

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 013673/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 15 FEBRUARY 2023

SIGNATURE:

In the matter between:

L[...] R[...]

APPLICANT

And

R[...] D[...] R[...]

RESPONDENT

JUDGMENT

Coram NOKO AJ

Introduction

[1] The applicant brought an application in terms of Rule 43 of the Uniform Rule of Court for an order for interim maintenance for herself and the parties' two minor children. Contact of the minor children be regulated as suggested. The applicant has further sought an order for contribution towards legal costs.

Background

[2] The parties are married to each other out of community of property subject to accrual system and were married on 23 April 2023. There are two minor children

born out of the marriage, both girls, aged 9 and 3 respectively. The applicant commenced divorce proceedings which are currently pending.

Arguments before this court

The applicant submitted that both parties are employed and the applicant is employed as an administrative assistant with a nett salary of approximately R11 353,48. On the other hand the respondent is employed as a divisional manager and is earning R69 302.13 per month. The respondent is further receiving bonuses and fringe benefits. In addition, the respondent receives dividends to the tune of R10 000.00 from the two million rands investment. The respondent's salary will increase to R89 000.00 in 2023. In view of the differential in salaries, though the parties contributed to the household expenses, the respondent has been a breadwinner for the family. Ordinarily the applicant's salary would be paid into the respondent's bank account and the latter would transfer same into his credit which the respondent will use to pay for the household expenses. To this end the applicant was therefore not actively in charge of the parties' finances. The parties have now separated and the respondent is not properly carrying out his responsibilities towards the family. His payments on monthly basis are insufficient and erratic.

Contact and Primary residence.

[3] The parties had and arrangements between themselves regarding visitation and access to the parties' minor children by the respondent. The applicant's counsel contended that the prayer with regard to the regulated visitation or contact is not necessarily in dispute except to state that the respondent prefers that the parties' current *ad hoc* arrangement should remain. This arrangement is not suitable for the applicant and the applicant will wish that it should be fixed by the court. The applicant request that respondent should exercise his right of contact once a week for three and half hours, every alternative weekend for four hours on Friday, 12 hours of Saturday and 10.5 hours on Sunday. In addition, that the children should not sleep over at the respondent's house as the children are still young and had a previous experience where one of the children was unhappy whilst with the respondent and insisted on being returned home immediately. The parties are not

averse to the suggestion that the office of the family advocate should be approached to assist the parties with the regard to parental plan.

[4] On the other hand, the respondent submit that the *ad hoc* arrangement should remain and this would not rudely interfere with what the children are accustomed to. In the alternative the arrangement should be that the right of contact be exercised by having children being picked up on alternate Friday afternoon between 16h00 and 16h30 and be returned to the applicant on Sunday afternoon at 16h00 or such later time as the applicant may require.

Maintenance for the minor children and the applicant.

[5] The applicant contended she requires the respondent to a monetary contribution in the sum of R15 000.00 and the respondent is currently only paying amount of R12 000.00 of one of their two minor children. Having regards to the expenses as detailed in the list attached to the papers it is axiomatic that the applicant needs financial assistance from the respondent. The items on the list have not been attacked or challenged by the respondent. The fulcrum of the respondent resistance to the application hinges on the contention that the parties should contribute equally to the household expenses. This contention is untenable, so contended counsel for the applicant, as there is plethora of authorities which decreed that contribution to the parties' expenses should have regard to the disparities in terms of their respective earnings. In this regard the respondent's contribution should at least be 89% of the total expenses.

[6] The counsel for the applicant further contended that respondent is well financially resourced to pay for the expenses for which the applicant requires assistance with. One should have regards to the list of expenses submitted by the respondent from which it is clear that there is a surplus of R46 000.00. The respondent is staying alone but has unreasonable and unnecessary expenses which includes golf membership of 1500.00 per month, domestic worker and a gardener. The applicant on the other hand enjoys no such luxuries. The respondent in this regard offered to pay R2 715.61 per child per month which amount shall escalate on

anniversary of the divorce date. He will also pay 50% of O[...] J[...]’s school fees and also settle the unforeseen emergencies.

Contribution towards legal costs.

[7] The applicant further contended that she requires the respondent to make contribution for her legal costs in the amount of R50 000.00 in two equal instalments. The applicant has noted that the respondent has already paid his attorneys for the legal costs in the sum of R178 000.00. in support of this claim the applicant has attached a pro forma statement of account from her attorneys.

[8] The respondent on the other hand contended that it is early at this time for the applicant to request contribution to the legal costs and in any event, so went the argument by the respondent’s counsel, authorities held that legal costs contribution in terms of rule 43 does not apply to costs already settled.

Legal analysis

[9] The provisions of Rule 43 when read with section 1 of the Divorce Act afford the court the powers to make orders for the primary residence and contact of the minor children, contribution to legal and maintenance *pendete lite* and contribution to legal costs. The order which may be granted for maintenance in terms of Rule 43 applications is predicated on the determination whether there is a need for payment of maintenance¹ and further as whether the respondent can afford.

[10] The court would ordinarily be invited to decide the issues in dispute between the party on the strength of evidence presented before it. Such evidence will not be interrogated intensively and may have to be assessed as they are presented. The disputants would therefore not always declare the information for the court to comprehensively make a decision. Spilg J observed in this regard in *Sc, R v Sc, L*, (20976/2017) [2018] ZAGPJHC (28 February 2018) 30 *that “[T]he mere fact that a*

¹ The court in *Taute v Taute* 1974 (2) SA 675 (E) at 676, has restated that “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”.

party claims to earn a salary and produces a payslip or even IRP5 form tells a court very little unless it is self-evident that he or she is strictly a wage earner with no personal connection to the employer”.

[11] The obligation to provide maintenance is in terms of section 18(2)(b) of the Children’s Act and right of contact is as set out in section 18(2)(c).

[12] The facts presented before the court clearly demonstrate that the applicant requires maintenance and the respondent can afford same. The respondent has at all times been the majority contributor to the sustenance of the family. The disparities in their salaries unsettles the contention advanced by the respondent that the parties should equally be liable to the expenses for the minor children. In the circumstances the said argument is unsustainable. The respondent has set out his expenses in annexure B of the financial disclosure form and still persist that with position that the expenses related to the children should be equally shared between the parties. The assessment and determination of the fair amount would have to, as per court’s discretion, take into consideration that the respondent has a second house which may require him to pay for some expenses and to this end the amount required by the applicant may not be necessarily be ordered as requested.

[13] There is no sufficient evidence presented by the applicant that the respondent’s right of contact should be restricted as submitted. The applicant having argued that there was an incident during which the children had to be urgently picked up from the respondent. The applicant has failed to demonstrate the circumstances relating to this incidence which (circumstances) would have been a basis for an order restricting access by the respondent. The request by the applicant in this regard is therefore unsustainable.

[14] The contention by the respondent that it is early for the applicant to seek contribution for legal costs is not founded on any persuasive legal basis advanced. In addition, the contention by the counsel that there are authorities which held that the

legal costs already settled are not per se definitive of the issue. There are other authorities² providing to the contrary.

Conclusion

In consequence, I make the following order:

1. The respondent shall exercise the right of contact by picking up the children on alternate weekends from 16h00 on Friday and return the children to the applicant on Sunday at 16h00. This order would be effective commencing the weekend of 24 the February 2023.
2. The respondent shall contribute amount of R30 000,00 (thirty thousand rands) made in three equal instalments into the bank account which the applicant shall nominate in writing. The payment shall be without deduction or set off. The first payment shall be on 31 March 2023.
3. The respondent shall pay 100% of the school fees of and further pay the applicant amount of R5000.00 per child per month, with effect from 28 February 2023.
4. The respondent shall pay amount of R10 000.00 per month in respect of the maintenance of the applicant, with effect from 28 February 2023.
5. The maintenance amount shall increase annually each year in accordance with the percentage increase in the headline of the Price Consumer index as published by Statistics South Africa during the preceding year.
6. The respondent is ordered to pay the costs of this application.

² See the reportable judgment in *AF v MF* (6664/19) [2019] (WC) (28 August 2019), where Davis AJ after considering various authorities held at para 55 that “since I can see no justification for an arbitrary rule that a wife cannot be awarded all the legal costs which she reasonably requires to present her case, I would have been inclined to order a contribution in the amount of R793 632 to cover the whole of the wife’s arrear legal costs. However, since the wife has only claimed a contribution of R750 000 for her costs, that is the amount which I will award”.

Noko AJ,
GAUTENG DIVISION, PRETORIA

APPEARANCES

Applicant	:	Adv B Bergenthuin
Attorneys	:	Du Preez Inc Attorneys, Pretoria
 Respondent	 :	 Adv C Ascar
Attorneys	:	Soldatos Cooper Inc, Johannesburg
 Date of hearing		 16 January 2023
Date of judgment		15 February 2023.