

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case 2024-143234

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

28 February 2025

In the matter between:

C[...] A[...] S[...]

Applicant

and

K[...] V[...] S[...]

Respondent

JUDGMENT

DU PLESSIS J

Introduction

[1] This is an opposed Rule 43 application, in which the applicant seeks interim relief pending the finalisation of the divorce proceedings between her and the respondent. She seeks relief pertaining to interim maintenance and contributions to legal costs and arrangements regarding the minor children's primary residence and contact rights.

[2] The parties were married on 24 March 2012, with two minor children born of the marriage in 2013 and 2015. A Parenting Plan and Agreement (“the agreement”) was concluded between the parties on 16 May 2024, regulating the issues of primary residence, contact and maintenance. The applicant states that changing circumstances necessitate a variation of the agreement. The respondent disagrees and regards this application as an abuse of Rule 43 proceedings.

[3] The applicant states that her financial position significantly deteriorated since the signing of the agreement. She submits that the respondent is not contributing adequately to the maintenance and education of the minor children. She seeks an order for increased interim maintenance and a contribution of R300 000 towards her legal costs.

[4] The respondent opposes the application, contending that he has fully complied with the 16 May 2024 agreement. He indicates that the applicant earns a higher monthly income and that her claims are excessive and unreasonable. He states that the applicant is now abusing the Rule 43 process as she seeks to overread a binding agreement without a material change in circumstances.

Joint parenting plan

[5] The agreement concluded between the applicant and the respondent on 16 May 2024 provides for the primary residence of the minor children to be with the applicant. The agreement sets out contact arrangements for the respondent, ensuring that he has meaningful engagement with the children.

[6] Concerning financial responsibilities, the agreement stipulates that the respondent is to contribute 50% of the key expenses related to the children, including school fees, medical aid, au pair services, and agreed extramural activities per child per month. No specific provision was made for direct monetary maintenance payments beyond these shared costs.

[7] Clause 4 of the agreement allows for changes to the agreement but only when both parties agree in writing. It also stated that both parties have the right to make the agreement an order of court. This did not happen.

[8] The respondent states that he fully complied with the agreement and that the applicant's Rule 43 application seeks to alter it without any material change in circumstances or showing how he breached the agreement. He relies on contract law principles of *pacta sunt servanda*, stating that the contract binds the applicant unless the contract is cancelled due to breach or unless, in the Rule 43 context, she can indicate a material change in circumstances.

Does the agreement bind the applicant?

[9] The principle of *pacta sunt servanda*, a fundamental tenet of contract law, holds that agreements freely and voluntarily entered into must be honoured and enforced.¹ This principle underpins the stability and predictability of contractual relationships, ensuring that parties can rely on the enforceability of their commitments. *Pacta sunt servanda* is essential to upholding legal certainty and fostering good faith in contractual dealings.

[10] However, it is not an absolute rule. It is subject to public policy considerations,² fairness, and legislative intervention,³ particularly in contexts where strict enforcement would lead to injustice, hardship, or contravene fundamental rights. In family law, for instance, courts may depart from rigid contractual enforcement where it conflicts with the best interests of a child or broader equitable principles. Thus, while *pacta sunt servanda* remains a cornerstone of contractual law, its application must be balanced against competing legal and constitutional imperatives.

[11] In *PP v MP*⁴ the court, in the context of a divorce settlement, acknowledged that *pacta sunt servanda* is a foundational principle of contractual law. However, maintenance agreements in divorce are distinct due to the ongoing nature and the potential for unforeseen future developments. Thus, the court has an equitable discretion on modifying agreements to changing circumstances, balancing the need

¹ *Barkhuizen v Napier* [2007] ZACC 5.

² *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13.

³ For instance, the Consumer Protection Act 68 of 2008.

⁴ [2018] ZAWCHC 140.

for contractual certainty with circumstances of fairness. While agreements between parties are thus considered, the court retains the discretion to adjust maintenance obligations to address immediate needs and prevent undue hardships. This is especially important in cases where the welfare of minor children is involved, and the children's best interest will always be paramount. It cannot be contracted out.

[12] This is more so in Rule 43 applications that are interim in nature, with a strong focus on the children's best interest.

[13] The fact that an agreement was concluded does thus not mean that the applicant cannot launch a Rule 43 application. Whether she is entitled to the relief she seeks will be discussed next.

Rule 43 application

[14] The applicant aver that the respondent uses the bank account of his company to pay for all his personal expenses. She points out that the company pays for his golf, haircuts, groceries, alcohol, restaurant and carwash. She claims that in 2023 the company earned an average income of R243 428 per month.

[15] The applicant discloses that she receives a monthly net salary of R57 023, quarterly commission, and a discretionary bonus. This brings her net income to R72 811 per month. Her monthly expenses amount to R48 538 per month, and the costs for the children are about R60 059 per month. She cites a deficit of R38 685. She had to sell the matrimonial home to enable her use the proceeds to pay for the deficit and incurring debt on her credit card. All her accounts considered together show a deficit of about R116 000.

[16] The first area of dispute concerns the maintenance contribution. The applicant seeks an order compelling the respondent to pay R30 800 monthly to maintain their minor children, arguing that her financial position has deteriorated and that the current arrangement does not adequately meet their needs. In contrast, the respondent opposes this request, maintaining that he has fully complied with the terms of the May 2024 agreement, which requires both parties to equally contribute to key expenses such as school fees, medical aid, au pair services, and

extracurricular activities. He contends that there has been no material change in circumstances to warrant an increase and that the applicant's financial position remains stable, if not superior to his own.

[17] The respondent points out that the applicant's net income exceeds his of R20 000 per month and that she made lifestyle choices – like purchasing a BMW X3 and holiday travel – which by no means indicate that she is destitute. She cannot rely on his company's statements as the company is not cited as a party, and she has not made a case that the company is his alter ego by piercing the corporate veil. He attached no financial disclosure forms to his sworn statement. He also does not attach his bank accounts.

[18] The respondent's failure to submit financial disclosure forms suggests a lack of candour before the court. The available financial information indicates that he is his company's sole shareholder and director, which generated an average monthly income of R243 000 over a three-month period in 2023. Furthermore, he funds personal expenses—including golf, haircuts, alcohol, restaurants, and carwashes—directly from the company's account. His reliance on a declared salary of R20,000 per month is an apparent attempt to downplay his actual financial capacity.

[19] Despite his financial means, the respondent's contributions towards the children's expenses have been limited and inconsistent, according to the applicant. He pays 50% of their medical aid, au pair fees, and school fees per month—and only since June 2024—leaving the applicant to bear the remaining financial burden. She had to incur debt to pay the household expenses.

[20] This partial contribution is especially concerning given that the children faced the risk of expulsion due to unpaid school fees, forcing the applicant to pay R40 000 from her own pocket to secure their continued education. Despite this, the respondent has refused to reimburse her, effectively shifting the full financial responsibility onto the applicant while maintaining his own discretionary expenses and lifestyle. His failure to prioritise his children's educational stability and well-being demonstrates an avoidance of his financial obligations. Apart from the respondent's lack of full financial disclosure, he has failed to engage meaningfully with the specific

financial needs outlined in the applicant's financial disclosure form, dismissing them as "excessive" without providing a detailed rebuttal or alternative financial breakdown.

[21] A second central point of contention is the contribution towards legal costs. The applicant seeks R300 000 from the respondent to cover her legal expenses, arguing that she lacks sufficient funds to continue the divorce proceedings. The respondent strongly opposes this, asserting that the amount is excessive and unaffordable, particularly in light of his monthly income of R20 000. He argues that the applicant has substantial financial resources, including a higher monthly income of R72 811.46 and access to prior legal funding. While he acknowledges that a contribution towards legal costs may be justified, he submits that any such order should be reasonable and proportionate to his financial means.

[22] The third dispute pertains to retrospective relief. The applicant seeks an order backdating maintenance to March 2024 and compelling the respondent to reimburse her R40,000 for past school fees. The respondent contends that Rule 43 does not allow for retrospective relief, emphasising that the parties had already settled their financial arrangements in the May 2024 agreement – and that the R40000 stems from March 2024, thus two months before signing the settlement. He argues that the applicant attempts to override a binding agreement without legal justification.

[23] The final area of disagreement concerns alcohol and conduct restrictions. The applicant seeks to impose stricter conditions on the respondent's time with the children, including potential liver function tests. The respondent, however, asserts that the existing agreement already includes safeguards and that there is no basis for additional restrictions.

The law

[24] Rule 43 provides expeditious and interim relief in matrimonial matters, ensuring fairness pending the final determination of the divorce. In *Du Preez v Du Preez*⁵ the court stated it as follows:

⁵ [2008] ZAGPHC 334 para 14.

"Moreover, the power of the court in Rule 43 proceedings, in terms of Rule 43(5), is to "dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision". The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume, there is a duty on applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith (*uberrime fidei*) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with "clean hands" and on that ground alone the court will be justified in refusing relief." (own emphasis)

[25] In this case, the respondent did not disclose his personal bank accounts or those of the company despite the applicant's pertinently raising the issue. This was also the applicant's experience in the divorce proceedings, where certain documents were requested to calculate the accrual but was not provided. In *SK v MN*⁶ the court examined the respondent's lifestyle and evasiveness in financial disclosure on similar facts. Based on that dictum, this court can echo that a lack of transparency hinders the court from assessing his true financial capacity, leaving the court with only the applicant's version.

[26] As for the argument that the respondent's company had to be joined, this does not accord with the legal position. *GRW v SLW*⁷ stated that while this might be the factual legal position, the fact that the respondent manages and controls the company's operation and refuses to provide financial documentation leaves the court with the interpretation that he attempts to conceal his actual income.

⁶ [2024] ZAKZDHC 43.

⁷ [2023] ZAGPJHC 202.

[27] As for retrospective maintenance, this was extensively dealt with in *AF v MF*⁸, which dealt with legal costs in divorce proceedings. The court stated

"32. At common law a claim for arrear spousal maintenance is barred by virtue of the principle in *praeteritum non vivitur* (one does not live in arrear), the argument being that if the spouse managed on her own resources, there was no need for support. An exception to this rule is recognised where the spouse has incurred debts in order to maintain herself."

[28] Cockrell *et al*⁹ also clarify that the rule against retrospective maintenance does not apply to claims made on behalf of a child, as the duty of support is shared by both parents. Consequently, the applicant is not barred from seeking retrospective maintenance in a divorce action. While I do not rule out the possibility that the same principle could apply in Rule 43 applications, I am not persuaded that it applies in these circumstances. Here, an existing agreement was in place, which the respondent asserts he has honoured. If he failed to do so, the applicant has alternative legal remedies available. The agreement expressly provided for amendment, meaning the applicant could have sought its revision or pursued this Rule 43 application to regulate interim maintenance. Considering these factors, I am not inclined to grant retrospective cash maintenance in this instance. However, since he was responsible for 50% of the school fees per the agreement, he is liable for half of the R20000 of the school fees that the applicant had to pay to keep the children in school.

[29] The draft order submitted by the applicant contained inconsistencies. The R30,000 request for monetary maintenance included school fees, au pair costs, and medical expenses, while a separate provision for these expenses was also made.

[30] I am of the view that the applicant cannot claim the vehicle instalment, as it does not qualify as a necessary expense for the children's transport needs. The BMW X3 appears to be a personal luxury expense for the applicant rather than an

⁸ [2019] ZAWCHC 111 para 27 onwards.

⁹ Cockrell A, Keightley R and Van Heerden B *Boberg's Law of Persons and the Family* (1999) Juta p 238.

essential cost related to the children's well-being. However, car maintenance and related costs will be allowed, as they directly cover the children's transportation needs.

[31] As a result, I have recalculated the necessary maintenance amount to ensure a transparent and equitable division of financial responsibility, as indicated in the table below. The amount comes to R40 455, which means a monthly cash contribution (rounded up) of R22230.

Item	The children's portion asked for	The amount awarded by the court
Rent	R 13 000,00	R 13 000,00
Food	R 5 400,00	R 5 400,00
Toiletries	R 860,00	R 860,00
Electricity	R 1 500,00	R 1 500,00
Insurance	R 80,00	R 80,00
Phone (combined)	R 420,00	R 420,00
Domestic help	R 2 600,00	R 2 600,00
Clothing	R 1 300,00	R 1 300,00
Haircuts	R 300,00	R 300,00
BMW instalment	R 5 900,00	R -
Vehicle maintenance	R 250,00	R 250,00
Fuel	R 1 925,00	R 1 925,00
Licence	R 500,00	R 500,00
Insurance	R 790,00	R 790,00
School	R 8 068,00	R -
Au pair	R 4 000,00	R 4000,00
Stationary	R 350,00	R 350,00
Outings	R 500,00	R 500,00
Sports	R 1 740,00	R 1 740,00
Extramural	R 160,00	R 160,00
Medical aid	R 1 670,00	R -

Doctors	R 500,00	R -
Excess	R 1 400,00	R -
Pocket money	R 400,00	R 400,00
Holiday	R 2 000,00	R 2 000,00
House maintenance	R 250,00	R 250,00
Household appliance	R 200,00	R 200,00
Linen etc	R 250,00	R 250,00
DSTV	R 550,00	R 550,00
Entertainment	R 1 000,00	R 1 000,00
Religious contributions	R 3 380,00	R 3 380,00
Gifts	R 500,00	R 500,00
Pets	R 250,00	R 250,00
	R 61 993,00	R 44 455,00

[32] The best interests of the children remain the guiding principle in this decision. The respondent's partial and inconsistent contributions are inadequate, particularly given his financial capacity. Given that he was responsible for 100% of the school fees during the marriage, it is both just and reasonable that he be ordered to reimburse the applicant for this expense.

[33] Lastly, the respondent disputes the claim for legal costs, arguing that the only documented legal expense is R90 000 from a previous domestic violence application and that no bill of costs has been submitted for the divorce proceedings. However, given the hostility of these proceedings, the respondent's reluctance to cooperate, his failure to disclose requested financial documents, and his overall lack of transparency, the applicant's request for R300 000 in legal costs—which includes expenses from prior litigation and an R60 000 deposit for this application—is not unreasonable or exaggerated.

[34] As for the contact with the children, the order will clarify holiday contact. I see no reason, based on the fact presented, why a more honour condition should be

placed on the parties regarding alcohol consumption when they are responsible for the children than the agreement provided for.

[35] As for the costs of this application, there is no reason why costs should not follow the cause. The element of the agreement makes this not a straightforward Rule 43 application, but it is not an overly complicated matter. The scale can thus be taxed at scale B.

Order

[36] The following order is made:

1. The parties remain holders of full parental responsibilities and rights in respect of the two minor children D[...] K[...] S[...] and A[...] B[...] S[, including the parental responsibilities and rights of guardianship, care, contact and maintenance as follows:

1.1. The right of primary residence is awarded to the applicant, subject to the following reasonable rights of contact to the respondent:

1.1.1. Weekend contact - to collect the minor children every alternative Friday from after school and/or extramural activities and to return them to the applicant on Sunday at 17:00;

1.1.2. Midweek contact after weekend contact – Every Wednesday from after school and/or extramural activities until 19:00. The respondent is to collect and return the minor children to the applicant;

1.1.3. Midweek contact in the week after the children spent the weekend with the applicant – Every Tuesday from after school and/or extramural activities until 19:00. The Respondent is to collect and return the minor children to the applicant and

1.1.4. During school holiday periods and subject to paragraphs 1.1.5 and 1.1.6, the weekend contact will be extended from a Friday at 14:00 to Monday at 8:00.

1.1.5. Long School Holiday contact:

1.1.5.1. The respondent is to have contact with the children for half of the available time during long school holidays, Christmas and New Year's Day, to rotate every year between the applicant and the respondent. Should the respondent not be able to exercise this contact during school holidays, he

will be entitled to the contact as stipulated in paragraphs 1.1.1 to 1.1.3 for half of the long school holidays.

1.1.5.2. Short School Holiday contact – The short school holidays rotate between the parties and to further rotate yearly to allow each party to have the children with them every second year during the Easter holiday.

1.1.6. Telephonic or virtual contact – Both Parties are to have this contact between 18:00 and 19:00 at least twice a week or at least once over a weekend when the minor children are in the other parent's care.

1.1.7. The contact is subject to neither party conveying the children whilst under the influence of alcohol or being intoxicated.

2. The respondent is to pay monetary maintenance for the two minor children in the sum of R22 230 per month on the first day of every month, which amount shall escalate at a rate equal to the consumer price index for the previous year on the anniversary of this order. These payments will start on the first day of the month following the order.

3. The respondent is to pay the applicant R20 000 for the school fees she paid.

4. The respondent is to pay 100% of the children's school fees.

5. The respondent is to pay 50% of the medical aid contribution and all medical treatment not covered by the medical aid, including excess payments.

6. The respondent is to reimburse the applicant for the children's school fees of R40 000, payable in two consecutive equal instalments, with the first payment to be made on the 1st day following the month of the order.

7. The respondent is to contribute towards the applicant's legal fees of R300 000, payable in six equal monthly instalments of R50 000 on the first day of each month.

8. The respondent is to pay the cost of this application, which is to be taxed on scale B.

WJ du Plessis

Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing: 24 February 2025

Date of judgment: 28 February 2025

For the Applicants: JC Kotze instructed by Du Plessis De
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