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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER:5181/2020

(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:

M[....] T[....] L[....]

APPLICANT

And

M[....] K[....] L[....]

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant and the respondent are married to each other by customary union. The applicant has issued divorce summons simultaneously with an application for relief *pendente lite* in terms of Rule 43 of the Uniform Rules of Court (the Rules). The Rule 43 application was brought on urgent basis and was struck off the roll due to lack of urgency.
- [2] The applicant in her *pendente lite* application seeks orders that she be awarded primary care and residence of the five minor children aged 15,13,11,9 and 5 years respectively with the respondent having right of reasonable contact at all reasonable times; that the respondent add the applicant and the five minor children as dependants on his medical aid scheme and thereafter to retain them on the medical aid scheme and to pay all medical expenses which are not covered by medical aid scheme *pendente lite*; that the respondent pays all the minor children's school fees *pendente lite*; that the respondent contribute an amount of R8750-00 towards the university fees, residence fees and textbook fees of the major child *pendente lite*; that the respondent pays maintenance in an amount of R51 530-00 per month for the applicant and the minor children *pendente lite*; and that the respondent makes an initial contribution towards the applicant's legal costs, in the pending matrimonial action in the amount of R30 000-00.

- [3] The applicant avers that since 2019 the respondent has refused to contribute financially towards the maintenance of the children, and she was solely responsible for maintaining them, and she is struggling tremendously to make ends meet. According to the applicant, the respondent left their common home during February 2020. The applicant avers that for the Rule 43 application to be brought on urgent basis was triggered by the fact that on 12th August 2020 she learned that the last born minor child and her were removed as dependants from the respondent's medical aid scheme, and at this stage she cannot afford to pay any medical aid.
- [4] The applicant submits that she and the respondent are both employed. Her net salary is R23 000-00 per month, whilst the respondent's gross monthly salary is R26 000-00. The applicant further alleges that the respondent receives an annual bonus of R26 000-00 and also overtime payment which takes his average monthly earning to R40 000-00. The applicant further alleges that the respondent is a wealthy businessman who conduct taxi operating business which gives him an average gross monthly income of R127 500-00. The applicant further alleges that before covid-19 lockdown, they had a contract with Pick 'n Pay to transport Pick 'n Pay employees and the monthly income for that contract was R27 000-00. The money for the Pick 'n Pay contract was paid into a close corporation account of which the applicant was the

sole member. The applicant avers that since the cancellation of the Pick 'n Pay contract, there are no further monies that goes into the close corporation account.

[5] The applicant alleges they used to enjoy a very luxurious lifestyle, they drove expensive cars, lived in a five-bedroom house on a big erf, dined out a lot, bought expensive gifts for each other and also went on luxurious holidays. That their expenses were paid from the income derived from the respondent's taxi business and their own salaries. The applicant further submit that the respondent bought a very expensive luxurious Mercedes V-Class motor vehicle without her consent, and the monthly instalments for that vehicle amounts to R25 000-00. According to the applicant her total monthly expenses amounted to R83 280-00, and she is left with a shortfall of R60 280-00. She is forced to take out loans in order to make up for this shortfall.

[6] The respondent in his answering affidavit has denied that they were living a luxurious life style, but that their lifestyle was a modest one. The respondent avers that he had left the family home at the end of February 2020 when he realized that his life was in danger as the applicant was plotting to kill him. The respondent submits that even after he had left the common home, he continued to make sure that his family was well maintained. The respondent further submitted that even

up to date he had paid his children's school fees the same way he used to do over the past years, despite his failing health and struggling business due to covid-19. It is the respondent's contention that the applicant's averments in her founding affidavit are a cocktail of half-truths, gross exaggerations, falsehoods and outright lies aimed at misleading the court in order to punish him unnecessarily just to vent her anger and hatred on him.

[7] The respondent submit that the major child is capable of suing and being sued in her personal capacity unassisted. The respondent avers that presently he is renting and paying R5000-00 per month. The respondent submit that the five minor children are still covered by his medical aid scheme as his dependants, and that the applicant is gainfully employed and is in a position to secure a medical cover for herself. The respondent further submits that the cover for the major child can be restored on her if she furnishes the medical scheme with proper documentation.

[8] The respondent submit that his salary fluctuates between R21 000-00 to R37 000-00 depending on whether he had worked overtime. It is the respondent's contention that in recent years he had been in and out of work due to ill health and has therefore been unable to work overtime. The respondent submit that the total income generated from running the

taxi business is around R70 000-00 per month, and still had to pay for drivers, insurance cover for the taxis and also pay monthly instalments for two of the taxis. It is the respondent's contention that as a result of covid-19, the income from the taxis has tended to be negative as opposed to positive fluctuation. The respondent had conceded that the Pick 'n Pay contract had terminated during April 2020 due to covid-19, but submitted that despite the termination of the contract, he buys groceries and other needs for the family. The respondent denies that the applicant is not in a position to pay her legal fees.

- [9] In court, counsel for the applicant submitted that the applicant is only claiming maintenance for five minor children and for contribution towards costs. The applicant is no longer claiming spousal maintenance. The applicant's counsel submitted that the respondent is paying school fees for the four minor children, and that he had not paid for the fifth minor child who is the last born and that the fifth minor child was taken out of crèche during August 2020 due to non-payment of the school fees. Counsel for the applicant further submitted that the respondent bought groceries for the applicant and their children on 12th February 2021 after failing to do so for over a period of a year. Counsel for the applicant further submitted that the respondent be ordered to pay maintenance of R4000-00 per month per child for the five minor children and also R8000-00 as contribution towards costs.

- [10] Counsel for the respondent submitted that there was no minor child who was removed from school due to non-payment of school fees. It is the respondent's contention that the respondent has been maintaining his family without fail. Counsel for the respondent submitted that the respondent has been delivering the monthly groceries in the absentia of the applicant, and that it was only on 12th February 2021 that he found the applicant at their common home and the applicant chased him away. Counsel for the respondent submitted that the respondent had long been staying with his children and he knows their monthly needs.
- [11] Rule 43 applications are designed to be inexpensive procedure which entitles a party to procure temporary relief in matrimonial actions. Payment of maintenance for minor children is a priority and depend upon the available resources of the parties involved. It is therefore important for both parties to be honest and frank about their available resources to assist the court to make an appropriate order even though it will not be precise due to the unavailability of detailed evidence. Where both parents work, a Rule 43 in respect of child support imposes financial obligations on each of the parents according to their financial resources.

[12] In **TS v TS**¹ Spilg J said:

“The adjudication of maintenance for children pendent lite involves establishing the actual expenditure requirements that have been incurred historically, establishing whether there is any change, and if so why. This may be particularly important in the case of the children’s costs of education, including extramural tuition which has gained significance in developing the individual child’s talent or assisting a child in overcoming any learning difficulties. Consideration such as the type of institution a child has attended, his or her educational needs and the level of education that both parties had envisaged they would provide for the child are relevant, as is the current financial ability to maintain that level or provide a suitable policy to cover future costs of tertiary education, if appropriate, having regard to the posted resources of the parties.”

[13] The applicant in her founding affidavit has stated that since 2019, the respondent has refused to contribute financially towards the maintenance of the children and that since then she was solely responsible for maintaining the children on all the necessities of life. As a result of the respondent’s failure to contribute to the upbringing of their children, the applicant’s monthly expenditure sky rocketed to R83 280-00. Her take home salary is R23 000-00 and that leaves her with a monthly shortfall R60 280-00 which she had to juggle around every month to make up for the shortfall.

[14] The picture created of the respondent is that of a parent who had no interest in the upbringing of his children, and who had left the applicant to take care of the children as if she was a single parent. The applicant has further stated that on 12th August 2020 she learned that the

¹ 2018(3) SA 572 (GJ) at 596 F-597B

respondent had removed her and the last born child as dependants from his medical aid scheme. All this paints the respondent as an irresponsible parent. However, it turned out that all these allegations were not correct, as the respondent had removed the applicant only. All the minor children are still dependants on the respondent's medical aid scheme. The respondent is paying the school fees of the minor children even though the applicant claims that the respondent is not paying for the last born who was taken out of school due to non-payment of his school fees during August 2020. However, when the applicant abandoned the claim for school fees for the minor children, she had abandoned for all the five minor children which gives credence to the respondent's contention that he is paying school fees for all the five minor children.

- [15] The applicant's monthly expenses seem to have been exaggerated. The monthly grocery of R20 000-00 which is almost equal to the applicants nett salary in my view is not realistic. The applicant in her monthly expenses had included school fees for the minor children which when the matter was argued before court has conceded that the respondent is taking care of them. It is clear that the applicant is not frank and honest with her monthly expenses hence she now just wants maintenance for the five children at R4000-00 per month per child. At R4000-00 per month per child it gives her a grand total of R20 000-00

which is close to the lost income of R27 000-00 for the Pick 'n Pay contract. What the applicant is now seeking will not cover her exaggerated monthly expenses, and she had not stated how she is going to make out of that shortfall. This also shows that the applicant is not honest and frank with her monthly expenses.

[16] Both applicant and respondent are having a nett salary which is almost equal to each other. However, the advantage of the respondent is that he is having a second source of income. Taking into consideration that the respondent is taking care of almost all the needs of the minor children, in my view R4000-00 per month per child is still unrealistic. What the applicant want is a replacement of R27000-00 income she had lost for the Pick 'n Pay contract and that has got nothing to do with the minor children's needs.

[17] By staying with the minor children, the applicant will in some instances be forced to incur unforeseen expenses which can never be budgeted for. There are some medical prescriptions which the medical aid scheme will not cover. In some instances, there will be school project which need money here and then and not wait for month end. In my view R1000-00 per month per child will be sufficient to cater for the emergencies which in my view will not occur every month for each minor child.

[18] With regard to contribution towards costs, in **AF v MF**² Davis AJ said:

“The quantum of the contribution to costs which a spouse may be ordered to pay lies within the discretion of the presiding Judge. In *Van Rippen v Van Rippen* Ogilvie Thompson J, as he then was, articulated the guiding principle for the exercise of that discretion in the following frequently cited dictum.

‘(T)he court should, I think have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the court.’”

[19] Both applicant and respondent are in stable employment and their take home salaries are almost equal even though the respondent had an added advantage of the second source of income. However, the respondent is taking care of almost all the household expenses and that will leave the applicant with sufficient balance to pay for her legal fees. In my view, R6000-00 will be appropriate as initial contribution towards the applicant’s legal costs in the pending matrimonial action.

[20] **In the result I make the following order.**

20.1 *Pendente lite*, the primary care and residence of the five minor children are awarded to the applicant, subject to the respondent’s right of reasonable contact as arranged by agreement between the parties;

20.2 The respondent retains the five minor children as dependants of his medical scheme *pendent lite*;

² 2019 (6) SA 422 (WCC) at 428F-429A

20.3 The respondent pays all five minor children's school fees, sport and extra-mural activities *pendente lite*;

20.4 The respondent pays maintenance in the amount of R1000-00 per child per month for the five minor children *pendente lite*;

20.5 The respondent makes an initial contribution towards the applicant's legal costs, in the pending matrimonial action, in the amount of R6000-00.

20.6 Each party to pay his/her own costs.

MF. KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION
POLOKWANE**

APPEARANCE:

Counsel for the Applicant	:	Adv MC. De Klerk
Instructed by	:	DDKK Attorneys
Counsel for the Respondent	:	Adv R. Moshiana
Instructed by	:	M.T Ramabala Attorneys
Date of hearing	:	03 March 2021
Date of Judgment	:	26th March 2021