

REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 52183/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

11/4/2022

In the matter between:

M[....] H[....] (U[....])

Applicant

and

W[....] H[....]

Respondent

JUDGMENT

MAKUME J:

[1] In this matter the Applicant seeks an order *pendent lite*:

i) That the Respondent be ordered to pay maintenance in respect of the parties' minor children D[....]1 and D[....]2 at the rate of R7 500.00 per month per child.

ii) Spousal maintenance in the amount of R15 000.00 per month.

The contribution order granted by the Germiston Magistrate Children's Court under case number 14/1/1-290/2021 dated the 8th October 2021 in terms of Section 165 of the Children's Act of 2005 be set aside.

iii) Contribution to the Applicant's legal costs in the sum of R88 025.00.

iv) That Respondent be ordered to grant the Applicant access to the common home to enable Applicant to collect items listed in Annexure "A" attached hereto.

[2] It is common cause that two minor children were born between the Applicant and the Respondent namely D[....]1 born on the 29 December 2012 and D[....]2 born on 22 December 2014.

[3] The Applicant is a Dutch National who arrived in South Africa on a valid permit and whilst in the country she and the Respondent who is a church minister fell in love and proceeded to have a marriage solemnised in Kempton Park on the 11 June 2011 by a Registered Marriage Officer Conradie V103.

[4] It turned out that the Department of Home Affairs has refused to register that marriage on the basis that when it was concluded the Applicant's visa had expired meaning that she is to date hereof in the country illegally. The Respondent is clinging to that issue as one of his defences both in this application as well as in the divorce matter.

[5] It is not for this Court to decide on the validity or otherwise of the marriage this application is about the best interest of the minor children. I will accordingly ignore all issues about the validity of the marriage save to say that even if it is found that the

marriage was invalid for whatever reasons it does not deprive the Applicant to launch these proceedings. Peregrines still retain the right to be heard in this Court.

[6] The Applicant is unemployed, does not have a bank account and presently lives in a one-bedroom flat with her two boys. She is home schooling them and is for all intents and purposes the primary care giver of both children. She presently survives on interim maintenance of R800,00 per week ordered by the Children's Court against the Respondent.

[7] She tells this Court that since she left the 5-bedroom matrimonial home she has been receiving financial assistance from sympathetic friends and her family in the Netherlands. She has attached a bank statement of a friend who has allowed her to have money meant for her from friends and family into that account. She has for obvious reasons decided not to disclose the name of the account holder. The Respondent lives all by himself in the 5-bedroom home in Dowerglen.

[8] In response to paragraph 3 and 4 of the Applicant's application the Respondent admits this Court has the jurisdiction to adjudicate on this matter all that he disputes is the existence of a valid marriage. He takes no issue with the Applicant's request that the interim Children's Court order in respect of the contribution of R800.00 per week be varied. In my view he does not say that this court has no jurisdiction to review that order.

[9] The order by the Children's Court dated 8th October 2021 read as follows:

9.1 The Respondent (Mr H[...]) will contribute R800.00 per week for the subsistence of his minor children payable every Monday by 09h00 into a bank account nominated by the Applicant (Mrs H[...]).

9.2 The Respondent shall buy clothes for the minor children as and when they need it.

9.3 The Respondent will forthwith reimburse the Applicant the amount of R500.00 for clothes bought by the Applicant.

9.4 The Respondent shall pay the costs of therapeutic treatment of the minor child D[....]1 with Psychologist Steven Rebello from Edenvale Therapy.

9.5 The Respondent will negotiate the number of sessions with and pay for sessions with Mr Rebello to accommodate his financial means.

[10] The Applicant says that since the marriage she has been fully reliant on the Respondent to provide for her in every aspect including financially. The Respondent disputes this and says that the Applicant had other sources of income but does not tell this court what those sources are.

[11] It is common cause that the Applicant's visa expired in 2017 She has enlisted the services of an immigration attorneys to regularise her situation in the meantime the Respondent is hanging on the issue and say that the marriage is not valid. The Applicant says that the Respondent has threatened her with deportation- and loss of the two children. There is no way that this Court should allow a separation of the two children from their mother it is not in their best interest.

[12] The Respondent admits that during the marriage the Applicant had access to a joint account which enabled her to draw between R1 600.00 to R2 000.00 per week to buy household groceries. This allegation the Respondent denies. She vacated the matrimonial home on the 25th February 2021.

[13] The Applicant has attached to her founding affidavit a copy of a bank statement in respect of account number [....] held in the name of Respondent at FNB for the period 28th June 2021 to 26th September 2021. The bank statements showed that as on the 28th June 2021 the account had a credit balance of R71 903.94 and on the 25th September 2021 it had a closing credit balance of R93 780.41. At some stage during the 30th August 2021 the account had a credit balance of R105 000.00.

[14] The Respondent does not deny those amounts and that payment and contributions are made into his personal account by church members all he says is

that the information was acquired illegally by the Applicant and hence cannot be used in these proceedings.

[15] In response to the Applicant's allegation that the amount of R3 200.00 per month presently contributed by the Respondent in terms of the Children's Court order is inadequate he says that he only had a duty to maintain his two children and not the Applicant as the marriage is illegal. He is mistaken the dispute about the validity of the marriage has nothing to do with the obligation to pay maintenance.

[16] Trollip J in the matter of **Zaphiriou vs Zaphiriou on 1967 (1) SA WLD 343** quoted with approval the earlier decision by Jones JP and Kotze J in the matter of **Levy vs Levy 1904 18 EDC 113 concluded as follows at page 345:**

“There is therefore good authority that in the common law even though the validity of the marriage was being disputed nevertheless the Court had jurisdiction in preliminary application proceedings to award maintenance and a contribution towards costs pending an action to determine that fundamental dispute.”

[17] It is common cause that the Applicant is unemployed and is unemployable due to the fact that her visa to be in the country expired during 2017. She can neither get employment nor even open a bank account.

[18] In the meantime it is not in dispute that the Respondent is a director of a sales marketing company as well as being a preacher. There is proof that he receives vast sums of money into his personal account on a monthly basis as I have indicated in paragraph 13 above. On the other hand the Applicant has had to rely on her family as well as sympathetic friends and church members who have donated money to her.

[19] She lives with the two children of the marriage and home-schools them. She lives in a one-bedroom flat which she says is inconvenient has no privacy for her and the two boys. She needs to relocate to a two- bedroom flat at a cost of +/- R8 000.00. I find this to be more than reasonable.

[20] In paragraph 10 of his reply the Respondent admits that he cut off the Applicant from using the credit card from which she was asked to make withdrawals and maintain herself and the minor children. He says that even after he had blocked the Applicant's use of the credit card he continued to support the Applicant and the minor children financially. What he does not say is how much did he contribute and when.

[21] If indeed it is correct as he says that he continues to maintain the Applicant and the minor children then there would have been no need for the Applicant to approach the Children's Court in Germiston for interim relief during October 2021 shortly after he had blocked the credit card.

[22] In paragraph 7.3 of the founding affidavit the Applicant say that since she got married to the Respondent she has been fully reliant on the Respondent to provide for her in every aspect including financially. In answer to that the Respondent denies and say that the Applicant had other sources of income apart from what he provided. The strange thing once more is that he does not tell the Court what those sources of income were and how much was it.

[23] What is further strange is that at paragraph 23 of his answering affidavit which is in reply to paragraphs 8.4, 8.5, 8.6, 9.10 and 11 of the Applicant's founding affidavit he says that he has consistently provided for the Applicant even though he had no duty to do so. In particularly in paragraph 9 and 10 the Applicant has set out details of amounts that she required to enable her to maintain herself and the minor children. She indicates that she requires R34 950.00 month.

[24] It is strange that the Applicant now says he bears no duty to maintain the Applicant simply on the basis that their marriage is invalid. This in my view is nonsensical and must be rejected. As regards the minor children the Respondent does not dispute the reasonableness of the expenses claimed but does not make an offer. He seems to rely on the R400.00 per week per child as ordered by the Children's Court which amount is clearly inadequate and was agreed as a stopgap after the Respondent disqualified the Applicant from using the credit card. Had he

not done so there would have been no need for the Applicant to approach Court in terms of Rule 43.

[25] As far as a contribution to legal costs the Applicant at paragraph 16 of her founding affidavit says that she foresees a prolonged dispute as the Respondent is placing in dispute the validity of their marriage and including the care and custody of the minor children. She concludes that given the complexity of the Respondent's financial affairs and his unwillingness to disclose financial information she foresees considerable dispute about the patrimonial aspects of the divorce. It is therefore only fair that the Applicant who is a foreigner in the country get the assistance of legal counsel to assist her. In his reply the Respondent still raised the invalidity of the marriage and say that the Applicant should first wait for the validity of the marriage to be established before she can claim entitlement to financial assistance.

[26] I have been referred by counsel for the Applicant to the decision in **Taute vs Taute 1974 (2) SA 675E** Wherein the court said the following:

“There are certain basic principles which in my view govern an application of this type. As already indicated such maintenance is intended to be interim and temporary and cannot be determined with the degree of precision and closer exactitude which is afforded by detailed evidence.

The Applicant's spouse (Who is normally the wife) is entitled to reasonable maintenance *pendente lite* dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income, although in some circumstances in roads on capital may be justified. The question of maintenance payable must in the final result depend upon reasonable interpretation of the summarised facts contained in the founding and answering affidavits as indeed is contemplated and intended by Rule 43.”

[27] In **Pommeril v Pommeril 1990 (1) SA 998 F** the court held that:

“a wife should in my view be able to expect the same standard of living that she had as a married woman. In most cases, it may not be possible to achieve this goal and of course, a husband should be entitled to the same expectation but in the final result it is a question of balancing up the needs of both parties and making an equitable distribution of available income.”

[28] The Applicant has explained in detail what the reasonable monthly expenses are in respect of the needs of herself and the children. She has not exaggerated figures and has in my view been realistic given the lifestyle of the family before separation. On the other hand, the Respondent's expenses are unreasonable judging by the fact that the children only spent 6 days per month with him. He has put the amount of R16 000.00 for the 6 days which amount is more than that required by the Applicant for the 24 days in a month he says he need R16 000.00 whilst the Applicant needs R15 000.00.

[29] A close examination of the bank account of the Respondent clearly indicates that he can afford to pay reasonable maintenance for the Applicant and the minor children pending the divorce. In his financial disclosure the Respondent has not been truthful for example he declares an income of “minus R78879” for the past six months and yet left out the amount of R217959 of other income. His declared income for the past six months should have been R139 080 which is R23 180 per month.

[30] The Respondent proffered monthly deficit is not supported by the information gleaned from the bank statements for example his positive balance ranged between R71903 and R105 437.34. He has not disputed this income instead when he noticed that he suddenly on the 2nd November 2021 made payment of R21 000.00 as rent office for the first time out of that account. He has been disingenuous and has not played open cards.

[31] It is clear that the Respondent in all probabilities has access to accounts of his many business, associated trusts donations and income from his church. He as a director of five active companies and has failed to disclose any of those companies' financial activities. He is clearly hiding information from this Court. He is also linked

to four Trust but declares only one being the Kingdom Business Trust even then does not say what income or benefit he gets from it.

[32] The Respondent's lifestyle as demonstrates by payment of rental of R21 000.00 per month garden services; R6 500.00 per month on groceries whilst he lives all by himself reveals that his income and benefits which he received from whatever sources is greater than the amount that he has declared.

[33] It is correct that until separation the Respondent had been financially caring from the Applicant and the minor children. Nothing has changed in his financial situation since then.

[34] I am accordingly persuaded that the Respondent will be in a position to afford the amounts as I had set out in the order that I granted on the 7th March 2022 copy of which I attach hereto.

[35] In the result I hereby confirm the order that I issued prior to furnishing my reasons for judgment.

DATED at JOHANNESBURG this the 11 day of APRIL 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING	:	22 FEBRUARY 2022
DATE OF JUDGMENT	:	11 APRIL 2022
FOR APPLICANT	:	ADV SCHOLTZ
INSTRUCTED BY	:	ATTORNEYS
FOR RESPONDENT	:	IN PERSON
INSTRUCTED BY	:	

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2021/52183

BEFORE THE HONOURABLE JUDGE MAKUME

In the matter between:

HORAK : MIRJAM (BORN: UPPELSCHOTEN)

APPLICANT

(Passport Number: [...])

and

HORAK: WARREN

RESPONDENT

Identity Number: [...])

DRAFT ORDER

MAKUME J

Having read the documents filed of record, heard counsel and having considered the matter: -

1. The contribution order granted by the Germiston Magistrate's Court (Children's Court) under case number 14/1/4-290/2021 on 8 October 2021 is hereby set aside.
2. That, pendente lite, the Respondent is to pay maintenance in respect

of the minor children, as follows:

2.1 R 7,500.00 per month per child, payable on or before the last day of each month, directly into the nominated account of the Applicant or any other electronic funds transfer service if preferred by the Applicant, free of any transactions- and/or bank charges. The maintenance amount

shall escalate annually on the date of the granting of this order, at a rate of 10%;

3. That, pendente lite, the Respondent is to pay spousal maintenance in respect of the Applicant, as follows:

3.1 R 10,000.00 per month, payable on or before the last day of each month, directly into the nominated account of the Applicant or any other electronic funds transfer service if preferred by the Applicant, free of any transaction- and/or bank charges. The maintenance amount shall escalate annually on the date of the granting of the decree of divorce, at a rate of 10%.

4. The Respondent is to make a contribution towards the Applicant's legal costs in the sum of R50 000.00 payable at the rate of R5 000.00 (Five Thousand Rand) per month with effect 1st April 2022 into the same account as in 2.1 above.

5. The Respondent is to give the Respondent access to the erstwhile common home, within a period of 5 (five) days from the granting of this order, in order to collect the items listed in annexure "FA10", alternatively that the Respondent is to, within a period of 5 (five) days from the granting of this order, deliver the items listed in annexure

"FA10" to the applicant.

6. Costs of the application.

DATED at JOHANNESBURG this day of MARCH 2022
the

BY THE COURT

REGISTRAR