

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 048701/2023

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

Date: 15 July 2024

Signature:

In the matter between:

R[...] S[...]

Applicant

And

H[...] P[...] S[...]

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is a rule 43 application by the applicant for an order regarding care and contact, interim maintenance, and contribution to legal costs *pendente lite*. It is opposed by the respondent who prays for the dismissal of the application with punitive costs based on two points *in limine*. These are, namely, that the issue of care and contact are already being dealt with in the Children's Court. Further, that the applicant intends to file a replying affidavit, which is not

permissible in terms of Rule 43, unless condonation is sought and granted by the Court.

[2] The Respondent essentially raises the defence of *alibi lis pendens* in the first instance. The applicant is opposed to the application on the merits as well. I deal herein only with the point in limine raised by the respondent.

[3] The parties made substantial submissions on the point in limine, the Respondent's Counsel also filed substantive heads of argument in this regard.

The requirements for *lis pendens*:

[4] The three requirements for a successful reliance on the plea of *lis pendens* are:¹

1. The litigation is between the same parties;
2. That the cause of action is the same; and
3. That the same relief is sought in both sets of proceedings.

[5] Wallis J in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*² explained the doctrine of *lis pendens* as follows:

"[2] As its name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties

¹ See *Standard Bank of SA Ltd v Tsheola Dinare Tours and Transport Brokers (Pty)Ltd* (22011/2021) [2022] ZAGPJHC 311 (6 May 2022) at para [14].

² [2013] ZASCA 129; 2013 (6) SA 499 (SCA).

and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years."

- [6] Ms. Bergenthuin has submitted in support of the respondent's plea of *lis pendens* that there is already an interim order granted by the Children's Court regulating the issue of parental rights, responsibilities and the interests of the children in terms of section 18 of the Children's Act 38 of 2005.
- [7] It was submitted further that the Children's Court is busy with a comprehensive investigation regarding the children's best interests with reference to care and contact. This is so, given that serious allegations of sexual abuse were repeatedly raised in this matter.
- [8] The application is an opportunistic attempt at forum shopping by the applicant through creating a jungle of litigation over the same issues.
- [9] With the matter serving before the two courts, there is a possibility that two incompatible outcomes may issue, argued Ms. Bergenthuin. The essence of the application is that it is a camouflaged appeal.
- [10] Mr. Van Niekerk submitted on behalf of the applicant that this court should nonetheless proceed and hear this application given the fact that it has jurisdiction to do so.
- [11] In *M.D.B. v C.N.*³ her ladyship Van der Schyff J stated the following:

³ (2023-113226) [2023] ZAGPPHC 1913(17 NOVEMBER 2023).

“Where a matter had a protracted history in the Children's Court with several social workers involved who provided numerous reports, and where a legal representative was appointed for the minor in that court, another court must be very slow to alter the dynamics that came about as a result of the Children's Court order. The High Court is the upper guardian of all minor children, but this does not mean that the High Court should adjudicate every matter relating to a child when proceedings relating to the same parties were recently considered in the Children's Court...”

- [12] No cogent reason is supplied as to why this matter is replicated in this court whatsoever. No evidence was provided to gainsay the applicability of the *alibi lis pendens* doctrine in this application.
- [13] I therefore find myself in agreement with the written submissions made on behalf of the Respondent that it is in the minor children's interest, and in the interest of justice that the determination of what shall ultimately be in the children's best interest be determined streamlined and determined by one court. If this court interferes by making another care/contact order, the process shall be fragmented, the children shall possibly be exposed to a duplication of assessments, and this can simply never serve the minors' best interests.
- [14] Accordingly, the application is dismissed to the extent concerning care and contact, the best interest of the child as is subject of the application that is pending before the Children's Court.
- [15] The remainder of the application (the application on the merits) concerns interim maintenance and contribution for legal costs. I propose to deal with the merits herein instead of postponing these for re-enrolment at a future date to the detriment of the applicant and the minor children's interests as foreshadowed already.

- [16] This is thus ultimately a finance issue. Whether there is factual and legal justification for the orders as prayed for to be granted or refused.
- [17] The applicant states in her founding affidavit that since the parties have separated on 14 November 2022, the respondent has made little to no attempt to assist her in the maintenance of their minor children.
- [18] The applicant has disclosed her financial position by way of the requisite documents.⁴ She is currently taking care of the minor children aged 2 and 5 years old.
- [19] The applicant currently earns an estimated R16 715.38 per month. This fluctuates from month to month when certain bonuses are earned. However, the amount is never in excess of R5 000.00 per month.
- [20] The applicant's bank statements reveal that she has been paying for the children's creche all along at R5200.00 per month all along. The respondent however alleges that the children attend creche at their maternal grandparents' creche "for free", quite absurdly.
- [21] The applicant pays for the medical aid expenses for herself and the minor children in the amount of R4 215.00.
- [22] The applicant has set out the maintenance requirements, and it is apparent that her total expenditure on the children's expenses alone exceed the applicant's monthly income. It is thus clear that a maintenance contribution is required from the respondent pending the finalization of the divorce proceedings.

⁴ Applicant's Financial Disclosure Forms attached [Caselines File 6-26 at 06-29].

- [23] The applicant seeks a contribution of R5000.00 per child per month. There will still be a shortfall of R2000.00 which the applicant hopes she could somehow sacrificially make up from her own expenditure requirements.
- [24] In her submissions, the applicant deals with the respondent's financial position.
- [25] At his turn, the respondent denies vehemently the applicant's assertion that since the parties have separated, the respondent has made little to no attempt to assist her in the maintenance of their minor children. Currently, the children and the applicant are living with her at her parents' residence. The parents have had to make tremendous contributions towards the upkeep and maintenance of the minor children.
- [26] The respondent accuses the applicant of serial litigation aimed at draining and exhausting him at every turn.⁵
- [27] The applicant prays for a contribution towards her legal costs in the divorce that is pending between the parties. It has been submitted on behalf of the applicant that she is left with a shortfall of R12000.00 per month.
- [28] It is common cause that the S[...] lived with the applicant's parents at the latter's home, being mostly supported by the applicant's parents.
- [29] Accordingly, Ms. Bergenthuin argued on behalf of the respondent, that this must continue because the purpose of Rule 43 is to maintain the *status quo*. I am not persuaded by this argument.
- [30] The respondent sought to shirk his obligations to maintain the minor children by placing reliance on the decision in *Heystek v Heystek*⁶ where a stepfather who

⁵ Para 18 of Respondent's answering affidavit.

⁶ 2002 (2) SA 754 (T)

was married in community of property had an obligation to maintain the stepchild in his capacity as administrator of the joint estate and his control of the common purse. Obviously, this was a bridge too far.

[31] A scrutiny of the respondent's bank statements laid bare that if he can get his spending priorities right and do away with some of his luxury expenses, he could meet the children's needs. It appears that the respondent is not averse to purchasing alcoholic beverages for his own enjoyment.

[32] The respondent's answering affidavit is replete with blame and complaints against the applicant's alleged obstructive conduct and expensive litigation against him.

[33] The respondent seems to expect the applicant's parents to perpetually maintain his children on his behalf as if they are legally duty bound whilst he carries on merrily.

[34] In the leading case of *Taute v Taute*⁷, the court held that "*The applicant is entitled to reasonable maintenance pendente lite dependent upon ... the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements....*"

[35] The court in *Taute* further held that a Court will be far more inclined to allow an application made on reasonable grounds than one that contains extravagant demands and a respondent who shows a willingness to maintain his spouse and/or children will be heeded with greater sympathy than one who is shown as avoiding his obligations.⁸

⁷ 1974 (2) SA 676 (E).

⁸ *Taute v Taute supra* at 676H.

[36] In *Jones v Jones*⁹ it was held that the respondent is defending the action in good faith. I have lingering questions in this regard.

[37] In so far as the application for contribution towards the applicant's legal costs, there was no documentation by the applicant in support of said claim. The application is thus speculative. In **Griesel vs Griesel**¹⁰ **1981 (4) SA 270 (O)** the Court held that a wife who is married out of community of property and who is able to finance her own litigation is not entitled to a contribution towards costs. I am therefore of the view that the applicant has not made out a case for contribution at this stage.

[38] In the result, I have come to the conclusion that the following is appropriate as an interim arrangement:

B. ORDER

(a) That the respondent be ordered to pay maintenance *pendente lite* for the minor children, to the applicant in the amount of R 5 000.00 (Five Thousand Rand) per child per month, pending the finalisation of the divorce. Payable into a bank account to be supplied by the applicant on or before the 7th day of August 2024, and thereafter on or before the 7th day of each following month until this order is varied or otherwise discharged.

(b) That pending the finalizations of investigations by the Office of the Family Advocate the interim care of the minor child be regulated by the interim court order issued by the Children's Court for the district of Tshwane Central dated 22 February 2024 with reference number: 14/1/4-626/2022.¹¹

(c) That each party shall pay own costs of this application.

⁹ 1974 (1) SA 212 (R).

¹⁰ 1981 (4) SA 270 (O).

¹¹ Annexure "RS4" filed under CaseLine 06-59.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 21/06/2024

Date of Judgment: 15/07/2024

On behalf of the Applicant: Adv. X van Niekerk

Duly instructed by: ML Schoeman Attorneys Inc.; Pretoria

e-mail: klerk2@mlschoemanatt.co.za / xavier@advchambers.co.za

On behalf of the Respondent: Adv. Bergenthuin

Duly instructed by: Van Heerden & Krugel Attorneys; Pretoria

e-mail: lenay@vhkp.co.za

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 15 July 2024.