

SOUTH AFRICA / JUDGMENT

S.V.A (Born D) v F.V.A (11183/2018) [2018] ZAGPPHC 506 (11 May 2018) [2018] ZAGPPHC 506

COURT

North Gauteng High Court, Pretoria

BEFORE

Mosopa

CASE / FILE NUMBER

11183/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE:11/5/2018

CASE NO: 11183/2018

In the matter between:

S V A (BORN D)

APPLICANT

And

F V A

RESPONDENT

RULE 43 JUDGMENT

MOSOPA, AJ

[1] This is an application for relief in terms of Rule 43 of the Uniform Rules of Court. The Applicant seeks relief under five heads, namely,

1.1. That the Respondent be ordered to pay maintenance to the Applicant in respect of the minor children in the sum of R12 946.00 per month for L V A; and R13 396.00 in respect of A V A, payable on or before the 1st day of each month;

1.2. That the Respondent be ordered to pay spousal maintenance to the Applicant in the sum of R1 7 975.85, payable on or before the 1st of each month;

1.3. That the Respondent be ordered to make contribution towards Applicant's legal costs in the sum of R80 000.00 which amount will be payable within 7 days of the granting of the order;

1.4. That the Respondent be ordered to make the items as contained in annexure "FA5" to the Applicant's founding affidavit available to the Applicant and the minor children for personal use.

1.5. That the Respondent be ordered to make a contribution towards the Applicant's relocation costs in the sum of R93 882.84 which amount

will be payable within 7 days of the granting of the order.

[2] On the 22nd March 2018 this matter came before Khumalo J wherein by agreement between the parties an order was made for the parties to file further affidavits, pendente lite parental rights and responsibilities awarded to both parties, that IRMA SCHUTTE be appointed by the parties to conduct a full evaluation and recommendation as to the best interest of the minor children, pertaining to primary care and residence of the minor children,

guardianship and the parties rights of contact pending finalization of IRMA SCHUTTE report about primary care and residence of the minor children to vest with the Applicant subject to the Respondent's supervised contact with the minor children and the payment of maintenance of the minor children pending determination of the IRMA SCHUTTE report .

[3] The only issues to determine in this application are:

3.1. Pendent elite maintenance of the minor children;

3.2. Pendente lite spousal maintenance of the Applicant;

3.3. Respondent relocation costs;

3.4. Contribution towards Applicant's legal costs;

3.5. Items listed in annexure "FA5" to the Applicants founding affidavit.

[4] It is not clear from the papers as to when was the divorce action instituted and who is the party who instituted such a divorce action. However it is common cause between the parties that such divorce action was instituted and it is pending in this division.

[5] The parties were married to each on the 4 February 2017 at Pretoria, out of community of property and subject to the accrual system. Two minor children were born out of the marriage relationship between the parties namely L, a girl born on the 18 June 2014 and A, a girl born on the 21 September 2015.

- [6] The Applicant alleges in her affidavit that the Respondent after his return to South Africa underwent a complete personality change. He developed a serious drinking problem and also became completely obsessed with hunting and his newly found knife making hobby. That the Respondent exposed the minor children to living conditions that were not at all conducive of their health, well-being and development. The hunting knives and hunting hobbies created a living environment which constituted a serious health and safety risk for the children. It is for those reasons that she had no alternative but to leave and take the children to a "place of safety", as she duly did on the 14th December 2017.
- [7] It is because of this temporary relocation that her circumstances materially changed due to that fact that while they were still

staying together with the Respondent he would deposit the amount of R20 000.00 per month into the Applicants' bank account but since

such relocation the Respondent started depositing an amount of R15 000.00 into her bank account and eventually R2 000.00 per month into her bank account. It is for that reason that she cannot maintain a lifestyle she lived together with the minor children while still staying with the Respondent.

- [8] The Respondent denied all the allegations of threatening the well being, health and development of the minor children with his new found hobby of knife making and maintained that he is doing his knife making in a safe environment being in his garage, which is not threatening the safety of the minor children. The Respondent further denied that the Applicant relocated to a "place of safety" but she relocated to a house of Mr Van Rensburg whom she is involved in an adulterous relationship with.

MAINTENANCE OF THE MINOR CHILDREN PENDENTE LITE

- [9] In *Taute v Taute* 1974 (2) SA 675 (E) at 676 par B-C, Hart AJ said the following: " There are certain basic principles which in my view govern an application of this type. As already

indicated such maintenance is intended to be interim and temporary and cannot be determined with that degree of precision and closer

exactitude which is afforded by detailed evidence. As was said by LUDORF J in the case of *Levin v Levin and Another* 1962 (3) SA 330 (W) at p 311D: "To decide the issues I am compelled to draw inferences and to look at 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"

- [10] The minor children are entitled to reasonable maintenance *pendente lite* dependent upon the marital standard of the living of the parties while they were still living together during the substance of the marriage, the minor children's actual and personal requirements and the capacity of their father to meet such requirements which are normally met from the income or money derived from any other source. The inclusion of luxurious expenditure must always be discouraged. (See *Taute v Taute* 1974 (2) SA 675 (E) at 676 par E-G)
- [11] The Applicant in the list of expenditures for the minor children included the amount of R3 000.00 as being money for rental. It is clear from the papers that the Applicant together with the children are not renting any premises at this stage and are living with Mr Van Rensburg. It is my considered view that Adv Van Niekerk on behalf of Applicant correctly conceded that such an amount can be deducted from the list of expenditure. She however submitted further that I should make an order that once the rental agreement of R9 000.00 is in place that the Respondent is liable to pay such an amount. At this stage I am not willing to make an order to that effect. This does not need to be construed differently to mean that I am closing the door on the Applicant, as she can still approach court once such an agreement is in place; either on the same papers or ask for leave of court to supplement her papers.
- [12] Adv D' Alton on behalf of Respondent submitted that the Respondent is prepared to pay the amount *pendente lite* of R8 042.00 in total per month for the minor children. The Respondent is employed as a civil engineer who earns a net payment of R55 000.00 per month. My attention was drawn by counsel for the Applicant that the Respondent utilized an amount of R15 701.00 in a period of two (2) months for unlisted expenses which are meant to maintain his hunting and knife making hobby.
- [13] From the list of expenditure in relation to the minor children and the expenses of the Respondent both parties avoided listing extravagant or extortionate expenditures. The Respondent in annexure "R" to his supplementary affidavit under the heading "Kinders Porsie" is clear that he is willing to pay for the following, even though on 640/o basis and the Applicant to pay for the remainder, the school fees, transport money, medical aid, water and lights, groceries, food and cellphones of the minor children. However I do not agree with the amount which is suggested by the Respondent taking into account that there was a point when the Respondent was paying an amount of R20 000.00 per month to cover the expenses that I mentioned which form part of annexure "R". I am also alive to the fact that both minor children are not enjoying good health which warrant that they be hospitalised from time to time.
- [14] The total amount for the maintenance of the two minor children the Applicant is seeking is R26 342.00 which I consider to be exorbitant looking at the financial capacity of the Respondent. I therefore consider the amount of R15 000.00 for both minor children per month to be fair and reasonable.

SPOUSAL MAINTANANCE OF APPLICANT PENDETE LITE

- [15] The same principle as espoused in claims for maintenance of minor children pendete lite is also applicable in claims of spousal maintenance pendete lite.
- [16] It is common cause that the Applicant and the minor children are currently residing with Mr Van Rensburg and they are currently not paying any rental money. However there is factual dispute relating to what relationship the Applicant is having with Mr Van Rensburg. The Respondent labels such relationship adulterous one which started with Mr Van Rensburg being the live couch of the Applicant and now staying together. Adv D' Alton submitted that she see no reason why the Applicant elected to stay with Mr Van Rensburg after relocating from matrimonial home as her mother and sister are staying within the jurisdiction of this court.
- [17] It is quite unclear under what circumstances did the Applicant decided to go and reside with Mr Van Rensburg. Mr Van Rensburg is clearly known to the Respondent as the Respondent is the person who introduced the Applicant to him, but instead of stating in her papers that she is staying with Mr Van Rensburg she decides to call that premises "place of safety."
- [18] It is apparent looking at the financial position of the Applicant that Mr Van Rensburg is partly responsible for the living expenses of the Applicant.
- [19] In *Carstens v Carstens* 1985 (2) SA 351 (SE) at page 353 par F; Mullins J stated: "It is in my view against public policy that a woman should be entitled to claim maintenance pendete lite from her husband when she is flagrantly and deliberately living as a man and wife with another man. Not only is Applicant in the present case living in adultery but she and her lover are maintaining a joint household complete with the addition of an adulterine child. She has by her conduct accepted the support of Clarkson in lieu of that of her husband. The fact that Clarkson is unable to support her to the extent that she may have been accustomed in her matrimonial
- .home with Respondent does not appear to me to affect the position". (See also *SP v HP* 2009 (5) SA 223 at page 225 par 1-J)
- [20] Similarly Professor Hahlo in *SA Law of Husband and Wife* 4th ed at 454, stated; "However it is submitted that the wife cannot claim arrear maintenance from her ex-husband for the time during which she was to all appearances another man's legal wife, or, at least, for the time which she was in fact supported by him. Though the in praeteritum non vivitur rule does not apply where maintenance order is in existence, it is contrary to justice and equality that she should be able to collect support for the same period from her ex-husband as well as from her "putative" second "husband". If necessary the position can be met by a variation of the maintenance order in respect of the arrears."
- [21] Now the question to ask is whether is the above dictum of application in casu. The Applicant in her papers fails to mention the fact that she is staying with Mr Van Rensburg, who ironically is known to the Respondent but mentions Mr Van Rensburg's place as a "place of safety." Little or no reasons are advanced by the applicant why she decided to go and stay

with Mr Van Rensburg whereas her mother and sister are all staying within the jurisdiction of this court. Without insinuating anything to the Applicant, there is a reason why she deliberately omitted to mention the name of Mr Van Rensburg in her founding affidavit.

- [22] The Applicant is currently unemployed and the Respondent is contributing a minimal amount of R2 000.00 per month towards the maintenance of the minor children. This clearly shows that Mr Van Rensburg is responsible for the bulk of the living expenses of the applicant. It is therefore my considered view that it will be unfair if the Respondent can be ordered to contribute towards the maintenance of the Applicant.

CONTRIBUTION TOWARDS RELOCATION COSTS

- [23] The Applicant requires a contribution of the amount of R93 882.84 from the Respondent towards relocation costs. The Applicant submits that the money will be used towards the deposit of the house and the moving of furniture from the matrimonial home.
- [24] In *Greenspan v Greenspan* 2000 (2) SA 283 at page 287 E-G, Hlophe DJP as he then was stated; "The case, in my view, raises an important legal question, namely what is the nature of the power which a Judge has under Rule 43 (1) (a) of the Uniform Rules of Court? Or, put differently, does a Judge have power to award a lump sum payment under the said Rule?... I agree with Mr Rogers that the court has no power to award lump sum payments in terms of Rule 43 (1). The only category of relief contemplated in Rule 43 (1) which might arguably apply to prayers 2-5 referred to above is Rule 43 (1)
- (a) namely maintenance pendente lite . In my view the term " maintenance pendent lite" clearly connotes periodic maintenance payments. It does not include lump sum payments. This is the position under the Maintenance Act 23 of 1963 which defines a maintenance order as "any order for the periodical payment of sums of money towards the maintenance of any person made by any court... in the Republic... " (See *Schmidt v Schimdt* 1996 (2) SA 211 (W) at 219 J; *Martin v Martin* 1997
- (1) SA 491 (N) at 494 I-J; *Zwiegelaar v Zwiegelaar* 1999 (1) SA 1182 (C) at 1184-5)."
- [25] It must be noted that in the *Greenspan* case (supra) the applicant was seeking an amount of R12 249.90 being relocation costs in respect of the Applicant's household furniture and effects; that the respondent pay her an amount of R63 500.00 to enable her to purchase household furniture and effects amongst others.
- [26] Based on the above it is clear that the court has no jurisdiction under Rule 43(1) to award lump sum payments and the applicant cannot succeed with her claim under his head.

ITEMS AS REFERRED TO ANNEXURE "FA5" OF THE APPLICANT'S FOUNDING AFFIDAVIT.

[27] Parties did agree on what items the Applicant can have and move with from the matrimonial home as referred to in annexure "FA5" of the Applicant's founding affidavit. The court is therefore competent to make such an order. See *Van Der Spuy v Van Der Spuy* 1981 (3) SA 638 (C).

CONTRIBUTION TOWARDS APPLICANT'S LEGAL COSTS

[28] The applicant seeks a contribution of the minimum amount of R80 000.00 towards legal costs in order to be in a position to adequately put her case before court. Adv D' Alton on behalf of the Respondent contended that the reasonable contribution can be in the region of R5 000.00 to R10 000.00 payable in instalments.

[29] 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. (See Erasmus Superior Court Practice; Second Edition; Van Loggerenberg at DI-580 and *Lyons v Lyons* 1923 TPD 345 at 346).

[30] The sum to be contributed is determined by the court's view of the amount necessary for applicant adequately to put her case before court. However the applicant is not entitled to all her anticipated costs, even though the respondent can well afford to pay her, but only a substantial contribution towards them.

[31] The applicant despite her academic qualifications is currently unemployed. As a result the Applicant has insufficient means of her

own and what is now left for the court is to determine the quantum of contribution of the applicant's legal costs. In determining quantum of the contribution, the court must have regard to the circumstances of the case, the financial position of the parties and the issues involved in the pending litigation.

[32] I therefore make the following order;

1. Respondent to pay an amount of R15 000.00 towards maintenance of the minor children per month immediately after this order and subsequent to that on or before the 1st day of each month *pendete lite*;
2. Respondent to make available to the applicant items mentioned in Annexure "FA5" of the applicant's founding affidavit immediately after this order;
3. Respondent to contribute an amount of R10 000.00 towards applicant's legal costs. Such amount is payable in 4 (four) instalments over a period of four (4) months at R 2 500.00 per month of this order.

MOSOPA, M.J

ACTING JUDGE OF THE HIGH COURT

For the Applicant: Adv N Van Niekerk

Instructed by: Serfontein Viljoen & Swart Attorneys

165 Alexander Street

Brooklyn, Pretoria

For the Respondent: Adv C.D' Alton

Instructed by: Ross & Jacobsz Attorneys

457 Rodericks Road

Lynwood, Pretoria

Date of Judgment: 11 MAY 2018

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