

SOUTH AFRICA / JUDGMENT

H v H (2014/06944) [2014] ZAGPJHC 445 (28 November 2014) [2014] ZAGPJHC 445

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

2014/06944

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2014/ 06944

Not reportable

Not of interest to other

judges

Revised.

28 November 2014

In

the matter between:

CH,
ICFS
Applicant
And
CH,
SJH
Respondent

JUDGMENT

SPILG, J:

THE DISPUTES

1. This is an application under 43 (6) to vary an order granted in August last year. The applicant seeks to vary the maintenance order and also to change the primary residence of B who is one of the two children born of the marriage. He is 14 years old. The other child, C, is 12 years old. The respondent's counter-application relates to the residence and contact rights in respect of B as well as an order that the applicant pays R5 000 maintenance.
2. In terms of the previous order both minor children would reside with the applicant. She was also ordered to pay spousal maintenance for her husband in an amount of R10 000 per month.
3. The parties are agreed that B resides with his father and that the applicant has reasonable contact rights. There is however no report by the family advocates. This is a concern as the interests of both minor children is of paramount importance and the effect that splitting them may have on each, both in the short and long term, has not been dealt with.
4. The dispute regarding whether the applicant should continue paying maintenance for the respondent turns on whether he is earning a significantly greater income than at the time of the original rule 43 hearing (whether due to a change in his fortunes or due to material non-disclosure at the time of that hearing) , whether he has actually disclosed his true income, whether the applicant has accurately disclosed her income and whether there has been a relevant change in either parties' expenditure.
5. If the applicant's income is insufficient to cover both her and the children's needs as well as the respondent's then the question arises whether either of the parties should be obliged to dip into their capital or other investments.
6. The respondent has also raised a number of preliminary issues which will be considered first.

POINTS IN LIMINE

7. The respondent complains that the papers are unduly lengthy. The applicant's papers are three pages longer than the respondent's

(if the counter-application is excluded). It accordingly does not lie in the respondent's mouth to complain.

8. The respondent also contends that the application is an abuse. The parties have fought maintenance issues in the previous High Court

application and also subsequently before the Maintenance Court. The focus however should be on whether the present application can be justified on its own merits as being initiated due to changed circumstances. Of course the fact that the applicant has also sought to use the maintenance courts might be evidence demonstrating a lack of bona fides in bringing the present application.

9. The applicant claims that circumstances have materially changed. Firstly she has moved out the matrimonial home which is registered in the respondent's name while B has in fact been living with the respondent since the beginning of June 2014.
10. I might have been disposed to consider the application as opportunistic. Realistically there was no need for the applicant to approach the court in order to deal with B's change of residence. Moreover the applicant moving house, without some explanation, might suggest a contrived situation. However the respondent then returned to live in the matrimonial home with B. The change in residence by both spouses must materially impact on their respective needs in relation to the cost of accommodation, which is one of the key expenses whether in the form of paying rental or servicing a bond. In the present case the matrimonial home is fully paid up which means that there is a full saving of rental (barring utility bills) for the respondent while the applicant must now start paying rent.
11. In my view the extent to which the overall circumstances of both parties have changed since the previous rule 43, and the need for the court to address the concerns regarding the splitting of siblings, brings the applicant within the ambit of rule 43(6).

SON B

12. It is always of concern when siblings are separated. In the present case the parties acceded to B's wish to reside with his father and he has done so since 1 June. C wishes to remain with his mother.
13. The issue should have been taken up with the family advocate since C's views regarding being split from his brother have not been dealt with in the papers, nor the longer term effect the split might have. However at the time of the hearing the position had endured and it is unwise to continually chop and change the children's place of residence, particularly as the trial is due to be heard in April 2015.
14. Nonetheless I will order that a family advocate's report be obtained with regard to the question of primary residence, which is to include a report on the advisability of splitting the siblings. It is also necessary to make provision in the order that contact rights have due regard to the desirability of maintaining a sound sibling relationship between B and C.

THE PARTIES' S CHANGED FINANCIAL POSITION

15. The applicant claims that the respondent's financial circumstances have improved since the previous rule 43 hearing. Since

July 2013 the respondent has received income from four sources, whereas only one significant source was disclosed when he brought the rule 43 application in April 2013. This related to the payments received working part-time for PM Engineering as a truck driver which since the rule 43 hearing last year and over the 11 month period from July 2013 to May 2014 has amounted to R87 200.

16. The documents discovered in the main action reveal that the respondent also received sporadic payments for architectural services over the same period from Double S Engineering totalling R53 920. It paid the applicant three amounts, one in August of R36 420, another in September of R7500 and the last payment was in December for R10 000.
17. The respondent was paid architectural fees of R43 000 during the same eleven month period from Notorious House Design. They comprise five separate payments in amounts ranging from R7 000 to R15 000 per month.
18. Finally the respondent also received during this period R7 800 from Mr H S. HS is a friend who occupies the respondent's house at the Vaal. The amount is made up of six individual payments ranging from R800 to R1800.
19. The total of all these amounts received over the eleven month period since the last rule 43 hearing is R191 920. It translates into an average monthly income of some R17 447, if the month of January 2014 is taken into the reckoning. The respondent however did not work for part of that month as he was travelling in Cambodia with B.
20. There are a number of troubling features. Firstly the respondent received at least one amount in cash of R10 000 which was not deposited into his bank account.
21. However the most disconcerting feature of the respondent's case is that in the original rule 43 proceedings the respondent claimed that his income was R 5 500 whereas shortly after that hearing there was a massive injection of R36 420. The respondent failed to disclose in the earlier proceedings that there was architectural work that he was in fact performing although payment was not yet due. The effect was that for the month of July 2014 the respondent received income of R16 000 while in August the amount was R48 420.

There has been no satisfactory explanation for the sudden rise in income. The uncharacteristically large deposit made in August 2013 of R36 420 may also suggest that the respondent had the ability to delay the receipt of income.

22. The respondent however claimed in the present proceedings that he earns R10 590.91per month. This is not borne out by the discovered

bank statements.

It is therefore clear that the respondent suppressed the full extent of his income not only at the time of the original rule 43 application but also in the present proceedings.

23. Of further significance is that the difference between the monthly income allegedly earned when the court ordered the applicant to pay the respondent spousal maintenance of R10 000 per month and the amount now earned over the eleven month period since the original rule 43 order is just short of R12 000.
24. If only the income component in the equation is taken into account then the respondent's earnings have increased by more than the amount of maintenance which the court hearing the original rule 43 application considered was needed to bridge the shortfall in the respondent's monthly expenses. If this was the only consideration then the respondent cannot continue to legitimately claim any entitlement to being maintained financially at the applicant's expense.

I proceed to consider the expenditure element in the equation.

25. The first consideration is that the respondent, by returning to the matrimonial home, is saving R4 800 per month which was the rental he had previously been paying. He has sought to build in a claim of expenditure for B of R5000 per month. Even if he was to be responsible for the full amount it will still only result in a net increase in expenditure of R200 per month which is insignificant when considered against the increase in the respondent's income of some R12 000.
26. The respondent has sought to meet this by now claiming that his overall monthly expenses are R44 700. This amount is some R9 000

per month greater than the amount he had disclosed not less than two months earlier in June 2014. The latter figures had been submitted

for purposes of responding to the applicant's enquiry launched before the maintenance court under section 10 of the Maintenance Act 99 of 1998. The application was unsuccessful. Save for referring to increases in expenditure as a result of B living with him no other explanation was offered in the opposing affidavit for this significant increase. However B's additional expenses cannot account for such a dramatic increase.

27. The respondent's unaccounted for increase in expenditure and material increase in income can only be rationally explained on the basis that he has not been frank with the court. If regard is had to the nature of rule 43 applications then in my respectful view the court must come down hard on a party that has failed to take the court into his or her confidence because there has been either a material non-disclosure of income or a material inflating of expenditure. Both occurred in the present case.
28. It is necessary that there be consequences to a litigant who takes advantage of the rule 43 procedures by not making frank disclosures of income and expenditure. While in most cases the parties have not reached the stage of discovery where such allegations can be tested, in the present case discovery was made which affords the court greater insight. The discovered documents indicate that the broad canvas painted by the respondent does not reveal the true picture and cannot be relied upon. Since the foundation upon which the

figures are provided is unreliable it becomes a pointless exercise to meticulously go through each item. A more robust approach is required where there is a discernable lack of frankness in rule 43 proceedings.

29. The applicant claims that as a result of leaving the matrimonial home and renting accommodation for herself and C her monthly expenses have increased by R8 000 which represents the rent she now has to pay. There is however a potential saving as a result of B now living with his father and an added financial burden placed on him.
30. Since the respondent's own assessment of B's monthly requirements (as against the former's savings in rental and even taking into account municipal utility charges) does not outstrip his current monthly earning capacity, there appears no reason why the respondent should continue to be maintained by the applicant. Even if I am wrong, the respondent has assets that can be considered as luxurious in the form of a house at the Vaal and he appears to have resources which he can dip into so as to be able to afford an overseas' trip with B to Cambodia. It is also significant that during the month in which he was away the respondent was still able to maintain his salary from trucking.
31. In broader terms the respondent is a qualified architect who claims that effectively he can find little work and must resort to trucking. He however admits to owning property aside from the residential home in Emmarentia where he now lives. I have mentioned the holiday home on the Vaal River. There are a number of motor vehicles, a motor cycle, a speed boat and jet-ski. Irrespective of their relative age they reflect a lifestyle which is unlikely to be supportable if the respondent did not access other resources. He has capital and liquid investments abroad and in South Africa of over R1million. The respondent claims that he has had to liquidate some of his investments to fund his monthly shortfall. As pointed out by Ms De Wet on behalf of the applicant, this would mean that over the past 14 month period prior to the present hearing the respondent was able to access just short of R200 000.
32. The applicant also earns income abroad and dividend income she used to obtain is no longer being received. It appears that she too is either able delay the timing of the receipts or the amounts have been ploughed back. Nonetheless having regard to the view I take of the respondent's financial circumstances and his material non-disclosure regarding the true state of his affairs, the applicant cannot be expected to liquidate any of her own capital assets and in any event her own financial position will not affect the outcome since I find that the respondent is able to meet his own needs, even if he continues to work at his current reduced pace in part-time employment, irrespective of whether this is due to the economic climate or otherwise.
33. I should add that at the court's request further financial records were provided and have been considered in reaching the conclusion I have.

B'S MAINTENANCE

34. Historically the applicant assumed responsibility for both children's needs save for an insignificant contribution from the respondent. She effectively paid R9 379 monthly for both children which she claims has increased to some R13 400 per month.
35. The applicant initially sought an order that the respondent contribute 50% for their support. In the draft order subsequently presented this was not persisted with, but in the draft provided yesterday this claim was re-instated. The respondent contends that he should receive maintenance for B in an amount of R5 000 per month. This is persisted with.
36. I have already dealt with the disposable income available to the respondent and that his lifestyle indicates that he continues to draw on other sources of income.
37. The main trial is not too distant. This court is reluctant to impose on the applicant at this stage the full burden of both children's

support. Since the respondent returned to his Emmarentia residence at the beginning of September the extra costs relating to B would be in respect of food. The applicant continues to pay for schooling, clothing and the like.

38. Realistically the extra costs that the respondent may now incur in respect of B are not significant. Moreover the respondent did not launch an application or seek an increase in maintenance despite Brennan residing with him since June 2014. The claim only arose by way of the counter-application after the present application had been launched.
39. The failure to take the court into his confidence regarding actual income, earning ability and expenditure also makes it unwise to undertake what must be a pure thumb suck. The trial court will be in a better position to assess if the applicant should bear all but a minor portion of the children's maintenance or whether it should be apportioned on a more balanced basis if the parties do not settle.

COSTS

40. The court is most concerned about what appears to be a chopping and changing of income and expenditure by the respondent to suit the contingencies. There was a material failure to disclose to the court hearing the first rule 43 application, which he had brought, that he had in fact been able to procure certain architectural work, even if he had not yet completed it or been paid in part.
41. However the court cannot conclude that the applicant has not also been reticent about her own deferral of sources of income.
42. Overall, the need to bring the present application arises from the documents discovered by the respondent which demonstrate that there had not been a frank disclosure to the initial court of income or the ability to earn income. It had clearly affected the court's decision.

43. I believe that the appropriate order regarding costs is that the respondent bears half the taxed or agreed party and party costs of the application and the full costs of the counter-application, to be paid when the order of divorce is granted.

ORDER

44. I accordingly make the following order:

1. Paragraphs 1 and 2 of the order of the above Honourable Court dated 5 August 2013 are deleted;

2. Pending finalisation of the divorce action:

2.1. B LN CH (hereinafter referred to as “B”) shall primarily reside with the Respondent;

2.2. the Applicant shall have the right of reasonable contact with B, which shall include but not be limited to the under mentioned and which contact times shall coincide with the times that C JL CH (hereinafter referred to as “C”) is in the Applicant’s

care:

2.2.1. alternate weekends from Friday 17h30 to Monday when the Applicant shall drop him off at school;

2.2.2. alternate Wednesdays (during the week that the Applicant does not have contact to him on the weekend) from 17h30, to Thursday morning when the Applicant shall drop him off at school;

2.2.3. on his birthday in alternate years;

2.2.4. alternate public holidays;

2.2.5. alternate short school holidays;

2.2.6. Mother’s Day;

2.2.7. half of long school holidays which are to alternate in such a manner that Christmas, New Year and the Easter periods alternate between the parties;

2.2.8. reasonable telephone contact;

2.3. C shall primarily reside with the Applicant subject to the Respondent’s rights of reasonable contact to C, which shall include but not be limited to the under mentioned and which contact times shall coincide with the times that B is in the Respondent’s care:

2.3.1. alternate weekends from Friday 17h30 to Monday when the Respondent shall drop him off at school;

2.3.2. alternate Wednesdays (during the week that the Respondent does not have contact with him on the weekend) from 17h30 to Thursday morning when the Respondent shall drop him off at school;

2.3.3. on his birthday in alternate years;

2.3.4. alternate public holidays;

2.3.5. alternate short school holidays;

2.3.6. Father's Day;

2.3.7. half of long school holidays which are to alternate in such a manner that Christmas, New Year and the Easter periods alternate between the parties;

2.3.8. reasonable telephone contact;

2.4. The Applicant shall not pay to the Respondent any amount for the maintenance of B nor shall the Respondent pay any amount to the Applicant for the maintenance of either child.

3. The family advocate is to prepare a report with regard to the question of B's primary residence, which is to include a report on the advisability of separating the siblings.
4. The counter-application is dismissed.
5. The Respondent shall pay half of the taxed or agreed costs of the application and all the costs of the counter-application on the party and party scale.

DATES OF HEARING: 1 October and 6 October 2014

DATE OF JUDGMENT: 28 November 2014

LEGAL REPRESENTATIVES;

FOR APPLICANT: Adv Adele De Wet SC

Allan Levin & Associates

FOR RESPONDENT: Adv Amandalee De Wet

Matthew Kerr-Phillips

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