

SOUTH AFRICA / JUDGMENT

V v V (72506/2012) [2013] ZAGPPHC 531 (1 March 2013)

[2013] ZAGPPHC 531

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhubele AJ

CASE / FILE NUMBER

72506/2012

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE

NO: 72506/2012

DATE:

1/3/2013

In

the matter between:

V[...]

..Applicant

and

V[...]

Respondent

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

1. The applicant and respondent married in community of property on 11 December 1999. Two minor children, a boy of eight (8) and a girl of four (4) years respectively were born out of the union. The respondent left the common household on 21 October 2012. The minor children are in the custody of the applicant.

2. In this application, applicant seeks an order in terms of Rule 43 of the Uniform Rules of Court in the following terms:

2.1 That the permanent primary residence of the minor children born between the parties be awarded to her, subject to the respondent's

right of limited contact which she describes as follows:

- (a) Respondent is only entitled to visit the children under the supervision of applicant or any person designated by her every alternative Saturday from 13:00 to 16:00 as well as every Wednesday from 18:00 to 20:00.
- (b) Respondent is entitled to visit the children on his and their birthdays, Fathers Day for two hours subject to what they may agree upon.
- (c) Respondent is entitled to reasonable telephone contact with the minor children every alternative day between 18:30 and 19:00.
- (d) The aforementioned contact should not unreasonably interfere with the minor children's scholastic, religious and or cultural activities.

2.2 That any one of the parties may approach the court for variation of the rights of access and contact with the minor children after the Family Advocate has made the recommendations. The parties may, if necessary file additional affidavits in this regard.

2.3 An order that applicant continue with the registration of the minor children as beneficiaries in her medical aid, but that the respondent should pay any shortfall that is not covered by the medical aid. Any payments made by applicant should be refunded by the respondent within three (3) days of presentation of an invoice.

2.4 That the respondent should be responsible for any expenses incurred by the applicant with regard to crèche, preschool, primary and after care needs of the minor children. This would include school uniforms, school necessities as well as extra mural activities.

2.5 That the respondent should continue to pay for the parties' and children' insurance and policies as they stand on October 2011.

2.6 That the respondent continue to pay for the following monthly expenses:

2.6.1 Half of the mortgage bond: R1 263.21 +_

2.6.2 City of Tshwane service fees for their former common household

R2 887.45+_

2.6.3 Groceries:

R 2 500.00

2.6.4 Bread, milk and vegetables R1 240.00

2.6.5 Half of maid's salary R600.00

2.6.6 Gardener

R480.00

2.6.7 Swimming pool maintenance: R200.00

2.7 In addition to these payments, the respondent should pay a monthly amount of R5 516.81 to applicant and the minor children on or before the 1st day of each subsequent month.

2.8 That the respondent pays an amount of R8000.00 as contribution to applicant's legal costs in monthly installments of R500.00

2.9 Costs of this application in the cause, respondent to pay costs only if he opposes the relief sought.

3. The application is opposed by the respondent, who has filed a thirty two (32) page answering affidavit and also confirmatory

affidavits by his sisters and a friend. Compared to the applicant's thirteen (13) pages founding affidavit and ten (10) pages annexures, the respondent's papers may be considered excessive and not in the spirit of Rule 43 applications.

However, I am inclined to condone respondent's bulky papers in view of the fact that applicant made certain allegations regarding his fitness to have custody (albeit temporary) of the minor children. In fact, both parties made accusations and counter-accusations of emotional instability against each other.

The parties accuse each another of shouting and screaming in front of the children. The bulk of the affidavits dealt with their perceived suitability and unsuitability of the other party to take care of the children.

3.1 Respondent has already issued divorce summons under case number 72192/12. The relief sought include amongst others access to the children on alternative weekends, school vacations and Christmas and to take them every alternative weekend from Friday at 17:00 to Sunday at 17:00.

4. I was informed from the bar by applicant's counsel that the issue of primary residence and access for the children was resolved and settled before the hearing and that the only outstanding issue in this regard is the times within which and how the respondent should be allowed to have access to the children.

5. I was also informed from the bar that applicant had offered respondent to have the minor children one night weekend

sleep over at his house subject to their attending normal Sunday School. The boy is a Sunday School leader. The only remaining

dispute relates to the time for picking up and bringing the children back to the applicant. Applicant wants the children to be picked up at 13:00 on Friday and returned at 17:00 on Sunday.

6. The respondent's counsel on the other hand, insisted (despite the alleged agreement) that the children should be picked up every alternative weekend at 17:00 on Friday and brought back in the afternoon on Sunday.

7. Although I was informed from the bar by applicant's counsel that the remaining issue for decision was maintenance, it appears from submissions made on behalf of the respondent that there is no agreement with regard to whether the children should spend the entire weekend (Friday to Sunday) with the respondent or only one night (Saturday to Sunday).

EARNING CAPACITIES

8. Applicant is employed by the Department of Labour and earns a net income of R7 813. According to information in her salary advice, the following deductions are made:

8.1 Tax

R1076.26

8.2 GEPPF

R873.82

8.3 GEMS

R1449.00

8.4 Nedbank Limited R1263.21

8.5 PSA

R70.27

8.6 PSCBC R0.50

8.7 GPSSBC R4.

9. Respondent is employed at Barlow World, Toyota in Menlyn. Applicant requested and obtained copies of his salary advices for the period between 30 June 2012 and 31 January 2013. It appears from a scrutiny of these documents that his basic salary increased from R19 500.00 (June, July, August and September 2012) to R21 150.00 (October 2012 to January 2013). Respondent's basic salary is supplemented by overtime pay of a maximum of R6000.00 (four months in the review period) and a minimum of R3904.62 (December 2012). His deductions are as follows:

9.1 Tax:

R6277.55

9.2 UIF

R148.72

9.3 Union

R195.24

9.4 IC levy R9.40

9.5 Add/hol/pay R293.76

9.6 Mot Indust Prov R1464.23

9.7 GST Div tax R46.45

10. Respondent's average take-home salary (net) since the increase in his basic salary is R22 000.00 . He admitted that he does extra private work sometimes, but failed to mention how much he gets as payment in that regard. The onus was on him to take the court into his confidence.

NEEDS AND EXPENSES

Applicant

11. According to the applicant, respondent previously made certain payments when they were still living together. She wants him to continue with the payments. These are:

11.1 half mortgage bond: R1 263.21

11.2 City of Tshwane

R2 887.45

11.3 Groceries:

R2 500.00

11.4 Bread, milk and vegetables: R1 240.00

11.5 Maid

R600.00

11.6 Gardener

R480.00

11.7 Swimming pool maintenance R200.00

11.8 Primary school fees R420.00

11.9 After care

R450.00

11.10 Creche

R780.00

11.11 Insurance and Policies unknown

11.12 Medical excess fees unknown

12. Except for the unknown amounts, it was submitted on behalf of the applicant that respondent paid a total amount of R10 820.00 for the common household needs and that he should be ordered to continue to make these payments.

13. Applicant's monthly expenses amount to R13 330.75 and comprise of the following:

13.1 Half bond:

R1 263.21

13.2 Food, groceries, vegetables, bread and milk

R800.00

13.3 Meat and fish

R400.00

13.4 Half of maid's salary

R675.00

13.5 Vodacom

R850.00

13.6 Petrol

R1 300.00

13.7 Haircare for applicant

R450.00

13.8 Entertainment, eating out and outings R650.00

13.9 Children' hair cut

R140.00

13.10 Personal grooming and care

R350.00

13.11 Applicant's Vitamins and non-prescription medication

R550.00

13.12 Children' multivitamins

R127.00

13.13 Children' carry money

R100.00

13.14 School photos (R250.00 once off p/year) R20.83

13.15 Security forms (per year)

R12.50

13.16 Sport fees and clothes

R200.00

13.17 Nail care

R120.00

13.18 Applicant's clothes and shoes

R450.00

13.19 Children' shoes and clothes

R600.00

13.20 Gym at work

R200.00

13.21Gym clothes and tekkies

R150.00

13.22 Parking and car wash at work

R300.00

13.23 Dog food

R440.00

13.24 Car licence (R450 p/year)

R37.50

13.25 UIF for maid

R27.00

13.26 UIF for gardener (R115.20 p/year) R9.60

13.27 Provision for Christmas present for children' birthdays and Christmas

R 350.00

13.28 Funeral policy

R200.00

13.29 Life policy

R400.00

13.30 Motor service and maintenance

(R3500 p/year, including tyres)

R292.00

13.31 Provision for vacation(accommodation,
petrol and toll fees)

R350.00

13.32 Bank costs on savings account

R153.65

13.33 Bank costs on moneybuilder

R23.35

13.34 Huisgenoot

R18.00

13.35 Vet

R110.00

13.36 TV licence per year R 250.00

R20.83

13.37 Game outstanding amount RR8335.97 R409.28

13.38 Psychologist (balance R2700.00) R350.00

13.39 Chronic medication excess fees

R431.00

14. Applicant maintains that she has a shortfall (between her salary and expenses) of R5 516.61 and that the respondent should be ordered to pay her this amount. This amount is in addition to the payments that respondent is required to continue to make (R10 880.00 and the cost of a insurance and medical excess fees).

The total monetary value (excluding the insurance and medical excess fees) of respondent's demand for contribution towards the maintenance of applicant and the children will thus be an amount of R16 336.61.

15. In his answering affidavit, respondent maintains (correctly so) that the amount of R1 263.21 should be taken off applicant's

list of expenses because it is deducted from her basic salary. Her total expenses will then be R12 067.54.

16. Respondent also criticizes applicant's expenses on the basis that her claim is "gelaai" and in this regard he disputed applicant's allegations that she spends R350.00 per month on personal grooming, R450.00 on her hair or that children's hair are cut on a monthly basis at a cost of R140.00.

He also challenges the cost of photos and borgvorms, money spent on sport clothes for the children, clothes and shoes and the funeral policy which applicant alleges she pays R200.00 per month for. He also indicated that he has made an offer to maintain applicant's motor vehicle.

17. After discounting the expenses which he considers loaded (a total of R1973.33) and half the bond amount that is already deducted in applicant's basic salary) respondent contends that in his view, the monthly needs of the children amount to R9 958.93.
18. I have to agree with applicant's counsel that the respondent's manner of opposition is petty and inappropriate. The parties have been married since 1999 and lived together in a common household until respondent moved out in October 2012. Respondent should , at least, have provided the court with exact information with regard to his wife's and children's monthly expenses. He knows their life style. It does not help to simply state that applicant

does not spend so much on a particular need. If he knows that the children do not cut their hair for a specified amount at the specified intervals, he should state what he knows the position to be, at least until up to the time he left the common household.

In his answering affidavit, respondent simply states, amongst other things that some of applicant's expenses are luxuries. He mentions things like gym at work, entertainment, eating out and outings, gym clothes and tekkies, parking at work and car wash as well as Huisgenoot. The question is whether these expenses were there when they were still living together or they were recently acquired.

If it is a lifestyle that applicant was accustomed to before the separation, respondent cannot be heard to complain. On the other

hand, if both of them cannot afford such a lifestyle, then there is no reason why it should be maintained, at a debt.

19. In the absence of a meaningful opposition on the part of the respondent, the court is left to its own resources to consider

whether applicant's expenses and needs are reasonable. In this regard, I will have to balance the parties' respective means, needs and expenses to reach an objective amount which applicant should contribute towards the maintenance of his children.

19.1 Applicant's expenses in as far as they relate to the children are in my view reasonable and appear to be normal family expenses. Her claim is not broken down into separate amounts for children and her own, but she seeks a global amount to supplement what she refers to as a shortfall.

19.2 Consequently, the only question is whether the respondent is in a position (financially) to meet the demand. Most of the expenses (for example, holidays, savings for Christmas, gifts) are capable of being curtailed, at least until the issues are fully ventilated in the divorce or maintenance court.

Respondent

20. His monthly expenses are listed in his answering affidavit as follows

20.1 House rent

R5 500.00

20.2 Water and lights

R1 200.00

20.3 Petrol

R3 000.00

20.4 50% share of mortgage bond R1 263.00

20.5 Groceries

R2 000.00

20.6 Insurance

R1 300.00

20.7 Standard Bank Loan R 500.00

20.8 Incapacity insurance R250.00

20.9 Vodacom

R800.00

20.10 Clothes, shoes and haircut R400.00

20.11 Credit card

R400.00

20.12 Solidarity

R120.00

20.13 Toll fees

R308.00

20.14 Gardener

R600.00

20.15 Bakkie maintenance R120.00

TOTAL

R17 761.00

21. According to respondent, his expenses exceed his earnings by R6 000.00 (In his affidavit his salary was indicated as R19 000,

however, it emerged during the hearing as I have indicated above that his net income is an average of R22 000.00. Therefore, following his logic of income over expenditure, his shortfall will be R3 000. 00)

22. Applicant's counsel argued that the respondent's expenses are too excessive for one person. It is common cause that respondent shares a house or household with his girlfriend and her children. As a result, respondent's counsel conceded (correctly so) that in some areas the expenses should be adjusted accordingly. There was no clear consensus on the amount and nature of expenses to be adjusted, however, taking a roust approach, I am of the view that

the only expenses that are indeed excessive are payments for accommodation, water and lights, petrol and groceries. This is because he is sharing a house with another woman and her children. The remaining expenses appear to be normal payments he could have incurred whether irrespective of which woman he was staying with. Respondent's expenses that need to be adjusted are:

22.1 Accommodation (half of R6500 and R700 (lease agreement handed in
)

R3 600.00

22.2 Water and lights

R600.00

22.3 Petrol

R1 500.00

22.4 Groceries

R1500.00

Total adjustments:

R7 200.00

TOTAL after adjustment:

R10 561.00

23. In her founding affidavit, applicant indicated that respondent paid the expenses which I have already referred to and that he also paid for unforeseen expenses such as licences, entertainment, eating out, additional school necessities, school clothes and activities for the minor children. Furthermore, applicant alleged that respondent gave her his credit card to make certain payments, but that he has since stopped this. Respondent did not specifically address these allegations in his answering affidavit, save to state that he has made an offer to pay applicant an amount R9 958. 93 per month that is made up as follows:

23.1 R50% bond

R1 263.21

23.2 50% land levy

R1 443.72

23.3 R1 000 per child

R2 000.00

23.4 Primary school fees

R420.00

23.5 After care fees

R450.00

23.6 Creche

R780.00

23.7 Bond insurance

R600.00

23.8 waiver of interest in market

value of rental income

R3000.00

24. During argument, applicant's counsel indicated that the offer with regard to item 23.8 is in theory only because the income

respondent refers to a fictional and refers to the house that is occupied by applicant and the children. In practical terms,

respondent regards the house as having been rented to applicant, and that there should be rental income of R6 000. He gives up his share and calculate it as part of maintenance for the children and applicant. Respondent's offer, in real terms is R6 958.93.

25. Save for the cost of swimming pool maintenance, maid and gardener's salaries and payment of medical excess fees, the items that respondent offers to pay are the same as what applicant alleges to be previous payments made by the respondent when they were still living under the same roof.
26. I am prepared to accept that indeed respondent made previous payments of R10 880.00 (excluding policies and medical excess fees) as alleged by the applicant.

CONTRIBUTION TOWARDS LEGAL COSTS

27. Applicant claims an amount of R8 000 .00 as contribution to her legal costs in what she refers to as a "bestrede egskeidingsaksie". She avers that respondent refuses to make a reasonable contribution towards her and their children' maintenance and that she will, of necessity be obliged to claim for maintenance.
28. I have already indicated that the parties have reached a settlement with regard to the primary residence and care, rights of access and contact for the respondent. In their affidavits, they seem to agree that the children should be assessed and evaluated by experts and that the Family Advocate will conduct an investigation. There is also consensus that they

will defer to the opinion and recommendations of the experts. In their respective affidavits, both parties acknowledge that the children, more especially the boy, has some behavioral challenges. Applicant contends that the problems were caused by their separation, whereas respondent's argument is that the boy's problems were pre-existing.

Wherever the fault lies, both parties are concerned about their children's well-being. They also acknowledge that a parenting plan and training is essential.

28.1 Applicant must show that if she is the plaintiff in the main action, that she has a prima facie case, if she is a defendant, that she is defending in good faith.

The amount for contribution to legal costs is determined by court's view of the amount necessary for applicant adequately to put her case before court.

See: *Van Rippen v Van Rippen* 1949 (4) SA 634 © at 639 – 40.

See also: *Dodo v Dodo* 1990 (2) SA 77 (W) AT 98F

28.2 Applicant is not entitled to all her anticipated costs, even though the respondent can well afford to pay them, but only a substantial contribution towards them.

See: *Van Rippen v Van Rippen* at 640-1 (supra) and *Dodo* 98F (supra)

28.3 Applicant must establish that she has insufficient means of her own to pay for legal costs and that the amount she seeks is reasonably necessary to pursue her defence.

Nicholson v Nicholson 1998 (1) SA 48 ??? AT 50C where Wunsh J said:

“The question to be considered is what the applicant needs for reasonable proceedings. The cases were reviewed in *Dodo v Dodo* 1990 (2) SA 77 (W). The applicant is entitled, if the respondent has the means and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the respondent is litigating and the scale on which the applicant intends litigating (I would have qualified this by reference to what is reasonable having regard to what is involved in the case), with due regard being had to the respondent's financial position.”

28.4 Litigation can be luxurious or economical and it is commensurate with the means of the parties. When litigating against a rich man who employs senior and junior counsel, *Willamson J* said she is entitled to litigate upon somewhat the same sort of scale as that upon which he can be expected to litigate. *Glazer v Glaze* 1959 (3) 928 (W) at A-C

29. I have already mentioned that respondent did not make a (full) disclosure with regard to the extra income from the private work he often renders. Rules of discovery should suffice in this regard. There is no need for extensive investigations.

30. Respondent did not make an offer with regard to legal costs. It was argued on his behalf that the enders he made for payment of maintenance in November and December 2012 which applicant did not accept disentitle her to a contribution towards legal costs. The issue here is costs in the divorce action not the present proceedings.
31. On the other hand, applicant did not lay a basis for the amount she claims for legal costs. Both parties have expressed their willingness to settle the dispute in their respective affidavits and blame each other for the delays.
32. Although I am of the view that respondent should contribute towards applicant's costs in the divorce action, the amount claimed by applicant is excessive.

QUANTUM OF MAINTENANCE

32. Applicant is entitled to reasonable maintenance pendent elite for herself and the children. The quantum thereof depends 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 although in some circumstances inroads on capital may be justified *Taute v Taute* 1974 (2) SA 675 (e) at 676E
33. More weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to that of one seeking to evade them. *Taute V Taute* at 676H
34. Respondent has shown a willingness to meet his responsibilities and save for the excessive expenses that I have already adjusted, I could not find any evidence that he does not want to carry on with his responsibilities.
35. It is clear from the parties' respective statement of income and expenditure that the expenses they incur are necessary save where I have already indicated. Respondent's counsel suggested that when they were still together their joint income was R27 000 (applicant's net income of about R7 000 and respondent's net income of R19 000 before it was increased). She further submitted that now they have two households instead of one. Respondent alleged that he wanted to move into the flat in the property but that applicant would not hear of it.

However, taking into account the negative feelings displayed in their affidavits, I doubt if this would have saved them some expenses.

Respondent had no option but to move out and rent accommodation. This obviously creates more pressure on the joint income.

RESPONDENT'S INTERIM ACCESS TO CHILDREN

36. As I have indicated above, the remaining issue in this regard is whether the children should spend one night weekend sleep over at respondent's house or the entire weekend, that is, Friday to Sunday.

36. Generally courts are reluctant to interfere with status quo. However, the principle of preserving status quo is subject to the considerations that the interest of the child are and should prevail and that the status quo must not constitute an unreasonable state of affairs. *Du Plooy v Du Plooy* 1953 (3) SA 848 (T) at 853F
37. It is clear from the affidavits that there is animosity between the parties and that this has played itself in front of the children. The boy, in particular has expressed ill-feelings towards respondent's current girlfriend. It is alleged that applicant has uttered certain unsavory words about this woman in front of the children. I was also informed that since the separation, the children have never been to respondent's house. Furthermore, respondent alleges that the boy is happy when they are together, but his attitude changes when applicant comes to where they are.
38. The interests of the children demand that caution be exercised before exposing them to the anxieties that may follow their first encounter with their non-custodian parent's new partner. There is evidence that the boy has some behavioral challenges which are attributed to his parents' separation. He has since changed schools.
39. Respondent indicated in his affidavit that before their separation, he often took the boy on fishing and hunting trips. There is no reason why this should not be continued and used as a building block towards repairing the relationship between father and son in particular. The girl appears to be in good terms with the father, but she too is overwhelmed by the whole situation, hence she cries whenever there is shouting between the parents.
40. It is for these reasons that in my view, there should be gradual integration between the respondent's current family (his

girlfriend and her children) and the children. The concern should not be how many nights the children spend at their father's house, but rather, whether they are emotionally ready and whether there is enough support from the parents to help them deal with the encounter with the new family. I have not seen a real commitment from both parties on papers before me. Each one of them is aware of the problem, but they insist on exercising what they perceive as their rights.

ORDER

41. Under the circumstances, I make the following order:

41.1 The interim primary residence and care of the minor children born between the parties is awarded to applicant, subject to the

respondent's right of access and contact which will be exercised as follows:

- (a) During the first two months after this order, respondent is entitled to visit and take the children out every alternative Saturday from 08:00 to 17:00 as well as every Wednesday from 18:00 to 20:00. Applicant is ordered to afford the respondent sufficient privacy with the children.

- (b) Three months after the date of this order, respondent is entitled to take the children for a one night weekend sleep over at his house subject to the following conditions:
 - (i) The children are collected at 13:00 on alternative Saturdays and returned at 17:00 on Sundays.
 - (ii) The children should attend their normal Sunday School classes.
- (c) Respondent is entitled to visit the children on his and their birthdays, Fathers Day for a reasonable duration, depending on the activities that may have been planned.
- (d) Respondent is entitled to reasonable telephone contact with the minor children every alternative day between 18:30 and 19:00. This contact should not unreasonably interfere with the minor children's scholastic, religious and or cultural activities nor should it be unreasonably be withheld.

41.2 Any of the parties may approach the court for variation of the rights of access and contact with the minor children after the Family Advocate has made the recommendations. The parties may, if necessary file additional affidavits in this regard.

41.3 Applicant is ordered to continue with the registration of the minor children as beneficiaries in her medical aid, and the respondent is ordered to pay any shortfall that is not covered by the medical aid. Any payments made by applicant should be refunded by the respondent within 14 (14) days of presentation of an invoice.

41.4 Respondent is ordered to pay crèche, preschool, primary and after care fees of the minor children. This would include school uniforms, school necessities as well as extra mural activities.

2.5 Respondent is ordered to continue to pay for the parties' and children's insurance and policies as they stand on October 2011.

2.6 Respondent is ordered to continue to pay for the following monthly expenses for the benefit of applicant and the children:

2.6.1 Half of the mortgage bond: R1 263.21 +_

2.6.2 City of Tshwane service fees for their former common household

R2 887.45+_

2.6.6 Gardener

R480.00

2.7 Respondent is ordered to pay R5 000.00 as contribution to applicant's legal costs in monthly installments of R500.00

2.9 Save for payments to the financial institution, municipality and schools, all payments due to the applicant in terms of this order should be paid into her banking account. Applicant should provide respondent with the details.

2.10 All payments will commence with immediate effect and thereafter on the 1st day of each and every subsequent month.

2.11 Respondent is ordered to provide applicant with proof of payments made to third parties on a monthly basis.

2.12 Costs of this application are costs in the main action.

2.13 The limitations as stipulated in Rule 43 (6) / (7) / (8) are not be applicable.

Acting Judge

DATE OF HEARING: 14 FEBRUARY 2013.

DATE OF JUDGMENT: 01 MARCH 2013.

APPEARANCES:

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