

SOUTH AFRICA / JUDGMENT

N.E v G.E (53648/2017) [2018] ZAGPPHC 501 (20 March 2018)

[2018] ZAGPPHC 501

COURT

North Gauteng High Court, Pretoria

BEFORE

Hattingh AJ

CASE / FILE NUMBER

53648/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH

AFRICA

GAUTENG DIVISION, PRETORIA

CASE

NUMBER: 53648/2017

20/3/2018

In

the matter between:

N

E

APPLICANT

and

G

E

RESPONDENT

JUDGMENT**HATTINGH AJ**

[1]. This is a rule 43 application for maintenance pendente lite.

[2]. The parties were married to each other on 27 August 1994 at Krugersdorp, out of community of property and the marriage relationship still subsists.

[3]. One minor child was born from the marriage being a daughter named K M E, who was born on 21 July 2000 and is to be a Grade 12 scholar at De La Salle Holy Cross College, Victory Parl.

[4]. The marriage relationship between the parties has broken down irretrievably and no reasonable prospect of the restoration of a normal marriage relationship between them exists. This is common cause.

[5]. The applicant commenced with a divorce action against the respondent out of this court under case number: 53648/17 during August 2017 and claimed, inter alia, the following relief:

5.1. A decree of divorce;

5.2. That an order be made in terms whereof the respondent and applicant retain their full parental responsibilities and rights in respect of the minor child, subject to the minor child primarily resides with the applicant subject to reasonable contact with the respondent.

5.3. The respondent contributes towards the maintenance of the minor child by making payment of R15,000.00 (Fifteen Thousand rand) per month and retaining the child on a medical aid scheme and paying all the medical shortfalls, and by making payment of all educational expenses pertaining to the minor child.

5.4. That the respondent maintain the applicant by making payment to her of a sum of R60,000.00 (Sixty Thousand Rand) per month and that the respondent retain her on his medical aid scheme and pay all reasonable medical expenses incurred by her which are not covered by the medical aid scheme.

5.5. That the respondent be ordered to make payment to the applicant of an amount equal to half of the difference between the accrual in their respective estates.

[6]. The respondent defended the action and instituted a counterclaim wherein he claims:

6.1. A decree of divorce;

6.2. That both parties retain full parental responsibilities and rights in respect of their child subject to the minor child residing primarily with the applicant and the respondent having reasonable contact.

6.3. An order that the accrual in their respective estates be determined and that the respondent make payment to the applicant of an amount equal to one half of the difference between the accrual of their respective estates.

6.4. That the respondent pay maintenance to the minor child in the amount of R10,000.00 (Ten Thousand Rand) per month, all educational expenses and medical costs.

[7]. The following is common cause:

7.1. Both parties are presently residing in the same house albeit in separate rooms.

7.2. The applicant is presently in possession of a Standard Bank Credit Card linked to the account of the respondent. The abovementioned credit card has a limit of R25,000.00 (Twenty Five Thousand Rand) on it.

7.3. The applicant received on her version at least R820,000.00 (Eight Hundred and Twenty Thousand Rand) worth of unit trusts from the respondent during 2014 and that such investment grew to R1,500,000.00 (One Million Five Hundred Thousand) in value.

7.4. Out of the abovementioned investment the applicant purchased a townhouse, [...] which her parents reside. The applicant's parents apparently reside in the town house for free.

7.5. The applicant and her sister commenced an estate agency business named Lifestyle Estates. It is furthermore clear from the financial

statements of the business that it does generate some income.

7.6. The respondent deposits an additional amount of R10,000.00 (Ten Thousand Rand) per month into the applicant's bank account.

[8]. It cannot be disputed that the family is used to a high standard of living.

[9]. On the respondent's own version his estate is in the region of R35,000,000.00 (Thirty Five Million Rand) to R27,000,000.00 (Twenty Seven Million Rand) and his income fluctuates between R190,000.00 (One Hundred and Ninety Thousand Rand) nett to R700,000.00 (Seven Hundred Thousand Rand) nett during the course of 2017. The respondent earned a gross amount of R9,094,609.00 (Nine Million and Ninety Four Thousand Six Hundred and Nine Rand) over the period 1 March 2016 to 28 February 2017, which amounts to a nett annual payment of R4,410,409.00 (Four Million Four Hundred and Ten Thousand Four Hundred and Nine Rand) and a monthly average of R367,500.00 (Three Hundred and Sixty Seven Thousand Five Hundred Rand) nett before payment of expenses. The respondent place his monthly expenses at approximately R178,000.00 (One Hundred and Seventy Eight Thousand Rand) per month.

[10]. The applicant list in her affidavit under paragraph 21 the fair, reasonable, necessary monthly needs and expenses. There are certain expenses that clearly are excessive. To name some:

10.1. Body and skin treatment, facials etc. for herself and their daughter of R2,500.00 (Two Thousand Five Hundred Rand) per month;

10.2. Clothing and shoes for herself and their daughter of R5,000.00 (Five Thousand Rand) per month;

10.3. Holidays at R6,000.00 (Six Thousand Rand) per month. This is clearly opulent taking into account that the applicant have full excess to a holiday home in Balito.

[11]. It is clear from the papers that the applicant seeks payment of an amount of R47,830.00 (Forty Seven Thousand Eight Hundred and Thirty Rand) per month whilst the respondent states that R18,000.00 (Eighteen Thousand Rand) should be enough.

[12]. The respondent contributes presently the following towards the applicant:

12.1. Credit card with limit of R25,000.00 (Twenty Five Thousand Rand)

12.2. Payment into the applicant's

account of

R10,000.00 (Ten Thousand Rand);

12.3. Payment directly to the daughter

of

R10,000.00 (Ten Thousand Rand)

TOTAL AMOUNT R45,000.00 (Forty Five Thousand Rand)

[13]. The object of the rule is that application brought in terms of rule 43 should be dealt with as inexpensively and expeditiously as possible, prolixity in averments and the unnecessary proliferation of papers and affidavits should be avoided.

[14]. It is stated in Erasmus, Superior Court Practice, Second Edition, Van Loggerenberg, Volume 2 page 01-580 that:

"Each case decided under this subrule must depend upon its own particular facts: There are, however, certain basic principles which govern application under this subrule. Maintenance pendent 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. The applicant is entitled to reasonable maintenance pendent lite dependent on the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements which are normally met from income..."

"It has been said that 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 that of one who is seeking to evade them."

[15]. As was said by Ludorf J, in the case of Levin v Levin and Another 1962

(3) SA 330 (W) at 331 D:

"To decide the issue I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously my findings are in no way binding on the trial Court and indeed after hearing the evidence it may emerge that some or all of the inferences I have drawn are wrong. On this basis I now turn to the issues as they emerge from the papers.'

I say with respect that I agree entirely with these remarks which are most appropriate in the present matter.

The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendent lite dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified. I have found nothing however in the decisions to which I have been referred which justify in such maintenance the inclusion of extraordinary or luxurious expenditure even in the case, for example, of *Glazer v Glazer* 1959 (3) SA 928 (W), where the husband is described by Williamson, J (as he then was), as being 'very wealthy' or 'very rich'. 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 indeed is contemplated and intended by rule 43. It is also in my view helpful to take cognisance of the approach made in the affidavits by the applicant and the respondent respectively,

bearing in mind that normally it is not the practice in these matters (although permissible) to test the evidence *viva voce*.,,

[16]. It is clear from the facts above that the plaintiff also asks for R20,000.00 (Twenty Thousand Rand) contribution as an initial contribution towards her legal costs.

[17]. The claim for a contribution towards costs in a matrimonial suit is *sui generis*. Its basis is the duty of support the spouses owe each other.

[18]. It is further stated in *Erasmus Superior Court Practice, Second Edition van Loggerenberg*, Volume 2, page 01 - 580 that:

"An application for a contribution towards costs must show that, if she is the plaintiff in the main action, that she has a *prima facie* case; if she is the defendant, that she is defending in good faith. The applicant must further show that she has insufficient means of her own."

[19]. The sum to be contributed is determined by the court's view of the amount necessary for the applicant adequately to put her case before the court. The applicant is not entitled to all her anticipated costs, even though the respondent can well afford to pay them, but only a substantial contribution towards them. The emphasis in obtaining a contribution on this basis is premised on the following:

19.1. The fees so payable have to be reasonable and as ordinarily payable as between an attorney and his own client;

19.2. Not all the fees payable on the criteria set out in 19.1 should be granted in advance in an application under rule 43 and the attorney

should bear some risk with regards to his fees; and

19.3. The fees set out in 19.1 are those that are necessary and as would be adequate for the applicant to prepare for and conduct her pending litigation.

[20]. Attention should also be drawn to the matter of *Glazer v Glazer* 1959 (3) SA 928 (W):

"The scale upon which she is entitled to litigation in my view is a scale commensurate also with the means of the parties. People in this position are not expected to litigate upon the basis that they have to watch every penny that is spent on litigation. Litigation can be conducted luxuriously or economically. I do not say that she is entitled to every luxurious expense in litigation, but she is entitled to litigate upon the basis you would expect rich people to litigate. She is the wife of a rich man who is obviously going to litigate against her on a luxurious basis. In this comparatively simple preliminary application he has appeared through senior counsel and junior counsel. I think she is entitled to litigate upon somewhat the same sort of scale as that upon which he can be expected to litigate. I do not think, on papers, that it is going to be a simple action. There are obviously very difficult questions of fact to be decided in the sense that there is bitter opposition to her action and bitter counter-arguments by him, equally strenuously denied by her. Obviously, if the matter be not settled, it would be a heavily disputed action required experienced legal skill for its proper preparation and presentation. If he is to employ the best possible legal assistance obtained by means of his wealth, she is entitled to be assisted upon a somewhat similar scale. I think that at this stage she is entitled to quite a considerable contribution towards her costs."

[21]. It is in the final analyses clear that the applicant does have a capital base from which she can augment her own maintenance. If regard is taken to the financial statements pertaining to the applicant's business it seems clear that the business also generate some income albeit on her version a very small amount.

[22]. Having heard counsel and having read the papers it is ordered, *pendente lite*:

22.1. That the parties retain parental rights and responsibilities in respect of the minor child born from their marriage;

22.2. That the Respondent contribute towards the maintenance of the minor child and the applicant as follows:

22.2.1. By making timeous due payment of the following expenses, directly to the service providers:

(i) Accommodation at 132 Senior Drive, Northcliff, Johannesburg, Gauteng Province;

- (ii) Water and electricity;
- (iii) Domestic Worker;
- (iv) Gardners;
- (v) Ballito domestic;
- (vi) DSTV premiums;
- (vii) Medical Aid premiums (Bankmed);
- (viii) School expenses;
- (ix) Medical expenses and shortfalls, including pharmacy;
- (x) BMW X3 motor vehicle payments, including insurance and maintenance;
- (xi) Car tracker;
- (xii) License;
- (xiii) Internet access.

22.2.2. By making payment to the applicant of a sum of R400,00. 00 (Forty Thousand rand) per month, on or before the first day of every month. The abovementioned amount shall include the credit card amount of R25,000.00 (Twenty Five Thousand rand) and a cash payment of R10,000.00 (Ten Thousand rand) per month into the applicant's account.

22.2.3. By retaining the applicant and the minor child, at his costs, as dependents on his current medical scheme, or a scheme with analogous benefits, and by paying the monthly premiums (and any escalations) timeously and on due date and by bearing the costs of all reasonable expenditure in respect of medical, dental surgical hospital, orthodontic and ophthalmological treatments needed by the applicant and the child not covered by the medical aid scheme, including any sums payable to a physiotherapist, occupational therapists, speech therapist, psychiatrist, psychologist and chiropractor, the costs of medication and the provision, where necessary, of spectacles.

22.2.4 By effecting payment of the child's educational costs, such costs to include, without limiting the generality of the foregoing, all secondary and tertiary fees, additional tuition fees, the costs of extracurricular school and sporting activities and the costs of all extramural activities in which the child participates, as well as the costs of all books, stationary, school uniforms, equipment and attire relating to the child's education and her sporting and/or extramural activities.

22.3. That the respondent be ordered to make an initial contribution towards the applicant's legal costs in a sum of R20,000.00(Twenty Thousand Rand);

22.4. That costs hereof be costs in the divorce action.

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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