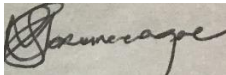




**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 24049/2022

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED: NO

SIGNATURE
10 FEBRUARY 2023

In the matter between:

G [....] R [....] W [....]

Applicant

and

S [....] L [....] W [....]

Respondent

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] The applicant (hereafter “Mrs. G”) and the respondent (hereafter “Mr. S”) are married to each other out of community of property subject to the accrual system. There are two minor children born out of their marriage. The parties are currently embroiled in a divorce action.

[2] Mrs. G approached this court in terms of Rule 43 of the Uniform Rules of Court. As it will be demonstrated below, this rule is aimed at providing prompt and temporary relief to a financially weaker spouse who needs maintenance and assistance with the payment of legal costs from a financially stronger spouse pending the finalisation of the parties’ divorce proceedings.

[3] Mrs. G seeks interim spousal and child maintenance as well as contribution towards her legal costs. Mr. S opposed the application. Despite the regrettable efforts to unnecessarily complicate issues that this court should determine and filing of lengthy documentation, some of which illegible, the issues that must be decided are relatively simple. 1. Are the parties’ children and Mrs. G in need of maintenance pending the finalisation of the divorce proceedings? 2. Does Mrs.

G need financial assistance from Mr. S to properly prosecute her case in the ongoing divorce litigation before this court? 3. If these questions are answered in the affirmative, then it should be determined whether Mr. S has the financial means to provide interim maintenance to Mrs. G and their children pending the finalisation of the divorce proceedings and also to contribute towards her legal costs. 4. If he does, to determine the reasonable amounts of maintenance and legal fees that Mr. S should be ordered to pay.

B THE PURPOSE OF RULE 43 AND SUBMISSION OF FURTHER AFFIDAVITS

[4] The purpose of Rule 43 is continuously being eroded through exchange of further affidavits that often complicates issues before the court and at times, also raise disputes of fact that cannot properly be resolved from such affidavits. This rule created an important procedure that enables financially weaker spouses to approach the court to order financially stronger spouses to pay maintenance pending the finalisation of divorce disputes. It also allows financially weaker spouses, often women, who do not have their hands on the keys of their joint estates' financial resources to be allowed to tap into those resources to finance their litigations.¹

¹ See *S v S and Another* 2019 (8) BCLR 989 (CC); 2019 (6) SA 1 (CC) para 3, where the Constitutional Court observed that '[a]pplicants in rule 43 applications are almost invariably women who, as in most countries, occupy the lowest economic rung and are generally in a less favourable financial position than their husbands. ... The inferior economic position of women is a stark reality. The gender imbalance in homes and society in general remains a challenge both for society at large and our courts'.

- [5] Where parties are married out of community of property with or without the application of the accrual system, and due to the duty of support between them that arose when they got married,² Rule 43 allows financially weaker spouses to approach the court to order financially stronger spouses to pay them maintenance pending the finalisation of their divorce proceedings and also to contribute towards their litigation costs.
- [6] Rule 43 also allows any of the spouses pending the divorce action to approach the court to seek the care and residency of the minor children born of their marriage pending the finalisation of the divorce proceedings.³ Spouses who do not reside with their minor children and are prevented from exercising their contact rights can also approach the court to be granted contact with their minor children pending the finalisation of divorce cases.⁴
- [7] It goes without saying that the procedure laid out in Rule 43 provides an effective interim remedy aimed at assisting financially weaker spouses, spouses who wish to exercise care and residency and those who wish to

² See *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 31, where O'Regan J held '[t]he celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function'. See also *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) para 90, where Skweyiya J held that '[t]he decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship'. Further that the duty of support '... is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also to the broader community. The duty of support gives rise to the special rule that spouses, even those married out of community of property, can bind one another to third parties in relation to the provision of household necessities which include food, clothing, medical and dental services' (para 112). See also *Plotkin v Western Assurance Co Ltd and Another* 1955 (2) SA 385 (W) 395, where it was correctly held that the duty of support 'is one of the consequences of marriage and does not depend upon whether the marriage was in or out of community'.

³ Rule 43(1)(c) of the Uniform Rules of Court.

⁴ Rule 43(1)(d) of the Uniform Rules of Court.

exercise contact rights pending the divorce to obtain a speedy and expeditious relief.⁵ For the court to consider whether to grant the desired relief, the applicant must deliver a statement under oath in the form of a declaration where the desired relief and the grounds upon which that relief is based are stated.⁶ The person against whom the desired relief is sought has ten (10) days after receiving the application to prepare his or her own statement under oath, in a form of a plea, and deliver it to the one who instituted the application.⁷

[8] Most importantly, once the parties have exchanged their respective statements, the Registrar shall ‘... *bring the matter before the court for summary hearing, on 10 days’ notice to the parties*’.⁸ The court will then hear argument and evidence presented by or on behalf of the respective spouses ‘... *as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision*’.⁹

[9] It is evident that the procedure laid out in Rule 43 is not only intended for the parties to approach the court and argue their matters in a short possible period of time, but also to enable the court to promptly hear evidence, decide the matter and expeditiously render its judgment. However, the desired goal of speedily disposing of Rule 43 matters and delivering judgments expeditiously is continuously becoming a pipe dream. This is because of the culture of delivering further affidavits which are usually referred to as supplementary

⁵ *E v E and related matters* [2019] 3 All SA 519 (GJ) at 522.

⁶ Rule 43(2)(a) of the Uniform Rules of Court.

⁷ Rule 43(3)(a) of the Uniform Rules of Court.

⁸ Rule 43(4) of the Uniform Rules of Court.

⁹ Rule 43(5) of the Uniform Rules of Court.

affidavits. It is clear that Rule 43 does not make provision for replying affidavits by applicants, hence these affidavits are ‘styled’ supplementary affidavits. This court in *E v E and related matters*,¹⁰ held that:

*‘Rule 43 applications as presently structured, are a deviation from normal motion proceedings in that the rule does not make provision for a third set of affidavits. The applicant is confined to what is set out in the founding affidavit, which must be in the nature of a declaration, setting out the relief claimed and on what grounds. On receipt, the respondent is required to file an answering affidavit in the nature of a plea. It is precisely this prohibition that causes the applicant to say more than what is required, knowing very well that there is no second opportunity to say more, which may in true prompt the respondent to file a lengthy answer’.*¹¹

[10] It is becoming a norm that applicants for interim relief pending the finalisation of the divorce proceedings, assisted by their legal representatives, do not state more than what is required in their initiating affidavits. Once applicants receive responses from respondents, they file further affidavits to dispute some of the averments in the respondents’ affidavits and place certain facts before the court which were not placed in their initiating affidavits.¹² When requesting leave to file these further statements, applicants often argue that some of the facts contained in the respondents’ statements are false, unfounded and could have

¹⁰ [2019] 3 All SA 519 (GJ) para 23

¹¹ [2019] 3 All SA 519 (GJ) para 23

¹² See generally *BS v GS* (23867/2019) [2022] ZAGPPHC 280 (21 April 2022) para 23; *AC v SM* (2020/27617) [2021] ZAGPJHC 392 (13 September 2021) para 7; *I[...] v P[...]* (2021/13610) [2021] ZAGPJHC 119 (5 August 2021) para 6; *S v S* (2020/31273) [2022] ZAGPJHC 847 (31 October 2022) para 15; *TJ v TA* (2019/22224) [2021] ZAGPJHC 39 (31 March 2021) para 2.1; *R v R* (born B) (16610/2021) [2022] ZAGPJHC 605 (24 August 2022) para 4; *M[...] v K[...]* and *Others* (8125/ 2021) [2021] ZAGPPHC 395 (9 June 2021) para 2; *ND v PT* (25792/2020) [2022] ZAGPJHC 13 (18 January 2022) para 9.

not been foreseen by the applicants and if left unchallenged would be prejudicial to the applicants.¹³

[11] Often, the so-called supplementary affidavits do not necessarily supplement the applicants' founding affidavits in the true sense but reply directly to the respondents' replying affidavits. Often, this prompts respondents to file their own 'supplementary affidavits', which appears to be defeating the purpose of Rule 43. This simply means that the court is expected to deal with large volumes of documentation. While different divisions of the High Court have accepted that this may be justified in certain instances, the net effect of this practice is the unnecessary delaying of delivery of judgments, which is not an intended goal of Rule 43 applications. Nonetheless, the full bench of this court in *E v E; R v R; M v M*, held that the '*[a]pplicant should have an automatic right to file a replying affidavit, otherwise she has no way of responding to allegations that are set out in the Respondent's answering affidavit*'.¹⁴

[12] The situation is not different in this matter. Mrs. G brought a Rule 43 application and served Mrs. S with her founding affidavit. Mrs. S responded with a replying affidavit. Having regard to the contents of the replying affidavit, Mrs. G served Mr. S with her supplementary affidavit. The Mrs. G's supplementary affidavit prompted Mr. S to also serve Mrs. G with what he styled the 'supplementary replying affidavit'. There are currently four (4) sets of affidavits before this court, with Mrs. G's founding affidavit and Mr. S' replying affidavit automatically being

¹³ See for instance *BS v GS* (23867/2019) [2022] ZAGPPHC 280 (21 April 2022) para 23 and *M v M* (12816/21) [2021] ZAGPJHC 642 (30 August 2021) paras 18 and 40.

¹⁴ [2019] 3 All SA 519 (GJ); 2019 (5) SA 566 (GJ) para 59.

considered by the court and their respective supplementary affidavits requiring leave to be considered by this court.

[13] Mrs. G sought an indulgence to file her supplementary affidavit. Ms Howard argued on behalf of Mrs. G that this affidavit was necessitated by what was referred to as ‘new facts’ which arose from Mr. S’ replying affidavit. Further that this affidavit contains necessary information that will enable the court to properly adjudicate this matter. Ms Segal SC, on behalf of Mr. M, opposed this application and maintained that there were no new facts established by Mr. S’ replying affidavit.

[14] After hearing arguments regarding whether to allow Mrs. G’s supplementary affidavit, I indicated that I will allow Ms Howard to refer to this affidavit and make an order regarding this affidavit when delivering the main judgment of the Rule 43 application. It follows therefore that if Mrs. G’s supplementary affidavit is not allowed, Mr. S’ supplementary replying affidavit will equally not be allowed. However, if Mrs. G’s supplementary affidavit is allowed, Mr. S’ supplementary replying affidavit should equally be allowed.

[15] In *JF v PF*,¹⁵ it was held that:

‘It is trite that Rule 43 only allows two sets of affidavits mainly to promote an expeditious determination of the matter. There is no right to adduce further evidence or to file a reply. The applicant is required to establish special

¹⁵ (2272/2020) [2021] ZAECPHC 14 (25 February 2021) para 4.

circumstances for this indulgence or it would be allowed where this is demanded by justice and equity’.

- [16] While I am of the view that generally, applicants should state their cases in detail in their founding affidavits, I am satisfied that in this case, it is warranted to grant Mrs. G and Mr. S an indulgence to file their respective supplementary affidavits. The evidence provided in these respective affidavits will be considered.

C BACKGROUND

i) Applicant’s version

- [17] Mrs. G is a graphic designer and businesswoman. She conducts her business, which is called Future Graphics, through a company called Astro Galaxy (Pty) Ltd T/A All Star Catering (hereafter ‘*All Star*’). Customers of Future Graphics are invoiced through *All Star* and make payments of graphic design services/products into the *All Star’s* banking account. Mrs. G receives a salary from All Star which also pays for her several other expenses.
- [18] Mrs. G is the sole director and shareholder of *All Star*, which was managed by Mr. S as its employee. *All Star* was established following the liquidation of Mr. S’ close corporation which also offered catering services, named *All About Food*. Mr. S controlled *All Star’s* operations and finances. The expenses of the parties’ household were paid by Mr. G using money generated by *All Star*. Mrs. G was responsible for the payment of the City of Johannesburg charges, which

she last paid in November 2020. The payment of these charges was subsequently taken over by *All Star*. There are several other purchases and payments that were made through *All Star* such as: children's bunk beds; La Boutique Eyewear sunglasses; fees for the personal marriage counsellor; one of the children's diabetic medical needs; children's school fees; telephone account; fuel; personal household insurance; pet food/ accessories; food purchased on holiday at Plettenburg Bay; food purchased at various restaurants; barber/haircut; Thai massage; and magician for children's birthday party.

[19] Several expenses ranging from R 120.00 to R 52 000.00 from 11 January 2022 to 05 July 2022 were settled through Mr S' Discovery and FNB credit cards. After these payments were made, money was paid from *All Star* into these credit card accounts. Some of these payments were recorded as 'research development' even though they were not. For instance, restaurants and cinema payments were recorded as 'research and development'. Furthermore, Mr. S deposited VAT amounts into the parties' bond/home loan account with ABSA, which he later withdrew when it became due. At times, Mr. S took money out of the bond/home loan account for personal expenses and those incurred by *All Star* at his discretion.

[20] In June 2022, Mrs. G become aware that Mr. S, with the assistance of his father, set up another catering company called 'So Yum Catering (Pty) Limited t/a Kitchen Mafia' (hereafter '*So Yum*'). Mr S' father was conveniently registered as a director of this company. Mr. S diverted *All Star* clients to *So Yum* and used his father as a 'front' to disguise the fact that he completely runs this

company for his sole benefit. *All Star* clients took their business to *So Yum* because Mr. S convinced them that *All Star* merely changed its name to *So Yum*. After successfully hijacking the *All Star*'s clientele, Mr. S informed Mrs. G that he will no longer be paying for any household expenses which were paid through *All Star*. Mr. S also restricted Mrs. G access to his Discovery credit card, which was also used to pay for some of the parties' household necessities.

[21] Mrs. G earns around R 4 000.00 per month depending on the amount of work she generated. Mrs. G's loss of income due to the diversion of *All Star*'s business made it difficult to financially care for herself and the parties' children.

[22] Mr. S is in the financial position to provide Mrs. G with interim maintenance because he receives money from *So Yum* and that his family is very wealthy. Mr S is also in a much better financial position than Mrs. G and can afford to contribute towards Mrs. G's legal costs in the divorce litigation. Mrs G claims an amount of R 143 000.00 for her legal costs. Since Mr. S hijacked *All Star*'s clients, leading to this company receiving no income, Mrs. G and the children survived through the financial assistance from her stepfather. Her stepfather provided her with his credit card which she uses to pay for her and the children's necessary expenses pending the outcome of this application.

[23] In her Financial Disclosure Form (hereafter 'FDF'), Mrs. G states that:

[23.1] She owns an immovable property with the current market value of R 3 500 000.00. As at 31 August 2022, the outstanding amount on the mortgage bond was R 1 474 352.81. The mortgage bond instalment

payments are currently paid by Mr. S. The equity on this property is projected as being negative R 174 352.00;

[23.2] She holds two bank accounts, one from Absa and the other from Nedbank with balances of R 4 276.85 as at 30 September 2022 and R 1 307, 76 as at 15 September 2022 respectively;

[23.3] She has a life policy (including critical illness and disability cover) with Alexander Forbes Life Policy valued at R 3 038 765.62, where she pays a monthly premium of R 1 182.32;

[23.4] She owns a collection of movable properties that include two motor vehicles, furniture and household contents collectively worth R 355 484.61;

[23.5] As a director of *All Star*, she has a director's loan account of R 19 851.00;

[23.6] The value of her fund credit held by the Provident Preservation Fund is R 111 388.04;

[23.7] She has timeshares with Sun International valued at R 37 000.00;

[23.8] Her gross income from *All Star* was R 82 000.00 and net income was R 73 702. 52 in the last financial year;

[23.9] Her gross income in the last financial year from Future Graphics was R 44 670.00.00;

[23.10] Her personal monthly expenses amount to R 46 855.00 and those relating to the children amount to R 56 252.00. In total, their monthly expenses amount to R 102 297. 00.

[23.11] She no longer receives income from *All Star*, which is no longer trading. Her income from All Star is nil and from Future Graphics is unstable and varies from month to month.

[24] The parties attended mediation and it was suggested that they should reside at different places and leave the children inside the house and alternate days where each of them can reside with the children in the house in the absence of the other. They decided to rent an apartment close to their house so that when one of them is with the children, the other would reside in the rented apartment. This apartment was rented for R 11 000.00. Disputes relating to the children must be referred to the Family Advocate Office to determine what, in the circumstances, would be in the children's best interests regarding the parental responsibilities accorded to the parties in terms of the relevant provisions of the Children's Act.¹⁶

[25] Mr. S has shown willingness to spend excessively. In July 2022, he spent R 2 250.00 at Bagel Zone. He purchased a bagel for each guest at the parties' children's party, which was too expensive. Between 16 and 26 September 2022, Mr. S went on holiday at Cape Town for 10 days.

ii) Respondent's version

¹⁶ 38 of 2005.

- [26] Mr. S is employed as a chef and manager by *So Yum*. He was previously a sole member of *All About Food* which was liquidated in May 2022. *All About Food* rendered catering services to corporate clients but could not survive the impact of Covid-19. Mr. S in his personal capacity and his close corporation are indebted to Investec Properties (Pty) Ltd in the amount of approximately R 1 500 000.00 in respect of arear rental for premises previously rented by the All About Food. He signed as surety for the liquidated close corporation's rental agreement.
- [27] Mrs. G is *All Star's* sole director and shareholder. Mr. S did not conduct the business of *All Star* on his own. He conducted it jointly with Mrs. G, whose input and approval was needed for the decisions that were taken.
- [28] Both Mr. S and Mrs. G had access to *All Star's* accounting system and were both authorised to withdraw or/and deposit money into this company's bank account. They both received monthly salary from *All Star*. Mrs. G's involvement in *All Star* reduced from the end of 2021. Her interest in *All Star* declined due to the growing demands of her graphic design business, which became lucrative prompting her to abrogate many of her duties in *All Star* and informing Mr. S that she hated catering.
- [29] Between November and December 2021, Mrs. G had no interest in *All Star* and abrogated her responsibilities in the catering business. Mrs. G's lack of interest in catering business led to the employment of the third person to assist Mr. S. Despite Mrs. G's lack of interest in the business of *All Star*, she remained its sole director and shareholder.

[30] Due to the heightened tension in the parties' marriage, it became difficult for Mr. S to tolerate Mrs. G as his boss or defer logistical operations of the business to her while she preferred to be somewhere else. The parties lack of cooperation regarding services rendered by *All Star* became detrimental to its clients. Mrs. G informed Mr. S that she relinquished all of her interests in the business of *All Star*. Due to the parties' inability to work together, Mr. S' father established *So Yum* with a view of assisting Mr. S to maintain himself and support the parties' children. Mr. S' father is *So Yum*'s sole shareholder.

[31] Mrs. G was aware of the establishment of *So Yum* and arrangements were made for *So Yum* to take over the debit orders of *All Star*. The establishment of *So Yum* did not lead to the hijacking of *All Star* business. In fact, the clients that were serviced by *All Star* were originally clients of *All About Food*.¹⁷ Some of the clients who previously used the catering services of *All About Food* and *All Star* elected to use the services of *So Yum*. Mr. S resigned from *All Star* and Mrs. G intended to liquidate *All Star* on Mr. S' resignation.

[32] The parties' certain personal and household's expenses were covered by *All Star*. Mrs. G covered some of the expenses, such as the City of Johannesburg charges, using her own money. Some of the expenses such as: the salary of the domestic worker that the parties cannot afford; payments to Eskom; school items for the children; cleaning materials, medication, groceries, and pet food; were covered by Mr. S' through his Discovery credit card. Mr. S also deposited VAT amounts into the Absa Bank home loan account which he later withdrew when such VAT become due. To reduce the debt on the home loan and interest

¹⁷ Paragraph 22.4.4 of the respondent's replying affidavit.

payable thereon, between 2019 and 2022, Mr. S deposited various amounts in the home loan account. Some of these amounts were paid from Stanlib, Allen Gray, and PSG investments as well as tax refunds and an inheritance received by Mr. S.

[33] In 2020, the parties were unable to sustain their monthly expenses due to Covid 19 pandemic. The deficit in the parties' expenses was funded from time to time with money withdrawn from the home loan account.

[34] Mr. S cannot afford the maintenance claimed by Mrs. G because he earns a nett salary of R 31 463.00 per month. Mr. S also receives *ad hoc* payments from a customer who owes him R 50 000.00. Mrs. G can maintain herself because shea has gross income of R 26 608.00 per monthly and her nett income of R 17 303.00. Between 15 March and 15 June 2022, Mrs. G received three separate payments totalling R 131 596.28.

[35] Mrs. G has a tendency of spending excessively. Mrs. G spends excessively on coffee, clothing, yoga, take aways, uber trips, alcohol, overseas holidays. She also spent excessively when she booked a hotel accommodation for her birthday celebrations. Due to Mrs. G's wasteful, reckless, and unfair spending, Mr. S restricted her access to the Discovery credit card. However, despite this restriction, Mrs. G continues to enjoy a lavish standard of living which demonstrates that she is not in dire financial need. Mr. S continues to purchase groceries for the matrimonial home. Mrs. G's expenses as provided in her FDF are inflated.

[36] In relation to the children, Mr. S does not object to the intervention of the Family Advocate. In the interim, both parties moved out of the house and resided in a rented Air B n' B situated down the road from their matrimonial home. When one party is with the children on the matrimonial home the other will be at the Air B n' B. Mr. S paid monthly rental of R 11 000.00 on this accommodation. Because of the parties' precarious financial situation, they could not afford to rent this property after the end of July 2022.

[37] Mr. S' family is not very wealthy and does not own any flats where he could relocate. On the contrary, the applicants' family is very well off and funded her overseas trips. Mrs. G also has access to an amount of R 600 000.00 credit balance in the bond facility over the matrimonial home which is registered solely in her name. Despite having made diligent monthly bond payments relating to the parties' matrimonial home, Mr. S does not have access to similar funds at his disposal. Access to the credit balance in the bond facility makes Mrs. G to be in a more financially stronger position than Mr. S. This means that Mrs. G should contribute towards Mr. S' legal costs.

[38] Mr M spent ten days in Cape Town from 16 to 26 September 2022. However, he was not in Cape Town for a holiday but for work. While in Cape Town, he took advantage of the two weekends to celebrate his birthday. He did not incur accommodation costs because he stayed with his friend who has a spare bedroom in his house in Cape Town. This trip allowed Mrs. G to spend additional four days with the children.

[39] Mr. S is unable to contribute towards Mrs. G's legal costs. The amount of R 143 000.00 sought by Mrs. G is inflated and excessive. In his FDF, Mr. M states that:

[39.1] As at 9 December 2022, his ABSA bank account's balance was R 35 903.96. He also has two credit cards with negative balances of R - 18 061.60 and R - 46 791.06 respectively;

[39.2] He is owed R 50 000.00 by Mr Seagal;

[39.3] He has personal assets worth R 21 051.00;

[39.4] He is a member of Liberty – Retirement Annuity Builder under 'two different policy numbers' worth R 174 892.99 and R 47 830.85 respectively;

[39.5] He took a loan from his mother worth R 250 000.00;

[39.6] His nett income is R 31 462.00 and his total monthly expenditure is R 68 354.00.

C CONTENTIONS OF THE PARTIES

[40] To decide whether Mrs. G and the children should receive interim maintenance from Mr. S pending the finalisation of the divorce proceedings, I need to draw certain inferences and weigh probabilities as they emerge from the parties'

respective affidavits, heads of arguments and oral arguments by their counsel. The conclusions that I reach are not binding on the court that will conduct the divorce trial which, after hearing all the evidence, may provide clarity on the actual financial position of the parties.¹⁸

[41] On the one hand, Adv Howard on behalf of Mrs. G, argued that to adequately understand Mrs. G's financial position, one should reflect at her income as of 01 July 2022. Before 30 June 2022, Mrs. G received income from *All Star* that allowed her to maintain herself, her children, and her lifestyle. However, after *All Star's* clients were hijacked by Mr. S, Mrs. G's income drastically reduced. On the other hand, Adv Segal SC argued on behalf of Mr. S that between 15 April and 15 June 2022, Mrs. G received the total income of R 131 596.28 at an average of R 43 865.00 per month. Further that between 6 and 10 June 2022, the applicant transferred R 34 000.00 out of her account.

[42] While Adv Segal SC's submission illustrates that Mrs. G may have been able to maintain herself before 30 June 2022. Unfortunately, this submission does not counter Adv. Howard's submission that from 1 July 2022, Mrs. G was not able to financially maintain herself and the children. From the evidence submitted in all her affidavits and arguments made in court, it is clear that Mrs. G's income was indeed drastically affected when *All Star's* business was diverted to *So Yum*.

[43] Evidence relating to the income received and expense incurred by Mrs. G before 30 June 2022 does not assist the court to determine whether from 1 July

¹⁸ *Levin v Levin and Another* 1962 (3) SA 330 (W) 331D.

2022, she was able to maintain herself and her children. Unfortunately, Adv Segal SC's argument regarding payments that Mrs. G received into her bank account between 14 March 2022 and 15 June 2022 as reflected in the Nedbank statement attached to the founding affidavit does not take the matter any further. It is clear that the amount of R 17 303.00, which it was argued on behalf of Mr. S that it flies in the face of Mrs. G's assertion that she earns in the region of R 4 000.00, was actually paid into Mrs. G's account by *All Star* before its business was diverted to *So Yum*.

[44] I am satisfied that Mrs. G no longer receives the salary that she used to earn from *All Star*. Mrs. G received R 20 004. 77 on 29 March 2022, R 19 056. 21 on 26 April 2022, and R 17 498.30 on 25 May 2022 from All Star. There is no evidence of Mrs. G receiving R 17 303.00 from the beginning of July 2022. This is consistent with Adv Howard's submission that post June 2022, Mrs. G's income was around R 4 000.00.

[45] Adv Segal SC also submitted that the credit card application rejection letter received by Mrs. G on 17 July 2022, clearly illustrated that she earns sufficiently to financially maintain herself. This letter demonstrates that Discovery Bank verified Mrs. G's gross income as R 26 608.00 and her nett income as R 17 303.00. While it is not clear as to when the application was made, it is clear that the affordability assessment was made in line with Mrs. G's Nedbank account which indicated the salary she received from *All Star*, which she no longer receives because the company lost its clients and manager to *So Yum* and is no longer operating.

[46] During argument, Adv Howard submitted that Mr. S hijacked *All Star*, while Adv Segal SC maintained that Mr. S resigned from *All Star* due to intolerable working conditions. I am convinced that there is merit in Adv Howard's argument. It is clear to me that after the liquidation of Mr. S' close corporation, he convinced Mrs. G to open a company in her name that he could control. Mr. S controlled the finances of *All Star* and paid himself and Mrs. G monthly salaries. I am also convinced that Mr. S approached his father in the same manner he approached Mrs. G to open another company which he would manage and control. While Mr. M is neither a director or a shareholder in the company established by his father, the reality is that he is the person running that company as he did with *All Star*.

[47] I am convinced that Mr. S influenced customers of *All Star* to trade with *So Yum* and informed them that *All Star* merely changed its name to *So Yum*. This is clearly demonstrated by his general attitude that these customers were not originally customers of *All Star* but customers of his liquidated close corporation. In other words, Mr. S felt entitled *All Star's* customers which he diverted to *So Yum* and in the process collapsing *All Star* while compromising Mrs. G's income.

[48] The fact that Mrs. G was not actively involved in *All Star* is totally immaterial. Unfortunately, while evidence relating to who directly controlled the finances of *All Star* was provided, no such evidence was provided regarding *So Yum*. It is however, clear that Mr. S has total control over *So Yum* and his father is merely a person who incorporated the company without real involvement in the company. His father was influenced to establish a company that provides

services on which Mr. S has expertise. There is no evidence that suggests that Mr. S' father has always been involved in the catering industry. Most importantly, in his replying affidavit, Mr. S stated that '*... my father established So Yum with the intention of assisting me to maintain myself and support our children*'.¹⁹ While Mr. S is neither a director nor a shareholder of *So Yum*, he is in full control of this company and its finances as he was with *All Star*. I am thus, of the view that Mr. S is in the position to provide financial information relating to *So Yum*.

- [49] Adv Segal SC submitted that in addition to the nett salary of R 17 303.00, Mrs. G also has access to an amount of R 600 000.00 which is available on the bond facility registered over the parties' matrimonial home in favour of Absa Bank. In response, Adv Howard argued that Mrs. G is not entitled to dissipate the bond account. However, Adv Segal maintained that the property is registered in Mrs. G's name and that she can access the bond facility for the purposes of covering her legal fees. Further that what is not permitted is for her to act fraudulently. I agree with Adv Segal's submission. It is trite that access bond is a type of home loan that allows bank customers who took home loans and paid extra money into their bonds' accounts to have access to such surplus payments by withdrawing money when they need it. If indeed, Mrs. G has access to this money, that may disqualify her at the very least from receiving contribution to her legal costs from Mr. S.

¹⁹ Paragraph 22.2 of the Respondent's Replying Affidavit. These sentiments are repeated in paragraph 10 of the Heads of Arguments submitted in support of the Respondent's case, where it is stated that '*... the Respondent's father established So Yum Catering (Pty) Ltd ("So Yum") to create an employment opportunity for the Respondent*'.

[50] Adv Segal SC also argued that Mrs. G inflated her monthly expenses and that Mr. S is not in a financial position to provide her with the interim maintenance that she seeks. Adv Howard maintained that the disclosures made by Mrs. G are a true reflection of her expenses and income. While Mrs. G claims to earn around R 4 000.00, in her FDF she indicated that her nett income from her graphics design business in the last financial year was R 73 702.52 (around R 6 141.87 per month) which seems to contradict the 'around' R 4 000.00 assertion. Similarly, Mr S claims to earn R 31 462.00. However, he received R 33 802.83 on 29 August 2022, R 31 529.00 on 23 September 2022 and R 34 208.00 on 28 October 2022. This is a clear demonstration that his salary fluctuates. He stated in his supplementary replying affidavit, that his current income '*... is only slightly less than ...*' his earnings from *All Star*.²⁰

[51] It is not entirely clear who was responsible for the payment of which particular expense within the parties' households. While both parties earned salaries from *All Star* and Mrs. G also earned a salary from her graphics design business, most of their household's expenses were covered by *All Star*. They however, occasionally covered certain expenses from their respective bank accounts.

[52] Time was spent, both in the parties' respective affidavits and during oral arguments, to demonstrate how the other party wasted money through certain habits such as going to expensive restaurants, purchasing clothes, purchasing expensive items for children's birthday and going on holiday. This did not really assist the court, on the one hand to determine whether Mrs. G is in need of interim maintenance and contribution to legal costs. On the other hand, to

²⁰ Paragraph 32.3 of the Respondent's Supplementary Affidavit.

determine whether Mr. S has the financial means to pay the interim maintenance and to contribute towards Mrs. G's legal costs.

[53] To adequately determine the need for maintenance and ability to pay, respective assets and incomes of both parties must be assessed. Mrs. G's Nedbank account statement from 14 April 2022 to 15 September and Absa bank statement from 1 March to 31 September 2022 were disclosed to this court. It is clear from all these statements that while large amounts flew into these accounts before 30 June 2022, there were no substantial amounts that Mrs. G received from 1 July 2022 when *All Star* was no longer receiving payments from its clients. This includes the salary she used to receive from *All Star*. There are no statements placed before this court from October 2022 to the date the matter was heard. It was argued on behalf of Mr. S that Mrs. G received substantial amounts in her bank account and that she can maintain herself. It is clear however, that she received money when *All Star* was still operating. It was not argued on behalf of Mr. S, and correctly so, that Mrs. G continued to receive a salary in addition to her income from her graphics design business from 1 July 2022. It is not in dispute that Mrs. G's income substantially reduced when her income from *All Star* was stopped.

[54] Mr. S' Absa bank statements from 1 May 2022 to 31 October 2022 were disclosed to this court. It is clear from these statements that Mr. M earns about R 4 000 less from *So Yum* than he did under *All Star*. From *All Star*, Mr. S received R 37 381.89 on 25 May 2022, and R 37 346.33 on 27 June 2022. From *So Yum*, he received R 31 462.50 on 28 July 2022, R 33 802.83 on 29

August 2022, R 31 529.00 on 23 September 2022 and R 34 208.00 on 28 October 2022.

[55] It is also clear that Mr. S receives additional income from month to month. On 03 August 2022, 14 September 2022 and 04 October 2022, he received R 47 009.93, R 30 000.00 and R 20 000.00 respectively into his Absa Bank Account. It is not clear whether Mr. S received any additional amounts from November 2022 to the date of the hearing, and if so, the value of the amounts received. There are no bank statements placed before this court to assess what he may have received during this period.

D APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[56] In family matters generally, and divorce related litigation in particular, courts are often asked to encroach in personal private matters of litigants before them to resolve their disputes in a fair, just and equitable manner. To effectively do so, courts depend largely on the honesty and good faith of the parties and their willingness to provide the court with full and accurate information that can be assessed to reach just outcomes. Unfortunately, given the emotive nature of divorce disputes, where at times parties also use their children as effective weapons, courts are often not provided with full information that can assist them to reach just outcomes. Applications for interim maintenance and contribution towards legal costs of financially weaker spouses are no different.

i) Claim for interim Children/Spousal maintenance

[57] It is trite that the financially weaker spouse is entitled to claim and receive interim maintenance from the financially stronger spouse. An order of interim maintenance is dependent on the parties' marital standard of living, the financially weaker spouse's actual and reasonable requirements, and the financially stronger spouse's capacity to meet such requirements pending the finalisation of the divorce proceedings.²¹ In *Taute v Taute*, it was held that:

'[a] claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands - similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them'.²²

[58] In the High Court, interim maintenance must be considered in light of Rule 43 of the Uniform Rules of Court which was intended to provide temporary financial assistance to financially weaker spouses (majority of whom in practice are women). Such spouses are meant to receive this financial assistance until the court dissolve their marriages and where there are children, for interim care and residency claims to be adequately determined.²³ Van den Heever J in *Nilsson v Nilsson* cautioned that Rule 43 procedure:

²¹ 1974 (2) SA 675 (E) 676.

²² *Ibid.*

²³ *Nilsson v Nilsson* 1984 (2) SA 294 (C) 295

‘... was not created to give an interim meal-ticket to ... [financially weaker spouses] who quite clearly at the trial would not be able to establish a right to maintenance’.

[59] In *N v N*, this court held that:

*‘The fact that the law allows reasonable expenses, insinuates that a respondent in a rule 43 application may not be ordered to contribute to the upkeep of a former spouse more than what such a respondent can afford’.*²⁴

[60] Mr. S contended that Mrs. G expenditure was excessive. This is evidenced by the entries contained in Mrs. G’s bank statement of between March and June 2022. There is merit to this contention. Indeed, these entries clearly demonstrates excessive expenditure on among others, coffee over a period of three months amounting to R 4 540.00. This however, does not disentitle Mrs. G of interim maintenance as of 1 July 2022. This is the period her source of stable income from *All Star* was stopped when Mr. S diverted *All Star*’s clients to *So Yum*. This is the crux of the issue. Was Mrs. G, after her salary of R 17 303.00 was stopped due to Mr. S’ deliberate conduct of transferring *All Star* business to *So Yum*, able to financially maintain herself with a monthly income of around R 4 000.00 to R 6 000.00? The issue is not whether Mrs. G should maintain the lifestyle she led before 30 June 2022, but whether she is able to maintain herself and the children pending the finalisation of the divorce proceedings?

²⁴ (60169/2018) [2019] ZAGPPHC 999 (18 December 2019) para 17.

[61] Mrs. G claims interim maintenance in the amount of R 6 500.00 for herself and R 7 200.00 for each of the parties' children. This is in addition to Mr. S paying bond instalments, levies, electricity and charges from the City of Johannesburg in the amount of R 15 000.00. It is worth noting that Mr. S has tendered to continue to make bond payments towards the matrimonial property. This means that the total amount that Mrs. G claims from Mr. S is R 20 900 per month. To assess whether this amount is reasonable and Mr. S can afford to pay it, both parties are required to make a full disclosure of their assets, liabilities and incomes.

[62] This court in *TS v TS*,²⁵ held that:

'The court requires full financial disclosure because the nature of the structuring of the respondent's finances is such that a court would be failing in its obligations to make a proper determination under rule 43 (as read with the Children's Act insofar as the outstanding issues of maintenance impact on the children) if it was not put in a position to consider them'.

[63] Murphy J in *Du Preez v Du Preez*,²⁶ observed that:

'... there is a tendency for parties in rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to correct the relevant information. ... To my mind the practice is distasteful, unacceptable, and should

²⁵ (28917/2016) [2018] ZAGPJHC 29 (2 March 2018) para 17

²⁶ 2009 (6) SA 28 (T) para 15.

be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings'.

[64] Mr. S claims that his salary is R 31 462.00. From the Absa Bank statements provided, it is clear that his salary fluctuates, and he receives it on different dates in a month. For instance, he was paid R 31 529.00 on 23 September 2022 and R 34 208.00 on 28 October 2022 by *So Yum* which was established for him by his father. It is clear that Mr. M has complete control over this company as he did with *All Star* and that he pays himself as and when it is convenient for him to do so.

[65] Mr. S refused to provide *So Yum's* financial documentation, which Mrs. G is of the view that they would have provided clarity on the extent of his income. This refusal was on the basis that, legally speaking, he does not own *So Yum* and thus, does not have authority to provide such information. In that, he is merely an employee of the company that is owned by his father. This might be a factual legal position, but I am convinced that this arrangement is a sham. Not only does Mr. S completely manage and control the operations of *So Yum* as he did with *All Star*, he is also in full control of its finances as it was the case with *All Star*.

[66] Mr. S contends that Mrs. G provided four contradictory versions regarding her income and that she did not make a full disclosure. There is no merit to this argument. The totality of the evidence before me clearly demonstrates that Mrs. G did not have the same income from 1 June 2022

as she did before that date. On the contrary, I am convinced that failure to provide the financial documentation relating to *So Yum* can be interpreted as Mr. S' failure to fully disclose his income to this court.

[67] Mrs. G was criticised for alleged failure to disclose that she has extensive assets registered in her name and a positive net asset value whilst Mr. S has the sum total of two retirement policies and a negative net asset value. While Mrs. G's founding affidavit did not disclose this, she clearly indicated in her FDF that the matrimonial property is registered in her name. It is also worth noting that Mrs. G's total amount of interim maintenance that she is claiming is significantly lower than what she stated as her monthly expenditure for both her and her children. She claims R 20 900 per month and stated her monthly expenditure to be R 102 297.00. While I agree with Adv Segal SC that the expenditure is inflated, the spousal and child maintenance appear to be reasonable under the circumstances. Mr. G states that he currently earns R 31 462.00. This means that in his own version, he can clearly afford to pay interim maintenance. Mrs. G earns significantly less than Mr. S which makes her a financially weaker spouse between the two of them. She earns around R 6 000.00 depending on how her business performs.

ii) Contribution towards costs

[68] It is imperative that Mrs. G is placed in a position to present her case adequately and not to be prejudiced by lack of financial resources. She should be able to sustain the divorce litigation in such a way that she can

achieve a fair and just outcome. To succeed with her application for Mr. M to contribute towards her legal costs, Mrs. G must demonstrate that she has insufficient financial means of her own to pay her legal fees and that the amount she claims is reasonably necessary to enable her to pursue her defence.²⁷ Contribution to legal costs must be awarded where that would ensure equality of arms between herself and Mr. S in their divorce litigation.²⁸ Most importantly, the scale upon which she is entitled to litigate must be proportional to the current financial means of the parties.²⁹

[69] It is trite that the quantum for the contribution to costs which the financially weaker spouse can be granted lies within the discretion of the presiding judge. Ogilvie Thompson J in *Van Rippen v Van Rippen*,³⁰ held that

'[i]n the exercise of that discretion the Court should ... have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the Court'.

[70] The claim for contribution towards the legal costs of the financially weaker spouse in divorce disputes emanate from the duty of support that parties owe to each other.³¹ This duty rests on the shoulders of the financially stronger spouse and arises by virtue of the parties' marriage.³²

²⁷ *M v M* (12816/21) [2021] ZAGPJHC 642 (30 August 2021) para 34.

²⁸ *Cary v Cary* 1999 (3) SA 615 (C) at 621 D-G.

²⁹ *Glazer v Glazer* 1959 (3) SA 928 (W) at 933.

³⁰ 1949 (4) SA 634 (C) 639

³¹ See among others *Boezaart & Potgieter v Wenke* 1931 TPD 70 at 83 and *Barass v Barass* 1979 (1) SA 245 (R) at 247

³² See *Lyons v Lyons* 1923 TPD 345 at 346, where Mason JP held that '[t]he cases in which an indigent wife, married out of community --- and this is a case where the marriage is out of community --- has

[71] In a marriage in community of property, both parties are equal owners in undivided shares of all the patrimonial benefits of their marriage and should ideally have equal access to the financial resources that constitute their joint estate for the purposes of paying for their respective divorce litigation costs. In practice, usually only one spouse has access to the keys that unlock the financial assets of the joint estate, which often triggers the spouse that does not have equitable access to such resources to approach the court during divorce proceedings to force the other spouse to contribute towards their legal costs. In truth, this is not an application for the financially stronger spouse to contribute to the legal costs of the financially weaker spouse, but an application to provide the financially weaker spouse equitable access to the financial resources contained in the parties' joint estate for the purposes of adequately pursuing their case.

[72] In marriages out of community of property with the application of the accrual system, as is the case in this matter, both parties retain their individual estates which would be combined when their marriage is dissolved and divided into half for the spouse whose estate shown a smaller accrual to benefit. During divorce proceedings, the spouse whose estate shows smaller growth may not have the same financial resources to properly place their case before the court. Hence, the financially stronger spouse would be expected to reasonably contribute towards the costs of the financially weaker

been held entitled to a contribution from the husband for costs are quite numerous. On what basis are those contributions ordered? It seems to me the only logical basis is that such contributions should be regarded as one of the necessities accompanying married life, just as the supply of alimony. It is so called in Scotch law and in many English cases. It is quite clear an indigent husband is entitled to support from his wife for the necessities of life, and it seems to me practically impossible to draw any distinction between the two in respect of a contribution for costs'.

spouse. The same is true for marriages out of community of property and profit and loss.³³

[73] There is no doubt that there is a reciprocal duty of support between Mr. S and Mrs. G. This means that if the court finds that Mrs. G needs financial assistance to adequately conduct her divorce litigation and that Mr. S is in a financial position to provide such assistance, it must order Mr. S to contribute towards Mrs. G's legal costs. Mrs. G requires an amount of R 143 000.00 as contribution towards her legal costs. Having regard to the parties lifestyles and expenditures as provided in their respective FDFs, it was surprising that counsel on both sides spent some time arguing about the breakdown of this amount. This amount can hardly be regarded as excessive in the High Court litigation that involves a firm of attorneys and counsel.³⁴ It is also worth noting that Mr. S also procured the services of a Senior Counsel in this matter.

[74] From the evidence placed before this court, Mrs. G earns around R 4 000.00 and R 6 000.00 a month and Mr. M earns R 31 462.00. Ordinarily, Mr. S should be ordered to contribute towards Mrs. G's costs. However, there is no evidence provided to the court that indicates that Mr. S can afford to contribute the amount sought by Mrs. G. Moreover, the parties' matrimonial

³³ See *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) 638, where it was held that '[t]he claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origin in the Roman-Dutch procedure, and has been sanctioned through many decades in our practice. It is true that the Court may in these applications for contribution more liberally assess the requirements of a wife married in community of property out of community of property; it is also true that in regard to the question of the merits of her case, the position of a defendant is somewhat less meticulously scrutinised than that where she is the plaintiff. But in my view the application for a contribution towards costs essentially remains what its name indicates; it is the making available of funds to the applicant for the purpose of enabling her adequately to place her case before the Court'.

³⁴ See *BS v GS* (23867/2019) [2022] ZAGPPHC 280 (21 April 2022) para 45.3 and *LM v TVM* (1492/2021) [2022] ZAGPJHC 500 (1 August 2022) 35.4, where this court ordered financially stronger spouses in those cases to contribute R234 279.70 and R 400 000.00 respectively.

property is registered in Mrs. G's name. Most importantly, Adv Howard during argument conceded that Mrs. G has access to R 600 000.00 bond facility. Even though she argued that this amount cannot be dissipated, Adv. Segal SC correctly argued that Mrs. G as the sole owner of the property can access this money. I am convinced that Mrs. G has access to money that can allow her to equitably pursue her case in the divorce litigation. There is no need to order Mr. S to contribute towards her legal costs.

i) Children

- [75] The parties agree that the Family Advocate's office should investigate what would be in the best interests of the minor children born of their marriage. Initially, Mrs. G appeared not to agree that the children should remain in the matrimonial property and for both parties to move out and only come to reside with their children on alternate days. This is what the parties referred to as a nesting format that was suggested when they participated in mediation. However, it appeared during argument that Mrs. G had reconciled herself with the nesting format and was not entirely opposed to it. The nesting format was identified by Adv Howard as common cause issue. In terms of the nesting format, the party who is not supposed to be with the children on specified days will be required to vacate the matrimonial home to allow the parent who is supposed to be with the children on those days to do so without any interference.
- [76] It seems to me that if Mr. S is ordered to pay spousal and child maintenance, then Mrs. G must contribute proportionally and in

accordance with her means towards the interim maintenance of the minor children.

[77] During argument, much was made regarding the respective contributions of the parties towards items such as groceries, cleaning products and services of a domestic worker. On the one hand, Adv Howard argued that Mr. S must shoulder 80% of these expenses with Mrs. G paying 20% thereof. On the other hand, Adv Segal SC submitted that the parties should equitably share the burden of these expenses by contributing 50% each. It is not entirely clear to me how these percentages are quantified in a practical sense. It seems to me that the parties should be proportionally responsible for these expenses in accordance with their respective means. From the financial disclosures made, it does not seem as if either party can afford the services of a domestic worker.

E CONCLUSION

[78] In conclusion, given the temporary nature of Rule 43 proceedings, I am convinced that Mrs. G has been placed in a situation that she and the parties' children are deprived of their necessary maintenance which warrants the intervention of this court by way of Rule 43 remedy. However, I am of the view that a case for contribution towards legal costs has not been made.

[79] Mrs. G claims a total of R 20 900 per month for both herself and the two children, and Mr. M states that he currently earns R 31 462.00, which the evidence placed before this court demonstrates that it fluctuates from month to month. I am satisfied that the applicant made a case for a need of interim

maintenance of R 20 900, which is substantially less than her and the children's stated month expenditure. The question, however, is whether Mr S can afford to pay the requested maintenance amount?

[80] In answering this question, it is worth mentioning that I do not have an impression that Mr. M seeks to evade his maintenance obligations, particularly towards his children. He has tendered to continue paying instalments regarding the bond registered over the matrimonial home. He has also tendered to retain the two children in his medical aid. To also contribute towards their private school fees, medical, pharmaceutical and surgical expenses not in his medical aid and also to pay reasonable charges for water and electricity in the matrimonial home. Can Mr. S cover all these expenses through his flatulating monthly income?

[81] On the strength of the evidence before this court, it appears that Mr. S cannot afford to pay interim maintenance. After the payment of the bond instalment as well as charges from the City of Johannesburg which are estimated at R 15 000.00, Mr. S will be left with an amount of around R 16 462.00. How will this amount among others, cover the children's private education fees if Mr. S does not have additional income?

[82] It cannot be ignored that Mr S received additional R 47009. 93, R 20 000.00 and R 30 000.00 in August, September, and October 2022 respectively. This suggests that it is possible that in November and December 2022, similar additional amounts may have been received. I am convinced that on the

strength of the additional income that he receives, Mr. S can afford to pay interim maintenance.

[83] I am convinced that Mrs. G and the children should receive interim maintenance from Mr. S. Based on the evidence before the court, it appears that apart from his monthly salary, Mr. S receives additional income that places him in a position to pay interim maintenance. However, given the fact that the additional amount also appears to be fluctuating from month to month, it may not be fair to expect Mr. S to pay the requested R 20 900. Particularly when he is also expected to make monthly bond instalments and also cover the charges from the City of Johannesburg on the property, which are collectively estimated at R 15 000.00.

[84] Given the extra costs that Mr. S is willing to cover such as children's private school fees; medical, as well as pharmaceutical and surgical expenses not in his medical aid, it may be reasonable to expect him to contribute at least R 15 000.00 interim maintenance for both the children and Mrs. G.³⁵ The divorce court will be able to determine the extent to which he should pay child and spousal maintenance post the divorce litigation, should such maintenance be sought.

[85] With regards to contribution to costs, I agree with Adv Segal SC that Mrs. G can deep into the available access bond facility over the matrimonial property

³⁵ My approach was influenced by the approach adopted by this court in *V S v A S* (12496/2019) [2020] ZAGPJHC 27 (11 February 2020).

that is registered in her name. She can surely use part of this money to pay for her own legal fees.

[86] In the circumstances, I make the following order:

[86.1] Leave is granted for the filing of the applicant's supplementary affidavit and respondent's supplementary replying affidavit.

[86.2] The respondent shall maintain the applicant and the parties' minor children *pendente lite* by paying a monthly cash amount of R 15 000.00. The first payment to be made within 10 days following the granting of this order. Subsequent payments to be made on or before the first day of the month until the date this court grants a divorce decree. These payments should be made directly into the applicant's chosen bank account.

[86.3] The respondent is not ordered to contribute towards the applicant's legal costs.

[86.4] The respondent is ordered to continue making monthly bond instalment payments on the parties' matrimonial property, including electricity and charges from the City of Johannesburg.

[86.5] The dispute relating to the two minor children born of the parties' marriage must be referred to the Office of the Family Advocate to investigate what would be in their best interests regarding their

care, residency and contact with their parents.

[86.6] Pending the outcome of the investigation by the Family Advocate's office and the implementation of its recommendation when this court makes the divorce order, both parties to continue exercising their full parental responsibilities and rights as provided by Section 18(2) of the Children's Act 38 of 2005, subject to the following:

[86.6.1] The parties shall implement a shared residence arrangement at the matrimonial home in a cycle of two weeks. In week 1, one party will reside with the children in the matrimonial home from Monday to Tuesday, with the other party residing with them from Wednesday to Thursday. The party that spent Monday and Tuesday with the children to spend Friday, Saturday and Sunday with them.

[86.6.2] In Week 2, the party who spends Monday and Tuesday with the children in Week 1 shall spend Wednesday and Thursday with them in Week 2. The party who spends Monday and Tuesday with them in Week 2 shall also spend Friday, Saturday and Sunday with them in Week 2.

[86.6.3] Each of the parties shall be entitled to contact with the minor children for half of all Jewish holidays and the minor children's birthday.

[86.6.4] The Applicant shall be entitled to contact with the minor Children on Mother's Day and her birthday. The Respondent shall also be entitled to contact with the minor children on Father's Day and his birthday.

[86.6.5] Each of parties shall be entitled to contact the minor children on alternate public holidays and for half of all long and half of all short school holidays. The party who is not entitled to have contact with the children as set out herein, is required to vacate the matrimonial home to afford the other parent uninterrupted contact with the children.

[86.7] The respondent is ordered to pay for the two children's school fees and their reasonable medical, dental, optical, orthodontic, therapeutic, hospital, surgical and prescribed pharmaceutical expenses not covered by his medical aid.

[86.8] The parties are ordered to contribute proportionally in accordance with their stated monthly income, which is around R 32 000.00 for the respondent and around R 6 000.00 for the respondent towards the following expenses:

[86.8.1] The minor children's education and related expenses,

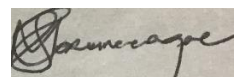
excluding school fees, but including, *inter alia*, school clothing, books, equipment, stationery, school tours, extra lessons where necessary and remedial lessons if required;

[86.8.2] All extra mural and related expenses in respect of the minor children which include but are not limited to, the costs of extra mural activities and the clothing and equipment required therefor;

[86.8.3] The minor children's reasonable clothing expenses;

[86.8.4] Homeowners and householders insurance premiums as well as wifi;

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

A handwritten signature in black ink, appearing to read 'C Marumoagae', on a light-colored rectangular background.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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. The date of the judgment is deemed to be 10:00 on 10 February 2023.

Counsel for the plaintiff: Adv K Howard

Instructed by: Karen Shafer Attorneys

Attorney for the defendant: Adv L Segal SC

Instructed by: Deanne Kahn Attorneys

Date of the hearing: 18 January 2022

Date of judgment: 10 February 2022