

SOUTH AFRICA / JUDGMENT

Y.B v L.B [2023] ZAGPPHC 185; 5413/2020 (28 March 2023)

[2023] ZAGPPHC 185

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

5413/2020

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Policy

IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 5413/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date: 28 MARCH 2023

In the matter between:

Y[....]

B[....]1

Applicant

And

L[....]

B[....]2

Respondent

JUDGMENT

NYATHI J

A.

INTRODUCTION

[1] This is an application for relief in terms of Rule 43 of the Uniform Rules of court. The Applicant is the defendant in a pending divorce initiated against her by her husband. This application is opposed by the Respondent.

[2] The Applicant more particularly seeks the following relief:

2.1 That the Respondent be ordered to pay maintenance to the Applicant in the amount of R23 500.00 per month, payable into the bank account as nominated by the Applicant on or before the 1st day of the month, and such amount to escalate yearly on the anniversary date of the order in accordance with the Average Consumer Price Index rate for the preceding 12 months;

2.2 That the Respondent be ordered to continue payment of the following expenses pertaining to the Applicant:

2.2.1 The monthly bond instalment in respect of the house that the Applicant occupies and which is registered in her name;

2.2.2 The monthly rates and taxes, householder's insurance premium, house owners' premium, estate levy, as well as the water, electricity and gas consumption pertaining to the house that the Applicant occupies;

2.2.3 The monthly expenses in respect of the telephone and ADSL used by the Applicant;

2.2.4 The salary of the gardener who works at the Applicant's house;

2.2.5 The licensing fee and insurance in respect of the vehicle used by the Applicant;

2.2.6 The medical aid premium in respect of the Applicant;

2.2.7 The Applicant's life insurance premium;

2.2.8 The television license in respect of the televisions used by the Applicant;

2.3 That the Respondent be ordered to retain the Applicant on the medical aid fund that she is registered on and to maintain her on the same level, with the same benefits;

2.4 That the Respondent be ordered to make a contribution towards the Applicant's legal costs in the total amount of R650 000.00 payable in monthly instalments of R100 000.00 each, with the last payment being R50000.00. The said payments are to commence on the first day of the month following this order;

2.5 Costs of this application, only in the event of it being opposed.

B.

BACKGROUND

- [3] The parties have been married for 24 years. They have two major sons who are not yet fully self-sufficient. It is not disputed that the Respondent entered into an extra-marital affair with another woman, with whom he lives currently. The Respondent moved out of the parties' former common home on 11 January 2020.
- [4] It is not disputed that throughout the parties' marriage the Respondent has been the main breadwinner. He continued to maintain the Applicant and their sons after he left the common home, yet he strategically started to reduce his contributions to the Applicant.
- [5] No proper explanation has been provided by the Respondent for the reductions in his contributions. He does not aver that he does not have the financial means to maintain her in the manner he did before. It appears that the Respondent is deliberately acting to cripple the Applicant financially.

C. APPLICANT'S CASE

- [6] In her founding affidavit, the Applicant sets out in detail the claim and counterclaim the parties filed in the pending divorce action. I will not delve that much into those for purposes of this application unless necessary or relevant.
- [7] The Applicant submits that the parties maintained a high standard of living. The houses that they lived in in Midstream Estate are all luxurious, and they drove luxury vehicles. Since 2015 they have travelled to various African countries for camping holidays. They visited Namibia, Zambia, Zimbabwe, Tanzania, Kenya, Angola, and more over the years. Some of these overland trips cost between R250 000 and R300 000.
- [8] Since the commencement of the divorce, the Respondent has systematically reduced his contributions to the Applicant and the children. He actually promised her that he will ensure that she walks out of the divorce with nothing and has stealthily shut her out of his bank accounts and facilities.
- [9] Following a letter of demand from the Applicant's attorneys, the Respondent paid R20 000 per month towards maintenance of the Applicant since approximately February 2020. Applicant utilised this amount for food, groceries, cleaning materials, clothes, and other incidental expenses. From May 2020 however, the Respondent abruptly reduced this to R10 000 per month and informed her that he is paying the boys directly an amount of R5 000 each since they were no longer minors.
- [10] During May 2020 the Respondent stopped payment of the Applicant's domestic worker's salary, her fuel expenses, and he also stopped payment of the DSTV premium.

- [11] During August 2021 he stopped payment of Applicant's cell phone expense, and during March 2022 he stopped paying the one son's "maintenance money".
- [12] During June 2022 both children started working for the Respondent in LJR Project Costing and Management CC, which is when they started receiving a salary as employees. The Applicant was left in dire straits.
- [13] The Applicant states that her health has deteriorated significantly since her separation from the Respondent. On 26 January 2020 she was diagnosed with thyroid cancer. During that same year the doctor partially removed her thyroid, with the remainder removed during 2021. She was prescribed medication, and currently the cancer is in remission. She became extremely depressed and struggled to cope with the trauma caused by the physical and mental abuse that she had suffered at the hands of the Respondent during their marriage. Furthermore, she had to deal with the fear and uncertainty that her cancer diagnosis caused. She thus required treatment from a Psychologist to date.
- [14] The Applicant still works at Eljen Kitchens as a sales representative. She earns a 10% commission on completed work for cupboards excluding installation costs. She also does marketing for and sells blinds for Quantum Blinds. Her income from both endeavours is meagre. Applicant has sourced an Industrial Psychologist's report wherein her earning capacity is assessed and reported on. This report has been disclosed to the Respondent. The picture painted by the report is rather gloomy. Her current total combined income is R15 489.63.
- [15] The Applicant has filed a Financial Disclosure Form ("FDF") with this application. Therein she lists her maintenance needs. She states that she is living on the bread line because she is unable to pay her normal expenses, since the maintenance that the Respondent pays is wholly insufficient to cover her monthly shortfalls. She states further that she is currently living way below the standard of living that she had become accustomed to during their marriage, which is very unfortunate, since the Respondent himself has not decreased his standard of living one bit.
- [16] The Applicant lists her monthly maintenance needs (excluding the expenses that are being paid for by the Respondent directly, and excluding the amounts that she spends on their two children and their expenses) amounts to R39 047.99 per month, leaving her with a shortfall of R23 557,37. It is therefore evident that the R10000.00 per month maintenance that the Respondent pays her is no longer sufficient to maintain her properly, and should be increased to R23 500.00 per month.

[17] The Applicant finally submits that the Respondent is more than able to pay the maintenance that she requests and the contribution towards her legal costs. She accuses the Respondent of embarking on a disinformation process about the extent of his income and his estate, and of ignoring her requests to be provided with proper documentation regarding his business dealings. She lists the following examples:

17.1 In response to a notice in terms of section 7 of the Matrimonial Property Act 88 of 1984 which was served on 27 February 2020, the Respondent only responded on 15 June 2020, and did not declare the value of his membership interest in LJR Project Costing and Management CC, he instead said the value is unknown. The Respondent declared that he holds a membership interest in Prospective Tyre Company Investment, which he valued at R1,9 million.

17.2 On 4 November 2020 the Respondent filed his "FDF". His declaration of certain assets in this form differ markedly from his response to the section 7 notice. His financial situation changes significantly every time he is requested to file an updated version of his financial position.

17.3 When he is requested to give information to explain and prove his changed and (allegedly) deteriorated financial state, he refuses to give the Applicant proper information or documentation, and instead gives her the run around. The Applicant is thus convinced that the Respondent is concealing his assets and refusing to account to the Applicant properly on the state of the accrual. This has caused Applicant to incur unnecessary and increasing legal fees and costs of forensic experts.

17.4 In explaining the above, the following excerpt from Applicant's founding affidavit is illuminative: "27.1 The Court will see that under paragraph 2.3 of the FDF he declared to have just over R5 million in an investment account at ABSA Bank. He further declared to hold 2 600 shares in Prospect SA under paragraph 2.4 where one needs to declare one's investments, yet he stated that the value of the shares is unknown. It is not clear if this is the same asset that was declared in his Section 7 reply as "membership interest in Prospective Tyre Company Investment" which he valued at R1,9 million. In paragraph 2.9 of his FDF he declared the value of his membership interest in LJR Projects Costing and Management CC to be R4 603 370,00."

17.5 The Respondent's summary of his capital (assets minus liabilities) in paragraph 2.19 (of his FDF) certainly made no sense. He declared his net asset value to be R6 425 956,62, which is totally understated if his assets and liabilities declared in this form are calculated, which can be summarized as follows:

ASSETS:

17.5.1 Total value of interest in bank account (paragraph 2.3 of FDF) - R5 104 334,08 (made up mostly of R5 001 380,98 held in an ABSA Investment account).

17.5.2 2600 Prospect SA Shares (paragraph 2.4 of FDF) — value declared as unknown.

17.5.3 Total surrender value of policies (paragraph 2.5 of FDF)— R971 622,64.

17.5.4 Total value of personal belongings (paragraph 2.8 of FDF)— R278 000,00.

17.5.5 Value of 100% membership in LJR Projects Costing and Management CC (paragraph 2.9 of FDF) —R4 603 370,00.

17.5.6 Total of other assets (paragraph 2.11 of FDF) — R750 000,00.

17.6 Therefore, the total value of the Respondent's assets as declared by him in his first FDF (without consideration of the value of the 2 600 Prospect SA Shares) amount to R11 707 326,70. If the 2 600 shares in Prospect SA is the same asset as the “membership interest in Prospective Tyre Company Investment” declared in the Respondent's Section 7 reply, which he valued at R1,9 million, then his total assets add up to R13 607 326 70.

17.7 Considering the fact that the only debt declared by the Respondent in his FDF is an amount of R400 000,00 loan to AE B[....]2 in paragraph 3.13 of his FDF, his net assets are either R11 307 326,70 (without consideration of his shares in Prospect SA Shares), or it is R13 207 326 70 if the shares in Prospect SA is the same asset as the one declared in his Section 7 reply as “membership interest in Prospective Tyre Company Investment” which is worth R1,9 million. This is a far cry from the net assets declared by the Respondent as amounting to R6 425 956,62.

17.8 On 3 March 2022 Applicant's attorney caused for another Section 7 notice (of Act 88 of 1984) to be served upon the Respondent's attorney. Applicant's attorney also caused for a notice in terms of rule 35(3) to be served upon the Respondent's attorney on 2 March 2022.

17.9 The Respondent's reply to the Section 7 notice was only forthcoming on 30 June 2022. From this declaration of the value of Respondent's estate it is apparent how it differs significantly from his last declaration, for example:

17.9.1 The R5 001 380,98 that was previously held in an Absa Investment account does not appear on his section 7 reply and seems to have disappeared.

17.9.2 The 2 600 Prospect SA Shares that was still declared in the first FDF filed by the Respondent, and declared to have a value of R1,9 million in the Respondent's first Section 7 reply was now all of a sudden reduced to only 600 shares, and a value of only R210 000,00 was placed on these shares.

17.9.3 The Respondent's membership in LJR Project Costing and Management CC which the Respondent declared as having a value of R4 603 370,00 in his first FDF, was now declared at a reduced value of R1 294 089,00.

17.9.4 Furthermore, the Respondent declared to be involved in a joint venture in respect of 2 immovable properties (Erf [...] and Erf [...]), however no documentation had been discovered in respect of these alleged joint ventures, nor was any information given.

D. RESPONDENT'S CASE

- [18] The Respondent applied for condonation for the late filing of its answering affidavit, the Applicant did not oppose this and condonation was accordingly granted by the court.
- [19] The Respondent denies the allegations levelled against him by the Applicant. He asserts that he pays maintenance of close to R47 000.00 per month. He states that he has done so since May 2020 and has always been willing to reasonably maintain the Applicant pendente lite and has continued to do so.
- [20] In his answering affidavit, the Respondent gives details of his business activities and dealings. He elaborates on how he allocated and withdrew certain amounts into different accounts for investment and preservation etc.
- [21] He is evasive as regards the question whether he can or cannot afford the amounts she demands and is silent as regards his spending patterns as alleged by the Applicant.
- [22] Respondent rejects, in sweeping terms, the Applicant's allegations concerning the standard of living that he and the Applicant enjoyed when living together as a married couple.

E. ANALYSIS OF THE FACTS AND SUBMISSIONS AND THE LEGAL POSITION:

- [23] In *Taute v Taute* 1974 (2) SA 675 (E) it was held that "relief under rule 43 is intended to be interim and temporary and cannot be determined with the degree of precision and exactitude afforded by detailed evidence." [1]
- [24] In this application the Applicant also seeks an order compelling the Respondent to make a contribution for her legal costs because as things stand she is litigating at a disadvantage against the Respondent. She already owes her attorney over R368 722,06 as at 22 September 2022, inclusive of costs of experts. The experts are Johann Ferreira – forensic accountant, Lance Marais – Industrial Psychologist, Corporate Valuations – sworn valuers and Martin Herbst – financial adviser.
- [25] The Applicant has also attached an estimate of the legal fees and costs that she will likely have to incur up until the first day of trial. These costs include the estimated fees of her attorney, her counsel, as well as the experts. The arrear costs, together with the estimated costs up to the first day of trial add up to R772 602,06.
- [26] The criteria used to determine interim maintenance has been laid down by our courts as being three-fold, namely –
- (a) The standard of living of the parties during the subsistence of the marriage; (b) The Applicant's actual and reasonable requirements and (c) the income of the Respondent. [2]

- [27] The Applicant is entitled to be maintained on the same standard of living that she enjoyed during the subsistence of the parties' marriage, subject thereto that the Respondent can afford to keep them on that standard of living. It is not expected of her to reduce her standard of living just because the Respondent refuses to pay her proper maintenance. After all, the Respondent admits that because they are still married to one another, he has a duty to maintain her.
- [28] The standard of living of the parties is a matter for evidence. In casu plenty of evidence has been presented. From the Respondent's bank statements and income and spending patterns it is clear that he is a man of considerable means. The Respondent continues to conduct his life at a very high standard. It can therefore not be denied that during the days when all was well in the marriage, the Applicant asked for nothing that she could not get. The Applicant's standard of living has plummeted drastically, all due to the Respondent's deliberate withholding of proper and reasonable financial assistance from the Applicant.
- [29] The Respondent has displayed clear reticence to disclose his financial affairs to the court. He went to the extent of ordering his auditor to withhold financial statements and related documents. All documents disclosed by the Respondent were done so after much cajoling and service of numerous Rule 35(3) notices.[3]
- [30] A cursory glance at his bank statements however, reveals a different picture from the one he seeks to paint. It is clear that he spends time and money in clubs and is not averse to taking a flutter on the slot machines when he so fancies.
- [31] On behalf of the Respondent, Adv. Van Niekerk also referred to the matter of Taute v Taute[4] where it was held that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Further that more weight should be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to that of one who is seeking to evade them. I agree with those assertions, even though ironically, the Applicant's demands appear to me reasonable and moderate in the circumstances and the Respondent is seeking to evade them.
- [32] As regards the contribution for legal cost, the law is clear. The premise is that the disadvantaged litigant should be assisted to get to a position of equality of arms with her husband or wife as the case may be. The basis for this is that the court is bound by section 9(1) of the Constitution of the Republic of South Africa to guarantee both parties the rights to equality before the law and equal protection of the law.
- [33] As Madam Justice Victor J observed in HS
- v. H[5],

“...In respect of rule 43 applications, Van Rippen, is old authority for the rule that the discretion in determining quantum of contribution to costs must be exercised such that “the wife must be enabled to present her case adequately before the Court.””[6]

[34] I am satisfied that the Applicant has made out a compelling case for the Respondent to pay maintenance to the Applicant pendente lite as prayed for in the notice of motion and for the Respondent to make a contribution to Applicant’s legal costs.

[35] In the result I make the following order:

35.1 that the Respondent pay the amount of R23 500.00 per month on or before the 1st day of the month as maintenance for the Applicant. The said payments are to commence on the 1st day of the month following this order.

35.2 that the Respondent make a contribution towards the Applicant’s legal costs in the amount of R650 000.00 payable in instalments of R100 000.00 per month. The said payments are to commence on the 1st day of the month following this order.

35.3 The Respondent to pay the costs of this application.

The full order dealing with all aspects of this Rule 43 application is attached hereto marked X.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 01 February 2023

Date of Judgment: 28 March 2023

For the Applicant: Adv.

I Vermaak-Hay

e-mail: Ilse@clubadvocates.co.za

Instructed by: Arthur

Channon Attorneys

e-mail: Arthur@channonattorneys.co.za

c/o De Jager Inc; PRETORIA

For the Defendant: Adv.

N. van Niekerk

e-mail: natashav@lawcircle.co.za

Instructed by: E Beyers Attorneys

PRETORIA

e-mail: daleenk@lantic.net

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[1] Taute v Taute 1974 (2) SA 675 (E) at 676B-C; Herbstein nd Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th Ed 2009 Chapter 47-p1535

[2] See: DD v FD 2021 JDR 0048 (G) (case no. 72897/2019) at p4 par 8;

[3] Paragraph 28 of Applicant's founding affidavit.

[4] 1974

(2) SA 675 (E) at 676H.

[5] H

v. H [2022] ZAGPJHC 904; [2023] 1 SA 413 (GJ) at Para 82.

[6] Referring to Van Rippen v. Van Rippen 1949 (4) SA 634 (C) at 639-40

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