

SOUTH AFRICA / JUDGMENT

N.S.F v R.H.F (2024/060778) [2025] ZAGPJHC 534 (2 June 2025)

[2025] ZAGPJHC 534

COURT

South Gauteng High Court, Johannesburg

BEFORE

N S Krüger

CASE / FILE NUMBER

2024/060778

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2024-060778

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In

the matter between: N[...]
 S[...]
 F[...]
 Applicant
 and
 R[...]
 H[...]
 F[...]
 Respondent

JUDGMENT

N S KRÜGER AJ:

Summary

Rule 43- maintenance pendent lite- orders sought in respect of what the respondent currently is paying and is willing to continue paying as well as to resume paying an allowance he has discontinued paying and is not willing to pay- contribution towards costs

Introduction

- [1] The parties married in community of property on 21 September 1997. The applicant is a school teacher and the defendant is a businessman. The applicant currently is some 54 years of age and the respondent 60.
- [2] A son was born of the marriage on 25 July
1999. At the time of the hearing of this application he is 26 years old. He remains dependant.
- [3] The applicant instituted divorce proceedings in this court on 3 June 2024. In January 2025 the applicant launched these proceedings. In summary applicant seeks an order for the respondent to:
- a. resume payment in the amount of R 25 000,00 which he had been paying but discontinued following the issue of summons in the divorce proceedings;
 - b. continue making a monthly contribution in respect of the dependent child;
 - c. continue making payment relating to the dependant child's education at university, monthly instalments in respect of the mortgage loan held in favour of FNB Ltd, the applicant's water, electricity, rates and taxes in respect of the matrimonial property, the applicant's cell phone contract and all costs related to the upkeep of the applicant's motor vehicle as well as the maintenance and upkeep of the dependant child's motor vehicle;
 - d. continue paying for costs pertaining to household repairs and maintenance of the matrimonial property;

- e. continue servicing the applicant's vehicle asset finance loan in the amount of R 6 114,26 monthly as well as the applicant's personal loan in the amount of R 5 157,48 monthly;
 - f. pay a contribution towards the costs in the divorce action and pay the costs of the R 43 application on an attorney and client scale in terms of Scale C.
- [4] During 2002, the applicant and the respondent purchased the former matrimonial property. In 2004 the applicant resigned from her employment as a teacher at a secondary school. She took care of the dependant child prior to him entering Grade R in 2005. The respondent left his previous employment in 2006 to pursue his own businesses.
- [5] In broad summary, the applicant after having left his previous place of employment started a business offering tours to the Victoria Falls. According to the applicant, her pension pay out following upon her resignation in the sum of R 100 000,00 was utilised towards establishing the business which was conducted in a registered closed corporation. She served as office manager. According to the respondent, the business became untenable around 2013 due to consistent economic decline in Zimbabwe and was closed down and remains so, though its returns are still being rendered.
- [6] The applicant then started selling beauty products soon followed by selling toilet paper and rentals of container park space. He rented a property in Vryburg and lived there to attend to the businesses, returning home from time to time. Eventually he moved to Vryburg permanently with a view towards him going home for two weekends per month and the applicant visiting in Vryburg two weekends per month. The applicant and the respondent decided to buy a property in Vryburg for the benefit of the dependent child. It is registered in his name. It is the respondent's primary residence.
- [7] Around 2016, the parties, according to the respondent, jointly decided to purchase a liquor store which has a tavern attached to it as well as a jazz club on the premises upstairs.
- [8] Absence appears not to have made hearts grow fonder. The applicant issued summons for divorce. Prior to the issue of the summons, the respondent had paid the applicant, in addition to what he had been paying as set out above, a sum of R 25 000,00 per month which the applicant typifies as an 'allowance'. This the respondent soon discontinued which, according to the respondent, precipitated this application. The respondent alleges that he is no longer able to afford payment of the said allowance as he is "...completely stretched financially and substantially covers the applicant's living costs to the extent that the applicant in fact has absolutely no major expenses."
- [9] In his answering affidavit the respondent recorded that he currently and willingly is making payments of all expenses in respect of the former matrimonial home, the applicant's two motor vehicles as well as her cell phone, all loans, inclusive of the applicant's personal loan, the dependant child's motor vehicle, his three properties in Vryburg as well as a R 10000

monthly cash contribution to his monthly expenses. The respondent declared that he shall continue paying these expenses which he

regards to be his responsibility.

[10] From the above, the essential disputes between the parties are firstly whether an order should be made for payment of the allowance in the sum of R 25 000,00 per month to be resumed, secondly an order be made for the respondent to continue to pay that which it is common cause he is currently paying and thirdly, whether the respondent should be ordered to pay a contribution towards the applicant's costs. In this respect the applicant, in her supplementary heads of argument the applicant seeks to amend prayer 7 of the notice of motion to read:

"That the respondent pays an initial contribution of R 97 338,85 towards the applicant's estimated legal costs related to the main divorce"

The parties' submissions and arguments in summary

[11] The applicant records that the respondent was the prime provider during the course of the marriage. In her founding affidavit, the applicant sets out a multitude of expenses. She states that there are various costs she pays for, which the respondent reimburses. The applicant states that "all the above amounts will be detailed and/or substantiated in my financial discovery. I therefore request that the Court refer to same as though they were specifically included herein so as to avoid a lengthy affidavit." I assume the financial discovery referred to is the applicant's Financial Disclosure Form ("FDF") as she omits specifying any other documents she intends to rely upon and it appears no discovery by either party has been made or called for in terms of Rule 35 of the Uniform Rules of Court.

[12] In the applicant's FDF under the heading "MAINTENANCE REQUIREMENTS" it is stated that "Maintenance needs for yourself and for any children living with you or provide [sic] for by you. All figures should monthly" (not annual, termly or weekly) [sic] You must not use a combination of these periods. General household expenses should appear on in [sic] the "total column whereas expenses to you or your children...should appear in the appropriate column as well as in the total column). The FDF consists of 4 columns, the heading above the first being "EXPENDITURE". The heading of the second column is "Self", the third "Child/ren" and the fourth "Total". Numbers towards maintenance requirements all appear under the "Total" column, none under either "Self" or "Child/ren". The total amount recorded is R 48 740,16.

[13] In short, the applicant's case is that the respondent is a wealthy and acute business man who is well able to afford continuing payment of the allowance in the sum of R 25 000,00, above and beyond what it is common cause he is already paying, as well as a contribution towards costs. During the course of the marriage the respondent was the primary income earner who provided for her and the major dependant child's needs.

- [14] Attached to the founding affidavit is a letter from the applicant's attorneys dated 18 October 2024 seemingly addressed to the applicant. It contains an estimate of the anticipated costs relating to the divorce: R 226 292,47 towards the action and R 67 562,50 towards the Rule 43 application.
- [15] In his answering affidavit, respondent alleges that he is currently sinking in debt. He draws an income of around R 62 000,00 per month. He is making payments in the total amount of around R 80 147,00 per month towards the applicant, the major dependent child and the previous matrimonial home. These consist of:
- a. R 18 834,00 per month towards the major independent child which includes a R 10000,00 cash contribution for him; R 1 900,00 for his cell phone and R500 towards fuel shortfall from time to time; R800,00 for maintenance to his vehicle and R 134,00 towards insurance (the vehicle is registered in Botswana); R 5 500,00 towards tertiary education fees including textbooks and stationary;
 - b. R 20 013,45 for the applicant specifically which includes R 6 111,27 in respect of the Range Rover Evoque used by the applicant as well as R 964,70 for its insurance premium; R 5 157,48 towards the applicant's personal loan; R 5000,00 for the applicant's vehicles; R 1 900,00 towards the applicant's cell phone; R 880,00 for the domestic helper;
 - c. R 41 300,00 which includes R 16 000,00 towards the mortgage bond of the former matrimonial home; R 22 000,00 for rates and taxes which includes payment on arrears; R 3 000,00 maintenance for the house; R 300,00 for the swimming pool.
- [16] On behalf of the respondent it was contended that the respondent is not able to afford the resumption of the allowance he had paid to the applicant previously. It is contended the applicant has failed to demonstrate that she in fact reasonably require payment in the sum of R 25 000,00 per month. As regards contribution to legal costs, the respondent contends the applicant has failed to demonstrate she has insufficient funds to make payment of her legal expenses.

Consideration

- [17] It is for the applicant to establish a need to be supported.[1] She is entitled to reasonable maintenance. Generally, in determining the extent of maintenance payable by one party to the other in divorce proceedings, a court may have regard to the existing and prospective means of the parties, the duration of the marriage and the standard of living of the parties prior to the divorce, their conduct relevant to the breakdown of the marriage and any other factor which in the opinion of the court finds just.[2]
- [18] The respondent's conduct in making the payments which is common cause he is paying and which he stated in his answering affidavit he is willing to continue paying, bears some weight. The applicant records in her founding affidavit that in January 2025 the respondent

gave her R 15 000,00 towards her holiday to Victoria Falls. In the same month he paid an amount of R 1092,50 for repairs when a facia board fell off the former matrimonial home. She also states there are various costs she pays for, which the respondent reimburses her. This is indicative of a willingness not to evade his lawful obligations.[3]

- [19] At the time of the hearing the applicant had been gainfully employed for a period of some 4 years as an educator. Her net income is just short of R 20 000,00 per month. It is not disputed that she has been able to set aside R 179 389,12 towards a nest egg or emergency fund. The applicant has a pension fund, medical aid as part of her salary contribution, funeral cover and an insurance policy for the dependent major child, her mother as well as herself.
- [20] From the founding affidavit it is not clear exactly what monthly shortfall the applicant experiences, if any. It does not wholly accord with what was set out in her FDF, in which her maintenance requirements is stated to be R 48 740,16, which includes payments she is alleged to make for her mother as well as certain payments which it is common cause the respondent is making. Nowhere is it stated, with any degree of clarity, what the applicant's monthly shortfall is alleged to be. It is disappointing and a sorry state of affairs. For the purposes of determining any shortfall the applicant may have, I use the applicant's FDF as a point of departure.
- [21] A salary advice dated 20 January 2025 is annexed to the applicant's founding affidavit. Her earnings is recorded as being R 27 802,00 plus R 1 784,55 towards housing. Several deductions are made, leaving the applicant with a net income of R 19 820,58, which is the sum I use in calculating the applicant's shortfall. Amongst the deductions made are R 2 085,15 for GEPF as well as R 2 650,00 for GEMS. The latter amount claimed by the applicant in her FDF towards maintenance is disallowed.
- [22] I am not inclined to include expenses incurred by the applicant for the benefit of her mother. There are other siblings and family who is liable to contribute to the upkeep of the applicant's mother. In any event, no case has been made by the applicant that her mother requires financial assistance. In the result the amounts of R 5 700,00 for the mother's bond, R 320,00 for her cell phone, R 290,32 for her policy and R 2 500,00 in respect of food are deducted.
- [23] As the respondent is paying towards the domestic worker and the applicant appears not to live in the former matrimonial home for the greater part of every week, the amount of R 900,00 is deducted. The amount of R 500,00 for maintenance to the swimming pool is disallowed as the respondent sees to the maintenance of the swimming pool and house. The amount of R 250,00 for a taxi is also disallowed as the applicant has transport available.

- [24] In my view, the amount claimed for fuel must be reduced to R 1 800,00 as the applicant no longer needs to travel as long a distance as before to her place of employment. The following amounts claimed are also reduced: lunches by R 800,00, plants by R 200,00, fresh flowers by R200,00 clothing and shoes by R 1 000,00, hair care by R 400,00, holidays by R 1 500,00, religious contribution by R 1 350,00, and charities by R 100,00.
- [25] The total sum of the reductions equals R 20 460,32, which leaves an amount of R 28 279,64 in respect of the applicant's expenses and costs. In the result, it appears the applicant has a shortfall of R 8 759,26 per month.
- [26] Rule 43 maintenance orders by its very nature obviously are intended to be interim and temporary. The calculation of the amount of maintenance to be awarded cannot and are not expected to be calculated with the degree of precision and closer exactitude which is afforded in the action, where the benefit of full discovery and enquiry into the financial affairs of the parties are available.[4]
- [27] In *Buttner v Buttner*[5] it was held that the court is enjoined to "...effect justice between the parties". This was expanded upon in *Botha v Botha*[6] that the concept of what is just contains a moral component of what is considered to be 'right' and 'fair', It envisages that an order is appropriate in reference to the other factors set out to be considered in section 7(2) of the Divorce Act. The moral component to be considered requires that it be well founded on the facts available within the ambit legal precepts.
- [28] The question arises whether the respondent is able to make any payment above and beyond what he is presently paying. He pleads relative poverty. To be sure, his willing contributions are substantial. In his answering affidavit he purports to explain the deficit, around R 20 000,00, between his willing contributions and the R 62 000,00 he draws as a salary as being financed on credit.
- [29] I am not persuaded the respondent is in such dire straits as to be unable to afford payment of the order I have in mind. For one thing, I found no plausible explanation as to the reason, nature and extent of his alleged constrained financial situation which has developed since the institution of the divorce. The various businesses he conducts are cash businesses. By its nature, the determination of income actually generated presents challenges, and may be manipulated. The respondent has various income streams. No financial statements, whether audited or not, has been made available to the court or to the applicant. In addition, no tax certificates or tax returns are available. The respondent's disclosure as recorded in his FDF has been guarded particularly in respect of income he personally has or has access to for his use. Having regard to the respondent's various subpoenaed bank statements, the applicant's counsel argued it is likely the respondent is being coy as regards his actual available income and assets. I agree. On the face of it, the total income put forth by the respondent appears incongruous and understated, regard being had to the prevailing circumstances.

- [30] Taking into consideration the age of the respective parties, the 27 years duration of their union as well as the difference between the parties' respective incomes and future likely opportunities, I am of the view that the respondent pay R 10 000,00 per month towards maintenance, previously framed as an allowance, to the applicant.
- [31] The purpose of a contribution towards costs is to enable a party in a divorce action who is financially at a disadvantage compared to the other party, to be placed in a position to adequately put her case before court. The extent of any contribution to be determined is in the court's discretion, having regard to the circumstances of the case, the financial position of the parties and the

issues

involved in the divorce.[7] Our courts have held that regard be had to the scale of the litigation which a respondent maintains and to ensure equality of arms between the parties.[8]

- [32] A court cannot disregard an applicant's own resources or income with which she can fund her legal costs. If resources or income is available, it needs to be established whether it is sufficient to enable the applicant to litigate on a scale commensurate with that of the respondent. If there is a disparity, a contribution must be ordered to bridge the divide.[9]
- [33] Taking the above into account, it is my view that a disparity of arms exists between the parties. The fact that the respondent conducts cash businesses and the difficulty it presents in establishing his income as well as net worth indicates the necessity of a thorough investigation into his business affairs. The value and extent of the joint estate of the parties consequent upon their marriage in community of property also will require meticulous investigation. This all will come at a cost.
- [34] The applicant has available the sum of R 179 389,12 which may be used towards payment of costs. It is not evident to me as to how the applicant arrives at a contribution for costs of R 97 338,85 to be made by the respondent. However, having regard to all the prevailing circumstances, it appears the applicant requires a contribution to be made towards her costs. I put the contribution at R 60 000,00 at this time.

Costs

- [35] The facts of this matter are not extraordinary. In my view, the opposition by the respondent was not frivolous, vexatious or in bad faith. In consequence and having regard to the prevailing circumstances, I decline to grant costs in either party's favour and leave it for the trial court to decide.

Order

Having regard to all of the above, I make an order in the following terms:

1. The respondent shall make payment in the sum of R 10 000,00 (ten-thousand Rand) per month, commencing on 7 July 2025 and thereafter on or before the 7th day of each succeeding month into the applicant's bank account, towards spousal maintenance pendente lite;
2. The respondent shall continue making the following monthly payments pendente lite:
 - a. R 10 000,00 (ten thousand Rand) in respect of the major dependent child;
 - b. Monthly repayments in respect of the mortgage bond loan held in favour of FNB Ltd under account number 3000 011 856 461 in respect of the former matrimonial home directly to the service provider;
 - c. Monthly payments towards the rates and taxes, water and electricity in respect of the former patrimonial property situated at [...] D[...] V[...], 4[...], [...]th Avenue, M[...], Johannesburg directly to the service provider;
 - d. Monthly payments in the sum of R 1 900,00 towards the applicant's cell phone directly to the service provider;
 - e. All costs related to the major dependent child's education at the University of Johannesburg, including but not limited to tuition, books and stationary directly to the service provider;
 - f. All reasonable costs for necessary maintenance and upkeep of the Mazda 3 with registration B[...] being used by the applicant. directly to the service provider;
 - g. All reasonable costs for necessary maintenance and upkeep of the Golf R32 with registration B[...] used by the major dependent child, directly to the service provider;
 - h. All reasonable costs for necessary maintenance and household repairs of the matrimonial property as and when the need arises;
 - i. Payment in the sum of R 6 114,26 towards the applicant's vehicle asset loan held with Wesbank Ltd under account number 8[...] by sending the said amount of R 6 114,26 to the applicant's Capitec Bank Account;
 - j. Payment of R 5 157,48 towards the applicant's personal loan held with Wesbank Ltd under account number 8[...] by sending the said amount of R 5 157,48 to the applicant's Capitec Bank Account;
3. The respondent shall pay an amount of R 60 000,00 a cost contribution in respect of the applicant's legal fees in the main divorce action. The said amount shall be paid in two tranches of R 30 000,00, the first no later than 7 July 2025 and the second no later than 7 August 2025.

N. S. KRÜGER

NAME OF JUDGE

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Electronically submitted

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 2 June 2025.

For the first applicant: Adv. S'thembile Shongwe instructed by TM Mahapa Inc Attorneys

For the first respondent: Adv. S. Meyer instructed by Ulrich Roux & Associates

Date of hearing: 26 March 2025

Date of judgment: 2 June 2025

[1] EH v SH 2012

(4) SA 164 (SCA) [13]

[2] Section 7(2) of the Divorce Act

[3] Taute v Taute 1974

(2) SA 675 (E) at 676H; JK v ESK [2024] 1 All SA 775 (WCC) [9.4]

[4] JK v ESK above [9.1]

[5] 2006 (3) SA 23 (SCA) at [24]

[6] 2009 (3) SA 98 (W) at [45]ff

[7] Van Rippen v Van Rippen 1949

(4) SA 634 (C) at 639

[8] Cary v Cary 1999

(3) SA 615 (C) at 621B-F; JK v ESK above at [52]

[9] AF v MF 2019 (6) SA 422 (WCC) at [48]; BJM v WRM [2023] JOL 58809 (GJ) at [49]ff

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