

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2019-009-000629
[2019] NZFC 7317**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[VIVETTE FOCHE] Applicant
AND	[MARICK PIETERSEN] Respondent

Hearing: 5 September 2019

Appearances: D P Dravitzki for the Applicant
A M Campbell for the Respondent

Judgment: 5 September 2019

ORAL JUDGMENT OF JUDGE M J HUNT

[1] These are proceedings in nominal terms between Miss [Vivette Fouche] and Mr [Marick Pietersen]. Mr [Pietersen] is represented by Miss Campbell and Miss Ebborn was also present this morning. Miss [Fouche] is represented by Mr Dravitzki, effectively on the basis that the Central Authority provides instructions to him and the hearing today has not involved Miss [Fouche] in a personal sense.

[2] The parties, that is, Miss [Fouche] and Mr [Pietersen], are the parents of [Liandri], born [date deleted] 2015. After separation between the parties in early 2018 Miss [Fouche], as I read the papers, obtained a protection order and subsequently within short order left to return to South Africa.

[3] Once she had returned to South Africa she sought, in a process that is set out in the affidavit that has been filed, an order for payment of a sum on account of child maintenance by Mr [Pietersen]. The process required that she file a declaration of her means. I note that that declaration was not the subject of any questions or cross-examination by Mr [Pietersen] who, it seems, did not know of the process or the application until sometime later but that declaration is dated 26 February. It recounts outgoings, some of which it seems are anticipated and some are likely actual. By anticipated I mean that there is reference in this to child or day-care costs but in the narrative portion of the application it is clear that those costs have not been incurred because there is limited financial resource available. That declaration recounts either anticipated or actual expenses and outgoings and Miss [Fouche] at the time disclosed no income.

[4] What she said at the time and is recorded as evidence before a Magistrate on 26 February, was that [Liandri], who was then [two years old], was not in child-care, although she had been in New Zealand, and that because Miss [Fouche] was not employed she could not afford to place her in day-care. There was no rent being paid because she was staying with her parents and there was expenditure of the outlined sums on food, nappies, clothing and other outgoings. The claim was for 8500 rand per month and a provisional order was made by a Magistrate to the effect against Mr [Marick Pietersen], dated 26 February. On the face of it, it is a process that seems to move relatively quickly.

[5] There was no questioning, as I have said, of Miss [Fouche] about her outgoings. Mr [Pietersen], it seems, was not given notification of the hearing at that point and the order is described as provisional.

[6] The process, which is not in dispute, then requires that the statutory scheme for recognition of that order in New Zealand apply and I have been assisted by the

submissions of counsel in that regard and the jurisdictional aspects of that are outlined particularly in Mr Dravitzki's submissions but also acknowledging that there is no disputing that process based on the submissions received from Miss Campbell.

[7] Mr Dravitzki's submissions at paragraph 8 are plain that there is jurisdiction for confirmation of provisional maintenance orders and that is governed by s 138 Family Proceedings Act 1980 and relevant sections address the process which is to be adopted. The provision for confirmation of the order is set out at s 138(7) and provides:

Where at the hearing (whether following an adjournment or otherwise) the respondent does not appear, or on appearing fails to satisfy the Court that the order ought not to be confirmed, the Court may confirm the order either without modification or with such modifications as it thinks fit.

Section 138(9) also addresses the question of outstanding arrears and that when confirming an order, if there is sufficient ability, orders may be made for payment on account of the person in respect of whom the order was made between the date of making of the order and its confirmation. I take that section to authorise or mandate that I address the matter of arrears.

[8] In this case there is no challenge to the notion that the order should be confirmed and the notice of defence as filed by Mr [Pietersen] does not dispute his basic liability but takes issue with the quantum that was fixed and that has been the focus of this hearing and that is the consensus between the submissions.

[9] Essentially the proposition taken by Mr [Pietersen] is that he cannot pay based on a proper assessment of his income, outgoings and means at the sum specified and that he could pay based on his resources at a rate of \$400 per month. He is critical of the situation between the making of the order and the present point on the basis that attempts were made to contact Miss [Fouche] but money which was proffered by him or family was not accepted and so, in that regard, I interpret the submissions to suggest that arrears should not be ordered but the basic proposition is that there is an acknowledgement that an amount is payable. It is a question of how much.

[10] Mr Dravitski's submissions and his oral submissions to me after the evidence address that on the basis that Mr [Pietersen] has not discharged the onus on him to satisfy me that the amount payable is excessive, although I do note in the statutory scheme that the question of the modification of an order is on the basis of such modification as the Court thinks just.

[11] It has not been possible in a meaningful way, and I make this point, to assess the reasonableness or otherwise of the applicant's claims and there is no real way of knowing what, if any, change of circumstance there has been since February 2018. At least I have no information about that circumstance and so in that regard I am reliant on that information as being the only information, that is, the statement of means, the Order of the South African Court, about Miss [Fouche]'s circumstances.

[12] Mr [Pietersen] gave evidence by way of two affidavits – one sworn on 28 May and the other 26 August. He was cross-examined by Mr Dravitzki and the cross-examination did highlight the difficulties of reliably and in a mathematically accurate way setting out a weekly or even monthly budget where there are non-recurring expenses or in circumstances, as apply very clearly in this case, where both outgoings and income vary. While Mr [Pietersen] did attempt at Exhibit B of his affidavit of 28 May to identify a weekly budget, it is apparent when one looks at his bank statements that were procured at Mr Dravitzki's request, that there were a number of non-recurring expenses, for example, expenses associated with the illness and subsequent passing of his mother, expenses associated with his accommodation from time to time for his work purposes, which did not lend themselves readily or easily to a concise and precise weekly budget.

[13] There are two aspects to this to be examined. The first obviously is the income that Mr [Pietersen] might properly expect on a proper evaluation and the second his outgoings but, as I say, with an acknowledgement being precise and exact about those matters is difficult because there are variables that are not always able to be predicted reliably.

[14] So far as income was concerned, Mr [Pietersen] was challenged about his income. In submissions it had been said that the income used in the South African

assessment was based on incorrect information. This is at paragraph 5a of the submissions of Miss Campbell. The payslips used showed income of \$1306 and \$1667 weekly. The assertion Mr [Pietersen] made is that his income could only be stated to be \$930.11 weekly and he attached as Exhibit A various payslips to demonstrate that point, each of which correctly identifies his pay for that week as being \$930.11; however, that is merely Mr [Pietersen]'s basic salary or basic entitlement predicated on a routine 40-hour week. It emerged clearly, both from a calculation based on the year to date earnings which demonstrated that the average weekly entitlement over the year to that point exceeded \$930 and the bank statements showing the actual payments of salary entitlements over key periods, that there are two key variations to the sum Mr [Pietersen] receives, the first of which relates to overtime. He acknowledged that overtime occurred when there were pressures at work and when required by his employer. I accept from him that it is not guaranteed but does occur from time to time and supplements his income over and above his routine or base salary.

[15] I also observe here that there were times when Mr [Pietersen] received lesser entitlements because leave without pay was required but they did seem quite aberrant inasmuch as they were at times when he was required to travel out of the country for reasons relating to his mother's health and subsequent passing so I do not consider there are likely routinely times when Mr [Pietersen] earns less than the base salary and that was not his evidence.

[16] The second aspect which relates to variations in his income is in circumstances where he is required by his employers to work out of the Christchurch area and there are allowances payable. The exact amount of those allowances and the basis on which they are paid was not particularised, but it is clear from the evidence that there are times, indeed routinely times, over the early part of this year covered by the statements¹ that there was a regular pattern of travel outside of Christchurch and supplementary income as a result. Mr Dravitzki prepared a schedule January through April inclusive documenting the total sums received and averaged the earnings. I am not confident that accurately reflects the net earnings after the costs associated with

¹ provided as Exhibit C in the affidavit evidence of [name deleted] which are bank statements from Mr [Pietersen]

residing out of the area but Mr [Pietersen] did concede that there was a profit to be made or a surplus achievable between the allowance paid and the costs he incurred and the bank statements highlight the regularity of trips away and he acknowledged that they do come without being entirely predictable. They also highlight that at key times when he was away there were other expenses such as Air B&Bs or similar associated with a cost to him of being outside of the area.

[17] A summary of Mr [Pietersen]'s taxable income for the 2018/2019 year was provided and incorporated at times when he was employed by other employers than his current employer, but they are a guide to his anticipated earnings in this industry.² They demonstrate that his taxable earnings, and in that regard I have assumed that the money received from the allowances would be non-taxable and that the only deductions made from his taxable income are the PAYE deductions because he is not a KiwiSaver, show that he earned just in excess of \$72,000, a combination of \$24,938 from one employer and \$47,381 from his current employer and that from that tax deductions of approximately \$16,000 were deducted, leaving a net sum received of \$56,000 which, plainly, is a weekly entitlement of something in excess of approximately \$1,070.

[18] I have used approximations and rounding rather than trying to be mathematically exact because I accept from Mr [Pietersen] there are variations. It is not possible to be confident that there will be work out of town. It is not possible to be confident that there will be overtime in any particular week or period of time but consistently, as demonstrated by the bank statements, I accept that has occurred and may occur again in the future such that the base earnings are not an accurate reflection of his capacity or, indeed, his anticipated earnings and that there is likely to be excess earnings on average over and above the \$930 so there is the income aspect of the calculation which I think is understated in Mr [Pietersen]'s evidence.

[19] The other aspect that needs to be scrutinised is the question of expenses. As I have outlined, Mr [Pietersen] attempted to prove by Exhibit B a weekly budget that allowed for rent at a rate which is not currently payable on a consistent basis and

² Exhibit C of the affidavit of 26 August

Mr Dravitzki demonstrated that the sum payable is close to \$100 a week rather than \$150. However, I acknowledge that Mr [Pietersen] has aspirations to have his own property and if he were to do so his outgoings would be higher than that and might reasonably be higher than that in that the desire to live in his own accommodation is not an unreasonable desire and is something that he has done in the past so there are aspects to predicting the future that require some latitude around how much the outgoings will be.

[20] There was criticism of the car finance. A vehicle was purchased on finance in February of this year and incurs a \$214 outgoing on a weekly basis. Mr [Pietersen] said he did not know of the maintenance application at the time he incurred that expense and did so to have a reliable motor vehicle for his work purposes. It is easy to be critical in the knowledge now that that outgoing impacts adversely on his capacity to pay child maintenance, but I do not think it was incurred for that reason. The total finance package for the vehicle involved a purchase price of something in the order of \$18,000 and financing charges to the company. It is not apparent that can readily be changed, and it will apply for the foreseeable future.

[21] Mr [Pietersen] did acknowledge that the personal loan claimed to the BNZ had now been repaid and that was plainly to be anticipated, reading his schedule. That adds a further surplus of \$80.76 to his weekly budget and without trying to line by line itemise all of the expenses or identify expenses that were not captured because there were some, for example, while there is road user costs and there is nothing allowed for registration, warrant of fitness or maintenance of a motor vehicle, and there is very little allowed for personal expenditure, clothing or other matters of that kind and Mr [Pietersen] made the point that he does not drink alcohol at all although whether that is a health or a financial decision was not clear.

[22] The short point is that the budget is an attempt to identify his general levels of expenditure, but it is not possible to be precise to a point of a mathematical certainty. One item that was clearly overstated, and acknowledged to be so, was the \$200 a week spent on food as claimed. It was difficult to reconcile that with the bank statements and identify where \$200 was spent and Mr [Pietersen] was frank to concede that more like \$100 was his weekly food budget.

[23] There is plainly within that scope for increased income above that which Mr [Pietersen] has acknowledged and based his calculation on and variations in the levels of expenditure, there is capacity for them to be increased. For example, if the current renting arrangement was to run its course but there are also some are likely overstated or have run their course such as the food expense and the loan. Rudimentary calculations suggests that the additional funds from the food and the saving on the loan would seem enough to meet the obligation of 8,500 rand per month which calculates to be about \$899 monthly but, as I have said, that does not tell the whole story of variations in expenditure, changes in lifestyle and the aspect where I am satisfied there is some uncertainty about whether income will increase, although that has been a pattern in the past.

[24] A further factor which was not apparent from the affidavits is that Mr [Pietersen] does hold assets in South Africa – a home property. While the value of that property is disclosed, the circumstances that he is in possession of it effectively and renting it out with the rental meeting the outgoings, was not so clear. To his income, notionally at least, should be added the rental income and to his outgoings notionally in terms of assessing his overall circumstances, the outgoings, but that was not done in the papers.

[25] I accept that Mr [Pietersen] has some responsibility to establish to my satisfaction on balance that the amount payable is in excess of his capacity to pay but also accept that there is a broader issue as to what is just as between the parties and Mr Dravitzki's calculations of his income and available means I think overstates the situation and Mr [Pietersen]'s own calculations understates it.

[26] The comparable child support calculations have been done by the parties and I am told, and I accept because it is not contentious, that the calculation based on Mr [Pietersen]'s state of income would see a payment of \$556.80 payable monthly. If the income were as high as \$80,000 it is said that the payments would increase to \$802 and I consider that to be a useful comparator to assist in determining the level at which payments should be fixed. I am satisfied that some reduction from the \$899 that is payable based on the 8500-rand payment is appropriate but not to the level suggested by Mr [Pietersen]. That is plainly not made out on the evidence.

[27] I come to the view that the amount payable on a monthly basis should be \$640 monthly. I consider that is both manageable and reasonable having regard to the variability of income and expenses as claimed. In addition to that, I consider the sum of \$160 per week should be payable on account of arrears, those arrears being calculated at a rate of \$640 per month from and including 26 February 2018.

[28] I direct that Mr [Pietersen] make an immediate payment of \$550 because he tells me he has put aside those funds for that purpose and that be deducted from the arrears. The first payment should start one month from today.

[29] I have just consulted with counsel and, in addition to the orders that I have made which are payment of \$640 monthly and \$160 on account of the arrears, I make it plain that should Mr [Pietersen] sell his property at the address specified, which is [address deleted], that any net proceeds would be applied towards payment of any then outstanding arrears. I make it plain that it is if and when the property sells. I am not able to make an order for the sale of the property.

[30] I consider in the circumstances that Mr [Pietersen] has achieved a measure of success and I am not minded to make an order for costs. There will be no order for costs as between the parties but neither do I award Mr [Pietersen] costs because although he is obliged to pay more than what has been proposed I consider more is achieved by applying what funds he has to the payment of the outstanding maintenance than by cost orders.

[31] I am very grateful to counsel for the submissions. They have been helpful by both Miss Campbell and Mr Dravitzki.

M J Hunt
Family Court Judge