorce is finalized;
- 3.6 The Applicant pays spousal maintenance of R3000.00 per month pendente lite.
- 3.7 That the Applicant be barred from dissipating any assets in the joint estate pendente lite.
- 3.8 That the Applicant returns the minor children passports to the respondent.
- 3.9 That the Applicant be barred from interfering with the child's peaceful attendance at Curro College;

3.10 An order that the Applicant is allowed to exercise access to the minor children in accordance with the recommendations by Family Advocate;

3.11 That the Applicant makes payment to the Respondent in the sum of R10 000.00 as a contribution towards her legal costs;

3.12 That the Applicant be ordered to pay the costs of the application.

[4] In support of the relief claimed the applicant made the following allegations in the founding affidavit which I shall briefly summarise.

[5] During 2019, the respondent instituted divorce proceedings against the applicant in which she sought a declaratory order to the effect that a customary marriage was concluded between them, and the dissolution of such marriage.

[6] On 16 November 2019, the respondent vacated the common home with the minor children, and has not been able to exercise his contact rights with the minor children since December 2019.

[7] On 4 December 2019 his attorneys addressed a correspondence to the respondent's attorneys seeking assurances that his right of contact with the minor children would not be frustrated. The respondent's attorneys replied that the issue of contact will be investigated by the family advocate. The relevant portions of the letter from the respondent's attorneys dated 5 December 2019 read as follows:

"2. Kindly note that as a settlement agreement was never finalised, the matter has been referred to the family advocate as the visitation rights should be reasonable and in consideration of the children's age. We will advise you of the date once received from the family advocate.

3. We also refer to our letter dated the 19th of November 2019, taking into consideration the minor children's ages, please be advised that at the moment your client will have weekend visits with the children and return the children the same day. Kindly note that as previously advised, the younger child is still nursing and it is not practical for him to have overnight or weekend visits."

[8] Despite the aforesaid assurances, the respondent has not acceded to his requests to have contact with the minor children.

[9] While they lived together the applicant enjoyed a close relationship with the minor children. He would prepare food and feed them, put them to bed, bath them, drop them to school and attend to them when they sought medical attention.

[10] The applicant has also attached a plethora of whatsapp communication between him and the respondent. It is not necessary for present purposes to traverse the content of these whatsapps.

- [11] In her answering affidavit the respondent alleges that the applicant has brought the rule 43 application in bad faith in that he failed to inform the Court that she is unemployed, and has no income to fend for herself and the minor children. According to the respondent she lost her job as a Human Resource Officer in October 2019. After she lost her job the applicant confiscated her vehicle with the result that she had to seek alternative means to transport the minor child to and from school.
- [12] The respondent also avers that the applicant is emotionally, physically and financially abusive towards her. Whilst they lived together he would threaten to evict her from the common home. He also confiscated the passport and all the Canadian papers in a bid to control her movements. The abuse escalated to the point that he pushed her out of the common home.
- [13] Eventually she decided to vacate the common home and settled in Midrand with the minor children.
- [14] Regarding the applicant's access to the minor children. She avers that she has not barred the applicant from accessing the minor children. Her concern was that each time they had a fight, he would verbally abuse the respondent in the presence of the minor children. She subsequently reported the issue to the family advocate with a view of protecting the children. Her other concern is that Matilda now understands the meaning of the abuse words.
- [15] Her other reason for engaging the family advocate is the applicant's insistence on the use of video call to see the whereabouts of the children. She finds this demand invasive.
- [16] In paragraph 12, the respondent contends as follows:

"I have no objection to the Applicant accessing the minor children per Family Advocate's recommendations, largely due to the

Applicant's hot temper and abusive behaviour which would manifest even in the presence of children."

- [17] Her counterclaim was met by the application in terms of rule 30 of the rules to strike out the entire claim contending that it was irregular step. I pause to mention that the said application is enrolled for hearing on the 17th of November 2020.

- [18] In the counterclaim the respondent listed her own monthly expenditure as follows:

Groceries

R1000

Water and lights

R500

Transport (Fuel, Parking)

R1000

Clothes

R500

Hair maintenance and toiletries R500

Telephone and internet

R1000

Entertainment

R500

TOTAL

R5000

Less Monthly Income

R0

MONTHLY SHORTFALL

R5000

[19] The monthly shortfall in respect of the minor children is shown in the table in the total amount of R10 000.00.

[20] The respondent also requires a contribution of R10 000.00 towards her legal costs in the divorce action.

[21] In limine the applicant objected to the respondent's counterclaim on the basis that it does not conform with the provisions of rule 43, in particular Form 17. As a result thereof he is barred from responding to the counterclaim until the notice in terms of rule 43(2) is served upon him. Counsel for the applicant also argued that had the respondent brought her counterclaim as prescribed in terms of Rule 43(2), the Court would be adjudicating two parallel applications. He went on to argue that, in the event that his interpretation is incorrect, then such error of interpretation should be condoned, and the applicant should be granted an opportunity to file an opposing affidavit to the respondent's counterclaim.

[22] Apart from the rule 30 application launched by the applicant on the 26th of February 2020, it further emerges from the applicant's heads of argument, that the respondent's right to claim maintenance

under the provisions of rule 43 is being challenged. In this regard the applicant contends that the respondent is not entitled to claim spousal maintenance under rule 43 in that the parties' purported customary marriage is not recognised both in Zimbabwe and South Africa. The applicant's argument as I understand it, is that this dispute is at the heart of litigation pending before the Court under case number 76427/19.

- [23] The respondent has objected to the applicant's request to file a further affidavit in response to the counterclaim. On this issue the respondent's counsel argued that, the applicant had sufficient time to deal with the allegations contained in the respondent's counterclaim, instead he chose an irregular step by filing a replying affidavit without seeking leave of this court.
- [24] It is convenient at this stage to consider the applicable legal principles in this matter. It is trite that rule 43 application provides a remedy by which a party in a pending matrimonial disputes may claim, inter alia, maintenance pendente lite; a contribution towards legal costs of the pending matrimonial; interim custody and access to any child.[1]The rule also apply to a recognised customary marriage and to marriages according to Hindu or Muslim rites.[2]
- [25] Rule 43 affords to the parties a procedure intended to be quick and inexpensive. To that extent the applicant is required to deliver a sworn affidavit in the nature of declaration, setting out the relief claimed and the grounds therefore. The respondent is expected to deliver a sworn statement in the nature of a plea in response to the applicant's declaration. No replying affidavit are permitted in the rule 43 application. The rule itself is self – contained that it is not necessary for the court to search for and peruse the file of papers relating to the main action.[3]
- [26] Failure to comply with these rules may lead to a dismissal of the application, a striking from the roll or a setting aside of the affidavit concerned as an irregular proceeding which will be followed by an adverse costs order against the litigant or its attorney.[4]
- [27] However, under certain circumstances like it was the occurrence in *Dodo v Dodo*[5], Wuffsohn AJ remarked in the context of rule 43, that there should be no reason why special circumstances may not justify a deviation from the norm. To my mind the applicant has completely misconstrued the purpose of rule 43 by seeking to file a replying affidavit, and by reacting to the respondent's counterclaim in the manner that it did. In this regard I hold the view that the horse has already bolted. This court will be remiss of its duty if it were to allow the applicant to file further affidavits which will result in further delay in the finalisation of this matter.
- [28] In *Daniels v Campbell*[6] the Constitutional Court interpreted the concept 'spouse' and 'survivor' in the context of Intestate Succession Act, 1987, and the Maintenance of Surviving Spouses Act, 1990 to include spouses married in terms of Islamic Law.

- [29] In *Zaphiriou v Zaphiriou* [7] it was reiterated that Rule 43 was designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under common law in regard to maintenance and costs. The purpose of such relief was to regulate the position between the parties until the court finally determined all the issues between them, one of which might well be whether the parties had contracted a valid marriage or not, or if they had, whether it still subsisted (344 D-E). It was held that Rule 43 was to be interpreted accordingly, and spouse in Rule 43 (1) was held to be interpreted as including not only a person who is admitted to be a spouse, but also a person who alleges that he is a spouse, and that allegation is denied (345 F-H).
- [30] The dispute serving before the Court in the main action is a matrimonial one. The respondent's claim contained in the counterclaim is for maintenance pendente lite and a contribution towards the costs of the pending matrimonial action. That said, I am therefore satisfied that the respondent in the current case is entitled to claim maintenance pendente lite in terms of Rule 43 pending the determination of the issues serving in the matrimonial proceedings, subject of course to her need for such maintenance and costs contribution.
- [31] It is trite that this Court sits as the upper guardian of all minors within its jurisdiction. In *Jackson v Jackson* 2002 (2) SA 303 (SCA), the Supreme Court held at para 5, that where the interests of minor children are involved, the litigation amounts to judicial investigation of what is in their best interests. The court is not bound by the contentions of the parties. That slavish adherence to technical procedural requirements might result in court not being able to decide an issue in the best interests of a child, has been recognised in the unreported judgement of Matojane J in *DJB v MDP* case number 30377/2008 decided in the North Gauteng High Court, Pretoria, para 12.
- [32] Section 7 of the Children's Act, provides a list of factors that courts must take into consideration when determining what is in the best interests of the child. That entails (a) the nature of the personal relationship between the child and the parent, a care-giver or a person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards the child; and the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parent, or any care-giver or person, to provide for the needs of the child; (d) the likely effect on the child of any change in the child's circumstances including the likely effect on the child of any separation from-(i) both or either parents; or (ii) any brother or sister or other child; or any other care-giver or person, with whom the child has been living;...(g) the child's age, maturity and stage of development, gender, background; and any other relevant characteristics of the child; (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development,...including (I) the need to protect the child from any physical or psychological

harm that may be caused by- subjecting the to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to

violence or exploitation or other harmful behaviour...

[33] It is undeniable that the children need both parents for their natural psychological development. Despite the rift between the parties the facts in this case show that the applicant is devoted to his children. Allegations were also made that the applicant is hot tempered, which temper also plays out in the presence of the children. The issue of the children's age is also a major one, considering that they are relatively young to spend the night without their mother. I am equally mindful of the potential psychological impact the separation from their mother would bring to bear upon the minor children. However, it is equally in their best interests that the children should build good relationships with both parents.

[34] It is evident from the content of the letter written by her attorneys supra, that the respondent did not seem to have any problem with the applicant having weekend visits to the children. I am therefore satisfied that the applicant should be entitled to have access and contact to the minor children pending the report of the Family Advocate. There is no evidence before me that the applicant's conduct has had any undesirable impact on the minor children. To my mind he comes across as someone who loves his children, and does not pose any threat towards them. The parties should use their endeavours to procure the report of the family advocate who will guide them towards developing a parental plan to overcome their differences.

[35] In light of the conclusion I reached that the respondent is entitled to claim maintenance pendente lite in terms of rule 43, I now proceed to consider whether there is any merit in her counterclaim. It is incontrovertible that the respondent

is presently unemployed. The need for her to be maintained is undisputed even though the extent of the need is not properly quantified. In terms of section 7 of the Divorce Act, No. 70 of 1979, the court is not quantifying a claim akin to a delictual damages claim. Section 7(2) of the Act should be used by the courts to ensure fairness between the parties. For example, in *Rousalis v Rousalis*[8], followed by *Kroon v Kroon* [9], the court held that a wife of long standing who by working had helped her husband to build up a separate estate, would be entitled to far more maintenance in terms of s 7(2) than one who for a few years merely shared his bed and kept his house.

[36] It is the respondent's contention that she used to apply a portion of her salary towards the joint estate of the parties. Although the respondent's actual living expenses would indicate the extent of her actual financial needs and obligations. This court is not expected to calculate a meticulously mathematically correct sum of money for purposes of her maintenance. I am expected to strive to the best of my ability to make a reasonable and appropriate amount as an order. Unfortunately, my task is not an enviable one as I have not been furnished with any information regarding the applicant's financial position, let alone a

hint relating to his source of income. However, I have noted his willingness to contribute towards certain expenses in respect of the maintenance and educational requirements of the minor children. I have also taken into consideration that he managed to take care of other household expenses whilst the parties were still living together. Regrettably, the applicant has taken an unfortunate attitude towards the respondent's counterclaim. In the absence of lack of financial disclosure on the part of the applicant amid the counterclaim mounted by the respondent, this court should draw an inference that he is able to meet some of the respondent's reasonable claims for maintenance as set out in the counterclaim as argued by the respondent's counsel.

[37] However, I should point out that I am not persuaded by the respondent's assertion that she is struggling to look for work due to transport problems. It could be that she has just not made enough effort to look for opportunities in her chosen career. Probably she is also faced the challenge of raising her last born baby who is barely one year old. I have carefully scrutinised her list of expenses, and have come to the conclusion that the reasonable and appropriate amount in respect of maintenance for herself is R3000.00 per month.

[38] On the issue of the respondent's claim for contribution towards her legal costs, I have taken into consideration that the dispute surrounding the marriage status of the parties may lead to protracted and bitter litigation. The respondent is unemployed and must be equally placed on the same footing with the applicant to properly present her case.

[39] In the result the order I make is as follows:

1. The applicant is ordered to maintain the minor children as dependants on his medical aid, and to pay all the excesses which are not covered by the medical aid scheme.
2. The applicant is further directed to pay the school fees for the minor child Matilda in the sum of R2 650.00 per month;
3. The applicant is ordered to pay the respondent the sum of R2500.00 per month per child in respect of the maintenance;
4. The applicant shall pay the respondent the sum of R3000.00 per month in respect of spousal maintenance;
5. The applicant shall pay the respondent the amount of R10 000.00 as contribution towards her legal costs;
6. The applicant shall, pending the report by the Family Advocate, exercise the following contact with the minor children:

6.1 Every alternative Saturday at 09h00 and shall remove the minor children and return them to the respondent by no later than 15:30 on the same day;

6.2 Contact with the minor children starting from 09h00 and shall remove them and return them to the respondent no later than 17h00 on his birthday and father's day;

6.3 Contact with the minor children starting from 12h00 and shall return them to the respondent no later than 17:00, on their birthdays, should their birthday fall on a weekday, this right shall be exercised on the first Saturday following their birthday;

6.4 Telephonic contact with the minor children at all reasonable times.

7. The applicant is ordered to return the minor children's passports to the respondent within 10 days of the date of this order.

8. The costs of this application shall be costs in the divorce action.

P H Malungana

Acting Judge of The High Court,

PRETORIA

APPEARANCES

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[1] Mather v Mather 1970 (40 SA 582 (E)).

[2] AM v RM 2010 (2) SA 223 (ECP); Baadjies v Matubeka [2002] 2 All SA 623 (W) at 627 – 628; Minister of Home Affairs v Fourie [2005] ZACC 19; 2006 (1) SA 524 (CC); Fourie v Minister of Home Affairs 2005 (3) SA 429 (SCA)

[3] Carstens v Carstens 1985 (2) SA 351 (SE) at 352E.

[4] Myburgh v Myburg 1970 (1) SA 681

[5] 1990 (2) SA 77 (W) at 89H

[6]

[2004] ZACC 14; (2004 (7) BCLR 735 (CC)

[7] 1967 (1) SA 342 (W)

[8] 1980 (3) SA 447 (C)

[9] 1986 (4) SA 616 (E) 623

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