

SOUTH AFRICA / JUDGMENT

Van Schalkwyk M v Van Schalkwyk I (1982/2017) [2018] ZANCHC 52 (12 June 2018) [2018] ZANCHC 52

COURT

Northern Cape High Court, Kimberley

BEFORE

M C Mamosebo

CASE / FILE NUMBER

1982/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape High Court, Kimberley)

Case

No: 1982/2017

Heard: 08/06/2018

issued: 12/06/2018

In

the matter between:

MAGDEL

ELIZABETH VAN SCHALKWYK

Applicant / Defendant

and

IZAK

JOHANNES VAN SCHALKWYK

Respondent/ Plaintiff

JUDGMENT

MAMOSEBO.J

[1] This is an application in terms of Rule 43(6)[1] of the Uniform Rules of Court for an order pendente lite from 01 July 2018 in the following terms:

1.1 That the respondent pay the applicant R17 000.00 per month, on or before the first day of the month following the granting of an order herein, and thereafter, on or before the first day of each succeeding month into an account nominated by applicant, without deduction or set off;

1.2 That the respondent retain the applicant as a dependant on the medical aid on which she is currently a dependant (Discovery Coastal Saver) or reinstating her as a dependant in the event that respondent has removed her from the medical aid, or by placing her on a scheme with analogous benefits to his scheme and by paying the premiums as well as any escalations thereon in respect of her cover. Should the applicant's medical expenses exceed the medical aid cover or should her medical expenses not be covered by the medical aid plan, respondent shall bear the cost of all expenditure in respect of her medical, dental, surgical, hospital, orthodontic and ophthalmological treatment including but not limited to any sums payable to a physiotherapist, psychiatrist, psychologist and pharmaceutical expenses incurred on prescription and the provision where necessary of spectacles and/or contact lenses.

1.3 That the respondent shall pay a further contribution to applicant's costs in the amount of R250 000. 00, such sum to be paid directly to applicant's attorney of record within 10 days of an order herein;

1.4 That the respondent pays the costs of this application.

[2] It is apposite that I redirect this process before dealing with the application before me. Only two affidavits are required to argue a Rule 43 application in court. The applicant must, in terms of Rule 43(2) deliver a sworn statement in a form of a declaration setting out the relief sought and his or her grounds therefor, together with a notice to the respondent as near as may be in the circumstances of either party or a child, or the contribution towards costs proving inadequate. accordance with Form 17 of the First Schedule. The respondent will then, within ten days of receipt, deliver a sworn reply in the nature of a plea.

The applicant has in this case filed a supplementary affidavit. Interestingly, while the supplementary affidavit was meant to reply

to the respondent's contentions, it has failed to do so. It is trite that rules are there for the parties to comply with them and not to be ignored.

[3] The applicant is a 56 year old woman married to the respondent on 04 October 2015 out of community of property and the marriage still subsists. On 20 October 2017 Phatshoane J granted the applicant an order pendente lite for the maintenance in the sum of R1 7 000.00 per month for 8 months, that the respondent retain her as a dependant in his medical aid

(Discovery Coastal Saver), that he allow her the use of his Toyota Legend Hilux bakkie during the subsistence of the marriage and for him to pay a contribution towards the applicant's legal costs in the amount of R45 000.00 directly into her attorney's bank account within 30 days of that order. No order was made in respect of the costs in that application.

[4] At the time of Phatshoane J's order the applicant was unemployed. She now says her circumstances have changed hence this application

before me.

Maintenance

- [5] The respondent was ordered to pay maintenance in the amount of R1 7 000 to the applicant when she was unemployed. She is asking that he should continue to pay the same amount for the next 4 months until 09 October 2018 when the divorce action will be heard. The respondent has, in his reply to her founding papers, placed in dispute her averment that she earns R4000 .00 and invited her to furnish her payslip. She has failed to do so. The reason for this failure has not been explained. She now has the benefit of a salary, free accommodation, a weekly meat supply from her employer and free water and electricity usage. The respondent has contended that she has use of the Isuzu bakkie that belongs to her employer which is also filled with fuel by her employer. The applicant has, however, remained adamant that she does not use the bakkie for her private purposes.
- [6] The applicant has, in my view, not been open and frank with the court in respect of her earnings. I have to, unfortunately, agree with the respondent that a payslip would have been conclusive proof of her earnings. The fact that she earns R4000.00, which is disputed, and receives other benefits which make her living better necessitates a review in the maintenance amount pendente lite. I agree with the views expressed by Hart AJ in Taute v Taute[2] which said:

"A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionable demands - similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them."

- [7] The applicant gives the following particulars of her monthly requirements made up of the R17 000 from the respondent and R4 000 of her monthly wage to the total of R21 000:

Attorney's monthly fee

R5 000.00

Father's repayment

R2 000.00

Saamstaan Cooperation for groceries

R3000.00

Total

R10 000.00

The remaining R11 000 is utilised as follows:

7.1 Groceries and cleaning material R3 500.00 7.2 Electricity and gas R 1000.00 7.3 Petrol/Diesel R1 500.00 7.4 Clothing and grooming R 1 000.00 7.5 Cellphone R550.00 7.6 DSTV R 825.00 7.7 Entertainment R500.00 7.8 Pet food R700.00 7.9 Plants, fertiliser R300.00 7.10 Toiletries R250.00 7.11 Church contributions R50.00 7.12 Gifts R100.00 7.13 Reading material R 100.00 7.14 Bank charges R 200.00 7.15 Non-prescription medicine R300.00 R10 775.00

[8] In his replying affidavit, the respondent accepted to continue with the maintenance pendente lite but contended that the reason for the 8 month period by Phatshoane J was for the maintenance to subsist until the finalisation of the divorce action but, according to him, the applicant is delaying the proceedings which resulted in failure to secure an earlier trial date. He disputes that the applicant is receiving a meagre R4000.00 because she is a supervisor and her employer is regarded as a "Mega Farmer" who remunerates his employees above average salaries, a submission which was not disputed by the applicant. She has only disclosed free accommodation and a salary of R4000 but failed to disclose that she is enjoying a weekly supply of meat and the use of the Isuzu bakkie which the employer fills with diesel.

[9] The respondent has agreed with the suggested amounts in the following items: 7.5 cellphone; 7.6 DSTV; 7. 7 Entertainment; 7.10 toiletries; 7.11 church contributions; 7.12 gifts and 7.13 reading material. Counsel for the respondent argued, however, that the following items be reduced as indicated: item 7.1 to R3000; 7.2 there should be no contribution towards electricity and gas as she is receiving them for free from her employer; 7.3 towards petrol/diesel R500; 7.4 clothing and grooming R500; 7.8 pet food R350; 7.9 there is no need to budget for plants and fertiliser as she is residing in the landlord's premises and cannot be planting her own plants; 7.14 on bank charges to be halved to R100 and 7.15 to be reduced to R100 which brings the total need to R6925 per month. Counsel argued that since there is no proof from the founding papers that the applicant is contributing the R5 000 towards her attorneys, R2000 towards her father as a loan repayment and R3000 towards Saamstaan, the Court should disregard those amounts. If the Court is with the respondent on that submission, it would then mean that from the revised R6925 if the Court considers that she earns R4000 then she will only have a shortfall of R2925 which can be rounded off to R3000. The respondent therefore submits that he is willing to contribute R3000 towards the maintenance pendente lite until the first day of trial (09 October 2018).

Medical Aid contribution

[10] In as far as her retention on the medical aid is concerned, the respondent contended that he is willing to retain her as beneficiary on his medical aid but be liable only for reasonable medical expenses

which are not covered by the medical aid until 10 October 2018 when the divorce is finalised.

The Toyota Hilux Legend bakkie

[11] The respondent maintains that the applicant should return the Toyota Legend Hilux because she has the use of her employer's bakkie where diesel/petrol is also catered for. Although the applicant argues that the bakkie allocated is not for private use, there was nothing filed to substantiate her submission.

Contribution towards legal costs

[12] What seems to be the main bone of contention is the contribution by the respondent towards the legal costs that the applicant is claiming. When the matter came before Phatshoane J, consideration was made of the applicant's need to call an expert as well as legal costs when an order of R45 000.00 was awarded, submitted counsel for the respondent. The applicant seems to be making the same submission without any supporting documentation. The respondent contends that despite the fact that he has invited the applicant to show by a bill of costs how her attorney's fees was R104 638.54 as at 31 March 2018

and expected to reach R250.000 up to the first day of trial, the applicant has failed to do so and failed to furnish any explanation

for the failure. It was argued on behalf of the respondent that the applicant should make a proper application at a later stage for this contribution towards costs as at this stage no proper case has been made for the Court to rule in her favour.

[13] There is an old saying "money does not fall from trees it is earned". When the respondent or any other person for that matter, requests for a breakdown in terms of how his money should be spent, this request in my view, is not unreasonable particularly because the same need of an expert and legal fees was previously argued before Phatshoane J. It should be remembered that the payslip was also not furnished to show how much the applicant is really earning. This is not good accounting practices even if it were assumed that the respondent was filthy rich and what the applicant was seeking was a tip of the iceberg. There must still be documents to support the averments. I do not think the applicant has made out a case on the papers why her legal fees should be increased to R250 000.00 payable by the respondent when what is expected from the respondent is to make a contribution towards her legal fees. In *Nicholson v Nicholson*[3] Wunsh J remarked as follows pertaining to cost contribution:

"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. "

[14] Counsel for the applicant referred me to the Full Bench unreported decision of this Court in *Bekker v Bekker* [4] This was an appeal and not a Rule 43 application. The appellant in that case appealed against the order of the court a quo for the maintenance of R2500 per month to his divorced wife contending that his ex-wife had the means while he on the other hand could not afford the stipulated amount. The facts are not similar to the case before me.

[15] Coming back to the facts of this case, having regard to the changed circumstances of the applicant being employed, it has not been shown neither is there any justification for the respondent to continue to pay R17 000.00 pendente lite, even if it may be for the next four months. I am also not persuaded by the submissions that the applicant is paying R5000.00 per month towards her attorney's fees, R3000.00 towards Saamstaan and R2000.00 towards her father's repayment because there was no supporting documentation to that effect. As a result, these figures will not be considered.

[16] The parties are still married to each other and there is no reason why the applicant cannot keep the Isuzu bakkie until the divorce action when the circumstances around the division of the joint estate will be fully ventilated. Besides, her argument that the bakkie by her employer is only for work-related purposes is sensible. In the meantime, there is no reason for me to order otherwise. I am mindful of the remarks made by Van den Heever J in *Nilsson v Nilsson* [5] where the following was emphasised: "Primarily, Rule 43 was envisaged to provide temporary assistance for women.....It was not created to give an interim meal-ticket to women who quite clearly at the trial would not be able to establish a right to maintenance."

The following pronouncements by Van den Heever J are also apposite [6] :

"The shorter the duration of a marriage, the more important the conduct of the parties within the relationship - their respective "guilt" or "innocence" - would ordinarily be in relation to the question whether maintenance should be paid at all, outside of cases where the marriage itself resulted in a loss: for example because of loss of previous alimony or a usufruct or perhaps of other marriage prospects, or by reason of resignation from employment."

[17] I am not persuaded either, by the applicant's submissions in respect of the contribution by the respondent towards costs since she has not made out a case on the papers. Once the applicant has sorted her documentation she can still launch another application and her door to litigation is not shut by my findings.

[18] That being said, I make the following order:

- (1) That the respondent, Izak Johannes Van Schalkwyk, is to contribute maintenance to the applicant Magdel Elizabeth Van Schalkwyk in the amount of R 6 000.00 per month pendente lite, until the 1st of October 2018.
- (2) That the applicant is to retain the use of the Isuzu bakkie until the main divorce action.
- (3) That the respondent retain the applicant as beneficiary on his medical aid fund and be liable for all of their reasonable medical expenses which are not covered by the medical aid until 10 October 2018.
- (4) The costs of this application will be costs in the divorce action.

M C MAMOSEBO

JUDGE

Northern Cape High Court, Kimberley

On behalf of the Applicant: Adv SL Erasmus

Instructed by :

Duncan&Rothman Attorneys

On behalf of the Respondent: Adv AS Sieberhagen

Instructed by:

Haarhoffs Attorneys

[1]Rule 43(6) stipulates: (6) The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.

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[2] [1974) 2 All SA 312 (E)

[3] 1998 (1) SA 48 (WLD at 50C-D

[4] Case No 685/2004 delivered 21/05/2010

[5] 1984 (2) SA 294 (CPD) at 295E - F

[6] At 297H

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