

SOUTH AFRICA / JUDGMENT

NM v AM (744/2021) [2021] ZAFSHC 112 (15 April 2021) [2021] ZAFSHC 112

COURT

Free State High Court, Bloemfontein

BEFORE

C.S. Parks

CASE / FILE NUMBER

744/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

no: 744/2021

In

the matter between:

NM
Applicant
and
AM
Respondent

JUDGEMENT

BY: PARKS, AJ

HEARD ON: 25 MARCH 2021

DELIVERED ON: 15 APRIL 2021

[1] This is an opposed Rule 43 of the Uniform Rules of Court.

- [2] Applicant initially sought inter alia primary care of the minor children fortnightly; maintenance pendente lite in respect of applicant in the amount of R7 200.00 and children in the amount of R5 000.00 per child; retained the applicant as beneficiary on medical aid of respondent; applicant to retain the use of 2014 Isuzu bakkie and a contribution towards applicant's legal costs.
- [3] Subsequent to the above were supplementary affidavits filed in respect of both parties incorporating the latest assessment report of the social worker Ms H Joubert. Whereupon the relief sought was amended to the extent that applicant wants to exercise contact with minor children once a month for a week; one short school holiday and half of the long school holidays once a month.
- [4] Applicant had instituted divorce proceedings under case number 56/2021 in this division.
- [5] It is also of importance to mention that the applicant had previously instituted divorce proceedings under case number 3353/20 and a Rule 43 application under case number 3354/20, which were both withdrawn on 23rd November 2020 in an attempt to save their marriage.
- [6] Parties are ad idem with the recommendations of Ms Joubert that primary care at this stage remains with the respondent pending the investigation and report from the Family Advocates Office.
- [7] The following are common cause between parties :
- 9.1 The applicant was a housewife primarily taking care of the children when they were still living together as a family.
- 9.2 The respondent is a farmer by profession.
- 9.3 During November 2020 whilst trying to save their marriage, the children were in the applicant's care until their removal by the respondent on 2 December 2020.
- 9.4 The applicant had relocated in December 2020 to George and is currently cohabiting with Mr E who she appears to be in a relationship with.
- 9.5 The applicant had seen the minor children on 26th December 2020 and wanted to take the children with her to George but respondent refused.
- 9.6 On 13th January 2021 on the eldest daughter's birthday, the respondent allowed the applicant to have contact with both minor children on certain conditions.
- [8] The applicant averred that whilst she was still at their communal home, the respondent had worked from early hours in the morning until late at night and therefore unable to look after the children.
- [9] According to the applicant, the respondent leaves the children on a daily basis in the care of the domestic worker when they are not at school.

- [10] The applicant averred that the respondent does not allow her to see the children in the presence of Mr E for many reasons advanced and portrays her as a bad mother.
- [11] In conclusion, the applicant stated that the respondent has the financial resources to pay spousal maintenance and contribute to her legal costs since the respondent and his 2 brothers have extensive commercial mixed farming enterprises.
- [12] Respondent in his opposing paper averred that the applicant is short-tempered and impatient with the minor children. This is confirmed by affidavits filed in the indexed bundle as Annexure “C1-C3” detailing a fight that ensued between the applicant and her brother on 28 November 2020.
- [13] The respondent had advanced his reasons for not feeling comfortable allowing the children to visit the applicant in the presence of Mr E.
- [14] The respondent averred that his financial position has changed due to his brothers’ unhappiness to reconcile with the applicant, which resulted in his resignation from the Close Corporation. A list of his expenses marked as Ann “I” forms part of the indexed bundle reflecting that he can barely make ends meet.
- [15] The respondent stated that he is unable to contribute towards her legal costs due to financial constraints. He opposed paying maintenance to the applicant since she is currently residing with the person who she had an extra-marital affair.
- [16] In conclusion is the averment made that the respondent has the best interest of the minor children at heart and will not refuse visitation by the applicant on condition that Mr E is not present during these visitations.
- [17] The respondents’ counsel argued and highlighted the case of *Carstens v Carstens* 1985(2) SA 351 (SE) in that it’s against public policy that a woman should claim maintenance if she is staying with another man.
- [18] Uniform Rule 43 reads as follow :

43 Interim relief in matrimonial matters

- (1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
- (a) Maintenance pendente lite;
 - (b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;
 - (c) Interim care of any child;
 - (d) Interim contact with any child.

- [19] In *Taute v Taute* 1974(2) SA 675, the court held that the applicant is entitled to reasonable maintenance pendente lite dependent upon 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.
- [20] In *EH v SH* 2012 (4) SA 164 (SCA), Leach JA opined the following : "I do not think in the modern, more liberal (some may say more 'enlightened') age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse. Each case must be determined by its own facts".
- [21] The entitlement to maintenance pendente lite arose from the general duty of the husband to support his wife and children.
- [22] When the issue of maintenance is raised, is the question always whether the person has the need for the maintenance requested and secondly whether the opposing party has the ability to pay the maintenance.
- [23] The applicant had relocated to George out of own choice. She is currently employed and earns a salary of R6000.00 per month. She is on the respondent's medical aid and the children are currently in the care of the respondent. When I consider her expenses detailed in her founding affidavit, I am of the view that the applicant's salary is sufficient to cover her necessary expenses.
- [24] However, in order for the applicant to exercise her contact rights with the minor children would need her to travel which is an unforeseen expense. The applicant had initially prayed for primary care of the minor children and did not expect circumstances to change. I will as a result make a suitable order that would assist the applicant to exercise her contact rights with the minor children.
- [25] Regarding the relief sought for contribution towards the costs, have I considered the financial position of both parties. The salary that the applicant earns is far less than the respondent's salary. I have considered the reason proffered by the respondent for his inability to contribute. I do not believe that the respondent is financially worse than six months ago mainly due to his siblings decision to no longer assist him financially and his resignation from the Close Corporation. The company he works at pays almost most of his expenses. He is also farming with his siblings and I doubt if one brother will be financially more stable than the other. I am therefore of the view that the respondent is financially on a better footing than the applicant and will grant the contribution order as prayed for.
- [26] When it comes to the care and/or contact of children is this court the upper guardian of minor children. I therefore have to consider what is in the best interest of the two minor daughters currently aged six and four respectively.

- [27] I have considered the content of the reports compiled by Ms Joubert as well as the allegations made by various people such as the brother to the applicant and the pastor they both had seen at the time when they tried to restore their marriage.
- [28] In the report relating to the eldest daughter, it appears that even though the father leaves home early and sometimes returns home late at night, they are never alone at home. The father is strict and affectionate. The mother on the other hand, even though strict, shouts and hits them a lot that makes the eldest daughter feels sad to the extent that she feels her mother is angry with her. Ms Joubert recommends additional contact between mother and children.
- [29] In the report relating to the youngest daughter, she had identified her father as the most significant figure and the preferred parent to reside with. Her father is affectionate and disciplined. She also describes her mother as strict and gives them a hiding a lot. She perceived her mother to prefer the company of Mr E than spending time with her.
- [30] It is evident from the assessment report that both daughters knew that their father does not like Mr E for reasons unknown to them and resulted in them not seeing their mother. Both daughters' gets along with Mr E, the eldest daughter perceives him as friendly, makes her happy and has no fear towards him. The youngest daughter is more reserved towards Mr E but accepts his involvement. She is comfortable and relaxed in his company. The conclusion of Ms Joubert is that the children are not considered at risk in Mr E's mileu and the father should refrain from sharing his opinion of Mr E with the children. I agree wholeheartedly with
- the latter suggestion of Ms Joubert.
- [31] These two girls at their tender age are now in the midst of these divorce proceedings. One can clearly get the idea that they do not want to choose sides. When they are in the company of one parent then they miss the other. The children in their fantasy world wish that their parents would reunite, as they do not want to be separated from their parents.
- [32] This is a path that no one would wish upon his or her enemy. At the tender age of 4 and 6 respectively, these two girls must be conveyed between two households to spend as much time as possible with their respective parents in order to maintain the relationships with their parents with the least amount of disruption possible.
- [33] The fate of the two minors girls are the result of the choices exercised by their parents. The parents must, for the emotional well-being of their children, put their differences aside and more specifically must the respondent stop voicing his opinion of Mr E towards the minor children. The parties must raise their children in the best environment that children could possibly be raised even though living apart.

[34] I am therefore of the view that contact between applicant and the minor children are very important in order to recover and re-establish the bond between mother and daughter respectively and will grant same, as ordered below.

ORDER

[35] I therefore make the following order:

1. Primary care of the two minor children remains with the respondent pendente lite subject to contact with the applicant on the following basis :-
 - 1.1 The April school holiday in Bloemfontein.
 - 1.2 The first half of the July school holidays in Bloemfontein/George on condition that the applicant has attended a parental guidance program prior to collecting the children and advances same to the respondent's attorney.
 - 1.3 The first half of the December school holidays in Bloemfontein/George
 - 1.4 Once a month, the 3rd week of each month with effect from May 2021 from Monday 16h00 to Thursday 16h00 in Bloemfontein except if this period falls within the school holiday allocated to applicant.
2. Respondent is ordered to pay monthly an amount of R2000.00 to the applicant towards travelling expenses in order to exercise her visitation rights with the minor children on or before the 15th of each month, starting May 2021.
3. The respondent to retain the applicant as a dependant on his medical aid pendente lite.
4. The respondent to contribute towards the applicant's legal costs in the amount of R20 000.00. The first instalment of R5000.00 is payable on or before 15th May 2021 and thereafter on/or before the 15th of each consecutive month for the remaining three (3) months.
5. Applicant to retain use of the 2014 Isuzu bakkie pendente lite.
6. Costs of this application to be costs in the cause.

C.S. PARKS, AJ

For the applicant: Adv Coetzer

Instructed by:

Honey Attorneys

BLOEMFONTEIN

For the respondent

Adv Johnson

Instructed by:

Phatshoane Henney Attorneys

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Prepared on 13 October 2026 · Esheria