

SOUTH AFRICA / JUDGMENT

Y.Y v G.Y (13718/21) [2024] ZAGPJHC 439 (6 May 2024) [2024] ZAGPJHC 439

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mahomed

CASE / FILE NUMBER

13718/21

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Case

No. 13718/21

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED:

In
the matter between:-
Y[...]
S[...] Y[...] (Born
W[...])
Applicant
and
G[...]
Y[...]
Respondent

JUDGMENT

MAHOMED AJ

INTRODUCTION

This is an application for interim maintenance and a contribution to legal costs in terms of Rule 43 of the Uniform Rules of Court. The applicant seeks an order for maintenance for the two minor children of the marriage, a contribution toward her legal costs in the divorce action, and costs of this application.

BACKGROUND

1. The parties were married by way of an antenuptial contract with the application of the accruals. They married on 8 March 2011 and have two minor children, a 9 year old and a 6 year old, who both attend private schools. The parties are both chartered accountants, the applicant runs her private company, G[...] A[...] S[...] (Pty) Limited, and the respondent is employed as Head of procurement for Firststrand Bank ("RMB"). They both enjoy impressive careers to date and lived luxurious lifestyles, during their marriage. In March 2021 the respondent issued a summons for divorce, their marriage has irretrievably broken down, they are no longer compatible however, the applicant alleges that the cause of the breakdown was the respondent/ plaintiff's infidelity. It is common cause that the respondent participated in an extra marital affair with a Ms Rego whilst he was seconded for two years, (2020 to 2022) to India, as a chief operations officer (COO) for his employer RMB. In February 2020, the applicant withdrew R6.6 million from the respondent's bank accounts[1], including, available credit in mortgage facilities, foreign currency accounts. The applicant feared that the respondent, who already transferred a substantial amount into his girlfriend's account in India, would continue to do so and prejudice her and the children. They had jointly accumulated the funds, he alleged that R4 700 000 was his and R1 870 000 was hers, she alleged that the larger amount was hers. The respondent contended that he transferred monies into his girlfriend's account for payment to his brother who needed the monies for medical reasons, he was not permitted by Indian law to operate a bank account without a visa and therefore used Ms Rego's account.
2. When they married, and for nine years, until she left, the parties lived with the respondent's parents and their children grew up in an extended family environment. They enjoyed all the luxuries of an upper middle class family. The applicant alleged that she could no longer live with respondent after he started verbally abusing her, therefore she moved out of the marital home. Initially she rented an apartment and later purchased a home for R5,5 million, in Bedfordview where she now resides with the two children. She also traded in an old vehicle for a luxury version after she set up her own home. It is common cause that the applicant also retained all rental income from three rental properties which, the parties jointly owned, during the period he was away.

MAINTENANCE

3. The applicant alleged that whilst the respondent was away for the two years, she attended to all the children's needs and had to run her own accounting business G[...] A[...] S[...] (Pty) Ltd at the same time. The respondent offered no assistance in that regard. The applicant contends that since 2020 the respondent failed to make any contributions to the children's maintenance, she attended to all their financial needs. She has incurred costs and requires that she be reimbursed for the respondents share of their costs. As primary care giver the children spend a significant amount of their time with her, and she has had to compromise her career and her business to attend to their needs. Segal SC proffered that the respondent has a far higher earning potential than the applicant and the maintenance awarded must be prorated according to their respective incomes.
4. Segal SC for the applicant proffered that the applicant is not a spendthrift and that she retains 200 000 USD in one of the accounts, the applicant denies having denuded the family funds. She contended that she was responsible for the financial management of the family resources, she had full access to the respondent's and his parent's banking accounts and on occasion deposited some of her monies into his account.
5. On her version she has used the monies to pay for expenses, therefor the respondent contends, that the applicant must continue to pay for expenses from the funds she withdrew from his account. He was upset to learn that she had abused her position as the financial manager of their family monies, and she unduly burdened the respondent with increased repayments and interest on bonds, the interest on bonds had increased to R25 000 per month,[2] she left him without any funds in his savings to service the debt. She contended that R4 779 572 was her money[3] and that the respondent's share was only R1 818 million. The applicant alleges she paid; the children's maintenance since 2020, the deposit on her home, conveyancing and transfer duties, the tax on her business, attorney's fees of R400 000, the expert's report regarding the primary residence of the children, and the children's expenses which all calculated to over R8.3 million.[4]
6. The respondent contended that the applicant was extravagant after their dispute arose and denied that they enjoyed a luxurious lifestyle. He proffered that they lived with his parents over the nine years they were married and were able to save monies on accommodation costs. His parents assisted them with their children and now that she has moved her mother assists her with chores.
7. The applicant claims R25 200 as maintenance for each child and the respondent has tendered R 13 582 per child.[5] The applicant furthermore, requires that the respondent continues to pay the full medical aid costs of the children and that the

co-payments are to be paid prorated to their respective income, therefor he is to pay 70% and she will be responsible for the balance

of 30%. The costs of the children's educational expenses must follow the same method of calculation, she contends he earns the higher income. She alleges she earns R145 000 per month and that the Respondent earns R303 275 per month. Ms Segal argued that the parties apply different methods of calculation as the respondent fails to include his payments toward a pension, his income from the rentals of the three units and his bonus as his total income. The applicant contends that her household expenses are R224 750 per month.[6] The respondent contends that on an analysis of her bank statements, the household expenses amount to R89 744 and the children's portion is R46 717.67.[7] The respondent disputes that the applicant would have spent all the monies she appropriated from his accounts and argued that over the period of 42 months she would have saved R6 million.[8]

8. The parties make allegations and counter allegations of a failure to disclose their full financial circumstances. Furthermore, Ms Frank submitted that the applicant failed to comply with the practise manual regarding disclosure, she failed to provide official

documentation regarding her finances in her financial disclosure form and provided only her assessment of her finances. She submitted that her client is prejudiced and unable to assess the value of G[...] Pty Limited, to determine her income from the private business, whereas the applicant contended that the respondent failed to disclose his foreign bank accounts held in India.

9. Furthermore, it is alleged that the applicant's list of expenses includes her business expenses, her spend on her mother and friends, which are not necessary and reasonable expenses as contemplated in the Rule.
10. The evidence is that the applicant is the primary caregiver of the children, and they obviously spend a significant amount of time with her, she attends to all their daily needs, including ensuring they attend extramural and cultural activities through the week. The respondent has the children as per arrangement between the parties, the time spent is limited and since 2020 when he left for India, he has not paid maintenance in respect of the children. The respondent contended that the applicant on her version used the monies which she appropriated from his bank accounts to pay for the children's expenses and denies that he has not paid for their expenses. The evidence is that the respondent paid for the outstanding school fees and the after care costs, when the applicant, driven by spite and malice, neglected the payment of the children's fees. The respondent tenders R13 075, 00 per month in respect of both children, he alleges that when they are with him, he spends a substantial sum of money which must be factored in, the children's needs are never compromised. Furthermore, he contends that he earns a nett salary, of R99 000, he receives R48 125 per month as a bonus and R21 289 from his consultancy work. His bonus is not guaranteed, and is performance based, whereas the applicant on her version retains \$200 000 US, which belongs to him , she has the funds to pay for his share of expenses. He

contended that she failed to disclose information he has requested in discovery and therefore he is unable to rely on her disclosure for a true reflection of expenses, he further contends that her spend of R4 652 798 over a period of two years is excessive, and overstated.

11. In the heads of argument, the applicant states that the parties differ materially in their respective assessments of the respondent's earnings.[9] Ms Segal argued that the respondent is incorrect in his assessment of his earnings and has omitted to include the pension he pays, the income from rentals and the bonus assessed monthly, as part of his earnings, and therefore the applicants version that he earns R303 275 per month must be accepted, and proves that the respondent earns substantially more than the applicant.
12. The respondent pays for their medical aid however the applicant makes all co-payments for the medical services[10] which the respondent refused to pay for, again he contends she has his money, and must use those funds to pay the children's expenses. Ms Segal submitted that the respondent wants for the applicant to exhaust all the monies to the last cent, before he takes responsibility for his children. Counsel furthermore argued that the respondent approbates and reprobates, regarding the use of the monies she has taken. Ms Frank proffered that the applicant had unlawfully appropriated the monies, but also contended that there was an agreement between the parties that the respondent should use the funds to pay the children's expenses.
13. Furthermore, she alleged that the respondent was vindictive, and obstructive regarding her business efforts . It was contended that the respondent impedes her earning potential as he competes with her, he insisted that she vacate his brother's property, and forced her to relocate her business, she has had to pay an increased rental.
14. The applicant contended that they lived a luxurious lifestyle, they enjoyed two holidays a year to international destinations, they drove expensive vehicles, and shopped at high end stores throughout their married lives and together with both their children. The respondent paid for their holiday expenses. She contended that their current home is a downgrade as it is all she could afford, she and the children no longer enjoy the safety of walking in a secure estate and the additional activities one enjoys in upmarket estates. According to the respondent they lived as a middle class family, she became extravagant after their dispute arose.
15. The Respondent's means

15.1. Ms Segal reminded the court that the respondent saves a substantial amount per month, as he lives in his parent's home and therefore does not spend on accommodation. He can afford to pay the maintenance she claims and contribute toward her costs. She proffered that the respondent purchased a luxury vehicle for R1,2 million for cash and owns a second luxury vehicle which he finances, the respondent had a higher earning potential as a banker, whilst her client's income fluctuates, as the client base varies from month to month. The respondent contended that the applicant on her version claimed that she is the sole director of the company, she declared retained earnings of R500 000, she has a substantial sum of the monies she

appropriated, therefore his total earnings, of R168 500 is very comparable to her earnings of R145 000 and therefor that each party must be ordered to pay 50% of the children's expenses.

Contribution to Costs

16. The respondent denies that the remaining issues for trial are complex, in that there is no dispute about the care and contact with the children and the expert's fees can be paid from the funds that the applicant has taken. There is no need to employ a forensic investigator, he has disclosed all that the applicant has requested and the value of the properties they own jointly is easily quantifiable at sale. Ms Frank submitted that the bill of costs is excessive and the applicant's cost consultant has stated that not much remains for preparation for trial. She submitted that her client has on several occasions sought to resolve the disputes cost effectively and each time the applicant has found excuses and sabotaged attempts at mediation. Although the parties not far apart, they were unable to resolve issues, through mediation.
17. Ms Frank argued that applicant rejected the suggestion of a referee to assist in the assessment of the accruals and at a reduced cost, compared to the costs for forensic accountants and investigators. Counsel reminded the court that the applicant has already paid R400 000 to her attorneys, which exceeds her client's costs to date, on her version she used the funds she took from his account and therefore the respondent has already contributed to legal costs, it was argued that R1 million is excessive, on a perusal of the bill it is evident that the several items are unnecessary and figures are inflated.
18. The applicant must demonstrate a need for maintenance and the respondent's ability to pay the maintenance. The minor children appear to have enjoyed a luxurious lifestyle, they attend various extra-curricular activities, they attend private schools and live in an upmarket area. However, their actual needs are disputed and the court notes that parties accused one another of failing to fully disclose their financial circumstances. The respondent based on objective evidence from bank statements presented a value for the children's expenses, which was not disputed, although it is noted that there is not further affidavit permitted. Upon consideration of the conspectus of the evidence, I am of the view that the respondent should pay the amount of R40 000 per month for both children for their maintenance. He tendered R27 164 for both children. I am of the view that an order must be in place, to ensure an amount in maintenance for the children's expenses is ordered. The children's immediate costs must be secured and should not be at risk of a falling into arrears whilst their parents grapple with their personal challenges with one another. Having regard to the objective and common cause facts before me[11], it was unnecessary, to compromise the children's interests when they were removed from their aftercare programmes and placed on the debtors list for outstanding school fees. The applicant conceded she has taken the respondent's monies, her counsel proffered that she had not dissipated the family funds and was in control of a substantial sum of money, she ought to have paid the fees timeously, she failed to prioritize her children.

19. I agree with Segal SC that the children spend more of their time with the applicant and she accordingly must dedicate more of her time at the expense of her career. The formula of a percentage prorated to income for expenses is in my view appropriate. The respondent holds an executive position in the financial services industry, it is not unusual that the male is favoured in the work environment, he has greater income earning potential than the applicant. Her income is impacted by several variables from month to month, as a self-employed female. Furthermore, bearing in mind that this is an interim order, it is fair at this stage and having considered the factors set out earlier, that the respondent pay 70% of all the educational expenses of the children and 70% of the co-payments on the medical aid, particularly in that he will eventually recover those payments from the medical aid.
20. The applicants claim for arrear maintenance of the children, cannot be valid against the common cause facts, after she accessed a substantial sum of money from the respondent's accounts, and on her version, she retains foreign currency and has had the benefit of the respondent's share of the rental income for the period 2020 to 2022. She had access to the capital and was permitted to pay his share from those funds. She too is obliged to contribute to the children's expenses, I am of the view that this claim must fail.
21. Regarding the applicant's claim for a contribution to costs, I noted the respondent's submissions that the parties are on par in regard to their assets, earnings (although they differ on how it is computed), maintenance, liabilities and their ability to pay costs.[12] I considered the issues remaining and their respective means and in the circumstances of this case, I am of the view the applicant's rights to equal protection by the law is preserved, she can afford to litigate to meet the respondent's case. On her version she had paid her attorneys R400 000 from the monies she appropriated, and she indicated in her business financial statements that she has retained funds, she has a balance from the monies she appropriated, and she receives her share of the rental income, which ought to be sufficient to pay her own costs. She will not be prejudiced in her continued litigation of this matter, and therefore I make no order regarding a contribution toward her costs. The applicant does not require the contribution to prosecute her case, there is no marked imbalance in the financial resources available to the parties to litigate.[13]
22. The applicant has had access to capital which in my view is a significant benefit whilst the respondent was left without any monies from his savings to pay for increased mortgage payments and interest. Furthermore, I am of the view the applicant failed to explore other legal remedies to address her fears that the funds would be lost. No court can condone her actions, which can impact on the determination of the accruals in the main action, even the children were not spared when payment of their fees was left unpaid. This order will "free up" some of her funds which she can use for her legal expenses.

COSTS

23. The parties could have settled this matter at the mediation, they knew then that their marriage had irretrievably broken down, their expert's recommendations on parental rights and responsibilities and access was not disputed, and only the assessment

of their accruals remained an issue.

24. The applicant failed to provide the necessary official supporting documentation in her financial disclosure documents, the directives are specific and must be complied with. It is not for a court to "investigate" to arrive at the truth. It is noteworthy that the respondent has not disclosed his legal costs to date, the respondent is obliged to disclose his spend on litigation, the case law is established in that regard to set out both past and anticipated future legal costs. The failure to comply as set out above are strong grounds for the court to dismiss the application, however I noted that no order was in place in regard to the children's maintenance and a determination was necessary.
25. The parties are on an equal footing, and it would be prudent to determine the costs of this application in the main action.

Therefore, the costs of this application are reserved.

Accordingly, I make the following order, pendente lite:

1. The respondent is ordered to pay R20 000 per month per minor child, to commence within 2 days of this order, and thereafter on the first day of each month. The amount is to escalate annually based on the consumer price index.
2. The respondent is ordered to pay 70% of all educational expenses, for the schools they currently attend, including expenses for extracurricular activities, and related expenses.
3. The respondent is ordered to continue to pay 100% of the comprehensive medical aid for the minor children and 70% of all payments not covered by the medical aid. The respondent is to reimburse the applicant for such costs within 5 days receipt of an invoice.
4. The claim for arrear maintenance is dismissed.
5. The claim for a contribution to legal costs is dismissed.
6. The costs of the application are reserved.

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 6 May 2024.

Date of hearing: 16 April 2024

Date of Judgment: 6 May 2024

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[1] CL 026-26

[2] CL 027-31

[3] CL 027-25 par 56, personal savings R1 403 00, Grandway Pty Ltd R847 993, Renovations R2 528 579

[4] CL 026- 28

[5] CL 032-57 at 98.1

[6] CL 026-90

[7] CL 02-32-43

[8] CL 032 -46

[9] CL 027-17 and 027-18

[10] CL 026-59

[11] Levin v Levine and Another 1962

(3) SA 330 at 331 D

[12] CL 032-50

[13] AF v MF 2019

(6) SA 422 WC

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