



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN DIVISION, GQEBERHA)**

**NOT REPORTABLE
CASE NO: 1661/2024**

In the matter between:-

H[...]-C[...] C[...] (born P[...])

Applicant

and

C[...]-S[...] C[...]

Respondent

In re:

H[...]-C[...] C[...] (born P[...])

Plaintiff

and

C[...]-S[...] C[...]

First Defendant

C[...]-S[...] C[...] N.O.

Second Defendant

H[...]-C[...] C[...] N.O.

Third Defendant

CRAIG HILTON KILLIAN N.O.

Fourth Defendant

THE MASTER OF THE HIGH COURT, CAPE TOWN

Fifth Defendant

JUDGMENT

MATEBESE AJ

[1] The applicant approaches this court by way of rule 43 of the Uniform Rules of court seeking an order, *pendente lite*, in the following terms:

1.1 That the respondent be ordered to pay directly to the applicant an amount of R20 000.00 (twenty thousand rand only) each month as interim maintenance, with the first payment to be made on the 25th day of the month following the grant of the order and thereafter on the 25th of each month and such amount to increase by 11.25% per annum on the anniversary of the granting of this order.

1.2 That the respondent be directed to make payment of the minor children's (L[...] C[...] ("LC") and R[...] C[...] ("RC")) school fees directly to the service provider as and when they fall due.

1.3 That the respondent be directed to make payment of the minor children's additional school costs, including but not limited to, extra mural activities, extra lessons, school uniforms, sports uniforms and transport, as and when they fall due.

1.4 That the respondent be directed to retain the minor children on his medical aid and to make payment of the monthly premiums thereof.

1.5 That the respondent be directed to purchase a suitable replacement motor vehicle being a 2023 Nissan Magnite 1.0 Visia MT or the like, (to be registered in the applicant's name), within 30 (thirty)

ordinary days of the granting of an order to the effect, the cost of which is to be partially covered by the amount/s received from the trade-in of the applicant's current motor vehicle, with the respondent being liable for the payment of the monthly re-payment/s (as and when they fall due) in respect of the balance of the purchase price in the event of the motor vehicle being financed.

1.6 That the respondent be ordered and directed to pay an amount of R1 712 554.38 (one million seven hundred and twelve thousand five hundred and fifty-four rand and thirty eight cents) towards the legal costs of the applicant.

[2] The parties hereto got married to each other on 2 December 2008 at Cape Town. They presently reside in Gqeberha and have business interests in Gqeberha and around the Eastern Cape.

[3] The parties hereto are going through a divorce with the plaintiff having instituted divorce proceedings in the above honourable court under case number 2469/2022. The divorce proceedings are pending. This application is instituted as an interlocutory application and the order above is sought pending the said divorce proceedings.

[4] The application is opposed by the respondent. Before I deal with the merits of the application and the grounds of the respondent's opposition thereof, it is imperative that I set out the following brief background.

Background:

[5] The parties hereto got married to each other on 2 December 2008 in community of property and of profit and loss. They later, in 2013, through an order of court and by way of a post nuptial contract registered with the Registrar

of Deeds, Cape Town, changed their marital regime to a marriage out of community of property and profit and loss with an accrual system.

[6] The applicant says much about how she was subjected to duress leading to the change of her marital regime. I do not think this is important for the purposes hereof. The factual position, as things stand now, is that the parties are married out of community of property and subject to an accrual system. In these proceedings I am not called upon to decide on the legal validity and effect of the change of the marital regime. Accordingly, I do not intend to say anything more on this issue.

[7] On 23 August 2023 the applicant instituted divorce proceedings in the above court against the respondent. In the divorce proceedings the applicant, plaintiff therein, has also cited the second to fifth defendants, above.

[8] The said defendants are cited, apparently, because the applicant seeks, in the divorce proceedings, a declaratory order that the Trust in which they act as trustees is *void ab initio* or alternatively that the said trust is the *alter ego* of the respondent and the assets of the trust are therefore, so the contention goes, the assets of the respondent. This is an issue that also dominates the applicant's papers in this application.

[9] Tempting as it may be to air my view on this issue, I refrain from doing so because this is an issue that must still be determined by the trial court hearing the divorce proceedings. In this judgement I make every effort not to be influenced by same, one way or the other.

[10] There are two minor children born of the marriage between the parties, LC and RC both boys born on 11 June 2009 and 31 October 2013, respectively. As per the arrangement between the parties, which appears to have been approved by the Family Advocate both parties share joint custody and care of the children

whilst the divorce proceedings are still pending. The applicant does complaint though that the respondent does not spend much time with the children. However, I do not think that has relevance to the issues that I have to decide in this application.

[11] The anger and bitterness between the parties is clear from the papers. The volume of the papers and the irrelevant fraud and other allegations made by the parties against each other in this application is also evidence of this. The founding papers, in particular, appear to be influenced by emotions. The application extends to over 370 pages. The founding affidavit consists of more than 60 pages with annexures spanning over 240 pages. The respondent's sworn reply consists of 33 pages with 31 pages of annexures.

[12] This is an issue that the respondent has taken as a point *in limine* in his sworn reply. The respondent has also made an application for upliftment of the automatic bar imposed by rule 43(3)(c) or condonation for his failure to timeously file his sworn reply. I deal with these later in this judgement.

[13] Turning to the relief sought in the Notice of Motion, it appears from the papers that the respondent is solely responsible for the children's school expenses and medical aid. This was confirmed by both counsel during the hearing of the matter. However, what appears to have triggered the relief in 1.2, 1.3 and 1.4 above, at least from the application papers, is that there was a time when the school account was in arrears. It does not appear that this is a matter that lasted for long, even on the version of the applicant. Furthermore there is no indication on the papers that the respondent has, at any stage refused to pay school fees for the children. He may have, at the time when the fees were in arrears, invited the applicant to assist, if she can, which invitation was rejected by applicant but nowhere in the papers does it appear or is it alleged that he has refused to assume or accept responsibility for the children's school fees and school expenses.

[14] The respondent has in fact tendered to continue to pay the school expenses for the children. He has never indicated an intention to remove the children from his medical aid. He has also tendered that the applicant can continue to use the vehicle, with registration number 16858 EC, that she currently uses. That is in response to the relief in 1.5 above. Accordingly, I do not think I need to detain myself with these issues as they do not present live disputes between the parties. Suffice only to mention that to the extent that the applicant still insists on an order that the respondent be directed to purchase a vehicle for her, that order, in my view, falls outside the purview of rule 43 and is refused. In any event and for completeness I hold the view, and accordingly find, that the offer or tender made by the respondent in this regard is reasonable in the interim pending finalisation of the divorce proceedings. Accordingly, an order will be made in terms of the undertaking.

[15] What remain for determination therefore are the following issues:

15.1 the upliftment of the bar or condonation application by the respondent ("the condonation");

15.2 the respondent's point in limine ("abuse of process");

15.2 the applicant's claim for interim maintenance in the sum of R20 000.00 (twenty thousand rand); and

15.3 the applicant's claim for contribution to costs in the sum of R1 712 554.38 (one millio seven hundred and twelve thousand five hundred and fifty four rand thirty eight cents).

Condonation

[16] It is common cause that the respondent's sworn reply was filed outside the ten day period envisaged in rule 43(3)(a). The respondent was therefore,

according to rule 43(3)(c), automatically barred from delivering the sworn reply when he delivered the reply.

[17] The respondent has cited the bulky nature of the documents filed by the applicant and the consequent difficulty he encountered to respond thereto as a reason for the delay in filing the sworn reply. He also states that he attempted to obtain an agreement from the applicant to file same outside the ten day period but no response was received from the applicant.

[18] It is trite that courts grant condonation or a relaxation of the rules where it is in the interests of justice to do so and where no prejudice is caused to the other party and to the administration of justice. I am of the view that the interests of justice dictate that I grant condonation for the late delivery of the sworn reply. I have already stated herein above, that the applicant's papers are bulky. In my view it would not have been prudent for the respondent to simply ignore the allegations in the applicant's papers. He had to answer thereto or risk being taken to have admitted same. Above that, the condonation application is not opposed and the applicant has not pleaded or shown any prejudice occasioned by the late filing of the reply.

[19] In any event the nature of these proceedings demand that a speedy resolution thereof must be achieved or sought to be achieved.

[20] For these reasons I grant condonation for the late filing of the sworn reply. No costs order will be made in this regard.

Abuse of process

[21] The respondent argues, *in limine*, that the application, by reason of its bulkiness, constitutes an abuse of the process in rule 43 and that it deserves to

be dismissed with costs. The respondent relies for the argument on ***MVN v ALN***¹ and other authorities referred to therein.

[22] The respondent argues that the process in rule 43 is designed to provide a just and expeditious result and that the filing of a voluminous application, as done by the applicant herein, defeats that purpose. I agree with the respondent in this regard.

[23] However, I do not agree that the application must be dismissed on this basis alone. My view is that the point advanced by the respondent may, at best, lead to the matter being struck off the roll.²

[23] I do not intend to take that route in these proceedings. This application, unlike other rule 43 applications has been set down in the opposed motion court and was specifically referred to the opposed motion court for hearing. The reason for such referral, I suppose, was the number of pages. It was also, for the same reason subjected to case Flow Management. It must therefore be heard in this court. The cases referred to by the applicant were dealt with in the unopposed motion court. I find them distinguishable from the present. In any event, courts have entertained rule 43 applications where the number of pages exceeded 800 pages.³

[24] This, however, should not be construed or interpreted as condoning the cynical conduct of filing voluminous papers by parties in rule 43 applications. Attorneys have a duty to ensure due compliance with the provisions of rule 43.

[25] Accordingly the respondent's point *in limine* is dismissed. No costs order is made in this regard.

¹ (094387/23) [2024] ZAGPPHC 402 (22 April 2024)

² KT v AT and others 2020 (2) SA 516 (WCC); SM v NM unreported case number D6667/2024 (KZN) (28 August 2024)

³ For example SH v MH 2023 (6) SA 279 (GJ) and other cases referred to in KT v AT, above.

Interim maintenance

[26] The respondent, on the papers before me, appears to be a man of some means. He is a successful businessman involved in various business ventures. Above all, he receives, at least on a consideration of his version, great support businesswise from his family and his friends.

[27] The applicant also earns a decent income from her employment. She is not destitute. She has always been employed during the marriage period and is still employed, albeit that she is now employed by a different employer. On her version she earns a net salary of about R38 000. 00 per month.

[28] Though denied by the respondent, it is clear from the papers that the parties lived a decent upper middle class lifestyle during their marriage. They had several sources of income, the businesses, which were used for their joint benefit during the time they were staying together as husband and wife. This assistance is no longer available to the applicant.

[29] The applicant used to receive an amount of R6000.00 from the respondent as contribution for the maintenance of the two minor children. The respondent stopped making the payment to the applicant around March 2024. The respondent admits this in his sworn reply. He argues that the children are in both their care for equal time periods and that he incurs the same expenses when the children are in his care. On enquiry it was explained that the children spend one week with the applicant and another week with the respondent, interchangeably.

[30] I do not find this to be a good enough reason for not contributing towards maintenance where there is a need established. In my view a contribution to maintenance has nothing to do with the amount of time one spends with a child

but more to do with whether one spends money towards the welfare of the children and with whether there is a need for maintenance. To this end the respondent has not furnished any information that would justify the termination of the payment. Above that, I believe that parents in the position of the applicant and the respondent must strive to give their children the same or almost similar maintenance benefits irrespective of whether they are with one parent or the other. This, in my view works well for the children and their relationship with both parents. Accordingly, if that means one parent must contribute towards maintenance to the other, depending on need being established, that must be done in the interests of the children.

[31] The Notice of motion is not specific on whether the maintenance contribution is sought for the applicant personally or for both herself and the minor children or for the minors alone. During argument Ms Morgan for the applicant confirmed that the maintenance contribution is for the minor children.

[32] The applicant's need for maintenance has been detailed in the application papers. The detail shows that the applicant even with the contribution sought herein will still remain with a deficiency. This to me shows a need for assistance by way of contribution. The argument by the respondent that the expenses are overstated is to me untenable.

[33] The applicant's income of R38000.00 is, in my view, not sufficient for her to live, maintain the minor children and litigate with the respondent fairly in the divorce proceedings. The respondent on the other hand, regard being had to his finances, has, in my view, sufficient financial resources to meet the applicant's and the children's reasonable needs without being exposed to financial hardship.

[34] I consider the amount of R 20000.00 per month claimed by the applicant reasonable in the circumstances of this case. That she is prepared to live with a deficit is clear indication of her reasonableness in this regard. I, however, find no

basis to order escalation on the said amount. The respondent must therefore pay the applicant an amount of R 20000.00 (twenty thousand rand) as interim maintenance on the 25th of each month from the date of this order until finalisation of the divorce proceedings.

Contribution to costs

[35] It has been stated by our courts that the rationale behind rule 43 contribution for costs is to ensure that neither party is prejudiced during the divorce proceedings by a lack of resources to pursue his or her case in the main action. The helping hand that the rule provides must, however never be interpreted to encourage litigation *ad nauseam*, nor should it permit malicious attempts to drain the pockets of the contributing spouse. The rule is essentially designed to achieve equality of arms during divorce proceedings.⁴

[36] In order to do justice to the spirit and the purpose of the rule, a court must, in my view, in the exercise of its discretion under the rule, consider whether the circumstances of the case demand a full or part contribution to the costs of the party seeking such contribution. Importantly, the rule must not be interpreted to mean or encourage a risk free litigation.

[37] The applicant is employed and is earning a decent salary. She also has some other means as well to access finance. This is clear from the documents. She is accordingly in a position to make some contribution towards her own legal costs. It may be that she needs some assistance in this regard. But I do not believe that she needs full assistance with such costs. A reasonable part contribution suffices.

[38] I must also take into account that the respondent, from his finances, must still pay his own costs of the divorce proceedings. In any event I hold the view

⁴ SH, *supra*, and the authorities referred to therein.

that the costs as appear in the Bill of costs attached are exaggerated and some items are unnecessarily inflated to make the amount bigger.

[39] The amount claimed by the applicant for the contribution to costs is, in my view, unreasonable.

[40] In my view an amount in the sum of R 750 000 – 00 (seven hundred and fifty thousand rand) is reasonable for contribution towards the costs.

Costs

[41] The general principle on costs is that costs follow the result. The applicant has achieved substantial success in the application.

[42] I am however not minded to award the applicant the costs, notwithstanding her substantial success in the application.

[43] I have stated herein above that the application is unnecessarily prolix. It includes annexures that are not relevant. It also traverses issues that are raised in the action proceedings which the applicant knows, or ought to know, cannot be determined in these proceedings. I believe all this was done to unnecessarily increase the costs of this matter. For this reason I am not inclined to award costs in favour of the applicant. The respondent also argued that the applicant's attorneys deserve to be denied their fees for the rule 43 application. I do not wish to go that far.

[44] I also hold the view that the respondent acted reasonably by tendering part of the relief sought by the applicant. His actions of defending the rest of the relief are not unreasonable in my view.

[45] In the circumstances it appears just that each party should pay its own costs.

[46] In the result the following order is made.

1. Condonation for the late filing of the respondent's sworn reply is granted with no order as to costs.

2. It is noted that, pending finalisation of the divorce proceedings, the respondent has tendered, and is accordingly directed:

2.1.1 to make payment of the school fees for the minor children, L[...] C[...] and R[...] C[...], directly to the service providers as and when they fell due;

2.1.2 to pay for the minor children's additional school costs as and they fall due which costs shall include, but are not limited to, extra mural activities, extra lessons, school uniforms, sport uniforms and transport.

2.1.3 to retain the minor children in his medical aid and to make monthly premiums therefor.

2.1.4 to allow the applicant full use and enjoyment of the motor vehicle (16858 EC) currently in the possession of the applicant.

3. The respondent shall pay directly to the applicant an amount of R20 000.00 as interim maintenance pending finalisation of the divorce proceedings.

4. The respondent shall pay an amount of R750 000.00 (seven hundred and fifty thousand rand only) as contribution towards the applicant's costs for the divorce proceedings payable in four (4) monthly instalments with effect from thirty (30) days from the date of this order and on the 30th of each successive month until fully paid.

5. Each party shall pay his or her own costs.

Z.Z. Matebese
Acting Judge of the High Court

Appearances:

For the applicant:	Adv M. Morgan
Instructed by:	Kamal Natha Attorneys
For the respondents:	Adv L. Ellis
Instructed by:	Kaplan Blumberg Attorneys

Date Heard: 29 August 2024

Date delivered: 03 September 2024