

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

CASE NO: 61402/2021

REPORTABLE: YES/ NO
OF INTEREST TO OTHER JUDGES: YES / NO
REVISED: YES / NO

In the matter between:

C[....] T[....]² T[....]

APPLICANT

AND

K[....] J[....] T[....]

RESPONDENT

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed on April 2022.

BAQWA J:

A. INTRODUCTION

[1] The applicant herein seeks an order *pendente lite* for spousal maintenance, a contribution towards the maintenance of the minor and dependent children as well as an order for contribution towards the legal costs of the applicant.

[2] The respondent opposes the application on the basis that the applicant has a

business of her own which gives her income and that he has not neglected paying for the basic needs of the family such as bond repayments, rates water and electricity, education and clothing for the children and medical costs.

[3] The parties were married in community of property on 22 December 2004 in Pretoria.

[4] Four children were born out of the marriage, the eldest of whom has since reached the age of majority, the other three are aged 14 (fourteen), 13 (thirteen) and 5 (five) respectively.

B. FACTS

[5] It is common cause that the relationship between the parents has irretrievably broken down and the parties are no longer cohabiting as husband and wife, the respondent having vacated the erstwhile matrimonial home.

[6] According to the applicant, the respondent can afford to pay her spousal maintenance and contribute towards child maintenance. In support thereof, she attaches the respondent's salary slip which indicates his net salary as R58 339.99.

[7] She confirms as alleged by the respondent that he has retained her as a beneficiary on his medical aid scheme and that he has been paying all the household expenses including medical aid and education expenses.

[8] The applicant has submitted a breakdown of her income and expenditure which indicates her total expenses amount to R 67 860. 79. It is common cause that the applicant is an owner and director of a company trading as Mahlako Cakes (Pty) Ltd from which the applicant allegedly draws R 3000.00 per month. The applicant has not submitted any financial statements regarding the Mahlako Cakes business.

[9] In his opposing affidavit, the respondent has extracted the following information from the company's bank statements regarding the income received.

9.1. For the period 30 August 2021 to 30 September 2021, a total of R 40

545.00

9.2. For the period 30 September 2021 to 30 October 2021, a total of R 29 867.00

9.3. The period 30 October 2021 to 30 November 2021, a total of R 41 421.00

9.4. For the period 30 November 2021 to 30 December 2021, a total of R 22 589.70

9.5. For the period of 30 December 2021 to 29 January 2022, a total of R 16 237

9.6. For the period 29 January 2022 to 28 February 2022 a total of R 18 620.00

[10] The applicant submits that she is unemployed, meaning that she has no source of income. If the three employees who were who were employed by the Company last year are no longer with the applicants Company, the only beneficiary in the Company would be the applicant.

[11] In her affidavit, the applicant states that she only pursues the cake business as a hobby, yet the average amount over the last six (6) months that flowed into the account of the business of the applicant comes to approximately R 28 213.28 per month.

[12] Regarding the applicant's personal bank statements for the period 24 August 2021 to 24 November 2021, a total of R22 100.84 flowed into her account.

[13] For the period 24 November 2021 to 24 February 2021, a total of R 25 692.18 came into her account, resulting in an average amount of R7 965.50 over the last 6-month period.

[14] Taking into account the personal income together with the company earnings, the average income that the applicant receives is about R 45 243.17 per month. In view of this information, it does not appear that the applicant has been entirely candid

with this Court. See *Du Preez v Du Preez*¹ where Murphy J said:

“16 Moreover, the power of the court in rule 43 proceedings in terms of rule 43(5) is to ‘dismiss the application or make such an order as it thinks fit to ensure a just and expeditious decision’. The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A mistreatment of one aspects of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume there is a duty on applicants in rule 43 applications seeking equitable redress to act with the utmost good faith (uberrimae fidei) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before court with ‘clean hands’ and, on that ground alone, the court will be justified in refusing relief.”

[15] It is trite that an applicant has to make out a case not only with regard to the need for the payment of the maintenance claimed but also the fact that the respondent has the capacity or ability to pay.

[16] Whilst it is also trite that an applicant has to prove that the respondent has neglected his duties with regard to maintenance, the applicant seems to agree that the respondent has continued to pay the mortgage bond, vehicle instalments, vehicle maintenance and monthly insurance premiums, school fees for the minor children and costs associated with the running of the house.

[17] Notably, having regard to the respondent's payslip submitted by the applicant, the respondent has to meet all these needs from a salary of about R 60 000.00. Hence the respondent pleads that he is financially besieged as he tries to bridge the gap between his earnings and expenditure.

C. CONTRIBUTION TOWARD LEGAL COST

[18] Regarding the relief sought for the contribution towards costs, the applicant

¹ 2009 (6) SA 33 para 16.

seeks a sum of R 147 500.00.

[19] No basis has been set out for the high amount claimed. The applicant simply gives an estimate of what counsel would charge together with estimated fees for an Industrial Psychologist and attorney's fees. There is no "pro-forma" account annexed to the papers. I am not satisfied regarding the adequacy of the information presented.

D. THE APPROACH OF THE COURT

[20] What needs to be accepted is that in a Rule 43 application, the weighing of issues does not involve consideration whether to punish one spouse or the other. The court has to take a dispassionate and objective view of the facts in order to decide what is just in the circumstances. What the court is dealing with is the right to maintenance which arises as one of the marriage and terminates at the time of the divorce.

[21] The court's approach was summarised in *Levin v Levin*² *"To decide the issue I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously my findings are in no way binding on the trial court and indeed after hearing the evidence it may emerge that some or all of the inferences I have drawn are wrong. On this basis, I now turn to the issues as they emerge from the papers."*

[22] Having considered the evidence, I am not persuaded that the applicant has made out a proper case but besides the matters I have referred to above, the parties have managed to find common ground regarding some of the relief claimed and that is included in the order which I proposed to make.

E. ORDER

[23] In light of the above, I make the following order:

² 1962 (3) SA 330 (W).

[23.1.1] The Respondent is ordered to retain the Applicant and the minor children on his medical aid fund, with the Respondent being liable for the medical aid premiums as well as 50% of the reasonable medical expenses not covered by the medical aid;

[23.1.2] The Respondent remains liable for the costs of the minor children's educational expenses, including but not limited to school fees, after-care fees, schoolbooks, school clothing, stationary, extramural activities, sporting expenses, cultural activities, extra lessons, tertiary educational fees, transport and any other reasonable educational costs relating to the minor children;

[23.1.3] The Respondent remains liable for the monthly bond instalment, insurance, utilities account and levies of the immovable property, until the property is dealt with as part of the joint estate in the final decree of divorce.

[23.1.4] The Respondent is ordered to pay a cash contribution of R4400.00 (four thousand, four hundred rands only) towards the minor children's groceries

SELBY BAQWA

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 28 March 2022

Date of judgment: 22 April 2022

Appearance

On behalf of the Applicants

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