Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 16742/2021

Before: The Hon. Mr Justice Binns-Ward

Hearing: 3 November 2021
Judgment: 9 November 2021

In the matter between:

C[....] M[....] S[....] C[....] Applicant

and

N[....] C[....] Respondent

JUDGMENT

BINNS-WARD J:

[1] The parties are engaged in action proceedings in which the applicant has sued for the dissolution of her marriage to the respondent. The respondent is defending the action and has brought a claim in reconvention. This judgment is concerned with an application brought by the applicant in terms of Uniform Rule 43 for maintenance *pendente lite* for herself and the parties' three minor and for a contribution towards her costs in the pending action.

[2] The parties were married in England, and it is common cause that English law governs the proprietary consequences of the marriage. They are agreed that in consequence

an equal division between of their respective assets should be an incident of any divorce order that may be granted in the action proceedings. The principal issue in contestation at the trial of the pending action proceedings will apparently be the applicant's claim against the respondent for personal maintenance until her death or remarriage. Her claim for a contribution towards her costs includes provision for the fee of an expert witness to substantiate her claim that she will be unable to provide for herself after the divorce.

[3] The applicant had been employed during the marriage, but was retrenched in May 2020, reportedly because of the financial impact on her employer of the national lockdown imposed to deal with the COVID-19 pandemic. The respondent reports that the applicant's net monthly income from employment prior to her retrenchment was R10 800. She has since established a home-based business doing financial administration for private clients. In the year from August 2020, the business generated a very modest income, averaging only R2 250 per month. She maintains that it is unlikely in the context of the prevailing economic conditions that she will be able to re-enter the job market and contends that it would in any event be in the best interests of the children that she works from home. The parties eldest child is 15 and the other two are twins aged 13.

[4] The applicant and the children are for the present continuing to live in the erstwhile common home in Meadowridge, upon which she has placed a market value of R4 million, whereas the respondent currently rents a flat in Heathfield for R7 200 per month. Since moving out of the former common home the respondent has continued to pay the rates on the property. He has also been paying for the children's cell phone expenses, the provision of Wi-Fi internet to the family household, insurance in respect of the applicant's motor vehicle, a security service to the property, medical aid contributions and non-covered medical expenses in respect of the applicant and the children and all expenses related to the children's schooling.

[5] During May 2021, the applicant's erstwhile attorney of record confirmed, in response to a demand from the applicant's attorney, that the applicant was willing to continue paying for the expenses listed in the preceding paragraph and, in addition, pay the applicant a cash amount of R20 750 per month in respect of maintenance for herself and the children. The applicant abided by that undertaking until August 2021, when he unilaterally reduced the cash payment to R10 000, to which he added, apparently under pressure, an additional R10 300 later in the month. The respondent's breach of the undertaking given by his former attorney resulted in the institution of the current proceedings for interim relief.

[6] The applicant alleges that the reduced payment, which was accompanied by demands by the applicant that the family would have to implement various cost cutting measures, including the sale of the family home, was precipitated by the respondent's displeasure at her insistence on an entitlement to lifelong maintenance after the divorce. The respondent asserts in response that he is simply unable to afford a monthly cash contribution of R20 750 in addition to paying for the other expenses enumerated earlier.

[7] The respondent has testified that his net income after tax, and excluding the income generated by the letting of a flatlet at the family home that currently is rented out for R5 500, is R39 800. He points out that the total cost of the maintenance package claimed by the applicant is over R45 800 per month and that it will increase by approximately R5 000 when the twins graduate to high school in 2022. The respondent has quantified his personal living expenses at about R14 200 per month and pointed out that in the result he is left with a deficit of over R20 000 per month.

[8] The respondent has suggested that the family's cash crunch could be alleviated if he were permitted to move into the flatlet at the family home, which is being vacated by the tenant. He says that would free up the greater part of the rental that he is having to pay for his accommodation in Heathfield. In my view, however, the respondent's proposal in this regard seems unrealistic in the context of his having moved out of the common home almost a year ago. I doubt whether the family dynamics would be well served by the parties living in close proximity to each other during what appear to be fiercely contested divorce proceedings. I am not persuaded that it would be unduly difficult for the respondent to obtain a replacement tenant for the flatlet.

[9] The respondent has also offered to employ the applicant as a driver in his business at a salary of R7 000 per month. He testifies that the working demands of the position would allow the applicant sufficient time to continue with her home-based business and that her duties would not necessitate personal contact with himself.

[10] The respondent's evidence concerning his income and expenditure is quite detailed and there is nothing about it that strikes me as improbable or contrived. It clearly vindicates the respondent's contention that his income is insufficient to sustain his ability to pay maintenance on the scale that he undertook through his attorneys in May this year. I did not understand the applicant's counsel to quibble with that assessment. The argument advanced in support of the applicant's claim in the face of the established affordability constraints was

that the respondent should be required to draw on his available capital resources to make up the shortfall to the degree necessary to maintain his wife and children at the standard of living to which they were accustomed when the parties lived in a common household. These are the resources which in terms of the parties' common understanding fall to be divided equally between them upon their divorce.

[11] In support of the argument, the applicant's counsel called in aid certain dicta in the judgments in *Taute v Taute* 1974 (2) SA 675 (E) at 676E, *Micklem v Micklem* 1988 (3) SA 259 (C) and *Dodo v Dodo* 1990 (2) SA 77 (W) at 93H-I, where there is reference, in turn, to *Oberholzer v Oberh*olzer 1947 (3) SA 294 (O) at 298 and *Harwood v Harwood* 1976 (4) SA 586 (C) at 587H-588A. A consideration of those judgments shows that they do not support, as a statement of generally applicable principle, the bald proposition that a spouse who cannot afford from his or her income to pay the other spouse maintenance in a given amount is obliged to draw on any available capital to do so.

[12] In *Harwood*, for example, the matter being addressed in the passage referred to by counsel from Wulfsohn AJ's judgment in *Dodo* was child maintenance. When Vos J there held that '*maintenance <u>pendente lite</u> must even be paid out of capital if necessary*', the learned judge explained that the principle he had in mind in support of that notion was '*the rule that the estate of a deceased parent is in appropriate circumstances liable to maintain a child*'. Only part of the maintenance claim in the current matter is in respect of the children and, in any event, the idea that resort may have to be had to capital when income is insufficient is, in my view, predicated on the assumption that the income is insufficient to provide maintenance in a reasonable sum in the peculiar circumstances of the case. What might be a reasonable sum in a given case depends on the prevailing circumstances.

[13] In *Oberholzer*, the claim for maintenance *pendente lite* was by one spouse against the other in a marriage in community of property. It is clear from Van den Heever J's judgment that he considered that it was incumbent on the applicant wife to establish that the £10 a month that she sought as interim maintenance was a reasonable amount in the circumstances. He found her evidence in support of the quantum to be lacking and therefore approached the question on the basis that she should be entitled to an equivalent amount to that which the respondent-husband said that *he* needed to live on, which was £8 10s per month. The learned judge noted that the evidence showed that the husband had no income or ready cash with which to meet his maintenance obligation to his wife, but that he had an estate 'conservatively estimated' to have a net value of £1 138. Addressing the respondent

husband's claim that he was unable from readily available cash to afford to pay any maintenance, the learned judge said '*Then he must liquidate assets. His wife is entitled to maintenance while there is a credit balance at all.*' The judge's remarks must be understood in the context in which they were made, namely, with reference to the import of the husband's marital power (as it then was) in a marriage in community of property and the husband's obligation under such a regime, as administrator of the joint estate, to maintain his wife. That is clear from the judge's detailed discussion in the preceding pages of the reported judgment of the proprietary implications under Roman-Dutch law of a marriage in community of property. It accordingly does not follow that learned judge would have uttered the quoted remarks in the quite distinguishable circumstances of the current application.

[14] The judgment in *Taute* also does not support the proposition that a claimant for maintenance *pendente lite* in terms of rule 43 is entitled, of right and without more, to maintenance sufficient to keep him or her in the same lifestyle as that enjoyed during the marriage. On the contrary, the learned judge in *Taute* expressly acknowledged the axiom that each application falls to be determined on its own peculiar facts. As to the standard of living enjoyed by the parties during the marriage, the judge referred to it as only one of the factors to which regard should be had. In the passage referred to by counsel, at p.676E, Hart AJ expressed himself as follows: '*The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified*'. It hardly needs explanation to recognise that a claimant's reasonable requirements depend on the circumstances prevailing when those requirements fall to be met. It is, after all, only with regard to such circumstances that the reasonableness of the requirements can be assessed.

[15] In fairness, counsel's written argument did acknowledge that whilst maintenance obligations would '*normally* [be] *met from income ... in some circumstances inroads on capital may be justified*'. In my judgment, counsel's written submission gives a reasonably accurate summation of principle and practice in this area. The questions in the current matter are then whether this is a case in which the respondent should be expected to liquidate capital and, if it is, to what extent would it be reasonable to require him to do so.

[16] When (Leonora) Van den Heever J remarked in *Micklem*, concerning interim maintenance, that a wife was entitled '*to maintain the standard of living to which she was*

accustomed', the learned judge was speaking in a case in which the husband had relatively unlimited means and where the wife's claim for additional maintenance was described as '*lavish*'. The point that the judge was making when she uttered the words relied upon by the applicant's counsel before me was that there is a limit to what a spouse may claim by way of interim maintenance. That is plain if the remarks are read in context. They formed part of the following statement: '*The fact that a husband has unlimited means does not in our law entitle his wife to unlimited spending. There is a difference between her wants and her needs (Grasso v Grasso 1987 (1) SA 48 (C) at 59G-H). What she is entitled to, is to maintain the standard of living to which she was accustomed, not to increase that.*' It was clear on the facts of that case that the husband would have no difficulty financially in maintaining his wife *pendente lite* at the standard to which she had been accustomed before the institution of the divorce proceedings.

[17] I do not think that it would be correct to construe anything said by the judge in *Micklem* as being intended to detract from the notion that the amount of the maintenance to which a dependant spouse and their children can look for from a provider spouse or parent is informed by the cost of their reasonable needs measured against the provider's reasonably assessed ability to pay for them. In the context of a claim for maintenance *pendente lite*, the parties' standard of living in the common household is undoubtedly a relevant consideration, but it would be wrong in a case like the current one, where the parties' means are relatively modest, to ignore the effect of the loss of economies of scale by the division of that household into two households on the providing spouse's ability to afford to continue to maintain it. A balanced and realistic assessment is required, based on the evidence concerning the *prevailing* factual situation.

[18] It makes little sense to grant an interim maintenance order that will require the provider spouse to draw down materially on the available capital in a case in which it is apparent that the parties are likely to be heavily dependent for their post-matrimonial welfare on their joint, or to-be-equally-divided capital resources, and in which the likelihood is that the dependant spouse will, after the divorce, not be able to live in the style to which he or she was accustomed during the marriage. To do so would only redound to the parties common long-term detriment.

[19] In *Micklem*, Van den Heever J remarked that rule 43 was directed at being of assistance to the spousal parties in the lead-up to their divorce. The learned judge said the rule was '*to assist parties in resolving their differences'*, and proceeded that *'if one makes of*

Rule 43 procedure a procedure whereby acrimony is engendered and further issues are brought forward, which only complicate the divorce instead of simplifying it, Rule 43 misses its point'. I respectfully agree. Making an interim maintenance order with exclusive reference to the parties' standard of living *stante matrimonio*, and no regard to the likely consequences of such an order on their livelihoods post-divorce, if such are apparent on the evidence, would, in my view, be likely to conduce to the acrimonious and complicating repercussions against which Van den Heever J cautioned, and give rise to an inappropriate application of the rule.

[20] The applicant is not without capital resources of her own. She has an amount in cash remaining from the package she received when she was retrenched, a loan claim against what appears to be family trust (of which she is also a beneficiary) and a retirement annuity investment which she is not able to access (presumably because she is still under the statutory age of 55). The net asset value of the respondent's estate has been estimated by the applicant at R5 909 716 and the gross value at about R7 266 350. The major part of the value of the respondent's estate is represented by the value of the property that was the former common home (R4 million) and his recycling business (approx. R1,145 million, including a bank balance of just over R98 000 at 21 June 2021). The respondent's readily accessible liquid assets, in the form of bank accounts, appear to be worth about R565 000. He also has two investments with Momentum, worth about R330 000, which I suspect may be retirement policies. An amount of approximately R921 000, being the net proceeds of the sale by the respondent of a fixed property at Ascot Towers, is being held in trust by agreement between the parties pending the determination of the principal proceedings.

[21] The respondent has put up a schedule of expenses showing that if he were to be required to continue paying maintenance on the scale to which he agreed through his then attorneys in May 2021 he would face a monthly deficit of R20 317. His calculation of the deficit makes no provision for the letting of the flatlet at the former common home to a new tenant, which I consider is unrealistically pessimistic. A plausible reason for the implied inability to find a substitute tenant has not been provided. In my view, the postulated deficit is realistically stated in the region of about R15 000.

[22] The pending action is not yet under case management, which implies – using the current state of the court's trial roll as a reference – that if the parties are not able to reach settlement, it is likely to come to trial only in late 2023 at the earliest. If the respondent were required to service the deficit from capital, it would involve – leaving aside the cost of the

litigation, which, if it is fought out to the bitter end, will be considerable – an erosion of the capital available for eventual division between the parties by between R360 000 and R400 000. This would clearly be to their common detriment in circumstances in which it seems unavoidable that they will both have to face up to a lifestyle adjustment because of the breakup of the former single household into two units, with the associated adverse effect on the economies of scale hitherto enjoyed by the family. I am therefore of the view that interim maintenance should be fixed in an amount that acknowledges the altered circumstances of the parties and limits the erosion of the available capital on which both of them will probably be critically reliant post-divorce.

[23] I am not persuaded on the papers that the applicant is unemployable. She was an active participant in the labour market until the middle of last year and all the indications are that she is probably only about 50 years of age. It is evident to any reasonably informed South African that whilst the economic situation remains relatively depressed, the position generally is visibly improved from what it was a year ago during and immediately after the strict COVID-19 related lockdown. The argument that it would be in the best interests of the children if the applicant stays at home is not convincing. The children are not of an age where the presence of their mother in the house when they are not at school would be especially important or desirable. It is evident that the respondent was a working mother when the children were younger and in probable greater need of parental supervision.

[24] I consider that it would be fair, using the rough and ready approach that has, of necessity, to be adopted in this type of application, to attribute to the applicant a current earning capacity of approximately R9 250 per month. The figure is derived from the R7 000 per month which the respondent would be willing to pay her to undertake a parttime job in his business plus the average of R2 250 that she has been able to earn from her limited business over the past year. It is calculated on the basis that acceptance of the respondent's offer would allow her to continue with her home-based business. The amount is materially less than she was earning until her retrenchment in 2020.

[25] In all the circumstances I have decided than an award of R13 000 per month in cash maintenance over and above the items of expenditure currently provided for by the respondent (which appear to be valued at about R25 000 per month – an amount which will reduce once the current family home is sold and the family moves into more modest accommodation, which looks to be unavoidable in the medium term) would meet the justice of the case. It is evident that on this basis the respondent will still be left with a deficit of

income over expenditure, but the extent to which he will have to draw on capital to finance it will at least be reduced.

[26] The parties agreed that each of them would be entitled to draw on the proceeds of the fixed property sold by the respondent at Ascot Park, which, as mentioned earlier, is being held in trust, to finance their legal expenses up to and including the first day of trial. The maximum amount in which such drawings can be made by each of them is limited to R230 000, and any drawing must be vouched by an invoice from their respective attorneys.

[27] Costs of the application shall stand over for determination at the trial.

[28] An order will issue in the following terms:

1. That the respondent shall maintain the applicant and the parties' minor children *pendente lite* as follows:

    a) By paying, with effect from 1 September 2021, a monthly cash amount of R13 000.00 to the applicant, payable on or before the first day of each and every month directly into a bank account to be nominated by the applicant for that purpose.

    b) By continuing to maintain the applicant and the minor children as dependents on his current medical aid scheme or a medical aid scheme with substantially similar benefits; and additionally, by bearing the cost of all necessarily and reasonably incurred medical-related expenditure in respect of the applicant and the children not covered by the medical aid scheme.

    c) By, within 10 calendar days of the applicant having provided him with copies of the relevant invoices, reimbursing the applicant for any expenses referred to in paragraph (b) above incurred by her, or paying the supplier or medical practitioner directly, whichever is appropriate.

    d) By paying the reasonably incurred educational expenses of the minor children, including school fees, additional tuition fees where additional tuition is reasonably required, school outings in which the children participate with the respondent's written permission which shall not be unreasonably withheld, extracurricular school and sport activities, as well as the cost of all schoolbooks, stationery, school uniforms, equipment and attire related to their schooling.

e) By, within 10 calendar days of the applicant having provided him with copies of the relevant invoices and/or proof of payment by her thereof, reimbursing the applicant for any expenses referred to in paragraph (d) above incurred by her or paying the supplier directly, whichever is applicable.

f) By continuing to pay the following expenses in respect of the applicant and the minor children:

   i. The rates and services in respect of his property at [….], Cape Town ('the property'), where the applicant and the minor children currently reside;

   ii. The minor children's reasonably incurred cell phone expenses;

   iii. Internet/Wi-Fi expenses in respect of the property;

   iv. The insurance premium on the applicant's motor vehicle;

   v. The monthly fee in respect of the provision of security services to the property.

2. Each of the parties shall be entitled to draw down to the maximum extent of R230 000.00 on the net proceeds of the sale of the respondent's property at Ascot Towers, which are currently held in trust, for the purpose of funding their respective costs in the pending action up to and including the first day of trial, provided that any such drawing shall be permitted only as against production of an invoice in respect of costs incurred in the amount sought to be drawn down from the party's attorney of record or, in the event of the party being self-represented, an invoice from a relevant service provider.

3. The costs of the application shall stand over for determination in the pending action.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Applicant's counsel:	**P.F. Cloete SC**
Applicant's attorneys:	**Miller Du Toit Cloete Inc.** **Cape Town**
Respondent's counsel:	**L. Bezuidenhout**
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