

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 15658/2008

5 In the matter between:

L A SMIT

Applicant

and

C A SMIT

Respondent

10 **JUDGMENT DELIVERED ON 17 NOVEMBER 2008**

GAUNTLETT, AJ:

15 This is an application in terms of Rule 43. The applicant seeks interim relief which is disputed, excluding provision for medical and related expenditure, and for school expenses and related expenditure. Counsel for the parties are agreed on the customary order in relation to the costs of this application, namely that these should stand over.

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The respondent is a building contractor and director of three private companies in that industry. It is not in serious dispute on the papers that the industry, at least so far as it affects the

operation of what I shall term his companies, is in particular difficulty at present, but equally it is not in issue that on his own showing his assets exceed R5million, that his monthly income is of the order of R45 000 and that he has in the past not disclosed his full financial position to the applicant. In this application he has explained the unavailability of the companies' 2008 financial statements, but not the absence of those for preceding years.

The parties continue currently to live under the same roof with two children aged 10 and 9. There is also a 21-year old child in the family.

It is convenient to address the relief claimed in relation to the three main categories in dispute: interim maintenance; use of the Mercedes-Benz Vito minibus vehicle; and a contribution to the costs of the divorce trial proceedings.

As regards interim maintenance the argument for the respondent is that he continues to maintain the applicant and the two minor children, and that he tenders to maintain that position pending the resolution of the principal divorce proceedings. The applicant, it was argued, is not entitled to the order sought because this would be at odds with the fact that on the evidence, he is currently

supporting her and the two minor children and is, as I have indicated, tendering to sustain that position.

5 In my view, the reasoning in this regard is not tenable. The parties are in the throes of divorce proceedings, adequate support pending the resolution of those proceedings is now an issue, even if this was not so before. Their relationship now is clearly such that the, one infers, at least relatively amicable *status quo* which existed previously, comprising regulation *inter se* of expenditure is
10 over. The applicant is entitled to clarity as regards the quantification of support she is entitled to receive until the divorce, and that claim is not validly deflected by a general tender of continued maintenance, as the respondent seeks to do. The very fact that the parties differ so strongly, as they have done in
15 this application, as regards the quantification of that interim support, points to the existence of a dispute which must be resolved.

In the order I intend to make in this regard however I have also
20 had regard to the respondent's financial position. Clearly his disposable income is limited. If however the opposed divorce proceedings oblige him, as a consequence, to realise certain of his assets, he must, by law, do so. The repeated *non possumus*

attitude that since this claim cannot be met out of income, and is not readily to be obtained out of capital, the claim cannot be met, is not one which is supportable in law.

5 As regards the vehicle, however, I am unpersuaded that the applicant requires the interim use of the Mercedes Benz minibus. As counsel for the respondent pointed out, he uses this is the course of his business, and moreover undertakes the burden of transporting the children to and from school. In all the
10 circumstances it seems to me equitable that that state of affairs should continue.

Lastly there is the question of a contribution to costs. The respondent's stance is once more that he can afford nothing.
15 Therefore, the implicit argument again runs, the applicant should receive nothing from him to make the divorce possible. That stance is not open to him; on his own say-so, his estate, as I have noted, is significant, and can meet the costs, even if this is at the unfortunate cost to itself of liquidation of capital assets
20 best preserved intact. Liquidation of assets is the unfortunate consequence of the fact that he and the applicant find themselves embroiled in opposed, and therefore expensive, divorce proceedings. The respondent's uncontested lack of full disclosure

expensive, divorce proceedings. The respondent's uncontested lack of full disclosure in the past, and the fact that his estate appears to be substantially entwined with his three companies, with the likelihood of at least some forensic accounting investigation costing at a minimum of R30 000, unfortunately
5 conduce to a larger cost contribution than might have been a position in a simpler matter.

Regard being had to all the circumstances, the order I accordingly
10 make is one in terms of the draft which was handed to me with the insertion of the amount of R10 000 per month in the first paragraph as regards maintenance *pendente lite*, the deletion in paragraph 4 of the words same Mercedes Benz Vita and substitution with the words "die Corsa bakkie" and the insertion in
15 paragraph 5 as regards contribution to legal costs of the sum of R70 000.

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GAUNTLETT, AJ