

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 14/29348

DATE: 23 July 2014

In the matter between:

N[...], C[...] F[...]

APPLICANT

and

N[...], K[...] G[...]

RESPONDENT

JUDGMENT

KHUMALO J

[1] This is an Application in terms of Rule 43 of the Uniform Rules of this Court, brought by a husband (“the Applicant”) against the wife (“the Respondent”) seeking an order, regulating the access, custody and maintenance of the two minor children born of their marriage, 2 girls aged 8 and 6, pending finalisation of the Divorce action instituted by the Respondent,

[2] The status quo at the time of the hearing was that the minor children were in the care of the Respondent. Applicant was afforded access to them, albeit not regulated. Applicant also paid maintenance in the amount of R5 000 per month for each child and had already paid school fees for both children for the whole year. He also had the children on his medical aid.

[3] The Respondent in the Divorce action had pleaded for the status quo that the primary residence of the minor children remains with the Applicant being afforded reasonable access. Applicant alleges that Applicant abuses alcohol and had been diagnosed with and undergoing treatment for Borderline Personality Disorder as

a result Applicant is seeking that such status quo remain *pendente lite* only if the Respondent subjects herself to alcohol testing every two weeks.

[4] Applicant is in agreement with the Respondent regarding the maintenance of the minor children and with the arrangement that he continues to make payment of R5 000 00 maintenance per month for each minor child and also be responsible for their school fees, *pendent lite*. He however contends that other needs pertaining to their schooling should be shared between the parties.

[5] He is also in agreement with the fact that the minor children remain on his medical aid but then demands that any access on the medical expenses that are not covered by the medical aid should be borne by both parties on an equal basis.

[6] Applicant however contends that Respondent is entitled to maintenance that she is seeking, and submits that she is possessed of assets and earns a net income in excess of R26 000 per month that she makes from commission out of her estate agent work, a salary he alleges she also made whilst at her previous employment with his parents. In addition she receives a rental income of R5750.00. She also runs a beauty salon business D[...] J[...] V[...] from which she earns an extra income and has a potential to increase her earning potential by being the rookie of the year. Whilst alleging her expenses, some to be lavish and unnecessary and amounting to R28 086.91, of which R10 000 is for personal expenses and R6 084.91 for the children's schooling and their general expenses that he is funding at the moment.

[7] On the other hand he alleges to earn a net income of R38 171.26 after deduction of tax and UIF from a gross salary of R51 900 and his expenses to be monthly debit orders amounting to R21239.66 (the debit order includes the R4834.91 already covered by a year's payment) and living expenses of R14450.00. In total the expenses amount to R 35 689.66 and exclude R10 000 maintenance payment for the minor children and R1 000 for the upkeep of the matrimonial home that he presently stays in.

[8] Consequently he moves for a motion of no order with regard to Respondent's maintenance.

[9] The Respondent denies in her papers that she has an alcohol problem and admits using alcohol but responsibly in a manner that will not affect her parental responsibilities. Although she admits to have previously drunk excessively and attended Alcoholic Anonymous meetings, she avers that she does not have an alcohol related or dependency problem and has annexed proof of results of tests she underwent that confirms that. However she agrees to subject herself to whatever tests with the Applicant covering the costs thereof.

[10] She also admits being diagnosed with and undergoing treatment for Borderline Personality Disorder but managing the condition and alleges that it does not create any risk for the children.

[11] Regarding the issue of her maintenance she alleges that Applicant already pays for her maintenance, albeit insufficiently although he does not acknowledge that. Her income from her estate agent work since June 2013 to date has been only from selling three houses with an income of only R166 377.68. She alleged at the time of launching the papers that the payment of R60 975.33 commission for one of the houses was going to be effected in May 2014. She therefore according to her, minus the delayed payment, has earned an average of R9 582.03 (instead of +-R13 114.00). She confirmed that presently she has got three properties that she is trying to sell but unlikely that she will earn the same commission as they are not easily sellable.

[12] She also admitted

[12.1] receiving the rental income and using it for running the household, purchasing groceries;

[12.2] running the beauty salon business, however alleging that she will no longer be selling the products as they were obtained from Applicant's mother;

[12.3] that Applicant paid for the minor children's general expenses (i.e clothing, medical aid, medication not covered by medical aid and school fees)

[12.4] that Applicant (during marriage) provided her with an amount of R10000 per month that she would add to the R5750 rental income and run the household on top of the other monthly expenses he paid for.

[12.5] she, on 8 May 2014 had access to an amount of R82 125.69 paid by Applicant from a joint account of which R15 000 has been transferred to her attorneys to pay her fees.

[13] She then alleges that her expenses amount to R47 640.00. The amount includes the R18 000 rental that has not been catered for by the Applicant in his calculations. Respondent alleges that renting the property was agreed upon as the deposit and first rental was paid by him from her portion of the joint savings account. Applicant admits that the amounts were paid from her portion of the joint account but he denies that he agreed to her renting the property the reason being that it is excessive.

[14] She consequently, having added together the R9 582.03 that she earns, the R10 000 for the minor children and R5 750. 00 for rental, allege to have a shortfall of R22 307.96. She, as a result seeks the Applicant to pay for the shortfall.

[15] She alleges that Applicant can afford the amount claimed as he has received salary payments from Hydromulch that he works for amounts of R91 025, R55 004.38 to R35 743.47 for the period December 2013 - February 2014 respectively. Also an income from a company called Noffprop in the amounts of R4049.11,

R2 163.15 and R2 093.85 for the same period. He has over and above been assisted by his parents who have paid the school fees for the children for the whole year and given him large donations of money. He also can afford lavish gifts, jewellery as well as overseas trips.

[16] Responding to Applicant's demand pertaining to the medical aid, she pleads that Applicant be solely responsible for the medical aid and the school related expenses.

[17] The principles that govern Rule 43 proceedings are said to have been well established that the Respondent is entitled to reasonable maintenance *pendente lite*. The reasonableness thereof being determined against the following factors:

- (1) The ability of Respondent to pay (looking at his needs as well and the responsibility that he has carried vis a vis he is to assume;
- (2) Living standard of the parties
- (3) Period of the marriage
- (4) Resourcefulness of the Applicant (insufficient means)

[18] The starting point should be the taking into consideration that the purpose of the Rule is to cater for the spouse and the children's needs pending the divorce and not for what a party wants. In determining the needs of the Respondent the question to be addressed is whether the Applicant has got sufficient means to cater for such need, in other words can he afford, being alive to the responsibility that he also has towards himself. The mentioned factors will then help the court to exercise its discretion sensibly without prejudicing any of the parties and the minor children.

[19] The court has therefore looked at the fact that the Applicant has certain funds already available to her. That is the average of the amount of R 13 000 to R14 000 earning capacity, the R5 750 00 that she admittedly uses for groceries and household needs and the R10 000 that she receives for maintenance of the children and the cash funds that is already available, that would be disregarded as they happen as a once off. That is approximately a total amount of R28 864 00. Also the fact that on her own she has agreed that part of the expense in the region of R10 000 are her own personal costs that she should be responsible for and others are already provided for by the Applicant. If the medical expenses and school expenses are fees that are to be borne by the Applicant the need of the Respondent would have been substantially provided for, and the perceived shortfall of R22 000 would then not be justified.

[20] The Applicant's position notwithstanding his protestation does indicate that he can afford to provide the

basic maintenance that he has been providing so far, the maintenance amount and the medical and school related expenses. The Applicant was also assigned to pay an amount of R10 000 over to the Respondent when they were staying together, for the Respondent to be able to run the household for the whole family which R10 000 can be equated to what he is paying for maintenance for the children presently. However at the time he also paid for the other household expenses over the R10 000.

[21] In all earnest It seems the expense that is of serious contention between the parties is the R18 000 that Respondent pays for the accommodation of herself and the children. The Respondent expenses are also hiked by this amount.

[21] The issue should be considered from the perspective that as much as it might have been the Respondent who opted for such accommodation with a view of her being responsible for that decision the Applicant is as a father also obligated to provide accommodation for his minor children. In consideration therefore of accommodation as a basic need that the Applicant has got also to provide for the children as a shared responsibility, the court is of the view that Applicant should contribute an amount in lieu of the children's portion that will be paid to the Respondent as her maintenance to cover part of the shortfall. This is also in recognition of the fact that the Applicant acquires a benefit from the utilisation of the matrimonial home that has been said not to be under a bond.

[22] At the commencement of the hearing the parties also agreed in the report of the Robyn Fasser being filed to form part of the proceedings and that she will continue with her investigation in relation to the questions of primary residence and contact in respect of the minor children.

[23] Under the circumstances I hereby make the following order: that pendente lite it is ordered that:

1. Pending the finalisation of the Family Advocate and the Forensic Psychologist' Robyn Fasser's report that an order be granted in the following terms with regard to the Minor Children.

- 1.1 That full parental responsibilities and rights as provided in Section 18 of the Children's Act 38 of 2005 pertaining to care, contact, guardianship and maintenance of the Minor Children, Emma Noffke and Paige Noffke be granted to both the Applicant and Respondent;

- 1.2 That primary residence of the Minor Children be granted to the Respondent.

- 1.3. The office of the Family advocate is requested to conduct an investigation in relation to the questions of primary residence and contact in respect of the minor children and to render a report.

1.4 That the Applicant shall exercise reasonable rights of contact in respect of the Minor Children as follows (in accordance with Beetge's recommendations) that:

1.3.1 The Applicant will fetch the Minor Children from school every Wednesday, alternating as follows:-

1.3.2 During the week they are with the Applicant for the weekend, from after school on a Wednesday until 18h00 in the evening when he shall return the minor children to the Respondent!.

1.3.3 During the week that the Minor Children are with the Respondent for the weekend, from after school on a Wednesday until Thursday morning when the Applicant shall drop them at school..

1.3.4 The Applicant will have the Minor Children every second weekend from after school until Sunday at 17h00 when he must return the Minor Children to the Applicant.

1.3.5 The Parties be granted reasonable telephonic contact with the minor children from 18h30 to 19h30 as well as messages or calls during the day as needed.

1.3.6 Any other times which the parties may agree to in writing.

1.4 Both Parties have agreed and duly appointed Robyn Fasser as the Forensic Psychologist to investigate the best interests of the Minor Children pertaining to contact between the Applicant and the Minor Children and to make a report available to the parties.

1.4.1 The Respondent will have alcohol tests done if so required by Robyn Fasser, with the Applicant bearing all the costs relating to such tests.

1.5 That either party may set the matter down on papers duly supplemented for the finalisation of the matter with regard to the parental responsibilities and rights to be granted to the Applicant and Respondent with specific reference to primary residence and contact with the noncustodian parent of the minor children after receipt of the Family Advocate's report or Robyn Fasser's report.

2 That the Respondent be ordered to pay the following expenses *Pendente Lite*:-

2.1 The Minor Children's school fees, and school uniforms which includes the costs of a private school.

2.2 An amount of R5 000.00 per month per child on or before the first of each month to the Applicant in respect of Maintenance regarding the Minor Children with the first payment the end of July 2014.

2.2 An amount of R 10 307.96 per month on or before the first of each month directly to the Applicant for spousal maintenance, with the first payment payable on or before the 1st August 2014.

2.3 Retain the Minor Children and the Respondent on the Applicant's comprehensive medical aid and pay excesses medical expenses not covered by the medical aid only for the minor children.

2.4 The rental amount of R5750.00 from the property 106 Summerset estate to be paid to the Respondent on or before the first of each month directly to the Applicant.

2.5. Respondent is ordered to pay for books, stationery, extra murals, sport clothes, excursions, tours, extra classes.

3. That the limitations of Rule 43(7) and 43(8) be waived.

4. The costs of this Application are to be costs in the cause of the main action.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA