

SOUTH AFRICA / JUDGMENT

D.D v F.D (72897/2019) [2020] ZAGPPHC 778 (27 November 2020)

[2020] ZAGPPHC 778

COURT

North Gauteng High Court, Pretoria

BEFORE

PN Manamela

CASE / FILE NUMBER

72897/2019

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 72897/2019

In

the matter between:

D[...]

D[...]

Applicant

and

F[...]

D[...]

Respondent

JUDGMENT

MANAMELA AJ (Ms)

- [1] This is an opposed application in terms of Rule 43 of Uniform Rules of Court, which was heard on 20 November 2020.
- [2] The Parties were married on 21 March 1998, out of community of property with the inclusion of accrual system. From the marriage, two children were born, D[...] D[...] born on 1 July 2000 (major) and N[...] D[...] born on 5 April 2004 (minor). The relief sought includes claims for maintenance for both children, and the applicant as well as a contribution towards legal costs, amongst others. The claim for the major child is said to be in terms of section 6(3) of the Divorce Act, 70 of 1979.
- [3] Divorce Summons were issued by the Applicant and a Plea was filed by the Respondent on 27 November 2019. This matter comprises of conflicting versions of prolixity of averments, proliferated papers and affidavits contrary to the spirit of a Rule 43 Application, some of which were handed in at court, with the last one being the Applicant's Affidavit in Response to the Respondent's Reply to the Applicant's Rule 43(5) Affidavit. Arguments led in this matter were equally lengthy, such that an order could not be granted without providing reasons.

Background

- [4] The Applicant was employed as an administration and accounting clerk in the Respondent's business, Durand Steel and Construction cc ("DSC") for a period of 20 years. DSC was established in 1999, and the Respondent is the sole member of DSC. Around 26 February 2019, the Applicant and the Respondent conclude an Agreement of Separation, in terms of which the parties reached consensus about termination of employment, with the effective date of termination being 31 October 2019, and in terms of which the Applicant received a severance package of R240 000.00 and a payment of four (4) months' salary in the amount of R60 000.00 per month, the last payment of which was at the end of February 2020. The Respondent continued to provide maintenance to the Applicant and the minor child, for an amount of R27 061.00 per month and also continued to directly cater for most of the expenses that he maintained during subsistence of the marriage. As far as the major child is concerned, the Respondent

continues to provide direct maintenance of around R2500.00 per month, which has been reduced to R2 000.00 per month by agreement between the Respondent and the major child[1], due to financial constraints and COVID-19 restrictions on movements.

- [5] The Applicant and the minor child are still residing at the matrimonial home, and the major child is attending tertiary education away from home. The Respondent vacated the matrimonial home prior to commencement of the divorce proceedings, on 22 July 2019. The

applicant explains that the respondent replaced her with his girlfriend not only as a romantic partner but also in the previous employment position that the applicant held. The applicant and the respondent lived a luxury lifestyle which enabled them to have expensive properties, including a holiday home, luxury cars, artworks and expensive personal apparels like watches.

1 of 13 prayers - The first prayer sought relating to section 18(2) of the Children's Act 38 of 2005[2]

- [6] There are no contentious issues around the custody of the minor child, N[...]' and access, except to an extent that the Applicant seeks that the wishes and expressions of the child as envisaged in section 6(5) and 10 of the Children's Act be considered whilst the Respondent seeks special parental rights and responsibilities to be set-out, as stated in his draft order. Having considered that, and particularly given the age of minor child.
- [7] I am of the view that the child's best interests comes first, and as provided in Section 10[3] of the Children's Act, it is mandatory to give due regard and consideration to the views expressed by the child. Section 6(5) of the Children's Act addresses the duty to inform a child about actions and decisions taken in a matter significantly affecting the child, and these rights are not intended to surpass the rights envisaged in section 18 of the Children's Act. I cannot find any submission about the history of the respondent that suggests that he lacks judgment towards his children to a point that he may disregard their wishes and expressions. I am in support of having a proper arrangement when it comes to access to the child. I would not agree that the evident tensions between the parties, which I would rather not mention, be disguised as views and expressions of the child. A child will easily adjust to the routine of having to spend time with his other parent, if properly scheduled. I have ordered the arrangements as fully detailed in the order below as I found it just.

2 of 13 prayers - Claim for Interim Maintenance

- [8] The criteria used for interim maintenance as considered by the courts, is threefold, namely – (a) The standard of living of the parties during the subsistence of the marriage; (b) The Applicant's actual and reasonable requirements and (c) The income of the Respondent. An emphasis on this criteria, was provided in V S v A S (12496/2019) [2020] ZAGPJHC 27,
- [19] Section 7 (2) of the Divorce Act sets out what should be taken into account with regard to the maintenance of a spouse by the other. Although the criteria set therein refers specifically to divorce proceedings, I consider that there is no harm in adapting the criteria to proceedings in terms of Rule 43. The factors include, inter alia, 'the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, and any other factor which in the opinion of the court should be taken into account.

- [9] To illustrate the standard of living during the subsistence of marriage the applicant provided evidence that the parties have a matrimonial home valued between R7 200 000.00 to R7 850 000.00, a Glentana (Western Cape) holiday home beach house, the respondents Porche Boxter (R1 000 000.00), Mercedes Benz GLE350 Coupe R1 500 000), Jet skis (R280 000.00), an investment account holding R2 167 297.00 as at 16 July 2019, Kruger Rands, Various Tag Huer, Seiko, Michel Herbelin, David Spilken watches, Paul Munro, Christinaan Nice, Crouse, Nic van Resnburg artwork and various other luxury items. The applicant further received a generous salary of R60 000.00 from the Respondent's business, which she has been a part of as an employee for 20 years.
- [10] The applicant's current employment status cannot be ascertained. In her own submission she is currently assisting a friend at her business, Clean Break Products and Services (Pty) Ltd ("CBP") with marketing out of goodwill. A confirmation letter from CBP as well as an affidavit by M[...] N[...] has been provided as evidence. The evidence led by the Respondent revealed that the applicant described herself as a sales manager of CBP, in an application submitted to a third party for credit assessment, dated 19 October 2020. Furthermore the applicant's details appears in the marketing material of CBP, as an additional contact person. The Respondent submits that there may have some other hidden arrangements with her friend which I found to be most probable. The estimated income according to the Respondent is around R8 000.00 per month. There is no evidence of any income from the friend's business on any of the applicant's bank statements, instead the only income disclosed on the credit assessment form to a third party relating to her employment at CBP is the amount she receives from the Respondent. The applicant received rental income from a property she owns, at R4000.00 per month. The prospective earnings of the applicant could not be ascertained from the evidence provided and it is for this reason that I am also inclined to direct the appointment of an industrial psychologist, as part of the cost contribution order.
- [11] In support for her claim for maintenance, the applicant provided under annexure "G" a list of monthly expenses which amounts to R71 774.00 per month, for purposes of determining her and the minor child's 'actual and reasonable requirement', and which based on her current income leaves her with a shortfall of R67 774.00. I have found that some of these expenses were not reasonable and/or possibly not necessary and/or were duplication of expenses already covered by the Respondent.
- [12] The Respondent strongly argues that –
- "55.3. I dispute that the applicant's alleged monthly expenses are R71 774.00 as alleged. It is rather R19 910.00.."*
- [13] With regards to the income of the Respondent and his capacity to meet the maintenance requirements[4], I have considered several submissions made by both the respondent and the applicant. The respondent's estimates his net estate at around R12 773 482.44 which is denied by the applicant, his monthly income has been reduced to R40 000.00. The applicant

argues that the respondent's statement in terms of section 7 of the Matrimonial Property Act, 88 of 1984 is wholly inaccurate, and it is for that reason that she seeks an order appointing a forensic auditor. The respondent demonstrated from an article relating to construction industry dated 3 December 2019 and the business's unaudited financial statements[5] for the year ending February 2020 as well as the cash flow projection, to illustrate that the business has significantly decreased. I could not put much reliance on the financials provided, as it is not audited, and has conflicting dates. I have considered the respondent's list of expenses under annexure G, which add to a total of R145 980.53 per month, which are paid from his personal bank account and/or business account interchangeably. These expenses also includes the expenses paid on behalf of the applicant and the children. From these expenditure it is evident that there is not much impact on the ability to cover the expenses.

[14] There's limited disclosure of finances by the respondent and the applicant. The challenge around upfront disclose of finances was explained in the matter of K N v R N (38941/2019) [2020] ZAGPJHC 35, where it was held that-

[24] However, Rule 43 was not envisaged to give an interim meal-ticket to women who would quite clearly at the trial would not be able to establish a right to maintenance. It was created to provide a temporary relief for women who had given up careers or potential careers for the sake of matrimony. In my view the respondent has failed to make a proper disclosure of his financial affairs. I have mentioned earlier that the only proof of his income is the letter from his accountant. Without a proper up-front disclosure judicial officers may be compelled to elevate an anomaly in one party's papers to an overall adverse credibility finding which impacts on the

maintenance to be paid. That said, I am compelled to find that the respondent should make additional financial contribution towards the maintenance of the children and the applicant.

[15] Based on my assessment of reasonable requirements and based on the parties' lifestyle during substance of the marriage, I am of the view that a maintenance pendente lite of R40 000.00 would be reasonable to cater for the applicant and the minor child's requirements, in addition to the applicant's

rental income received. I have also considered what the court said in Botha v Botha 2009

(3) SA 89 (WLD) at 106C it was held that –

“the purpose of interim maintenance is to supplement expenses which the applicant cannot meet and not to establish a lifestyle which the applicant and the children may previously have enjoyed. However, such maintenance must be reasonable in the circumstances; depending upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet the requirements. In doing so, the court must establish whether the respondent can further supplement the applicant's expenses which he/she apparently cannot meet

3 of 13 Prayers – Retrospective Maintenance

[16] The Applicant abandoned the claim for a retrospective order of maintenance, sought under prayer 3.

4 of 13 Prayers – Maintenance of a Dependent major child

[17] It is trite law that if a child is over 18 years old but not self-supporting, he/she must approach the relevant court for an order, if no existing order is in place. The applicant relies on the provisions of section 6(3) of the Divorce Act 70 of 1979[6], in seeking an order on behalf of her major dependent child, D[...]. Placing a burden on an adult dependent child who still lives at home in most circumstances puts him or her in an invidious position[7]. The respondent argued against the applicant's locus standi in this regard. I am strongly of the view that the common law principle that maintenance does not end by the age of majority, but

rather when the child become self-supporting creates an overlap on the one parent who spends most time with dependent major child.

Unlike in Butcher case, the applicant's major dependent child no longer resides at home, but I am convinced that there is nothing wrong with endorsing the arrangements already made between the respondent and the major child, despite her full right to lodge her own claim in the maintenance courts provided that she was joined in the proceedings. The strict application of Section 6(3), limits the court dealing with rule 43 order as it refers to a divorce court. I concur with Gasnner J, in Butcher v Butcher when he states that –

“Given the absence of an enabling statutory provision in the Divorce Act or the Children's Act, I am compelled to the view that the applicant lacks the necessary locus standi to claim an order, on

behalf of the adult children, ”

5 of 13 Prayers – Reimbursement of direct expenses

[18] Notwithstanding the direct arrangements between the respondent and the major dependent child, I find it acceptable for the applicant to be allowed to claim reimbursement for any expenses directly paid by her on behalf of the major dependent child, provided that such claims can be proven to be in line with the usual expenses and that she can provide proof of payment within a reasonable time. This is based on the decision of JG v CG 2012 (3) SA 103.

6, 7, 8, 9 of 13 Prayers – Direct expenses of the minor child, reimbursement thereof and retention of minor child on medical aid and appointment of educational psychologist

[19] It would equally be justifiable for the applicant to be reimbursed for the expenses directly paid on behalf of the minor child, if the applicant can prove that any such direct payment was for the usual expenses that the respondent is responsible for, and for which she will have to submit proof of payment of same for purposes of reimbursement.

[20] It is common cause that there is a need for appointment of an educational psychologist, as illustrated by both parties, respectively, as they describe the behavioural change of the minor child. The only difference is that the respondent argues that the child does not need both the evaluation and therapy, and that he is only prepared to pay for therapy. Having considered the issue, I am of the view that the expert should be allowed to determine what service is required to assist the minor child, than to bring it as a point of contention. For that reason I have directed that the order in line with what the applicant sought.

10 of 13 – Maintenance of garden, home and swimming pool

[21] Despite the fact that the respondent has continued to provide for various other expenses, including the maintenance of the household, the applicant sought an order directing that she obtains 3 quotations from which the respondent may select the service provider to be appointed for the maintenance services. I am convinced that, the continuation of the arrangements that an employee of the respondent is able to provide the same service, there is no need to obtain quotations or to replace the same.

11 of 13 - Contribution towards appointment of forensic auditor –

[22] As part of contribution towards legal costs, the applicant sought an order directing the respondent to contribute towards legal costs as well as costs for the appointment of a forensic auditor, whose role is to determine the value of the member's interest in DSP, as well as the value of the accrual claim. This is based on the fact that the applicant has incurred substantial legal costs relating to her termination of employment with the respondent and furthermore she argues that the Respondent undervalued his estate[8]. The Respondent concedes to the appointment of the forensic auditor, however he pointed out that the applicant should also contribute 50% of the forensic auditor's costs, which suggestion I endorse. Respondent argues that the forensic auditor's scope should only be limited to the value of the member's interest in his business, and this I find to be dilatory, in that it would create further disputes around the value of the estates. In that regard, I direct that both the business and the estates be subjected to a forensic audit.

12 of 13 - Contribution towards legal costs –

[23] The Respondent argued against this relief sought by the Applicant of an initial contribution of R100 000.00 towards legal costs. The said contribution includes R27 600 in respect of the appointment of an industrial psychologist. The Applicant has already paid R100 000.00 towards her legal costs, unlike in the case of *Service v Service* 1968 (3) SA 526 (D) where the applicant claimed full legal cost contribution. The applicant provided a proforma statement from her attorneys with estimated costs of R189, 962.75 as well as the quotation from the industrial psychologist, which were both rejected by the Respondent. The Applicant argued that she wants to be put in the same position as the Respondent by providing for litigation cost contribution. The same point was raised in *Nicholson v Nicholson* 1998

(1) SA 48 (W) at 50C – where G Wunsh J said the following:

“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, with due regard being had to the respondent's financial position.”

It would however still be necessary for such costs to be reasonable. I was persuaded by the argument made by the Respondent that the contribution sought was exorbitant, until the Applicant rebuts that by proving the Respondent's own legal fees of around R80 000.00 from the Respondent's bank statements. I therefore found it justifiable to grant an order of contribution towards legal costs in the amount of R80 000.00 in favour of the applicant.

Costs

[24] With regards to costs of this application, I consider it appropriate to order that the costs be costs in the main divorce action.

In

Conclusion

For the above reasons, I have granted an order as set-out below –

1. The full parental rights and responsibilities as envisaged by section 18(2) of the Children's Act, 38 of 2005, is awarded to both the Applicant and the Respondent;

1.1. The primary residence of the minor child, N[...] shall be with the Applicant.

1.2. The specific parental rights and responsibilities in respect of maintaining contact with the minor child, N[...] is awarded to the Respondent and is to be exercised at all reasonable times, subject to the provisions of section 6(5) and 10 of the Children's Act, but including the following: -

1.2.1. The right to remove the minor child on every alternative weekend from after school to Sunday at 18h00;

1.2.2. The right to remove the minor child on every alternative short school holiday and for half of every long school holiday, on the provision that Christmas rotates between the Applicant and the Respondent, starting with the Applicant;

1.2.3. The right to remove the minor child on Father's Day, on every alternative public holiday, and on every alternative long weekend, and every alternative birthday of the child;

1.2.4. The right to have daily telephonic contact with the child at all reasonable times.

2. The Respondent is to continue payment of the following expenses directly in respect of the minor child, N[...] -

2.1. The child's school fees, including all other educational expenses, inter alia, schoolbooks, stationery, seasonal uniforms outings, excursions, all extra mural activities and school levies;

- 2.2. All the costs for sporting events and activities, including clothing and equipment required as well as costs for school and other tours, tournaments and costs of competitions;
- 2.3. All expenses associated with the minor's motorbike sport participation which shall include all gear, travel expenses, registration expenses, costs of compensation and/or races, motorbike services after each competition, replacement of motorbikes from time to time as and when necessary;
- 2.4. Payment of Allan Gray study policy and monthly cell-phone contract;
- 2.5. The Respondent shall retain the minor child on his medical aid and be responsible for monthly instalment thereto and to pay all expenses not covered by medical aid in respect of all medical, dental, optical, ophthalmic, orthodontic, surgical, hospital, therapeutic and pharmaceutical expenses;
- 2.6. That the Respondent shall be responsible for all the expenses associated with Dr. Jeanné Roux, an educational psychologist, in respect of therapy necessary for the well-being of the minor child.
3. The Respondent is ordered to pay directly in respect of the minor child, N[...], all reasonable costs of tertiary education, whether at a technical training college, university, Technikon, computer, secretarial, art school or any other like educational institution, subject to N[...] displaying an aptitude for the aforesaid tertiary education and his reasonable progress therein, including stationary, equipment, transport, accommodation and registration fees as well as a cash contribution towards holiday expenses.
4. That the Respondent be ordered to pay maintenance to the Applicant in respect of her and the minor child in the amount of R40 000.00, per month, the first payment to be made within 7 days of this order and thereafter on or before the 1st of each month;
5. That the Respondent is ordered to retain the Applicant on his medical aid fund and be responsible for monthly instalment thereto and to pay all reasonable medical expenses of the applicant not covered by medical aid, including dental, optical, ophthalmic, orthodontic, surgical, hospital, therapeutic and pharmaceutical expenses.
6. That the Respondent is ordered to reimburse the Applicant within 7 days after being furnished with proof for any expenses incurred by Applicant in respect of both the minor and the major child, subject to the applicant providing proof of such expenses.
7. That the Respondent be ordered to continue making available the worker who performs the gardening and general maintenance work at the parties previous common home, and to continue payment of this worker's salary;

8. The Respondent is to pay all expenses associated with the appointment of forensic auditor, Mr Johan Ferreira and the expenses of all valuers which Mr Johan Ferreira may instruct for purposes of determining the values of the estates of the applicant and the Respondent in order to calculate the accrual in the respective estates, subject to the respondent retaining the right to argue a reimbursement of 50% of such costs at the trial.
9. The Respondent is ordered to contribute R80 000.00 as an initial contribution towards the legal costs of the applicant, payable in monthly instalments of not less than R20 000.00 per month, the first payment to be made within 7 days of this order and thereafter on or before the 1st of each month, payable into the applicant's attorney's trust account;
10. Costs of the application, including the costs for Monday 16 November 2020 to be cost in the course.

PN MANAMELA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Applicant's Counsel

: Advocate LC Haupt SC

Applicant's Attorneys

: Adams & Adams Attorneys

Respondent's Counsel : Advocate I Vermaak-hay

Respondent's Attorneys : VFV Attorneys

Date of hearing

: 20 November 2020

Date of judgment

: 27 November 2020

- [1] Paragraph 65 read with annexure H of the Answering Affidavit ("AA")
- [2] '1.The applicant and the respondent shall have parental rights and responsibilities as envisaged by section 18(2) of the Children's Act 38 of 2005 and the primary residence of the minor child be with the applicant and the respondent is awarded right of contact towards the minor child: as agreed between the parties and whilst due consideration is given to the minor child's views and expressions as envisaged in section 6(5) and 10 of the Children's Act 38 of 2005, and reasonable telephone contact directly with the minor child on his cell phone'.

- [3] Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be give consideration.
- [4] Taute v Taute 1974 (2) SA 675 (ECO) at 6760-H
- [5] Annexure F of the AA
- [6] “Section 6(3) – A court granting a decree of divorce may, in regard to maintenance of a dependent child of the marriage, make any order

which it deems fit, and may in particular if in its opinion it would be in the interest of such minor child to do so, grant to either parent the sole guardianship (which shall include the power to consent to the marriage of the child) or the sole custody of the minor child, and the court may order that, on the predecease of the parent to whom the sole guardianship of the minor is granted, a person other than the surviving parent shall be the guardian of the minor, either jointly with or to the exclusion of the surviving parent”

- [7] Butcher v Butcher 2009 (2) SA 421 (C)
- [8] Paragraph 50 of FA

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