



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable / ~~Not Reportable~~

Case no: 2026-216476

In the matter between:

J[...] M[...]

Applicant

and

W[...] M[...] M[...]

First Respondent

F A HANEKOM ATTORNEYS

Second Respondent

KOBUS CRONJE INCORPORATED

Third Respondent

Coram: Honourable Justice HM Slingers

Heard: 11 September 2026

Delivered: 16 September 2026

Summary: Rule 43 proceedings premature - No divorce action instituted - High Court as upper guardian has inherent jurisdiction to protect minor children and to give effect to section 28(2) of the Constitution - Requirements for anti-dissipation order set out

ORDER

- (i) the first respondent's point *in limine* is upheld;
- (ii) the Rule 43 application is dismissed;
- (iii) the first respondent is ordered to maintain the minor children by:
 - (a) paying an amount of R16 500 within five (5) days of the granting of this order which amount it to be utilised towards payment of a deposit to securing the minor children suitable accommodation;
 - (b) paying an amount of R16 500 per month in respect of rental for suitable accommodation for the minor children, with the first payment commencing on 1 October 2026 and thereafter on or before the first of every month thereafter;
 - (c) payment of R15 000 as maintenance for the minor children with the first payment commencing on 1 October 2026 and thereafter on or before the first of every month thereafter; and
 - (d) continuing to maintain the minor children on his medical aid scheme and continuing to pay the reasonable and necessary monthly school fees;
- (iv) all payments to be made in respect of the minor children's maintenance will be made to the applicant's attorneys of record, alternatively to an account designated by the applicant;
- (v) the application for an anti-dissipation interdict is dismissed; and
- (vi) there is no order in respect of costs.

JUDGMENT

Introduction

- [1] The parties married on 17 January 2015, out of community of property with the inclusion of the accrual system. Three minor children aged 11 years, 8 years and 7 years old were born to the parties during their marriage.

- [2] The parties have been separated for approximately four (4) months and on 1 September 2026, the first respondent moved out of the common home.
- [3] On 6 September 2026 the applicant instituted an application to be heard on 11 September 2026 wherein she sought an order in the following terms:
- (i) that the applicant's non-compliance with the forms and service provided for in Rule 6 of the Uniform Rules of Court be condoned, insofar and where this may be necessary, and that the matter be heard as one of urgency in terms of Rule 6 (12) thereof;
 - (ii) that the first respondent contributes to the maintenance of the applicant and the parties' minor children *pendente lite* by:
 - (a) paying an amount of R40 000-00 per month, directly to the applicant on or before the first day of every month into an account nominated by the applicant, without deduction or set-off as from 1 October 2026;
 - (b) paying an amount of R25 000-00 per month in respect of rental or the rental amount to be secured, directly to the applicant's landlord, including any payment in respect of a deposit that may be necessary;
 - (iii) that the respondent be directed to continuing to maintaining the applicant and the minor children on his current medical aid scheme and GAP cover, or a scheme with similar benefits, and paying all necessary medical, dental, surgical, orthodontic and ophthalmological treatment required by the applicant and the minor children and not covered by first respondent's medical aid fund, including costs of medication and the provision where necessary of spectacles and/or contact lenses;
 - (iv) that the respondent be directed to continuing to pay the costs of the minor children's reasonable and necessary monthly school fees, including any reasonable expenses in respect of school uniforms, schoolbooks, school stationary, sport and other extramural activities and sport equipment or other items required for sport and other extramural activities by the minor children;
 - (v) that the respondent be directed to continuing to pay the vehicle instalment and insurance premiums of the applicant's vehicle;

- (vi) *pendente lite* care and contact arrangements pertaining to the minor children; and
- (vii) that the respondent be directed to contribute an amount of R100 000 towards the applicant's legal costs.

[4] Furthermore, the applicant sought an interim interdict, pending the determination of the divorce action to be instituted, that the nett proceeds generated by the sale of the parties' family home be retained by the second respondent, alternatively the third respondent and that no distribution thereof be made pending the finalisation of the divorce action, unless otherwise agreed to in writing by the parties.¹

[5] It is common cause that the substantial relief sought in paragraph 1 is sought in terms of Rule 43. Rule 43 (1) provides that:

'This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- (a) *Maintenance pendente lite;*
- (b) *A contribution towards the costs of a matrimonial action, pending or about to be instituted;*
- (c) *Interim care of any child;*
- (d) *Interim contact with any child.'*

[6] It is common cause that at the time of hearing the application, no divorce summons had been issued. Although the applicant had conveyed her intention to institute divorce proceedings as early as 29 July 2026 threatened to bring the current application as early as 6 August 2026, she has furnished no explanation nor reasons why, to date, she has not instituted divorce proceedings.

Rule 43

[7] In opposing the application, the first respondent took a point *in limine* that the relief sought in terms of Rule 43 was incompetent and contended that the maintenance and care and contact relief sought were available in respect of pending matrimonial actions. It was only relief pertaining to a contribution

¹ As the parties were ad idem in respect of the proposed care and contact arrangements, there was no need for the court to decide in respect thereof.

towards costs that could be granted in respect of pending matrimonial actions or **matrimonial actions about to be instituted**. (own emphasis)

- [8] In *A.C v H.C*² the court comprehensively addressed the question whether Rule 43 found application where summons had not yet been issued. It discussed the amendment to Rule 43(1)(b) by GN 42064 dated 30 November 2018 which inserted the words '*pending or about to be instituted*.'
- [9] It found that if it was the intention of the Rules Board to amend Rule 43 to such an extent that it would be applicable to claims for interim maintenance, interim care and interim contact in pending matrimonial actions and actions about to be instituted, it would not have limited the insertion to Rule 43(1)(b) only. This reasoning cannot be faulted and is consistent with the principles of statutory interpretation.
- [10] The court went on to hold that the amendment to Rule 43(1)(b) was consistent with the Constitutional Court's judgment of *S v S* which held that:
*'Applicants 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. Black women in South Africa historically have been doubly oppressed by both their race and gender. 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. This is particularly apparent in applications for maintenance where systemic failures to enforce maintenance orders have negatively impacted the rule of law. It is women who are primarily left to nurture their children and shoulder the related financial burden. To alleviate this burden our courts must ensure that the existing legal framework, to protect the most vulnerable groups in society, operates effectively.'*³
- [11] The court furthermore had regard to *Moolman v Moolman*⁴ which discussed the meaning of to be attributed to *pending* and held that:
'From the above authorities, it is clear to me that an action can only pend, once at least summons has been issued. Prior to the issuing of summons there can be no talk of pending action. The intention of the parties, prior to

² (2024/148225) [2025] ZAGPJHC 741 (28 July 2025)

³ See also *SH v MH* 2023 (6) (SA) 279 (GJ)

⁴ (36397/2007) [2007] ZAGPHG 273 (15 November 2007)

the issuing of summons is irrelevant. The authority relied upon by the applicants counsel for the submission that there was a pending action as the parties were not living together, cannot be sustained. Pending matrimonial action cannot include a proposed matrimonial action.

- [12] In *Mahlangu and Another v Van Eeden and Another*⁵ the court held that the concept of pending proceedings entailed proceedings which had commenced by way of service of summons. It held that:
- ‘Moreover, I have little doubt that when the old authorities spoke of pending proceedings, they had in mind proceedings which had commenced by way of service of summons. This is borne out by the analysis of the old authorities in the Mills case supra.’*
- [13] In *L.S v G.A.S*⁶ the court held that contemplated litigation must mean litigation about to be launched and that pending must mean contemplation of the parties, evidenced by some concrete explanation. Consequently, the court found that the *in limine* objection that the Rule 43 application was prematurely instituted as no summons had at that stage been instituted was well taken.
- [14] In *D v D*⁷ the court explained that Rule 43 proceedings could be abused by litigants who do not hold a *bona fide* intention to instituted divorce proceedings and who (ab)use the mechanism of Rule 43 proceedings to obtain indefinite interim relief without proceeding with divorce actions.
- [15] Similarly, in *R.O v M. O*⁸ the court held that there was an inherent danger of a litigant obtaining interim relief who then fails to take any steps to advance the matter to its logical conclusion. Rule 43 provides an inexpensive and speedy mechanism for a spouse seeking interim relief in respect of the listed matters therein. The prerequisite of an issued summons limits the potential for its abuse.
- [16] I agree that Rule 43 proceedings are open to abuse and that the requirement of an issued summons serves to limit the potential for such abuse. Consequently, the point *in limine* must be upheld.

⁵ (LCC 53/99) [2000] ZALCC 17 (2 June 2000)

⁶(2558/2016) [2016] ZAWCHC 154 (26 August 2016)

⁷ (23031/2017) [2017] ZAGPPHC 293 (29 June 2017)

⁸ (5834/2017) [2017] ZALMPPHG 38 (14 November 2017)

The best interests of the children

- [17] Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.
- [18] In *R.O v M.O* the court held that although no divorce action was proven to be pending, one of the claims involved the minor children and recognised that their rights were guaranteed under section 28(2) of the Constitution.
- [19] In *L.S v G.A S* the court acknowledged that a High Court, as the upper guardian of minor children, remains clothed with inherent jurisdiction to protect the interests of children.
- [20] In *T.H v L.A.H*⁹ the court upheld the point *in limine* that the Rule 43 application was premature as no divorce action was pending. It went on to consider whether it could, as the upper guardian of minor children, consider certain orders pertaining to the minor children. It declined to do so because the respondent had not placed his version before court by way of an affidavit.
- [21] It is common cause that the first respondent sold the family home and that the applicant together with the minor children are obliged to vacate it by the end of September. It appears from the papers filed on record that the applicant has minimal and limited financial resources.
- [22] Therefore, the papers before me establishes that the three (3) minor children may be homeless by 1 October 2026 and with minimal to little maintenance to provide for their immediate wellbeing.
- [23] Unlike *T.H v L.A.H*, the first respondent has delivered an answering affidavit and placed his version before court. The first respondent makes no tender in respect of maintaining his three minor children. He states that his financial situation is dire and that he is besieged with debt and legal claims. Given the nature of these proceedings the court accepts what is stated in the first respondent's affidavit that his financial situation is dire.
- [24] However, it appears from the first respondent's affidavit that he secured R100 000 in trust to fund litigation costs pertaining to the imminent divorce action. Furthermore, he has listed the following monthly expenses:
- (i) rental in the amount of R16 500;
 - (ii) groceries and cleaning supplies in the amount of R6000;
 - (iii) groceries and snacks for the children in the amount of R3000;

⁹ (10554/20) [2020] ZAGPPHC 109 (6 February 2020)

- (iv) electricity in the amount of R1000;
- (v) personal loan in the amount of R2365;
- (vi) credit card instalment in the amount of R4500;
- (vii) laundry in the amount of R200;
- (viii) fibre/WIFI in the amount of R939;
- (ix) medication in the amount of R500;
- (x) clothing in the amount of R1000;
- (xi) haircuts in the amount of R150;
- (xii) children entertainment in the amount of R2000;
- (xiii) personal entertainment in the amount of R1000; and
- (xiv) linen towels etc in the amount of R500.

- [25] The monthly amount allocated to fibre / WIFI in the amount of R939 is accounted for twice as the first respondent states that this expenditure is paid for by Felix Retail, which also pays his medical aid in the amount of R6 192.
- [26] It is unclear from his answering papers why the first respondent would require a monthly amount of R500 in respect of medication as he lists no medical issues or requirement for chronic medication.
- [27] The first respondent states that he is presently residing in temporary accommodation in Durbanville that is suitable for sleep-over contact with the three (3) minor children. It can therefore be assumed that the amount of R16 500 is a reasonable amount necessary to obtain accommodation in Durbanville for the three minor children. I see no reason why the first respondent should be able to allocate funds to repay debts and to secure funds in trust for pending litigation when his minor children are facing homelessness.
- [28] Consequently, as the upper guardian of the minor children and in discharge of the constitutional obligation set out in section 28(2) of the Constitution, it is ordered that the first respondent pay the applicant an amount of R16 500 within 5 days of this judgement as a deposit to secure accommodation. Thereafter, the first respondent shall pay the applicant a monthly amount of R16 500 commencing on 1 October 2026 in respect of a contribution to the rental of accommodation for the minor children.
- [29] The first respondent shall pay a monthly amount of R15 000 towards the maintenance of the three minor children, commencing on 1 October 2026.

The best interests of the minor children are paramount and take precedence over expenses such as personal debt repayments, credit card payments, personal entertainment expenses and personal clothing expenses.

- [30] Furthermore, the first respondent shall continue to maintain the minor children on his medical aid scheme and shall continue to pay the reasonable and necessary monthly school fees.
- [31] The orders made in respect of the minor children's maintenance I deem necessary for their immediate well-being, health and education, and are by no means exhaustive of their needs nor reflective of the full extent of maintenance required by them. The maintenance orders made in respect of the minor may be revisited at such time and by such forum when the full extent and long term duration of their maintenance requirements are fully ventilated and determined.

The anti-dissipation relief

- [32] The first respondent was the sole registered owner of the family home situated at 1[...] D[...] T[...] Road, S[...], Durbanville (**“the property”**) which he sold on 22 July 2026.
- [33] In addition to relief in terms of Rule 43, the applicant seeks an interim interdict in the form of anti-dissipation order to secure the nett proceeds generated by the sale of the property.
- [34] In order to succeed with her application for an anti-dissipation interdict, the applicant must establish:
- (i) a *prima facie* right, even if it is open to some doubt;
 - (ii) an injury actually committed or reasonably apprehended;
 - (iii) that the balance of convenience favours the granting of the interdict;
 - (iv) the absence of a suitable alternative remedy; and
 - (v) that the applicant has a claim against the first respondent who is intentionally dissipating assets or is likely to do so with the intention of defeating the applicant's claim.
- [35] In *KSL v AL*¹⁰ the court held that having regard to the purpose of the type of interdict applied for, the applicant must show a particular state of mind on the part of the respondent, namely that he is getting rid of funds or that he is likely

¹⁰ 2024 (6) SA 410 (SCA)

to do so with the intention of defeating the claims of creditors. This flows from the effect of the interdict which is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim.¹¹

[36] As the applicant and the first respondent are married out of community with the application of the accrual system, the applicant has no vested right to the first respondent's assets, nor can she dictate how he deals with his property. The applicant has a contingent right to share in the value of the accrual which is only determined at the dissolution of the marriage and her contingent right becomes a vested right only when the contingency materialises.¹²

[37] The applicant avers that the first respondent intends to utilise the proceeds from the sale of the house to settle his business liabilities, thereby intentionally depleting her accrual claim. She does not claim that the liabilities are not due or inflated or that the first respondent is liable for them, she merely states that

*'If the First Respondent is permitted to utilise the funds as indicated to pay off debts which may not be real and prior to the parties being in a position to establish the true financial position of the First Respondent and his businesses, that I will suffer irreparable harm as. My accrual claim will be substantially less or none at all.'*¹³

[38] As set out in paragraph 35 above, the applicant has no vested claim at this stage.

[39] After considering the facts set out in the applicant's founding affidavit against the requirements for the anti-dissipation interdict, I am not convinced that the applicant has made out a case for the relief she seeks, more specifically she has not established the necessary intention on the part of the first respondent to secure an anti-dissipation order.

Costs

¹¹ *KSL v AL*, like in the present matter, pertained to a matrimonial matter where the parties were married out of community of property with the application of the accrual system. The applicant refused to vacate the sold family home on the assertion that she enjoyed a quasi-proprietary or quasi-vindicatory right by virtue of her right to claim a share in the accrual of the respondent's estate which would be diminished by eviction,

¹² *J.M.M and Another v Cara Dorothy Masureik and Others* (807/2024) [2026] ZASCA 1; 2026 (4) SA 367 (SCA) (8 January 2026)

¹³ Paragraph 68 of the applicant's founding affidavit.

[40] This is not a case where costs should follow the result. Although the applicant was unsuccessful in her Rule 43 and anti-dissipation applications, the first respondent's approach to his minor children's wellbeing and maintenance requirements, as set out in the papers, persuaded me that he should not be awarded costs.

Conclusion

[41] In the circumstances, I make the following orders:

- (i) the first respondent's point *in limine* is upheld;
- (ii) the Rule 43 application is dismissed;
- (iii) the first respondent is ordered to maintain the minor children by:
 - (a) paying an amount of R16 500 within five (5) days of the granting of this order which amount it to be utilised towards payment of a deposit to securing the minor children suitable accommodation;
 - (b) paying an amount of R16 500 per month in respect of rental for suitable accommodation for the minor children, with the first payment commencing on 1 October 2026 and thereafter on or before the first of every month thereafter;
 - (c) payment of R15 000 as maintenance for the minor children with the first payment commencing on 1 October 2026 and thereafter on or before the first of every month thereafter; and
 - (d) continuing to maintain the minor children on his medical aid scheme and continuing to pay the reasonable and necessary monthly school fees;
- (iv) all payments to be made in respect of the minor children's maintenance will be made to the applicant's attorneys of record, alternatively to an account designated by the applicant;
- (v) the application for an anti-dissipation interdict is dismissed; and
- (vi) there is no order in respect of costs.

Appearances

For applicant: Adv. MA McChesney
Instructed by: D Visser, Potgieter & Associates

For respondent: Adv. M Muller
Instructed by: FA Hanekom Attorneys