



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

2016.06.03
DATE


SIGNATURE

CASE NUMBER: 18349/16

DATE: 3 June 2016

ESREEZ VAN JAARSVELD

Applicant

V

ABRAHAM JOCOBUS VAN JAARSVELD

Respondent

JUDGMENT

MABUSE J:

- [1] This matter came before the Court as an application in terms of Rule 43(1) of the Uniform Rules of Court for maintenance of the applicant pending the hearing of an action in which the applicant is suing the respondent for a divorce. The application

was fully argued on 31 May 2016 in an unopposed Court roll. After I had listened to all the arguments by Adv. N van Niekerk on behalf of the applicant and Adv. Ferreira on behalf of the respondent, I stood the matter down to 3 June 2016, that is today, for judgment. I am ready to deliver the judgment in this matter and proceed hereby to do likewise.

- [2] The applicant in this matter is Mrs. Esreez van Jaarsveld, an adult female who currently resides at 28 Eeufees Street, Middelburg, in the province of Mpumalanga. The respondent is described as an adult business man who stays at the same address as the applicant.
- [3] The applicant is the plaintiff and the respondent is the defendant in the divorce action that the plaintiff has initiated by a combined summons issued by the registrar of this Court, under case number 18349/16. According to the applicant's founding affidavit in support of the said application, the applicant seeks, in the said divorce action, permanent maintenance, payment to her of an amount to which she may be entitled in terms of the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984, and thirdly and lastly, that the respondent should retain her on his medical aid and that the respondent should, over and above retaining her on his medical fund, pay all the reasonable medical expenses not covered by the medical aid fund.
- [4] Today this Court is less concerned with the said divorce action but more concerned instead with the application in terms of Rule 43(1) as set out supra.

[5] The said Rule 43(1) states that:

"This rule shall apply whenever a spouse seeks relief from the Court in respect of one or more of the following matters:

- (a) maintenance pendente lite;*
- (b) a contribution towards the costs of a pending matrimonial action;*
- (c) interim custody of any child;*
- (d) interim access to any child."*

It is important to state that the applicant seeks the relief set out in paragraphs (a) and (b) supra of the Rule 43 as set out above in respect of maintenance for herself, *pendente lite*. In addition, and only in the event of her relocating, she seeks an order in terms of which the respondent makes available to her certain of her personal effects, clothing, and certain movable assets and household assets listed in a document annexed to her founding affidavit and marked "A". Finally she seeks an order in terms of which the respondent contributes towards her costs of litigation in the sum of R15,000.00. Needless to say the application is opposed by the respondent who has, for that purpose, delivered an opposing affidavit.

[6] Before dealing with the reasons why the respondent opposes the application, I will proceed to deal firstly with the reasons why the applicant seeks the relief set out in her application.

[7] As pointed out earlier, the parties hereto, although going through a divorce, are still living together at the address set out in paragraph 2 supra. The respondent finds this situation acceptable to him, finds nothing wrong with it and, if his wishes could be granted, he would, against all odds, continue to co-habit with the applicant. The applicant, however, finds, for reasons that I will hereinafter set out, co-habitation with the respondent stressful. To her the situation is unbearable. She contends that she is not emotionally strong enough to continue living with the respondent in the same house while their divorce action carries on.

[8] The reasons she has now given are as follows:

- 8.1 that communication between her and the respondent has deteriorated to an extent that she always attempts to avoid the respondent and any communication with him;
- 8.2 that every time her attorney of record addresses a letter in respect of the divorce action to the respondent and upon receipt thereof the respondent becomes unpredictable, volatile, emotionally and verbally abusive towards her and threatens her with financial ruling;
- 8.3 after the respondent received a copy of the divorce summons, he cut her off financially by stopping the credit card which was issued in her name but linked to the respondent's account and which credit card he paid and she used for personal and household expenses;
- 8.4 the respondent threatened, among others, to sequestrate himself on 5 April 2016 after receipt of her attorney's letter dated 4 April 2016 in which it was

recorded that due to the respondent's conduct by cutting her off financially, she had no alternative but to launch the Rule 43 application for interim maintenance;

8.5 the respondent threatened to stop paying for all the insurance he is presently paying;

8.6 during or about the beginning of April 2016 the respondent failed to pay her cell phone account which she had always been paying by way of a debit order from his account as a result of which she was forced to pay an amount of R450.00 in respect of the said cell phone;

8.7 that the respondent is attempting to force her to stay in the marriage by financially abusing her and putting her in an untenable financial position which he would alleviate if she commits reconciliation;

8.8 that the respondent is obsessed with pornography and dating sites which he uses, notwithstanding her presence and attempt to avoid same;

8.9 that the emotional stress and trauma caused by the situation at their house is such that in an attempt to avoid conflict and abuse by the respondent she locks herself in her room every evening before he returns home;

8.10 in attempt to harass her, the respondent activates the alarm sensor in her room, resulting in the alarm being triggered if she moves within the room;

8.11 that the respondent's reactions are triggered by the divorce process and anything relating to the divorce process and he is unpredictable in his conduct.

Consequently she is unable to live under the same roof in these conditions.

[9] According to her, before he was served with a copy of the divorce summons, the respondent contributed to all the household expenses, her entire personal expenses and the expenses of the parties' two grownup children. The applicant has listed the respondent's contributions to the household. In view of the fact that it is the applicant's evidence that the respondent has contributed to almost everything it is not necessary for this Court to detail in this judgment all the contributions that the applicant made. It is however sufficient to mention that the respondent paid for all the expenses.

[10] The applicant testified further that the respondent also paid, from either his personal or business account, all the applicant's personal expenses. For the purposes of paying her personal expenses, the respondent had given the applicant a credit card which she used as she pleased. The credit card was linked to the respondent's bank account but was issued in her names. The applicant utilised the said card for both her personal and household expenses and also for the needs of the parties' two children. It is clear from the evidence of the applicant that she used the said credit card for amounts ranging from R7933.18 for only nine days to R37,255.65 per month. In addition the applicant has also listed all the items which she purchased using the said credit card.

[11] It is, in my view, crucial to summarise her evidence simply as follows. The respondent paid for all their expenses. She did not contribute anything despite the fact that she herself had her own income.

[12] The straw that broke the camel's back was firstly that the respondent stopped her from using the credit card. Since March 2016, the respondent has been depositing, on a monthly basis, a sum of R2,000.00 into her bank account and, over and above, giving her cash of R2,000.00. At the beginning of April 2016, the respondent gave her R4,000.00. Secondly, she complains that the respondent does not purchase proper groceries for the household; does not provide for some of the necessities of the family. What is of crucial importance with her evidence is that she does "not know if the respondent will continue paying for all her expenses he previously paid."

[13] The applicant alleges that the respondent is possessed of sufficient funds from which amount her maintenance may be paid. She claims that she has bank statements of the respondent's company known as Sinvest Investment 84 (Pty) Ltd which shows that as at January 2015 the balance in the relevant bank account was R912,802.83; in February 2015 R987,601.77; in March 2015 R1,201,211.92 and in April 2015 R1,041,675.61. This company, Sinvest Investment 84, was registered in 2006 and the respondent is its sole director.

[14] Over and above the funds in the Sinvest Investment 84 account, the respondent has a membership interest of 33.33% in Loumarco Trading and Investment and another membership interest of 40% in Sizasonke Trading. He is also a director of Chrome Fields Reclamation.

[15] The respondent is a registered owner of the immovable property known as Nr. 8 Jacaranda Street, Kannonkop, Middelburg. This is, according to the applicant's testimony, a spacious three bedroomed house with an office which the respondent has rented out at R13,000.00 per month.

[16] The respondent, who is the owner of two other immovable properties located at 29A and 29B Heksriver Street, Aerorand, Middelburg, receives R24,000.00 per month at least from the rental of such properties. Although she and the respondent are jointly income beneficiaries in respect of the aforementioned properties, the respondent does not share such income with her.

[17] The respondent does not support the application and, as it is to be expected, opposes it vigorously. He has labelled the application as an absolute abuse of the Court process, premature and launched simply to manipulate him and to have her own way. The respondent contends that, by reason of the fact that he and the applicant are still staying together in the same household, there exists no genuine basis for the launching of this application. More so for the following reasons:

17.1 he is still meeting all his obligations towards the applicant;

17.2 the applicant herself earns income;

17.3 the applicant has no debts;

17.4 the applicant has been less than candid in placing information before the Court;

17.5 he has already, in writing, undertaken in correspondence exchanged between the parties, to continue to pay. For the aforementioned reasons, the

respondent seeks the dismissal, with punitive costs, of the applicant's application.

[18] The respondent contends furthermore that his financial position has changed drastically. Such change he has explained to the applicant but the applicant has refused to accept it. Despite all his efforts to live within his financial means, the applicant, so he testified, still expected him to continue providing funds for her as he used to do. The respondent denies it flatly that there is no meaningful communication between him and the applicant. While he and the applicant do not communicate as well as they should, when the need to communicate arises, they do speak to each other.

[19] In order to succeed with the application, the onus lies on the applicant to satisfy the Court that:

19.1 there exists an obligation on the respondent to support or to maintain her;

19.2 that the respondent has failed in his obligation of maintaining her. This means that she must satisfy the Court that she is entitled to maintenance. She must show that she is entitled to maintenance *pendente lite* because, *prima facie*, the respondent, as her husband, owes her the duty of supporting her as long as their marriage subsists. See in this regard *Hamman vs Hamman* 1949(1) SA 1191(W);

19.3 that, as a consequence of such failure, she is in need of being maintained by the respondent; and

19.4 that the respondent is financially capable of maintaining her. The applicant, in other words, must satisfy the Court that the respondent has the capacity to meet her financial requirements.

[20] There is no doubt in the Court's mind that the applicant has, in her evidence, succeeded in establishing that there exists an obligation on the respondent to maintain her. Secondly, the applicant has, in my view, satisfied the Court that the respondent has the financial capacity to meet her financial obligations and thereby to support her.

[21] Having said that, I have not been persuaded that the respondent has failed in his obligations to maintain the applicant. In the first place, the respondent has been supporting the applicant. He has been paying for all her personal expenses and household expenses without any contribution from the applicant. This evidence was also supported by the respondent. Even where the applicant complained that here and there the respondent fell short, which is denied by him, the respondent still supports the applicant and pays for all the household expenses and her personal expenses to a large extent. The respondent has even undertaken in correspondence exchanged between the parties, to continue maintaining the applicant. In cases where there exists clear evidence that the respondent fulfils his obligations of maintenance towards his family or those who are entitled to be maintained by him. There some measure of inequity to the respondent if the Court were to order such a respondent to maintain. Such an order becomes otiose and

serves no purpose than being oppressive. The respondent has not failed in his obligations. An order of this nature should only be made against a respondent who, while being capable of doing so, is unwilling to carry out his obligations to maintain those who depend on him for maintenance.

[22] What is of paramount importance in the applicant's case is her following evidence that:

"I do not know if the respondent will continue with the payment of any of the expenses he previously paid ... I have no alternative but to launch this application."

This is quite clearly an admission that the respondent does maintain the applicant. The only problem that the applicant has is, so she thinks, absence of an unwavering guarantee from the respondent that the maintenance will, even after the commencement of the divorce action, continue. In my view, the applicant has that unconditional guarantee given by the respondent.

[23] Finally the law in so far as it concerns the fear that the respondent may not continue with the payments of any of his expenses has been set out as follows in The South African Law of Husband and Wife, 5th Edition, by HR Hahlo at page 432:

"As long as the husband maintains his wife and children adequately, the mere apprehension that he might no longer do so in future is not sufficient ground for granting an order for maintenance pendente lite."

In this regard, the Court in *Mostert vs Mostert* 1974(2) SA 116 OPA at page 119 E-F has the following to say where there was an apprehension by the applicant that the

respondent may not execute his maintenance obligations towards the applicant and her children:

"Maar selfs al dui die applikante se beëdigde verklaring aan dat sy so 'n vrees het, is ek, nogtans, van mening dat die blote vrees dat die respondent nie sy verpligting om vir die applikante en die kinders te onderhou sou nakom nie, nie voldoende grond bied vir die aansoek nie en dat die applikante eers nadat die respondent inderdaad versuim het om sy verpligting na te kom geregtig sou wees om na die Hof te kom vir die nodige regshulp."

It is for these reasons that the respondent contends in his affidavit, and Mrs. Ferreira argued, that the applicant's application in terms of Rule 43 was, at this stage, premature. The applicant would only be entitled to a maintenance order if the respondent failed properly to support her after the respondent had stopped providing for her. This, in my view, sets out the requirement that must be established before an application for maintenance *pendente lite* can be made.

[24] Mrs. Ferreira placed much reliance on the case of *Taute vs Taute* 1974(2) SA 675 ECD. In this matter the Court had this to say at page 676 G-H:

"A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands – similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them." (my own underlining).

The application for maintenance *pendente lite* must therefore fail.

[25] With regards to costs, there exists, in my view, no genuine reason for departing from the ordinary rule that the unsuccessful party should bear the costs. The respondent has always shown a willingness to comply with his obligations to support the applicant. Considering the respondent's willingness to pay for all the expenses, personal or household, of the applicant, there was no reason for the applicant to come to Court. The application was unnecessary. Her actions, in hauling the respondent before the Court when it was unnecessary, have now escalated the costs which should never have been incurred. It has now increased the costs not only of these proceedings but also of the divorce action between the parties.

This Court makes the following order:

The application is accordingly dismissed with costs.



P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:

Adv. N van Niekerk

Instructed by:

Weavind & Weavind Attorneys

Counsel for the respondents:

Adv. R Ferreira

Instructed by:

Kruger & Bekker Attorneys

Date Heard:

31 May 2016

Date of Judgment:

3 June 2016