

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-106722

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>09/04/2026</u>	
DATE	SIGNATURE

In the matter between:

NM

Applicant

and

SM

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 wife instituted divorce proceedings in this Court during or about June 2024. The parties were married in community of property on 3 June 2008. Four minor

children – all girls – were born of the marriage: SNM (17), MNKM (15), AKM (9) and SAM (6).

[4] Paraphrased for brevity, the wife claims the following, pending the divorce:

- a. Setting aside a maintenance court order and a children's court order;
- b. Awarding the wife full parental responsibilities and rights in respect of the minor children, with some rights of access and contact to be given to the husband;
- c. Ancillary relief in respect of parenting skills therapy for the husband and wife and behavioural modification therapy for the oldest child;
- d. An obligation on the husband to pay for school fees, school uniform, stationery and extra-mural activities;
- e. An obligation on the husband to pay R3,000 per year per child for clothes;
- f. An obligation on the husband to pay R10,300 per month in respect of maintenance of the minor children;
- g. An obligation on the husband to pay R3,550 per month in respect of spousal maintenance;
- h. Claims for lump sum amounts for a rental deposit, and to purchase furniture; and
- i. A claim for a contribution in respect of legal costs in an amount of R71,473.77.

[5] Regrettably, although the wife is legally represented, her papers are drawn badly and it is, at times, difficult to establish their meaning.¹ This feature of the application was also apparent from the fact that there are or were several parallel

¹ An example is prayer 3 of the draft order filed before the hearing:

"3. That the full parental Responsibilities and rights in respect of the minor children as set out in terms of Section 18(2) of the Children's Act 38 of 2005 the Applicant is awarded primary care and residence to the minor children, pendente lite."

proceedings instituted on behalf of the wife with no discernible strategic objective.

Background

- [6] The husband and the wife separated in February 2024. This seems to have been a period of emotional and other turmoil: the Family Advocate's report records that the wife was in essence "*evicted*" due to the husband obtaining a protection order against the wife. There are also allegations that the wife had become physically abusive before that, and it is common cause that she was hospitalised around this time for mental health problems. Later, she obtained a protection order against the husband based on alleged emotional and financial abuse.
- [7] I record this, because it is clear from the papers that even before their split, the parties were financially distressed. The split has exacerbated this position, not least because it requires two households to be maintained. The practical outcome is that the wife and the oldest two children are currently housed in cramped and relatively economically deprived circumstances which are not in keeping with the apparent lifestyle of the husband and the youngest two children.² This discrepancy – along with the household's unsustainable spending patterns – is untenable.
- [8] The husband currently lives in a house which he records to be worth R1.8 million in his financial disclosure form. Although he records there to be approximately R200,000 in equity in the property, he was (as of the date of the form) in arrears amounting to R550,466.60. The husband is employed in a mid-level managerial position at a municipality and as at December 2025 earned a net salary of R58,642.32 per month. (After deduction of tax, pension, some insurance, a cell phone allowance and sundries, but excluding an annual bonus.)
- [9] The husband's bank statements and declaration of monthly expenditure reveal extensive spending on luxuries like restaurants, take away foods, alcohol, a

² I was told from the bar that the second-oldest child is now living with the husband, but this is inconsistent with the order of the children's court and the Family Advocate's recommendation. As the issue was not ventilated on affidavit, and as either party is at liberty to approach this court again for an amendment of the court order based upon changed circumstances, I disregard the evidence from the bar in this judgment.

domestic worker and gardener. His (desired) expenditure – like that of the wife – far exceeds his means. He estimates his monthly expenditure at R103,381.02³ as against a monthly income of R58,400. While this may be partly exaggerated, his mortgage statements and statements from store cards, medical professionals and the children's schools all reveal significant financial distress. The husband is borrowing from Peter to pay Paul. This is clearly unsustainable.

- [10] The wife has a B Tech degree but is currently unemployed. She has been a housewife for most, if not all, of the duration of the marriage. After the split in February 2024, the wife lived with her mother in a one-bedroom apartment for four months. The arrangement came to an end because of mutual disagreements – no doubt hastened by the circumstances in which they were living as well as the fact that the oldest daughter “*ran away*” in June 2024 from her father to live with her mother. The wife then lived, with her oldest two children, in various temporary accommodations. (The second-oldest daughter also “*ran away*” from her father in October 2024.)
- [11] In March 2024, the wife launched proceedings in the maintenance court. For reasons that she describes as “*the emotional strain and stress [she] received from the [husband]*”, she withdrew the proceedings and launched Rule 43 proceedings in the High Court in September 2024. Shortly thereafter, she secured employment (as it turns out, temporarily). She lost this employment in April 2025. She withdrew the Rule 43 application on 7 August 2025, ostensibly because of the discrepancy between her allegations of unemployment in the founding affidavit and the fact that she then became employed.
- [12] In the interim, she had secured an order from the maintenance court by consent on 25 March 2025. The order provided that the husband would pay maintenance of R1,500 per month per child and a contribution of R4,000 per year for clothes. There is currently an open maintenance inquiry pending before the maintenance court, but the maintenance officer has stated on email that she feels

³ This is based upon the monthly personal budget the husband filed as part of his financial disclosure form: CaseLines 080-96ff. There is another version at CaseLines 078-1ff where he estimates his total monthly expenses at R119,686.02.

overwhelmed with the case, because the parties “*deviate a lot from proceedings with emotional matters*”.

- [13] I detail the parallel proceedings before the children’s court below.
- [14] The wife brought this application on 11 August 2025, within days of withdrawing the previous Rule 43 application. The matter first came before this court on 16 October 2025. The court ordered – apparently as an interim measure, pending hearing of the application) – that the husband would pay an additional R1,000 per month on top of the R3,000 per month ordered by the maintenance court. The husband was also given time to solicit the services of an attorney.
- [15] The matter came before this court again on 3 December 2025. It was removed from the roll to give the wife an opportunity to order the CaseLines file appropriately and to afford the husband time to make financial disclosure. By the next time the matter came before this court on 16 February 2026, it was removed from the roll because there was no updated or joint practice notes and the set-down was defective. By the time the matter came to court again on 23 March 2026, there was a joint practice note although it did not comply with the practice directives⁴ – another concerning feature implicating the quality of the wife’s legal representation.

The relief sought in relation to care and contact with the children

- [16] The children’s court ordered on 16 January 2025 that the two oldest children (SNM and MNKM) would reside with the wife and that the two youngest children (AKM and SAM) would reside with the husband. The court also ordered that a social worker employed by the Department of Social Development should refer the parties for parenting skills classes and that the oldest child (SNM) was to be referred for behavioural modification therapy. The social worker was ordered to monitor compliance with the court order.
- [17] In these proceedings, the wife seeks the setting aside of the children’s court order, to be replaced with an order that the children would reside with her and

⁴ For example, it did not attach any comparative table setting out the parties’ respective positions.

that she would be the primary caregiver (in addition to some contact rights for the husband).

[18] The matter was referred to the office of the Family Advocate, which performed an investigation including interviews with the children. According to a report dated 25 November 2025, the Family Advocate recommended that the *status quo* in terms of the children's court order should remain.

[19] The parties were agreed that the High Court has the inherent power in Rule 43 proceedings to vary or set aside prior orders by other courts (including the children's court and maintenance courts) regarding care and contact with minor children and regarding maintenance. This power sits at the confluence of the following provisions:

- a. section 28(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child;⁵
- b. section 172(1)(b) of the Constitution which provides that in a constitutional matter within its power, a court may make any order that is just and equitable;
- c. section 173 of the Constitution which provides that the superior courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice;
- d. the traditional common-law powers of the High Court as the upper guardian of minors as read with the statutory recognition of that principle in section 45(4) of the Children's Act, 38 of 2005;
- e. the recognition in section 29(1) of the Children's Act of the High Court's power to make an order *inter alia* in relation to assignment of contact and care; and

⁵ Cf. *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) where the Constitutional Court found that this provision justified the enforcement of maintenance court orders by the High Court through contempt proceedings in appropriate circumstances.

- f. the common-law powers of a High Court in which a divorce action is pending to make orders “*pendente lite for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance*” as recognised in section 1(1) of the Divorce Act, 70 of 1979.⁶

[20] While High Court has the power to vary or set aside orders of a children’s court or a maintenance court without an appeal or review in Rule 43 proceedings, this power must be sparingly exercised and only upon a demonstration that the order is no longer appropriate or exhibits a major flaw. Forum-shopping (especially in family law matters) ought to be strongly discouraged. The Supreme Court of Appeal has held, in the context of the concurrent jurisdiction of various High Courts over a child, that High Courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction. As a rule, since one is entitled to assume that any order has been made in the best interests of a child, should those interests change over time, the court that made the initial order should be approached for a variation.⁷

[21] In this case, however, I do not think the children’s court’s order should be varied or set aside. The Family Advocate has, independently and subsequently to the children’s court order, investigated and concluded that the order should stand. Further, the wife’s founding affidavit does not demonstrate a change in circumstances or a major flaw in the children’s court order. Her allegations that the husband is a distant and uncaring father is raised more in the context of the older children, who reside with her, and seems to be a projection of her disdain for the husband. There is no objective evidence before this court justifying the conclusion that the children are inadequately cared for, neglected or abused by their father. The Family Advocate’s assessment points the other way.

[22] Thus, I make no order regarding care and contact with the children. The children’s court has already made orders providing for contact, parenting skills therapy for the husband and wife and behavioural modification therapy for the

⁶ As to which, see *JG v CG* 2012 (3) SA 103 (GSJ) paras 28-32 and the authorities referred to there.

⁷ *FS v JJ* 2011 (3) SA 126 (SCA) para 38.

oldest child. The fact that there seems to be problems with the implementation of the order regarding the indicated types of therapy does not necessarily call for the High Court's intervention. It means that the children's court's procedures should be followed to exact compliance with the order.

The relief sought in relation to child and spousal maintenance

- [23] As should be clear from the exposition above, currently the husband pays an amount of R1,500 per month per child and a contribution of R4,000 per year for clothes for the children (as ordered by the maintenance court), plus an extra amount of R1,000 per month as ordered by this court on 16 October 2025 as an interim measure.
- [24] The husband's counsel stated from the bar, without demur from his opponent, that the husband currently complies with the order insofar as paying the wife R4,000 per month for child maintenance is concerned. In a draft order filed on 11 March 2026, the husband tendered to pay R2,000 per child per month and R2,000 per month for spousal maintenance (for a total of R6,000 per month).
- [25] This, among other reasons, means that this court may legitimately vary the order of the maintenance court. The husband has tendered a higher amount than that stipulated in the maintenance court's order; and the maintenance court made no order in relation to spousal maintenance. It also seems desirable to me that the husband's payment obligations should be contained in one order.
- [26] The question is then what the appropriate amounts are in respect of child and spousal maintenance. As recorded above, the husband earned as at December 2025 a net salary of R58,642.32 per month. It may safely be assumed that he would have received an increase in 2026. For ease of calculation, I will assume that he currently earns R60,000 per month – although it is likely to be more, and there are indications on the papers that he also receives an annual bonus.
- [27] The question is then how to arrive at an equitable division of this amount. In this regard, the approach in *Acutt*⁸ commends itself, particularly in situations where

⁸ *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.

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.

- [28] In this case, it means that the wife and the husband together consume four units of expenses while the children consume four units, for a total of eight units. One unit represents R7,500: R60,000 divided by 8 equals R7,500.
- [29] The wife had asked for an order that her husband should pay her R3,550 per month in respect of spousal maintenance. In light of her equitable share of R15,000 per month, this is eminently reasonable, and leaves some room for a reasonable contribution to her legal costs – a matter with which I deal below.
- [30] The combined equitable share in respect of SNM and MNKM, who live with the wife, is R15,000. The husband has, so far, been responsible for payment of school fees, school uniform and stationery and the wife has sought an order that he would remain so responsible and should, in addition, pay for extra-mural activities.
- [31] Based upon the husband's declared monthly expenses – as appears from his financial disclosure form – the monthly payments in respect of all four children for these items are: R2,500 in respect of school uniform; R11,400 in respect of school fees; R1,500 in respect of books and R400 in respect of stationery. I will assume in the husband's favour that only half of these payments relate to the two older children – although it seems likely that their costs would be higher than that for the younger children. This means that an amount of R7,900 (R1,250 plus R5,700 plus R750 plus R200) should be set aside for the husband's obligations to pay for school fees, school uniform and stationery in respect of the two older children.
- [32] This leaves an amount of R7,100 per month from the two older children's equitable share, which should cover their clothes, groceries, reasonable extra-mural activities, transport and accommodation. I will order the husband to pay to the wife R3,550 per month per child in the care of the wife.

- [33] This means that the husband must pay a monthly total of R10,650 to the wife's household. This amount should obviate the need for lump sum contributions to a rental deposit and to furniture purchases, particularly since I will order that it should be paid within five days of this order and then again at the end of the month. With careful planning, the wife should be able to finance these items from the monthly cash contribution.
- [34] Counsel acting for the husband submitted, in passing, that the husband's maintenance obligations towards SNM will cease when she turns 18 on 30 April 2026. This is incorrect as a matter of law. It has long been established that a parent has a duty to support his or her child, notwithstanding the fact that the child is no longer a minor, and for so long as the need for support exists and the parent has the ability to support the child.⁹ To put the matter beyond doubt, I provide in the order that the maintenance duty towards each child only ceases once the child becomes self-supporting.

Contribution to legal costs

- [35] The wife claims a lump sum contribution of R71,473.77 from the husband. Her founding affidavit quantifies this as the legal fees so far incurred on her behalf in the divorce action, the children's court matter and the maintenance matters. It does not provide for future legal fees.
- [36] The husband does not disclose exactly how much he has spent on legal fees so far, but he admits that he spent R17,000 on his legal fees around May and June 2024. His answering affidavit states that he has so far incurred a "*tremendous amount of legal fees*". His estimate of monthly expenditure in his financial disclosure form lists a sum of R10,000 per month in legal fees.¹⁰
- [37] It is trite that the common law provides (with Rule 43 providing the procedural machinery) for a contribution to legal costs as a means of ensuring equality of arms. This is a means of ensuring adequate access to court for both parties in a matrimonial dispute, to give effect to section 34 of the Constitution. Thus, the

⁹ See *JG v CG* 2012 (3) SA 103 (GSJ) paras 7-8 and the authorities referred to there.

¹⁰ CaseLines 080-96.

essential purpose is to enable the applicant to litigate on a scale commensurate with that of the respondent.¹¹

- [38] The husband submitted that the wife's various legal manoeuvres show that she is incurring legal fees unreasonably. He also submitted (without adducing any evidence in that regard) that he is using private legal representation because he would not qualify for Legal Aid, while she could be using Legal Aid given its means test. This appears doubtful to me, given the fact that until a divorce they share the joint estate, which has some means. I make no finding in that regard, however. It suffices to say that it seems unfair to expect the wife to rely on the uncertain prospect of Legal Aid while the husband litigates through private attorneys.
- [39] I do have concerns regarding the quality of the wife's legal representation, as shown by the state of the papers before me as well as the unexplained and inexplicable series of applications regarding maintenance that have been launched and withdrawn. That can no doubt be fixed through greater diligence or – if necessary – a change of legal representation. I do not consider that, in itself, to be a reason to withhold legal representation from the wife.
- [40] From his financial disclosure, the husband does not appear to have liquid assets which would permit him to make a lump sum contribution to legal fees in the amount sought by the wife. He does, however, envisage spending up to R10,000 per month litigating against her and has spent "*tremendous*" sums doing so thus far. What is good for the goose, should be good for the gander. I will therefore order the husband to pay a contribution to legal fees in an amount of R10,000 per month to the wife with effect from the end of April 2026.
- [41] I implore the parties to end this wasteful and destructive litigation as soon as possible through a mediated settlement or, if needed, by bringing the divorce action to court.

¹¹ Compare *AF v MF* 2019 (6) SA 422 (WCC) para 41.

Costs

[42] I see no reason to deviate from the standard order regarding costs in these types of cases, namely that costs are to be costs in the divorce action.

Order

[43] I make the following order:

- a. The husband shall pay the wife an amount of R3,550 per month in respect of spousal maintenance into her Capitec Bank Account with account number 1956961079.
- b. All previous orders in respect of child maintenance are varied as follows:
The husband shall pay the wife an amount of R3,550 per month into her Capitec Bank Account for each of SNM and MNKM in respect of child maintenance until such child becomes self-supporting.
- c. The husband shall pay for school fees, school uniform and stationery in respect of each of the children (including arrear school fees) until they leave school.
- d. The husband shall pay the wife an amount of R10,000 per month in respect of a contribution to legal costs into her Capitec Bank Account, with the first payment to be made on 28 April 2026 and thereafter monthly on the 28th of each month.
- e. The amounts payable monthly pursuant to this order 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. Except in relation to the contribution to legal costs, 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).

- f. Save as aforesaid, the application is dismissed.
- g. The costs of this application will be costs in the divorce action.



DJ SMIT
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 24 March 2026

Date of judgment: 9 April 2026

For the Applicant:

L Mello instructed by Ipeleng
Motshegoa Attorneys

For the Respondent:

K Ntjana instructed by Goodgall
Attorneys