

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 050529/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/NO
14/03/25	
DATE	SIGNATURE

In the matter between:

S, C.

Applicant

and

S, H. C.

Respondent

In re:

S, H. C.

Plaintiff

and

S, C.

Defendant

JUDGMENT

Joyini AJ

INTRODUCTION

- [1] The applicant and the respondent (“the parties”) and their 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, one of the parties’ children is a minor. I accordingly deem it appropriate to refer to the parties and their 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, primary residence and care of the minor child, contact by the respondent with the minor child, contribution by the respondent towards her legal fees, 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

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

- [7] The applicant and the respondent are married out of community of property with the exclusion of the accrual system as of 1 May 1999. The marriage relationship still subsists. The respondent is the plaintiff in the pending divorce action.
- [8] Two children were born of the marriage, 20-year-old boy (born on 27 February 2004) and 15-year-old daughter (born on 11 December 2009) who is still a minor. The minor child, the daughter, is residing with the respondent since August 2023.
- [9] The marriage relationship between the parties has broken down irretrievably. The applicant left the matrimonial home during June 2023.

APPLICATION FOR CONDONATION FOR LATE FILING OF THE RESPONDENT'S OPPOSING AFFIDAVIT

- [10] With regard to the application for condonation, counsel for the applicant did not argue against granting the condonation application for late filing of the respondent's opposing affidavit.
- [11] In weighing up the prejudice of condoning the late filing of the respondent's opposing affidavit on the applicant versus the prejudice on the respondent, the balance tips in favour of the respondent.
- [12] It is my considered view that condoning the late filing of the respondent's opposing affidavit does not prejudice the applicant in any way and it will in fact assist the court in reaching a decision. It should thus be allowed.

RELIEF SOUGHT BY APPLICANT

- [13] The court is called upon by the applicant to make the following order *pendente lite*:

"1. That the parties retain full parental responsibilities and rights as are provided for in section 18(2) of the Children's Act, 38 of 2005 ("the Children's Act"), including the parental responsibility and right to:

1.1 act as guardians for the minor child

- 1.2 care for the minor child in which regard the minor child shall reside with the Plaintiff on a primary basis*
- 1.3 have contact with the minor child, in which regard the Respondent shall have reasonable rights of contact in relation to the minor child*
- 1.4 contribute towards the maintenance of the minor child in accordance with her means.*
- 2. That the Respondent is ordered to pay R88 950.00 towards the maintenance of myself;*
- 3. That the Respondent is ordered to bear the costs of retaining me as dependent member of a medical aid scheme and by bearing all the medical expenses incurred in private healthcare in excess of the cover provided by the medical aid scheme;*
- 4. That the Respondent pay a contribution towards my legal fees/expenses in the amount of R150 000.00;*
- 5. That the Respondent pays the costs of this application;*
- 6. Additional and/or alternative relief."*

APPLICANT'S VERSION

- [14] The applicant is unemployed and was maintained in full by the respondent whilst living at the matrimonial home.
- [15] The applicant gets R180 000.00 income as maintenance payments from the respondent in the last 12 months.
- [16] The applicant estimates her net income in the next 12 months to be R180 000.00 from maintenance payments from the respondent.

RESPONDENT'S VERSION

- [17] The respondent tenders to continue paying the applicant the following:

- [17.1] The applicant's monthly rent, water and electricity, which is approximately R16 000.00 per month;
- [17.2] An amount of R15 000.00 per month to the applicant;
- [17.3] The respondent retains the applicant as a dependent on his medical aid and pay the monthly premiums thereof, as well as her extra medical expenses not covered by the medical aid;
- [17.4] The applicant's monthly cell phone account with vodacom, which is approximately R2000.00 per month; and
- [17.5] The respondent continues to pay the applicant's monthly insurance on the applicant's motor vehicle. According to the respondent, the applicant has a new motor vehicle in her possession and usage. This vehicle has been paid in full by the respondent and the applicant may register the vehicle on her name. The respondent has tendered same in the divorce proceedings.
- [18] The respondent solely maintains the parties' minor daughter, who primarily resides with him, without receiving any form of a contribution from the applicant.
- [19] The respondent is of the view that the applicant is seeking an absurd and astronomical amount in respect of a contribution towards her legal cost.
- [20] The respondent does not make any tender in respect of a contribution towards the applicant's legal fees.
- [21] According to the respondent, the applicant's alleged expenses are extremely inflated, fabricated and unsubstantiated. The respondent's opinion is that what the respondent is and has been contributing towards the applicant, since she vacated the erstwhile common home is more than reasonable and covers all of the applicant's monthly needs.
- [22] The respondent is of the view that the applicant's Rule 43 application is based on unfounded, unsubstantiated and baseless allegations, whilst she (applicant) does not dispute the substantial contributions the respondent is making towards

her, since she left the erstwhile common home. The respondent therefore argues for the dismissal of the applicant's Rule 43 application.

ANALYSIS

- [23] 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."*
- [24] According to the respondent, in assessing the applicant's Rule 43 application, the court should censure the applicant's misstatement of her expenses. The respondent argues that the applicant's schedule of expenses does not constitute a true reflection of the applicant's actual and reasonable needs in that she has misstated her expenses.
- [25] The legal principle in respect of exaggerated expenses and misstatements of the true nature of financial affairs are well established. In *Du Preez v Du Preez*,³ the Court held: *"...there is a tendency for parties in rule 43 applications, acting expeditiously or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income...To my mind the practice is distasteful, unacceptable, and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings...Should such conduct occur in rule 43 proceedings at the instance of the applicant, then relief should be denied."*
- [26] In the circumstances, I am of the view that the respondent has made out a case to seriously suggest that the expenses claimed by the applicant are unreasonable so as to bring it within the purview of the court's censure in *Du Preez*. Considering the support that the respondent provides to the applicant and their minor child, I am of the view that the applicant is guilty of the conduct referred to in the *Du Preez* case *supra*.

² 1974 (2) SA 675 (E).

³ 2009 (6) SA 28 (T).

- [27] Rule 43 was not created to provide an interim meal ticket as stated in *Nilsson v Nilsson*.⁴ The rule was enacted to ensure justice, in that the parties were treated fairly *vis-à-vis* one another. The totality of what was covered by the rule had its basis in the duty of support that the spouses owe each other as held in *Carry v Carry*⁵ and parents owe to their children.

Contribution towards costs

- [28] In my opinion, the rule was not envisioned for the parties to have identical means. If that were the case, experience has taught that some divorce actions would last for the lifetime of the parties involved. The rule was also not intended to result in an order which would, for all intents and purposes, be a certificate of exemption for legal practitioners from some risk, namely, that their fees are covered in advance. The rule was intended for the parties to have equal means, allowing them to engage with the issues between them on an equal footing.
- [29] The applicant seeks contribution towards her legal costs in the amount of R150 000.00. Even though the respondent does not make any tender in respect of a contribution towards legal fees, this is somewhat steep.
- [30] 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*

⁴ [1984] 1 All SA 520 (C) at p. 520.

⁵ 1999 (3) SA 615 (C) at 619H-I.

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

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. 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

- [31] The applicant has misstated her expenses and understated the support that the respondent provides to her and their minor child. This is a dishonorable conduct which has no place in judicial proceedings as held in *Du Preez* case. The respondent therefore argues for the dismissal of the applicant's Rule 43 application and I am persuaded by the respondent's argument with, of course, the exception of the contribution towards the applicant's legal costs.

Conclusion on contribution towards applicant's legal costs

- [32] In *Dodo v Dodo*⁷, 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*". On the evidence before court, I am convinced that 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

⁷ 1990 (2) SA 77 (WLD) at 96 F.

[33] 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.

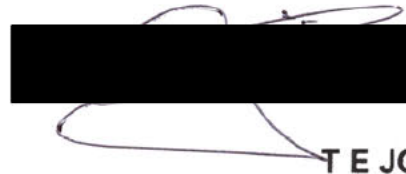
ORDER

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

[34.1] The respondent's application for condonation for the late filing of his opposing affidavit is hereby granted.

[34.2] The respondent is ordered to pay an amount of R75 000.00 towards a contribution to the applicant's legal costs, payable in monthly instalments of R15 000.00.

[34.3] The costs of this application will be costs in the cause.



T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Date of Hearing: 26 February 2025

Date of Judgment: 14 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 14 March 2025 at 10h00.