

SOUTH AFRICA / JUDGMENT

## I.P v J.P (21010/2020) [2020] ZAGPPHC 400 (12 August 2020)

[2020] ZAGPPHC 400

COURT

North Gauteng High Court, Pretoria

BEFORE

Ceylon

CASE / FILE NUMBER

21010/2020

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REIN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES:NO

(3) REVISED.

CASE NO: 21010/2020

IN THE MATTER BETWEEN

I[....] P[....]

APPLICANT

(ID NO: [....])

AND

J[....] P[....]

RESPONDENT

(ID NO: [....])

**JUDGMENT**

CEYLON AJ

The Application:

- [1] This is an application for relief pendente lite in terms of Rule 43 of the Uniform Rules of Court. The applicant seeks an order for, inter alia, determination of contact rights of the respondent, maintenance for herself and the minor children of the parties and a contribution

towards legal costs. The application is opposed. There is a counter-application in respect of the contact rights, which is unopposed.

**Background:**

- [2] The applicant is the defendant (wife) and the respondent the plaintiff (husband) in the divorce proceedings instituted in this court under case number: 21010/2020 in March 2020 (main action).
- [3] The parties are married out of community of property with the exclusion of the accrual system on 25 October 2014. Two minor children were born from the marriage relationship between the parties, being a girl (born 10 October 2016, 3 years old) and a boy (born 25 February 2019, 1 year old).

**Issues**

in Dispute:

- [4] From the papers filed and submissions made, it appears that the following are the main issues in dispute:
- The maintenance pendente lite for the applicant and the minor children;
  - Contact rights of the respondent to the children; and
  - Contribution towards the applicant's legal costs.

This judgement will therefore, in the main, be confined to these disputed

**issues.**

Maintenance:

- [5] The applicant claims an amount of R24 000.00 per month in respect of maintenance for herself and the minor children and also that all of them be retained on the applicant's medical aid scheme.
- [6] It seems to me that the payment of maintenance is in respect of the minor children is not in dispute only the quantum thereof.

[7] Although the respondent does not formally tenders payment of the children's maintenance , it appears that he does concede

liability for same as he clearly offers to contribute R2500.00 per month per child for such maintenance. He is currently, in any event paying the said amount to the applicant.

[8] This court is therefore only seized with determining the amount payable in respect of the maintenance amount for the minor children and if the amount of R2500.00 per month per child is sufficient in the circumstances.

[9] With regards to the applicant's claim for spousal maintenance pendent lite , this is disputed by the respondent and no tender is made regarding same.

[10] It is trite that children are entitled to reasonable maintenance from their parents and that parents have a common law duty to maintain

their children [Taute v Taute 1974 (2) SA 675 (E ) at para E-G ; V v V (11183/2018 (2018) ZAGPPHC (506) (18 MAY 2018) at para 10 and section 18(2) of the Children's Act 38 of 2005].

[11] The entitlement to spousal maintenance in certain circumstances was recognized in Taute v Taute and V v V supra, and in section 7(2) of the Divorce Act 70 of 1976. In terms of the latter section the factors to be taken into account when determining spousal maintenance in divorce proceedings are, inter alia, the following: 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, 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. In VS v AS [12496/2019 (2020) ZAGPJHC 27 (11 February 2020) at para 19] it was held that there is no harm that a court should adapt the criteria

contained in said section of the Divorce Act to the Rule 43 proceedings, even if they apply to divorce matters. This court agrees

with the latter point of view.

[12] The amount of reasonable maintenance for the applicant and the minor children must therefore be determined with regards to the marital

standard of living of the parties, the actual and personal requirements of the children and the capacity of their parents to meet such requirements which are normally met from the money or income derived from any source. The inclusion of luxurious expenditure must always be discouraged [Taute , V v V supra and MB v NB 2010 (3) SA 220 (GSJ) at para 33]

[13] From the applicant's papers and financial disclosure forms , it appears that the family owned a fairly comfortable standard of living

- the family owned a 2018 Nissan Navara double cab bakkie , jet ski and micro light , regularly ate out , shop and went on local holidays [para 3.15 , applicant's Heads of Argument [HOA], pg 14].
- [14] With regard to the applicants expenses, she contends that her income is about R15 000.00 per month – a net salary of R10 000.00 per month and an amount of R 5 000.00 she receives in maintenance for the children from the respondent (paragraphs 3.8 – 3.11, HOA of applicant).
- [15] It is further contended by the applicant that the monthly expenses for herself and the minor children amounts to R37 639.23, therefore a shortfall of more than R13 000.00 per month. She states that it is impossible for her to maintain herself and the minor children properly without a contribution from the respondent (paras 3.12 to 3.14, HOA)
- [16] The applicant contends that she has very few assets and list her total asset value at R126 858.00 (para 2.19 financial disclosure forms).
- [17] The applicant submit that the respondent earns an income of R70 000.00 per month (salary of R30 000.00 and an amount of R40 000.00 paid by [...]) [para 3.22 of HOA of applicant].
- [18] The applicant further contend the respondent's assets to be valued in the amount of R737 000.00, retirement annuity valued at R26 749.00 and a pension fund valued at R603 974.70 (para 3.27, HOA ).
- [19] The respondent denies that his monthly income is R70 000.00 per month. He contends his nett income to be R29 000.00 per month, depending on the amount of commission earned during a specific month.
- [20] The main bone of contention is the R40 000.00 per month that the respondent allegedly earns from [...], which appears from the transaction history at pages 68 to 69 of the founding papers of the applicant.
- [21] This payment is denied by the respondent as an income, as he denies being employed by [...] It is also denied by [...] itself [annexure JP3, pg 97 of opposing papers; para 10.2 of respondent's HOA ].
- [22] There is no basis upon which this court can make a credible finding that this amount is a definite income of the respondent and be taken into account when determining the maintenance amount in the circumstances.
- [23] With regards to the gross monthly amount of R 66 410.00, indicated as gross income of R793 694.00 for the financial year of 2019 in the respondent's financial disclosure forms, this court accepts that the said monthly amount includes taxable fringe benefits, which are reflected on the respondent's salary advice and which are not payable monthly to the respondent, as it cannot be viewed as such in hand. It therefore follows that the respondent's annual nett income is R700 000.00, thus approximately R 29 00.00 per month.

[24] With regards to the applicant's expenses, the respondent is of the view that they are not properly substantiated by proof thereof. He contends that it cannot be properly established by bank statements or lease agreements, etc. Even though this may be true to some extent, this court is alive to the high costs of living and the costs of basic necessities in this country. This court is therefore inclined to accept that certain of the expenses listed by the applicant may be fair in the circumstances. This court is prepared to accept that the applicant's expenses are reasonable and bona fide.

[25] The remaining issue to be determined is the affordability of the contribution claimed from the respondent – that is, can the

respondent afford to make a contribution towards the maintenance claimed by the applicant?

[26] I am of the view that the respondent earns approximately double the income of that of the applicant (that is R29 000.00 and R15 000.00 respectively). It is therefore fair and reasonable that he should pay a contribution towards the applicant's shortfall of R13 000.00. This court is of the view that an amount of R7000.00 towards the maintenance of the applicant, in addition to the R5000.00 he already pays currently, would be reasonable and affordable to the respondent.

Respondent's Contact Rights:

[27] With regards to the respondent's rights to contact, the parties are only in dispute with regards to the manner in which this should be implemented, not with regards to the principle thereof.

[28] The applicant propose the following arrangement:

28.1. That the office of the Family Advocate be requested to conduct an investigation to determine the best interest of the children,

particularly with reference to the respondent's contact to the minor children;

28.2. Pending such an investigation and receipt of the Family Advocate's report containing recommendations, as approved by the Honorable Court, the respondent shall have the right to exercise contact with the minor children as follows:

28.2.1 Contact every alternate Saturday and Sunday from 09h00 until 17h00. The respondent shall collect the minor children from the applicant at 09 h00 and return them at 17h00 on both days;

28.2.2 Telephonically and/or electronic contact daily between 18h00 and 19h00;

28.2.3 Contact on Father's day and on the respondent's birthday, subject thereto that the children spends Mother's day and the applicant's birthdays with the applicant;

28.2.4 Contact on the minor children's birthday as per the recommendations of the family Advocate;

28.2.5 Contact during school holidays as per the recommendations of the family Advocate.

- [29] The respondent contends that he exercised his rights in terms of the initial agreement thereto as concluded between the parties, which was unilaterally curtailed by the applicant and by imposing conditions which were financially impossible to fulfil, but also due to the lockdown regulations, legally impossible.
- [30] The main grounds of dispute for the respondent is that he would have to commute between his residence in Grobersdal and Pretoria (380km) on Saturdays and repeat the trip again on Sunday, which he regards as unreasonable and mala fide, and also the costs of fuel and toll fares which would amount to thousands of rands every weekend.
- [31] The respondent is ad idem with the applicant that the Family Advocate be afforded the opportunity to investigate and make recommendations regarding the exercise of his contact rights.
- [32] The respondent contends that it is in the best interest of the children that the contact rights be granted as detailed in his counter

application, which the applicant failed to oppose.

In the counter application the respondent claims contact rights to be exercised as follows:

- 32.1 Every alternative weekend from Friday after school to Sunday at 18h00 when the respondent will return the children to the applicant;
- 32.2 Every alternative long weekend from the day on which the school close at 14h00 until the day preceding the next school day at 18h00;
- 32.3 Telephone contact or any digital or other form of contact available to the parties (eg facetime and/or skype) every day between 18h00 and 19h00, alternatively between 07h00 and 08h00;
- 32.4 Every alternative school holiday, long and short school holidays to rotate annually between the parties.
- [33] The children are very young and it is extremely important that contact rights be effected taking into account their tender age and other interests. The parties therefore, correctly and wisely so, seek the assistance of the Family Advocate to investigate and recommend the best possible options available and in the best interest of the children.
- [34] In the interim period, I am of the view that the contact rights, as set out in the order hereto, is in the best interest of the children, taking also into account the arguments made by the parties in their papers and orally and section 7 (1) of the Children's Act.

Costs Contribution:

- [35] The claim for a cost contribution in a matrimonial action originated from Roman – Dutch law and is well established in our practice [ Van Loggenberg v Erasmus : Superior Court Practice, citing Van Rippen v Van Rippen 1949 (4) SA 634 (C ) at para 37]. The substantive

basis of the claim is the reciprocal duty of support between spouses, which includes the costs of legal proceedings [ *Lyon v Lyon* 1923 TPD 345 ; *Charmani v Charmani* 1979 (4) SA 804 (W) at 806 E ; *Nicholson v Nicholson* 1998 (1) SA 48 (WLD) at 50B ; *Cary v Cary* 1999 (3) SA 615 (C ) at 619 and *AF v MF* (6664/2009), unreported WCHC decision at para 27-28].

[36] The quantum of such costs contribution which a spouse may be ordered to pay lies within the discretion of the presiding judge. In *Van Rippen supra*, it was held that “... the Court should, I think, have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties , and the particular issues involved in the pending litigation , the wife must be enabled to present her case adequately before Court” , at para 639 ( refer also to *V v V supra* , in this regard , paras 29-30. In *Cary, supra* it was held that “... the applicant is entitled to a contribution towards costs which would ensure equality of arms in the divorce action against her husband.” (at para 621D-G)

[37] The applicant claims an amount of R 50 000.000 as a contribution for legal costs from the respondent. She contends that she earns

significantly less than the respondent, therefore the contribution is required to place the parties on equal footing in respect of litigation in the matter. She further contends that she cannot be expected to realise her possessions in order to finance her action and is entitled to litigate upon a scale commensurate with the means of the parties , citing *Glazer v Glazer* 1959 (3) SA 928 (W) at 932 ; *Nicholson and Cary , supra*

[38] This court already found above that the respondent earns approximately double the amount that the applicant does. This court is, however, of the view that , given the expenses of the respondent and the financial position of each of the parties in general , the respondent will not afford the amount of R 50 000.00 claimed by the applicant.

[39] Having regard to the record, arguments and factors outlined above, it is this court’s view that it would be reasonable and fair in the circumstances that an amount of R15000.00, payable in five (5) equal monthly instalments of R3000.00, be paid as a contribution towards the applicant’s legal costs, the first instalment to be paid before or on 03 September 2020, and on or before the 3rd day of each month thereafter.

#### Costs of Application:

[40] The issue of costs lies in the discretion of the court. In the ordinary course of events, costs will follow the result. However, due to the acrimonious , lengthy and costly nature of divorce matters and the financial position of the parties, it would serve no purpose to burden the any of the parties with a cost order in the circumstances.

In the result, the following order is made:

Order:

Payment of an amount of R 12 000-00 per month towards the maintenance of the applicant and the minor children of the parties, by way of direct payment into the applicant's chosen bank account. The first amount to be paid within ten (10) days of this order, and subsequent amounts before or on the 3rd day of each month thereafter.

That the respondent shall retain the applicant and the minor children on his current medical aid scheme, the parties to equally pay the excess payable on medical, dental, hospital, pharmaceutical and related expenses.

The parties shall continue to hold full parental rights and responsibilities in respect of the minor children as provided for in section 18(2)(a) to (d) of the Children's Act 38 of 2005.

The minor children's primary residence shall be with the applicant.

The reasonable and age appropriate rights of contact of the minor children shall be investigated by the Family Advocate and a report in this regard will be made available within a reasonable period of time, but not exceeding thirty (30) days of date of this order. The Respondent shall then have such rights of contact as recommended by the Family Advocate forthwith, subject to the approval of this Court thereof.

Pending the report of the Family Advocate, the respondent will have the following rights of contact of the minor children:

- 6.1. Contact every alternate weekend from 18h00 Fridays until Sundays at 18h00. The respondent will collect and return the children from the applicant's residence;
- 6.2. Telephonic and/or electronic contact daily between 18h00 and 19h00, alternatively 07h00 and 08h00;
- 6.3. Contact on the respondent's birthdays and on father's day;
- 6.4. Contact every alternate birthday of each of the minor children;
- 6.5. Every alternate long weekend, school holiday (long and short) and public holidays to rotate annually between the parties, at which time the respondent will collect the children on the day preceding the long weekend or holiday, after school at 17h00 and return them on the day preceding the next school day at 17h00.

That the respondent pay an amount of R 15 000.00 to the applicant as a contribution towards legal costs, which amount will be payable in five (5) equal installments of R 3 000-00 per month, the first of which is payable before/on 03 September 2020, and on the 3rd day of each month thereafter. The cost contribution must be paid directly into the account of the applicant's attorneys.

No order as to costs is made.

BRIAN CEYLON

ACTING JUDGE OF THE

HIGH COURT, NORTH

GAUTENG DIVISION

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Hearing Date:

28 July 2020

## Judgment

Date:

12 August 2020

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