

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-050259

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>30-03-2026</u> 	
DATE	SIGNATURE

In the matter between:

HL

Applicant

and

BPAL

Respondent

JUDGMENT

DJ Smit, AJ

Introduction

- [1] This is an opposed application in terms of Rule 43 of the Uniform Rules of Court.
- [2] I will refer to the applicant as “the wife” and the respondent as “the husband”.
- [3] The parties were married to each other on 5 July 2012, out of community of property with the accrual system. There are three minor children born of the

marriage, E (currently 11 years old), H (currently 8 years old) and N (currently 5 years old). The parties separated on 8 April 2024 and started living apart shortly thereafter.

[4] The wife instituted divorce proceedings on 8 May 2024 and this Rule 43 application on 30 January 2026. The rule 43 application was preceded by a long history of attempts of mediation, which was unsuccessful.

[5] In the Rule 43 application, the following is at issue:

- a. Arrangements regarding the care, residence and contact in respect of the minor children.
- b. The costs of the appointment of a parenting co-ordinator.
- c. Decision-making power in relation to the children's extra-mural activities, their medical aid and their schooling.
- d. The amount of child maintenance payable by the husband to the wife.
- e. Whether spousal maintenance is payable to the wife and, if so, the amount.
- f. Whether an amount (of R298,193.72) in respect of arrear maintenance is payable to the wife.
- g. Whether an amount (of R33,389.20) in respect of arrear school fees is payable to the wife.
- h. Whether a contribution to legal costs is payable to the wife and, if so, the amount.

[6] The major dispute between the parties is in respect of the child maintenance payable to the wife; and, concomitantly, whether the amount payable should account for the (high) fees of a remedial school for the eleven-year-old boy E.

[7] After I set out the necessary background, I deal with each of the issues in turn.

Background

- [8] From 2017 to 2023, the couple and their children lived in the United Kingdom and the Netherlands. The time overseas appears to have been disastrous, financially and emotionally, for reasons that are not pertinent to this application. The couple had, at a point, had to resort welfare payments in the United Kingdom to make ends meet.
- [9] Not long after their return, the parties became estranged and later separated. There is no dispute that the marriage has irretrievably broken down.
- [10] The husband is 52 years old. He has a diploma from Wits Technikon in Packaging. Notwithstanding what he portrayed in argument as modest educational accomplishments, he has enjoyed a measure of professional success. He is currently a director of consumer facing operations at a company in Gauteng. In that capacity, he earns a net amount of approximately R89,100 per month (before medical aid payments are subtracted).
- [11] It was common cause at the hearing that he had been paid a discretionary bonus of R56,480 at the end of 2025. There was no evidence before the court whether this is likely to be repeated, or increased, in 2026.
- [12] The husband as at the date of his financial disclosure form had assets in an amount of R1,103,331 (of which R966,486 is his interest in a pension fund and only R23,028 is liquid) and liabilities in an amount of R1,284,905.¹ His liabilities therefore exceed his assets.
- [13] The wife is 45 years old and has a BA Degree in Anthropology. She is currently employed as a bookkeeper for a London firm and in that capacity, she earns a net amount of R37,500 per month.
- [14] The husband did not, in argument, dispute that R37,500 per month is the actual net amount she earns, although he contended – based on her past employment history – that she could earn more. This submission was based on the common

¹ By the time the husband filed his affidavit in this matter, his liabilities, according to him, increased to R1,364,958.92 while his pension fund interests increased to R1,258,072.60.

cause fact that the wife, for a period of three months last year, earned additional income from a second job. The wife, in turn, stated on affidavit that she gave up the second job after three months because she found the demands of working two jobs incompatible with her child-rearing duties. The husband complained that she had deliberately "impoverished" herself so as to make out a case for maintenance.

- [15] The wife is a beneficiary of two family trusts: the [HL] Trust set up in her name and the [PLO] Testamentary Trust. She is not a trustee of these trusts; her deceased mother and her attorney are the trustees. She has no vested rights in the trusts and has, thus far, not received any distributions from the trusts. She has, however, received loans in a total amount of R336,333.47 from the trusts.
- [16] The wife also has some non-liquid assets (including pension interests), as well as potential claims against the husband in respect of their relocation to South Africa (and other disputed issues regarding a bank account).
- [17] At the moment, and with the agreement of both parties, they exercise joint and equal parental responsibilities and rights in respect of the minor children. They also share equal contact with the children in what is described as a 3-1-3 day split. Thus, there is a shared residence arrangement in regard to the children. This, of course, necessitates two fully-equipped households. Currently, the wife lives in Linden, while the husband lives in two storeys of a three-storey house in Westdene.
- [18] The wife (and the children, when they are with her) lives in a house that belonged to her mother and is now, subsequent to her mother's passing in 2025, left in a family trust. The papers do not reveal whether she is currently renting the accommodation from the trust, although she claims an expense of R17,000 per month in respect of rent and utilities.
- [19] It is common cause between the parties that it is recommended that their oldest minor son, E, is required to attend a remedial school. The husband resists this, however, on the basis that he cannot afford the school. There are also disputes between the parents regarding the children's extra-mural activities; the husband

is not in principle opposed to (any of) them but contends that he cannot afford them.

Arrangements regarding residence, contact, education and medical aid of the children

[20] The parties have been on-and-off in mediation before different mediators since early 2025. When they initially failed to reach agreement, the husband referred the issue of contact and care of the children to the Office of the Family Advocate, which issued a report on 30 November 2025. The Family Advocate recommended that the parties continue with the current shared residence arrangement in relation to the minor children. The Family Advocate also recommended the broad outlines of a contact regime.

[21] It was common cause between the parties that the Family Advocate's recommendations should be accepted. The wife contended that the report of the Family Advocate should be supplemented to address certain concerns she has raised. At the hearing, counsel acting for the wife agreed, however, that it was unnecessary to grant any relief regarding these concerns, since the parties could at any point approach this court (or the children's court) to vary the regime based upon concerns that may arise.

[22] Thus, I will simply order that residence of the children is shared between the parties and that the recommendations of the Family Advocate be implemented regarding contact.

[23] The parties also agreed that a parenting co-ordinator should be appointed. The only dispute in that regard was as to the costs of the parenting co-ordinator. The wife contended that the husband should pay for the parenting co-ordinator while the husband contended that the costs should be shared equally.

[24] As I explain, the amounts to be taken into account as joint monthly income for purposes of this application yield an (approximate) ratio of 70/30 with the husband earning 70% of the household's combined income and the wife 30%. Thus, I will order that the costs of the parenting co-ordinator will be shared in that ratio, with the husband paying 70% of the coordinator's costs and the wife 30%.

- [25] There was some debate at the hearing as to the identity of the parenting co-ordinator. The husband and the wife seemed content, however, with Ms Tanya Kriel, subject to the issue of cost. I will therefore order that she be appointed, unless the parties agree otherwise.
- [26] To the extent that the contact regime proposed by the Family Advocate needs to be fleshed out, or any dispute arises in that regard between the parties, the decision of the parenting co-ordinator will be final subject to this Court's overarching powers in respect of minor children.
- [27] The wife also sought sole decision-making power in respect of which schools the children should attend, their extra-mural activities and their medical aid.
- [28] The husband has historically paid for the children's medical aid and there seems to be no reason why he should not continue to do so or why the wife should enjoy sole discretion over the medical aid of the children. The issue was not debated before me and there is little motivation on affidavit as to why that discretion should vest solely in the wife. The evidence was that the husband currently pays a monthly amount of R5,451.00 (R1,817 per child) in respect of the medical aid. I will make an order in that regard, the monetary consequences of which I consider in the overall evaluation of the amount of child maintenance payable.
- [29] The issues of education and extra-mural activities appear difficult on their face but on analysis are relatively simple. The husband has no qualms with the wife's proposals in this regard, except that he was unwilling to fund them.
- [30] Thus, I will order that the wife has discretion to decide which schools and extra-mural activities the children attend. The reason I make this order is that it seems the children have become (as so often happens) a tool to leverage power in their parents' divorce dispute. This power play has had the serious consequence that the oldest boy E has not been in school for the first term of 2026 – a fact which will no doubt sharpen the need for extra educational support for him.
- [31] My decision is not a reflection on the husband's ability or suitability to make decisions regarding the educational needs of the children. It is simply a pragmatic solution *pendente lite* taking account of the following facts:

- a. Historically, the wife has paid school fees and, it seems, has been responsible for most if not all decisions in this regard.
- b. The husband has not raised any concerns with the wife's decisions in regard to the children's education, save that he did not wish to finance them where he considered them extravagant.
- c. Thus, all that is in issue is the cost of the wife's decisions – not their nature.
- d. While the order I intend to make is in effect, the wife's discretion will be informed by the fact that she will have to fund her decisions from the child maintenance awarded to her (and any other sources that may be available).

Maintenance of the minor children

[32] It is necessary to restate a basic principle regarding maintenance and other contributions² *pendente lite*: the spouse from whom maintenance – or another contribution – is sought must be able to pay what he (or, on occasion, she) is ordered to pay.³ This is the case even where one party has deliberately impoverished himself or herself to escape a duty of support. Claims for support *pendente lite* should not be used to pre-empt remedies that could (only) be made upon the dissolution of the marriage.⁴

[33] The wife contended that the husband should pay an amount of R20,000.00 per month per child in respect of maintenance for the minor children, which amount includes medical aid and excess medical expenses as well as the school fees (including the fees of any remedial school).

[34] While the husband did not dispute his duty to contribute to the maintenance of the minor children, he disputed the amount. The husband stated that on that an objective consideration of his financial position, it is apparent that he does not

² In *AF v MF* 2019 (6) SA 422 (WCC) para 31 the Court confirmed that contributions to legal costs in a matrimonial action are a species of support and the same rules should logically apply as to maintenance.

³ For the analogous position upon divorce, see *Buttner v Buttner* 2006 (3) SA 23 (SCA) para 36.

⁴ *Reyneke v Reyneke* 1990 (3) SA 927 (E) esp. at 932J-933B referred to in *LS v JS* [2024] ZAGPJHC 653 (2 August 2024) para 4.9.

have the income to support such a payment nor is he possessed of assets which could be liquidated to support such a payment.

[35] It was essentially common cause that the husband earns a net salary of R89,100 per month (including medical aid payments) and the wife earns R37,500 per month. It is not relevant to a court considering the actual earnings of the parties *pendente lite* that one or both of the parties could potentially take up additional or different employment. This court may at any time be approached in terms of Rule 43(6) should one or both of the parties' circumstances change.

[36] Thus, I conclude that the common monthly pool from which the expenses of the husband and the wife and their children must be met is an amount of R126,600. Of that, the husband earns approximately 70% and the wife approximately 30%.

[37] It is equally irrelevant to this analysis that the husband has some illiquid assets (which are exceeded by his liabilities) or that the wife could, potentially, receive discretionary payments from the family trusts or other family members. There is no evidence before the court to disprove the wife's version that she has not received any distributions from these trusts, or other income from family members, aside from loans. This court cannot implicitly transfer the duty of support the children from the husband to the wife's family (or family trusts).⁵

[38] The question is then how to arrive at an equitable division of the common pool. In this regard, the approach in *Acutt*⁶ commends itself, particularly in situations where the parties' stated needs vastly exceed their means (as in this case). In terms of the *Acutt* approach, each adult is considered to consume two units of household expenses while each child consumes one unit.

[39] In this case, it means that the wife and the husband together consume four units of expenses while the children consume three units, for a total of seven units. One unit represents approximately R18,000: R126,600 divided by 7 equals R18,085.71.

⁵ Compare *CAM v DWM* [2023] ZAGPJHC 1203 (23 October 2023) para 23.

⁶ *Acutt v Acutt* 1990 (4) SA 873 (ZS) as endorsed by a Full Bench of this court in *Forssman v Forssman* 2008 (2) SA 114 (W) paras 31-34.

- [40] On this calculation, it means that the wife can meet her own reasonable maintenance needs (of R36,000 which represents two sevenths of the household income). She can also contribute R1,500 to the children's maintenance.
- [41] The children's combined reasonable maintenance needs, in terms of the *Acutt* approach, amount to R54,000. Of that, the wife is obliged to contribute R1,500, leaving a total of R52,500. In terms of the order I make below, the husband is already obliged to contribute a current amount of R5,451 in respect of the medical aid of the children, leaving an amount of R47,000 (rounded off).
- [42] In this case, residence of the children is shared between the parents so that the husband will have additional expenses to meet from his pocket in respect of the children's food and sundry expenses. It was not possible to discern with precision from the parties' evidence what these amounts would be, since both parties' estimated expenses on the children were heavily inflated by discretionary expenses (such as domestic help, child-care services, provision for a cellular phone, gym membership, subscriptions to streaming services and the like).
- [43] Accordingly, and after scrutinising the parties' respective estimates of their expenses, the court will make the rough assumption that the husband's necessary expenses while the children are in his care will amount to approximately R12,000 per month. This leaves an amount of R35,000 per month, which I will order the husband to pay to the wife in respect of child maintenance. From this amount, she will need to meet the necessary expenses of the children while they are in her care, as well as school fees.
- [44] The amount of R35,000 has the additional benefit of being close to an assumed amount of R12,000 for the children's necessary expenses while they are in the wife's care plus the total monthly amount of approximately R24,000 she estimates for school fees – given that a remedial school for E would, on her version, cost about R16,000 per month.
- [45] This means that the wife will, on a monthly basis, dispose of R72,500 of their joint income while the husband will dispose of R54,100. This disparity is, in my view, justified by the fact that the wife will be obliged to pay for the educational needs of the children which, on any version, is expensive.

Spousal maintenance

- [46] The wife contended that the husband should pay an amount of R1,300 per month, in respect of maintenance for her. The husband disputed that she had made out a case for spousal maintenance and contended that she is self-supporting. The husband argued that the wife has not claimed spousal maintenance in her particulars of claim and is thus not entitled to it *pendente lite*.
- [47] The amount of R1,300 per month is not justified with reference to any calculation on the papers. In addition, and based on the *Acutt* analysis, the wife earns more than her reasonable requirements to maintain herself. She earns R37,500 per month while her share of the joint household income amounts to R36,000 (R18,000 times two).
- [48] In addition to these factual considerations, there is authority for the proposition that a party cannot claim spousal maintenance *pendente lite* if she does not claim spousal maintenance in the divorce absent further facts to explain the discrepancy between her claims.⁷ In this case, the wife did not adduce any facts or explanations why she claims spousal maintenance *pendente lite* but not on divorce.
- [49] I was urged to award a token amount of R1 in spousal maintenance if I were to conclude that the wife is not entitled to the amount claimed. This request does not make sense to me. On divorce, it is possible to award a token amount which may then, later, be varied by a competent court should a spouse require maintenance at that point.⁸ The reason is that, if a court on divorce does not make an order in terms of section 7(2) of the Divorce Act, 70 of 1979 then it is not possible for another court at a later stage to award spousal maintenance.⁹
- [50] But this consideration does not apply in respect of orders for maintenance *pendente lite*. This court may revisit the order I make at any time before the divorce should it, at that point, be required to award spousal maintenance. And

⁷ See *B v S* [2018] ZAGPJHC 534 (16 August 2018) paras 11-12 per Keightley J (as she then was) citing *MCE v JE*, unreported decision of the North Gauteng High Court (14/09/2011) under case number 13495/2011, a decision of Makgoka J (as he then was).

⁸ Compare *Buttner v Buttner* 2006 (3) SA 23 (SCA) paras 36-37

⁹ *DB v CB* 2024 (5) SA 335 (CC) para 96; *Schutte v Schutte* 1986 (1) SA 872 (A) at 882E-F.

the court adjudicating the divorce action may also award spousal maintenance should it, at that stage, be claimed and be found to be justified even if I did not.

[51] Accordingly, I make no order in relation to spousal maintenance.

The claims in respect of arrear maintenance

[52] The wife contends that the husband should pay arrear maintenance in the amount of R298,193.72 (excluding arrear school fees). This amount is based upon unexplained assumptions regarding how much the husband should have paid, but did not, between February 2025 and December 2025.

[53] In addition, there was a dispute in relation to the payment of the minor children's outstanding school fees for 2025 (in an amount of R33,389.20). The arrears arose, according to the wife, because the husband unilaterally applied a ratio in respect of the amount of school fees that he is liable for. The husband says that the school fees accounts have always been in the wife's name and the alleged arrears are a result of the wife's failure "*to pay her proportion to the schools in respect of these fees*".

[54] According to the wife, as a result of the outstanding school fees (which relate to all the children), the school has refused to release the oldest boy E's exam results for 2025.

[55] The husband disputed that he is liable for arrear maintenance, both in relation to the outstanding school fees and the maintenance since the date of demand. The husband states that there is no previous agreement or order against him in regard to the arrears. He contends that he has paid his unilaterally determined portion of all school fees to date. He contends that an arrears claim cannot arise from a mere demand; only from an order.

[56] In heads of argument submitted on behalf of the wife, it is conceded that ordinarily an order for arrear maintenance in a Rule 43 application is not competent, based upon the principle that "*one does not live in arrear*". There is

an exception to the rule, however, where the spouse has incurred debts to maintain themselves.¹⁰

- [57] In this case, there are indications that the wife has incurred debts in relation to the arrear maintenance she seeks to recover. She says that she has had to take loans in an amount of R85,245 from her (now deceased) mother and R78,385.35 from her brother; and R336,333.47 from the two family trusts.
- [58] If the husband had liquid assets (as disclosed in this application) to settle an amount of arrear maintenance of this magnitude, it would have been possible to order him to pay such amount as he fell short between February 2025 and February 2026 of discharging his reasonable child maintenance obligations. This would have necessitated an arduous exercise of comparing what the parties each paid during these months with what they should have paid – an exercise for which there is currently insufficient evidence before the court.
- [59] In my view, the principle that a duty of support is bounded by ability to pay, militates against embarking on that exercise. On no version does the husband have the liquid funds to settle arrears of this magnitude.
- [60] The claim for arrear school fees is on a different footing. The amount of R33,389.20 owing to the schools is not in dispute. The husband's only contention is that it arose because the wife did not contribute to the maintenance of the children in the 50/50 split that he unilaterally implemented. It is clear from the evidence that the husband contributed less towards child maintenance than he should have, even though the amount is not capable of easy calculation on the evidence before the court. (His direct payments to his wife ranged between about R1,500 and R4,500 per month since February 2025.)
- [61] In addition, it weighs heavily with the court that the interests of the children are compromised while school fees remain outstanding. This includes the fact that E's exam results are being withheld pending payment of an outstanding amount. Further, it appears that the husband had, at the time of his financial disclosure,

¹⁰ In *AF v MF* 2019 (6) SA 422 (WCC) para 32.

cash of R23,028 and that he earned a discretionary bonus of R56,480 at the end of 2025.

- [62] Accordingly, I will order the husband to discharge the arrear school fees of R33,389.20.¹¹

Contribution to legal costs

- [63] The wife contended that the husband should make a contribution of R350,000 towards her legal costs. The husband disputes that the wife is entitled to this relief. He says the amount appears to be unreasonable “*considering that the only real point of dispute is the parties’ respective maintenance contributions for the minor children*”. The wife, so he contends, has shown no genuine disadvantage in the litigation while he is under severe financial pressure. He says the wife’s conduct (including the rejection of a previously mediated agreement), has resulted in the costs and delays she is now complaining of.

- [64] The wife’s attorney estimated that the legal costs (fees including disbursements and VAT) leading up to the trial certification stage could be as much as R1,934,500. It is notable that this amount exceeds the parties’ net assets as disclosed in this application by a considerable margin.

- [65] The purpose of ordering a contribution to costs is to enable the financially weaker party in the principal divorce litigation to put her case before the court. This is to ensure, as far as is possible, equality of arms in the litigation. Thus, the essential purpose is to enable the applicant to litigate on a scale commensurate with that of the respondent.¹²

- [66] In this case, the essential information before the court regarding the scale on which the parties have been, and can be, litigating is as follows:

¹¹ See also *CAS v KVS* [2025] ZAGPJHC 718 (28 February 2025) paras 27-28 where the Court recognised a claim for arrear school fees on the basis that the bar against arrear maintenance at the divorce proceedings does not apply to claims made on behalf of a child, as the duty of support is shared by both parents. In this case, the court granted a claim for arrear school fees in Rule 43 proceedings.

¹² Compare *AF v MF* 2019 (6) SA 422 (WCC) para 41.

- a. Both parties have so far been represented by attorneys. The husband's third set of attorneys withdrew on the eve of the hearing. The husband is paying off debt incurred to his previous attorneys at a rate of R5,000 per month.
- b. The wife was represented before this court (and in other proceedings) by senior counsel and junior counsel acting *pro amico*. Counsel has not, so far, been paid. The husband has been representing himself, at least in these proceedings.

[67] I fervently wish that both parties could afford adequate and paid legal representation, including counsel. The reality is that both parties appear to be stretched to the limit by their circumstances and choices. So far, the only major disparity in the litigation is that the wife could count on the kindness of counsel to assist her. This is obviously not sustainable, but it does not mean that an order could be made to fully fund legal representation for the wife at a luxurious level from the husband's very limited means.

[68] Thus far, the husband appears to have been able to fund his own defence in this matter in an amount of about R5,000 per month. As I indicate above, he has some (although limited) liquid assets and received a discretionary bonus of R56,480 at the end of 2025. I have not taken into account the possibility of a discretionary bonus in 2026 for purposes of his net salary, but I will do so in respect of a contribution to legal costs. Further, I take into account indications that the husband has been dipping into his pension interests under the "two-pot" regime to fund some expenses.

[69] Accordingly, I will order that the husband should pay an equal amount of R5,000 per month to the wife's legal costs as he is paying towards his own. In order to give him an opportunity to arrange that, I will order that this contribution will only commence in May 2026, given that he will have to make two payments in respect of child maintenance in April and also pay a lump sum in regard to the arrear school fees.

Order

[70] I make the following order:

- a. The residency of the children is shared between the parties.
- b. The parties share contact with the minor children in accordance with the recommendations in the Family Advocate's Report dated 30 November 2025. Decisions of the parenting co-ordinator will be final subject to this Court's overarching powers in respect of minor children.
- c. Ms Tanya Kriel is appointed as parenting co-ordinator, with 70% of her costs to be paid by the husband and 30% by the wife. The parties may jointly decide to appoint a different parenting co-ordinator or to replace Ms Kriel, should the need arise.
- d. The husband shall continue to pay for the medical aid of the children and shall maintain the same level of medical aid coverage for them.
- e. The wife has the discretion to decide which schools and extra-mural activities the children will attend and shall pay for such schools and extra-mural activities.
- f. The husband is ordered to pay the wife an amount of R35,000 per month in respect of child maintenance. This amount will increase annually on 1 March of each year by such percentage as is equivalent to the percentage change in the Consumer Price Index (CPI) (all items), as published by Statistics South Africa, for the most recent annual period available at the time the increase is calculated. The first payment shall be made within five (5) days of this order and shall thereafter be made monthly on the 28th of each month (regardless of whether the second payment falls with the same month as the first payment in terms of this order).
- g. The husband is ordered to pay arrear school fees to each of the schools concerned in an aggregate amount R33,389.20 within five (5) days of this order.

- h. The husband is ordered to pay the wife an amount of R5,000 per month in respect of a contribution to her legal costs. The first payment shall be made on 28 May 2026 and thereafter shall be paid monthly on the 28th of each month.
- i. The costs of this application will be costs in the cause.



DJ SMIT
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 23 March 2026

Date of judgment: 30 March 2026

For the Applicant:

RR Rosenberg SC with AB Kessery
instructed by Hesselink Attorneys

For the Respondent:

BPAL in person.