

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-069663

1. REPORTABLE: **NO**
2. OF INTEREST TO OTHER JUDGES:
NO
3. REVISED:

DATE: 25 August 2025

SIGNATURE OF JUDGE

A handwritten signature in black ink, which appears to be "D. L. A.", is written over a black rectangular redaction box.

In the matter between:

E [...] L [...] H [...]

APPLICANT

and

H [...] H [...]

RESPONDENT

This Judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines system and by release to SAFLII. The date for hand down is deemed to be 25 August 2025.

JUDGMENT

BADENHORST, AJ**INTRODUCTION:**

[1] This is an opposed Rule 43 application and the following *pendente lite* relief is sought in terms of the applicant's Draft Order:

- [1.1] That the parties to remain co-holders of full and equal parental responsibilities and rights concerning guardianship of the minor child, as outlined in Sections 18(2)(c), 18(4), and 18(5) of the Children's Act, 38 of 2005 (hereinafter referred to as "the Act").
- [1.2] That consent is required (by both parents) in respect of any matter as mentioned in Section 18(5) of the Act.
- [1.3] That both parties are to remain co-holders of full and equal parental responsibilities and rights in relating to care and contact of the minor child, as contemplated in Section 18(2)(a) and 18(2)(b) of the Act, subject to the provisions hereof.
- [1.4] That the primary residence of the minor child is to be with the applicant.
- [1.5] That the specific parental responsibilities and rights with regards to maintaining contact with the minor child, are awarded to the respondent, to be exercised in the following manner:
- [1.6] Every alternative weekend for two night's sleep over from Friday at 17h00 to Sunday at 17h00.
- [1.7] Three night's sleepovers contact during any short and/or long school holiday on provision that the respondent's partner is not present during such holiday visitation and that the minor child is willing to spend three nights with the respondent.

- [1.8] The right to remove the minor child for Father's Day from 09h00 to 17h00. The applicant shall similarly be entitled to have the minor child in her care for Mother's Day.
- [1.9] The right to remove the minor child for the respondent's birthday, alternatively, and if the day falls on a school day, the right to remove him for 2 (two) hours. The applicant shall similarly be entitled to have the minor child in her care for her birthday.
- [1.10] The minor child's birthday to be shared between the parties.
- [1.11] The right to remove the minor child for alternative public holidays from 09h00 to 17h00.
- [1.12] The right to make telephonic contact with the minor child (inclusive of facetime calls, video calls, WhatsApp calls, or calls through other electronic mediums) between the hours of 17h00 – 18h00. The applicant shall similarly be entitled to make telephonic contact with the minor child on the same basis during holidays and weekends when the minor child is in the respondent's care.
- [1.13] The minor child shall attend therapy, and the exercise of holiday contact as stipulated in paragraph 1.7 herein above shall be extended and/or discussed with the assistance of the therapist together with the applicant and respondent to ensure that the minor child's views and wishes are considered as provided for in the Act.
- [1.14] That the respondent will pay monthly maintenance to the applicant for herself, the minor child, and the dependent child in the cash amount of R 38,513.61 (thirty-eight thousand five hundred and thirteen rand sixty-one cents), the first payment to be made within 5 (five) days after the granting of the order, and thereafter on or before the 1st day of every month, without any deductions, which

payments include calculations retrospectively from 1 February 2025.

- [1.15] That the respondent shall continue to pay and be responsible fully for the children's school fees, registration fees, extra-mural activities, extra classes, outings and camping trips, sport clothing and equipment, school uniforms and shoes, stationery, and books.
- [1.16] That the applicant shall maintain herself, the minor child and dependent child on her medical aid and be responsible for the monthly instalment, and the respondent is to pay 100% of any and all medical expenses and prescription medication not covered by the medical aid for the applicant, the minor child and dependent child.
- [1.17] That the respondent shall be responsible for the insurance of the adult dependent child's motorcycle being a Honda CBR and shall pay the monthly instalment associated therewith.
- [1.18] That the respondent shall re-imburse the adult dependent child the amount of R 8,339.00 (eight thousand three hundred and thirty-nine rand) within 30 (thirty) days after the granting of this order.
- [1.19] That the respondent is ordered to pay for all tertiary fees of the adult dependent child which shall also include all registration fees, books, stationary any and all equipment, necessary for the completion of his tertiary studies subject to the adult dependent child displaying an aptitude for the aforesaid tertiary education, being accepted for such tertiary studies and his reasonable progress therein.
- [1.20] That the respondent shall be fully responsible for all maintenance, service and repair costs of the applicant's motor vehicle and the dependent child's motorcycle which are not covered by insurance and for the replacement of tyres.

[1.21] That the respondent to contribute R 75,000.00 (seventy-five thousand rand) as a cost contribution to the legal expenses of the applicant.

[1.22] That the respondent be ordered to pay the costs of this application.

[2] Given that this judgment contains references to the parties' personal and financial information I have, in the interests of protecting such information, redacted the parties' full names in the heading of this judgment.

FACTS:

[3] The applicant is employed as a sales representative and the respondent is a businessman.

[4] The parties were married on 9 June 2006 out of community of property with inclusion of accrual system, and which marriage still subsists.

[5] From the marriage relationship, two children were born:

[5.1] R... H..., currently 18 years of age and in Grade 12.

[5.2] K... H..., currently 12 years of age and still in primary school.

[6] The applicant (plaintiff in the divorce action) issued summons during June 2024 for a decree of divorce and claims *inter alia*:

[6.1] Spousal maintenance in the amount of R30 000.00 until death or remarriage as well as maintenance towards the children;

[6.2] Payment of medical aid premiums and all expenses not covered by the medical aid;

[6.3] The determination of the accrual between the parties.

- [7] The respondent (defendant in the divorce) filed a counterclaim claiming inter alia:
- [7.1] That the claim be dismissed with costs.
- [7.2] Claiming that primary residency of the minor children be awarded to him subject to the applicant's rights to contact with the minor children. The children were both still minor at the time of the exchange of pleadings.
- [7.3] The eldest son turned 18 years of age on 19 April 2025.
- [8] The respondent and children left the common home in February 2025.
- [9] The applicant launched the Rule 43 application during May 2025.
- [10] The applicant requested an investigation by the Family Advocate regarding the primary care and residency of the minor children on 27 May 2025. (In terms of Regulation 2 of the Mediation in Certain Divorce Matters Regulations "Arrangements regarding dependent and minor children")
- [11] The investigation is still pending. The minor child and the major dependent child are currently residing with the applicant subject to the respondent having certain rights of contact with the minor child.

PRIMARY RESIDENCE AND CONTACT RIGHTS:

- [12] The applicant initiated the investigation with regards to the care and residency of the minor child.
- [13] The respondent currently has sporadic contact with the minor child in line with the wishes of the minor child. The minor child is seeing a therapist and the parties agreed to the interim contact with the minor child.

- [14] The applicant avers that she was forced to seek alternative accommodation due to the traumatic events perpetrated by the respondent whilst they were still living at the common home. The applicant explains that her eldest son even asked that they rather relocate.
- [15] The respondent denies this allegation and avers that the parties went for marriage counselling during January 2025 and the respondent found out that the applicant is still having contact with her previous boyfriend. The respondent avers that after he confronted the applicant, she chose to move out of the common home the following week.
- [16] According to the respondent the current arrangement is *inter alia* that he will have contact with the minor son every second Friday from 17h00 until Sunday 17h00 and when there are special weekends or events, he would have unrestricted contact as well as telephonic/WhatsApp calls and holidays to rotate between the parties.
- [17] The respondent states that the oldest son has his own transport and he would visit the respondent after school and weekends.
- [18] The respondent states that the applicant is seeking a more restrictive contact regime with the minor child and the applicant also seeks different contact as set out in her particulars of claim. The respondent avers that the applicant is *mala fide* and she is trying to punish him.
- [19] The respondent is also of the view that the applicant is negatively influencing the minor child and demanding that the child may only visit him when his partner is not present.
- [20] The applicant referred the Court to correspondence dated 22 April 2025 requesting a 'voice of the child' assessment as the minor child indicated that he does not wish to visit the respondent when the respondent's partner is present as he wishes to spend alone time with the respondent. In responding correspondence, the respondent rejected the suggestion.

- [21] The respondent refers the Court to a message attached as annexure "HH5" attached to his answering affidavit where the applicant told the respondent that he is a good father.
- [22] The applicant avers that the restrictive contact is currently in the best interest of the minor child and the Court is referred to the Constitution of the Republic of South Africa, 1996, that guarantees that the best interest of a minor child is of paramount importance. The principles laid forth in the Act determines that a Court, who sits as upper guardian of all minor children, are obliged to take into consideration all factors present to determine the best interest of a minor child.
- [23] The applicant further relies on Section 7(1) of the Act is relevant in determining the best interest of a minor child.
- [24] The first appointment with the Family Advocate was held on 17 June 2025.
- [25] I am not satisfied with the agreed *pendente lite* contact *i.e.* that the minor child may only spend three night's sleepovers with the respondent during long school holidays, on provision that the respondent's partner is not present during such holiday visitations and subject to the minor child's willingness to spend the three nights with the respondent.
- [26] This arrangement effectively means that the minor child will spend only three nights sleepovers during the coming December holidays. That can never be in the best interest of the minor child and this Court must consider the child's best interest and grant an order avoiding possible parental alienation.
- [27] I am of the view that the minor child should *pendente lite* be able to spend three night's sleepovers with the respondent, *every alternative week* during long school holidays, pending the Family Advocate's report and recommendations.

APPLICANT'S SUBMISSIONS:

- [28] The applicant seeks condonation for the late filing of her affidavit in response to the respondent's counterclaim.
- [29] The applicant's explanation is adequate, and it is in the interest of justice that condonation be granted.
- [30] There is no prejudice to the respondent and I accordingly granted condonation for the late filing of the affidavit.
- [31] The applicant seeks maintenance for herself and the two children, which includes the tertiary studies of the adult dependent child. The judgment from the Supreme Court of Appeal in the matter of **Z v Z** 2022 (5) SA 451 (SCA) dated 21 July 2022 is relevant because the oldest son became a major, however he is still dependant.
- [32] During February 2025 the applicant moved to a two-bedroom property but as from the 1st of June 2025 the applicant and children are living in a three-bedroom apartment. The current lease is R15 000.00 per month.
- [33] The applicant avers that the rental property does not come close to what the children were accustomed to, however the common home is in the market to be sold, and the applicant and respondent are joint owners of the property.
- [34] The applicant claims that the respondent should pay the insurance on her motor vehicle as well as the oldest child's motorcycle. There is an email attached by the respondent dated 23 April 2025, wherein the applicant informed the respondent that she chooses to pay her own motor vehicle's insurance as well as pay the insurance of the motorcycle. It was argued that the applicant was in a bad emotional state and did not really mean to take over the payments.
- [35] It is common cause that the respondent has been paying a lump sum of R10 000.00 to the applicant as from January 2025. The applicant avers that this amount is insufficient to cover all the expenses.

- [36] The applicant avers that the respondent used to pay R22 000 per month in a cash contribution whilst she and the children were still living in the common home. The respondent replies that this amount was paid to the applicant to cover the daily expenses whilst the family was still living in the common home.
- [37] The applicant avers she was unemployed since 2022 due to her illness and she took up employment in 2024 solely because of the respondent's romantic relationship with Ms B.
- [38] The respondent avers that the applicant is misleading the Court as the applicant took up employment during 2023.
- [39] The applicant attaches to her Financial Disclose Documents a 2023/2024 tax certificate confirming that the applicant was indeed employed since 2023.
- [40] The applicant says in her founding affidavit that she earns a nett income of R32 676.62 per month and the Court was referred to her February 2025 salary advice, which is not attached to the Financial Disclosure Documents.
- [41] The applicant's January 2025 salary slip shows gross earnings in the amount of R52 261.91 and nett pay in the amount of R40 441.88.
- [42] The applicant avers that her expenses increased since February 2025 due to a higher rental amount in June 2025 and she underestimated the costs of groceries, as initially claimed. The applicant is now claiming R15 000.00 for food, groceries and cleaning materials as well R15 000.00 towards rent.
- [43] The applicant previously paid R9 150 towards rent and she paid R8 500.00 for groceries as can be seen from her income and expenditure place before Court.
- [44] The applicant now claims that her initial calculation of R53 292.79 expenses were an underestimation, and she has a shortfall of R71 190.02 per month. A further expense is the domestic worker is paid R1 450.00 per month and household insurance of R500.00 per month.

- [45] The respondent pays the lump sum amount of R10 000.00 per month towards the children's expenses.
- [46] The applicant has two saving accounts, indicted as her disability savings, being a policy paid out for her illness. The total amount of the savings accounts is R1 263 012.00.
- [47] The also has two flexi notice accounts totalling an approximately R29 000.00.
- [48] The applicant has two motor vehicles, a Ford Fiesta 2017 and a BMW 320 (which she is planning to sell).
- [49] The applicant has pension interest to the value of R202 069.76 and personal assets to the value of R189 326.26.
- [50] The applicant states in her FDF that she will earn an average nett income of R37 261.09 per month for the next 12 months, which equates to the average income for the previous six months.
- [51] The applicant avers that she paid the amount of R853 146.36 into the bond on receipt of her critical illness policy proceeds and this mount does not form part of the accrual calculations.
- [52] The applicant avers that the respondent paid a deposit for a motor vehicle for Ms B, but he refuses to adequality support this family.
- [53] The applicant avers that the respondent is a 50% director of his company and he can afford to pay the shortfall per month as well as to pay all the tertiary expenses towards the major dependent child for 2026.
- [54] The applicant submits that she has made out a proper case for her claim towards spousal maintenance and that respondent can afford to pay same.

RESPONDENT'S SUBMISSIONS:

- [55] The respondent confirms that he is making financial contributions towards the maintenance needs of his family in the amount of R10 000.00 per month since January 2025.
- [56] The respondent confirms that the applicant informed him to stop paying the insurance towards her motor vehicle and the major son's motorcycle as well as the salary of the domestic worker. The respondent referred to emails attached to his affidavit which is self- explanatory.
- [57] Over and above the R10 000.00 cash contribution, the respondent is also paying the following expenses in the amount of R10 820.00 directly to the service providers:
- [57.1] R 2770 towards primary school fees;
 - [57.2] R2 080 towards aftercare for K;
 - [57.3] R4 070 towards High school for the major child;
 - [57.4] R400 towards data for R 's cell phone;
 - [57.5] R 500 towards pocket money for R;
 - [57.6] R500 for petrol for R's motorcycle (transport to school);
 - [57.7] R400 insurance for R's motorcycle.
- [58] The respondent refers to the discrepancies of the applicant's founding affidavit and her Financial Disclosure Forms. The applicant deposes to an affidavit stating she earns a nett salary of R32 676.62 but according to her Financial Disclosure Documents, the average nett income is R37 261.09.
- [59] The respondent denies that all the purported expenses as listed by the applicant are fair, reasonable, necessary or actual expenses. The respondent avers it is the applicant's 'wish list'.
- [60] The respondent and applicant are joint owners of the common home with a value of about R4 000 000.00.
- [61] The respondent owns 1/3 of a house he inherited situated in Langebaan, Western Cape, to the value of R713 333.33.

[62] The respondent has pension interest to the value of R356 092.01.

[63] The respondent's personal assets are:

- [63.1] Personal assets in the amount of R80 000.00;
- [63.2] Caravan with value of R80 000.00;
- [63.3] Vehicle financed with Wesbank R184 353.44;
- [63.4] FNB Current account in the amount of R392.59;
- [63.5] FNB Savings account in the amount of R149 917.10;
- [63.6] BMW to the value of R315 101.05;
- [63.7] Life insurance policy in the amount of R9 750 812;
- [63.8] 50% shareholding in S[...] Pty Ltd

[64] According to the respondent's financials and SARS documentation he earns a nett income of R469 922.52 per year which equates to R39 160.21 per month.

[65] The respondent is currently earning R7 000.00 per month from the rental of a flat attached to the common home but the house is on the market and this income will fall away when the property is sold.

[66] The respondent avers that the applicant does not have a shortfall because she made monthly contributions to a friend called 'Marlene' ranging between R4 000.00 to R10 000.00, as can be seen from the applicant's bank statements.

[67] The respondent avers that he is not refusing to pay the amount of R8 339.00 to the parties' major son. The major son received the motorcycle as a birthday gift and the major son wanted to service the motorcycle immediately. The arrangement was that the respondent pays for the new exhaust and the major dependent child pays for the service. The major child is earning money by making wooden furniture.

[68] The respondent avers that his income does not cover all his expenses and he draws monthly against his loan account in the business. The respondent states that he contributes towards the maintenance of his children within his means.

- [69] The respondent avers that spousal maintenance is not an automatic right, and the respondent must demonstrate her need for both in merit and amount.
- [70] The respondent referred to **Botha v Botha**¹ where it was held that the purpose of interim maintenance is to supplement expenses which the applicant cannot meet however, in terms of Rule 43, such maintenance must be reasonable in the circumstances, depending upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet the requirements.
- [71] The respondent avers the applicant has not made out a case for maintenance for herself. **Kroon v Kroon**² held that, *"The position in our law is that no maintenance will be awarded to a woman who can support herself."* It was further held that, *"What does the plaintiff want and what does she need? Wants and needs are two different things. People usually want more than they need."*
- [72] This decision makes it clear that a woman who has no need for maintenance, because she earns an income and can support herself, will not be entitled to maintenance.
- [73] The respondent argues that the applicant does not make out a case for contribution towards her legal costs because both parties are on equal financial footing with regards to litigation.
- [74] The respondent referred to **Du Preez v Du Preez**³ where the Court held that 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 (*uberrimae fides*) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean

¹ 2009 (3) SA 89 (WLD) at 106 C

² 1986 (4) SA 616 (E)

³ 2009 (6) SA 28 TPD

that he or she is not before the Court with "clean hands" and on that ground alone it will be justified in refusing relief.

EVALUATION:

- [75] The relief sought in the respondent's counterclaim is postponed sine die pending the outcome of the Family Advocates Report and recommendations.
- [76] Both the parties had extra marital affairs and this Court will not assign blame.
- [77] It is common cause that Rule 43 proceedings are interim in nature pending resolution of the main divorce action. Each case must be based upon its own particular facts.⁴
- [78] The applicant spouse is entitled to reasonable maintenance *pendente lite* dependent upon the standard of living of the parties, her actual and reasonable requirements and the capacity of the respondent to meet such requirements which are normally met from income.
- [79] The Court is referred to Erasmus, Superior Court Practice (2nd Edition) Vol. 2 at D1-580 during argument in that it states: " ... *Maintenance pendente lite is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced. The applicant is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified.*"

⁴ **Taute v Taute** 1974 (2) SA 675 (E)

[80] Our Courts have always emphasised the need for utmost good faith by both parties in Rule 43 proceedings and the need to disclose fully and all material information regarding their financial affairs.⁵

[81] The Court affirmed the position that the lifestyle requirement must be a balanced and realistic assessment, based on the evidence concerning the prevailing factual situation.⁶

Ludorf, J held: *"To decide the issues I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously, my findings are in no way binding on the trial Court and indeed after hearing the evidence it may emerge that some or all of the inferences I have drawn are wrong. On this basis I now turn to the issues as they emerge from the papers."*⁷

[82] The Court need to consider the applicant's need since she and children moved out of the common home in the beginning of February 2025 as well as the ability of the respondent to meet that need.

[83] The applicant avers in her founding affidavit that she earns an amount of R32 676.62 per month which differs from the amounts reflecting in the Financial Disclosure Form.

[84] I have calculated an average nett income over the period from September 2024 to January 2025 in the amount of R38 150.00 per month. The applicant's increased expense calculates to the amount of approximately R34 221.33 per month. Even without criticising any listed expenses, it is evident that the applicant is not in need of spousal maintenance. The expense for groceries only for the applicant in the amount of R7 500 is excessive. The amount of R1 000.00 per month for holidays are excessive given that the applicant paid for the previous holiday from her savings accounts.

⁵ *Du Preez v Du Preez* 2009 (6) SA 28 (T) at para 16

⁶ *M.M v T.M* (2023/012335) [2024] ZAGPJHC 835 (20 August 2024) para 18

⁷ *Levin v Levin and Another* 1962(3) SA 330 (W) at p331D

- [85] The applicant's expenses can be cut by at least R3 500.00 per month.
- [86] The applicant does not attach her salary slips for February 2025, March 2025 nor April 2025 considering the application was brought in May 2025. The inference the Court makes is that the applicant probably receives a higher income than what is reflecting in her application.
- [87] **Kroon v Kroon**⁸ it was held that: *"the position in our law is that no maintenance will be awarded to a woman who can support herself."* It was held further that *'what does the plaintiff want and what does the plaintiff need?' Wants and needs are two different things. People usually want more than they need."*
- [88] The applicant is employed, and she is receiving a total income (salary and cash contribution) that is more than the respondent's nett salary. The applicant can support herself as she is not entitled to maintenance *pendente lite*.
- [89] The applicant and the children moved into a three bedroom apartment on 1 June 2025 with a rental of R15 000.00 per month.
- [90] The total increased expenses are the amount of R66 190.23 and not R71 190.23 as stated by the applicant. The previous expenses claimed was R53 292.79 plus insurance of R500.00, plus motor vehicle insurance of R947.44, plus the domestic worker of R1 450.00, plus R3 500.00 increase on rental plus R6 500.00 increase on groceries.
- [91] In terms of the applicant's expenses listed in her Financial Disclosure Documents the increased expenses claimed towards the children, is totalling approximately R32 700.00 per month.
- [92] The average income of the applicant is approximately nett R38 150.00 plus the R10 000.00 cash contribution paid by the respondent. The applicant therefore has an average monthly income of at least R48 150.00 less reasonable expenses for herself in the amount of R30 500.00 leaving a surplus of R17 650.00.

⁸ 1986 (4) SA 616 (E)

[93] I have criticized the expenses claimed by the applicant toward the children, inter alia:

[93.1] R1 000 toiletries for the two children is excessive and an amount of R500 is reasonable.

[93.2] The respondent pays the school uniforms and sport uniforms. Less R1 000 per month.

[93.3] R1 500 per month for clothes for the children is excessive and an amount of R600 is reasonable.

[93.4] The respondent pays the expenses towards the maintenance of the motorcycle. Less R300 per month.

[93.5] The respondent pays for extra murals. Less R600 per month.

[93.6] The respondent is liable for the amounts not covered by the medial aid. Less R700 per month.

[93.7] To claim for holidays in the amount of R1 000 per month for holiday is a luxury and I will allow R500.

[93.8] Groceries for R7 500 per month for the children is excessive and an amount of R6 500 per month is reasonable.

[94] That amount of R5 500.00 to be deducted from the applicant's listed expenses for the children, equals an amount of approximately R27 200.00 per month.

[95] The applicant has a surplus of about R17 650.00 per month (R48 150.00 less her personal expenses of R30 500.00) and that leaves a need of about R9 550.00 per month towards the minor children.

[96] On the respondent's financial disclosure forms he earns a nett salary of R39 160.21 and Gross R51 000.00 in terms of the SARS documents attached

to the Financial Disclosure Forms. The respondent indicates that he draws from his loan account to be able to cover all his monthly financial requirements.

- [97] The applicant's total income is R10 000.00 more per month than that of the respondent according to the financial information before the Court.
- [98] The respondent also pays an additional amount of R10 720.00 towards the children's schooling, aftercare, insurance, petrol, cell phones and pocket money. The total payment towards maintenance is currently R20 720.00 per month.
- [99] That leaves the respondent with approximately R20 000.00 per month for his personal expenses versus the applicant's R34 221.00 for her personal expenses. I am considering that the respondent is still receiving an amount of R7 000.00 towards rental income, which will fall away when the property is sold.
- [100] The respondent will also be solely responsible for the major child's tertiary education costs as from next year.
- [101] Both parties are joint owners of the common home and the proceeds of the sale will assist the parties to meet the financial need of the children.
- [102] The shortfall of maintenance for the children is approximately R10 000.00 (rounded off) and should be paid equally by the parties as their income is on par and they both have sufficient savings to cover this expense, *pendente lite*. Both parents have a maintenance responsibility towards their children proportionally according to their respective income.
- [103] After having perused and considered both parties' documents filed of record, and after having considered the applicant's actual maintenance requirements for the children and after having considered the respondent's capacity to meet these requirements, I am of the view that the respondents should pay *pendente lite* maintenance towards the children in the amount of R15 000.00 per month.

Claim for retrospective maintenance:

- [104] The applicant is claiming retrospectively maintenance from 1 February 2025. This will amount to approximately R200 000.00, calculated on her claim of maintenance for R70 242.00 per month.
- [105] The respondent is denying that he is liable to pay the retrospective maintenance.
- [106] In common law, a claim for arrear spousal maintenance is barred by virtue of the principle *in praeteritum non vivitur* (one does not live in arrears), 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.
- [107] It was stated in *Dodo v Dodo*⁹ that: “...[A] person seeking a maintenance order, or a variation thereof for an increase or for a reduction or for a suspension of payments, should do so expeditiously in order to avoid the accumulation of arrears of maintenance that the spouse liable to pay may be burdened with, a substantial liability which he can ill-afford to pay.”¹⁰
- [108] *S.N v S.R*¹¹ it was held that: “In any event I am not empowered under Rule 43(1)(a) to order a lump-sum payment towards retrospective maintenance.”
- [109] This notion was well expounded in *Greenspan v Greenspan*¹² where it was held that:

“Unlike in ordinary motion proceedings, where the parties are not so strictly limited in the number of affidavits they may file nor are they discouraged from setting out their versions fully in their papers, by contrast Rule 43 is designed

⁹ 1990 (2) SA 77 (W) at 95G-J

¹⁰ See also *AF v MF* 2019 (6) SA 422 (WCC) at para 33.

¹¹ 2023/036122) [2023] ZAGPJHC 1298 (14 November 2023) at par 35

¹² 2000 (2) SA 283 (C) at para 12

*to afford an inexpensive procedure for granting interim relief. The parties to Rule 43 proceedings are limited in the material they may place before Court, and the Courts actively discourage lengthy affidavits and bulky annexures ... Furthermore, the term 'maintenance pendente lite' means 'maintenance during the period of litigation'. Therefore, there is no distinction in principle to be made between the interpretation of the relevant words in s 7(2) of the Divorce Act and Rule 43(1)(a). Surely the framers of Rule 43(1) would not have contemplated the making of an order under Rule 43 which a Court could not competently make either under the Maintenance Act of 1963 or the Divorce Act of 1979. In my view, the framers of Rule 43 clearly contemplated orders which were capable of variation. This is so because of the provisions of Rule 43(6) in terms of which the Court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child. Once a lump sum payment has already been made it can hardly be varied. Surely this further militates against attributing to the framers of the rule any intention that claims for lump sum payments should be adjudicated upon under Rule 43. **In my judgment, the answer to the above question is surely that a Court has no jurisdiction under Rule 43(1)(a) to award lump sum payments.**"*

- [110] The applicant seeks an order that the respondent be ordered to pay her claim for interim maintenance with retrospective effect, but the respondent has been making payments towards maintenance in the amount of R10 000.00 directly to the applicant since January 2025 and he has been paying a further R10 280.00 maintenance towards the children, directly to the service providers.
- [111] In my mind there is no basis on the facts and circumstances before me, to justify the retrospective order as sought by the applicant and furthermore I am not empowered under Rule 43(1)(a) to order a lump-sum payment towards retrospective maintenance.

Motorcycle service expenses:

- [112] The applicant claims that the amount of R8 339.00 be refunded to the major dependent child for costs of servicing his motorcycle
- [113] The respondent explained that the motorcycle was a birthday present for the major dependant son. The parties' major son earns money by his woodwork hobby. The respondent states that the arrangement was that the major son should pay for the service of the motorcycle with his own money earned through his hobby if he does not wish to wait with the servicing of the motorcycle. The respondent explained that their son wanted the service done immediately and the respondent paid for a new exhaust.
- [114] I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. The applicant attaches the invoice dated 28 January 2025 to her Rule 43 application, some four months later. I do not see evidence of any demands made for payment of this invoice prior to this application and I am of the view that the respondent's version is more probable.
- [115] The respondent will however be liable for all future maintenance towards services of the major son's motorcycle.

Motor vehicle expenses:

- [116] The applicant seeks an order that the respondent should be responsible for all maintenance, service and repair cost of the applicant's motor vehicle, the VW Polo 1.4L.
- [117] According to the evidence before me the applicant receives a motor vehicle allowance of R5 000.00 per month and she has always paid for her own motor vehicle services and maintenance and she can afford to pay this expense.
- [118] The applicant also made provision for the maintenance of the motor vehicle on her expenses.

Medical Aid:

- [119] It is common cause that the applicant has been paying the medical aid premium for herself and the children.
- [120] The applicant says in her founding affidavit that she has removed the respondent from her medical aid. The applicant makes provision in her expenses for any excess costs for doctors and the excess costs for medication, thereby indicating that she is liable for her own medical excess payments.
- [121] It will be reasonable that the respondent should pay for all the medical expenses and prescription medication not covered by the medical aid for the minor child and the major dependent child.

CONTRIBUTION TOWARDS COSTS:

- [122] The applicant claims an amount of R75 000.00 towards a contribution to legal costs
- [123] The applicant relies on **Micklem v Micklem**¹³ the Court held that a contribution may be ordered to cover costs already incurred. The applicant avers that Mr Johan Ferreira (forensic accountant) should be appointed to report on the estate of the respondent. The applicant avers that the respondent is attempting to create a division between him and the company of which he is a director and shareholder.
- [124] The applicant avers that the respondent made payments to his partner and the respondent is a financially wealthy individual, and this is clear from the standard of living the parties enjoyed during the marriage. The home the parties resided in before the applicant vacated same is of luxury standard (more than four million rand).

¹³ 1988 (3) SA 259 (C) at 264E to 265B

- [125] It seems that one of the reasons the applicant's claim is based on the fact that the respondent was able to pay a deposit for Ms B's motor vehicle and spending money on his partner and not providing for his family.
- [126] The respondent submits that a Rule 43 order is not meant to provide an interim meal ticket to a person who will not be able to establish a right to maintenance at the trial and the applicant has not made out any case for the contribution.
- [127] The applicant is also criticised for not attaching a pro-forma account to enable to Court to consider the amount contribution claimed.
- [128] The applicant has not informed the Court what the basis of her R75 000.00 claim is, except to say that she will have to appoint a forensic accountant. The applicant does not show how she arrived at the amount, what unpaid claims and costs have already been incurred, the projected amount up to and including the first day of trial.
- [129] The best way to place this information before Court is a draft bill of costs or a summary of fees schedule. This would have assisted the Court to consider the applicant's claim for contribution towards costs.¹⁴
- [130] In Van Zyl v Van Zyl it was held that to succeed in an application for contribution towards costs, the applicant must set out sufficient facts which if established by her at the trial on the hearing of the evidence, would justify the Court in granting an order as claimed.¹⁵ The sum to be contributed is to be determined by the Court's analysis of the amount necessary for the applicant to adequately put her case before Court.
- [131] In the matter at hand, the applicant has not set out any facts to support her claim for a contribution towards her legal costs. The applicant did not set out sufficient facts to show that the parties are not litigating on equal footing nor does the applicant show that she has insufficient means of her own.

¹⁴ Micklem v Micklem 1988 (3) SA 526 (D); Nicholson v Nicholson 1988 (1) SA 48; Cary v Cary 1999 (3) SA 615; Greenspan v Greenspan 2001 (4) SA 330 (C)

¹⁵ 1947 (1) SA 251 (T)

[132] Rule 43(1) and (6) provides a mechanism whereby a party can claim a contribution to legal costs at the commencement or prior to the divorce proceedings and two or more such applications can be made before the first date of trial. Should the matter not settle and proceed to trial, the applicant has the remedy in terms of this Rule to approach the Court for a contribution towards her legal costs.

[133] It is on this basis that I am inclined to refuse applicant's request for contribution towards legal costs.

COSTS OF THE APPLICATION:

[134] It is trite that the awarding of cost is a matter which falls within the domain of the Court's discretion. I am inclined to grant an order that the cost of this application be costs in the divorce action.

ORDER:

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

[135.1] That the parties to remain co-holders of full and equal parental responsibilities and rights concerning guardianship of the minor child, as outlined in Sections 18(2)(c), 18(4), and 18(5) of the Children's Act, 38 of 2005 (hereinafter referred to as "the Act").

[135.2] That consent is required (by both parents) in respect of any matter as mentioned in Section 18(5) of the Act.

[135.3] That both parties are to remain co-holders of full and equal parental responsibilities and rights in relating to care and contact of the minor child, as contemplated in Section 18(2)(a) and 18(2)(b) of the Act, subject to the provisions hereof.

- [135.4] That the primary residence of the minor child is to be with the applicant.
- [135.5] That the parties agree that specific parental responsibilities and rights with regards to maintaining contact with the minor child, are awarded to the respondent, to be exercised *pendente lite* in the following manner:
- [135.5.1] Every alternative weekend for two night's sleep over from Friday at 17h00 to Sunday at 17h00.
- [135.5.2] Three night's sleepovers contact during short school holidays on provision that the respondent's partner is not present during such visitations and that the minor child is willing to spend three nights with the respondent.
- [135.5.3] Three night's sleepovers contact, every alternative week during long school holidays, on provision that the respondent's partner is not present during such holiday visitation and that the minor child is willing to spend three nights with the respondent.
- [135.5.4] The right to remove the minor child for Father's Day from 09h00 to 17h00. The applicant shall similarly be entitled to have the minor child in her care for Mother's Day.
- [135.5.5] The right to remove the minor child for the respondent's birthday, alternatively, and if the day falls on a school day, the right to remove him for 2 (two) hours. The applicant shall similarly be entitled to have the minor child in her care for her birthday.

- [135.5.6] The minor child's birthday to be shared between the parties.
- [135.5.7] The right to remove the minor child for alternative public holidays from 09h00 to 17h00.
- [135.5.8] The right to make telephonic contact with the minor child (inclusive of facetime calls, video calls, WhatsApp calls, or calls through other electronic mediums) between the hours of 17h00 – 18h00. The applicant shall similarly be entitled to make telephonic contact with the minor child on the same basis during holidays and weekends when the minor child is in the respondent's care.
- [135.5.9] The minor child shall attend therapy, and the exercise of holiday contact as stipulated in paragraphs 135.5.2 and 135.5.3 herein above shall be discussed with the assistance of the therapist and possibly extended to ensure that the minor child's views and wishes are considered as provided for in the Act.
- [135.6] The *pendente lite* contact with the minor child, as set out above, shall be exercised pending the report and recommendations of the Family Advocate. Both parties are granted leave to file supplementary affidavits dealing with the Family Advocate's recommendations.
- [135.7] The *pendente relief* claimed in the respondent's counterclaim is postponed *sine die*, pending the Family Advocate's Report.
- [135.8] The applicant's claim for *pendente lite* spousal maintenance is dismissed.

- [135.9] The respondent shall pay a monthly cash amount to the applicant in the amount of **R15 000.00 (Fifteen Thousand Rand)** towards the maintenance of the minor child and the major dependent child. The first payment to be made on or before 1 September 2025, and thereafter on or before the 1st day of every month, without any deductions.
- [135.10] The respondent shall continue to pay and be responsible fully for the children's school fees, registration fees, extra-mural activities, extra classes, outings and camping trips, sport clothing and equipment, school uniforms and shoes, stationery, and books.
- [135.11] The applicant shall maintain herself, the minor child and dependent child on her medical aid and be responsible for the monthly instalment, and the respondent is to pay 100% of any and all medical expenses and prescription medication not covered by the medical aid for the minor child and dependent child.
- [135.12] The respondent shall be responsible for the insurance of the adult dependent child's motorcycle being a Honda CBR and shall pay the monthly instalment associated therewith.
- [135.13] The respondent is ordered to pay for all tertiary fees of the adult dependent child which shall also include all registration fees, books, stationary any and all equipment, necessary for the completion of his tertiary studies subject to the adult dependent child displaying an aptitude for the aforesaid tertiary education, being accepted for such tertiary studies and his reasonable progress therein.
- [135.14] The respondent shall be fully responsible for all maintenance, service and repair costs of the dependent child's motorcycle which are not covered by insurance and for the replacement of tyres.

[135.15] The applicant's claim for a contribution towards legal costs is dismissed.

[135.16] The claim for retrospective maintenance is dismissed.

[135.17] The costs of this Application to be cost in the divorce action.

**BADENHORST AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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Matter heard on: 30 July 2025

Judgment handed down: 25 August 2025