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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 2022-

023698

NT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

31.08.23

In the matter between:

M E M

Applicant

And

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an opposed Rule 43 application in terms whereof the applicant seeks the following relief *pendete lite*: An order regulating the interim care and residency and interim contact in respect of the 3 minor children.

1. That the respondent be ordered to pay maintenance for the minor children.
2. That the respondent be ordered to contribute towards the applicant's legal costs in the divorce action.
3. That the respondent be ordered to pay the costs of this application.

[2] The detailed relief is as specified in the notice of motion and will be stated in full in due course as it becomes necessary hereunder.

- [3] The 3 minor girls were born on 19 September 2015, 15 February 2018, and 22 July 2020 respectively. They are school going and reside with the applicant.

B. BACKGROUND

- [4] The parties were married to each other on 8 August 2015 in terms of Customary Law.
- [5] On 25 August 2016, after the customary marriage was concluded, the parties signed what purported to be an antenuptial agreement which was registered on 30 September 2016. A copy of the antenuptial agreement is annexed to the particulars of claim.
- [6] The parties never applied to court in terms of section 21 of the Matrimonial Property Act 88 of 1984, for leave to change the matrimonial property system to a marriage out of community of property with the exclusion of the accrual system.
- [7] On 1 March 2017 the parties converted their marriage by virtue of section 10 (1) of the Recognition of Customary Marriages Act 120 of 1998, to a civil marriage in terms of the Marriage Act 25 of 1961.

- [8] The status and proprietary regime of the parties is a matter for the decision of the court hearing the divorce action.
- [9] The parties are no longer sharing a common residence. They each moved to other localities having sold their erstwhile marital home at the end of January 2023.
- [10] The applicant now leases a townhouse in Centurion. It consists of three bedrooms, a kitchen with an open plan lounge and an enclosed garden. The property is located approximately 6.5 kilometers from the children's primary school.
- [11] The monthly rental is R9000.00 and she is in addition responsible for payment of electricity, sanitation, and waste management. Water usage and garden services are included in the rental amount. A copy of the lease agreement is attached.
- [12] The deposit and administration fee, which is payable in the amount of R10 500.00, was paid by the applicant on 12 January 2023.
- [13] The children's nanny has been residing with the applicant and the children since the respondent moved out of the previous shared residence. She is also residing with them at the new leased residence to take care of the minor children whilst the applicant is at work during the day. It was accordingly

necessary for her to obtain a residence with at least three bedrooms as the nanny is occupying one of the bedrooms.

[14] There is currently no structure to the respondents contact with the minor children and he merely notifies the applicant when he wishes to have contact with them. He does not seem to consider the impact thereof on the children's schooling and extramural activities. The respondent furthermore insists on having sleepover contact with the minor children every weekend, which is unreasonable.

[15] The respondent abuses alcohol daily, and it is not in the children's best interest to be with the respondent whilst he consumes alcohol. The respondent becomes verbally and emotionally abusive when he is under the influence of alcohol, and he resorts to shouting which negatively impacts the children.

[16] The applicant has always been the primary caregiver of the minor children and has attended to most of their day-to-day needs by inter alia assisting them with their homework, ensuring that they are fed and bathed, making sure that they are ready for school in the mornings, driving the children to extra-curricular activities, ensuring that they are well taken care of, and that their physical and emotional needs are met.

[17] Whenever she is at work, the applicant leaves the children in the care of a stay-in Nanny, whose salary is paid by the applicant. The respondent has only

began assisting with the children's homework shown an interest in the children during July 2022 when it was evident that the applicant would be proceeding with the divorce action.

[18] The applicant submits that it would be in the best interest of the minor children that interim residency and care be vested with her and that specific parental responsibilities and rights in relation to interim contact be awarded to the respondent as follows:

1. Every alternative weekend, the respondent to collect the children on a Friday at 17h00 and return the children to applicant's residence on a Sunday at 16h00.
2. Every alternative Wednesday afternoon, directly after school and the respondent to return the children to applicant's residence at 17h30 in the evening.
3. That short school holidays alternate between the applicant and the respondent (March and September/October).
4. That long school holidays be equally shared between the respondent and the applicant (June/July and December/January).
5. That Easter holidays rotate annually between the respondent and the applicant (from Good Friday until and including Family Day).
6. Public holidays shall alternate between the respondent and the applicant (other than Christmas, Easter, such public holidays that fall on either a Monday or a Friday or any other public holiday that falls within a school holiday). Should the public holiday fall on either a Monday or a Friday or during a school

holiday, such public holiday will be dealt with as part of the weekend or the school holiday, as the case may be.

7. Irrespective of whose care the minor children are in during a specific contact week:

18.7.1 The minor children shall spend the applicant's birthday with her from directly- after school, alternatively from 09h00 in the morning during a non-school day, until 19h00 that evening.

18.7.2 The minor children shall spend the respondent's birthday with him from directly after school, alternatively from 09h00 in the morning during a non-school day, until 19h00 that evening. The minor children shall spend the weekend on which Mother's Day falls with the applicant from directly after school on a Friday. The minor children shall spend the weekend on which Father's Day falls with the respondent from directly after school on a Friday until Sunday at 16h00.

8. That the respondent's contact with the minor children shall be subject thereto that the respondent is prohibited from consuming any alcohol whatsoever whilst the children are in his care.

9. The respondent will furthermore have daily telephonic contact *via* voice and/or video chat on any available platform with the minor children, which shall be limited to the hours of 18h30 to 19h30, so as not to disturb the children's house and schooling routine.
10. In the event that the respondent is unable to exercise his right to the aforesaid contact, that he affords applicant first option to have contact during the said period(s).
11. The aforementioned right of contact shall be exercised in the best interest of the minor children, and subject to the minor children's educational, religious, social, sporting and extramural activities.
12. The aforementioned rights of contact must be exercised subject to section 31 of the Children's Act and the parties must give due consideration to any views and wishes expressed by the minor children, bearing in mind the minor children's ages, maturity and stage of development.

Applicant's financial position

[19] The applicant is employed as an Analyst at Armscor and earns a net income of R39 246.42. She has submitted a Financial Disclosure Form as required in an application such as this.

[20] According to the applicant, the respondent is only paying the following expenses for the minor children:

1. The two older children's school fees in the total amount of R2 780.00 per month.
2. The youngest child's crèche fees in the total amount of R3 450.00 per month.
3. Swimming lessons for the two older children in the total amount of R900.00. At the time of deposing to the founding affidavit, the applicant had received a statement reflecting that the amounts were in arrears.
4. The two older children's transportation costs to school, of which the total amount is unknown.

[21] The respondent's total current contribution, excluding the transport costs which she is not privy to, amounts to R7 130.00 per month. The applicant submits that this is simply insufficient to maintain the three minor children.

[22] The applicant points out that she is currently paying towards *inter alia*, the children's medical aid, the nanny's salary, school clothes, casual clothes, groceries, toiletries, vehicle instalment and fuel which is necessary to drive the children to extramural activities and the youngest child to and from crèche, outings and pocket money, the children's accommodation as well as water and electricity.

[23] The applicant has listed her expenses as follows:

ITEM	TOTAL
Rental of suitable accommodation	R9 000.00
Electricity, sanitation and waste management	R2 600.00
Salary of children's nanny	R2 500.00 (to increase in May 2023)
Fuel	R3 500.00
Groceries, including cleaning materials	R4 150.00
Clothing and shoes	R1 100.00
Phone / Data for children	R 200.00
Hair care, cosmetics	R1 650.00
Ballet classes for children	R 600.00
Toiletries and personal hygiene	R1 600.00
Entertainment / eating out and home entertainment / pocket money	R1 600.00
Gifts, birthday presents, etc.	R 800.00
Books, newspapers and magazines	R 160.00
Medical Aid and Gap Cover	R2 814.00
Unforeseen medical costs (35%)	R 450.00
Vehicle instalment	R 7 900.00
Netflix	R 159.00
Tracker	R 79.00
Vodacom data	R 199.00
OUTsurance	R1 549.00
Old Mutual life covers	R 869.00
Old Mutual retirement annuity	R 407.19
Pension Fund – Armscor	R3 393.86
Provident Fund – Armscor	R 300
Funeral Plan	R 283.95
Loan	R1 919.55
Credit card	R 500.00
Bank charges and overdraft	R1 100.00
Gym (Planet Fitness + Work)	R 240.00
Internet / Wi-Fi	R 495.00
Vitality	R 465.00
Union membership fees	R 100.00
Dis-chem nappies	R1 034.00
TOTAL	R53 718.50

[24] The applicant refers to the Financial Disclosure Form which she has filed with the court and submits that the minor children's monthly needs are R28 314.17 plus the R7 130.00 which the respondent already contributes, this comes to the actual, fair amount of R35 444.17 (excluding transport costs) for the three minor children.

Respondent's financial position

[25] Since the institution of the divorce action the respondent has been secretive about his financial and social affairs. The applicant has little knowledge of the respondent's financial situation and his financial footing is unfamiliar to her, save to state that the respondent has always managed, without difficulty, to contribute to the common household and the children during the subsistence of their marriage, drives a luxury vehicle, pictures of very expensive clothing and shoes and did not hesitate to spend money on expensive alcohol or entertainment for himself.

[26] The respondent is permanently employed as an executive manager at Transnet and from her discussions with the respondent during their marriage, the applicant got to know that he earns a monthly net income of at least R68,000.00 per month. This excludes yearly bonuses. The respondent's income forms approximately 65% of the household's joint income.

[27] There's content has not filed a financial disclosure form as required.

[28] The applicant contends that the respondent is more than able to meet the minor children's maintenance needs and it is clear from the applicant's disclosure and supporting documentation that she is unable to meet both her own and the children's maintenance needs on her monthly income.

[29] She accordingly seeks an order pending delete whereby the respondent he's ordered to make the following maintenance contributions in respect of the minor children:

1. That the respondent will pay a monthly maintenance contribution of R5 400.00 (Five thousand four hundred Rand) per month per child to enable applicant to purchase clothing, food, pay for over the counter medication (if required), entertainment, extramural activities, medical aid, housing, and all other necessities as required by the minor children monthly.
2. That the respondent will pay 65% of all expenditures in respect of medical, dental, surgical, hospital, orthodontic and ophthalmological treatment required by the minor children which are not covered by the medical aid scheme.
3. That the respondent will pay 65% of all amounts payable to psychiatrist, physiotherapist, occupational therapist, speech

therapist, psychologist, chiropractor, the cost of medication and the provision, where necessary, of spectacles and/ or contact lenses.

4. That the respondent will pay the school fees of the minor children directly to their respective schools.
5. That the respondent will pay for the swimming lessons for M.T and L directly to the applicable institution.
6. That the respondent will pay for the transport to school and back for M.T and L directly to the service provider.

[30] Should these prayers in respect of the maintenance contribution for the minor children be granted, submits the applicant, the respondent's total contribution will be an amount of R23 038.71. That will result in a monthly contribution of R12 406.46 by the applicant. This apportionment would align with the parties' respective incomes.

Contribution towards legal costs

[31] The respondent has raised disputes in respect of the existence of the customary marriage and the validity of the purported and the nuptial contract concluded on 25 August 2016. The applicant has been advised that this will lengthen the divorce hearing to the estimated 3 days, and that it may become

necessary to call experts to testify on the status of the marriage, a liquidator may need to come and determine the respondent's financial position. This will invariably increase the costs of the litigation on the part of the applicant who cannot afford it. She accordingly requires an initial contribution towards the cost of litigation.

[32] The applicant has been given a proforma account by attorneys which amount to R 543 663.38. She therefore asks that the respondent be ordered to contribute to her legal costs in the amount of R80 000.00 which is payable over 4 months in instalments of R20 000.00 per month payable from the 1st day of the month after the making of this order.

C. THE LEGAL PRINCIPLES AND THEIR APPLICATION TO THE FACTS

[33] In *F v F*¹ it was stated by Maya AJA (as she then was), that:

"...Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender based. It is still predominantly woman who care for children and that reality appears to be reflected in many custody arrangements upon divorce...."

[34] The respondent has not provided any information on his living circumstances such as accommodation, daily routine and so forth which would place him in a

¹ *F v F* [2006] 1 SA 571 (SCA) at Paragraph [12].

position to care better for the minor children compared to how they are being cared for currently by the Applicant.

[35] The Applicant has described her living circumstances in her founding affidavit. Namely, that she is renting a house to accommodate the minor children and their nanny who assists her full time with the three minor children. The Respondent has failed to provide any such information to this Court.

[36] The parties have made serious allegations against one another in their submissions, upholding the status quo may be the most ideal situation while a resolution is sought out of this conundrum. The Family Advocate should be directed to investigate and report on the best interests of the minor children, particularly with regards to primary care and residency.

[37] In *S v S and Another* 2019 (8) BCLR 989 (CC) at para 3 the Constitutional Court stated as follows:

"Applicants in Rule 43 applications are almost invariably woman who, as in most countries, occupy the lowest economic rung and are generally in a less favourable financial position than their husbands. Black woman in South Africa historically have been doubly oppressed by both their race and gender. The inferior economic position of woman is a stark reality. The gender imbalance in homes and society in general remains a challenge both for society at large and our courts. This is particularly apparent in application for maintenance where systemic failures to enforce

maintenance orders have negatively impacted the rule of law. It is women who are primarily left to nurture their children and shoulder related financial burden. To alleviate this burden our courts must ensure that the existing legal framework to protect the most vulnerable groups in society, operates effectively."

[38] The Applicant indicates that she incurs large amounts of debts to pay her monthly expenses, which debts and credit facilities she has to service.

[39] The Respondent has not placed his true income and/or assets before this Court and the Applicant is entitled to the relief sought in the light of the fact that the Respondent previously contributed towards the minor children's expenses.

[40] The Respondent's non-disclosure of his full financial position is indicative of the Respondent not taking this Court into his confidence.

[41] From the pleadings, there are disputes raised by the respondent relating to the marital regime and the validity of the marriage itself. This will lengthen the divorce trial.

[42] This resulted in the call for a contribution by the respondent towards the legal costs of the applicant. The Applicant seeks a contribution towards costs in the amount of R80 000.00 which is to assist her in getting to the first day of trial.

[43] In *Cary v Cary*, Donen AJ carefully considered the authorities and the constitutional imperatives involved. He observed at the outset that he was obliged to exercise his discretion under Rule 43 in the light of the fundamental right to equality and equal protection before the law. He reasoned that there should be "equality of arms" for a divorce trial to be fair and came to the conclusion that:

"...applicant is entitled to a contribution towards the costs which would ensure equality of arms in the divorce action against her husband. The applicant would not be able to present her case fairly unless she is empowered to investigate the respondent's financial affairs through the forensic accountant appointed by her. That is, applicant will not enjoy equal protection unless she is equally empowered with 'the sinews of war'. The question of protecting applicant's right to and respect for and protection of her dignity also arises in the present situation where a wife has to approach her husband for the means to divorce him. I therefore regard myself as constitutionally bound to err on the side of "paramount consideration that she should be enabled adequately to place her case before the Court." The papers before me indicate that the respondent can afford to pay the amount claimed and that he will not be prejudiced in the conduct of his own case should he be ordered to do so."

The learned Judge continued:

“The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in financial resources available to the parties to litigate, there is a real danger that the poorer spouse — usually the wife — will be forced to settle for less than that to which she is legally entitled simply because she cannot afford to go to trial. On the other hand the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. In my view the obligation on Courts to promote the constitutional rights to equal protection and benefit of the law, and access to courts requires that courts come to the aid of spouses who are without means to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs. (42] The right to dignity is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow funds for legal costs, or forced to be beholden on an attorney will have to wait for payment of fees — in effect to act as a banker. The primary duty of support is owed between spouses and if a wife who is without means should be entitled to look to the husband, if he has sufficient means, to fund her reasonable litigation costs. (the same of course applies if the husband is indigent and the wife affluent.) And where an impecunious spouse has already incurred debts in order to litigate, whether to family or to an attorney, I consider that a court should protect the dignity of that spouse by ordering a contribution

to costs sufficient to repay those debts (at least to the extent that the court considers the expenditure reasonable) ...

(45) For all those reasons I hold, as a matter of principle, that a court is entitled to take into account legal costs already incurred, including debts incurred to fund legal costs, in the assessment of an appropriate contribution to costs in terms of Rule 43. (50) To my mind logic and fairness dictate that if the wife is indigent and the husband has the wherewithal to fund his own as well as all the wife's reasonable costs, he should be ordered to do so. Since legal costs are covered by the duty of spousal support, there can be no justification for a situation where the husband, who controls the purse strings, pays for all his legal costs upfront, while the wife without means is forced to borrow to fund the shortfall, or to ask her attorney to carry the case without full payment. As I have already mentioned, I consider this an unacceptable impairment of the right to dignity and equal protection of the law.

(51) In my respectful opinion the constitutional imperative to which I have referred require that we jettison the arbitrary rule that a wife may not, by way of a contribution towards costs under rule 43, be awarded all the costs which she reasonably requires to present her case. The court's discretion regarding the quantum of costs should not be fettered by fixed rules, but should be exercised in the light of the reasonable litigation

needs of the parties, having regard to their particular circumstances, and their respective ability to pay."

[44] The Respondent has failed to place legible copies of his payslips and bank statements before this Court, and as such has failed to provide this Court with a full and proper disclosure dispute requests from the Applicant to do so. Ms Thamane made an undertaking as part of his submissions that more legible copies of the respondent's salary advice will be uploaded. That has not happened at the time of writing this judgment.

[45] From the filed IRP5 tax certificate, it is obvious that the respondent earns far more than he has declared.

[46] The respondent's main contention is that he was a primary caregiver for the children during the marriage and that it has not been shown that he cannot be a suitable caregiver. I find this rather speculative in the absence of cogent facts.

[47] I am satisfied on a holistic evaluation of the evidence presented, that the applicant has made out a case for the interim relief that she seeks pending the finalization of the divorce between the parties.

[48] Of great concern to me is the fact that the draft order filed of record affords contact rights to the respondent that are strikingly different from those which

are prayed for in the notice of motion and the heads of arguments, consequently the draft order has been ignored.

In the result, I make the following order:

1. The Applicant and the Respondent both retain full parental rights and responsibilities and rights in terms of section 18(2)(a), 19 and 20 of the Children's Act 38 of 2005 (the "Act") subject to what is set out herein below.
2. That the primary residency and care of the minor children will vest with the Applicant.

[49] That the respondent is awarded the following rights in relation to contact with the minor children:

1. Every alternative weekend, the respondent is to collect the children on a Friday at 17h00 and return the children to applicant's residence on a Sunday at 16h00.
2. Every alternative Wednesday afternoon, directly after school and the respondent to return the children to applicant's residence at 17h30 in the evening.
3. That short school holidays alternate between the applicant and the respondent (March and September/October).
4. That long school holidays be equally shared between the respondent and the applicant (June/July and December/January).
5. That Easter holidays rotate annually between the respondent and the applicant (from Good Friday until and including Family Day).
6. Public holidays shall alternate between the respondent and the applicant (other than Christmas, Easter, such public holidays that fall on either a Monday or a Friday or any other public holiday that falls within a school holiday). Should the public holiday fall on either a Monday or a Friday or during a school

holiday, such public holiday will be dealt with as part of the weekend or the school holiday, as the case may be.

7. Irrespective of whose care the minor children are in during a specific contact week:
8. The minor children shall spend the applicant's birthday with her from directly- after school, alternatively from 09h00 in the morning during a non-school day, until 19h00 that evening.
9. The minor children shall spend the respondent's birthday with him from directly after school, alternatively from 09h00 in the morning during a non-school day, until 19h00 that evening. The minor children shall spend the weekend on which Mother's Day falls with the applicant from directly after school on a Friday. The minor children shall spend the weekend on which Father's Day falls with the respondent from directly after school on a Friday until Sunday at 16h00.
10. That the respondent's contact with the minor children shall be subject thereto that the respondent is prohibited from consuming any alcohol whatsoever whilst the children are in his care.

11. The respondent will furthermore have daily telephonic contact *via* voice and/or video chat on any available platform with the minor children, which shall be limited to the hours of 18h30 to 19h30, so as not to disturb the children's house and schooling routine.
12. In the event that the respondent is unable to exercise his right to the aforesaid contact, that he affords applicant first option to have contact during the said period(s).
13. The aforementioned right of contact shall be exercised in the best interest of the minor children, and subject to the minor children's educational, religious, social, sporting and extramural activities.
14. The aforementioned rights of contact must be exercised subject to section 31 of the Children's Act and the parties must give due consideration to any views and wishes expressed by the minor children, bearing in mind the minor children's ages, maturity and stage of development.
15. That the respondent is ordered to pay an amount of R5400.00 (five thousand five hundred Rand) per month per child which amount will be paid to the applicant on or before the first day of each month following the date of this order.

15.1.1 The amount payable in terms of order 15 shall be increased annually on the anniversary date of this order, by the percentage change in the headline consumer price index ("CPIX") for the Republic of South Africa in respect of the middle income group, or in line with the headline inflation rate, which is applicable, or any replacement inflationary index should the CPIX be discontinued, is notified from time to time by the director of statistics, or his equivalent, for the preceding 12 months;

16. That the respondent will pay 65% of all expenditures in respect of medical, dental, surgical, hospital, orthodontic and ophthalmological treatment required by the minor children which are not covered by the medical aid scheme.
17. That the respondent will pay 65% of all amounts payable to psychiatrist, physiotherapist, occupational therapist, speech therapist, psychologist, chiropractor, the cost of medication and the provision, where necessary, of spectacles and/ or contact lenses.
18. That the respondent will pay the school fees of the minor children directly to their respective schools.

19. That the respondent will pay for the swimming lessons for M.T and L directly to the applicable institution.
20. That the respondent will pay for the transport to school and back for M.T and L directly to the service provider.
16. The respondent is ordered to contribute an amount of R 80 000,00 towards the applicants' legal fees which amount is payable over a period of four months, in installments of R20 000,00 per month. The first instalment is payable on or before the first day of the month immediately following this order, and on or before the 1st of every subsequent month.
17. The respondent is ordered to pay the costs of this application.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 28 April 2023

Date of Judgment: 31 August 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 28 August 2023.