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

CASE No. 55426/2021

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED:

Date: 20/04/2022

In the matter between:

**T[....] B[....]
(ID. NO. [....])**

Applicant

and

**D[....] B[....]
(ID. NO. [....])**

Respondent

In re:

D[....] B[....]

Plaintiff

and

T[....] B[....]

Defendant

JUDGMENT

MAHOMED AJ,

This is an application in terms of Rule 43, for interim maintenance. The parties separated in October 2021. They were married to one another for twenty years and have three children, one is a minor. The applicant left the marital home and is residing in a guesthouse, whilst the respondent and the three children continue to live in the marital home.

THE APPLICANT'S CASE

1. The evidence is that throughout their marriage, in community of property the applicant has never known or had control of any of the finances of the community estate.

2. She was reliant throughout the marriage on the respondent's income, except for the period 2013 to 2019 when she earned income from a beauty therapy business, which has closed down. The court was not advised of the reasons for the termination of this business.

2.1. No evidence has been put before this court of her attempts to restart the business.

2.2. The applicant stated that all her equipment is at the marital home, and she is unable to collect and store them at her current place of accommodation.

2.3. The court was informed that she will require to rent premises to restart the business and she has no funds to do so. She is unable to lease premises as she does not have a pay slip to enter into a lease agreement.

3. The marital home is a rental property, however the respondent has not filed a rental agreement to support this claim, he does however furnish a "rates" invoice.

4. She claims:

4.1. R36 544 per month retrospective to 18 October 2019, when she left the marital home;

4.2. She be retained on his medical aid; and

4.3. R50 000 as a provisional contribution to her legal costs.

5. Their minor child is seventeen years old and has expressed a desire to continue to live with the respondent and his other older siblings in the marital home.

6. Upon analysis of the respondent's income annexed to his papers, the applicant identified various discrepancies in his evidence given under oath.

7. Advocate Bekker appeared for the applicant and informed the court that the respondent has failed to file his bank statements for the past 6 months. This is a requirement set out in the Financial Disclosure Form, which is signed under oath. He submitted statements for 4 months only.

8. The applicant has identified various discrepancies between his answering papers and his financial disclosure form, where he claims in his papers a monthly shortfall in expenses to be R41 257 and in his financial disclosure form he sets out a shortfall of R19 950 per month, in expenses. He alleges he cannot afford to pay the applicant any maintenance.

9. Ms Bekker submitted that the respondent has money and can afford to pay interim maintenance. Counsel submitted that based on the four bank statements, she identified that the respondent received income from various sources, being his employer, a private client for whom he does private jobs, and from the applicant's account, in a total sum of R234 148.

9.1. Counsel informed the court that it is apparent from the bank statements over the four month period, he withdrew R62 000 in cash, in addition to having paid for household expenses and certain personal expenses.

9.2. On an analysis of his credit cards statements over the same period, she noted that he withdrew R20 000 in cash and transferred to a certain Selby, unknown to her client, the sum of R1 067 271. There were no deposits recorded during that time in his credit card.

10. Ms Bekker submitted that it is apparent from this movement in funds that the respondent used his credit card to pay household expenses and to dissipate funds.

11. It was argued further, that for the 12 months preceding the applicant's leaving the marital home, the respondent deposited R456 793 into the applicant's account with instructions to pay an amount of R235 800 into his bank account.

12. Ms Bekker submitted that from the facts set out above, the respondent in fact earns three times more than his declared income.

13. The applicant proffered that for the duration of their marriage, they enjoyed a fairly comfortable lifestyle and she submitted that the respondent must have earned a fairly good income to support them throughout. Accordingly, she argued, he is able to afford the maintenance pendente lite.

14. She submitted that she was "constructively" forced out of the marital home, as the respondent continued with his abusive language and manipulative behaviour toward her.

15. Counsel submitted that the applicant's expenses are reasonable and that she has to date relied on the generosity of family and friends for her living expenses over the past months.

16. The applicant claimed for R50 000 as a contribution toward legal costs and that she be retained on his medical aid.

THE RESPONDENT'S CASE

17. The respondent has been responsible for expenses for their three children, a grandchild and one of their daughter's fiancé. Furthermore, he alleges that he supports the applicant's mother, who lives on the property they lease. Although no details of the expenses were furnished, the court was advised that the senior person relies on a state pension for her expenses.

18. He submitted that he was recently diagnosed with cancer, although the court was not advised of any further particulars thereto, and now has health problems. He cannot afford "additional expenses which the applicant has incurred."

18.1. The respondent submitted that the applicant left the marital home, she was not forced out of it.

18.2. When she left he was of the understanding that she had been offered accommodation by friends and family.

18.3. She could have moved into the cottage in which he accommodates her mother, alternatively, she could have limited expenses and lived in a caravan on the property which she owns.

18.4. The applicant has been receiving financial assistance from a Roelofse through their eldest daughter's account. Their daughter confirms receipt of monies on behalf of the applicant.

19. The respondent alleges that he had a business arrangement with a colleague "to store equipment on his property for a fee," however this arrangement has now been terminated due to his ill health, which is confirmed by an email annexed to the papers.

20. The respondent alleges that the applicant has skills and has generated an income up to R50 000 on her version, and that she ought to have gone back to work.

20.1. Furthermore, he alleged that he has often begged her to return to work so as to assist him with household expenses and she has refused to do so.

20.2. The evidence is that her work equipment is at their home and the applicant has never asked to collect them, nor has she provided any evidence that she has sought employment or made any attempts to generate an income, given her skills in beauty therapy. In the past she offered a house call service to clients and does not need to secure premises for the interim period.

20.3. The Respondent furthermore alleges that the applicant has a large following on social media and ought not to have too much trouble in establishing a client base. He denied allegations that he was obstructing her efforts to do so on facebook. He tendered to transfer her account upon her application to do so.

21. The respondent alleges he earns R27 574 per month and incurs monthly expenses in the amount of R68 832.46.

JUDGMENT

22. The R43 procedure is designed to be expeditious and an inexpensive method to determine interlocutory issues.

23. The disputes cannot be determined with precision or exactitude within the ethos of this rule. See **TAUTE v TAUTE**.¹

24. The rule serves to assist a spouse who has limited or no income during the marriage, with funds to meet needs until the divorce is finalised and for with litigation costs up to the first day of litigation.

24.1. The care and contact with children and their maintenance is other relief that an applicant may call upon a court to determine under this Rule.

25. An applicant's needs are determined according to the means of the spouse ordered to pay such maintenance and the lifestyle enjoyed by the parties during the marriage.

26. I have considered the submissions by counsel on behalf of both parties and the financial disclosures documents completed by both parties.

27. I stood this matter down for the parties to hold further discussions to settling the matter, however I was advised that the parties were unable to settle their disputes.

¹ 1974 (2) SA 675 E at 676 B-C

28. It is common cause that the applicant has not been earning an income in the past three years and that she has found it necessary to set up a home for herself elsewhere, she alleged that she cannot continue to live with verbal abuse and manipulation.

28.1. The respondent alleged that he cannot continue to live with her, due to an alleged extra marital relationship the applicant has been involved in.

29. In almost all divorces, there is likely to be an additional home to be set up and as a result additional costs.

30. In casu, the respondent argued that the applicant could have settled into a caravan on the property of their marital home or in a cottage on the same property, which the applicant's mother, now in her senior years , occupies. He argued that there is no need for her to live in a guest house and to incur additional costs.

30.1. I was advised that the respondent himself tried to occupy the caravan and found it uncomfortable due to his medical condition.

30.2. I have noted that the applicant has not stated fully why she is unable to share the cottage with her mother and makes only a bald allegation that it is not convenient.

31. Whilst parties are obliged to limit their pleadings to promote speedy and effective disposal of the interim matters, bald statements do not assist a court in the determination of the dispute. Parties then must themselves bear the "risks" that the outcomes may not favour their lifestyles or the impact on expenses.

APPLICANT'S EARNING CAPACITY

32. The applicant is the mother of the children now adult/grown up and deserves respect and dignity particularly, in her family life, albeit that the respondent may hold a different view.

32.1. It is common cause that the applicant has earned an income for about six years in the beauty industry and that her income was adequate to meet her projected needs.

32.2. The applicant appears to want to restart her business however argues that she cannot without some start-up capital. However, she also proffers that the economic climate is unfavourable, particularly in her industry.

THE RESPONDENT'S ABILITY TO AFFORD MAINTENANCE

33. It is also unfortunate that the respondent faces health challenges that allegedly impede his ability to earn sufficient to pay for expenses.

33.1. However, the court noted the submissions by Ms Bekker that a lot of money has moved between various bank accounts at various times and to unknown persons through the respondent's bank accounts, as set out in paragraph 9 above.

33.2. The further evidence is that the applicant was instructed by the respondent on one occasion to accept a deposit of close to R450 000 and to transfer half back to him into his account.

33.3. I noted that the respondent's explanation of the terms of his agreement with a business partner "to store equipment" on his property for a fee. I noted the very cryptic email correspondences between the respondent and his business partner terminating the agreement. However, this court has difficulty understanding how the respondent's medical condition would prevent that business opportunity "the storage of equipment" on his premises from continuing. It appeared to be a very lucrative opportunity for him to earn the extra income.

33.4. I am not persuaded about the nature of the relationship between the respondent and his business partner nor of the termination of their agreement and the reasons therefor, but that can be fully ventilated at trial. This court is to determine an interim payment for living expenses and must do so based on evidence presented.

33.5. It is noteworthy that the applicant, who has lived with the respondent for a long time now, made no mention of storage of equipment on the property and any fee that was being charged for it.

33.6. I perused the bank and credit card statements filed on record and noted fairly large payments to a Selby as pointed out by Ms Bekker. Counsel for the respondent did not address the court in that regard nor was it disputed.

MAINTENANCE *PENDENTE LITE*

34. I considered the various factors outlined above and am of the view that the respondent can afford to pay the applicant maintenance until the divorce is finalised. He appears to have other sources of income, and the termination of his agreement due to his health does not make sense to this court.

35. The applicant has a duty to preserve community assets and there is no evidence that she explored alternatives for her accommodation on the property, which the respondent referred to. I therefore do not consider it fair to order that he pay maintenance retrospective to October 2021.

36. I noted the applicant's expenses as listed on her founding papers² and I am of the view that an amount of R29 000 per month is fair in the circumstances, having reduced, meal costs, cellular phone costs and halved the loan repayment, subject to negotiating an extension on repayment.

36.1. The applicant can negotiate further extensions on the loan repayment, the respondent was of the understanding that the applicant was living with friends and family and not that she was paying for accommodation at a guesthouse.

36.2. The meal costs can often be better managed, as many homes have to reprioritise and forego luxuries. Furthermore, the applicant has an earning ability and must make efforts to assist herself in supplementing her income. The respondent's evidence is that he has been calling for help for a long time for a contribution to manage home expenses.

² G9 caselines

37. A contribution to legal costs is often costs up to the first day of trial, see **GLAZER v GLAZER**³ and **SENIOR v SENIOR**⁴ and must be supported by a bill of costs. The applicant's papers do not set out those costs and the respondent is entitled to an itemised bill ahead of the trial. Although, I am of the view that a contribution is in order, I am compelled to an estimate in setting the amount *pendente lite* at R35 000. The Rule provides for an applicant to approach the court for an increase if necessary.

Accordingly, I make the following order:

1. The respondent is to pay the applicant, an amount of R29 000 per month, for maintenance *pendente lite*,
2. The amount is payable from 1 April 2022, and on the 1st day of each month following,
 - 2.1. The respondent shall pay an amount of R35 000 toward the applicant's legal costs.
 - 2.2. The respondent shall maintain the applicant as member on his medical aid, retaining the same benefits as she is entitled to date of this order, *pendente lite*.
 - 2.3. Costs of this application shall be costs in the divorce.

MAHOMED AJ

³ 1959 (3) SA 928 W at 932

⁴ 1994 (4) SA 955 W at 962-964

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 20 April 2022.

Heard on: 22 March 2022

Delivered: 20 April 2022

Appearances

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