

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 10013/2021

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

Date: 26 January 2022 E van der Schyff

In the matter between:

S[....] P[....] M[....]

APPLICANT

and

R[....] T[....] S[....]

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction and background

- [1] The applicant is the plaintiff in the principal proceedings. He sued for the dissolution of the marriage by divorce, and is now claiming relief *pendente lite* in terms of rule 43.

- [2] The parties were married in 2011 in terms of customary law. They have a daughter born in August 2010. The respondent is also the mother of a son born in June 2005. Although it is stated in the particulars of claim to which the applicant is the plaintiff that the boy was born from their relationship, the applicant states in the founding affidavit that although he is not the child's biological father, his relationship with the respondent's son is akin to a father-child relationship. This child has known the applicant as his father since his birth..

- [3] The parties no longer live together. The respondent and the children live together. The applicant currently resides with his mother.

- [4] Although the applicant stated in the founding affidavit to the rule 43 application that the application became inevitable due to disputes between the parties as to an interim arrangement regarding primary residence and contact, as well as maintenance, the papers read as a whole indicate that the main issue in dispute is the applicant's claim for maintenance *pendente lite*.

- [5] The applicant claims maintenance *pendente lite*, in the amount of R10 000.00 per month from the respondent. He earns an amount of R14 086.15 per month. His current expenses amount to R13 700.00 per month. He claims that he cannot continue to live with his mother and needs to rent an apartment. The rental will cost about R 6 500.00 per month with an additional R2 000.00 in utilities. Since the respondent kept all the furniture, he has to purchase new furniture on lease, and the estimated additional expense is R2 000.00 per month. His projected shortfall is R10 124.85.

- [6] The applicant, who studied part-time to obtain his LLB degree, recently completed his studies and plans to commence with his articles. The respondent has been the primary breadwinner throughout the marriage and was liable for most household expenses. The applicant claims that since he vacated the matrimonial home, the

respondent refused to maintain him. He also claims that she restricts contact with the minor girl child, and the last time she allowed him contact with the child was in January 2021.

- [7] The respondent filed her answering affidavit very late, an issue that is dealt with in more detail below. She denies that a child was born during her relationship with the applicant but does not indicate whether she disputes that he is the girl child's father or claims that he is also her son's biological father. She claims that the marriage relationship broke down because of the applicant's continued emotional, physical, and financial abuse.

- [8] The respondent's answering affidavit is unclear regarding the current medical aid to which the children are members. She claims that the applicant removed her from his medical aid for reasons unknown to her and states that she took out her own medical aid. She then states that it is not in the best interest of the minor children 'to be separated from the medical aid as that will create an impression that the other child is preferred above the other.' She laments that the applicant does not contribute to the minor child's maintenance. She denies that the applicant is entitled to any maintenance. After having heard argument, I enquired from both counsel to indicate to me what the current position is regarding the children's medical aid. I was informed that they are currently beneficiaries on the applicant's medical aid.

- [9] The respondent avers that the applicant did not disclose all material facts to the court. She claims that he has bank accounts with ABSA Bank, Capitec Bank, and First National Bank wherein there are savings of R350 000.00 to which the applicant has access.

- [10] The respondent states that her monthly income is 'around R350 000.00'. Counsel, however, submitted that this amount is not correct and reflected as such due to a typing error. In the answering affidavit, she declares that her net monthly salary is R19 618.51. She receives approximately R70 000.00 to R100 000.00 per month from additional part-time employment. Her declared expenses total R142 458.00 per month. She claims that the applicant cannot 'want to live beyond his financial

means whilst he is not even maintaining the minor children.' She can see no reason why he cannot stay with his mother. She avers that she cannot compromise the children's financial support over the applicant's. She claims that the applicant is ungrateful for not being thankful that she assisted in payments towards his UNISA fees and the celebration of his graduation day. The respondent avers that the applicant last visited the children on 30 May 2021 and the reason why he stopped visiting them is unknown to her.

- [11] The applicant's discovered bank statements from ABSA, CAPITEC, and FNB do not reflect a savings balance of R350 000.00. The respondent did not state when the alleged payment was made neither did she identify the account to which the payment was made or attach proof thereof.

Discussion

- [12] The respondent is not inclined to support the applicant, not in the interim and not after the divorce. However, the reality is that the evidence indicates that she has been the primary breadwinner throughout the subsistence of the marriage. The extent of the parties' combined income indicates that they maintained a comfortable lifestyle during the marriage. In comparison with the respondent, the applicant is financially disadvantaged.
- [13] It is trite that maintenance *pendente lite* cannot be determined with the same degree of accuracy as possible during a trial.¹ An applicant is entitled to reasonable maintenance *pendente lite* dependent on the marital standard of living of the parties, the applicant's actual requirements, and the respondent's capacity to meet such requirements from income.
- [14] After considering the applicant's expenses, I am of the view that they are, except for the legal costs indicated, not extravagant or excessive. Although the applicant claims R6 500 for accommodation the court can take cognisance of the fact that apartment-accommodation for one person can be obtained from R4 500 upwards.

¹ *Taute v Taute* 1974 (2) SA 675 € at 676C-D.

Legal fees are not regular monthly expenses, and if the need arises, the applicant can claim a contribution towards costs in appropriate circumstances. I noted that the respondent filed a Rule 41A notice, and if a mediatory approach is followed, future legal costs may be curtailed substantially. However, the reality of the parties' separation is that he needs accommodation, and it is unreasonable to expect that he resides with his mother. On the other hand, the respondent is quite correct when she avers that the children's interests trump the applicant's. The children cannot be prejudiced by the extent of the award made regarding maintenance *pendente lite* paid to the applicant. The children are used to their current lifestyle, and the award made should not impact thereon. The applicant cannot financially contribute to the minor child's maintenance at this stage, except for expenses incurred when he exercises his contact rights and by retaining the children on his medical aid.

- [15] As far as the applicant's rights and responsibility towards the minor boy child are concerned, it is disconcerting that the issue of paternity is now disputed by the applicant. I have to consider that the applicant avers that although he suspects that he is not the child's biological father, that he is the only father figure in the child's life, and stated in his particulars of claim that he is the child's father. The child is a beneficiary of his medical aid. It is in this child's best interest that the *status quo ante* is preserved until the paternity issue, if it persists, is finally determined. Section 32 of the Children's Act finds application in this regard, and although the minor children resides with the respondent, their mother, they were also cared for by the applicant.
- [16] The respondent's answering affidavit and annexures to it exceed 65 pages. In addition, it has been filed extremely late. While the notice of intention to oppose is dated 20 October 2021, the answering affidavit is dated 6 January 2022. It was filed in the court file by 17h00 on the day preceding the application. The respondent did not request the court to condone the late filing of the answering affidavit, and no reason for the excessive delay was proffered. Counsel for the applicant submitted that the application should be considered on an unopposed basis since the respondent was barred from filing the answering affidavit as a

result of rule 43(3)(c). Since the interests of minor children are affected by this application, I ruled that I would consider the answering affidavit but that the late filing and the respondent's lackadaisical approach would be considered when an appropriate costs order is considered.

ORDER

In the result, the following order is made:

1. Pending the finalisation of the divorce action:

- 1.1. The applicant and the respondent retain full parental responsibilities and rights in respect of the minor children;
- 1.2. The applicant and the respondent shall act as co-guardians of the minor children as provided in the Children's Act 38 of 2005;
- 1.3. The primary residence of the minor children shall vest with the respondent subject to the applicant's parental rights and rights of contact, which rights are set out as follow:
 - 1.3.1. The minor children are to spend every alternative weekend from Friday at 17h00 to Sunday at 19h00 with the respondent;
 - 1.3.2. The minor children are to spend each alternate short school holiday and long weekend with the respondent. The Easter-holiday is to alternate annually;
 - 1.3.3. The children are to spend the half of every long school holiday with the respondent. The Christmas-holiday is to alternate between the parties, and the period will be split on the basis that the first and second half of each long holiday alternate between the parties;
 - 1.3.4. The children are to spend Father's day with the applicant and mother's day with the respondent. The children are to spend the respective parties' birthdays with the respective parties.
 - 1.3.5. The children's birthday are to be shared between the parties so that each party have sufficient time to spend with the child;
 - 1.3.6. The applicant is allowed telephonic contact with the children each day between 19h00 and 19h30, or as arranged between the parties. When the

children visit the applicant the respondent has the same right to telephone contact.

- 1.4. The respondent is liable for the minor children's maintenance needs, and education costs which costs include but are not limited to school fees, stationary, after-school care, and extra-mural activities, and excess medical expenses;
- 1.5. The applicant will retain both children on his medical aid fund;
- 1.6. The respondent is to make monthly maintenance payments of R7000.00 to the applicant, payable before or on the 1st day of the month;
2. The respondent is to pay the costs of the application.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email as a courtesy gesture. The date for hand-down is deemed to be 26 January 2022.

Counsel for the applicant:	Adv. T Paige-Green
Instructed by:	Du Toit's Attorneys
For the respondent:	Adv. T Kwindu
Instructed by:	Sikhala Attorneys Inc.
Date of the hearing:	13 January 2022
Date of judgment:	26 January 2022