

SOUTH AFRICA / JUDGMENT

LM v TVM (1492/2021) [2022] ZAGPJHC 500 (1 August 2022)

[2022] ZAGPJHC 500

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Karachi

CASE / FILE NUMBER

1492/2021

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, JOHANNESBURG
CASE
NUMBER: 1492/2021

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED
1
August 2022
In

the matter between: L[...]
M[...]
Applicant
and
T[...]
V[...]
M[...]
Respondent

Delivered: 1 August 2022 - This judgment was handed down electronically.

JUDGMENT

Karachi AJ

Introduction

1. This is an application in terms of Rule 43 of the Uniform Rules of Court.
2. The applicant, the defendant in a pending divorce action, launched the present application during April 2022.
3. The applicant seeks an order for maintenance for herself and major children in the amount of R 17 583.75 per month as well as a contribution towards her legal costs in the amount of R 1 048 659.75, up to and including the first day of trial. The applicant further seeks the respondent to continue paying:
 - 3.1. Instalments and insurance on a motor vehicle to be purchased in the amount of R 250,000.00;
 - 3.2. Maintenance for the aforementioned motor vehicle, including the replacement of tyres;
 - 3.3. Life insurance premiums;
 - 3.4. Retirement annuity premiums in the amount of R 12 000.00;
 - 3.5. Monthly premiums for the applicant's cell phone contract;
 - 3.6. The applicant's medical aid; and
 - 3.7. Medical expenses not covered by the medical aid.
4. The applicant has annexed a schedule of expenses wherein she sets out her monthly expenses with a total amount of R44 392. 75. She adds that she has a shortfall of R17 583. 75 per month.
5. The respondent opposes the application. He argues that (1) the applicant has the necessary means; (2) the applicant's maintenance claims are exaggerated and unreasonable; and (3) the applicant does not make out a case for the contribution towards her legal costs.

Background

6. The parties married on 5 October 1996 out of community of property excluding the accrual system.
7. There are two children born of the marriage. Both children are now majors in their early to mid-twenties.

8. At the time of marriage, the respondent had by then taken over his father's business known as the ETL Group. The respondent is now the sole shareholder and director of Alma SA (Pty) Ltd ("Alma"). Alma trades as the ETL Group.
9. When the children were born, the applicant stayed home to take care of them. The respondent supported the household financially. Subsequently, the applicant assisted the respondent in the respondent's business and received a monthly salary which was paid by the ETL Group. The applicant argues that the family enjoyed a luxurious standard of living and that the respondent would utilise his own personal account and the account of his company to pay for all expenses.
10. Since early 2021 the applicant and respondent began a mediation process to resolve certain marital and family disputes that had arisen. In April 2021, the applicant and respondent agreed that the applicant would move out of the common home albeit the applicant argues that she was manipulated by the respondent to move out.
11. In October 2021, the applicant unilaterally moved back to the marital home. The respondent states that

"25. I was livid when I found out that the applicant simply moved back into my home, without my consent. On 13 October 2021 I instructed staff members of ETL Group that the applicant's employment had been suspended, suspended her work-related cell phone, and withdrew the applicant's access to the business premises of the ETL Group. I was advised that my actions were procedurally unfair, and I uplifted all the suspension on or about 18 October 2021.
26. On 14 October 2021, the applicant sought and obtained an interim protection order against me alleging that I perpetrated acts of verbal, emotional, psychological, physical and economic abuse as well as intimidation."
12. Prior to the return date of the interim protection order and after the respondent filed opposing papers, the applicant and respondent entered into an interim agreement in terms of which:
 - 12.1. The applicant was to withdraw the application for a protection order;
 - 12.2. The applicant was to vacate the respondent's home on or before 1 December 2021;
 - 12.3. The respondent was to pay:
 - 12.3.1. 50% of the applicant's rental in the amount of R 5000. 00;
 - 12.3.2. 100% of the applicant's motor vehicle instalments in respect of a Volvo XC40 for a period of 12 months. The applicant agreed to a period of 12 months subject to a Rule 43 hearing and the parties furnishing their full financial disclosure forms;
 - 12.3.3. R 1000. 00 in respect of the applicant's retirement annuity held with Liberty Life;

12.4. Alma South Africa (Pty) Ltd would for the duration of the applicant's employment continue paying directly to the following service providers in respect of the applicant's:

12.4.1. cell phone contract;

12.4.2. travel allowance;

12.4.3. motor vehicle insurance in respect of the Volvo XC40.

12.5. The respondent would pay 50% of the applicant's rental deposit in the amount of R 5000.00 and the applicant shall pay the remainder of the deposit in respect of her rental.

12.6. The applicant and respondent reserved their rights to approach the High Court to institute rule 43 proceedings in order to duly ventilate the parties' financial status and to determine the issue of maintenance and vary the interim agreement after having sight of the parties' full financial disclosure forms.

("the interim agreement")

13. In December 2021, the applicant lodged a grievance of victimisation and unfair treatment in the workplace in terms of Alma's grievance procedure. Alma and the applicant entered into an exit agreement in terms of which the applicant resigned from her employment in February 2022 ("the exit agreement"). The applicant was to retain the two cell phones she utilised but the sim cards and contracts associated with these remained the property of Alma which contracts Alma could cancel after 31 May 2022. The applicant would return all property in her possession that belonged to Alma.
14. In January 2022, the applicant's attorneys of record informed the respondent that he was in breach of the interim agreement by failing to, among other things, pay the instalments of the motor vehicle and retirement annuity. The respondent argues that he subsequently brought the arrears up to date. The respondent concedes that he did not pay the applicant on time as agreed but he argues that he subsequently paid in excess of what he undertook to pay. He further argues that since the applicant sold the vehicle and the financier having been settled, there is no obligation for him to pay over the cash equivalent to the applicant.
15. It is against this background that I now turn to the issues to be decided.

Maintenance

16. There is no general principle upon which an application for maintenance pendente lite under Rule 43 can or must be based. Each case must depend on its own particular facts. The applicant spouse is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, actual and reasonable requirements and capacity to meet such requirements.^[1]
17. The quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summarised facts contained in the founding and answering affidavits as is contemplated and intended by Rule 43. A claim supported by reasonable and moderate

details carries more weight than one which includes extravagant or extortionate demands - similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them.[2]

18. The considerations enumerated in section 7(2) of the Divorce Act 70 of 1979 that deals with claims for spousal maintenance in divorce proceedings are similarly useful in applications in terms of Rule 43. These factors include 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, the 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. [3]
19. In *CMSC v NC* 2021 JDR 3264 (WCC) Justice Binns-Ward held that a claimant for maintenance pendente lite in terms of rule 43 is not entitled, of right and without more, to maintenance sufficient to keep him or her in the same lifestyle as that enjoyed during the marriage. Each application falls to be determined on its own peculiar facts. The standard of living enjoyed by the parties during the marriage is but one of the factors to which regard should be had.
20. The applicant provided the court with a schedule wherein she listed her monthly expenses, which amount to a total of R44 392.
75. This amount excludes payments in respect of medical aid, motor vehicle premiums and legal costs. She argues that the respondent should:
 - 20.1. Purchase a new motor vehicle for the applicant in the amount of R 250 000 and pay for the maintenance thereof including the replacement of tyres; and
 - 20.2. Reimburse the applicant for her medical aid premiums and expenses not covered by the medical aid.
21. Counsel for the respondent contended that some of the applicant's listed expenses were inflated and excessive, that the amounts tendered by the respondent was fair and reasonable under the circumstances and that in respect of reimbursement for medical aid this was part of her employment and the applicant is therefore not entitled to payment in respect thereof.
22. I have scrutinised the applicant's listed expenses. I cannot find any deliberate misstatement or exaggeration of her expenses. There does however appear to be items listed that the respondent argues are unnecessary and/or are duplicated, this is factored in in determining a reasonable amount.
23. The applicant together with one of the children resides on the property rented by the applicant. She has reduced her retirement annuity to R 1000. 00. Her medical aid is deducted from her current salary. On the evidence before me, the respondent paid the instalments for the applicant's vehicle, the insurance premiums, her retirement annuity, her cell phone contract albeit through Alma.

24. In respect of the motor vehicle,
- 24.1. The applicant claims in her founding papers that the respondent be ordered to pay for the instalments and insurance on a motor vehicle to be purchased in the amount of R250 000. 00. She argues that she was forced to sell her vehicle in order to survive.
- 24.2. The respondent confirms that the applicant sold her vehicle and received R15 000. 00 since the financier had to be settled. The respondent however states that the vehicle he uses (that is the Volvo XC60) is registered in the applicant's name, that the finance agreement has been settled in full and that the applicant has requested return of this vehicle which the respondent has agreed to.
25. The applicant argues that her current net income is R 25 665. 00 and that as a result, the shortfall amounts to R 17 583. 75.
26. The purpose of interim maintenance is intended to supplement expenses which the applicant cannot meet.[4]
27. In the circumstances I consider that, having regard to the amounts claimed, the amounts tendered by the respondent and what is reasonable, I find that the respondent should pay maintenance pendente lite in the amount of R 14 050. 00 per month in addition to the insurance premiums of and maintenance to the applicant's vehicle and the expenses not covered by the applicant's medical aid. The retirement annuity, life insurance and cell phone premiums have been included in the said amount.
28. On a close examination of the evidence before me, I am persuaded that the respondent will be in a position to pay the amounts so ordered having regard to the respondent's income and the evidence placed before me with regard thereto. I am satisfied that the applicant has a reasonable need for maintenance and that the respondent has the means to pay the amount so ordered.
29. Further, in respect of the applicant's claim to a motor vehicle the respondent is ordered to return to the applicant, the Volvo XC60 in working condition which the respondent confirms under oath has been fully paid up for. I pause to mention that it is often impossible for a presiding judge in Rule 43 applications to have proper insight into all the facts. A balance between the parties has to be achieved. Maintenance pendente lite is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced. A payment of R 250 000. 00 for a new vehicle as claimed by the applicant would not be just in the circumstances. No further evidence has been adduced by the applicant as to why she is entitled to such relief. The applicant without more withdrew her amendment to her notice of motion and did not seek leave of the court to file a further affidavit addressing these issues.

A contribution towards legal costs

30. A claim for a contribution towards costs in a matrimonial suit is sui generis. Its basis is the duty of support spouses owe each other.
31. The applicant seeks a contribution in the amount of R 1 048 659. 75. The respondent tenders an amount of R 20 000. 00.
32. The question is whether the applicant has made out a case for a cost contribution. The applicant must demonstrate that the respondent owes her a duty of support, that she has a need to be maintained, and that the respondent has adequate resources to discharge this duty. I find that the applicant has made out such a case. The only issue remaining, being the quantum of such cost contribution.
33. Counsel for the respondent argued that a contribution towards costs is in respect of costs in the action and that costs in respect of interlocutory applications are excluded. She further argued that there were duplications in respect of the amounts claimed, that most items per the bill of costs were extraneous to the divorce action and that the costs associated with the divorce action were excessive. These include, costs in respect of
- 33.1. the protection order;
- 33.2. the applicant's employment;
- 33.3. the rule 43 application;
- 33.4. costs associated with the divorce action including counsel's fees and fees of the experts.
34. An application for a contribution towards costs is for the costs of the divorce action not for legal costs in other proceedings. The applicant cannot claim for costs relating to the proceedings in the magistrate's court, her employment grievances and new employment. In assessing the bill of costs and the quantum of the contribution to enable the applicant to present her case adequately before the court in the divorce action, having regard to the applicant ordinarily being entitled to be awarded a contribution only up to and including the first day of trial, I consider a cost contribution in the amount of R400 000. 00 to be reasonable in the circumstances.

Order

35. For the reasons aforesaid, I consider it appropriate to make an order in the following terms:
- 35.1. The respondent is ordered to pay an amount of R 14 050.00 per month to the applicant for maintenance pendente lite with effect from 31 August 2022, and thereafter by no later than the last working day of each month, such payment to be made into the applicant's nominated bank account;
- 35.2. The respondent is ordered to return to the applicant, the Volvo XC60 ("the applicant's vehicle") in working condition;
- 35.3. The respondent is ordered to continue paying the following expenses pendente lite:

- 35.3.1.payment for the maintenance costs, services and repairs of the applicant's vehicle;
- 35.3.2.payment of the insurance premiums in respect of the applicant's vehicle;
- 35.3.3.payment of the applicant's medical expenses which are not covered by her medical aid;
- 35.4. The respondent is ordered to make a contribution towards the applicant's costs of the divorce action in the amount of R 400 000. 00 within 60 days of this order.
- 35.5. Costs of this application shall be costs in the divorce.

F KARACHI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Adv R Andrews

For the respondent:

Adv S Liebenburg

Date of the hearing:

26 July 2022

Date of the judgment:

1 August 2022

[1] Taute v Taute 1974 (2) SA 675 (E)

[2] Taute v Taute 1974 (2) SA 675 (E)

[3] HM v SM 2021 JDR 2736 (GJ)

[4] Botha v Botha 2009 (3) SA 89 (W)

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