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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 5478/2018

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>

DATE..... SIGNATURE.....	

In the matter between:

S J P[....]

APPLICANT

And

P P P[....]

RESPONDENT

JUDGMENT

SEMENYA J:

[1] The parties in this matter are in the process of divorce after being married to each other for approximately nine years. Two minor children aged 6 and 3 years were born out of the marriage. The applicant and the two children moved out of the common home during July 2018. She and the children initially stayed with her brother but are currently staying at her parents' farm in the outskirts of Thabazimbi.

[2] This is a Rule 43 application in which the applicant seeks maintenance for herself and the minor children in the amount of R30 000.00 per month. She also seek an order in terms of which the respondent is ordered to contribute an amount of R20 000 towards her legal costs of divorce proceedings. It is common cause that the respondent is currently contributing an amount of R4500 00 per month towards the maintenance of the two children which he offers to increase too R6000.00. Furthermore, the respondent has retained the applicant and the children on what he refers to as the medical aid. The applicant on the other hand refers to it as a hospital plan. It is further common cause that the motor vehicle that the respondent has given to the applicant has since broken down. Lastly, the parties agree that the respondent was the breadwinner during the subsistence of their

marriage. The issue of primary residence and care of the minor children has been resolved.

[3] The issues left for this Court's determination are whether the relief sought by the applicant is reasonable, whether the applicant is entitled to maintenance from the respondent and contribution for legal costs from the respondent and whether the respondent has the ability to contribute the amount sought. Although the respondent admits that he is liable to contribute towards the maintenance of his children, he differs with the applicant with regard to the amount that he is supposed to contribute. It is trite that the maintenance of children is the responsibility of both parents, according to their means and ability.

[4] With regard to accommodation of the children and herself, the applicant stated that she will have to find a place where she can stay with the children. That place will have to be somewhere nearer their child's school as she does not have a vehicle that she can use to transport her. She will have to pay rental of R6 600.0 per month. The respondent argued that the applicant can still move back to the common home in order to reduce costs. I find this argument to be unreasonable in that there must be a good reason, which is not relevant at this stage, which may have forced the applicant to leave the common home with a three year old child. An amount of R6 600 per month for accommodation

is in the circumstances not unreasonable. A motor vehicle is a necessity for a mother of two young children. In this case I agree that the respondent should return the bakkie that he took from the applicant rather than to sell it. Toiletry of R600 and groceries of R5 500 per month for the applicant and the two children is more than reasonable where the cost of living is escalating at an alarming rate. However, the applicant should device ways and means of reducing water and electricity costs. The applicant claims an amount of R500.00 for the children's entertainment and R1000 for eating out. I am of the view that R1000 would be reasonable for the two items. I am further of the view that an amount of R3000 per month for petrol is too exorbitant. The applicant will have to use the vehicle mainly for transporting the children to and from school and to attend to school activities.

[5] I agree with the respondent that it would not be necessary for the applicant to look for accommodation which will make it necessary for her to have a gardener. This expense is an unnecessary luxury. It is further not necessary for the applicant and the children to buy clothes on a regular basis. The respondent's argument that his children do not have to buy presents for their friends. This argument is without merits. The applicant's explanation that the children gets invited to their friends'

birthday and are expected to bring presents is accepted. The amount of R150 is not unreasonable for this item.

[6] With regard to the contribution that the applicant is expected to make towards the maintenance of the children, the applicant stated that she does not have a tertiary education and would always find it difficult to secure meaningful employment. She stated that after she left the common home she secured employment with an estate agent. She however had to leave after the respondent had dispossessed her of the bakkie which she was using to take her clients to view the farms. On this point, the respondent contended that the applicant stopped selling farms not because the bakkie was repossessed but that it was simply because she was not trained for that job. Either way, what remains is that the applicant had to try something else to earn a living.

[7] The applicant stated that she intended to operate a horse riding training for school children which she will do on three days per week in the afternoon. According to her she will be able to generate income of approximately R2000 00 to R6000 00 per month. The applicant stated that the respondent should be ordered to contribute an amount of R1 760 00 towards horse feed in order to successfully run this business. It is however common cause that the respondent is against the idea of putting their three year old into a pre-school. According to him, this child

should stay at home under the care of the applicant. It is for this reason that he argued that it will not be necessary for the applicant to hire a helper and that she should continue to do the house chores as she used to do when they were still staying together.

[8] The respondent argued that there is no duty upon him to maintain the applicant. The argument raised by the applicant is that it is impossible for her to earn a living and to stay at home in order to look after their child at the same time. The respondent stated that he is willing to provide the biltong making equipment which the applicant will use to produce biltong and to sell it. The applicant contended that she cannot be expected to take care of the children and to make biltong at the same time. According to the applicant the money generated will in any event not be sufficient to cater for her needs and those of the children.

[9] I am satisfied that the applicant has discharged her duty to prove on a balance of probabilities that she need assistance in the form of maintenance for herself and the two minor children. What remains to be determined is whether the respondent has the ability to maintain them and to what extent. The applicant alleges that when she was still staying in the common home, the applicant was in construction and used to generate profit of approximately R180 000 building a house. She alleges that the money was paid to him in cash. The applicant avers that the

respondent buys assets in the names of other persons or entities and not in his own names. She however alleges that the sports activities and hobbies that the respondent is engaging in, namely Brizely shooting and fishing, which involves a lot of travelling and requires a lot of money, provides an indication of his financial position. The applicant stated that the respondent owns guns and barrels which cost between R60 000 to R100 000 and has to buy ammunition as well.

[10] On his ability to contribute, the respondent has attached to his affidavit bank statements of PSP Konstruksie CC (PSP), his personal bank account and his credit card statement which according to him show that his financial position is dire. The balance in all accounts is in the negative. The respondent further averred that the construction sector has collapsed nationally and that his income has dried up. He is now working for his father who pays him R8000.00 per month. The respondent admits that he was previously involved in sports and hobbies referred to by the applicant. He however denies that he used his own money to finance these activities. He alleges that the activities were sponsored. The respondent further alleges that he is a surety and co-principal debtor of the PSP which cannot service its debt.

[11] Counsel for the applicant argued, with reference to unreported case of Sc, **R v Sc, L Case NO:20976/2017** Gauteng Local division,

Johannesburg that the court should order the respondent to make a full disclosure of all material information his financial information. It was argued that in so doing the court will have more evidence on which it will determine whether the respondent is indeed unable to contribute the amount claim as maintenance and legal costs. I am of the view that the submission made by the respondent will not take the matter further in that it is the applicant's version that the respondent conducted his business in such a way that he received payment for the work done in cash. This in essence means that most of the transactions will not reflect in the CC's bank accounts and SARS documents. In **E v E; R v R M v M Case NO: 12583/17; 20739/18 and 5954/18 at [40]** the court stated that where a party is self-employed the only way to prove his/her income and of making a full and frank disclosure of his/her financial position is by attaching bank statements. In this case, the applicant is unemployed and has no income. The respondent was self-employed when the applicant left the common home. He alleges that he is now employed by his father and has attached the agreement he has with his father to his affidavit. The applicant is unable to gainsay this allegation.

[12] In the circumstances of this case, I am of the view that the applicant has a choice of either continuing to stay with her parents or to return back to the common home with the children. In any event the

respondent is willing to vacate the home so as to give way to the applicant and the children. The applicant will nonetheless have to have a vehicle which she and the children will use. In this regard the respondent will have to abandon his plans of returning it to the dealer. The applicant was dependant on the respondent before she left the common home with the money he generated from PSP despite the difficulties he was encountering in the construction industry. I fail to find any reason why he should refuse to do so now that they are going through a divorce. I am however of the view that the applicant failed to show that the amount claim is reasonable in relation to the financial position of the respondent.

[13] With regard to legal costs, the applicant submitted that it will be apposite that she and the respondent are afforded the opportunity to litigate on equal grounds. I was initially of the view that she should approach the Legal Aid South Africa with instructions to represent her. However, despite the fact that the respondent is pleading poverty, he is still able to afford private legal representative. It will only be fair that he should assist the applicant in this regard.

[14] In the circumstances I make the following order:

1. The primary residence of the minor children remains with the applicant;

2. Specific parental responsibilities in respect of maintaining contact with the minor children is awarded to the respondent, to be exercised in the following manner:

2.1 Rights of removal of the minor children on every alternative weekend from Friday after school until Sunday at 17:00;

2.2 Rights of removal on every alternate school holiday for periods to be agreed upon between the parties, with Christmas to rotate between the parties;

2.3 The right to remove the minor children on father's Day. Similarly the applicant shall have the right to keep the children with her on Mother's Day;

2.4 The right to remove the children for half of the available time on their respective birthdays;

2.5 The right to remove the children for every alternate public holiday;

2.6 The right to contact the minor children telephonically at all reasonable times.

3. The respondent is ordered to pay maintenance to the applicant in respect of her and the minor children in the amount R10 000.00 per month ' the first payment to be made on or before

the first day of the month following the order, and thereafter on or before the 1st day of every consecutive month;

4. The respondent is ordered to hand over to the applicant for her use his motor vehicle , alternatively provide the applicant with an alternative vehicle to use, which vehicle should be reliable and on the same standard as the double cab ba kkie that the applicant handed over to the respondent upon demand;
5. The respondent is ordered to pay the following expenses in respect of the applicant and the minor children:
 - 5.1 To retain them on the medical aid fund of which they are currently members, and to pay the monthly premium;
 - 5.2 To pay the short term insurance of the motor vehicle that he will hand over to the applicant for her use;
 - 5.3 To pay the reasonable maintenance costs, repairs and servicing costs of the motor vehicle that he will hand over to the applicant for her use;
 - 5.4 To pay for the school clothes of the elder minor child as well as the stationary needed for her schooling;
6. The respondent is ordered to make contribution towards the applicant's legal costs in the amount of R20 000.00 payable within ten (10) days of this order;
7. No order as to costs is made.

**M.V SEMENYA
JUDGE OF THE HIGH COURT;
LIMPOPO DIVISION.**

APPEARANCES

ATTORNEYS FOR THE PLAINTIFF : VAN HEERDEN & KRUGER ATT.

COUNSEL FOR THE PLAINTIFF : ADV.

ATTORNEY FOR THE DEFENDENT : JW BOTES INC.

COUNSEL FOR THE DEFENDENT : ADV.

RESERVED ON : 25 JUNE 2019

JUDGMENT DELIVERED ON : 14 AUGUST 2019