

SOUTH AFRICA / JUDGMENT

N.H.F v J.P.M.F (22/22113) [2023] ZAGPJHC 1396 (30 November 2023)

[2023] ZAGPJHC 1396

COURT

South Gauteng High Court, Johannesburg

BEFORE

SC Mia

CASE / FILE NUMBER

22/22113

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG

Case Number: 22/22113
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
In
the matter between: F:
N H
Applicant
And
F:
J P M
Respondent

JUDGMENT

- [1] The applicant brought an application in terms of Rule 43 for interim relief to regulate the respondent's contact with the minor children born of the party's marriage as well as for interim maintenance. The relief requested was opposed. The respondent lodged a counterclaim. Whilst interim relief is intended for speedy, expedited relief, neither the applicant nor the respondent's applications were brief. The applicant's founding affidavit and annexures were over 300 pages; the reply and response to the counter application was 196 pages, whilst the respondent answered the affidavit and counter application were equally voluminous. The respondent filed an application to strike out paragraphs 13 to 22, 32 to 35, 90 to 241, 256 to 267. The evidence was permitted and the respondent was authorised to file a sworn reply thereto.
- [2] A brief background is necessary prior to considering the issues. The applicant is the plaintiff, and the respondent is the defendant in the divorce action. They are joint owners of the immovable property they resided in as a family. According to the applicant, she contributed the major portion of the costs to setting up the matrimonial home, which included the cost of the renovations to the property. The parties do not reside together at present. The respondent moved out of the parties' family home in June 2022. The applicant now resides at the family home with the children, a daughter aged 7 years old and a son aged 3 years old.
- [3] According to the applicant, she utilised her income to maintain the family home and minor children from June 2022, when the respondent moved out. Her income is derived from her assets, which she inherited, and she has business interests in three companies, which are non-operational. The companies' assets have been sold, and she expects she will receive 25% of the profits after all the debts have been settled. To date, she received R 620 000 in lieu of the sale of the product registrations. She expects further additional income to be paid by the end of 2023. She utilised the amounts she received to maintain herself, the children, and the family property since June 2022 when the respondent moved out of the family home. She has also effected necessary repairs to the property whilst they reside there. She wishes to be reimbursed for the costs of the repairs effected. She states she is unable to continue maintaining the family home from her income where both parties will derive a benefit from the sale fee.
- [4] When the parties lived together they each contributed R24 000 per month into a joint bank account to cover the household costs. The applicant paid the medical aid premium, whilst the company that employed the respondent paid the children's school fees. The respondent is still employed at the same company. The respondent still pays the school fees of the minor children. He has stopped contributing the R 24 000 into the joint bank account after he moved out. Instead, he has paid the amount of R10 000 per month into the parties joint bank account. The applicant maintains this amount is insufficient for the maintenance of herself the minor children in the household.

- [5] The issues for determination having regard to both hearings are the contact the children may have with their father and the maintenance that he is required to pay for the children and toward the applicant.
- [6] The applicant seeks an order that parental responsibility be retained by both parties jointly and that primary residence be awarded to her whilst the respondent be permitted contact in three phases. The first phase of contact is subject to supervision on condition that the respondent undergoes a breathalyser test confirming he is not under the influence of alcohol and remains sober throughout the period of contact. The second phase is subject to the respondent providing a hair follicle test and a clean liver function test for one year by an independent laboratory nominated by the applicant before the second phase commences and after a forensic psychologist has investigated and recommended unsupervised access be introduced and phased in. The third phase is to be commenced on condition that the respondent undergoes a nine-month rehabilitation programme and once the younger minor child commences Grade 0.

Contact

- [7] The applicant bases her request for supervised restricted contact which should be phased in over a period of time on her view that the respondent abuses alcohol. She submitted video footage indicating the respondent is under the influence of alcohol at various times whilst with the children and whilst in public. Her concern is for the care of the children should the respondent have unsupervised access and consumes alcohol to the extent that he is unable to care for the minor children. I appreciate the applicant may have a valid concern about contact. This aspect needs further investigation prior to contact being permitted without supervision. Whatever concerns the parties may have they should not lose sight of the fact that it is the children's right to have a relationship with their parents. To this end the parent responsible for the primary care of the children should ensure that contact occurs in a responsible manner.
- [8] The applicant's concern is that the respondent will be unable to provide adequate care for the children can be mitigated by supervised contact until the issue is addressed by a comprehensive investigation. The instance when the applicant contacted the minor child during a contact visit and the child reported that the respondent was asleep and would not wake up suggests that the respondent was not available to attend to the children's needs but requires further investigation to limit contact as envisaged by the applicant. The videos submitted by the applicant give an unfavourable impression of the respondent. The videos however would have been taken by the applicant at opportune moments when she was aware the respondent was consuming alcohol and

does not give an accurate account of a month in the life of the respondent. I accept however that there is concern and it is sufficient to refer the issue to investigate whether this pattern persists to what extent and how it impacts on contact with the children. In view of this, the issue of contact should be investigated by the Family Advocate or a forensic psychologist with a view to informing a more comprehensive extended contact arrangement.

[9] The respondent lodged a counter application seeking joint residency where the children spend equal time with each parent. Counsel

argued that this would result in the children alternating and spending a week at each parent's home. The applicant disputes the

medical report submitted by the respondent regarding his liver function test and seeks an independent hair follicle test and liver

function test before the contact is determined and finalised. The contact the applicant seeks to introduce may be informed by her

fears, however the limited contact between the children and the respondent will not support the children's relationship with

the respondent. At present, it appears from the short video submitted by the applicant that the children, at least the older of the children, seeks to include the respondent in the family group as opposed to seeking isolation or estrangement. Regarding the footage as well as the children's need for contact with their father, an interim arrangement is required. In the interim, the children should be permitted to see their father on alternate weekends for day visits on Saturday and Sunday from 9h00 to 17h00 under the supervision of a mature family member. The family member could be one of the respondent's family, a friend or a caregiver. The contact for the long term should be investigated as indicated above. Where the parties unable to agree to a forensic psychologist and that is the decided route such person can be identified by the chairperson of the family law practitioners forum.

Maintenance

[10] In respect of maintenance, the applicant seeks maintenance in respect of herself as well as the children. I have considered the applicant list of expenses as well as the parties' lifestyle and income. I have indicated that the applicant is not indigent. She is a businessperson and in the process of selling a business. A further entity has been registered. On the papers before me no case has been made out for the applicant to receive maintenance from the respondent.

[11] The applicant requested a cash contribution in the amount of R10 000 per month to cover rates, water refuse, electricity, gas, insurance, and fibre, including various other costs related to the property and maintenance of the property and home. These costs were also to be increased according to the consumer price index plus 25% each year. In view of the order being aimed at interim maintenance with a view to the parties seeking to settle the divorce

as soon as possible the request that the respondent cover the month living expenses of the home in which the applicant resides and the property she seeks to claim as she make a major investment in, it does not make sense that the respondent should be maintaining the applicant's investment. Any value he contributes to the property should be to secure the family property and securing the children's comfort. The request that the respondent reimburse her for 50% of the value of the generator at the matrimonial home which was valued at an amount of R 111 000.00; does not make sense as the generator is not in use and the applicant has replaced the generator with an alternative system which was installed without consulting the respondent in respect of the costs. The changes the applicants seeks to make she claims as improvements she must be compensated for and at the same time she seeks compensation for the parts she is no longer utilising. She seeks a double benefit. The applicant will realise the costs of her improvements in any event when she sells the property.

- [12] I had regard to counsel for the applicant's submission that the parties financial standing during the marriage should inform the interim maintenance order. She placed reliance on the decision in *Young and Coleman*[1]. This financial position should take account of both parties financial standing. The applicant is a businessperson with business interests which are being sold at a substantial price. In short, she is not financially indigent and has a good business acumen having regard to the business interests. On her own version she has invested more of her own funds into the family home than the respondent. This is evident from the generator that she seeks to have reimbursed, the renovations she effected to the property that has caused the property to increase in value. She maintains that the property has increased in value because of her investment in the property. She was also able to cover medical expenses in the amount of almost R300,000 that were not covered by the medical aid. She also maintained that she paid the medical aid.
- [13] When regard is had to the table set out in the applicant papers, the calculation places the estimate of the necessary expenses at R19 766.44 under the children's column which allows for lodging, food, toiletries, rates, electricity, gas, laundry, school lunches, fibre, cellphones, domestic helpers, gardener, flowers, swimming pool. This amount did not include clothing which was estimated at R5 555.85, and included school uniforms which only formed R524 of this amount, haircuts at R213, a vehicle cost at R4 760.63, educational costs which included gifts(R5 353.96) at R18 143.66, reading material at R194.00, pets at R1281.00. The total cost of maintaining the children amounted to R99 707.81. The cost of fibre was an unknown expense and a duplication of technology costs.
- [14] Having regard to the parties financial position informing the maintenance of the children, it appears that both parties are

financially stable and enjoy a very comfortable lifestyle. What is required is adequate maintenance for the children according to their standing rather than that the parties being involved in each other's financial affairs. The respondent has indicated that he will continue to be responsible for the school fees and related costs. I do not regard his contribution as insignificant.

I consider the applicants requirement in the context of securing “ensure a fair trial or hearing... [and] to secure [an] inexpensive and expeditious completion of litigation.....” as suggested in Eke v Parsons[2]. The respondent has not shown a need for spousal maintenance and the respondent is only is required to provide spousal maintenance where the applicant proves a need, the duty to provide and receive spousal maintenance depends on the applicant’s need, which is not unqualified.[3] On the facts before me I am not persuaded that the applicant has demonstrated that she requires spousal maintenance. I am also not persuaded that the applicant is entitled to arrear maintenance in the amount of a once-off cash component of R298 289.79. for, inter alia, the matrimonial property maintenance and repairs not paid/contributed from June 2022. This is so because the property will eventually be sold, and the applicant maintains that she contributed the bulk of the investment and she will claim her portion of the investment in the property.

[15] The medical costs appear to be more contentious in that the parties disagree on the nature of treatment required by the children and the cost incurred are in dispute. Each party seeks to have the children registered on their own medical aid. There is no reason to change the current medical aid provider if the applicant covers the monthly medical aid levy due. Should the children require treatment that is not covered by the medical aid, the parties will jointly be responsible for the costs associated therewith and will be required to consult each other, it being for their shared account. If the respondent exercises equal control as a parent the children need not endure unnecessary medical procedures.

[16] For the reasons above, I grant the following order:

ORDER

1. The parental rights and responsibilities in respect of the care and contact of the minor children is awarded to the parties jointly;
2. The primary residence of the minor children to vest with the applicant subject to the respondent’s right of reasonable

contact as set out hereinunder.

3. The appointment of Tanya Kriel as Parental Coordinator with the specific function to mediate issues that come up during the contact

period. The cost of the Parental Co Ordinator is for both parties’ account. The appointment of the Parental Co Ordinator ends after the forensic report and recommendations become available.

4. The respondent shall exercise the following contact with the minor children:

4.1. The respondent shall exercise supervised contact with the minor children in the presence of the a third party and/or registered

social worker at an agreed location OR HIS HOME, provided that the respondent submits a breathalyser test indicating that he is not under the influence of alcohol and on the provision that he remains sober throughout the duration of the contact with the minor children as follows:-

- 4.1.1. Twice during the course of the working week from 16h30 to 19h00, subject to the minor children's extramural activities and as agreed between the parties;
- 4.1.2. On Saturday and Sunday from 08h00 – 14h00 or as previously arranged between the parties on alternate weekends;
- 4.1.3. The respondent is to have telephonic access to the minor children between;
- 4.1.3.1. The hours of 06h30 and 19h00 during weekdays, and;
- 4.1.3.2. 06h30 and 19h00 during weekends on the days that no contact is exercised and depending upon their set routines or as agreed;
- 4.2. the Family Advocate or a private forensic psychologist as the parties agree, shall investigate and report upon the best interest of the minor children regarding the respondent's position of phasing in of unsupervised contact;
- 4.3. The respondent is to pay for the associated costs of a private forensic psychologist.
- 4.4 The contact shall remain as provided above until the forensic report provides an alternative recommendation.
- 4.5 Upon receipt of the recommendation either party may approach the court on supplemented papers to vary the order with regard to contact.
- 4.6 The Applicant shall be entitled to have the minor children with her on Christmas day.
- 4.7. The respondent shall be entitled to have the minor children with him on Christmas Eve
- 4.8. Easter weekends shall alternate between the parties.
- 4.9 The applicant shall have the right to have contact with the minor children on her Birthday and Mother's Day.
- 4.9. The respondent shall have the right to have contact with the minor children/ on his Birthday and Father's Day.
- 4.10. The parties shall mutually share contact with the minor children on their birthdays.
- 4.11 Whilst the minor children are in the care of the respondent, the applicant shall be entitled to reasonable telephonic contact with the minor children, depending on the minor children's set routines.
- 4.12. Each party shall be entitled to: -
- 4.12.1 Attend the minor children's school, sporting, extra-mural and religious activities;
- 4.12.2 be provided with the other party's home address and contact telephone numbers as updated from time to time;

4.12.3 be provided with copies of health, educational and sporting reports, correspondence and records pertaining to the minor children;

4.12.4 The minor children shall be given the opportunity of having contact with both their paternal and maternal relatives;

4.12.5 In the event of either party being unavailable due to a social or employment-related commitment, the other parent (or their approved nominee) will be given the first option to care for and look after the minor children.

5. Neither party shall remove the minor children from the Republic of South Africa without the express written consent of the other, nor will either party apply for a visa or passport for the minor children without the written consent of the other, which consent shall not be unreasonably withheld;
6. Neither party shall relocate from the current city of residence without due consideration being given to the other party;
7. The respondent is ordered to pay a monthly cash contribution towards the maintenance pendente lite of the minor children as follows:-

7.1. The respondent to pay 100% of the minor children's school fees, and all related academic expenses such as extra murals, sports and equipment, stationery, books, school uniforms, extra lessons, school outings, by virtue of his own person or by virtue of his company directly to the school or service provider on or before the due date of the said expense;

7.2. The children shall remain on the applicant's medical aid;

7.2.1. The minor children's medical aid premium to be shared equally between the parties (50/50%);

7.2.2. All additional medical expenses not covered by the medical aid to be shared equally between the parties, provided the applicant has consulted the respondent prior to incurring the additional medical expense and the parties have agreed that the treatment is necessary;

7.2.3. 50% of any agreed medical costs not covered, or agreed "out-of-pocket medical expenses", incurred by the applicant on behalf of the minor children shall be reimbursed by the respondent to the applicant within seven (7) working days after the presentation of an invoice into her nominated account;

7.3. The parties shall share the costs in respect of the minor children's birthday party equally (50/50%) provided they have agreed on the event.

8. The respondent is ordered to pay maintenance pendente lite towards the children's maintenance as follows;

8.1 A cash contribution in the amount of R 10 000.00 (Ten Thousand Rand) per month all inclusive of towards monthly maintenance expenses not provided for elsewhere in this order.

8.2. The maintenance payable by the respondent for the children shall be payable through electronic funds transfer into the

applicant's nominated bank account as advised from time to time, on or before the first (1st) day of every month following the month during which the order pendente lite is granted;

9. The costs of this application are costs in the cause of the pending divorce action between the parties

SC Mia

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:

Adv. T Carstens

Instructed by Theron Inc Attorneys

For the Respondent:

Adv. S Georgiou

Instructed by Houghton Harper Inc

Heard: 25 July 2023

Delivered: 30 November 2023

[1]

[1956] 1All SA 413 (D) 1956 (4) SA 213 (D)

[2] Eke v Parsons 2016 (3) SA 37 (CC)

[3] Reyneke v Reyneke 1990(3) SA 927(E)

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Prepared on 9 October 2026 · Esheria