

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 051384/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
13/03/25	
DATE	 SIGNATURE

In the matter between:

C, M.

Applicant

and

C, H. J.

Respondent

JUDGMENT

Joyini AJ

INTRODUCTION

[1] The applicant and the respondent ("the parties") and their minor children are cited in court papers by their full names. It is now standard practice in our courts that in order to give effect to the paramountcy principle entrenched in section 28 of the Constitution, the interests of minor children must be protected in legal proceedings, including, divorce proceedings. In this case, the parties have minor

children. I accordingly deem it appropriate to refer to the parties and their minor children by their initials only.

- [2] This is an application in terms of Rule 43 of the Uniform Rules of Court (“Rule 43”) brought by the applicant for interim maintenance in respect of herself and parties two minor children, primary residency of the minor children, care of the minor children, contact by the respondent with the minor children, etc. pending the determination of an action for divorce.
- [3] Courts are required to consider the applicant's reasonable needs and the respondent's ability to meet them.¹ The Court will look at the financial circumstances of both the parties and will make an order accordingly thereto. The Court will not make an order where luxuries are asked for in the Rule 43 application, and will only make an order for what is essential.
- [4] One critical function of the courts in these proceedings is to ensure that neither party is prejudiced by a lack of resources – whether to pursue their claims in the action itself, or to look after themselves and their children while the action proceeds. Another function, of at least equal importance, is to ensure that appropriate arrangements are made for the interim care of affected minor children.
- [5] The respondent opposes the application.
- [6] The court appreciates the insightful and engaging submissions from both parties' legal representatives, which greatly assisted in adjudicating this matter and, of course, compiling this judgment.

BACKGROUND FACTS

- [7] The applicant and the respondent are married out of community of property with the accrual system as of 12 November 2011. The marriage relationship still subsists. The pending divorce action was instituted on 22 November 2022. Two

¹ *M G M v M J M* [2023] ZAGPJHC 405 para 9.

minor children were born of the marriage, a 10-year-old boy (born on 24 June 2014) and 8-year-old boy (born on 11 August 2016).

- [8] The marriage relationship between the parties has broken down irretrievably and the applicant wishes to leave the matrimonial home with the minor children. The parties are *ad idem* that the minor children should remain in the primary care of the applicant.

ISSUES IN DISPUTE BETWEEN THE PARTIES

The manner in which contact with the minor children should be exercised by the respondent

- [9] In light of the allegations of physical abuse and more specifically corporal punishment and the respondent's excessive use of alcohol, the applicant is of the view that the respondent should not exercise sleepover contact. The family advocate has already investigated the best interest of the minor children and provided two interim reports on 31 March 2023 and 31 July 2023 respectively.
- [10] In the first interim report, the family advocate requested, *inter alia*, that the allegations of the respondent being aggressive and abusing alcohol should be investigated by a clinical psychologist.
- [11] In the second interim report, the family advocate stated that the respondent has not provided them with a report from a clinical psychologist and therefore the investigation was suspended, pending receipt of the psychologist's report.
- [12] The respondent has to date (almost two years) not provided a report by a clinical psychologist and therefore no recommendation could have been made by the family advocate in respect of the respondent's contact with the minor children. The court was referred to paragraph 4.3 of the family advocate's report wherein it is stated that the photographs provided to them, of the corporal punishment exercised on minor children by the respondent is concerning.
- [13] In the absence of a report by a psychologist, the applicant persists with the relief set out in her notice of motion.

[14] The applicant also obtained a protection order in the domestic violence court, during November 2022, which order has not been set aside.

[15] The respondent is seeking sleepover contact every alternative weekend from Friday to Monday as well as every Wednesday until Thursday.

The amount of maintenance that the respondent should be liable to pay in respect of the minor children

[16] The applicant is seeking an order that the respondent pays an amount of R12 000.00 per child per month. The minor children's financial needs are set out and listed in paragraph 5.7 of the applicant's sworn statement and in her financial disclosure form.

[17] The respondent is tendering to pay an amount of R4 000.00 per child per month with no justification as to how this amount is calculated, taking into consideration the minor children's needs set out by the applicant.

The amount of maintenance that the respondent should be liable to pay in respect of the applicant

[18] The applicant is seeking an order that the respondent should be liable to pay an amount of R23 000.00 per month in respect of spousal maintenance. The applicant's maintenance needs are set out in paragraph 5.7 of her sworn statement and her financial disclosure form.

[19] The respondent does not make any tender to pay a cash amount towards the applicant, with no justification other than alleging that the applicant should find employment. The respondent tenders to retain the applicant on his medical aid fund and pay the monthly contributions and that the applicant can retain his petrol card to be utilised up to an amount of R3 000.00 per month.

The amount to be paid by the respondent in respect of a deposit for a rental property for the applicant and the minor children

[20] The applicant seeks an amount of R15 000.00 in respect of the deposit for herself and the minor children. The applicant will need to rent a 3 bedroom property in the same area that they are currently residing, close to the minor children's schools.

[21] The respondent only tenders an amount of R10 000.00 in respect of a deposit for a rental property, again with no justification.

Whether the applicant is entitled to a legal cost contribution and if so, in what amount?

[22] The applicant is seeking an order that the respondent contributes towards her legal fees in the amount of R75 000.00 to be paid in monthly instalments of R15 000.00 per month. The applicant's grounds for a contribution towards legal costs are set out in paragraph 7 of her sworn statement.

[23] The respondent does not make any tender in respect of a contribution towards legal fees and again does not provide any justification nor explanation.

Costs of the application

[24] The applicant seeks an order for costs.

[25] The respondent seeks an order that costs be cost in the divorce.

PARTIES' FINANCIAL POSITIONS

[26] It is common cause that the applicant is unemployed and is currently earning an income, by doing small odd jobs, of approximately R6 000.00 per month.

[27] It is also common cause that the respondent has always been the breadwinner and that he has always been responsible for all of the household expenses. Although the respondent does not tender the amounts sought by the applicant, the respondent does not state that he is not in a financial position to do so.

[28] Although denied by the applicant, the respondent is of the view that he is currently still sufficiently maintaining the minor children and the applicant in that

he continued to pay for all expenses and necessities, even after the divorce action was instituted.

- [29] The respondent denies that he earns a monthly income of approximately R100 000.00 per month, but fails to state what his monthly income is. The respondent merely refers the court to his financial disclosure forms wherein it is indicated that he earns a monthly income of R62 437.76 (R749 253.12 / 12). He furthermore alleges that his monthly expenses amounts to R66 354.00.

EVALUATION AND ANALYSIS

- [30] It was held in *Taute v Taute*² that “*relief under rule 43 is intended to be interim and temporary and cannot be determined with the degree of precision and exactitude afforded by detailed evidence.*”

- [31] The applicant is only entitled to a reasonable maintenance *pendente lite*. In deciding whether a case for a reasonable maintenance has been made, the court looks at: (i) the standard of living of the parties during the marriage; (ii) the applicant's actual and reasonable needs/requirements; and (iii) the respondent's income (although the use of assets can also sometimes be considered).³

- [32] The applicant seeks interim spousal and children's maintenance. The applicant does not agree with respondent's version. The respondent opposes the application. Despite the regrettable efforts to unnecessarily complicate issues that this court should determine, the issues that must be decided are relatively simple and they are as follows: (i) Are the parties' children and the applicant in need of maintenance pending the finalisation of the divorce proceedings? (ii) What are the applicant's actual and reasonable needs and/or requirements? (iii) If these questions are answered in the affirmative, then it should be determined whether the respondent has the financial means to provide interim maintenance to the applicant and their children pending the finalisation of the divorce

² 1974 (2) SA 675 (E).

³ See *Taute v Taute* 1974 (2) SA 675 (E) at 676D-H; *CD v JHD* [2022] ZAGPPHC 456 at paras 55-6.

proceedings. (iv) If he does, to determine the reasonable amounts of maintenance that the respondent should be ordered to pay.

[33] To adequately determine the need for maintenance and ability to pay, respective assets and incomes of both parties must be assessed.

[34] It is common cause that the applicant is unemployed and is currently earning a small income, by doing small odd jobs, of approximately R6 000.00 per month.

[35] Although denied by the applicant, the respondent is of the view that he is currently still sufficiently maintaining the minor children and the applicant in that he continued to pay for all expenses and necessities, even after the divorce action was instituted. I am not persuaded by the respondent's argument.

[36] The respondent denies that he earns a monthly income of approximately R100 000.00 per month, but fails to state what his monthly income is. The respondent merely refers the court to his financial disclosure forms wherein it is indicated that he earns a monthly income of R62 437.76 (R749 253.12 / 12). He furthermore alleges that his monthly expenses amounts to R66 354.00. This is somewhat confusing as it does not sound correct.

[37] Some of the applicant's and minor children's expenses referred to above comprise of basic daily necessities and implicate the constitutional rights of the minor children.⁴ The court sitting as the upper guardian of all minor children, is enjoined to take into consideration all factors present in order to determine the best interest of minor children.⁵

[38] I accept that the respondent is making some contribution towards the minor children's expenses. However, he has a constitutional duty to meet all their needs

⁴ See: Section 28(2) of the Constitution and section 9 of the Children's Act.

⁵ See *Kotze v Kotze* 2003 (3) SA 628 (T) at 630G which was endorsed by the Constitutional Court in *Mpofu v Minister for Justice and Constitutional Development and Others* [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 21.

and a common law duty to maintain the applicant, a duty that will terminate upon divorce. It is evident from the above schedule of expenses that the R4 000.00 tendered by the respondent for the maintenance of the minor children is not adequate at all.

[39] It is also common cause that the respondent has always been the breadwinner and that he has always been responsible for all of the household expenses. Although the respondent does not tender the amounts sought by the applicant, the respondent does not state that he is not in a financial position to do so. As such, the court draws an inference that he can afford.

[40] In my view, the respondent does have the means and ability to pay for the reasonable maintenance for the applicant and the minor children. However, there is a need to be fair in terms of ordering what he must pay.

Contribution towards costs

[41] The applicant seeks contribution towards her legal costs in the amount of R75 000.00. The respondent does not make any tender in respect of a contribution towards legal fees and again does not provide any justification nor explanation.

[42] It is well accepted that a claim for contribution towards costs is *sui generis* and based on the duty of support spouses owe each other. In *AF v MF*,⁶ the court made the following pertinent point: *“The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the 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*

⁶ 2019 (6) SA 422 (WCC) at paras 41-2.

resources to come to court to fight for what is rightfully theirs. 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 to an attorney who is willing to wait for payment of fees — in effect to act as her 'banker'. The primary duty of support is owed between spouses, and 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.)"

CONCLUSION

- [43] To decide whether the applicant and the children should receive interim maintenance from the respondent pending the finalisation of the divorce proceedings, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective affidavits, heads of arguments and oral arguments by their counsel. The conclusions that I reach are not binding on the court that will conduct the divorce trial which, after hearing all the evidence, may provide clarity on the actual financial position of the parties.⁷
- [44] The respondent's submission illustrates that the applicant may have been able to maintain herself at some point especially before she was fired from work by the respondent. I am satisfied that the applicant no longer receives the salary and income that she used to receive. The R6 000.00 she earns as an income per month from doing small odd jobs is not sufficient at all.
- [45] In conclusion, given the temporary nature of Rule 43 proceedings, I am convinced that the applicant has been placed in a situation that she and their minor children are deprived of their necessary maintenance which warrants the intervention of this court by way of Rule 43 remedy. I am convinced on the strength of the evidence submitted to the court, that the respondent can afford to pay interim maintenance. I am convinced that the applicant and the minor

⁷ *Levin v Levin and Another* **1962 (3) SA 330** (W) 331D.

children should receive interim maintenance from the respondent based on the evidence before the court.

- [46] Each application for spousal maintenance must be decided on its own facts. It is not disputed there is a significant disparity in their respective incomes and that the respondent has through the years paid for most expenses. He has always paid for his family's living expenses.
- [47] In *CC v NC*⁸ the court stated that an applicant is entitled to reasonable maintenance dependent on the marital standard of living of the parties, albeit that a balanced and realistic assessment is needed, based on the evidence concerning the prevailing factual situation.
- [48] I have considered the list of expenses the applicant annexed to her papers, they appear reasonable. It is clear that the respondent would not be seriously prejudiced if he must keep his family financially comfortable. I am inclined to grant the applicant maintenance in the amount of R10 000 per month and a further R5 000 per child per month.
- [49] The applicant's constitutional rights to dignity⁹ should not be compromised. She should not have to go cap in hand to the respondent each time, he has refused to pay for very critical necessities. The facts demonstrate a recent trend of "*tight fisted and spiteful behaviour*", and it is likely to continue until the matter is finalised. In *Glazer v Glazer*,¹⁰ the court stated: "*I think that a wife is entitled to a reasonable amount according to her husband's means, not necessarily according to what he thought was reasonable.*"
- [50] It is my considered view that the respondent can afford to make a once-off payment of R15 000.00 towards deposit on the applicant and minor children's rental accommodation and a once-off payment of R5 000.00 contribution towards relocation costs.

⁸ 16742/21) [2021] ZAWCHC 227 (9 November 2021).

⁹ Section 10 Act 108 1996.

¹⁰ 1959 (3) SA 930 D_E.

[51] In *Dodo v Dodo*¹¹, it was held: "*The husband's duty of support includes the duty to provide the wife with costs for her litigation with her husband.*" This is compatible with the provisions of section 9(1) of the Constitution which reads: "*Everyone is equal before the law and has the right to equal protection and benefit of the law*". The respondent can afford to pay an amount of R75 000.00 towards contribution to the applicant's legal fees, payable in monthly instalments of R15 000.00.

COSTS

[52] The costs of this application will be costs in the cause. I have ruled that costs would be costs in the cause, meaning they would be determined as part of the overall case.

ORDER

[53] In the circumstances, I make the following order, *pendente lite*:

- [53.1] Both parties retain full parental rights and responsibilities in respect of the two minor children;
- [53.2] Primary residency of the minor children vests with the applicant;
- [53.3] The respondent has the right to exercise contact with the minor children as follows:
 - [53.3.1] Every alternative weekend on Saturday from 08h00 until 17h00 when the respondent will return the minor children to the care of the applicant and collect them on Sunday at 08h00 and return them at 17h00;
 - [53.3.2] Every alternative public holiday from 08h00 until 17h00;
 - [53.3.3] Every day of half of every long school holiday from 08h00 until 17h00 when the respondent will return the minor children to the applicant's care;

¹¹ 1990 (2) SA 77 (WLD) at 96 F.

- [53.3.4] Father's Day from 08h00 to 17h00, with the understanding that the applicant will be entitled to exercise contact with the minor children on Mother's Day if Mother's Day falls on a weekend that the respondent is entitled to exercise contact;
- [53.3.5] Half of the available time on the minor children's respective birthdays, to be arranged between the parties in advance;
- [53.3.6] The respondent's birthday insofar as it is practical, with the understanding that the applicant may have the minor children in her care on her birthday;
- [53.3.7] Daily telephonic contact between 17h30 and 18h30;
- [53.4] The respondent is ordered to pay maintenance in respect of the minor children as follows:
- [53.4.1] School fees payable directly to the respective schools;
- [53.4.2] Extra mural activities payable directly to the supplier;
- [53.4.3] Retains the minor children on his medical aid and pay the monthly premium and expenses not covered by the medical aid;
- [53.4.4] On demand, all reasonable medical expenses of the minor children not paid by the medical aid;
- [53.4.5] Cash amount of R5 000.00 per month per child, to be paid into the bank account of the applicant with the first payment due on 30 March 2025 and thereafter on or before the 30th day of each month;
- [53.5] The respondent is ordered to pay maintenance in respect of the applicant as follows:
- [53.5.1] Retain the applicant on his medical aid fund and pay the monthly premium;
- [53.5.2] The respondent is ordered to pay a cash amount of R10 000.00 per month into the bank account of the applicant with the first payment due

on 30 March 2025 and thereafter on or before the 30th day of each month;

- [53.6] The respondent is ordered to make a once-off payment of R15 000.00 towards deposit on the applicant and minor children's rental accommodation on or before 30 March 2025;
- [53.7] The respondent is ordered to make a once-off payment of R5 000.00 contribution towards relocation costs on or before 30 March 2025;
- [53.8] The respondent is ordered to sign or co-sign the lease agreement, if the applicant does not qualify and/or meet the requirements for whatever reason;
- [53.9] The respondent is ordered to pay an amount of R75 000.00 towards a contribution to the applicant's legal fees, payable in monthly instalments of R15 000.00; and
- [53.10] The costs of this application will be costs in the cause.

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T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Date of Hearing: 26 February 2025

Date of Judgment: 13 March 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 13 March 2025 at 10h00.