

IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 2022/14582

(1) **REPORTABLE:**

(2) OF INTEREST TO OTHER JUDGES: [Y/N]

(3) REVISED: [Y/N]

In the matter between:

D[...] HE (NEE P[...])

Applicant

and

Respondent

D[...] D

JUDGMENT

KUMALO J

INTRODUCTION

[1] This is a rule 43 application in which the Applicant seeks certain orders against the Respondent, amongst others that the Respondent be directed to pay maintenance retrospectively with effect from 1 March 2024 an amount of R42 525.00 per month, medical aid premiums of a medical aid scheme/hospital plan.

[2] Over and above that she seeks an order that the Respondent be directed to pay a contribution towards her past and future costs of the pending divorce

proceedings between them and including the first day of trial in the sum of R513 844.87.

[3] Appellant seeks further an order that the Respondent be directed to pay the costs of a psychologist or social worker to administer bonding therapy between the Applicant and the child born of marriage between the parties.

[4] The application is opposed by the Respondent.

[5] The parties were married on 3 October 2005 at Johannesburg and in community of property. There is one minor child born of the marriage aged 15 years and currently lives with the Respondent in in Croatia and is solely responsible for maintenance and care in terms of an order of this court dated 19 December 2022.

[6] Applicant instituted divorce proceedings against the Respondent on 13 April 2022. When the divorce proceedings commenced, the issues in dispute it would appear revolved primarily over the primary residence, parental responsibilities, rights and maintenance of the minor child.

[7] The issues were resolved by the order referred to above and it appears that the remaining issues to be resolved at the trial are the division of the joint estate and the Applicant's claim for a lifelong maintenance.

[8] This court is not seized with that dispute, but I believe it is appropriate to make certain observations in that regard particularly the division of the joint estate.

[9] The Applicant it would appear wants a receiver to be appointed for the division of the joint estate and Respondent is opposed to the idea and reasons that the joint estate of the parties is not that complicated but a simple arithmetic exercise and would not require the appointment of a receiver.

[10] He further submitted that the appointment of a receiver would attract further costs as the receiver would be entitled to a commission based on the value of the

estate. He submits that the estate is not substantial and would therefore only prejudice both parties in their equal share.

[11] The estate of the parties consists mainly of the matrimonial home and the Respondent's pension benefits which the Respondent alleged amounts to R4 929 233.00. This amount does not take into consideration the tax due. Respondent alleges that the tax would amount to approximately R1 606 223.00.

[12] The current municipal value of the matrimonial home is R2 070 000.00.

[13] The Applicant's case is that she had not been employed for the past 14 years, except for the period in 2019 to 2020 when she worked as a researcher for TEARS, an NGO and earned an income of R10 000.00 per month, which income she contributed towards the parties' living expenses. Prior to that, she had worked as a rental agent, sales consultant at Barnies Paint and in the fabric department St Lager and Viney.

[14] She became a fulltime housewife after the birth of their daughter to take care of her and enable the Respondent to concentrate on his career. Accordingly, the Respondent has been the breadwinner during their marriage.

[15] The Respondent was employed as a project manager on contract basis by the Catholic Relief Services (the "CRS") which employment came to an end in September of 2022.

[16] Subsequent thereto, Respondent was employed by the same organization in Croatia from December 2022 and allegedly earning Euro 5494.66 which allegedly equates to R112 211.94 per month. This, however, one must bear in mind that it is dependent on the exchange rate applicable at the relevant time. It cannot readily be accepted that it is the amount that he earned in Rand terms per month.

[17] It is further alleged that when Respondent relocated to Croatia, he contributed R30 000 per month towards the Applicant's maintenance which money she used to pay for her living expenses and the home loan instalment.

[18] In August 2023, Respondent advised the Applicant that his employment would be terminated in December 2023.

[19] The Respondent deposed to an affidavit stating that he was employed by a company named Ambacia which operates as a labour broker for CRS in Croatia. CRS has no legal presence in Croatia and its personnel is employed by Ambacia and all decisions are taken by CRS. His letter terminating his employment was unsigned as it was electronically mailed to him.

[20] His last day of employment was the last day of December 2023. He is currently unemployed and attached documentation confirming that he registered with the Croatian State Employment Agency and received a payment of EURO 800.80 per month for a period of three months and half of the said amount for a period of six months. He currently does not receive further payments from the Croatian Government.

[21] He is registered with the Croatian State Health Coverage, but the minor child is not as she does not qualify at this stage, and he therefore must provide for her medical needs as required.

[22] He denies the allegation contained in paragraph 30 to 32 of the Applicant's founding affidavit.

[23] Despite having been advised that the Respondent's employment would be terminated in December 2023, the Applicant did not believe the Respondent in this regard and sought to disprove the allegation and what she googled on the internet about the Respondent.

[24] Respondent denies the allegation and states that the person referred to is not him and the so-called skills that the Applicant alleges he possess apparently refers to a DIY project he did in the matrimonial home. This can hardly qualify him as skilled to enable him to earn a living.

[25] I have no reason to disbelieve the Respondent's averments that he is currently unemployed and currently seeking employment. He also avers that he is looking at setting up a business with his relatives. This, however, has not taken off yet.

[26] I canvassed the opinion of the Applicant's counsel how I can grant the order sought when clearly the respondent is currently unemployed. Her submission in this regard is that the Respondent can surrender his pension and pay maintenance from the proceeds thereof. This obviously is an asset in the joint estate which is the subject matter in the main divorce action. The sooner the parties agree on the way forward with the main action, the sooner this issue will be resolved and may put both parties in a position that they may be able to look after themselves.

[27] This court is satisfied that the Respondent is unemployed, and it would be futile to make any order for maintenance when he is not able to comply with the said order.

[28] The Applicant is currently residing in the matrimonial home. She made certain renovations which included the installation of a kitchenette and undercover parking to be done to two rooms at the matrimonial home.

[29] She currently is renting out the two rooms for an amount of R8 074.20 cumulatively.

[30] The Respondent had, up to the period that he lost his employment, continued to contribute to the maintenance of the Applicant. He now finds himself unemployed, having to provide not only for himself but for the parties' daughter who lives with him in Croatia.

[31] He does not strike this court as a person who is unwilling to maintain his spouse or child. On the other end, the Applicant seems to be a person who is unwilling to compromise and insist to have her pound of flesh.

[32] There is another issue that relates to the Applicant's prayer that the Respondent continues to pay the costs of a psychologist or social worker to be

appointed by her to administer bonding therapy between the child born of their marriage.

[33] Respondent admits that the court ordered that the Applicant and the minor child have two bonding sessions prior to the minor child's emigration and online sessions thereafter.

[34] Emma Wilkinson, a therapist, was identified and appointed by the Applicant. Therapy sessions were conducted between the therapist, the Applicant and the minor child. The minor child has since requested the therapist to discontinue the sessions. All the sessions were paid for by the Respondent.

[35] Without getting into detail about the relationship between the child and the Applicant, this court notes that the child is fifteen years of age and her views would indeed have to be taken into consideration. Currently this court does not have them but only the say so of the Respondent which it must accept in the context of the facts before it.

[36] These would include the fact that the Applicant's trip to Croatia paid for by the Respondent had to be cancelled at her behest due to the status of her relationship with the minor child.

[37] These are all factors that indicate to this court that the Respondent is not a delinquent, who simply does not want to comply with his obligations.

[38] On the other hand, the Applicant appears to want the Respondent to pay for every need of hers which in the circumstances is unreasonable. Over and above the R42 525.00 per month maintenance, she seeks medical aid premiums for a medical aid plan she is a member or becomes a member of.

[39] She also seeks an order that the Respondent contribute towards her legal costs in the amount of R513 844.87. This is even though there is an order of costs against her in favour of the Respondent.

[40] The claim for a contribution towards costs in a matrimonial action originated in Roman-Dutch procedure and is well-established in our practice. The substantive basis of the claim is the reciprocal duty of support between spouses, which includes the costs of legal proceedings.

[41] The quantum of the contribution to costs which a spouse may be ordered to pay lies within the discretion of the presiding judge. In *Van Rippen v Van Rippen* Ogilvie Thompson J, as he then was, articulated the guiding principle for the exercise of that discretion in the following frequently cited dictum:

'(T)he Court should, I think, have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved the wife must be enabled to present her case adequately before the Court.'

[42] This formulation neatly encapsulates the twin criteria of reasonable needs and financial means which feature in the test for ordinary maintenance. When assessing a spouse's reasonable litigation needs, a court will have regard to what is involved in the case, the scale on which the parties are litigating, or intend to litigate, and the parties' respective means.

[43] The matter before this court presents its own challenges. The Respondent is currently unemployed and finds himself saddled with the maintenance of the minor child born of the parties' marriage. He has no source of income and lives on borrowed monies and so does the Applicant.

[44] But for the Applicant's insistence that a receiver be appointed in the main matrimonial action, the divorce proceedings would have been settled by now. Other than the matrimonial home and the Respondent's pension benefits, there is little else in the joint estate. The Applicant currently resides in the matrimonial home and is in possession of all the parties' movable asserts including the two motor vehicles.

[45] She sold one of the vehicles and used the proceeds thereof for her own benefit even though she ought to have shared the same with the Respondent.

[46] Taking all of the above into consideration, the court is of the view that the following order would fair to both parties and following order is made:

- 1 The Applicant's application for maintenance and medical aid premiums contributions *pendente lite* is dismissed;
- 2 The Applicant's application for contributions towards her legal costs is dismissed;
- 3 The Respondent is to continue to service the bond repayments of the matrimonial home which is currently occupied by the Applicant; and
- 4 The costs of this application are to be costs in the main trial.

Kumalo MP Judge
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant: Adv S Georgiou instructed by HOUGHTON HARPER INC.

For the Respondent: Adv K Howard instructed by SPELLAS LENGERT KUEBLER BRAUN INC.