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

Case number: 25896/21

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
31 OCTOBER 2022

In the matter between:

G[....]2 H[....] F[....] D[....] Applicant
(Identity Number: [....])

And

L[....] D[....] Respondent
(Identity Number: [....])

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] This is an application in terms of Rule 43 0f the uniform rules where the applicant seeks an order as follows:

Full parental rights and responsibilities in terms of section 18. 19 and 20, that the respondent be awarded primary residence with the minor children and that the applicant be awarded contact with the minor children defined as per the draft order filed.

[2] The respondent in her answering affidavit has requested maintenance for herself, contribution towards legal costs, maintenance for the minor children and full parental rights and responsibilities as defined in the draft order.

BACKGROUND

[3] The parties were married to each other on this the 03rd day of April 2004 out of community of property with the accrual system. There are two minor children born from the marriage relationship, namely G[....] (boy) and N[....] (boy) who are 15 and 7 years respectively.

[4] The applicant is an engineer whereas the respondent is a housewife. The respondent possesses a BSC Genetics Degree and an honours in the field, but has never worked as such during the subsistence of the marriage since 2004.

[5] The respondent has been a stay-home mother since the start of the marriage relationship and has been looking after the children without the assistance of a nanny, day care, or permanent domestic worker. The respondent submits that her not working has been a joint decision between her and the applicant.

[6] The respondent submits that she cannot find employment as she was a homemaker for years however no proof of any attempt to obtain employment has been attached. The Applicant submits that they maintained a normal lifestyle which can be interpreted as an average lifestyle however the respondent says that they maintained a high lifestyle.

[7] According to the respondent, the applicant has aggressive behaviour due to the consumption of alcohol which is a regular occurrence. The respondent says that the applicant moved out of the common home in February 2020. The respondent says that she does not deny contact of the minor children with the applicant however requires that an investigation should be done first before any changes to the children's care and contact are made.

[8] The respondent says the parties have been separated since December 2019 however the applicant finally moved out of the erstwhile marital home in February 2020. This affected the applicant's contact with the minor children. The applicant exercised his right to contact the minor children at the parties' common home after work for a period of time a week. The situation improved with the youngest as he was able to sleep over at the applicant's place of abode on Saturdays, safe for the eldest whom he was still seeing at the marital home.

[9] The applicant says that he never ceased his obligations of maintenance towards the respondent and the minor children. He says he has been paying a sum of R 20 000.00 per month to the respondent, children's school fees and medical aid. The applicant further says the respondent and the minor children occupy a property that is owned by a trust at no costs to them and there is no talk of them being evicted.

[10] The applicant is amenable to these contributions by him encapsulated in an order and has no intention of desisting from these contributions. The applicant alleges that the respondent is alienating him in order to make unilateral decisions about important matters that relate to the children's schooling. He says the respondent denies him holiday contact.

[11] The applicant says the respondent withheld sleepover contact and later changed and offered that he sleepover at the matrimonial home which he felt was not reasonable or reasonably executable. The respondent's attitude has since changed in that she now allows sleepover contact between the applicant and the youngest child.

[12] The applicant says that it is improbable that the respondent would have allowed sleepover contact with the youngest child if she was concerned about the alcohol abuse. The applicant addresses the severely negative allegations against him in a further affidavit in terms of Uniform Rule 43(5). The applicant prays for condonation for the filing of this affidavit, as it contains necessary evidence and issues of particular concern for the applicant's eldest child's emotional state.

[13] The applicant says the eldest child was isolated due to home-schooling (a unilateral decision by the respondent) and his academic performance is still deteriorating to a concerning extent. The said child is reluctant to exercise contact with the applicant, despite reasonable efforts to secure contact by the applicant. The applicant says the respondent does not allow/ motivate contact between the children and the applicant's side of the family.

[14] The applicant says the respondent frequently threatens that she shall remove the children and live in the Northern Cape where her family resides. The applicant is concerned that this will have a detrimental impact on his contact with the minor children and his relationship with them. The applicant says that the respondent has never before instituted an application for interim maintenance in terms of Rule 43.

[15] The respondent says the maintenance received from the applicant is not sufficient and she requests a greater contribution. The respondent also mentioned a contribution towards legal fees. There is no counter application launched. The respondent has failed to provide a pro forma account in support of the respondent's estimated legal fees and does not speak to the status of the divorce action.

[16] The applicant says he cannot afford a greater maintenance contribution to the respondent and the minor children. The respondent says the applicant has the means and will be able to pay the maintenance amount she requested and continue to maintain his lifestyle.

RELEVANT CASE LAW & LEGISLATION

[17] The Children's Act[1] plays a major role in this matter and the following sections of the Act as alluded to by the applicant I will reiterate:

Best interests of child standard

7. (1) Whenever a provision of this Act requires the best interests of the child standard 25 to be applied, the following factors must be taken into consideration where relevant, namely-

(a) the nature of the personal relationship between-

(i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards- (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver person, to provide for the needs of the child, including emotional and intellectual needs; (the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-

both or either of the parents; or any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child-

(i) to remain in the care of his or her parent, family and extended family;

[1] Act 38 of 2005

and (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's- (i) age, maturity and stage of development;

(ii) gender; and (iii) any disability that a child may have;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child &om any physical or psychological harm that may (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment,

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or

(2) In this section "parent" includes any person who has parental responsibilities and rights in respect of a child.

[18] In terms of Section 18 of the Children's Act deals with parental rights and responsibilities and provides: - That a person may have either full or specific parental rights and responsibilities in respect of a child;

> The parental responsibilities and rights that a person may have in respect of a child include the responsibility and the right. To care for the child; To act as guardian of the child; To contribute to the maintenance of the child.

[19] In the matter of P V P[2], the learned judges said "In determining what custody arrangement will best serve the children's interests in a case such as the present, a court is not looking for the "perfect parent" – doubtless there is no such being.

[20] In the matter of D v P[3] the learned Judge said "The courts as upper guardians of minors have the daunting task in deciding the destiny of minors when their parents, either due to their own actions or due to particular circumstances forced upon them, cannot agree on what would be in the best interests of the minor children. More than often, the parents tend to see the best interests of their children through their own self cantered interests, and then pose those interests as being that of the minor child. Rightly or wrongly, that is life. It does, however, impose a greater duty upon the court to determine what the best interests of the minor child are."

[21] Applicant prays for an Investigation by the Family Advocate. The Family Advocate is a statutory body created by the Mediation in Certain Divorce and relies on the matter of MB v NB[4]. it is said that the act. I am inclined to agree that the family advocate is better placed to deal with matters of this nature.

[22] The respondent relies on the matter of Taute v Taute[5] wherein the court said

> "…Maintenance pendente lite is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced. The applicant is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, the applicant's actual and reasonable

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[2] 2007(3) All SA 9 (SCA)

[3] [3](2016)33 Van der Westhuizen, AJ of the Gauteng Division of the High Court remarked:

[4] "makes provision for a family advocate to enquire into and furnish the court with a report and recommendations concerning the welfare of the children of the marriage concerned. According to its preamble one of the aims of Act 24 of 1987 is to provide for the consideration by a court in certain circumstances of the report and recommendations of a family advocate before granting a decree of divorce or other relief."

[5] 1974(2)675 (ECD

requirements and the capacity of the respondent to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified. It has been said that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands".

[23] In the matter of Dodo v Dodo 1990 (2) SA 77 (WLD) at 96 F:

> "The husband's duty of support includes the duty to provide the wife with costs for her litigation with her husband." What is 'adequate' would depend on the nature of the litigation, the scale on which the husband is litigating and the scale upon which she intends to litigate, with due regard being had to the husband's financial position

ANALYSIS

[24] It is imperative that this court acts in the best interest of the minor children whether boys or girls. The sex of the children should never be the determining factor in whether the parent[6] should have contact with the minor children.

[24] It is so that I became concerned about the allegations of abuse of alcohol by the applicant. But the fact that the respondent was comfortable allowing the youngest child to be in contact with the applicant to the extent that he was able to sleep over at the applicant's place of residence is concerning.

[25] It would seem the respondent is unreasonably withholding contact to the of the children to the applicant. It is strange that the applicant relaxed the rules with the youngest and failed to encourage the eldest minor child to sleep over at the applicant's place. There is no evidence of abuse as alluded to by the respondent either to the minor children nor to the respondent.

[6] Section 9(1) of the Constitution reads: "Everyone is equal before the law and has the right to equal protection and benefit of the law".

[26] The parent that is residing with the minor children must encourage the minor children to have contact with the non-residence parent and his family. The parent that is residing with the minor children must not make unilateral decisions[7] regarding the children. In *casu t*he respondent must involve the applicant in all decisions that relate to the minor children. The fact that she stays with the minor children does not give her sole guardianship regarding the minor children. All the decision regarding the minor children must be done in consultation with the applicant. He cannot be kept in the dark regarding his minor children' s well-being.

[27] The applicant has stated that he has been the sole provider or the breadwinner at the parties' common home. The respondent despite the qualifications she did not seek employment as she has been the house executive for the home and caring for children.

[28] The applicant says he is prepared to continue to pay all the expenses of the common home as he has been doing, allowing the respondent to occupy their common home which belongs to a trust, pay children's school fees, keeping the respondent and the minor children on the medical aid and in addition to pay a sum of R 20 000.00 to the respondent.

[29] The applicant's counsel argues that the respondent failed to file a counter application and merely stated in her answering affidavit that she requires a higher amount of maintenance and contribution of legal costs which she has failed to substantiate. In relation to the application for Rule 43 it is so that the respondent would answer with his or her expenses alluded to and attachments thereto which will be accompanied by the prayers. I, therefore, do not find anything untoward in relation to the response by the respondent.

[30] In considering the application herein it is imperative to mention that the applicant is the husband whom is not the primary care-giver for the minor children. He is the sole breadwinner and it is only fair that he contributes towards the litigation of this matter in order to assist the respondent. The fact that the respondent does not

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[7] Section 31(2) provides that a holder of parental responsibilities and rights must give due consideration to the views and wishes of a co-holder of parental responsibilities and rights before he or she takes any decision which is likely to change significantly or to have a significant adverse effect on the co-holder's exercise of parental responsibilities and rights.

speak to the status of the case and that the exact amount has not been disclosed does not exonerate the applicant from contributing taking into account the means that has been displayed in his founding affidavit.

[31] The respondent has filed the proforma costs which gives an overview of the charges that she will incur in the divorce proceedings. The matter has been instituted in the High Court and this court takes judicial notice that costs of litigation in High Court does not come cheap. Counsel for the respondent in his argument that maintenance be awarded says the applicant can afford. In terms of section 7(2) of the Divorce Act, 70 of 1979 provides the court with the discretionary power to make an award should it be necessary.

[32] The Act says the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, the conduct in so far as it may be relevant to the breakdown of the marriage.

[33] It is trite that not only will the means be looked at in order for maintenance to be awarded but it will be as alluded to supra and any other factors that in the court's opinion should be taken into account. The respondent is in the afternoon of her life and it is concerning that despite that she has the qualification she has no experience regarding same. The applicant does not deny that it was a joint decision that she be a stay home mum. This court is the guardian of all minor children and will act in the best interest of the minor children.

[34] The parties *in casu* are going through a divorce and it is so that they will use all the ammunition against each other. This application is urgent in its nature. It covers all the issues that have been alluded to either by the applicant or the respondent. This court can therefore take into account the circumstances of the parties as alluded to in their respective affidavits. The order that this court will make herein is an interim order regard been heard to the divorce proceedings. It is therefore on consideration of all those circumstances that I award the respondent maintenance and costs contribution.

[35] I have considered the list of expenses by the respondent which is inclusive of the children's expenses. I have taken off the expenses that relate to the minor children and those that the applicant has agreed to do. I am however unable to see the sum of R18 000.00 for food, groceries and cleaning materials as stated. I have noticed that some of the amounts are yearly done such as licences. Most of the items have no vouchers annexed. It is so that the life of the parties shows that of high standards considering the income and the properties bought and sold.

[36] It is trite that the lifestyle of the wife must not change overnight however the applicant must still be able to proceed with his life whilst the divorce proceedings unfold.

[37] I now come to the conclusion that the applicant must pay the respondent maintenance in the sum of R 25 000.00 per month and R10 000.00 per child per month, the sum of R20 000.00 being contribution towards costs and the applicant shall continue to pay school fees for the minor children, extra-mural activities, medical aid for the respondent and the minor children with related medical expenses, pay other expenses as he has agreed, and he shall have contact with the minor children as defined in the draft order and the respondent shall have primary residence of the minor children.

In resultant, I grant the following order: as per the amended draft order marked X.

KHWINANA ENB
ACTING JUDGE OF GAUTENG HIGH COURT
PRETORIA

Counsel for the Applicant: Adv. B. Bergenthuin

Counsel for Respondent: Adv SM Stadler Parc

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 25896/21

BEFORE THE HONOURABLE JUDGE KHWINANA AJ ON 31 OCTOBER 2022

In the matter between:

G[....]2 H[....] F[....] D[....] Applicant
(Identity Number: [....])

And

L[....] D[....] Respondent
(Identity Number: [....])

DRAFT ORDER

After perusing the papers, and after hearing counsel for both Parties, the following order is made, pending finalisation of the divorce action between the Parties:

1. Both parties shall retain their full parental rights and responsibilities towards the minor children, G[....] H[....] D[....] and N[....] H[....]3 D[....] (hereinafter 'the minor children'), as envisioned in Section 18, 19 and 20 of the Children's Act, 38 of 2005;

2. The minor children shall be in the Respondent's primary care;

3. The Applicant shall have the following specific rights of contact towards the minor children:

a. Every alternative weekend from 14h00 on the Friday until 17h00 on the Sunday;

b. Mid-week contact every Wednesday from 17h00 to 19h00;

c. Every alternative long weekend from 17h00 on the day prior to the first day of the long-weekend, until 17h00 on the last day of the long weekend;

d. Every alternative public holiday from 09h00 to 17h00, with the understanding that a public holiday directly abutting a weekend shall not be singled out as a public holiday, but shall be regarded as part and parcel of the long weekend;

e. Every alternative short school holiday and half of every long school holiday with Christmas and Easter alternating between the Parties annually;

f. On the Applicant's birthday for at least 3 (three) hours if this day falls in the week, and from 09h00 to 17h00 if this day falls on a weekend;

g. On Father's Day from 09h00 to 17h00; pm. on both of the minor children's respective birthdays for at least 3 (three) hours.

i. Reasonable telephonic and electronic contact;

j. The Applicant's contact as afore-stated shall be subject to the minor children's reasonable extramural, religious and cultural activities;

k. Should either of the parties be unable to care for the minor children at a time designated to them according to this order the other party shall have the first option to provide alternative care.

The Office of the Family Advocate shall conduct an investigation into the best interest of the minor children regarding care and contact and shall include an investigation regarding the children's best interest in the context of home-schooling and public schooling herein and shall encapsulate its findings in a report with recommendations.

4. That the Applicant exercise reasonable contact at all reasonable times with prior arrangement with the Respondent pendente lite;

5. That the Applicant pays maintenance to the Respondent in favour of the minor children in the amount of R10 000.00 per month per child pendente lite;

6. That the Applicant retains the minor children and the respondent as beneficiaries on his current medical aid and that the Applicant be liable for all medical, dental, ophthalmic and pharmaceutical costs of the respondent and the minor children pendente lite;

7. That the Applicant pays the minor children's school fees, school expenses and all school-related expenses pendente lite;

8. That the Applicant pays the minor children's extra-mural activities as well as all costs related to the extramural activities pendente lite;

9. That the Applicant pays maintenance towards the Respondent in the amount of R25 000.00 per month pendente lite;

10. That the Respondent and the minor children will continue to reside at the property situated at [....] B[....] Estate, M[....], H[....]2, North West Province and the Applicant will pay the bond instalment, water, electricity, levies and Municipal account of the said property pendent lite;

11. That the Respondent has the use of the BMW vehicle currently in her possession and that the Applicant is liable for the maintenance of the vehicle pendente lite;

12. That the Applicant makes a contribution towards the Respondent's legal costs in the amount of R20 000.00 pendente lite;

13. Costs be costs in the divorce action.

BY THE COURT

Counsel for the Applicant: Adv. B. Bergenthuin

Counsel for Respondent: Adv SM Stadler Parc