

SOUTH AFRICA / JUDGMENT

R.A v H.A (51793/2021) [2024] ZAGPJHC 123 (12 February 2024) [2024] ZAGPJHC 123

COURT

South Gauteng High Court, Johannesburg

BEFORE

Malindi

CASE / FILE NUMBER

51793/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

Case

No: 51793/2021

1.

Reportable: No

2.

Of interest to other judges: No

3. Revised

In

the matter between:

R[...] M[...]
A[...]
(IDENTITY
NO.: [...])
Applicant
And
H[...] R[...] A[...]
(IDENTITY
NO.: [...])
Respondent

Delivered:

This judgment was prepared and authored by the 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 12 February 2024.

JUDGMENT

MALINDI J

Introduction

[1] The applicant seeks relief as set out in the founding affidavit as follows:

1. “That respondent and I remain co-holders of full parental responsibilities and rights as provided for in terms of section 18(2) of the Children's Act, 38 of 2005 in respect of the minor child, M[...] A[...], (born 24 May 2006), including the parental responsibility and right to:
 - 1.1. Care for the minor child, subject to the minor child primarily residing with me and respondent having reasonable contact to the minor child.
 - 1.2. Act as guardian of the minor child.
 - 1.3. Have contact with the minor child, in particular, respondent shall be entitled to exercise contact to the minor child as follows:
 - 1.3.1. Reasonable contact as arranged with M[...] directly.
 - 1.4. Contribute towards the maintenance of the minor child, in terms of which:
 - 1.4.1. Respondent shall make payment towards the monthly maintenance of the minor child in the amount of R1000.00 per month which payment shall be made on or before the first day of each month to into a bank account nominated by me.
 - 1.4.2. The sum in paragraph 1.4.1 here in above shall increase annually commencing on the anniversary of the date of the order in line with the Consumer Price Index.

1.4.3. Respondent is to retain the minor child being a dependent on his medical aid scheme (which is to be a comprehensive medical aid scheme) and is to continue to pay the monthly premium in respect thereof.

1.4.4. Respondent is to be liable for all medical, dental, ophthalmic and/or other expenses in respect of the minor child not paid for by
the medical aid scheme.

1.4.5. Respondent shall be liable for the minor child's reasonable educational costs in respect of schooling, being the costs of tuition

fees, extramural activities, irrelevant clothes and equipment, school prescribed books and stationery, school prescribed computer equipment and software, school uniforms, compulsory outings and local school tours.

2. Respondent shall make payment towards the monthly maintenance of the major child (J[...] A[...], born 4 September 2003), in the amount

of R1000.00 per month which payment shall be made on before the first day of each month into a bank account nominated by me alternatively

into the major child's bank account.

3. The sum in paragraph 2 hereinabove shall increase annually commencing on the anniversary of the date of the order in line with the Consumer Price Index.

4. Respondent is to retain the major child as a dependent on his medical aid scheme (which is to be a comprehensive medical aid scheme) and is to continue to pay the monthly premiums in respect thereof.

5. Respondent is to be liable for all medical, dental, ophthalmic and/or other expenses in respect of the major child not paid for by

the medical aid scheme.

6. Respondent shall be liable for the major child's reasonable educational costs in respect of tertiary education, being the cost of

tuition fees, extramural activities, irrelevant clothes and equipment, prescribed books and stationery, prescribed computer equipment and software.

7. Respondent is to pay spousal maintenance to me in the sum of R4000.00 per month, which payment shall be made on before the first

day of each month into a bank account nominated by me.

8. Respondent is to retain me as a dependent on his medical aid scheme (which is to be a comprehensive medical aid scheme) and is to

continue to pay the monthly premiums in respect thereof.

9. Respondent will make payment of the amounts stipulated in annexure FA10 annexed hereto.
10. Respondent is to pay a contribution towards my legal costs in the amount of R100 000.00.
11. Costs of the application to be cost in the cause.
12. Further and alternative relief.”

The

issues

- [2] The primary issue is whether the applicant and the children are entitled to maintenance by the respondent pending the finalisation of the divorce proceedings which were instituted by the applicant in October 2021 in terms of Rule 43 of the Uniform Rules of Court.
- [3] The parties have summarised the common cause facts, and their respective contentions as follows.
- [4] The parties were married on 28 September 1996, at Roodepoort, out of community of property with the application of the accrual system.
- [5] There are two children born of the marriage relationship between the parties, namely a major son named J[...] A[...], (born on 4 September 2003) and 20 years of age; and a minor son named M[...] A[...] (born on 24 May 2006) and currently 17 years of age. He turns 18 this year. Both children reside with applicant and have so resided since the parties separated on 20 September 2019.

Background

and Submissions

- [6] The applicant has always been and remains the primary caregiver of the children.
- [7] It is also common cause that the parties agreed that the applicant will play a major role in the upbringing of the children during the marriage.
- [8] The applicant is a female freelance administrator and currently 48 years of age. The respondent is a senior sales and account manager, currently 50 years of age.
- [9] The applicant instituted divorce action against the respondent during November 2021. The respondent defended the divorce action and delivered a counterclaim therein.
- [10] The applicant states that she earns an average amount of approximately R7000.00 gross per month and that she has been

receiving gratuitous payments from her parents who are pensioners since September 2019 in order to assist in meeting her, and the

children's financial needs.

[11] The applicant has a pre-existing medical condition (scoliosis) and is in the process of being tested in respect of a recent mammogram. Scoliosis is a condition in which a person's spine has a S or C curve. There is no evidence whether this is a mild and stable condition of whether it is a progressive one which may cause health problems in the future. It is not absolutely necessary to establish this at this stage of the divorce proceedings.

[12] The applicant states that whilst they were living together, respondent earned an income of approximately R129 314.33 gross per month plus bonuses (this was at November 2019).

[13] The applicant does not know what the respondent currently earns, however, asserts that respondent still lives a lifestyle that is similar to that which they shared when they were together.

[14] The applicant argues that on respondents own version, the respondent contributes "approximately R60 000.00 a month towards the maintenance of the major and minor child and the applicant" and therefore should afford to meet her claim for interim maintenance. She seeks a court ordered maintenance order because

although the respondent has made payments towards her and the children, he unilaterally decides when and for how long such payments

are made. A few examples of when certain items were either reduced, stopped or threatened to be stopped were given.

[15] The respondent raises the point in limine that the applicant's notice is not in compliance with form 17 of the first schedule and argues that "the applicant's conduct in this regard is prejudicial to me, as I have not received proper notice of the application and relief sought against me." The respondent submits that the application ought to be dismissed on that basis, alone.

[16] The respondent contends that maintenance for the children is a reciprocal duty between parents, and as such, the applicant is also required to maintain the children. The respondent contends that the applicant is capable of contributing significantly to hers and the children's maintenance. She is a freelance administrator who, for the past eight years, has earned R120.00 per hour and limited hours of work to 40 hours per month. The applicant is currently 49 years old. It was not argued that she is not capable of working longer hours per month or obtain permanent employment. It was only submitted that the original arrangement that she be the primary caregiver and guide to the children is still relevant, especially to the minor son who is in his matriculation year in 2024. I agree with this submission to this extent. That burden has been greatly reduced in respect of the major son who is now in tertiary institution learning.

- [17] The respondent denies that applicant has been left with no other option but to launch the current application (which the respondent will argue is flawed).
- [18] The respondent complains that the legal costs incurred by the applicant were not necessary. He submits that applicant has had ample time to set the matter down for trial, and that this application is an abuse of court process.

Discussion

- [19] The respondent undertakes or does not dispute his obligation to pay for all costs referred to in annexure FA10, plus R12 000.00 in respect of groceries for the children, except for the items in paragraphs 25.3, 25.4, 25.5, 25.7, 25.8, 25.9, 25.10, 25.11 and 25.12 of the founding affidavit.

- [20] The authorities are clear that Rule 43 proceedings are an interim measure until the divorce proceedings and the proprietary aspects governed by the marital regime have been resolved. This interim relief is designed to provide the applicant/partner a reasonable

lifestyle pending the finalisation of the divorce. The purpose of Rule 43 is to ensure that the partner who was being maintained by the other or who was contributing less than the other in the maintenance of the home, continues to live a reasonable lifestyle until the divorce proceedings are concluded where the full proprietary rights of the parties will be resolved. Rule 43 is not intended to resolve those issues on an interim basis. Secondly, the purpose of the rule is to ensure that the less financially able of the parties is not prejudiced by lack of representation or inadequate representation in the divorce proceedings in the main action and/or in the Rule 43 proceedings.

- [21] Therefore, the party with more financial muscle, inevitably the one being sued under the Rule 43 proceedings, is therefore required to maintain the other at a reasonable lifestyle and to provide him or her with reasonable or adequate legal representation in the proceedings.
- [22] The respondent in this matter is not a wealthy man. It is common cause that he earns R92 000.00 a month according to his latest pay slip, although the applicant alleges that he earned R129 300.00 in 2019, the year in which they separated. Following the parties separation in 2019, he has had to start a new life separate from the applicant and their two children. A balance has to be struck therefore, between the respondent's needs and his obligations to the applicant and their children.
- [23] The respondent has provided a list of his expenses which amount to R105 000.00, inclusive of expenses to himself, the applicant, and their children. He states that this is R15 000.00 more above his earnings. The applicant's expenses together with those of their children amount to R104000.00. Some items need to be moderated or even eliminated in order to fall within what is affordable in the circumstances.

- [24] The applicant alleges that she is not certain that the respondent will continue to pay the amounts he is currently paying. In order to bring such certainty, an order is required in the form of Annexure X to the draft order, which sets out the amounts payable under each item and the manner of payment.
- [25] As regards a contribution towards the applicant's legal costs, an amount of R100 000.00 is sought. The respondent submits that the applicant is not entitled to this amount as it is an amount already expended which means the applicant was able to cover the costs. It is submitted on behalf of the respondent that such an order should not be granted and that the costs of this application should be costs in the cause.
- [26] I differ with the submissions on behalf of the respondent in respect of costs. The applicant has become impoverished or is out of pocket as a result of the costs incurred. The applicant needs to be reimbursed to a certain extent. In my view, an amount of R40 000.00 is sufficient for previously incurred legal costs and that the costs for this application should be in the cause.

Conclusion

- [27] My order follows the one proposed by the respondent, with some changes and incorporating the applicant's prayer regarding medical aid.
- [28] In the circumstances, an order is made in terms of the draft order as amended in the following terms:
1. The applicant's non-compliance with the provisions of Form 17 of the First Schedule to the Uniform Rules of Court is condoned.
 2. The respondent is ordered to contribute towards the minor child as follows:
 - 2.1. R 3000-00 per month;
 - 2.2. The following expenses directly to the service providers:
 - 2.2.1. Cell phone subscription fees;
 - 2.2.2. School uniform;
 - 2.2.3. Fuel to and from school;
 - 2.2.4. School fees;
 - 2.2.5. Half of the extra Afrikaans lessons;
 - 2.2.6. Books and stationery; and
 - 2.2.7. Half of the tertiary education fees.
 3. The respondent is ordered to contribute towards the major child as follows:

- 3.1. R 2000-00 per month;
- 3.2. R 1 500.00 towards fuel to be paid directly to the major child;
- 3.3. The following expenses directly to the service providers:
 - 3.3.1. Cell phone subscription fees;
 - 3.3.2. Vehicle instalment;
 - 3.3.3. Vehicle insurance;
 - 3.3.4. Vehicle licence;
 - 3.3.5. Half of the tertiary education fees.
4. The respondent is ordered to continue making payment of the following expenses for the applicant directly to the service providers:
 - 4.1. Cell phone subscription until same reaches its cancellation date and the respondent will only pay the subscription amount and no additional charges incurred by the applicant.
 - 4.2. The motor vehicle instalment for the Honda CRV in the applicant's possession, until the finance period comes to an end.
 - 4.3. The insurance for the Honda CRV in the applicant's possession.
 - 4.4. The annual licence renewal for the Honda CRV.
5. The respondent is ordered to continue making payment of the following expenses directly to the service providers:
 - 5.1. Bond repayment;
 - 5.2. Rates and taxes;
 - 5.3. Water and electricity;
 - 5.4. Home content insurance;
 - 5.5. Internet;
 - 5.6. DSTV (a package of the respondent's choosing);
 - 5.7. Home security; and
 - 5.8. TV licence.
6. Medical Aid

The Respondent is to retain the applicant, minor child and major child on his medical aid scheme (which is to be a comprehensive medical aid scheme), alternatively, to pay to their medical aid schemes the monthly premiums,

7. The respondent is to pay a contribution towards the applicant's legal costs in the amount of R40 000.00 (Forty Thousand Rands).
8. Costs of the application to be costs in the cause.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

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