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

**Case number: 55203/2020**

In the matter between:

**K[...] C[...] M[...]  
(I.D NO: 87[...])**

**APPLICANT**

versus

**K[...] M[...] F[...]  
(ID NO: 84[...])**

**RESPONDENT**

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**JUDGMENT**

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**MAKHOB A J**

1. The matter was brought to me by the applicant in terms of Rule 43(1) (a)-(d) of the Uniform Rules. The matter was opposed. After hearing both counsels I requested them to file their heads of arguments.
2. The Applicant is K[...] C[...] M[...] and Respondent is K[...] M[...] F[...]. There are two minor children born of the marriage between the applicant and the respondent and are currently residing with the applicant.

3. The applicant commenced divorce proceedings against the respondent in this court on 31<sup>st</sup> August 2020 under case number 42619/20. On the 21<sup>st</sup> October 2020 the applicant instituted Rule 43 proceedings against the respondent.
4. The respondent opposed the application and disputes the existence of the customary marriage between the applicant and himself. Furthermore, the respondent submits to this court that he is no longer employed and thus has no financial means to pay maintenance.
5. On behalf of the respondent counsel submitted that this court cannot hear the application since the marriage is in dispute. However, Counsel for the applicant referred the court to various decided cases and submitted that the court can entertain the application even where marriage is in dispute.
6. In *Zaphiriou v Zaphiriou 1967 (1) SA 342 (W)* Trollip J said at page 345 E-H: “  
*There is, therefore, a good authority that in common law, even though the validity of the marriage was being disputed, nevertheless the court had jurisdiction in preliminary application proceedings to award maintenance and a contribution towards costs pending an action to determine that fundamental dispute. And I have no doubt that that applies equally, if not a fortiori where, although the validity of the marriage is admitted, its continued subsistence is disputed, as in the present case. Rule 43 was merely designed to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs, and I think, therefore, that Rule 43 must be construed accordingly; in other words, that ‘spouse’ in sub-rule (1) must be interpreted as including not only a person admitted*

*to be a spouse but also one who alleges that he or she is a spouse, and that that allegation is denied. In other words, the Rule also applies where the validity of the marriage or its subsistence is disputed. The application under Rule 43 in the present case can, therefore, be entertained by this Court.”* This decision is quoted with approval in *MRL V KMG Case number 15078/12 dated 08/04/2013*.

7. I am therefore in agreement with Counsel for the applicant that this court can hear and decide the matter in terms of Rule 43.
8. The Respondent pleads poverty and unemployment as a reason why he will be unable to pay any amount towards the maintenance of his children and the applicant. The applicant is unemployed and she has no source of income.
9. It is common cause that the respondent has a business called Chillas Ice Cube. The respondent submits that this business does not generate a lot of money.
10. On behalf of the applicant, it is submitted to this court that the respondent possesses the following motor vehicles:
  - (i) Polo
  - (ii) Toyota Hilux
  - (iii) Mercedes Benz
  - (iv) It is alleged the respondent has an investment of R600 000.

11. The Court is of the view that currently the respondent is in a position to maintain his children although it is uncertain whether he will still be able to do that in future as he is unemployed.

12. I therefore make the following order:

12.1 An order that both parties retain their full parental responsibilities and rights with regard to the care of the minor children born of the marriage between the parties as contemplated in Section 18 (2)(a) of the Children's Act No.38 of 2005;

12.2 An order that the primary residence of the minor children born of the Marriage between the parties be awarded to Applicant;

12.3 An order that specific parental responsibilities and rights with regard to contact to the minor children born of the marriage between the parties as contemplated in Section 18(2)(b) of the Children's Act No.38 of 2005 be awarded to the Respondent in the following manner:

12.3.1 The Respondent shall be entitled to remove the minor children for alternate weekends;

12.3.2 The Respondent shall be entitled to remove the minor children for alternate short school holidays on the basis that the minor children shall spend alternate MARCH / APRIL short holidays with the Applicant. For purposes hereof, short school holidays refer to the

school holidays which take place during MARCH / APRIL and SEPTEMBER / OCTOBER each year;

12.3.3 The Respondent shall be entitled to remove the minor children for one half of all long holidays on the basis that the minor children shall spend alternate Christmas portions of the DECEMBER / JANUARY long school holidays with me. For purposes hereof, long school holidays refer to school holidays which take place during JUNE / JULY and DECEMBER / JANUARY each year;

12.3.4 The Respondent shall be entitled to remove the minor children for alternate long weekends and public holidays which do not form part of a school holiday;

12.3.5 The Respondent shall be entitled to remove the minor children for every Father's Day on the basis that the minor child shall spend every Mother's Day with Me;

12.3.6 The Applicant shall be entitled to remove the minor children for every birthday of the Applicant;

12.3.7 The Respondent shall be entitled to contact the minor children both telephonically and electronically at all reasonable times;

13. *Pendente lite* the Respondent to pay maintenance in an amount of R2000.00 per month in respect each child subject to 10% percent annual increase. The first payment must be made on the next pay date of the Respondent from date of this order directly to the Applicant and the further payments to be made on or before the 3<sup>rd</sup> day of each month.

14. *Pendente lite* the Respondant pays School, buys uniform and stationary and to pay school transport in respect of both minor children, with the understanding that the school fees must be paid directly to the school and the transport must be paid directly to the transport provider.
15. *Pendente lite* the Respondent to pay maintenance for the Applicant in the amount of R3 000 per month directly to the Applicant's Bank account. The first payment must be made on the next pay date of the Respondent from date of this order and the further payments to be made on or before the 3<sup>rd</sup> day of each month.
16. *Pendente lite* the Respondent to keep Applicant and the minor children as members on his Medical Aid Scheme;
17. An order that the Respondent pays for Applicant's legal costs in amount of R10 000.00 in respect of Applicant's legal costs for this application and the main divorce action respectively.

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**D MAKHOB  
JUDGE OF THE HIGH COURT OF  
SOUTH AFRICA,  
GAUTENG DIVISION**

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