

SOUTH AFRICA / JUDGMENT

Y.V.D.M v W.P.V.D.M (2021/43213) [2023] ZAGPJHC 1280 (9 November 2023)

[2023] ZAGPJHC 1280

COURT

South Gauteng High Court, Johannesburg

BEFORE

Thupaatlase

CASE / FILE NUMBER

2021/43213

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 2021/43213

In the matter between:

V D M, Y (born W) (PLAINTIFF IN THE MAIN ACTION) APPLICANT And V D M, W P (FIRST DEFENDANT IN THE MAIN ACTION) RESPONDEDNT

Judgment

Thupaatlase AJ

Introduction

[1] This is an application in terms of Rule 43 of the Uniform Rule of Court. The applicant is a plaintiff in the pending divorce action. The application is opposed. The plaintiff is seeking an order of maintenance for herself as well as for two major children born of the marriage. The parties will be referred to as cited in the main action.

[2] The applicant sets out the relief sought in the following terms:

2.1. Pendente elite the respondent is ordered to pay maintenance in respect of the applicant and the two major children as follows:

2.1.1. In respect of the applicant:

2.1.1.1 The sum of R 84 000.00 each month. The first payment and all payments thereafter shall be paid directly in the applicant's FNB account. The first payment shall be paid on the 07 November 2023 and thereafter on the first of each month;

2.1.1.2. The sum of R 180 000.00 in respect of arrear maintenance such amount to be paid within five (5) days of the order;

2.1.1.3 The monthly premiums to retain the applicant as dependant on the respondent's medical aid scheme (Profmed Pro Secure) of which he is currently a member and payment of all excess medical and dental expenses not covered by the benefits of such medical aid;

2.1.1.4 The applicant's monthly cellular telephone and data costs.

2.1.1.5 Payment of the monthly municipal rates and taxes and all imports on due date in respect of the following immovable properties;

2.1.1.5.1 [...]Poortview, Roodepoort

2.1.1.5.2[...], North Willowbrook;

2.1.1.5.3 [...] Groot Brakrivier (being in respect a vacant land).

2.2 In respect of the parties 'major dependent daughter Q maintenance as follows:

2.2.1 The sum of R 20 000.00 each month directly into bank of Q; the first payment to be on the 07 November 2023 and thereafter on the 01 of each succeeding month;

2.2.2 Her university fees directly to the university concerned;

2.2.3 The monthly insurance premium in respect of the motor vehicle driven by her;

2.2.4. The monthly premiums to retain her as dependent on the respondent's medical aid scheme and payment of all medical and dental expenses not covered by the benefits of such scheme;

2.2.5 Her cellular telephone costs and data costs.

2.3. In respect of the parties' son, T maintenance as follows:

2.3.1. The sum of R 15 000.00 into the bank account of T, the first payment on the 07 November 2023 and thereafter on the 01st of each succeeding month;

2.3.2. The monthly rental payable in respect of the present accommodation rented by T or such other accommodation rented by T in an amount not exceeding his present rental;

2.3.3. The monthly insurance premiums in respect of the motor vehicle driven by T;

2.3.4. His university fees directly to the university;

2.3.5. The monthly premiums to retain him as a dependent on the respondent's medical scheme and payment of all medical and dental expenses not covered by the benefits of such scheme;

2.3.6. His cellular telephone costs and data costs.

3. The respondent shall reimburse the applicant all medical and dental expenses not covered by the benefits of the medical aid scheme paid by her for which the respondent is liable within five (5) days after presentation of an invoice to him.
4. The amounts set out above shall increase annually on the 01st of the month succeeding the anniversary date of this order and every 12 months thereafter at 6% per annum.
5. The respondent shall pay the costs of this application including costs of senior counsel.
- [3] The parties were married to each other on the 04 April 1993 out of community of property and by antenuptial contract. The marriage still subsists. The copy of the antenuptial contract is attached to the summons in the main action.
- [4] There are two children born from the marriage. The eldest is a daughter born on 11 December 1998. She is a full-time university student. She is studying a Bachelor of Commerce in Industrial Psychology and currently staying with the plaintiff. The second child is a son. He is a full-time university student, studying towards a LLB degree. He is staying in a rented property.
- [5] It is common cause that there is irretrievable breakdown of marriage. The plaintiff issued summons on 09 September 2021. The defendant pleaded and counter claimed. The trial in the divorce action is still pending.
- [6] The cause of the breakdown of the marriage is to the extent that it is relevant is that the defendant formed extra-marital relationship with another woman and committed adultery with her. The defendant is currently staying with the said woman. The parties have been separated since March 2021. The defendant provides a different reason for the breakdown and further avers that the relationship with his present partner came after the breakdown of the marriage.

Plaintiff's financial position

- [7] The plaintiff asserts that she does not have an income from any source, except an income from what she describes as an insignificant amount of interest from her FNB 7-day notice account. She received various loan amounts from her father totalling R 180 000.00. She borrowed the money after the defendant had reneged on the agreement to pay R 60 000.00 towards her maintenance per month.
- [8] The Financial Disclosure Form (FDF) of the plaintiff lists about 4 immovable properties registered in her name. Before separation, 2 of the properties were rented out. The defendant was receiving rental payments. It was also the defendant who paid rates, levies and water and electricity and other municipal imposts.

- [9] The immovable properties are worth about R 10. 5 million. It is not disclosed how much rental payment was received from each of the properties. It is common cause that the properties are hers. She avers that the defendant has instructed tenants not to pay rental to her.
- [10] The movable asset of the plaintiff consists of a motor vehicle with an estimated value of R 400 000.00 and jewellery valued at R 407 000.00 and a pension interest with an estimated value of R 82 234.82 as of 26 October 2022.
- [11] The plaintiff further has investments and bank accounts with various financial institutions. The banks accounts are R 84 237. 58 and offshore investments valued at \$ 72 481.68. In addition, there is an investment and bank accounts in her name. There are 8 such accounts with estimated value of R 1 514 334.35.
- [12] In respect of liabilities and debts she has a debt to the Family Trust in respect of rental. She owes her father an amount of R 1 610 716.
00. According to her, she also took out a loan to fund her legal expenses, own maintenance and for the purchase of a motor vehicle.
- [13] She describes herself as 52 years of age and had remained unemployed shortly after marriage. She states further that upon their separation the defendant undertook to pay maintenance at the monthly sum of R 60 000.00, retain her as a dependant on his medical scheme and to pay her cellular fees.
- [14] The plaintiff states that the couple enjoyed a high standard of living during the period that they stayed together. These included holidaying at places both locally and internationally on regular basis. The children attended private educational institutions. They were spoilt with presents including being bought new cars when they turned 18 years of age. The family ate at restaurants at regularly intervals. According to her during all these times, the defendant was the one paying. The defendant controlled all the family finances; including the bank accounts in her name. She alleges that the defendant was secretive about his financial affairs.
- [15] The plaintiff bemoans the fact that whilst she is no longer enjoying the high standard of living, the defendant continues to enjoy same lifestyle. He still travels throughout the country and has even continued with overseas holidays.
- [16] The plaintiff submits that she is in need of maintenance as she has no income and currently relies on her father for financial support. She states that the Family Trust has given her concession not to pay rental until after the finalization of the divorce.

[17] She submits further that she is in need of maintenance for herself as the defendant is able to afford it. She attributes the refusal of the defendant to pay maintenance as a tactic and strategy to compel her to enter into a divorce settlement agreement which is unfavourable to her. The plaintiff has monthly expenses of R 84 000.00 and this is the amount of maintenance she claims in these proceedings.

Defendant's financial position.

[18] The defendant disputes that the plaintiff is in need of maintenance. According to him the plaintiff has the means to maintain herself. He disputes the allegation that he has failed to make a full disclosure. He maintains the position that he is unemployed and that he is unable to get work because of the fact that he declared a delinquent director by the court.

[19] In respect of their financial position both of them, the defendant submits that the plaintiff is not having any financial difficulties given the property portfolio and as well as the investments that she owns. He contends that the plaintiff is a recipient of large sums of money from her father through a Family Trust he created for the benefit of his daughters. According to him the plaintiff is worth millions as a result of payments from the W Trust.

[20] In respect of various holidays the family enjoyed, the defendant credited the plaintiff's father and his clients for funding such trips.

Issues for

determination

[21] The issues for determination as distilled from the papers are:

- Whether the plaintiff is entitled to maintenance and if so the quantum of such maintenance including her ancillary expenses by her;
- Whether the court should fix an annual escalation of 6%;
- Whether the defendant should pay arrear maintenance in respect of the plaintiff in the sum of R 180 000.00.

[22] There was also a point in limine which was initially taken by the plaintiff regarding locus standi. This related to whether the plaintiff had locus standi to claim maintenance for adult dependent children. This point was correctly abandoned during argument before the court.

Analysis

[23] The plaintiff submitted that she was entitled to maintenance which was both reasonable and commensurate with the lifestyle she enjoyed when they still lived together. She submitted that the defendant acknowledged the need for such maintenance when he agreed to pay her a sum of R 60 000.00 per month when they separated.

- [24] She criticised the defendant for stating that the plaintiff was receiving payments from the W Family Trust as according to her the funds were distributed as discretionary funds.
- [25] Despite submitting a claim for the two adult dependent children, the court notes that there was no evidence to show how the amounts were quantified. It is conceded that the defendant is currently paying the maintenance of the two children though at times payments are done late. The amounts proposed are not substantiated by any supporting documents. No confirmatory affidavits were submitted by the two adult dependent children.
- [26] According to the plaintiff, the defendant still has control over her finances despite their separation. The parties are married out of community of property. It is not explained why she is supposedly suffering financially when she has such a huge property portfolio that should generate enough income to leave off and yet she doesn't. There is no legal impediment preventing from her exercising control over what is rightfully and lawfully her property except the defendant has not relinquished control over her properties. The plaintiff has no history of dealing with family finances and she appears to be still impeded by the financial control the defendant had over her.
- [27] The plaintiff has huge investment portfolio and yet she has not revealed to the court how returns on those investments are utilised. She does not deny the investments and the property portfolio she owns. However, her contention is that these are investments that are not immediately available to be used.
- [28] It is noteworthy that the resolution of trustees that defers payment of rental by the plaintiff was passed on 27 June 2022. It is clear that such concession could only have been made after it was realized that the plaintiff was struggling financially.
- [29] It is evident that defendant is still responsible for the running of the financial affairs of the plaintiff, and no evidence was placed before court to indicate steps if any, he has taken to divest himself of such control. There is no evidence that there is a stage that the plaintiff ever took charge of her financial affairs.
- [30] The plaintiff has conceded that some of the overseas trips were paid for by her father and or the Trust. It is undeniable that both parties have accumulated assets of considerable value during the subsistence of their marriage.
- [31] It is clear that during this litigation the defendant has not always been forthcoming with his financial disclosures, that led to an application being launched to compel him to make such a disclosure. He submitted FDF without supporting documentation which makes it harder to assess his true financial position. The behaviour of the defendant appears to be designed to hide his true financial position.

Status of the adult dependent children.

- [32] It is common cause between parties that the two children born out of marriage are adult dependants. Both are full time university students. The plaintiff seeks maintenance on their behalf. In terms of the law, she has locus standi to apply for maintenance on their behalf.
- [33] The conflicting decisions from different divisions of the high courts were resolved in the case *Z v Z* (556/2021) [2022] 113 (21 July 2021) where the court held that: ‘dependent children should also remain removed from the conflict between divorcing parents as long as possible unless they themselves assert their rights to the duty of support. It is undesirable that they should have to take sides and institute a claim together with one parent against the other, they should preferably maintain a meaningful relationship with both their parents after divorce. The institution of a separate claim for maintenance by an adult dependent against his or her parent or parents would further lead to a piecemeal adjudication of issues that arise from the same divorce are intrinsically linked to other issues in the divorce action, such as claims for spouses and other minor children born from marriage. Further, the invidious position of an indigent adult child in this situation is clearly evident’. (References omitted)
- [34] The SCA further commented at para [20] that: ‘In *AF* it was correctly observed that that, Courts should be alive to the vulnerable position of young adult dependants of parents going through a divorce. They may be majors in law, yet they still need the financial and emotional support of their parents. The parental conflict wrought by divorce can be profoundly stressful for young adult children’. The court went on to state that; it is important to protect the dignity and emotional wellbeing of young adult dependants of divorcing parents by regulating the financial arrangements for their support in order to eliminate family conflict on this score and create stability and security for the dependent child’.
- [35] I have already alluded to the fact that the plaintiff did not place any evidence in support of the expenses of these adult dependent children. She only requires that they should be paid amounts mentioned in the notice of motion. The defendant concedes responsibility to maintain these children albeit conditional upon sale of the Stellenbosch property which is registered in the name of their daughter.
- [36] He has indicated that he has a separate arrangement with the children regarding their maintenance and support. The plaintiff has conceded such an arrangement adding that the defendant does not always pay in time. Given the age of the two children and not taking away from the law as stated above, the two children are competent to conclude such arrangements with the defendant. I find that on the papers no need for maintenance has been established in respect of adult dependent children.

The applicant’s claim for retrospective maintenance

- [37] It is common cause that upon their separation the defendant agreed to pay maintenance. He paid a sum R 60 000.00 per month. The defendant paid from March 2021 to March 2023. He thereafter stopped, stating that he has 'changed his mind'. The defendant seeks relief that the arrears sum of R 180 000.00 be paid. The question is whether the plaintiff is legally entitled to recover such amount as retrospective maintenance.
- [38] In the case of *AF v MF* 2019 (6) SA 422 (WCC) the legal position was articulated as follows at para [32] 'At common law a claim for arrear spousal maintenance is barred by virtue of the principle in *praeteritum non vivitur* (one does not live in arrear), the argument being that if the spouse managed on her own resources, there was no need for support. An exception to this rule is recognised where the spouse has incurred debts in order to maintain herself'.
- [39] At para [33] the court concluded that: 'Since the *in praeteritum non vivitur* rule does not operate where a spouse can show that she had to incur debts in order to maintain herself, logic would suggest that it should likewise not apply where she has had to incur debts to fund her legal costs. The question, then, is whether there
- is anything in precedent or principle which militates against allowing a claim for past legal costs in such circumstances'. (references omitted).
- [40] There is documentary proof that the Family Trust exempted her from paying rent. It is to be regarded as loan until she is in a position to pay. The occupational rental is currently in arrears. I am satisfied that the plaintiff has shown that she incurred the debt in order to maintain herself. She is entitled to recover the amount from the defendant.

The Law

- [41] Rule 43(1) (a) which provides that 'This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters: (a) Maintenance pendente lite'. It is clear that the rule applies to a pending divorce action between spouses.
- [42] The principles regarding the nature of this application were formulated as follows *Taute v Taute* 1974 (2) SA 675 (E) at p676B that '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'.
- [43] The court at 678 H continued to state that 'Much reliance has been placed by her counsel on such cases as *Rose v Rose*
- (1950) 2 All ER 311, *Griffith v Griffith* (1957) All ER 494, but a reference to these cases clearly demonstrates that there is no general principles upon which an application for maintenance pendente lite under Rule 43 can or must be based. Each case must depend on its own particular facts'.

- [44] The procedural principles were stated as follows in the matter *Greenspan v Greenspan* 2000 (2) SA 283 (C) at para [12] where Hlophe DJP (as he then) was stated as follows: ‘Unlike in ordinary motion proceedings where the parties are not so strictly limited in the number of affidavits they may file nor are they discouraged from setting out their versions in their papers, by contrast Rule 43 is designed to afford an inexpensive procedure for granting interim relief. The parties to Rule 43 are limited in the material they may place before Court, and the Courts actively discourage lengthy affidavits and bulky annexures’.

Conclusion

- [45] It is trite that applicant spouse, is entitled to maintenance pendente lite. This is dependent on whether such a need has been established on the papers. That maintenance pendente lite is determined based upon the standard of living of the parties prior the divorce proceedings is, commenced or contemplated to be commenced.
- [46] In casu, it is not denied that during the period that the couple stayed together, it was the defendant who controlled the family finances to the exclusion of the plaintiff. The defendant made much about the financial assistance the plaintiff is receiving from her father. That fact alone is indicative that the plaintiff needs financial support.
- [47] The defendant is not disputing the fact that he agreed to pay the plaintiff an amount of R 60 000.00 per month until he decided to stop. He did not stop because of improved financial situation of the plaintiff. Instead, the position has worsened as the plaintiff is no longer staying at the former matrimonial home. He stopped because as said he ‘changed his mind’.
- [48] The defendant has offered to retain the plaintiff in his medical aid except but that he’ll not be responsible for excess payments which may be required. The same goes for payment of cellular phone and data costs. This is a further admission on the part of the defendant the plaintiff needs maintenance pendente lite.
- [49] The court is not required to make a determination with the exactitude which is afforded by full trial. That is for the trial court to determine. It is enough if I am satisfied that the plaintiff has shown a need for maintenance.
- [50] The defendant fails to appreciate that the assets that the plaintiff is having where not acquired post their separation. He maintained the plaintiff prior separation with the assets being there.
- [51] The old case of *Glazer v Glazer* 1959 (3) SA 728 (W) at page 930E stated the position as follows: ‘The wife is entitled to support on a scale commensurate with the social position, lifestyle, and financial resources of the parties. It would be reasonable to maintain her in a position similar to that to which she would ordinarily be accustomed while she was living with the husband. In the words of Williamson J, ‘she is entitled to a reasonable amount according to her husband's means, not necessarily according to what he thought was reasonable’.

[52] In the circumstances, it is ordered as follows:

1. Both parties are granted leave to file further affidavits in terms of the provisions of Rule 43(5) of the Uniform Rules of Court;

2. Pendente lite, the respondent/defendant is ordered to pay maintenance in respect of the applicant/plaintiff as follows:

2.1. The sum of R 84 000.00 each month. The first payment and all payments thereafter shall be paid directly into the applicant/plaintiff's

FNB account number [...]. The first payment on the 17th of November 2023 and thereafter on the first day of each succeeding month;

2.2. The sum of R 180 000.00 in respect of arrear maintenance and such amount to be paid within 14 days of this order;

2.3. The respondent/defendant to pay monthly premiums to retain the applicant/plaintiff as a dependent on the respondent/defendant's

medical scheme (Profmed Secure plan) of which he is currently a member and payment of all excess medical and dental expenses not

covered by the benefits of such medical aid scheme;

2.4. The applicant's monthly cellular and data costs.

3. Payment of monthly rates and taxes and all imposts on due date in respect of the following immovable properties:

3.1. [...]Poortview, Roodepoort;

3.2. [...] North Willowbrook;

3.3. [...], Groot Brakrivier (vacant land).

4. The respondent/defendant shall reimburse the applicant/plaintiff all medical and dental expenses not covered by the benefits of the medical aid scheme paid by the applicant/plaintiff for which the respondent/defendant is liable within seven (7) days after

presentation of invoice to him.

5. The respondent/defendant to pay the costs of the application including costs of Senior Counsel.

THUPAATLASE AJ

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 30 October 2023

Judgment Delivered: 09 November 2023

For the Applicant:

Adv. J Woodward SC

Instructed by:

Billy Gundelfinger Attorneys

For the Respondent:

Adv. S Nathan SC

Instructed:

Fluxmans Incorporated

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