

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D 7139/2020

In the matter between:

D[...] P[...]

APPLICANT

and

C[...] P[...]

RESPONDENT

ORDER

In the premises, the following order is made:

1. The respondent is ordered to pay the applicant the sum of R45 000 per month for costs of maintaining the matrimonial property.
2. Costs are reserved for determination by the trial court in the divorce proceedings.

JUDGMENT

Mathenjwa AJ

[1] This is an application in which the applicant seeks an order in terms of Uniform rule 43 that pendente lite the respondent is directed to pay maintenance to the applicant at the rate of R134 000 per month, in advance, without set-off or deduction. The respondent opposes the application.

[2] The applicant and respondent are married to each other and they are in the process of divorcing. Before they were married, the respondent was employed by K[...] E[...] (Pty) Ltd ('K[...]') and after the parties were married, he remained employed by K[...] with the title of managing director, whereas the applicant was employed by the same company with the title of general manager. The respondent is a 100 percent shareholder in T/A Holdings (Pty) Ltd which owns 49 percent shares in K[...].

Parties' contentions

[3] The applicant deposed to a sworn statement in which she contends that her living expenses with the respondent were paid for from the respondent's salary which was R102 500 per month and from her salary which was R72 500 per month. There were always certain of the parties' personal expenses that were paid through the business which were drawn from the respondent's loan account in K[...]. Excluding their two combined salaries their cost of living for the year end February 2021 was approximately R3,2 million for the year or R215 000 per month. During December 2020 the respondent instigated other members of K[...] to charge the applicant for dishonesty. She was subsequently subjected to a disciplinary enquiry, found guilty and dismissed on frivolous charges. Consequently, she does not have

any source of income and hence instituted this application for maintenance pending their divorce.

[4] The applicant contends that she and the respondent are accustomed to an extremely high standard of living. They set up the matrimonial home as palatial. The property is estimated at a value in excess of R12 million. To supplement the household expenses, part of the property was converted into a BnB, but over the last eight months the only income derived from that source was approximately R160 000. She no longer rents out the home as the respondent has opposed her renting it out as a BnB. The applicant contends that apart from half share in the matrimonial property she has approximately R500 000 which is the remainder of the proceeds of the sale of an immovable property owned by a family trust. She does not have any further assets, apart from personal effects and items of insignificant value. The applicant contends that her total expenses amount to R134 727 per month which includes the costs of about R90 000 for maintaining the matrimonial home.

[5] The applicant contends that the respondent is exceedingly wealthy and controls the purse strings. In support of her contention, she attached a statement in terms of s 7 of the Matrimonial Property Act 88 of 1984 which was provided by the respondent in the pending divorce action on 5 May 2022 in which the respondent assets are listed as follows:

1. T[...] Holdings (Pty) Ltd (100%) shareholding
T[...] Holdings 49% shareholder in K[...] E[...] R30 million
2. Immoveable property situated at M[...]
Avenue-Durban North R10 million
3. (a) Sale of shares to S[...] L[...] Trust;
S[...] Trust and N[...]Trust and these three trusts
Make up 51% in K[...] E[...]
Loan balances that the three trusts owed to respondent R8 532 000
- (b) Dividend outstanding due by sale of shares in
three trusts above R9 million
4. 50% beneficiary interest in the P[...] Family Trust R3,8 million
5. Shareholding in SA C[...] holding 100% shares R2 million
6. Nedbank Savings Account R500 000

- | | |
|--|----------|
| 7. 3 x motor vehicles | R840 000 |
| 8. Furniture and personal effects, approximately | R500 000 |

Thus, the value of the respondent's estate in terms of his s 7 statement is approximately R65 million. After the respondent had deposed to a sworn statement in reply, the applicant deposed to a supplementary affidavit with the leave of the court to respond to new issues which arose from the respondent's sworn statement.

[6] In his sworn statement the respondent disputes that the applicant needs support and contends that he cannot afford to support her. He contends that the applicant has not disclosed her financial position in this court and therefore she is not coming to court with clean hands. When the parties were married, the applicant was already an established business woman, she had her own business as it is evident from the antenuptial contract. She is still well able to earn her own income and provide for herself. The respondent contends that the applicant was paid the sum of R3 390 000 from the P[...] Family Trust in July 2021; she received a further amount of R2 274 508 as a pay-out from a joint investment that was withdrawn in December 2019; she purchased an immovable property in Durban North where she resides intermittently while the property is being rented out. The respondent denies that he instigated the dismissal of the applicant from K[...], but alleges that the applicant was subjected to a disciplinary enquiry, found guilty of theft and was dismissed. The respondent further contends that the applicant's alleged expenses arise from her own choice, not out of necessity. The respondent has launched an application in this court for an order to sell the former matrimonial home and for the proceeds to be split equally between the parties, but the applicant opposes such application.

[7] With regard to assets and liabilities the respondent contends that he has engaged a forensic chartered accountant to conduct a full assessment of his financial position as at 31 May 2022 and consequent thereto has delivered a notice of intention to amend the s 7 statement of assets and liabilities. The full analysis of his assets and liabilities reveals that the positive value of his estate is R1 516 669.44. His income per month which is the salary from K[...] is R71 000 and his total income remaining after expenditure is R15 800. The respondent contends that the high expenditure that he and the applicant were accustomed to, was during a time when K[...] was doing well, but this changed due to the downturn in the economy

and lack of orders by K[...]. After the applicant delivered her supplementary sworn statement, the respondent delivered a further supplementary sworn statement without the leave of this court. However, during the hearing of this matter applicant's counsel referred to the respondent's supplementary sworn statement and thus it was admitted.

Analysis

[8] It is trite that maintenance is claimed when the applicant has the need for maintenance and the respondent is in a position to pay maintenance (See *EH v SH* 2012 (4) SA 164 (SCA)). In a claim for maintenance the parties are required to make disclosure and take the court into confidence regarding their financial income and expenditure. This would enable the court to determine whether or not the applicant needs support and whether or not the respondent is able to afford the amount or any part thereof claimed by the applicant. In *Du Preez v Du Preez* 2009 (6) SA 28 (T) para 16 it was held that:

'...A misstatement of one aspect 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 the court with "clean hands" and, on that ground alone, the court will be justified in refusing relief.'

[9] There is a worrying misstatement and non-disclosure by both parties in the present matter. The applicant in her sworn founding statement explicitly states that apart from her half share in the matrimonial home and the sum of R500 000 available in her bank account she does not have any other assets of value. The respondent in his sworn statement in reply pointed out that the applicant has bought a house which she is letting out. When the applicant deposed to a supplementary sworn statement, she did not dispute that she owned another house and did not explain how much income she received from letting out the house. The respondent referred this court to the antenuptial contract which reflects that the applicant had her own business when the parties were married, and contends that she still runs that business. The applicant in her sworn supplementary statement does not explain the

nature of her business, and any income she receives from such business. Further the respondent contends that the applicant could still receive income from letting out part of the property. With regard to respondent's financial situation, the respondent provided a s 7 statement which reflects that the value of his assets is approximately R65 million, however, after the applicant instituted these proceedings, the respondent submitted a revised lists of assets and liabilities which reflects that the value of his assets is now R1,5 million. This figure is based on his chartered accountant's report who conducted an assessment of his assets. The explanation for the immediate downturn of his assets' value from approximately R65 million to R1,5 million is unsatisfactory. The respondent alleges that his salary has decreased from R105 000 to R71 000 per months because K[...]s financial situation has deteriorated, however the applicant contends that, recently, K[...] provided an increase to all its staff across the board. The respondent's explanation on the immediate demise of his financial situation is not satisfactory.

[10] Given the misstatement of their financial situations and non-disclosure by both parties, this court is not in a position to assess whether the applicant needs support and whether the respondent is able to support her. With regard to maintenance of the matrimonial home, the respondent does not dispute the costs incurred by the applicant in maintaining the property, but alleges that the costs are incurred as a result of the applicant's refusal to the sale of the property. In my view the respondent is liable to pay half of the R90 000 which are the costs of maintaining the matrimonial property. The contention by the respondent that the property should be sold is receiving attention in another court, however in the present matter the parties are still jointly liable for the costs of maintaining the matrimonial property.

Order

[11] In the premises, the following order is made:

1. The respondent is ordered to pay the applicant the sum of R45 000 per month for costs of maintaining the matrimonial property.
 2. Costs are reserved for determination by the trial court in the divorce proceedings.
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Mathenjwa AJ

Date of hearing: 12 August 2022

Date of judgment: 19 August 2022

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Judgment is duly handed down electronically.