

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

CASE NO: 38304/21

- (1) REPORTABLE: **YES** / NO
(2) OF INTEREST TO OTHER JUDGES: **YES**/NO
(3) REVISED: NO

DATE: 21 February 2023

In the matter between:

G[....] R[....]1(born N[....]). APPLICANT

And

R[....] P[....] R[....]2 RESPONDENT

JUDGMENT

Coram NOKO AJ

Introduction

[1] The applicant brought an application in terms of Rule 43 of the Uniform Rules of Court for interim orders for maintenance for the applicant and the two children, contribution to legal costs and that the primary residence of the parties' minor child be awarded to the applicant subject to the respondent's right of reasonable contact with the minor child.

Background

[2] The parties were married to each other in terms of customary rites in 2008 and subsequently entered into a civil marriage which marriage still subsists. The applicant commenced divorce proceedings which have, at the stage of hearing of the Rule 43 application, reached *litis contestatio*.

Arguments before this court

[3] The applicant's counsel submitted that the applicant is no longer persisting with the prayer for primary residence and reasonable contact for the minor child since the parties still reside together. The maintenance for the children includes the major child who was born of a relationship between the applicant and the third party. The prayers as set out in the notice of motion are as follows:

(1) *That both parties retain parental responsibilities and rights in respect of the minor child M[....] S[....] R[....]3, subject thereto that:*

1.1 primary residence and care of the minor child shall be with the Applicant.

1.2 the Respondent shall be entitled to reasonable contact with the minor child at all reasonable times.

(2) *That the Respondent be ordered to contribute as follows to the maintenance:*

2.1 By making payment of maintenance to the Applicant for herself, the minor child and the major child in the amount of R50 000.00 per month on or before the first day of every month;

2.2 By retaining the Applicant, the minor child and the major child on the current medical aid membership of the Respondent and by making payment and by bearing all the medical expenses incurred in private healthcare in excess of the cover provided by any medical aid scheme or hospital plan of which the major child is a member, such costs to include all medical, dental, pharmaceutical (including levies), surgical, hospital, orthodontic and ophthalmic (including spectacles and/or contact lenses), physiotherapeutic, psychotherapeutic, occupational therapeutic, homeopathic, chiropractic and similar medical expenses which are not covered by the medical aid scheme. The Respondent shall reimburse the Applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the Applicant providing the Respondent with proof of payment and/or the relevant invoice.

2.3 By making payment of all reasonable expenses incurred in respect of the minor child's education, such costs to include, without limiting the generality of the foregoing, all school fees (at a private school), holiday-care fees (including holiday camps and similar activities), additional tuition fees, as well as the costs of any extra-curricular school and sporting activities (including school tours, eisteddfods, trips and outings) in which he may participate, as well as the costs of all books, stationery, school uniforms, equipment (including computer hardware and software, printer hardware and software and electronic devices reasonable required by him) and attire relating to his education and/or the sporting and/or extra-mural activities engaged in by him. The Respondent shall reimburse the Applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the Applicant providing the Respondent with proof of payment and/or the relevant invoice.

2.4 For so long as the major child, L[....] S[....]N[....], applies himself with due diligence and continues to make satisfactory progress, by making

payment of all reasonable expenses incurred in respect of the major child's tertiary education, such costs to include, without limiting the generality of the foregoing, all university fees and/or fees due to an institution for higher learning attended by the major child, tuition fees, as well as the costs of, but not limited to, the costs of all books, stationery, equipment (including computer hardware and software, printer hardware and software and electronic devices reasonable required by him). The Respondent shall reimburse the Applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the Applicant providing the Respondent with proof of payment and/or the relevant invoice.

(3) That in addition to the foregoing, the Respondent be ordered to pay:

3.1 The rates and taxes and municipal imposts in respect of the immovable property situate at [...] M[...], R[...], M[...];

3.2 The electricity costs in respect of the electricity supply to the aforesaid immovable property;

3.3 The water costs in respect of the water supply to the aforesaid immovable property;

3.4 The internet charges in respect of the supply thereof to the aforementioned immovable property;

3.5 The DSTV and Netflix charges in respect of the aforesaid immovable property;

3.6 The costs in respect of the residential access gate relating to the aforesaid immovable property;

3.7 The costs of ADT security/alarm system to the aforesaid immovable property;

3.8 The motor vehicle insurance costs in respect of my Mercedes Benz motor vehicle, as well as L[...]'s VW Polo motor vehicle.

(4) That the Respondent be ordered to make an initial contribution towards the Applicant's legal costs in the sum of R50 000.00.

(5) *That the costs hereof be costs in the divorce action.*

[4] The applicant has been unemployed since 2017. She has tried businesses but same could not succeed. There was never a pressure for her to look for employment as the applicant has always been gainfully employed and able to maintain the applicant and the children. The respondent has been paying for all household related expenses and also paid her amount of between R28 000 and R32 000 per month for her personal needs. In addition, the respondent gave the applicant Absa credit card for her unrestricted use. The respondent has also paid for the expenses related to the schooling of the major child. Though the husband is gainfully employed he has decided not to continue with his responsibilities associated maintenance hence the application in terms of Rule 43 was launched.

[5] The counsel further stated that in one of the parties exchanges the respondent sent a WhatsApp text to the applicant where he stated that he will no longer be making available financial resources for the applicant until the divorce is finalised. Subsequently the respondent stopped providing the applicant with cash and lo and behold the medical aid fund rejected the claim submitted in respect of the medical treatment received by the applicant.

[6] The counsel further submitted that the respondent has sufficient means to provide for the needs of the applicant. The respondent's business is to provide services to government departments mostly in respect of tenders secured by his company. The parties have purchased in cash a matrimonial home worth 4 million Rand. He has improved the said property to the value of R100 000,00 (one hundred thousand Rand) and has purchased furniture to the value of more than 1 million Rand. This information was not objected to by the respondent in his answering affidavit. One would also deduce from the money the respondent is spending as indicated in the bank statements that he is a man of attractive means. Further that the respondent occasionally pays his siblings, his mother and girlfriend cash. He is an extravagant buyer and is also into expensive brands clothing. This includes a perfume he purchased for R7 000.00.

[7] The applicant's counsel contended further that the argument by the respondent that there is no legal obligation to maintain the major child as he has, *inter alia*, not adopted him is unsustainable. The respondent has been maintaining the child without any qualms since 2018 after the biological father stopped contributing to his maintenance.¹ In fact since there is a legal obligation on the applicant to maintain the child and as she is married in community of property to the respondent the latter is indirectly contributing to the maintenance for the said major child.

[8] The counsel for the applicant further submitted that the respondent has been less than candid with the court claiming that he is only receiving a monthly salary of R40 000.00 and at the same time stating that he has monthly expenses to the tune of R68 584.40. The court is invited to take a dim view thereto and draw a negative inference from the respondent's inability to demonstrate how does he afford to pay off the excesses more particularly as such amount excludes the amount of R28 000.00 which was paid monthly to the applicant and some of his monthly payments to third parties including his girlfriend.

[9] The respondent on the other hand contended that the applicant's list of expenses appears to be too luxurious and unnecessary. Further that the respondent is staying with the applicant in the same house and is paying for the household expenses, including but not limited to, levies and municipal accounts and to this end there is no basis for the applicant to approach court for the order as set out in the application launched before the court. Further that though there was a WhatsApp message alluded to, the said message should be taken in context. It was in reply to the applicant's sentiments where she stated that the respondent will end up in jail. It was further a coincidence that the medical aid rejected a claim lodged in respect of medical treatment she received. According to him the debit for the monthly premium for the medical aid was dishonoured as there were no funds in the respondent's bank account. He has subsequently

¹ The respondent's heads of argument stated that "*the respondent contend that he only assisted the applicant with her major dependent son's expenses in order to assist her in taking care of her child*".

made the payment and the medical aid has now been reinstated. In any event, so contended the respondent's counsel, the applicant can still secure a lucrative employment.

Legal analysis

[10] The order which may be granted in terms of Rule 43 applications is predicated on the determination whether there is a need for payment of maintenance² and further as whether the respondent can afford it. It is not in dispute that the parties though involved in a divorce proceedings are still residing together. Further that the applicant is unemployed and the respondent has been a bread winner at all times. In fact, the respondent conceded that he has been paying for all household expenses and is still prepared to proceed with payments.

[11] The respondent who is a civil engineer and the chief executive officer of a private company stated that his income is R40 000,00 per month and his expenses are well over R68 584.00 per month. It appears that the respondent was indeed less candid with the court in this respect but he failed to take the court into his confidence and explain how he pays for the excess. Spilg J observed in this regard in *SC v SC* (20976/2017) [2018] ZAGPJHC 30 (28 February 2018) that

“[T]he mere fact that a party claims to earn a salary and produces a payslip or even an 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”.

The respondent in this case has a personal connection with the employer.

[12] At the glance on the bank statement of the records of transactions in the business accounts of the respondent it appears astounding for the respondent

² 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.”

to contend that the applicant should look to her parents for maintenance. This confident but ill-informed suggestion is being made despite evidence which demonstrate that the respondent appears to be a philanthropist who occasionally pay his parents, siblings and girlfriend some thousand rands.

Maintenance in respect of the applicant and the children.

[13] The applicant is unemployed and the respondent has always been a bread winner and responsible for the financial needs of the family. It is noted that according to the respondent the applicant is employable but at this stage she is unemployed. It is expected that the applicant is likely to start looking for employment as the parties would be divorced and the respondent would also be having a new household to maintain. The respondent in the meantime has an obligation to provide maintenance and this may change once the applicant is employed during the operation of the interim order. The applicant alleges that she was receiving an amount of between R28 000.00 and R30 000.00 per month and unlimited usage of the credit card and now request R50 000.00 per month which includes monetary contribution for the children's maintenance. There appears to be no basis for the amount to increase since the respondent's counsel confirm that the respondent would still be able to contribute R5 000.00 per month for each child. To this end the reasonable amount should be R25 000.00 per month to the applicant and amount of R5 000.00 per month for each child.

[14] The respondent should also keep the applicant and the children on the medical aid.

Educational expenses for the parties' child and applicant's major dependent.

[15] The respondent has confirmed that he has always gave his minor child cash and has never stopped. In this regards counsel for the applicant submitted that the respondent should further contribute to expenses for the parties' minor child reasonable educational expenses and the school fees.

[16] Under common law a step-parent has no legal duty of support in respect of the step children. Reference was made to two judgments³ in *Heytek v Heystek* that a step-father who is married in community of property has an obligation to maintain the step child in his capacity as administrator of the joint estate and his control of the common purse.⁴ The emphasis on those judgments was the fact that the parties are married in community of property and it follows that such an obligation to pay maintenance may not follow when such parties are divorced. It is understood that the step child's upbringing and maintenance is the responsibility of the applicant and the child's biological father. It is quite curious why the applicant in this case or even the respondent were both content that the biological father is not discharging his responsibilities and pay maintenance for his child. If anything, they have themselves to blame. The applicant's failure to provide any explanation to allow the major child's father not to pay is unfathomable except to say that the applicant is taking advantage of the respondent and at the same time the respondent is happy to oblige. That notwithstanding the liabilities for the applicant indirectly becomes liability for the joint estate. To this end the respondent indirectly is liable and as set out above on the basis that he is the administrator of the joint estate. In the end the respondent should be ordered to also contribute towards maintenance of the stepchild for a period of 6 months during which period the applicant should ensure that the biological father carry out his obligations to pay for maintenance of his child. The authority cited by the respondent in *MB v NB* 2010 (3) SA 220 (GSJ) is distinguishable and does not in any event upset the decision of the Appellate Division.

Applicant's locus standi

[17] The respondent further contended that the applicant has no *locus standi* to launch an application on behalf of the major child. The latter would have to bring a separate legal action against the respondent in his personal name unless in the proceedings the major child is joined alternatively that the said child should

³ *Wilkie-Page v Wilkie-Page* 1979 (2) SA 258 (R) and *Mentz v Simpson* 1990 (4) SA 455 (A) at 460 C – D.

⁴ See *Heystek v Heystek* 2002 (2) SA 754 (T) at 756E – I. This case was distinguished in *MB v NB* 2010 (3) SA 220 (GSJ) which was a divorce matter and the obligation to pay was contractual rather than an issue of maintenance and not a duty to support *pendente lite*.

have signed a confirmatory affidavit. A decision to the contrary would tantamount to sanctioning the abrogation of the rights of the adult dependent to launch legal process by himself. The applicant contended that in the circumstances of this application the applicant does have *locus standi*.

[18] The foregoing stance is fortified by the understanding that whilst the parents have a duty to pay maintenance of their children in terms of section 18(2)(d) of the Children's Act such children would become adults on reaching the age of 18 in terms of section 17 of the Act. However in contrast, section 6(1)(a) of the Divorce Act provides that a decree of divorce shall not be granted until the court is satisfied that the provisions made in respect of minor or dependent children are acceptable under relevant circumstances. Section 6(3) of the Divorce Act provides that the court may make an order of maintenance in respect of a dependent child as it deems fit.

[19] The same issue was raised in *Butcher v Butcher* 2009 (2) SA 421 (C) where a party seeking maintenance on behalf of an adult dependent would not have *locus standi* except that where such a claim is part of the general household expenses, e.g. food and grocery at a family home. It would therefore be unnecessary for a separate legal process to be pursued by such an adult dependent. The reasoning of the court in *Butcher* was considered by the court in *JG v CG* 2012 (3) SA 103 (GSJ) where it was held that on proper interpretation of the provisions of Rule 43 read with ss 6 and 7(2) of the Divorce Act and the common law the maintenance order should not only be limited to the expenses related to household but may relate to expenses which relates specifically to the adult dependent child. I align myself with the conclusion reached in *JG's* judgment that the issue of *locus standi* would not be an impediment against the proceedings being launched by a parent of an adult dependent. Even if such reasoning may be found wanting the Divorce Act as set out below does not make it a prerequisite that order for maintenance of a child should only be brought by an adult dependent.

[20] The court in *JG*'s judgment further reasoned that the order made in terms of Rule 43 would ordinarily be orders which bind the child and may still pursue the errant parent hence non-joinder cannot be an impediment to the applicant.

[21] There appears to be a contest between statutory provisions in the Maintenance Act and Divorce Act since the former seems to extinguish the liability to pay maintenance once a child becomes a major whereas the latter suggest the court is authorised in a divorce proceeding in its own discretion to make an order for maintenance to a minor or dependent child. (emphasis added). Ordinarily a child whether a minor or an adult dependent is not a party cited or joined in divorce proceedings (or process *pendente lite*⁵) and to this end it must follow that the parties in the divorce proceedings would be clothed with authority to pursue a prayer for maintenance for a dependent child. If the order which can be granted in terms of section 6 of the Divorce Act was only available to be granted to the dependent major provided that latter is party to *lis* such a provision would have clearly spelt this out in the section more particularly because Rule 43 is generally only launched by divorcing parties. Any contrary interpretation would imply that the order as envisaged in section 6(1)(a) or 6(3) of the Divorce Act would not be given effect to. By virtue of divorce proceedings being ordinarily acrimonious it would then defy logic that children be sacrificed on alter of jurisdictional formalism. It therefore follows that the arguments advanced on behalf of the respondent are unsustainable.

[22] The confusion of different perspectives on the question of *locus standi* of the parent in claiming maintenance for an adult dependent was arrested and settled by the SCA in *Z v Z* (566/2021) [2022] ZASCA 113 (21 July 2022) where it was held at para [22] that

“An interpretative analysis, therefore, leads to the inevitable conclusion that ss 6(1)(a) and 6(3) of the Divorce Act vest parents with the requisite legal standing to claim maintenance for and on behalf of their dependent adult

⁵ Section 1 of the Divorce Act provides that the “divorce action” means an action by which a decree or other relief in connection therewith is applied for, and includes – (a) an application *pendente lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for payment of maintenance.

children upon their divorce. Given the words used in their ordinary grammatical meaning, properly contextualised, and the manifest purpose of s 6, an interpretation that preserves its constitutional validity is reasonably possible”.

Household expenses

[23] The respondent has admitted that there is no basis for the applicant to seek an order for payment of the usual monthly expenses for the household and he is paying for them. There is merit in this contention and therefore by consent the respondent is ordered to pay for all expenses related to matrimonial home. These will include, rates and taxes, water and electricity, grocery and households' products (as accepted by the Respondent) to the value of R8 000.00, domestic helper, car and household insurance, security service, WIFI, DSTV and gardener.

Legal costs

[24] The request for contribution to legal costs falls to be a liability arising from the marriage. In any case section 9(1) of the Constitution of the Republic of South Africa, Act 108 of 1996 guarantee the parties' rights to equality before the law and equal protection of the law.⁶ It is required that the applicant should be able to demonstrate to court that she has insufficient means to pursue the action and further she has a *prima facie* case and at the same time that the defendant has no good grounds to the action.⁷ In addition it is not expected of the respondent to pay all the anticipated costs but there must at least be a substantial contribution towards them.⁸

[25] It has already been stated that the applicant is unemployed and it follows that she has no sufficient means to sustain the legal battle. The contribution as requested by the applicant is the sum of R50 000.00.

⁶ See Erasmus Superior Court Practice

⁷ *Jones v Jones* 1974 (1) SA 212 (R)

⁸ *Nicholson v Nicholson* 1998 (1) SA 48 (W)

Primary residence and Contact for the minor child

[26] The parties are in agreement that it is not appropriate for a costs order in this regard since they are both residing in the same house and this prayer would therefore not be considered.

Conclusion

[27] In the circumstances, and on the basis of the reasons set out above, the following orders are appropriate.

1. Pending the determination of the divorce action between the parties, the respondent shall maintain the applicant and the children as follows:

1.1. by payment to the Applicant for herself an amount of R25 000.00 (twenty five thousand Rand) per month with effect from 1 March 2023, without deduction or set off on the first day of every month, by way of electronic funds transfer or debit order, into an account as the applicant may nominate from time to time.

1.2. by payment to the applicant for the two children amount of R5 000.00 per month per child with effect from 1 March 2023, without deduction or set off on the first day of every month, by way of electronic funds transfer or debit order, into an account as the applicant may nominate from time to time.

1.3. by retaining the Applicant, the minor child and the major child on the current medical aid membership of the respondent and by making payment and by bearing all the reasonable medical expenses incurred in private healthcare in excess of the cover provided by any medical aid scheme or hospital plan of which the major child is a member, such costs to include all medical, dental, pharmaceutical (including levies), surgical, hospital, orthodontic and ophthalmic (including spectacles and/or contact lenses), physiotherapeutic, psychotherapeutic, occupational therapeutic,

homeopathic, chiropractic and similar medical expenses which are not covered by the medical aid scheme. The Respondent shall reimburse the Applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the Applicant providing the Respondent with proof of payment and/or the relevant invoice.

1.4. by making payment of all reasonable expenses incurred in respect of the minor child's education, such costs to include, without limiting the generality of the foregoing, all school fees (at a private school), holiday-care fees (including holiday camps and similar activities), additional tuition fees, as well as the costs of any extra-curricular school and sporting activities (including school tours, eisteddfods, trips and outings) in which he may participate, as well as the costs of all books, stationery, school uniforms, equipment (including computer hardware and software, printer hardware and software and electronic devices reasonable required by him) and attire relating to his education and/or the sporting and/or extra-mural activities engaged in by him. The Respondent shall reimburse the Applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the Applicant providing the Respondent with proof of payment and/or the relevant invoice.

1.5. by making payment for all reasonable expenses incurred in respect of the major child's tertiary education, such costs to include, without limiting the generality of the foregoing, all university fees and/or fees due to an institution for higher learning attended by the major child, tuition fees, as well as the costs of, but not limited to, the costs of all books, stationery, equipment (including computer hardware and software, printer hardware and software and electronic devices reasonable required by him). The Respondent shall reimburse the Applicant for all expenses so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within 5 (five) days of the Applicant providing the Respondent with proof of payment and/or the

relevant invoice. Payment shall be on condition that the major child, L[....] S[....]N[....], applies himself with due diligence and continues to make satisfactory progress. The payment is further on condition that the applicant make reasonable and active efforts (including but not limited to approach the maintenance court) to ensure that the biological father is requested to pay maintenance for L[....] N[....], and report to the respondent or his attorneys in writing of the said progress every quarter.

By making payment of the following expenses:

1.6. the rates and taxes and municipal imposts in respect of the immovable property situate at [....] M[....] R[....], M[....];

1.7. the electricity costs in respect of the electricity supply to the aforesaid immovable property;

1.8. the water costs in respect of the water supply to the aforesaid immovable property;

1.9. the internet charges in respect of the supply thereof to the aforementioned immovable property;

1.10. the DSTV and Netflix charges in respect of the aforesaid immovable property;

1.11. the costs in respect of the residential access gate relating to the aforesaid immovable property;

1.12. the costs of ADT security/alarm system to the aforesaid immovable property;

1.13. the motor vehicle insurance costs in respect of my Mercedes Benz motor vehicle, as well as L[....]'s VW Polo motor vehicle.

1.14. The respondent is directed to pay in two equal instalments an amount of R25 000.00 (Twenty Five thousand Rand) each as contribution towards the applicant's legal costs, such amount to be paid into the trust account of the applicant's attorneys.

2. That the costs hereof be costs in the divorce action.

Noko AJ,
GAUTENG DIVISION, PRETORIA

APPEARANCES

Applicant's Counsel:	Adv M L Haskins SC,
Applicant's attorneys:	Geniv Wulz Attorneys Midrand

Respondent's Counsel:	Adv S Meyer
Respondent's attorneys:	Ulrich Roux and Associates Sandton

Date of hearing	:	16 January 2023.
Date of judgment	:	21 February 2023.