

SOUTH AFRICA / JUDGMENT

K v K (63858/16) [2017] ZAGPPHC 587 (13 September 2017)

[2017] ZAGPPHC 587

COURT

North Gauteng High Court, Pretoria

BEFORE

C J Collis

CASE / FILE NUMBER

63858/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 63858/16

DATE: 13/9/17

In

the matter between:

K.:

M. (BORN

M.)

APPLICANT

and

K.:

J.

A.

RESPONDENT

JUDGMENT

COLLIS AJ:

INTRODUCTION

[1] This is an opposed Rule 43 application. The parties were married to each other on 31 January 2009, in 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 service of the summons on the respondent's attorneys of record would constitute valid service on the respondent, for the purpose of divorce proceedings;

2.2 directly linked to the above, whether the applicant is entitled to an order directing the respondent to make payment for her maintenance and that of the two minor children in the amount of R 25 000;

2.3 whether the respondent in addition to the above amount is to contribute 50 (percentage) of the costs of medical aid premium for the children;

2.4 whether the respondent should be solely liable for the children's school fees, school uniforms, books and stationery costs, and

2.5 whether the applicant is entitled to a contribution towards her legal costs as claimed by her in the amount of R 100 000?

[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 allowed.

[4] Notwithstanding the above, in appropriate circumstances, a party may seek to file a supplementary affidavit. In such an instance a party seeking to file a supplementary affidavit must ask the Court to exercise its powers in his/her favour and leave to file such supplementary affidavit must first be sought.[1] The applicant in the present proceedings proceeded to file a supplementary affidavit, without first obtaining leave from this Court. In the absence of leave being sought and granted, I did not consider the contents of such supplementary affidavit prior to the hearing of the application.

SERVICE OF THE SUMMONS

- [5] The respondent in opposition, had raised a point in limine of absence of lis pendens between the parties in respect of which this application could be brought. The respondent basis the aforesaid on the ground that the summons was not served on him personally, neither did the applicant apply to have the summons served on him by way of substituted service.[2]
- [6] The applicant in her founding affidavit alleges that service of the summons was not effected personally on the respondent because his address in Dubai, United Arab Emirates, was not known to her. As a result, she through her erstwhile attorneys requested that service of the summons should take place on the respondent's attorneys of record, whereafter his attorneys requested that all future pleadings should be exchanged between the parties via electronic mail.[3]
- [7] The above arrangement was acceded to by the applicant and the respondent thereafter on 23 August 2016 proceeded to serve his notice of intention to defend the action and on 20 September 2016, he delivered his plea.[4] She as a result denies that the summons was not brought to the attention of the respondent and that no lis existed between the parties to enable her to bring this application against him.
- [8] As mentioned in paragraph 5 supra, the respondent concedes that the summons was served on his attorneys and that he subsequently thereto, had entered an appearance to defend and thereafter he delivered his plea.[5]
- [9] If regard is had to the object of service, the decision of *Gamble v Sauer* (1980) 7 SC 323 is instructive, whereby personal service was interpreted to mean: "such service as would satisfy the court that the process has reached the hands of the person intended to be served."
- [10] Albeit that the summons was not served personally on the respondent but that it was served on his attorney of record; and given the fact that the attorney of record of the respondent had upon service of the summons entered an appearance to defend and subsequently proceeded to file a plea on his behalf, this Court is satisfied that the summons had reached the hands of the person which it was intended to be served.
- [11] It is for this reason that I conclude that valid service of the summons had taken place on the respondent and that indeed a lis existed between the parties which entitles the applicant to seek the relief in terms of Rule 43.

MAINTENANCE PENDENTE LITE

- [12] The applicant in her founding affidavit sets out that she is employed and earns a monthly net salary of approximately R 56 260,27. Her monthly expenses is tabulated in paragraph 38 of her affidavit and reflects an amount of approximately R 67 889, which expenses caters for medical aid, accommodation, school fees and general household expenses carried by her.

- [13] The applicant further concedes that the respondent since vacating the former matrimonial home, has paid maintenance to her in respect of the minor children but that these payments have not been consistent.[6]
- [14] The respondent in reply concedes that he has paid maintenance to the applicant since vacating the matrimonial home,[7] which maintenance consists of R 8000 monthly school fees, but he considers the monthly expenses towards groceries, fuel, clothing and haircuts to be extravagant.[8] In respect of maintenance towards the minor children the respondent offers maintenance per child in the amount of R 6000 per child, school fees of the minor children, and a 50 % (percent) medical aid contribution. He also undertakes to provide a 50% (percent) contribution towards all school related expenses upon the applicant providing him with proof of such expenses[9]. He offers the applicant nothing in respect of her own maintenance, whereas the parties are married in community of property and he still carries a duty to support her.
- [15] Albeit that the respondent alleges that some of the monthly expenses as claimed by the applicant is 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.
- [16] 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.
- [17] 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 applicants actual and reasonable requirements and the income of the respondent.[10]
- [18] By the respondent's own admission, he admits having terminated the applicant and the children from his own medical aid and he concedes not having paid maintenance towards the children on a regular basis. His affidavit is also silent in respect of any maintenance paid to the applicant to maintain herself.
- [19] The applicant as per her notice of motion, seeks monthly maintenance in respect of herself and the children of an amount of R 25 000, the monthly school fees contribution school of R 8000 and in addition thereto, a 50 % (percent) contribution towards the medical aid.
- [20] Taking into account the respondents income and the parties' standard of living I find the amount as claimed by the applicant reasonable under the circumstances.

CONTRIBUTION TO LEGAL COSTS

- [21] In as far as a contribution towards her legal costs is concerned, the applicant in this regard requests a contribution in the amount of R100 000 from the respondent. In her founding affidavit[11] she sets out, that the respondent has defended the divorce proceedings so

instituted by her and that he has failed to reply to a number of notices which will force her to bring a number of interlocutory applications before this court in order to seek compliance. She is necessitated to take these steps as without taking same she is being hampered to adequately prepare for trial.

[22] In opposing this request, the respondent denies that he has failed to furnish the applicant with the necessary discovery documents and he also denies that there has ever been an application to compel served on his attorney of record. The respondent

further sets out, that h has to date already made a contribution R 10 000 towards the applicant's legal costs.[12]

[23] The applicant has not denied the contribution towards her legal costs as alleged by the respondent. Furthermore, she has failed to take the Court into her confidence by disclosing what amount she has already spent on her legal fees to date or that her attorneys are currently without payment for costs incurred by her.

[24] The applicant is also vague as to what notices she has served on the respondent if any, to which he has failed to respond necessitating

her to seek assistance from this Court to compel the respondent. In addition, thereto she has not attached any account to her founding

affidavit or a confirmatory affidavit filed by her attorney in support of this claim.

[25] 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 absence of either a statement of account having been filed by her, or a confirmatory affidavit by her attorney confirming the legal fees already spent by her, I am not persuaded that the applicant has discharged her onus to be awarded an additional contribution towards her legal costs. As a consequence, I cannot grant her the contribution towards her legal costs which she seeks.

[26] At the hearing of the matter the parties had reached an agreement and informed the Court that whatever the outcome of this application, this Court should order a waiver in as far as costs are concerned in terms of Rule 43(7) and Rule 43(8).

ORDER

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

27.1 The applicant and the respondent shall share parental rights, responsibilities, care and guardianship of the minor children;

27.2 That primary residence of the minor children shall remain with the applicant, subject to the respondent's reasonable rights of contact to the minor children;

27.3 That any change to the exercise of parental rights and responsibilities in respect of the minor children be referred to the office of the Family Advocate, whenever necessary;

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

27.4.1 A monthly cash contribution payable on or before the 7th day of each succeeding month of R 25 000 in respect of the applicant and the minor children, such payment commencing on the following month, to the month that the order is served on the respondent;

27.4.2 The respondent is to pay the monthly school fees of the minor children, school uniform, books and stationary costs;

27.4.3 The respondent is further liable for the contribution of the costs of the minor children to be maintained on the applicant's medical aid.

[28] The Court further directs that the restrictions contained in Rule 43(7) and 43(8) shall not apply and that the respondent is ordered to pay the costs of this application.

C. J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANT:

MS. A OLIVER

INSTRUCTED BY: MARTIN VERMAAK ATTORNEYS

FOR RESPONDENT: ADV J. BRENKMAN

INSTRUCTED BY: EUGENE K. & CO INC.

DATE OF HEARING: 23 AUGUST 2017

DATE OF JUDGMENT: 13 SEPTEMBER 2017

[1] Verster v Verster 1975 (3) SA 493 (W) at 494B-C and Rule 43(5)

[2] Respondent's Answering Affidavit paragraph 4 pages 53 to 55

[3] Applicant's Founding Affidavit paragraph 9 page 9

[4] Applicant's Founding Affidavit paragraph 9 and 10

[5] Respondent's Answering Affidavit paragraphs 13 to 23.

[6] Applicant's Founding Affidavit paragraph 20 page 14

[7] Respondent's Answering Affidavit paragraph 20 page 62

- [8] Respondent's Answering Affidavit paragraph 33 page 66
 - [9] Respondent's Affidavit paragraph 37 page 67
 - [10] Taute v Taute 1974 (2) SA 675 (E) at 676E
 - [11] Applicant's Founding Affidavit page 21 paragraphs 54 & 55
 - [12] Respondent's Answering Affidavit paragraph 44 pages 69 & 70
 - [13] Van Rippen v Van Rippen 1949 (4) SA 634 (C) at 637
 - [14] Griesel v Griesel 1981 (4) SA 270 (0) at 277A
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