

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.


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F. MARCANDONATOS

22 January 2025

CASE NUMBER: 2020/35177

In the matter between:

W: K.L.

Applicant

and

W: C.S.

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 22 January 2025

JUDGMENT

MARCANDONATOS AJ:

INTRODUCTION

[1] This is an opposed Application in terms of Rule 43(6) of the Uniform Rules of Court for a variation of a Rule 43 Order granted on *17 August 2021* in terms of which the Applicant seeks, in summary, the following:-

- 1.1. maintenance in respect of the Applicant and the children;
- 1.2. a contribution towards the Applicant's historic and future legal costs;
and
- 1.3. the costs of this Application.

POINT IN LIMINE RAISED BY RESPONDENT

[2] The Respondent raised a point *in limine*, alleging non-compliance with the Practice Manual, paragraph 29.12 and that the Applicant failed to mediate the matter and failed to explain why mediation was not embarked upon. As a result the Respondent sought a punitive costs Order against the Applicant and that the matter be postponed.

[3] Mediation, as envisaged by Rule 41A, is a voluntary process and no party can be ordered to adhere to the process.

[4] The aforesaid point *in limine* was therefore not upheld.

THE PARTIES

[5] The Applicant (*wife*) and the Respondent (*husband*) were married to each other on *10 July 2008*.

[6] Two minor children were born of the marriage, a boy born on *28 February 2011* and a girl born on *16 October 2012*, (*hereinafter referred to collectively as, "the children"*).

SALIENT ISSUES

[7] The Rule 43 Order dated *17 August 2021*,¹ made the following Order in respect of maintenance²:-

7.1. pending the Report of Ms Kriel, the Respondent was ordered to pay R6 450.00 monthly maintenance in respect of *the children*;

7.2. the Respondent was to contribute R10 000.00 per month for the remainder of the school year in respect of *the children's* schooling;

7.3. the Respondent was to pay the medical aid and all expenses not covered by the medical aid in respect of the Applicant and *the children*;

7.4. the Respondent was to pay the monthly bond instalments, as well as the utilities and municipal services;

7.5. the Respondent was to make payment of the Applicant's monthly motor vehicle instalments, including maintenance, insurance and services.

[8] Subsequent to the aforesaid Order being made, the Respondent defaulted on the Order, however, the precise respects in which the Respondent defaulted on the Order, are in dispute.³

[9] In *January 2022*, the Applicant and *the children* moved out of the former common home and moved into a rental unit.⁴

[10] Pursuant thereto, the Applicant alleges that it was agreed that⁵:-

¹ FA: 24-32 to 24-36, annexure "KW1"

² Supra 1, paras 4.1, 5, 6, 7 and 8

³ FA: 24-12, para 21 and RA: 24-79, para 53

⁴ FA: 24-13, para 25

⁵ FA: 24 – 13, para 26, including the sub-paragraphs

- 10.1. the Respondent would pay maintenance for *the children* and the Applicant in the sum of R25 000.00 per month;
- 10.2. the Respondent would pay 100% of all the expenses pertaining to *the children's* schooling and 100% of all ancillary expenses thereto, including but not limited to, uniforms, equipment, books, stationery, tours and outings and the like;
- 10.3. the Respondent would pay 100% of all the expenses pertaining to *the children's* extra mural and sporting activities, whether educational or social and 100% of all expenses ancillary thereto, including but not limited to clothing and equipment;
- 10.4. the Respondent would pay 100% of the costs of the Applicant's cell phone contract;
- 10.5. the Applicant and *the children* would remain on the Respondent's medical aid, for which contributions the Respondent would pay 100% of their portion of such medical contributions;
- 10.6. the Respondent would pay 100% of all the expenses pertaining to *the children's* reasonable medical, dental, ophthalmic, orthodontic, hospital and allied expenses incurred, such to include but not be limited to, all costs of hospitalisation, surgical treatment, spectacles and prescribed medication, not covered by the medical aid;
- 10.7. the Respondent would continue to pay for the monthly bond of the former common home, which included payment of utilities and municipal services, rates and taxes; and
- 10.8. the Respondent would make payment of the monthly finance instalments for the BMW X3 motor vehicle driven by the Applicant, including, insurance, maintenance costs and services.

- [11] According to the Applicant, it then seems that subsequent to the aforesaid and from about *February 2022*, the Respondent made payment in accordance with the said Agreement for a period of approximately 21 months.⁶
- [12] However, thereafter, the Applicant states that the Respondent reneged on the aforesaid Agreement, failed to pay the monthly amount of R25 000.00 per month and reduced the portion of maintenance back to R6 450.00 per month, in terms of the Rule 43 Order.⁷
- [13] The Applicant avers that from the end of *November 2023* and given the pressing circumstances at the time, the Applicant and *the children* moved in to live with the Applicant's boyfriend, CM (*hereinafter referred to as "CM"*), and that she and *the children* have been living with him since then.⁸
- [14] Albeit it that the Respondent disputes the aforesaid without providing any details, he contends that the purported Agreement was no longer valid given that the Applicant and *the children* were living with CM.⁹

ASSESSMENT OF MAINTENANCE FOR THE APPLICANT AND THE CHILDREN

The Applicant

- [15] On the Applicant's version, *inter alia*, the following is evident:-

15.1. the Applicant is a British national and is unemployed;¹⁰

15.2. at the time of the Rule 43 Order (*supra*), the Applicant was not living with anyone;

⁶ FA: 24-15, para 31 and RA: 24-86, para 84

⁷ FA: 24-16, paras 36 & 37

⁸ FA: 24-16, para 34 and RA: 24-85, para 80,

⁹ RA: 24-86, para 84

¹⁰ FA: 24-17, para 2

- 15.3. in terms of the Rule 43 Order (*supra*), no spousal cash maintenance was granted in favour of the Applicant, however, the Respondent was ordered to retain the Applicant on the Respondent's medical aid scheme and to make payment of the monthly instalments in respect of the Applicant's motor vehicle (*a BMW X3*), including the motor vehicle's maintenance, insurance and services;
- 15.4. the Applicant no longer drives the BMW X3 motor vehicle, having returned the vehicle to the Respondent;¹¹
- 15.5. the Applicant commenced living with **CM** since the end of *November 2023*;¹²
- 15.6. the Applicant and *the children* are living for free with **CM**;¹³
- 15.7. the Applicant is solely reliant on, **CM**;¹⁴
- 15.8. **CM** has paid for the Applicant's past legal costs;¹⁵
- 15.9. **CM** has absorbed the Respondent's financial responsibilities;¹⁶
- 15.10. **CM** often deposits funds into the Applicant's account;¹⁷ and
- 15.11. the Applicant uses a Woolworths card provided for by **CM**.¹⁸
- [16] Our Courts have long held that it is improper for a man to be expected to maintain a woman living with another man, as "*man and wife*".

¹¹ FA: 24-15, para 29

¹² FA: 24-16, para 34,

¹³ FA: 24-19, para 43.4

¹⁴ FA: 24-19, para 44

¹⁵ FA: 24-20, para 46.5

¹⁶ FA: 24-20, para 47

¹⁷ FA: 24-21, para 51

¹⁸ FA: 24-21, para 52

[17] In this matter, it is common cause that the Applicant is living with another man¹⁹ being **CM**, and has been for some time now – on the Applicant's version since **November 2023** and on the Respondent's version for the past 3 years.

[18] Professor Hahlo, in the book: *"The South African Law of Husband and Wife"*, states the following:-

"... it is submitted that the wife cannot claim arrear maintenance from her ex-husband for the time during which she was for all appearances another man's legal wife or, at least, for the time during which she was in fact supported by him. Though the in praeteritum non vivitur rule does not apply where a maintenance order is in existence, it is contrary to justice and equity that she should be able to collect support for the same period from her ex-husband as well as from her "putative" second "husband". If necessary, the position can be met by a variation of the maintenance order in respect of the arrears."

[19] In the matter of **Drummond v Drummond**²⁰ the phrase "living as man and wife" was defined, whereby the Court agreed with the observations of the Court *a quo*, namely that it denoted the basic components of a marital relationship, except for the formality of a marriage and that the main components of a *modus vivendi* akin to that of a husband and wife are:-

19.1. firstly, living under the same roof;

19.2. secondly, establishing, maintaining and contributing to a joint household;
and

19.3. thirdly, maintaining an intimate relationship,

on a permanent basis.

¹⁹ FA: 24-16, para 34 and RA: 24-85, para 80

²⁰ 1979 (1) SA 161A

- [20] In **Carstens v Carstens**,²¹ the Judge found that a wife claiming maintenance as well as a contribution towards her legal costs, *pendente lite*, whilst living with another man, to be against public policy.
- [21] In **SP v HP**,²² the matter dealt with the notion of a woman being supported by two men at the same time, wherein she was unemployed, alleging having no way of subsisting herself and having to rely on family and friends for provisions since her departure from the marital home. The Court accepted that the Applicant was being supported by her lover and emphasised that it had been laid down in law that it is contrary to justice and equity that a person in the Applicant's position should at the same time collect support from her husband as well as a second "*putative*" husband and asserted that the dictum in the **Carstens** matter was applicable to this case.
- [22] Whilst it is contended by the Applicant that her relationship with **CM** is volatile, I am of the view that the relationship between them is a continuing relationship, is one that is intended by the parties to continue indefinitely and, looking at the evidence, I am satisfied that the Applicant and **CM** are living together as "*man and wife*" on a permanent basis at the time of this Application, that **CM** and the Applicant have established and are maintaining and contributing to a joint household and are maintaining an intimate relationship.
- [23] I am therefore not persuaded that it would be just and equitable for the Applicant to be entitled to maintenance, *pendente lite*, from her husband, the Respondent, albeit that she is currently unemployed, whereby she is flagrantly and deliberately living as "*man and wife*" with **CM** and being supported by **CM**.
- [24] As an aside, and without detracting from the foregoing, this Court has a concern that whilst the Applicant says that she returned the BMW X3 to the Respondent, she fails to deal with the vehicle she now drives, being a Range Rover, and in respect of which she claims a monthly expense. On an analysis

²¹ 1985 (2) SA 351 (SE)

²² 2009 (5) SA 223 (O)

of the Applicant's Financial Disclosure Form, commissioned on *24 April 2024*,²³ she reflects the Range Rover as an asset in her Estate having a value of approximately R340 000.00, with no corresponding liability,²⁴ yet she does not take this Court into her confidence as to how she acquired same and/or afforded the purchase of the Range Rover, being unemployed and/or explain the credit balance in her Standard Bank Money Market savings account in the sum total of R45 009.90,²⁵ against the backdrop of the relief she seeks in respect of herself.

- [25] Accordingly, to order anything to the contrary, would be contrary to justice and equity and would further be against public policy for the Applicant to be entitled to collect support from her husband (*the Respondent*), as well as her "putative" second "*husband*", *CM*.

The Children

- [26] Rule 43(6) is a provision that allows a party to bring an Application to Court to have the Rule 43 Order varied, being available only where a party seeking to vary a Rule 43 Court Order can demonstrate that there is a "*material change*" in the party's circumstances in order for the variation to be successful.
- [27] Having regard to the Applicant's averments and argument, I am satisfied that the Applicant has demonstrated a material change in respect of *the children's* maintenance since the Rule 43 Order.
- [28] The Applicant sets out the expenditure for *the children* totalling an amount of R29 104.38.²⁶
- [29] The Respondent, whilst acknowledging that at the time of the Rule 43 Order, the Applicant was unemployed, he avers that she has made little to no effort

²³ CL: 25-7 to 25-25

²⁴ CL: 25-12

²⁵ CL: 25-10

²⁶ FA: 24-37, annexure "KW2"

since then to rectify the situation, however, the Respondent provides no evidence to the contrary, hence acknowledging that the Applicant remains unemployed at the time of this Application.

- [30] Whilst the aspect of the Respondent's affordability is in dispute, in terms of the Respondent's second Financial Disclosure Form, commissioned on *08 October 2024*,²⁷ the Respondent alleges therein that his *gross* income for the last financial year (*2024*) as shown on his IRP5 was R1 908 746.00, whilst his *nett* income for the last financial year was R1 296 755.18, it also being anticipated by him that for the next 12 months (*2025*), his estimated total for all *nett* earned income for *2025* will be R1 493 000.00, this means that his average monthly nett income will be R124 416.66.²⁸
- [31] Furthermore, the Respondent states in his aforesaid Financial Disclosure Form that his total monthly expenses are R92 830.00,²⁹ meaning that the Respondent has a surplus of R31 586.66 based on the *2025* figures, that is, after having provided for, in his monthly expenses, for Educational Expenses for *the children*.³⁰
- [32] In the premise, and in terms of the Respondent's expenses, measured against his income, he has a discretionary income and an affordability amount. Furthermore, the Respondent has multiple credit facilities.
- [33] In my view, the Respondent can therefore afford to contribute to *the children's* monthly expenses as dealt with hereinbelow, it being common cause that there is no obligation on *CM* to contribute to *the children's* expenses, the Applicant is unemployed and is ostensibly therefore unable, at this time, to contribute to *the children's* maintenance.

²⁷ CL: 10-42 to 10-61

²⁸ CL: 10-51

²⁹ CL: 10-59

³⁰ CL: 10-57

[34] Against the backdrop of the foregoing, I disallow the following costs as claimed by the Applicant for *the children*, as being unreasonable, uncorroborated, unaccounted for and/or that I am not persuaded that the said expenses are in fact being incurred by the Applicant:-

34.1. lodging	R5 049.22;
34.2. house rates	R 498.84;
34.3. householder's insurance	R 168.65;
34.4. car maintenance – services, tyres, brake pads etc	R1 238.00;
34.5. car licences	R 50.00;
34.6. car insurance	R 750.00;
34.7. parking	R 150.00;
34.8. outings	R1 000.00;
34.9. doctor/dentist/medication excess (<i>outstanding</i>)	R 750.00;
34.10. other medical expenditure (<i>neurologist</i>)	R 400.00;
34.11. life insurance	R1 000.00;
34.12. retirement annuity	R 500.00;
34.13. holidays	R1 000.00;
34.14. repair/replacement items, household appliances	R 250.00;
Total	<u>R12 804.71</u>

- [35] In the premise, the Court finds *the children's* reasonable maintenance to be in the sum of R16 000.00 (*rounded off*), in addition to their Educational and Medical Expenses.

CONTRIBUTION TO LEGAL COSTS

- [36] The claim for a contribution towards costs in divorce cases is well established in our law. Rule 43 of the Uniform Rules regulates the process to be adopted where a contribution to costs is sought.
- [37] The quantum of the contribution to costs which a spouse may be ordered to pay, lies within the discretion of the presiding Judge.
- [38] I am guided by the well-established principles pertaining thereto, which include, *inter alia*, the following:-
- 38.1. the circumstances of the case, the financial position of the parties, the particular issues involved in the pending litigation and enabling the party to present a case adequately before the Court;³¹
 - 38.2. when assessing a spouse's reasonable litigation needs, a Court will have regard to what is involved in the case, the scale on which the parties are litigating, or intend to litigate, and the parties' respective means;³²
 - 38.3. the legal rules pertaining to the reciprocal duty of support between spouses, which are gender neutral, but that the reality must be acknowledged that given the traditional child care role and the wealth disparity between men and women, it has usually been women who have had to approach the Court for a contribution towards costs in divorce litigation;³³

³¹ Van Rippen v Van Rippen 1949(4) SA 634 at 639

³² AF v MF 2019 (6) SA 422 (WCC) at par 29

³³ AF v MF 2019 (6) SA 422 (WCC) at par 30

38.4. an Applicant is entitled to a contribution towards his/her costs, which would ensure equality of arms in the divorce action against his/her spouse.³⁴

[39] In respect of the Applicant's past costs, she avers that she was assisted and loaned money from:-

39.1. her parents, in the sum total of R137 533.30, which is for the period *03 February 2020 to 30 August 2021*;³⁵ and

39.2. *CM*, in the total sum of R128 783.10, for the period *01 February 2022 to July 2024*,³⁶ bearing in mind that the Applicant's Founding Affidavit was commissioned on *09 July 2024*,³⁷ meaning that her costs to date thereof as referred to by the Applicant, were paid for by *CM*.

[40] In the premise, the Applicant's paid costs to date of her Founding Affidavit, is in the total sum of R266 326.40, which were paid for by her parents, until *30 August 2021* and the balance by *CM*, from *01 February 2022* to date of the Applicant's Founding Affidavit.

[41] In my view, whilst it is the obligation of a Court to promote the Constitutional rights to equal protection and benefit of the law and access to Court 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, it is apparent that the Applicant has had the resources available to her to litigate and that there is no danger that she does not continue to have the resources to fund her on-going legal costs and to fight for what she is rightfully entitled to.

³⁴ Cary v Cary 1999 (3) SA 615 (C) at 621 D

³⁵ FA: 24-27, para 68.1 and FA: 24-41 to 24-45, annexure "KW4"

³⁶ FA: 24-28, para 68.2 and FA: 24-46 to 24-50, annexure "KW4"

³⁷ FA: 24-31

[42] Whilst the Applicant alleges that she must pay back the money she has loaned in respect of her legal costs, she is notably silent in respect of any proof thereof and/or that *CM* will not continue paying her legal costs, as he has done since *01 February 2022*, and which must be read in conjunction to that which I have found in respect of maintenance for the Applicant.

[43] I am therefore not inclined, at this time, to grant the Applicant a contribution to either her past and/or future costs, it being common cause that the Applicant may approach Court at any stage hereafter for such a contribution if her circumstances change.

COSTS OF THIS APPLICATION

[44] I have considered both parties' argument relating to the costs of this Application. The facts in this regard are not extraordinary and I am not persuaded that either party's position was frivolous or in bad faith.

[45] I am accordingly not inclined to grant costs in either party's favour and accordingly exercise my discretion to grant costs in the cause.

ORDER GRANTED

[1] That the following orders of the Rule 43 Order dated *17 August 2021*, under the abovementioned case number, be varied and replaced with the following:-

1.1. paragraph 4.1 shall be replaced with:-

"4.1 The Respondent shall pay maintenance for the children, in the amount of R16 000.00, which amount shall be paid monthly into a bank account nominated by the Applicant. The aforesaid payment shall be paid on or before the 1st of every month, commencing on 01 February 2025."

1.2. paragraphs 5, 7 and 8 be deleted and replaced with:-

"5 *The Respondent shall pay 100% of all expenses pertaining to the children's schooling, and 100% of all ancillary expenses thereto including but not limited to: uniforms; book; stationery; tours and outings.*

7. *The Respondent shall pay 100% of all the expenses pertaining to the children's extra mural and sporting activities, whether educational or social, and 100% of all expenses ancillary thereto, including but not limited to clothing and equipment."*

[2] The costs of this Application are costs in the cause.



F. MARCANDONATOS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: *28 October 2024*
Judgment: *22 January 2025*

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