

SOUTH AFRICA / JUDGMENT

D.L.N v A.H.N (61903/2019) [2020] ZAGPPHC 315 (10 July 2020)

[2020] ZAGPPHC 315

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

61903/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGE: NO

(3) REVISED

CASE NO: 61903/2019

In the matter between:

N[....] : DL

APPLICANT

and

N[....] : AH RESPONDENT

J U D G M E N T

COLLIS J:

INTRODUCTION

- [1] This is an opposed Rule 43 application. The parties were married to each other on 23 October 2011, out community of property, which marriage still subsists. Two children were born into this marriage.
- [2] The issues to be determined can succinctly be tabulated as follows:
- 2.1 Whether pendent lite the respondent should be ordered to pay maintenance to the applicant in respect of each minor child in the amount of R 30 000.00;
- 2.2 whether the respondent pendent lite should be ordered to pay the applicant maintenance in the sum of R 79 000 per month;
- 2.3 whether the respondent should be ordered to pay the applicant maintenance of a provisional contribution towards her legal fees in the amount of R 50 000.00, or whether the applicant should be ordered to pay a contribution towards the respondent's legal costs; and
- 2.4 whether the Office of the Family Advocate should investigate the primary residence of the minors.
- [3] Rule 43 is a self-contained rule. It regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. The application is initiated by a notice to the respondent which should accord with the prescribed form of the Rules of Court. This form must be accompanied by the applicant's affidavit and only two sets of affidavits are usually allowed. In the present application, the applicant however delivered a sworn reply to the counter application of the respondent in the Rule 43 proceedings and at the hearing of the matter had requested the court to exercise its discretion in favour of allowing such reply. This request was duly granted by the court and the court also condoned the late delivery of the respondents answering affidavit. These then the preliminary issues dealt with by the court.

MAINTENANCE PENDENTE LITE

- [4] The applicant in her founding affidavit sets out that she is a practicing attorney, conveyancer and notary public and earns a monthly net salary of approximately R 15 000. Her monthly expenses are tabulated in paragraph 20 of her affidavit and reflects an amount of approximately R 130 155.71 which expenses caters for medical aid, accommodation, school fees and general household expenses. In this regard she has annexed 'FA 4' reflecting such expenses.[1] In her affidavit she requires that this amount be split into two categories, the first category relating to maintenance for herself in the amount of R 79 000 and the second category relating to maintenance of the children in the amount R 30 000 towards each of the minor children.[2]
- [5] In addition to the above, she also requests that the respondent be ordered to continue to ensure that sufficient funds be held in his Investec bank account, more specifically in the amount of R 47 500.00 from which amount expenses such as the home loan, insurances for

motor vehicles, DSTV and the minors' school fees are paid. Furthermore, the applicant alleges that as at 5 February 2020 the respondent has blocked her from accessing his internet banking profile and as a result she no longer has access to funds with which to pay for food, fuel and day-to-day expenses. The applicant further sets out that the respondent for the last five years has transferred sufficient funds so as to even cover her business expenses and in her papers she also requests this court to direct the respondent to continue to do so. [3]

[6] As for the immovable property where they presently reside, the respondent at present has a debit order in the amount of R 33 000

debited from his account and as such she also requests the court to order the respondent to continue paying the monthly bond instalment.[4]

[7] The respondent in reply concedes that he used to be employed in Zambia, but sets out that as from 21 May 2020, he will be unemployed

as he has been retrenched. In support of this assertion he annexes annexure "A" which is a letter setting out the terms of his retrenchment. He asserts that as a result of this impending retrenchment he would have to rely on the applicant to provide for his daily needs.[5]

[8] In paragraph 7 of his affidavit he further sets out that up until February 2020, he used to earn an average of R 170 000.00 per month and spent approximately R 17 500 of this amount on his personal expenses in Zambia.[6]

[9] As his financial position will change significantly as from May 2020, he requests that the court orders the applicant instead to contribute at least R 31 500 towards some of the joint household expenses,[7] and that the court should order the applicant to cash in her investment policies to be utilised for the benefit of the joint household expenses.

[10] As regards the budget presented by the applicant before this court he alleges that same is completely unreasonable under the prevailing circumstances and that the court should indeed order the applicant to pay a contribution towards the joint household expenses in the amount of R 31 500.00 [8]

[11] In reply to the allegation that he closed the applicant's bank account, he sets out that he had instructed the bank to close same, as he will no longer in future be able to stand surety for it due to his impending unemployment.

[12] Albeit that the respondent alleges that some of the monthly expenses as claimed by the applicant are extravagant, he does not deny that indeed the applicant incurs these monthly expenses nor does he set out what he would consider to be a reasonable amount for these expenses under the circumstances. However, this does not mean that a court faced with an application for interim maintenance must merely award the applicant that which she seeks. She still carries the onus to prove that she is in need of maintenance and that, that which she seeks is reasonable to maintain herself.

[13] As mentioned earlier, this court permitted the applicant to file a reply as an answer in terms of the provisions of R 43(5) of the Uniform Rules of Court. In this replying affidavit, the applicant sets out that she was advised by the applicant as at 9 April 2020, of his impending termination of employment but that he had assured her that upon his return to South Africa he would take up another employment.[9] In the said affidavit she vehemently denies that she is in a position whatsoever to maintain the respondent and requested this court to decline granting such order against her.

[14] In order for the applicant to succeed with her claim for interim maintenance, the applicant is required to provide in her sworn statement evidence of her income and expenses. She is also required to demonstrate a reasonable need for such expenses.

[15] The factors to be taken into account when determining whether or not to grant interim maintenance include the parties' standard of living during the marriage, the applicant's actual and reasonable requirements and the income of the respondent.[10] It therefore follows that where a respondent is able to prove to the court that he is unable to pay maintenance, then the application

cannot succeed.

[16] It is so that spouses have a reciprocal duty to support each other and this duty extends to their joint duty to support their

children. The duty of supporting a child is an obligation which the parents have incurred jointly and the parents' respective shares of such obligation are apportioned between them according to their respective means. Therefore, an argument cannot be made that only one of the parents must carry such obligation exclusively. Furthermore, our courts accept that the parents' duty to support themselves and their children will be viewed as against their respective ability to support each other and their children in turn. It is for this reason that one of them might be called upon to contribute more than the other at any given time and where

circumstances change, this obligation will be altered. It is as against this background that this court will determine this matter.

[17] The applicant as per her notice of motion, seeks monthly maintenance from the respondent in respect of herself in the amount

of R 79 000 and R 30 000 in respect of each minor child. Let me start off by saying that these amounts, I view as excessive

given the prevailing circumstances that the respondent finds himself. In her founding affidavit she requires from the respondent to pay an amount of R 47 000 in respect of school fees, insurances and bond repayment and having regard to her schedule prepared as per annexure "FA 4" this court views this amount as reasonable under the circumstances as this amount it can hardly be argued can be reduced or altered midstream and it is considered reasonable by this court.

[18] As a result the respondent would be ordered to pay the applicant this amount and the applicant must ensure that same is paid into an account nominated by her so that these debits may be honoured. It as a result follows, that her claim for R 130 000 should be reduced by this amount of R 47 000, which leaves a residue of R 83 000.

[19] From the amount of R 83 000, the respondent and the applicant jointly will have to provide for their children's reasonable

expenses and to maintain themselves. Without in any way derogating from the fact that the order sought in the present application is interim in nature and not final, I am of the view that given the tender ages of the children, the amount of R 30 000 per child as sought by the applicant appears to be excessive. By way of example, it cannot be contended that they will require a monthly food allowance of almost R 4000 per child but only a clothing allowance of R 600 per child. It can neither be argued that they are in need of an entertainment allowance of R 4750 per month. These amounts are just some examples which to the court's mind are unreasonable. In the circumstances, I am of the opinion that the respondent should be ordered to pay an additional amount of maintenance pendent lite per child in the amount of R 5 000.

[20] It is so that children will maintain a lifestyle which both parents can afford and where their parents' financial position

changes which for many is a reality in life, they need to alter their lifestyles accordingly. This is also the position in respect of spouses who as mentioned above have a reciprocal duty to support each other. In this regard the applicant has conceded that she is a practicing attorney and generates a net income of approximately R15 000 per month. In addition to this, the respondent alleges that the applicant earns a rental income from immovable property which she owns. Based on the aforesaid, I am satisfied that the applicant is not a woman of straw and in law she also carries the responsibility and obligation to contribute towards the maintenance of the children and the joint household.

[21] The respondent stated under oath that he will be retrenched as from 21 May 2020 and that he has not as yet secure employment for the future. In the applicant's replying affidavit, she disputes that he has not secured future employment, but provides no proof that indeed the respondent will be employed beyond 21 May 2020.

[22] That, being said, it cannot be contended that he will receive no severance package as this is a normal labour practice to pay employees a severance package whose contracts have been ended at their employers' instance.

CONTRIBUTION TO LEGAL COSTS

[23] In as far as the applicant's request that the respondent be order to contribute towards her legal costs is concerned, the applicant in this regard requests a contribution in the amount of R 50 000 from the respondent. In her founding affidavit [11] she sets out that the respondent has defended the divorce proceedings that she has instituted and that he has also filed a plea and a counterclaim. Furthermore, that to date that she has received two

accounts from her attorneys and three accounts from counsel. As her sources of income is limited, she requires a contribution from the respondent in this regard.

[24] In opposing this request, the respondent denies that the applicant is in need of a contribution towards her legal costs and he further alleges that her legal team consists of her family and friends. Furthermore, that at the commencement of these proceedings he had presented the applicant with a settlement offer which she refused to sign and instead elected to litigate him to the ground. It is on this basis that he contends that the applicant should instead be ordered to make a contribution towards his legal fees as reflected in Annexure 'E' annexed to his Answering Affidavit.[12]

[25] The applicant, save for alleging that she has been furnished with the accounts and invoices from her legal team, she has not

alleged that she has been unable to pay such invoices and that they as a result remain unpaid. Furthermore, if indeed same 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) and not in her replying affidavit, as she now is attempting to do, as to the amount she has already spent towards her legal fees. Her assertion also that she will make use of counsel and intends even appointing a senior counsel is also baldly made without tendering an explanation as to why the need will arise to appoint a senior counsel. It is for this reason that I conclude that her claim for R 50 000 as a contribution towards her legal costs is unsubstantiated and in the circumstances not warranted to the extend

which she seeks. Likewise, as far as the respondent is concerned he has also failed to take the court into his confidence that he has been unable to pay his legal fees and it appears having regard to the Annexure 'E' annexed to his answering affidavit, that the amount he seeks as contribution from the applicant, constitutes his entire fees to date.

[26] A claim for a contribution towards legal costs is sui generis and is based on a duty of support spouses owe each other.[13] In order for the applicant to succeed she carries the duty to show that she has insufficient means of her own.[14] In the present instance the applicant's affidavit is not supported by a confirmatory affidavit by her attorney confirming the legal fees already spent by her. This having been said, I do accept that in order for her to adequately present her case before a court she will require a contribution towards her legal costs, but that those costs should be reasonable and necessary to enable her to prepare and conduct her pending litigation. In the circumstances, I am of the opinion that an amount of R 30 000 would suffice in this regard. In turn, the respondent has failed to persuade this court, that he has insufficient means of his own to enable him to adequately defend these divorce proceedings and it is for this reason that his claim for a contribution towards his legal costs is dismissed.

[27] In as far as the respondent's relief for the referral of the matter to the Office of Family Advocate, insufficient evidence

has been placed before this court that warrants such a referral. It simply is insufficient to contend that as a result of the applicant

having left the children with a caregiver on an occasion that she now somehow is unfit to be in custody of the minor children. This finding so made by the court, does not prevent the respondent to approach this court in future on a substantive application to seek such directive, if indeed the circumstances arise which would justify such a referral. Consequently, this relief sought by the respondent is refused.

ORDER

[28] In the result I make the following order:

28.1 That pendente lite the respondent is ordered to pay the applicant maintenance as follows:

28.1.1 A monthly cash contribution payable on or before the 1st day of each succeeding month of R 47 000 in respect of the joint household, such payment commencing on 1 August 2020, which amount is to be paid into a nominated account of the applicant;

28.1.2 The respondent is to pay maintenance pendente lite in respect of the applicant of R 20 000 per month as from 1 August 2020;

28.1.3 The respondent is further liable to pay maintenance pendente lite per minor child in the amount of R 5000 as from 1 August 2020;

28.2 The respondent is ordered to pay the applicant R 30 000 towards her legal fees to be paid in monthly instalments of R 10 000 as from 1 August 2020.

28.3 The respondents' contribution towards legal costs which he seeks from the applicant is refused and so to his claim to receive maintenance from the applicant.

28.4 The respondents' relief seeking a referral to the Office of the Family Advocate is also refused.

[29] The Court further directs that each party pays his or her own costs for these proceedings.

C. J. COLLIS

JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANT:

ADV A.M. VAN NIEKERK

INSTRUCTED BY:

LOUW LE ROUX INCORPORATED

FOR RESPONDENT:

ADV A. GRANOVA

INSTRUCTED BY: HACK

STUPEL & ROSS

DATE OF HEARING: 04

& 08 May 2020

DATE OF JUDGMENT: 10

July 2020

Judgment electronically transmitted.

- [1] Applicant's Founding Affidavit para 23 page 13
- [2] Applicant's Founding Affidavit para 26-27 page 14
- [3] Applicant's Founding Affidavit para 24 page 13
- [4] Applicant's Founding Affidavit paragraph 48-49 page 19
- [5] Answering Affidavit paragraph 6 page 4
- [6] Answering Affidavit paragraph 7 page 6
- [7] Answering Affidavit paragraph 7 page 6
- [8] Respondent's Answering Affidavit paragraph 9.6 page 9-10
- [9] Replying Affidavit paragraph 8.3-8.4 page 1 & "RA 2"
- [10] Taute v Taute 1974 (2) SA 675 (E) at 676E
- [11] Applicant's Founding Affidavit page 20 paragraphs 51
- [12] Respondent's Answering Affidavit paragraph 11 page 11
- [13] Van Rippen v Van Rippen 1949 (4) SA 634 (C) at 637
- [14] Griesel v Griesel 1981 (4) SA 270 (O) at 277A

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2020/315.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dln-v-ahn-unknown-topic-agpphc-2020>

Prepared on 13 October 2026 · Esheria