

SOUTH AFRICA / JUDGMENT

L.B v D.F.B (013221/2021) [2023] ZAGPJHC 1441 (8 December 2023)

[2023] ZAGPJHC 1441**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Francis

CASE / FILE NUMBER

013221/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****JOHANNESBURG****CASE NO: 013221/2021****NOT REPORTABLE****NOT OF INTEREST TO OTHER****JUDGES****08/12/23****In the matter between:**

L
B (born E)
(Identity
Number:[...])
Applicant/Plaintiff
And
D
F B
(Identity
Number:[...])
Respondent/Defendant

JUDGMENT**FRANCIS J**

1. The applicant brought a rule 43 application in May 2023 seeking interim maintenance and a contribution towards her legal costs against the respondent. The respondent opposed the application.
2. The applicant and the respondent got married on 30 April 2006 out of community of property with the exclusion of the accrual system. Four minor children aged 15, 14, 12 and 5 years respectively were born from their marriage. They were living in Dubai from 2014 until November 2022 when they returned to South Africa.
3. The respondent has since December 2022 been paying the following in respect of the applicant:
 - 3.1 R12 000.00 cash contribution;
 - 3.2 R9 000.00 in respect of the applicant's accommodation;
 - 3.3 Medical aid and GAP cover premiums;
 - 3.4 Medical expenses incurred by the applicant directly;
 - 3.5 Rental vehicle monthly premiums.
- 4 The applicant instituted an action for divorce against the respondent on 12 February 2023. The minor children are living with the respondent in terms of a court order granted by Vally J in the urgent court on 4 April 2023 pending the outcome of an investigation of an appointed expert. The issue of the minor children does not arise in this application and the respondent is maintaining them.
5. The applicant in this application is seeking the following relief:
 - 5.1 Maintenance in the sum of R28 875.00 per month to be paid on or before the 28th day of each month, increased annually in accordance with the CPI;
 - 5.2 Retaining the applicant on the respondent's medical aid scheme and paying the premiums in respect of such scheme;
 - 5.3 Retaining the applicant on the current GAP cover scheme and paying the premiums in respect of such scheme;
 - 5.4 Reimbursing the applicant for any medical expenses within 5 days of receipt of such invoice and/or proof of payment;
 - 5.5 Continuing to pay the rental vehicle currently in the applicant's possession on a monthly basis;

5.6 Continuing to pay the applicant's monthly rental in the sum of R9000.00 per month;

5.7 An initial contribution towards her legal costs in the divorce action in the sum of R250 000;

5.8 The respondent to pay the costs of the application.

6. As from June 2022 the respondent has made a tender of R16 332.14 towards the applicant's maintenance due to a reduction in his salary made up as follows:

6.1 R6 000.00 cash contribution per month;

6.2 R4 704.00 in respect of the vehicle instalment in the applicant's use;

6.3 R571.14 in respect of vehicle insurance;

6.4 R4 777.00 in respect of the applicant's share towards the medical aid instalment;

6.5 R280.00 in respect of streaming services made available to the applicant.

7. It is trite that rule 43 provides an interim remedy to assist an applicant for a limited period of time before a divorce is finalised. It provides for interim maintenance, a contribution towards the costs of a matrimonial action, pending or about to be instituted, interim care of any minor child and interim contact with any child. It sanctions a quick and inexpensive interim procedure in which the court protects the interests of children, and ensures that neither spouses are prejudiced in the defence of their rights during a contentious divorce action. The material issues in any rule 43 application are generally no more extensive than where the best interest of the parties' children lie; what the applicant's reasonable maintenance requirements pending divorce are; whether the respondent can reasonably meet those needs; and whether the applicant is entitled to the contribution to costs that she seeks, and the amount that she seeks. These issues are assessed in light of the standard of living the parties enjoyed during the marriage and what they are earning.

8. It is trite that a court is not required to examine the parties' affairs with the same degree of precision as would be possible in a divorce trial where detailed

evidence is adduced. Accordingly, what is required from the parties is a simple statement of facts bearing in mind that the procedure is an interim one.

The point is to keep the issues simple. Ultimately given the interim nature of the proceedings, that does not matter, so long as the parties and their children are protected against financial impoverishment and emotional alienation until

the divorce action is finalised, and a full and final financial reckoning can be made in the main divorce proceedings.

9. The following issues need to be determined and are issues in dispute:

9.1 The current employability of the applicant and her capabilities to generate an income for herself;

9.2 The principle of spousal maintenance;

9.3 The applicant's responsibility to contribute towards the expenses of the four minor children;

9.4 Is pendente lite maintenance due by the respondent to the applicant and if so, in which amount and for what duration?; and

9.5 Is the applicant entitled to a contribution towards her legal costs by the respondent and if so, how much should be contributed?

10. The respondent was employed in Dubai and was receiving a monthly salary in the sum of AED67 169.23 (R352 669.25 per month) up until the end of April 2023. The parties moved back to South Africa during November 2022 and the respondent's contract of employment was transferred to a filial company in South Africa.

11 Since May 2023, the respondent's basic salary was reduced from R352 669.25 to R191 666.67 per month, with his net salary being R115 240.15 per month. This is a huge drop in his salary.

12. It is clear from the affidavits filed that whilst the applicant and respondent were residing in Dubai they were living and enjoyed a very comfortable and lavish standard of living given the respondent's monthly salary at the time being R 352 669.25. The fact of the matter is that they are no longer living in Dubai since November 2022 and the respondent is now earning a net salary of R115 240.15 since May

2023. This is a factor that this court must take into account when dealing with the issue of maintenance and a contribution towards legal costs.

13. The payments referred to in paragraph 3 above were made by the respondent voluntarily, prior to his reduced salary.

14. The respondent contends that the applicant is immediately employable and is able to maintain herself. This is being disputed by the applicant.

15. I find it rather odd that the respondent contends that the applicant is immediately employable and can maintain herself. She had been a housewife and mother to the respondent's minor children. She had met the respondent during December 2005 when she was unemployed and had just obtained her BA degree in journalism. They were engaged to be married during November 2006 and at the end of March 2007 she discovered that she was pregnant with their first child. Since they were financially comfortable she remained a housewife to take care of their children and did not pursue her own career. She intends taking up a teaching profession and said that it would at least take two years to complete.

16. The respondent has failed to prove that the applicant is immediately employable. As such since she is his wife there is a duty on him to maintain her. I have had regard to the particulars of claim in the divorce proceedings and those are issues that can be dealt with expeditiously by both parties and I hope that common sense will prevail between the parties to finalise that divorce proceedings expeditiously.
17. It is so that the applicant's father is assisting her financially. That is what any good father would do to assist his child if she is struggling financially. It does not however prevent the respondent from maintaining his wife since it is his duty to do so and they are currently not divorced.
18. There is a duty on the applicant to support her children once she becomes employed but the fact of the matter is that she is unemployed and cannot do so at this point in time.
19. This brings me to the question of how much maintenance the respondent must pay to the applicant pending the divorce action. The applicant is seeking the sum of R29 875.00 as well as the other relief referred to in her paragraph 5 above. The applicant has tendered to pay the applicant the sum of R6 000.00 as well as the amounts referred to in paragraph 6 above.
20. It is common cause that the respondent is solely responsible for all the expenses of the four minor children and that the applicant is currently making no contribution towards the financial needs of the four minor children
21. It is further common cause that since December 2022 and prior to his salary reduction the respondent has been paying the following maintenance to the applicant namely a cash amount of R21 000.00; a rental motor vehicle at an amount of approximately R9 247.00; maintaining the applicant on a comprehensive medical aid scheme and reimbursed the expenses incurred which the respondent claims from the insurer.
22. The respondent's salary reduction occurred in May 2023 and he now earns a net income of R115 240.15. From the net income he maintains himself and their four minor children in all their material needs including food, clothing, entertainment, education, school supplies, extracurricular activities, and all other necessary expenses. He has provided the court with a detailed expenditure which consists of his fixed monthly expenses and monthly expenses. His monthly expenses total R68 445.00. After his fixed monthly expenses are paid he is left with R44 773.40 per month from which he must now pay all the essential monthly expenses for himself and the four minor children in his primary care. The essential monthly expenses total R46 950.00. Once he had paid the essential monthly expenses of himself and the four minor children in his primary care he is left with a shortfall of -R2 176.60. However, a further affidavit was filed where the respondent stated that he has a surplus of R3 915.40.
23. From the above, the respondent has made provision for the applicant's medical aid membership and car hire, but has not made provision for the cash amount of R21 000 which he has paid to the applicant prior to his salary reduction.

24. The respondent will be receiving a gratuity of about R1 913 011.97 which he said is earmarked for his future and that of his children. He has also stated that he has received a bonus of R172 000.
25. It appears that the applicant is being supported by her father and that he has contributed towards her legal fees and that they have an agreement that she would reimburse him once she has obtained an order regulating her pendente lite maintenance. Her total monthly expenses which excludes what the respondent pays totals R29 875.00. She states that she has a monthly shortfall of R17 875.00 and her parents have been assisting her with legal fees and to cover the shortfall, until such time as she has an order in place regulating her pendente lite maintenance.
26. This court must still come across parties who are honest about what they are earning. Some parties have tendencies to hide or underplay what their exact earnings are when it comes to divorces. They increase their expenses in an attempt to mislead the court and to pay as little maintenance as possible. It is clear from the papers that this court is not dealing with paupers. The parties are residing in South Africa and no longer in Dubai where the respondent used to earn a huge salary and were able to lead lavish lifestyles. The applicant seems to forget this fact. However, the respondent is still receiving a high salary.
27. The applicant is in possession of a BA degree and has indicated that she wants to become a teacher but would study on a full time basis. She would then be able to support herself. A factor that this court must consider is that she became a housewife after she had met the respondent and had raised four children with him. She is currently 39 years old and the children are no longer in her care but in the care of the respondent. She is being assisted by her parents.
28. I have considered the applicant's listed expenses and that of the respondent. I have also taken into account the fact that the parties are now living in South Africa and no longer in Dubai. The sum sought by the applicant is highly extravagant and the respondent can simply not afford to pay that. The cash component that the respondent has tendered to pay the applicant should be increased to the sum of R12 000.00 if regard is had to his earnings and expenses.
29. This brings me to the question of a contribution towards the applicant's legal costs. The applicant is seeking that the applicant contributes R250 000,00 towards her legal costs. This is being opposed by the respondent.
30. The rationale behind rule 43 is to ensure that neither party is prejudiced during the divorce proceedings by lack of resources to maintain a reasonable standard of living, or to pursue their case in the main action. Often one party, usually the wife, will not be in a position to institute or defend a divorce due to lack of financial means.

31. The claim for a contribution towards costs in a matrimonial suit is *sui generis*: an incident of the duty of support which spouses owe to each other. The purpose of this is to enable the party in the principle litigation who is comparatively financially disadvantaged in relation to the other side to adequately place his or her case before the court. The object of the rule is twofold namely to ensure a fair trial hearing and to secure the inexpensive and expeditious completion of litigation and to further the administration of justice.
32. The applicant has an agreement in place with her parents that she would reimburse them for the legal fees that they have been paying once the rule 43 order is granted. This appears to be a licence given that you may litigate as you please and that the court will grant you what you are seeking. You may approach the most expensive lawyers and they can merrily file affidavits as they please. This I am afraid is not how parties should litigate and that is not the purpose of rule 43 applications.
33. It is always sad to notice that some couples who had professed their underlying love for one another got married and before the ink on their marriage certificates dried off, separate and bring divorce actions against each other. They forget about the vows that they had taken when they had tied the knot. Invariably the real victims in such acrimony between two so-called adults are their minor children. They then seek high profile attorneys and common sense disappears and they are then mulcted with high costs when the disputes between them could easily have been resolved.
34. I have considered the pleadings in the divorce proceedings and the divorce action is not a complex one which is capable of a speedy resolution between the parties without the need to incur huge further legal expenses which is really for the benefit of the legal practitioners.
35. I have taken into account that the applicant is currently a housewife and that an appropriate order in the circumstances would be to order the respondent to make a once off contribution of R50 000.00 towards her legal costs.
36. I do not believe that this is a matter where costs should follow the result. An appropriate order would be that costs be costs in the cause.
37. In the circumstances the following order *pendente lite* is made:
 - 37.1 The respondent is to pay maintenance to the applicant in an amount of R12 000.00 per month on or before the 28th day of every month without deduction or set off in the bank account nominated by the applicant from time to time;
 - 37.2 The respondent is to retain the applicant on his current medical aid scheme or a medical aid scheme with similar benefits, and making payment of the premiums of such medical aid scheme;
 - 37.3 The respondent is to retain the applicant on the current medical GAP cover scheme and making payment of the premiums thereof;

37.4 The respondent is to make monthly payment of R4 704,00 in respect of the vehicle instalment in the applicant's use;

37.5 The respondent is to make payment of R571,31 in respect of the vehicle insurance of the vehicle that the applicant is using;

37.6 The respondent is to make payment of R280,00 in respect of the streaming services made available to the applicant;

37.7 The respondent is to make payment of the applicant's rental in the amount of R9 000.00 per month;

37.8 The respondent shall pay a once off contribution of R50 000.00 towards the applicant's costs in the divorce action, to be paid directly to the applicant's attorney of record within 7 days from date of this order; and

37.9 The costs of this application are costs in the main action;

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION,

JOHANNESBURG

APPEARANCES

FOR APPLICANT : F W BOTES SC

INSTRUCTED BY HANNES PRETORIUS, BOCK & BRYANT

FOR RESPONDENT : L VAN DER WESTHUIZEN

INSTRUCTED BY HAYES ATTORNEYS

DATE OF HEARING : 14 AUGUST 2023

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This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to Court Online. The date and time for hand-down is deemed to be 10h00 on 8 December 2023.

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