

SOUTH AFRICA / JUDGMENT

N v N (25172/17) [2017] ZAGPPHC 1278 (27 October 2017) [2017] ZAGPPHC 1278

COURT

North Gauteng High Court, Pretoria

BEFORE

Shangisa

CASE / FILE NUMBER

25172/17

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REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

CASE NO: 25172/17

27/10/2017

In

the matter between:

P

N

APPLICANT

and

M

M

N

RESPONDENT

JUDGMENT

SHANGISA AJ:

A.

Introduction

- [1] The parties were married to each other out of community of property with the accrual system on 08 January 2000. Two minor children were born of the marriage, a son and a daughter, aged 9 and 11 years.
- [2] On 6 April 2017 the respondent instituted divorce proceedings against the applicant. The divorce action is still pending before the high court. It is common cause that on 31 May 2017 the respondent left the parties' communal home and relocated to Bloemfontein. Consequently, on 30 June 2017 the applicant launched the present application in terms of the provisions of rule 43 of the Uniform Rules of Court for an interim order. In the main, the applicant seeks an order granting him contact rights to the two minor children. In that regard, the applicant also seeks an order granting him contact and right of access to the minor children.
- [3] Furthermore, the applicant also seeks the appointment of the family advocate and a psychologist to investigate the best interests of the minor children. I pause to mention that the respondent in her answering papers makes allegations of abuse against the applicant who, in turn, denies the allegations. It is against this background that the applicant seeks an order which compels both parties and their minor children to submit themselves to an assessment by a psychologist and for an investigation to be conducted by the family advocate.

B Application for postponement and strike out

- [4] At the commencement of the present rule 43 proceedings, on September 2017, the applicant applied for the striking out of certain averments in the respondent's opposing affidavits which he contended were vexatious, scandalous and irrelevant. However, the applicant also sought the postponement of rule 43 application pending the determination of the application to strike out the impugned allegations contained in the respondent's answering affidavit.
- [5] The nub of the applicant's strike out application was directed at the paragraphs 7.1 to 7.2 which referred to the terms of the settlement

agreement the parties had initially entered into. It is common cause that in May 2017 the parties had entered into a settlement agreement. However, the applicant later withdrew from the settlement agreement. Accordingly, the terms of the settlement agreement are now in dispute and are the subject of the pending divorce action. In that regard, the applicant contended that it was impermissible for the respondent to make references to the disputed terms of the settlement agreement.

- [6] The other leg of the applicant's strike out application relates to paragraph 14 of the respondent's answering affidavit in which she accuses him of abusive conduct towards her. On behalf of the applicant, it was submitted that the rule 43 application for postponed pending the hearing of the application to strike out. I was also informed by counsel for the applicant that the strike out application will be heard on 08 December 2017. The effect of the postponement sought by the applicant would have meant that the rule 43 would only be heard after December 2017.
- [7] In my view, it would be undesirable to accede to the application for postponement. The application for postponement was made from the bar and, in my view, was not properly substantiated and lacked merit. It is trite that the purpose of rule 43 is to enable the parties to obtain an expeditious interim relief pending the finalization of the divorce action. In my view, a postponement of more than three months as sought by the applicant would have been undesirable and not in the best interests of the minor children in circumstances where they clearly require an interim relief for maintenance pending the finalization of the divorce proceedings. Accordingly, I ordered counsel for the parties to address argument on both applications for postponement and strike out. Having heard full argument, I dismissed both applications and ordered the parties to address me on the merits of the rule 43 application including the respondent's counterclaim.
- [8] It is worth noting that in his rule 43 (2) affidavit the applicant made numerous references to the terms of the settlement agreement that were favourable to his case. By way of example, the applicant referred to some purported undertakings the respondent had made in regard to her role in assisting with the travelling arrangements of the minor children, and the establishment of regular contacts between the applicant and the minor children. That attracted a response from the respondent who also referred to the terms of the settlement agreement.
- [9] In my view, it seems to me that the present rule 43 application and counterclaim can easily be disposed of, and an appropriate relief granted, without paying regard to the terms of the disputed settlement agreement. Accordingly, I will disregard the disputed settlement agreement when arriving at what I consider to be a just and expeditious order in the circumstances.
- [10] The nature of the averments that are the subject-matter of the strike out application relate to the respondent's allegations in her affidavit filed in terms of rule 43(3) in which she alleged that the applicant was aggressive and abusive towards her. However, the context in which

the respondent made such allegations is instructive. As already stated, in his rule 43 affidavit the applicant sought the appointment of a psychologist to assess the parties. In substantiation of the latter relief, the applicant asserted that the respondent was prone to making false allegations of abuse against him. He then contended

that in his submission it was necessary to appoint a psychologist who would assess the parties and compile a report on the veracity of such allegations.

- [11] For her part, the respondent pointed out that she was amenable to the appointment of a psychologist. She further made it clear that she did not object to the applicant being granted access to the minor children. In that regard, she stated asserted that the applicant has always enjoyed reasonable access to the minor children and that she was in support of that position. However, she persisted stated that she stood by her allegations. In essence, this is what triggered the applicant's application to strike out the respondent's allegations of abuse.
- [12] In my view, it is pertinent that the allegations of abuse were first mentioned by the applicant in his founding rule 43 papers. If one has regard to the relief sought by the applicant it is clear that such allegations are relevant to his interim relief for access to the minor children. It was the applicant who sought to bolster his case for the appointment of the psychologist by setting out the allegations of abuse made against him. It was in response to the applicant's averments concerning the appointment of the psychologist that the respondent indicated that she stood by such allegations. In any event, this does not take the matter any further since the respondent has firmly indicated that she does not oppose the appointment of the psychologist and that in the interim she is in support of the applicant being granted access to the minor children.
- [13] If the foregoing is taken into account, it follows that there is no merit in the applicant's submission that the allegations pertaining
- to abuse are vexatious or irrelevant.

C Merits of the rule 43 application and counterclaim

- [14] On the merits of the rule 43 application the parties were largely in agreement on the relief sought by the applicant. At the outset, the respondent indicated in her rule 43 (3) affidavit that she did not oppose the applicant's interim relief for access to the minor children and the appointment of the family advocate. She, however, launched a counterclaim for maintenance pendente lite for herself and the minor children. She also sought an order for contribution towards her costs. I proceed to deal with the application and the counterclaim.
- [15] As already mentioned, the respondent relocated to Bloemfontein where she is currently an intern estate agent. She asserts that until she completes her internship she will earn no income for the next 10 to 12 months. She does not have an income and she accordingly seeks maintenance for herself and the minor children.

- [16] The applicant opposes the counterclaim for the maintenance on the ground that the applicant's stated intention for relocation was that it would enable her to earn a viable income as an estate agent. The applicant criticized the respondent's decision to relocate. He asserted that such relocation to Bloemfontein was unplanned and would have an adverse effect on the minor children. In my view, it is not necessary to make a finding on that issue. It forms part of an investigation to be conducted by the family advocate and the psychologist and will best be ventilated at the pending divorce trial. For the present purposes, it suffices to mention that both parties agree that the applicant should be granted his parental rights of access to the minor children.
- [17] The only main issue in dispute relates the amount for maintenance and contribution towards costs claimed by the respondent. In her rule 43
- (3) affidavit, the respondent points out that she will only earn income upon the completion of her internship as an estate agent. As matters stand, she is entirely dependent on the maintenance paid by the applicant. In that regard, she annexed proof of her reasonable monthly expenses. The respondent further contended that since her relocation to Bloemfontein her brother has been paying her rental and that she has been dependent solely on the assistance of family members. She accordingly annexed her bank statements as proof of her lack of income.
- [18] The applicant has tendered to pay maintenance in the amount of R3,500.00 per month in respect of each child. He has also tendered to maintain the minor children on his medical aid, and to meet their school fees.
- [19] In my view, the respondent has made out a proper case for her counterclaim for maintenance. The undisputed facts establish that she is presently unemployed and does not have an income. Accordingly, she is entitled to reasonable maintenance pending the finalization of the divorce action.
- [20] Properly construed, in the context of the respondent's personal circumstances, it is clear that her move to Bloemfontein was motivated by her desire to secure employment and earn a steady income as an estate agent. However, before she could commence practicing as an estate agent she is required to first complete a period of twelve months of unpaid internship. She previously earned a living by practicing as a "holistic counsellor" and used her income to contribute towards the household necessities. She however, closed her practice two years prior to her separation from the applicant. The respondent asserts that the applicant used to pay for all of her and the minor children's expenses. However, when their marriage ran into difficulties, the applicant abruptly terminated all such payments to her and the children. That also contributed to her decision to relocate to Bloemfontein since her family members reside in that city.

[21] The last issue concerns the respondent's counterclaim in respect of the contribution towards her legal costs. The applicant submits that during the course of the parties' marriage before she closed her practice, she raised the minor children and contributed emotionally

and financially to the common household. After that she relied on the applicant for maintenance. She points out that in June 2017 the applicant previously launched an urgent application in the high court against her which was dismissed.

[22] As mentioned elsewhere in this judgment, the applicant has also launched an application to strike out which is set it down on 08 December 2017. It is clear that the applicant has the means to litigate. It seems to me that the respondent is entitled to proceed with the divorce action and should be similarly offered the means that will enable her to put a proper case before the court. That approach seems to accord with the principle our courts apply in rule 43. Thus in *Cary v Cary* 1999 (3) SA 615 (C) Donen AJ propounded the significance of granting, where appropriate, contribution towards costs as follows:

"The claim for contribution towards costs in a matrimonial suit was *sui generis*. The basis of such claim was the duty of support which the spouses owed to each other In assessing the quantum of the contribution to enable the party seeking the contribution to present her case adequately before the court, the court had to have regard to the circumstances of the case, the financial position of the parties and the particular issues involved in the pending litigation. The question of essential disbursements was a material factor to be considered, as was the scale on which the party from whom the contribution was required was litigating. In exercising its discretion in the determination of the quantum towards costs to be awarded, the court was bound by Section 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 to guarantee both parties the right to equality before the law and equal protection of law. This has to be interpreted in context to mean that the applicant was entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against the respondent. The applicant would not be able to present her case fairly unless she was empowered to investigate the respondent's financial affairs through forensic accountant appointed by her."

[23] What emerges from the foregoing when applied to the facts of the present matter is that the respondent is entitled to a contribution towards costs so that she is able to pursue her pending divorce action against the applicant.

[24] I have considered the financial positions of the parties, their needs and expenses as presented in the rule 43 papers. I have also taken into account the applicant's monthly net salary and his expenses. It seems to me that the order that I propose to make will provide a just and an expeditious relief to the parties pending the finalization of their divorce trial.

[25] In the result the following order is made *pendente lite*:

25.1 The applicant is ordered to pay maintenance for the two minor children in the amount of R7,000.00 monthly, the first payment to be effected on or before the 1st day of November 2017, and monthly thereafter on or before the last day of the succeeding month.

25.2 The applicant is ordered to pay maintenance for the respondent in the amount of R7,000.00 monthly, the first payment to be effected on or before the 1st day of November 2017, and monthly thereafter on or before the last day of the succeeding month.

25.3 The respondent shall have primary residence of the two minor children pendente lite.

25.4 The respondent shall have the following contact and access rights to the minor children:

25.5 contact with the children every alternative weekend from 17:00, until Sunday at 17:00;

25.6 every alternative public holiday or long weekend from 17:00 the day preceding the public holiday or long weekend until 17:00 on the public holiday or the last day of the long weekend;

25.7 every alternative short school holiday and every alternative long school holiday;

25.8 every birthday of the applicant and on Fathers' Day;

25.9 The applicant and the respondent will approach and seek the appointment of the family advocate and a psychologist to assess the parties and the minor children, and where applicable, the applicant will bear the costs for such appointment.

25.10 The applicant shall maintain the minor children and respondent on his medical aid.

25.11 The applicant shall remain liable for the minor children's school uniforms, school books, after-care caretaker fees, and all other

school-related and extra-mural related expenses.

25.12 The applicant shall make a contribution to the respondent's legal costs in the amount of R30,000.00, payable in monthly instalments of R3,000.00 each, payable on or before the first day of each consecutive month. The first payment to be made within 10 (ten) days

of the order, and on or before the first day of every month thereafter until the amount is fully paid.

25.13 The costs of this application and counterclaim shall be costs in the main action.

It is so ordered.

SHANGISA AJ

Acting Judge of the High Court,

Gauteng Local Division, Johannesburg

DATE OF HEARING: 8 September 2017

DATE OF JUDGMENT: 27 October 2017

APPEARANCES:

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