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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38941/2019

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

DATE SIGNATURE

IN THE MATTER BETWEEN:

N K

AND

N R

JUDGEMENT

CORAM: MALUNGANA AJ

- [1] This is an application for relief *pendente lite* in terms of Rule 43 of the Uniform Rules of the Court. It is a common cause that the applicant and the respondent were married to each other in accordance with the Hindu Rites in 2005. Two minor children were born out of the said marriage, namely A, a girl born 14 January 2005, and S, a boy born on 18 November 2013. The children currently reside with the applicant.
- [2] The respondent instituted divorce proceedings against the respondent out of this Court, and the matter as I understand, is still pending. The applicant now seeks *inter alia* an order directing the respondent to pay a contribution of R10 000,00 as maintenance for the minor children, and the R10 000,00 towards the applicant for herself (spousal maintenance).
- [3] The applicant also seeks contribution towards divorce legal costs in the sum of R50 000,00; parental rights and access as contemplated in section 18(2)(b) of the Children's Act 38 of 2005, as well contribution by the respondent of all reasonable medical expenses incurred in respect of the minor children whilst she retains them as dependents in her medical aid scheme.
- [4] The first issue to be considered is the entitlement of the applicant to claim spousal maintenance *pendente lite* as raised by the respondent during the hearing. It was argued by counsel for the respondent that since the applicant and the respondent have concluded their marriage in terms of the Hindu rites, and the divorce court still has to determine the validity of such marriage, the applicant is not entitled to spousal maintenance. In dealing with this issue, the starting point is section 9 of the Constitution which provides that:

'(1) Everyone is equal before the law and has the right to equal protection and the benefit of the law.'

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

[5] In *Dawood and Another v Minister of Home Affairs and Others*¹ O'Regan notes that:

"Marriage and family are social institutions of vital importance....

...The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses, joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."

[6] Structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. One of the most invariable consequences of a marriage is the reciprocal duty of support. It is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also broader community. (See *Dawood* case referred to above).

¹ 2000(8) BCLR 837(2000 (3) SA 936) (CC)

- [7] The Constitutional Court in *Daniel v Campbell No and Others*² in considering the rights to inherit of a spouse married in accordance with the Muslim rights in a *de facto monogamous union* interpreted the word 'spouse' in the context of the law:

"[19] The word "spouse" in its ordinary meaning includes parties to a Muslim marriage. Such a reading is not linguistically strained from a linguistic point of view to exclude parties to a Muslim marriage from the word "spouse" than to include them. Such exclusion as was effected in the past did not flow from courts giving the word "spouse" its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice prejudice than to the dictates of the English language. Both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage, flowing from a particular world-view, as the ideal against which Muslim marriages were measured and found to be wanting."

- [8] In paragraph 20 thereof, the Court went on to say that discriminatory interpretations deeply injurious to those negatively affected were conditions of the time widely accepted in the courts. They are no longer sustainable in the light of our Constitution.

- [9] In *Suchitra Singh v Jailall Ramparsad* ³Patel J in dealing with the dissolution of a Hindu marriage remarked in paragraph 38 as follows:

"Our courts have, since the advent of the Constitution, consistently come to the aid of spouses and their children if the marriage was one of the common law if there was a need, especially if unfairness would result by application of the strict letter of the law...."

- [10] I am alive to the fact that this court is not called upon to adjudicate on the validity of the marriage between the applicant and the respondent. The central issue for

² 2004(7) BCLR 735 (CC)

³ Case No. 564/2002, delivered on 22 January 2007 (Durban and Coast Local Division)

determination is whether the applicant is entitled to spousal maintenance in the context of Rule 43. In my view a party married in accordance with Hindu rites is entitled to claim spousal maintenance for purposes of Rule 43. This accord with the spirit, object and purport of our constitution.

[11] I now proceed to consider whether the applicant has made out a case for the relief set out in the Rule 43 application.

[12] The applicant' expenses are set out in the financial disclosure form as follows:

EXPENDITURE	SELF	CHILD/REN	TOTAL
Lodging(bond repayment ,levy, rental,board	R2300	R4600	R6900
Food, Groceries & Cleaning Materials	R2000	R4000	R6000
Toiletries(including hair care, cosmetics;make up	R1000	R700	R1700
Water	R170	R340	R510
Electricity/Gas/Paraffin	R630	R1260	R 1890
Cell Phone	R600	R500	R1100
Domestic Worker	R1000	R2000	R3000
Clothing	R1000	R1000	R2000
School Uniforms		R400	R400
Transport: Car Installments	R2900	R1100	3600
Fuel	R2000	R1000	R3000
Licenses	R20	R40	R60
Insurance	R400	R800	R1200
Educational Expenses: School Fees		R7700	R7700
Stationery		R3000	R3000
Outings		R420	R420
Other Educational Expenditure-wifi		R600	R600
Medical Expenditure: Medical Aid	R3021	R2418	R5439
Doctor	R90	R180	R270
Insurance: Life	R1725.71		R1725
Pocket Money/Allowances	R1000	R1000	
Holidays	R400	800	R1200
House Maintenance (plumber, handyman,			

electrician, painter)		R170	R340	R510
Repair & Replacement of items:	Household			
	appliances	R200	R400	R600
	Kitchenware	R200	R400	R600
M-Net/ DSTV		R230	R460	R690
Personal Loans		R2000		R2000
TV Licence		R20		R20
TOTAL EXPENDITURE		R22346,71	R36798	R59144,71

[13] Her current monthly expenses for herself and the minor children as set out in the founding affidavit amount to R52 904-00. Her net monthly income is R16 586-34.

[14] According to the applicant, the respondent used to hire a driver to transport her and the minor children when they were living together. Their lifestyle have changed since she left the matrimonial home as she now has to carry the burden of the bulk of expenses for herself and the minor children without the assistance of the respondent.

[15] According to the applicant, the respondent is an astute businessman who runs a logistic company as well as a wholesale fruit and vegetable. He spends the majority of his money in cash buying designer clothing, shoes and jewellery costing R10 000 and R20 000,00 per month. He has acquired a fleet of about 20 -30 vehicles for his business. She was kept in the dark about his finances when they stayed together.

[16] In support of her claim for R 50 000,00 contribution towards legal costs for her divorce action, she provided me with a bill of costs prepared by her attorneys of record totaling R144 254.85. In this regard she contends that she was fooled into thinking that the parental plan concluded in August 2018 would cater for the maintenance needs of the minor children. It turned out that it did not. Her attorneys subsequently wrote a letter to the respondent requesting that the issue of maintenance be adequately addressed in the parental plan.

- [17] The respondent has filed an opposing affidavit in which he disputes most of the items listed in the applicant's expenditure disclosure form. He contends that in terms of the parental plan he is liable to 50% of the children's casual clothing and does not spend R3000 per month as alleged by the applicant. He estimates his spending to be around R2000,00 in a month. He also dispute the amounts which the applicant spends on transport costs for the children. He acknowledges, however, that the parental plan makes no provision for the transport of the applicant and the minor children.
- [18] In terms of the parental plan which is annexed to the opposing affidavit, the respondent is liable for the school fees and extra mural in the amount of R7 275,00 and R420,00 per month respectively. He contends that these amounts should not have been included in the applicant's schedule of expenses. He also argues that the applicant pays an amount of R 1 857,00 in respect of medical aid premium and not R5 439,00 as she claims.
- [19] The respondent contends that his monthly income is about R 30 000,00. He no longer owns any businesses as alleged by the applicant. He further states that he was sequestered in 2011. No documentary proof of his monthly income in the form of bank statement or IRP 5 has been attached save for the letter from Simic Consultancy (Accountants).
- [20] On papers before me it is clear that the applicant's income has drastically been reduced after she became separated from the respondent, and this has had a major impact on her lifestyle including those of the minor children who used to enjoy being chauffeured around. The respondent appears to concede that he was able to afford their lifestyle prior to his sequestration. However, it is trite that in our law that insolvency does not terminate the party's obligations for maintenance.⁴

⁴ Weinerberg v Weinberg, 158 (2) SA 618 (C)

- [21] It is not necessary for purposes of Rule 43 application for me to deal with the issues raised in the respondent regarding the cause of separation. The arrangements contained in the parental plan agreement dated the 27th March 2018 regarding the parental rights and access appear to be reasonable and working for both parties. Accordingly I do not deem it necessary to amend the parental rights and access stipulated in that agreement
- [22] In applications of these nature, this court has inherent common law powers as upper guardian of all minors to make an order which it deems fit in the best interests of the child, and that power include every other arrangement which it considers not in the best interest of the child. With that prelude I proceed to consider whether the respondent should in addition make a further financial contribution towards the minor children.
- [23] It is evident that the applicant can no longer maintain the living standard which has been brought to bear by the acrimony of the separation with the respondent. Unfortunately the children have to endure the brunt of such action. Such consequences should not be visited upon the minor children. The best interests of the children are paramount in all matters concerning the care, protection and well-being of a child including the standard. Sub-rule (5) of rule 43 provides a sufficiently flexible platform to enable the court to give due regard to the paramount importance of a child's best interests and respect the best interests of a child's living standard as required by ss 2(b) and 6(2) as read with s 7 of the Children's Act.
- [24] However, Rule 43 was not envisaged to give an interim meal-ticket to women who would quite clearly at the trial would not be able to establish a right to maintenance. It was created to provide a temporary relief for women who had given up careers or potential careers for the sake of matrimony. In my view the respondent has failed to make a proper disclosure of his financial affairs. I have mentioned earlier that the only proof of his income is the letter from his accountant. Without a proper up-front disclosure judicial officers may be compelled to elevate an anomaly in one party's papers to an overall adverse credibility finding which impacts on the maintenance to

be paid. That said, I am compelled to find that the respondent should make additional financial contribution towards the maintenance of the children and the applicant.

[25] On the issue of contribution towards legal costs it was submitted from the bar that the validity of the marriage between the parties is being challenged, which factor may impact on the expeditious finalization of the divorce action. Taking this into consideration, the applicant is entitled to some kind of financial contribution.

[24] Accordingly, the order I make *pendente lite*, is as follows:

1. The respondent is ordered to continue paying all school fees and extra mural expenses of the minor children.
2. The Respondent is ordered to contribute an amount of R10 000,00 per month towards the maintenance for the applicant and the minor children, payable on the 1st day of each month from the date of this order.
3. The Respondent is ordered to contribute an amount of R25 000,00 towards the legal costs of the Applicant to be paid within 30 days of the date of this order.
4. Costs of the application will be costs in the divorce action.

P MALUNGANA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Held on: 28 January 2020
Delivered on: 31 January 2020

