

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 6395/2017

Not reportable

Not of interest to other judges

Revised

31/7/2017

In the matter between:

L P

Applicant

and

L R

Respondent

JUDGMENT

MANAMELA AJ

Introduction

[1] This is an application in terms of Uniform Rule 43 of this Court. The applicant herein is plaintiff in the divorce action, in which pleadings have already closed. The applicant is married to the respondent out of community of property to which the accrual system applies. The parties have an 11-year-old son, who is currently in grade 6. The minor child stays with the applicant after they both left the matrimonial home. The respondent occupies the matrimonial home. The applicant seeks, in terms of this application,

pendente lite maintenance for the minor child and initial contribution towards legal costs.

[2] The application is opposed. It came before me in the unopposed motion court of 19 July 2017. After listening to argument by Ms Collins, on behalf of the applicant, and Ms HJ Basson on behalf of the respondent I reserved this judgment. I considered the issues raised to be requiring further reflection and a written judgment. But, I will endeavour to avoid making pronouncements on issues that may have a bearing on the pending divorce litigation between the parties. I will start with a narration of the brief background to the matter, but will only do so to the extent necessary to decide the issues in this application.

Relevant Brief Background

[3] The following issues are common cause between the parties. The parties were married to each other in February 2004. As indicated above their matrimonial regime is out of community of property with an antenuptial contract, with the application of the accrual system.

[4] The applicant is a travel and logistics manageress in an entity located in Rosebank. After she moved out of the matrimonial home with the minor child, she now resides in a rented apartment in Centurion, Pretoria. Her matrimonial home is also in Centurion.

[5] The respondent is a sales manager at a company located in Centurion. He now solely occupies the matrimonial home after the applicant and minor child vacated same. He pays the monthly instalment comprising the mortgage bond loan repayments, insurance and the rates and taxes. The immovable property is registered in the names of both parties.

Maintenance

[6] The applicant seeks on a monthly basis cash payment in the amount of R 15 000 and payment of 50% of the educational and medical expenses of the minor child. The medical expenses are to include medical aid premiums and those additional payments not covered by the medical aid.

[7] The applicant earns an amount of R44 541 as nett salary per month in terms of the payslip attached to her papers. The respondent earns an average of R40 212.25 per month. This is confirmed by a payslip attached to his papers for the month of April 2017. On the other hand, the applicant is a proprietor of a corporate entity, which she submits is dormant, but earned an amount of R 1 500 in 2015, but did not trade in 2016.

[8] The applicant contends that the respondent has not dealt with additional earnings in the form of policies and bonuses, as well as attaching proof of his financial situation. It is also submitted by the applicant that, the respondent recently changed jobs. It is submitted this was financially motivated. The applicant was told by the respondent that the new job offered the respondent lucrative benefits in the form of salary and bonuses. However, the respondent is steadfast on his only income being in an average of R40 212.25 per month.

[9] The applicant submits that the total monthly requirements for the minor child is in an amount of R24 111.65, whilst her own expenses are in an amount of R20 183.97. On the other hand, the respondent states his expenses to be in an amount of R39 818.00. He is tendering payment of an all-inclusive amount of R8 900 a month in respect of the maintenance requirements of the minor child or an amount of R2 500 per month plus 50% of the medical aid premiums (respondent asserts that the minor child be retained on the applicant's medical aid) and medical excess expenses; 50% of the school fees and other school related and extramural expenses. The applicant submits the respondent's offer is wholly inadequate.

[10] I consider it trite that a spouse is, *pendente lite*, entitled to reasonable maintenance in accordance with the marital standard of living of the parties, his or her actual and reasonable requirements and the capacity of the other spouse to meet such requirements.¹

[11] I will start with the capacity of the parties to maintain the minor child. From the papers, the parties' salaries appear to be almost equal, although as indicated above, the applicant asserts the respondent quit her old job for the new one, due to the benefits the new job has on offer. I deem it material to quote the actual averment as contained in the

¹ See Taute v Taute 1974 (2) SA 675 (ECO) at 6760-H.

papers in this regard, which says:

"31. I am not in possession of the respondent's payslip. However, the respondent told me that he earned a salary at Schneider in the amount of +/- R550, 000 - R600, 000 per annum with additional quarterly bonuses, and that his salary at Eaton was more than that amount ranging close to R850,000 - R900, 000.00. In addition, he told me that the quarterly bonuses at Eaton were more lucrative than those at Schneider, which made the offer more attractive to him. It was on this basis that he accepted the position at Eaton ."²

[12] The respondent dealt with the above rather detailed assertions by the applicant only as follows:

"I earn an average monthly income of R40 212,25 as can be seen from my salary slip annexed hereto marked "LRI" which is dated 30 April 2017. All income earned by me year to date, is stated on my salary slip as being R11 500,49."³

[13] It is clear that the respondent is denying what is alleged against him. The respondent says he earns a net salary of around R40 000. However, he falls short of dealing with the allegations about bonuses etc. The respondent is alleged to have left his previous job for greener pastures, so to speak. The new job is said to offer him more benefits in the form of bonuses and increment in salary. This is logical, unless the respondent had indicated another reason for leaving his previous job, where he was earning around about R45 833 (on R550 000 as alleged by the applicant) R50 000 (on R600 000 as alleged by the applicant) per annum. The respondent ought to have dealt with the applicant's allegations against him unequivocally. Under the circumstances, I accept that the respondent earns a salary around the same as the applicant. Therefore, I hold the view that both applicant and respondent should contribute equally towards the maintenance of the minor child.

[14] Regarding the parties' respective monthly expenses, I am of the view that much could be done on both sides to reduce the expenses in order to accommodate the

² See par 31 on pp 16-17 of the indexed papers.

³ See par 34 on p35 of the indexed papers.

maintenance requirements of the minor child. I have had regard to the figures raised in the papers.

[15] Ms Collins for the applicant handed up in court different scenarios on the possible maintenance payable towards the minor child. One of those scenarios reflects figures which have factored in the respondent's concerns regarding the expenses of the minor child. The scenario states the minor child's expenses at R20 178.32, which if one deduct the educational and medical expenses of R4 681.33 (being R9 362.66 /2) which the respondent is prepared to pay or actually pays amounts to a pro rata payment of R7 748.50 (being R 15 496.99/2) for each of the parties per month. I find this scenario to be fair and reasonable and will make an award based on its contents.

[16] The applicant seeks a retrospective order for maintenance. She finds support in this regard from the decision of *Harwood v Harwood*⁴ wherein it was held that retrospective or retroactive orders were possible in matters relating to maintenance in terms of the common law and that such orders are not ousted by the silence in this regard in the provisions of Rule 43 of the Uniform Rules of this Court. The issue was decisively pronounced on in the decision of *Herfst v Herfst*.⁵ However, no case is made out in the papers for an order for retrospective maintenance. I also find no justification of such an order from the papers.

Contribution towards legal costs

[17] With regard to contribution towards costs, the applicant seeks an amount of R20 000, whereas the respondent makes no tender of payment. The test for contribution towards legal costs in maintenance matters is said to be that an applicant in a Rule 43 application ought to be placed in a position adequately to present his or her case.⁶ As to what constitutes "adequate", it is said that would depend on the nature of the litigation, the scale on which the respondent is litigating and the scale on which the applicant intends to

⁴ 1976 (4) SA 586 (CPD) at 5880-E.

⁵ 1964 (4) (WLD) at pp127-128A-B.

⁶ See *Muhlmann v Muhlmann* 1984 (1) SA 413 (W) at 4180, cited with approval in *Dodo v Dodo* 1999 (2) SA 77 (WLD) at 98C-E.

litigate with due regard to the respondent's financial position.⁷ This appears to have been a slight variation of an earlier decision of *Micklem v Micklem*,⁸ wherein it was stated that applicants for payment of contribution towards legal costs are to be put in a position of being able adequately to place her case before court.

[18] The applicant has not really proffered much regarding why contribution towards her legal costs should be ordered. The Court has always emphasised the need for an applicant for contribution to provide sufficient details as a basis for the order sought. In an unreported decision of this Division by Makgoka J in *MCE v JE*⁹ it was held that there "can be no better manner of placing such information before court than a draft bill of costs, or at the very least, a summary of fees schedule."¹⁰ Due to the absence of such information and my conclusion that the parties appear to be on the same level of financial capacity, I will not order any contribution towards legal costs.

Costs

[19] Regarding costs of this application, I consider it appropriate to order that costs hereof be costs in the divorce action. The parties also appear to be of the same mind on this. I will also order upliftment or waiver of the restrictions in Rules 43(7) and 43(8).

Order

[20] For the abovementioned reasons, I will grant an order in terms of the attached draft, which I initialled and include some amendments in manuscript.

K. La M. Manamela
Acting Judge of the High Court
31 July 2017

⁷ See *Muhlmann v Muhlmann* at 4180

⁸ 1988 (3) SA 259 (C) at 262H-263A.

⁹ (13495/2011) (201 1) ZAGPPHC 193 (14 September 2011).

Appearances:

For the Applicant : Ms Collins
Instructed by : Fairbridges Wertheim Becker
Johannesburg
c/o Macintosh Cross & Farquharson
Pretoria

For the Respondent : Ms HJ Basson
Instructed by : David G Sonderup Attorneys
Johannesburg
c/o Louw Le Roux Incorporated
Pretoria

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No.: 6395/2017

ON THIS THE 31st DAY OF JULY 2017
BEFORE THE HONOURABLE MANAMELA AJ

In the matter between:

L P

Applicant

and

¹⁰ See MCE v JE at par 12.

DRAFT ORDER

After having read the papers and hearing argument, the following order is granted, *pendente lite*:

1. The parties shall remain co-holders of full parental responsibilities and rights in respect of the minor child, S., as contemplated by the provisions of section 18(2) of the **Children's Act**, 38 of 2005 ;
2. Primary care and primary residency of the minor child, S., born from the marriage between the Applicant and the Respondent is awarded to the Applicant, subject to the Respondent's contact with the minor child as follows:
 - 2.1 Contact every alternate weekend from 18h00 on a Friday when the Respondent will collect S. from the Applicant , until Sunday 18h00 when the Respondent shall return S. to the Applicant ;
 - 2.2 Half of all school holidays, Christmas/New Year to rotate between the parties;
 - 2.3 On Father's day provided that the Applicant shall be entitled to have S. with her on Mother's day;
 - 2.4 On the Respondent's birthday provided that the Applicant shall be entitled to have S. with her on her birthday;
 - 2.5 Half of the available time on S.'s birthday;
 - 2.6 Reasonable daily contact via FaceTime, Skype, e-mail, telephone and the like;
3. The Respondent is ordered to pay a cash amount towards S.'s maintenance in the sum of R7 748.50 per month, directly into the bank account nominated by the Applicant, free from transaction fees and bank charges on/before the last day of each consecutive month.

- 3.1 The first payment to commence on 28 July 2017 and thereafter on/before the last day of each month;
 - 3.2 The monthly maintenance shall yearly increase at the rate equivalent to the Consumer Price Index ("CPI") on the anniversary date of this order, in the event of the divorce not being finalised ;
4. The Respondent is ordered to pay the following expenses of the minor child:
 - 4.1 50% of the cost of S's educational expenses including school fees, school books, school stationary, school tours, extramural activities , sports, school uniforms , school tours, lunches, after care fees , sports equipment and attire and any other educational fees;
 - 4.2 50% of S's medical aid premiums and those reasonable medical expenses incurred by the minor child, not covered by the medical aid, including but not limited to hospital, dental, ophthalmic, medical, surgical, optometric, psychological, all therapy , dermatological and pharmaceutical expenses, within 7 (seven) calendar days after receipt of an invoice in respect of such expenses ;
 - 4.3 50% of all extra lessons which S may attend, on presentation of an invoice;
 - 4.4 Payment of 4.1 and 4.2 is within 7 (seven) calendar days after receipt of an invoice in respect of such expenses ;
5. The Respondent is ordered to ensure payment of the monthly mortgage bond payments and insurances in respect of the immovable property situated at 51 Aberdeen Road, Clubview, and any increases thereto ;
6. The cost of the application shall be costs in the divorce proceedings;
7. The restrictions of Rule 43(7) and (8) are not applicable.

BY ORDER
REGISTRAR