

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 20413/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: 20 February 2024

Signature:

In the matter between:

R[...] K[...] K[...]

Applicant

And

M[...] D[...] K[...]

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an application in terms of Rule 43 of the Uniform Rules of Court. The parties got married in community of property on 21 October 2008 and have been married for 15 (fifteen) years. The Applicant instituted divorce proceedings against the respondent on 7 April 2022. All three children reside with their father¹. The respondent is the applicant in this application. The applicant lacks the financial means to maintain herself and the children.

[2] The applicant seeks relief in the following terms:

¹ Respondent's heads of argument in the Rule 43 application para 2.7.

- 2.1 An order granting her primary residence of the 3 children born out of the marriage, subject to reasonable access by the respondent, in the alternative, she may be content with residing with the youngest child. The children were born on 6 May 2004, 5 May 2009 and 28 March 2013 respectively. The eldest child is a university student.²
- 2.2 That a clinical psychologist be appointed to conduct a forensic assessment and investigate and report on the best interests of the children. The respondent should pay for the costs of such investigations.
- 2.3 Spousal maintenance in the amount of R 75 000 per month. Maintenance of the minor children.
- 2.4 Contribution towards the applicant's legal costs.
- 2.5 Respondent to pay for arrear municipal charges and levies.
- 2.6 Costs of the application, alternatively costs to be in the cause.

[3] The respondent opposes the application in its entirety.

B. BACKGROUND

² Ibid.

[4] The respondent operates in the engineering and construction field and controls a construction company. The parties own a substantial asset portfolio valued at over R50 million including a house in the coastal resort of Zimbali with a value of over R9 million. The applicant held a management position in a government department but by agreement of the parties, had to leave to focus on the household and the upbringing of the children.

C. APPLICABLE LEGAL PROVISIONS

Contact with the minor children:

[5] The parental responsibilities and rights of parents in respect of minor children are laid out in section 18, 19, 20 of the Children's Act 38 of 2005 ("the Act").

[6] The non-custodial parent is entitled to specific parental responsibilities and rights of contact with regards to the minor children as provided for in section 18(2)(b) of the Act. The applicant alleges that since the parties' separation the respondent has not given his cooperation. He has influenced two of the older children negatively against the applicant to an extent that they no longer wish to talk to her anymore. It is alleged that the respondent has blocked the

applicant from the children's cell phones. This situation requires urgent professional investigation.

[7] The Court will generally be reluctant to upset the status *quo* concerning the custody of minor children. The paramount interest of the children must however prevail.³ Normally, young children should go to their mother.⁴

[8] The separation of children should where possible be avoided.⁵

Spousal maintenance

[9] The entitlement to maintenance *pendente lite* arose from the general duty of the husband to support his wife and children. Maintenance *pendente lite* is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced.

[10] The applicant is entitled to reasonable maintenance *pendente lite* dependent upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such

³ Madden v Madden 1962 (4) SA 654 (T).

⁴ Du Plooy v Du Plooy 1953 (3) SA 848 (T).

⁵ Madden v Madden supra at 658D.

requirements, which are normally met from income although in some circumstances inroads on capital may be justified.⁶

[11] In *Taute v Taute*⁷ it was held that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Similarly, more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to that of one who is seeking to evade them.⁸

Contribution towards legal costs:

[12] The Court in *Dodo v Dodo*⁹ held that: “The husband’s duty of support includes the duty to provide the wife with costs for her litigation with her husband.” This approach conforms with section 9(1) of the Constitution which reads: Everyone is equal before the law and has the right to equal protection and benefit of the law”.

[13] In *Cary v Cary*¹⁰ Donen AJ held that an applicant is entitled to a contribution towards her costs to ensure that there is equality of arms in the divorce action against her husband.

⁶ Levin v Levin [1962 \(3\) SA 330 \(W\)](#) at 331D; Taute v Taute [1974 \(2\) SA 675 \(E\)](#) at 676C–D

⁷ Taute v Taute 1974 (2) SA 675 (E).

⁸ Ibid at 676H.

⁹ Dodo v Dodo 1990 (2) SA 77 (WLD) at 96 F

¹⁰ Cary v Cary 1999 (3) SA 615 (C)

[14] On behalf of the applicant, it was submitted that a cost accountant estimates that inclusive of this application an amount of R546 000.00 would be required. The applicant is seeking a round figure of R500 000.00 for her costs.

[15] In *Service v Service*¹¹ and similar cases¹², it was held that the applicant is not entitled to all her anticipated costs, even though the respondent can well afford to pay them, but only a substantial contribution towards them.

[16] In *Zaduck v Zaduck*¹³ Davies J refused to endorse the view that the respondent should pay only a portion of the applicant's legal costs. The learned Judge held that:

'The correct approach is to endeavour to ascertain in the first instance the amount of money which the applicant will have to pay by way of costs in order to present her case adequately. If she herself is unable to contribute at all to her costs, then it seems to me to follow that the respondent husband must contribute the whole amount required. I see no validity in the contention that in those circumstances he should only be required to contribute part of the amount involved.'

¹¹ *Service v Service* 1968 (3) SA 526 (D) at 528F

¹² *Micklem v Micklem* 1988 (3) SA 259 (C) at 263B and *Maas v Maas* 1993 (3) SA 885 (O) at 888J – 889B.

¹³ *Zaduck v Zaduck* 1966 (1) SA 78 (SR)

[17] In determining the *quantum* of the contribution, the court will have regard to the circumstances of the case, the financial position of the parties and the issues involved in the pending litigation.¹⁴

Arrear municipal charges and levies:

[18] A purview of Rule 43 and the decisions flowing therefrom shows, in my view, that it does not cover this subject.

D. ANALYSIS AND CONCLUSION

[19] It is trite law in applications of this nature that an applicant for spousal maintenance and ancillary requirements must show a need. In this case, the parties enjoyed a luxurious standard of living. The unravelling sees the appellant being excluded from the medical aid by the respondent. The couple's children are, according to the applicant, also being alienated in a very unbecoming fashion.

[20] The financial disclosures by the parties confirm the applicant's assertion that they have substantial proprietary holdings and investments. Affordability is not in question. In recent times courts have not shied away from bringing

¹⁴ Erasmus Superior Court Practice **RS 21, 2023, D1-582A.**

equilibrium between the parties where the applicant is being cut off from joint assets by making appropriate orders.¹⁵

[21] Central to this disputed application is the fact that the respondent has systematically started excluding the applicant from access to the joint finances since she commenced the divorce proceedings and this application. For example, the applicant states that she previously managed the income generated by the Zimbali property and was using it for household requirements. This was unilaterally terminated by the respondent. Similarly, the respondent cut her off from the ABSA savings account which the applicant had used to purchase day to day requirements and personal expenses.¹⁶ On the other hand, the respondent carries on his lavish lifestyle as before. This yawning chasm cannot be left unattended.

[22] The parties need to see to it that the main action is expedited, seeing that it is not possible for this court which is dealing with this application to meaningfully determine the extent and under whose control whichever assets are currently vested, to do justice in determining fair value of the patrimonial relief sought.

[23] Having regard to the submissions made and the documents filed of record, the order in the following paragraph is made:

¹⁵ See BJM v WRM [2023] ZAGPJHC 401

¹⁶ Applicant's founding affidavit and correspondence between the parties' attorneys of record.

[24] The primary residence of the children will, at this stage, continue to vest in the respondent, subject to reasonable contact,¹⁷ more specifically as follows:

¹⁷ Section 28 of the Constitution read with Section 9 of the Children's Act, 38 of 2005. These sections provide that in all matters concerning minor children, their best interest is of paramount importance.

- 24.1 every alternative weekend, from Friday at 17:00 until Sunday at 17h00.
- 24.2 every alternative short school holiday to rotate annually between the parties, and the long holidays will be divided in half.
- 24.3 the respondent shall have the minor children with him for Father's Day and the applicant shall have the children with her on Mother's Day on the relevant day from 09h00 until 17h00 if these days do not fall on such party's contact weekend.
- 24.4 each party shall have contact with the minor children on such party's birthday even if such day would have been on the other party's contact day. If it is a weekday, the relevant party shall collect the minor children from the minor children's school and will return the minor children to the other party at 17h00 that same day. If it is a weekend, then contact will be from 09h00 until 17h00.
- 24.5 the party which does not have access to the minor children on one of the minor children's birthdays will be entitled to remove the minor children for two hours if it is a weekday and for five hours if it is a weekend day on either of the children's birthdays.

- 24.6 both parties are entitled to reasonable telephonic and/or electronic contact per phone, email, WhatsApp, SMS, MS teams, Skype or similar platform daily.
- 24.7 if either party cannot accommodate the physical contact as stipulated hereinabove due to any, reason whatsoever, such party shall give the other party notice at least 7 (seven) days, if possible, in advance thereof. In the case where an unexpected situation arises and the party concerned is unable to give the other party 7 (seven) days advanced notice, the party concerned shall then notify the other party as soon as possible.
- 24.8 the parties undertake to be flexible regarding the contact rights with the minor children as set out above and the parties may agree between themselves regarding any additional contact periods upon request of either party or the minor children.
- 24.9 each party shall within a reasonable time prior to travelling with the minor children, domestically or internationally, provide the other party with details of their travelling plans and accommodation, including but not limited to dates and time of the planned travel, the manner in which the minor children are to travel, and the full address and contact details of the accommodation facility.

24.10 neither party shall be entitled to unreasonably withhold his or her consent to the minor children travelling internationally, should the above clause be fulfilled, and the respective party has been fully informed of the minor children's travel arrangements and a reasonable person would be satisfied that the minor children's well-being is not endangered by the proposed travel arrangements.

[25] That a clinical psychologist be appointed to conduct a forensic assessment and investigate and report on the best interests of the children. The parties' attorneys and/or Counsel to guide and assist the parties in the selection of the appropriate professional and the terms of reference thereof.¹⁸ The respondent is ordered to pay for the costs of such investigations.

[26] The respondent is ordered to pay spousal maintenance to the applicant in the amount of R 75 000 per month on or before the 29 February 2024 and before the 7th day each successive month until the final determination of the divorce action between the parties or the discharge of this order, whichever comes first.

[27] The respondent is ordered to continue maintaining the minor children in his parental custody.

¹⁸ The applicant's attorneys have already proposed the names of either Ronel Duchel or Leon Roper for this purpose, see Para 16 of letter from Alan Kissoon Attorneys to NDBV Inc filed at 018-65 Caselines.

[28] The respondent is ordered to pay a contribution towards the applicant's legal costs in the amount of R500 000.00 in instalments of R100 000.00 per month effective from the end of February 2024 until the satisfaction of this order.

[29] The costs of this application to be costs in the divorce.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 19 October 2023

Date of Judgment: 20 February 2024

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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 20 February 2024.