

SOUTH AFRICA / JUDGMENT

E v E (68802/12) [2013] ZAGPPHC 525 (1 March 2013)

[2013] ZAGPPHC 525**COURT**

North Gauteng High Court, Pretoria

BEFORE

Makhubele AJ

CASE / FILE NUMBER

68802/12

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Policy**IN THE NORTH GAUTENG****HIGH COURT, PRETORIA****(REPUBLIC****OF SOUTH AFRICA)****CASE****NO. 68802/12****DATE:**

1/3/2013

In

the matter between:

E[...].

.

Applicant

and

E[...].

Respondent

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

1. The applicant and respondent married out of community of property on 07 May 1994. Two children, a boy and a girl were born on [...] and [...] respectively. The applicant left the common household during July 2012 and was staying with a friend at the time this application was launched.

The children are in the custody and care of their father, the respondent.

2. In this application, applicant seeks an order in terms of Rule 43 of the Uniform Rules of Court in the following terms:

2.1 That the primary care and parental rights and obligations as well as primary place of residence of the minor children be awarded to the respondent, subject to applicant's rights of reasonable contact.

2.2 That respondent be ordered to pay applicant maintenance of an amount of R24 620,00 per month .

2.3 That respondent be ordered to retain applicant and the minor children in his medical fund and to pay all reasonable deductibles in this regard.

2.4 That respondent be ordered to continue to pay school fees for the minor children.

2.5 That respondent be ordered to continue to pay for applicant's motor vehicle and insurance.

2.6 That the respondent be ordered to pay a contribution to applicant's legal costs in the amount of R5 000.00.

2.7 Cost of this application be costs in the proceedings.

3. It appears from the answering papers and submissions made on behalf of the respondent that there is no dispute with regard to the relief sought on behalf of the children.

The respondent only mentioned (without placing his liability in issue) the fact that the boy, who is now 19 years of age, is no longer a minor. Therefore, for purposes of this judgment, the only issue is whether respondent should be ordered to pay maintenance and other expenses sought for the applicant and if so, the quantum thereof.

4. Although divorce summons have not been issued yet, I am satisfied, on the facts, and concessions made by the respondent that there is a pending action between the parties as contemplated in Rule 43.

A matrimonial action may be pending even though summons has not yet been issued. See: *Bienestein v Bienestein* 1965 (4) SA 449 (T) 451E

See also: *Noah v Union National South British Insurance Co Ltd* 1979

(1) SA 330 (T) 332B-H

5. The following issues are common cause or were not seriously contested by the respondent:

5.1 They are joint owners of a property that is situated at erf [...] M[...] V[...], Pretoria. The property is being rented out and the rental income is shared between the parties. Applicant receives an amount of R2 200.00 per month.

5.2 They were shareholders in a close corporation known as Siyaela Projects between 2004 and 2009.

5.3 The respondent bought and owns the property that is situated at erf [...] M[...] P[...], Extension 45, Pretoria. This was their marital home before their separation during July 2012. He continues to stay with the children in this property. A mortgage bond with Absa was registered on the property for an amount of R2 167 500.00. This amount includes a first covering bond of R722 500.00 in respect of the joint property referred to above.

5.4 In 2009, a joint decision was made that applicant should resign from her employment with Medihelp where she had worked since

2003. Part of her pension money was injected in a business known as SP Micro Loans.

5.5 Applicant helped the respondent to start and build the micro loans business and worked there full time until 16 April 2010 . The reason she stopped working full time is because they were robbed, whereafter it was decided that they should employ staff to do most of the work. She continued to assist and drew a salary of R8 000.00 per month from the business.

6. Respondent alleges that he borrowed R100 000.00 from applicant's father to start the micro loans business and that he refunded

applicant the money she contributed when they started the business by buying her a motor bike and a camera set for R88 000.00 and R25 000.00 respectively.

7. The issues around applicant's contribution to the micro loans business will undoubtedly form a basis for her claim for

rehabilitative maintenance and other claims in the main (divorce) action .

8. In terms of common law, maintenance for a spouse upon divorce is not a right. However, Section 7(2) of the Divorce Act, 70 of 1979 confers discretion on the court in this regard. Applicant need to lay a factual basis for such a claim. (see: *Botha v Botha* (2009) 3 SA 89 (W)).

9. I am satisfied that applicant has a prima facie claim for rehabilitative maintenance on the undisputed facts laid before me. As a result, the only remaining issue is the quantum thereof.
10. Save for acknowledging receipt of an amount of R2200.00 (rental income in respect of the joint property), applicant alleges that respondent deprives her of financial support since she moved out of the common household.
11. Respondent alleges that he makes certain payments for the benefit of applicant. If this were not correct, applicant would have requested leave to file a further affidavit to gainsay these allegations. The payments are:
 - 11.1 R3 000.00 in respect of applicant's share for the joint property.
 - 11.2 R623,47 for a policy
 - 11.3 R350,00 motor vehicle (Yaris) insurance .
 - 11.4 R1 125,00 medical fund contributions
 - 11.5 R250,00 for applicant's share of the erf levy in respect of the joint property.
12. Respondent also alleges that he gave applicant R5000.00 deposit for a motorbike. This amount, in my view does not count as maintenance. He makes a further allegation that he paid the deposit of R5 000.00 for her accommodation. However, it appears from the document attached as proof that this was a loan.
13. Respondent also contends that he paid an amount of R24 000.00 on 15 December 2012 as an advance for 6 months' rental for applicant's accommodation. This amount was paid to a third party and it is not clear from papers (and respondent's counsel could not explain too) whether applicant indeed benefited from this payment. In her founding affidavit, applicant stated that she is presently staying with her friend and she is paying an amount of R1 500 per month. She also attached a confirmatory affidavit by her friend. She also stated that she is looking for a two bedroom flat and expects to pay about R6 000.00 monthly rentals.
14. I am not satisfied that the alleged payment of R24 000.00, even if it was made, did benefit the applicant. Save for the allegation that the payment was made and an attachment showing proof of payment to a third party, nothing more was alleged, for example, where this accommodation is, whether applicant is occupying it or not, etc.
15. I will accept, for purposes of this judgment that respondent makes the payments referred to in paragraph 11 above and that he is prepared to continue to make these payments

MEANS AND EXPENSES OF APPLICANT

16. Applicant is employed by Oasis Water Annlin on a temporary basis in a post occupied by a person who is on maternity leave. Her income for 11 days in November 2012 was R1 269.29. She submitted that her monthly income would then be R3 000.00. The founding affidavit was deposed on 28 November 2012. I will accept that this is her income. She acknowledged the fact that she is receiving R2 200 on a monthly basis from the respondent as her share for the rental income derived from the joint property.
17. She is looking for a better paying work, however, she has been out of the market for some time since the joint decision that she should resign and that she would need further training. She does not state what her qualifications or nature of experience is. She has sent several CV's to prospective employers but she has been unsuccessful thus far. She attached a letter of regret from a company known as PNet dated 12 September 2012. She did not present further evidence on her job-hunting efforts or whether she is receiving any training in any trade or career as she lamented she would need it.
18. Applicant's income is therefore R5 220.00 per month, made up of the R3 000.00 salary and R2 200 she receives as her share of the rental income.
19. The expenses mentioned in paragraph 5.2 of the founding affidavit appears to be an ideal rather than actual. Applicant refers to them as "My maandelikse uitgawes sien as volg daarna uit". It is probably for this reason that her counsel, from the outset conceded that the total amount is excessive and that an amount of R12 000.00 (half thereof) should be ordered. This was a submission from the bar and there was no explanation or motivation as to which of the listed expenses should be discounted.

The expenses that applicant says she will incur are:

19.1 House/apartment rental

R6 000.00

19.2 Water and electricity

R1 000.00

19.3 Edgars account

R500.00

19.4 Dr Winando Van Zyl

R500.00

19.5 Policy

R1 000.00

19.6 Motor vehicle

R2 800.00

19.7 Vodacom

R200.00

19.8 Groceries, including meat and
cleaning materials

R5 000.00

19.9 Bread and milk

R450 00.

19.10 Toiletries

R500.00

19.11 Petrol

R1 500.00

19.12 Clothes

R500.00

19.13 Savings for own medical fund

R1 000.00

19.14 Hair care (cut)

R220.00

19.15 Monthly purchases of furniture

R2 500.00

19.16 Motor insurance

R450.00

19.17 Mr. Price account

500.00

20. The respondent conceded that applicant pays for certain items and these are:

20.1 Dr Van Zyl

R500.00

20.2 Vodacom

R200.00

20.3 Petrol

R1 200.00

20.4 Hair care (cut)

R220.00

20.5 Motor vehicle. The amount is R2 450.00

21. Respondent disputes the amounts that applicant contends are payment for rental of house/apartment, water and electricity,

groceries, bread and milk and toiletries. He describes them as excessive because applicant lives alone. He maintains that he has

already made a six-months advance payment for applicant's accommodation (R24 000,00). This means that in his view, an amount of R4 000, 00 per month would be sufficient to pay rental for a house or apartment. He regards an amount of R450,00 as sufficient to pay for electricity and water. An amount of R2 000.00 would be sufficient to cover for groceries, cleaning materials, meat, bread, milk and toiletries.

22. According to respondent, applicant's claim for clothes is covered in the Edgars and Mr. Price accounts, which he contends are paid by him.

23. As indicated above, respondent maintains that he is paying for applicant's medical fund, motor insurance

and Absa policy.

24. After discounting certain expenses as excessive or being paid by him already, the respondent submitted that applicant's expenses are R8 743.47. He then made an offer to pay R4 000.00 to cover for the shortfall on an income of R4 000.00 which she allegedly receives.

25. Taking into account the expenses that respondent pays for, which he should continue to pay, applicant's realistic expenses per months should be as follows:

25.1 Water and lights

R600 00.

25.2 Dr Van Zyl

R500.00

(balance not indicated)

25.3 Motor vehicle

R2450.00

25.4 Vodacom

R200.00

25.5 Groceries, including cleaning
materials, meat, bread, milk

R2 000.00

25.6 Toiletries

R500 00

25.7 Petrol

R1 500.00

25.8 Hair care (cut)

R220.00

25.9 Motor vehicle insurance

R450.00

25.10 Clothes

R500.00

TOTAL:

R8 920

26. Respondent disputed her claim for monthly purchases of furniture on the basis that she took certain items with her when she left amongst which was:

26.1 Queen size bed with cabinets and bed lamps

26.2 Dining room suite

26.3 New 43 Plasma TV

26.4 Fridge

26.5 Washing machine

26.6 Pots, pans, knives, forks , etc

26.7 Utensils to the value of R10 000.00

26.8 Orbitrek

26.9 Lounge suite

26.10 Applicant's clothes.

27. The fact that applicant admitted to selling the dining room suite in order to obtain money to survive is an indication that she left the common household with some furniture.

I therefore make a finding that she is in possession of basic furniture and if she continues to sell it that is her own problem.

MEANS AND EXPENSES OF RESPONDENT

28. Respondent indicated in his affidavit that his income is R73 000.00 and his expenses are R65 325.05. In this amount he has included

expenses he allegedly pays for the applicant. His income is made up of income from two properties (R6 000.00) and R2 200.00), SP Micro salary cheque R45 000.00 and SP Micro Salary savings account (R20 000.00).

29. Except for the statement of income and expenditure, respondent has not attached anything to prove his income, such as bank statements

and audited financial statements .

30. I have noted in this application that both parties have misstated or failed to state the true state of their financial affairs. Applicant, as his counsel correctly conceded, overstated her expenses. To her credit however, I do not think that this was deliberate. As I have already stated above, she has not yet incurred most of the expenses because she is still living with a friend.

Her projections may be based on her previous lifestyle with the respondent because they sure do not look like they were of meager

means. On the other hand, I am unable to accept respondent's income because he has not attached proof.

In the matter of *Du Preez v Du Preez* 2009 (6) SA 28 (T) at paragraph 15, 32 C -E. Page 32 Murphy J held (after making similar observations) that "the tendency for parties in rule 43 applications to misstate the true nature of their financial affairs by exaggerating their expenses and understating their income, was unacceptable. Where such conduct occurred at the instance of the applicant relief had to be denied"

31. The fact that respondent has not attached a shed of proof for his alleged income is not different from the conduct that Murphy J is referring too.

32. Respondent's own expenses are listed as follows:

32.1 Joint properties

R18 000.00

32.2 Payment to applicant

R2 200.00

32.3 Own policy at Absa

R2 151.47

32.3 Applicant's policy at Absa

R623.47

32.4 Absa insurance

R3 587.63

32.5 Pretoruium Trust—Kos

R8 000.00

32.6 Medihelp : children

R2 250.00

32.7 Medihelp: Applicant and respondent R2 250.00

32.8 Fortuner

R6 363.48

32.9 Erf levy at Karel Trichatdt

R500.00

32.10 Water and lights, erf levy

at Montana Park

R2 500.00

32.11 Prepaid electricity

R2 000.00

32.12 8ta

R299.00

32.13 Girl's orthodontist

R5000.00

32.14 Wonderboom

R1 500.00

32.15 Maid

R1 500.00

32.16 Petrol

R3 500.00

32.17 Unforeseen expenses

R4 000.00

32.18 Yaris. Extra car

R2 450.00

33. Respondent alleges that he already pays R8 847.47 for expenses that should by right be paid by applicant. These are:

33.1 R3 000.00 for joint property

33.2 R2 200.00 her share for the rental income

33.3 R623.47 Absa policy

33.4 R350 Yaris insurance

33.5 R1125.00 Medical fund

33.6 R250.00 levy for Karel Trichardt property

33.7 R299.00 8ta (taken away)

33.8 Girl's orthodontist R250.0

33.9 Wonderboom R750.00

34. Most expenses are not explained, for instance the R8 000.00 (Pretoriim Trust – kos), the balance on the orthodontist account.

35. Respondent has a surplus of R7 874.95. Taking into account the “onvoorsiene” budget of R4 000.00, his surplus is R11 874.00.

36. Except for the medical fund and orthodontist fees, no mention is made of the children's school fees and other necessities.

In any event, respondent has sufficient surplus funds to pay for these.

37. Respondent alleged that he pays clothing accounts such as Edgars and Mr. Price. However, they do not appear in his list of expenses. It may be these too are paid from the surplus fund.

QUANTUM OF MAINTENANCE

38. Applicant drew a salary of R8 000.00 from SP Micro Loans. She helped to start the business. Respondent has been paying certain expenses for her, but these are in the main their joint responsibilities in respect of the properties as well as her medical aid. He only gives her R2 200 .00 from the rental income and nothing else.
39. Respondent indicated that he has already paid R24 000,00 for applicant's accommodation. This means he was prepared to pay for her accommodation. The only problem is that applicant did not utilize that accommodation and it appears she was not aware. This money can be returned and utilized for applicant's accommodation.
40. I accept, and under the circumstances, respondent should continue to make payments reflected in paragraph 33 above.
41. If applicant was still receiving her R8 000,00 salary from SP Micro Loans , she would have no shortfall after receiving her current salary of R3000.00 and the rental income of R2 200.00.

If any, her shortfall would be insignificant.

In the matter of Botha v Botha 2009 (3) SA 89 (W), Satchwell J said the following at paragraph 106 at 107F

“ The court’s understanding of rehabilitation gives meaning to the concept and purpose of limited-period maintenance. The spouse who has been disadvantaged or disabled in some way by the marriage is enabled, through training or therapy or opportunity, to be restored either to the economic position vis-a× vis employment which she occupied prior to the marriage, or to be reintroduced to the ability to participate effectively and profitably in normal economic life”

CONTRIBUTION TO LEGAL COSTS.

42. Applicant must establish that she has insufficient means of her own to pay for legal costs and that the amount she seeks is reasonably necessary to pursue her defence.

Nicholson v Nicholson 1998 (1) SA 48 ??? AT 50C where Wunsh J said:

‘The question to be considered is what the applicant needs for reasonable proceedings. The cases were reviewed in Dodo v Dodo 1990 (2) SA 77 (W).

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 (I would have qualified this by reference to what is reasonable having regard to what is involved in the case), with due regard being had to the respondent's financial position.”

43. Litigation can be luxurious or economical and it is commensurate with the means of the parties. When litigating against a rich man who employs senior and junior counsel, Willamson J said she is entitled to litigate upon somewhat the same sort of scale as that upon which he can be expected to litigate. Glazer v Glaze 1959 (3) 928 (W) at A-C

44. In support of her claim for legal costs, applicant has made a terse bald statement that “Ek benodig dringend n’ bylae tot my regskoste ten einde my in staat te stel om op dieselfde vlak as die respondent te litigeer”
45. There is no evidence to suggest that respondent is litigating on a luxurious or expensive level, instead, respondent says he intends to settle the divorce action in order to save costs.
46. I do accept though that the issue of applicant’s contribution to respondent’s business may need further investigations and expert evidence of some sort. Moreso because respondent underplays her contribution and avers that he refunded her what she put into the business. Applicant requires an amount of R5 000, and the offer made by respondent is R3 000.00.

ORDER

47. Under the circumstances, I make the following order:

47.1 Parental responsibility and right to care for the minor children shall vest jointly in the parties. Their primary place of residence shall be with the respondent, with the applicant having her rights of reasonable access and contact.

47.2 Respondent is ordered to pay applicant maintenance of an amount of R10 000,00 per month .

47.3 Respondent is ordered to pay an amount of R4 000.00 per months towards rental of accommodation for the applicant. This amount should be paid directly to a rental agent whose details will be provided to respondent by applicant.

47.4 The respondent is ordered to pay or continue to pay the installments and insurance of the applicant’s vehicle.

47.5 The respondent is ordered to retain applicant and the minor children in his medical fund and to pay all reasonable deductibles in this regard.

47.6 The respondent is ordered to continue to pay school fees and all living expenses for the minor children.

47.7 The respondent is ordered to pay a contribution to applicant’s legal costs in the amount of R5 000.00 in monthly installments of R500.00

47.8 All payments in terms of this order shall commence with immediate effect, thereafter, subsequent payments will be made on the 1st day of each and every succeeding month. Respondent is ordered to provide applicant with proof of all payments made to third parties on a monthly basis.

47.9 Costs of this application are costs in the proceedings.

47.10 The limitations as stipulated in Rule 43(6) / (7) / (8) are not applicable.

Acting Judge

DATE OF HEARING: 14 FEBRUARY 2013

DATE OF JUDGMENT: 01 MARCH 2013.

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