

SOUTH AFRICA / JUDGMENT

J.K v E.S.K (15912/2023) [2023] ZAWCHC 317; [2024] 1 All SA 775 (WCC) (29 November 2023) [2023] ZAWCHC 317

COURT

Western Cape High Court, Cape Town

BEFORE

Pillay

CASE / FILE NUMBER

15912/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 15912/2023

In

the matter between:

J[...]

K[...]

Applicant

and

E[...]

S[...] K[...]

Respondent

Heard:

13 November 2023

Delivered:

29

November 2023

(Electronically)

JUDGMENT

PILLAY, AJ

INTRODUCTION

1. This is an application in terms of Rule 43. The applicant is the defendant and the respondent is the plaintiff in a pending divorce action.
2. The parties were married to each other on 1 December 2012, out of community of property and with the inclusion of the accrual system. There are two minor children born of the marriage, one aged six years

and the other aged three years. The parties no longer live together. The children reside half of the time with the applicant and the other half of the time with the respondent.

3. Issues in respect of contact, alcohol testing and the appointment of a Parenting Co-ordinator have, to a large extent, been agreed between the parties.
4. The respondent is an attorney and businessman. He is the managing director of a firm of attorneys, a director of ### South Africa and a business owner of various ### franchises. He is also the husband of the applicant and father and co-guardian of the two minor children born of the marriage.
5. Until 6 April 2023, the applicant and the respondent lived together in their common home. The applicant still resides there. The applicant is and has been a full-time mother to their two little

daughters. The respondent accepts that the applicant was unemployed but denies that she was a full-time mother “in the full sense of the word”, seemingly on the basis that the applicant had the assistance of a live-in domestic worker who took on the bulk of the child rearing responsibilities together with various nannies who provided additional assistance.

6. The parties decided that the applicant was to become a full-time mom after the birth of their first born. This was some six years ago. The applicant has, since then, been financially dependent on the respondent.
7. The applicant holds a BSc (Human Life Sciences) degree, with an honours degree in Genetics. She worked previously as a specialist medical representative.
8. The applicant seeks maintenance pendente lite in respect of the following:
 - 8.1. Spousal maintenance in the amount of R 37 500.00 per month.
 - 8.2. Maintenance in the amount of R 15 000.00 per child per month towards the parties’ two minor children.

8.3. A claim for an initial contribution towards costs in the amount of R 1 309 390.00.

THE

LEGAL FRAMEWORK

9. In determining this application, I am bound by the following well- established legal principles:

9.1. Orders for maintenance that are issued pursuant to Rule 43 are intended to be interim and temporary and cannot be determined with the degree of precision and closer exactitude which is afforded by detailed evidence.[1]

9.2. The purpose of Rule 43 is to provide a speedy and inexpensive remedy, primarily for the benefit of women and children.[2] It allows for interim arrangements to be imposed on the parties in matrimonial disputes, and pendente lite until the Divorce Court can make a properly informed decision and after hearing viva voce evidence.[3]

9.3. The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent on the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified. [4]

9.4. 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 one who is obviously, albeit on paper, seeking to evade them. [5]

9.5. One of the fundamental principles for an award of maintenance is an ability to pay on the part of the spouse from whom maintenance is claimed.[6]

9.6. Rules of Court (including Rule 43) are concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law.[7] The court's power to make pendente lite orders for maintenance, contribution to costs, and access to and custody of children, is a power which vests in it by virtue of substantive law.[8]

10. These principles have been recognised and regularly affirmed in our current constitutional dispensation. The Constitutional Court has, however, pronounced on the context in which Rule 43 applications fall to be determined. It has held in this regard that:

10.1. 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. [9]

10.2. 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.[10]

11. This application does not concern the enforcement of Orders for maintenance but is rather concerned with whether maintenance should be ordered and if so, the quantum thereof. So too, the parties to this application have agreed to shared custody. This notwithstanding, the following principles as set out by the Constitutional Court in *Bannatyne v Bannatyne* (Commission for Gender Equality as Amicus Curiae) 2003

(2) SA 363 (CC) (2003 (2) BCLR 111; [2002] ZACC 31)[11] are nevertheless, in my view, instructive in the adjudication of applications under Rule 43:

11.1. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements.[12]

11.2. It is a function of the State not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system. [13]

11.3. Compounding these logistical difficulties is the gendered nature of the maintenance system. On the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.[14]

11.4. These disparities undermine the achievement of gender equality which is a founding value of the Constitution. The enforcement of maintenance payments therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.[15]

11.5. The appropriate relief required by section 38 of the Constitution is relief that is effective in protecting threatened or infringed rights. Where legislative remedies specifically designed to vindicate children's rights as efficiently and cost-effectively as possible fail to achieve that purpose, they do not provide effective relief.[16]

12. It follows, in my view, that when determining this matter I must be guided by the well established principles governing Rule 43 applications. I must however, also be guided by: (a) the gendered realities in claims for maintenance while divorce proceedings are pending; and (b) the vital constitutional principle of the best interests of the child as required by section 28(2) of the Constitution. These factors do not allow for an easy departure from an otherwise reasonable claim for maintenance founded on the well-established principles governing Rule 43 applications.

FACTORS RELEVANT TO AN ORDER FOR INTERIM MAINTENANCE

Prior standard of living

13. By all accounts, it is clear that the parties and their family had a comfortable standard of living through the duration of their marriage. As is to be expected in these circumstances, there are some variances between the parties as to the extent of the luxuries that they had access to. Be that as it may, the following are, in my view, relevant to the claims before me.

Payments for living expenses

14. According to the applicant:

14.1. The respondent paid her a “salary” of R 38 205.78 from the account of his law firm, as well as additional amounts which are listed as “sorting” on her bank statements.

14.2. In January 2023, the respondent started asking the applicant to reconcile her cheque and credit card accounts, to itemise her expenditure and to provide proof of expenditure. He also required her to submit a weekly budget and as of January 2023, the respondent stopped paying her a “salary” and instead paid her the exact amount submitted in her “budget”. Despite attempts by the applicant to discuss this change in approach with the

respondent, he did not make any effort to do so.

14.3. It is clear from the applicant’s bank statements that her credit limit was consistently R 54 350.00 until the week of 6 April 2023, when the respondent left the marital home. Since then, the applicant’s credit limit on her account was reduced to R 20 000 and recently further reduced to R 10 000.

14.4. Since the respondent’s departure from the marital home on 6 April 2023, he has only made the following payments:

14.4.1. 1 May 2023 – R 17 000.

14.4.2. 1 June 2023 – R 20,000.

14.4.3. 1 July 2023 – R 20,000.

14.4.4. 1 August 2023 – R 10,000.

14.4.5. 10 August 2023 – R 16,000 (the amount was allegedly paid into the credit card so as to allow the respondent to reduce the credit limit on the card to R 10,000 per month).

14.4.6. 1 September 2023 – R 10,000.

15. According to the respondent:

15.1. He accepts that he has reduced the cash maintenance payable to the applicant from R 20 000.00 per month (as agreed between them in January 2023) to R 10 000.00 per month from August 2023 “due

to the applicant’s conduct in defaming me on social media and attempting to ‘financially ruin’ me.” The respondent explains in this regard that since “careless and unnecessary spending by the applicant was also a problem we experienced in our marriage over the previous five years”, he asked the applicant in January 2023 to stop overspending and that they should implement a budget to assist with that.

15.2. During 2022 the applicant’s limit on her credit card was about

R 54 000.00 which the applicant viewed as a target rather than a limit.

15.3. He accepts that he previously paid the applicant an amount of R38 205.78 per month from his business. He explains that the applicant almost always spent more than this and the sorting amounts were the amounts that he had to pay to settle her overspending on the credit card sometimes up to R 16 000.00 per month in excess of her salary.

15.4. Towards the end of 2022, when the parties had various conversations,

they decided that the applicant would start looking for employment in the new year and that her monthly spending limit would be reduced to R 20 000.00 with all additional expenses to be funded from her own income. The respondent explains that he thought that this may incentivise the applicant to look for employment. As to how the amount of R 20 000.00 came about, the respondent explains that the applicant budgeted that this was the amount that she would require for her reasonable needs. He further explains that because the applicant kept incurring expenses on the credit card, he kept having to pay additional funds.

Holidays, eating out and other luxuries

16. According to the applicant, they could afford international vacations at least every two years, local vacations during each school holiday and in addition, they would go away for weekends at luxury resorts. They would dine at expensive restaurants at least once a week, the applicant would regularly treat herself to treatments at spas, and they had four weeks per annum of timeshare at Fancourt Luxury Hotel and Golf Resort in George.

17. According to the respondent, he and the applicant went to the Maldives in 2022 for their 10 year anniversary. The children have never been abroad. He explains that the family did go away for school holidays to local destinations but did not have to pay for accommodation on these holidays. The respondent accepts that they went away on luxury weekends but avers that these were only for special occasions which justified the expense. He accepts that they went to expensive restaurants but denies that this was as frequent as the applicant alleges. According to the respondent, it was with some encouragement from his father that he bought himself a Porsche SUV motor vehicle five years ago.

The applicant's current financial position

18. Since having become a full-time mum some six years ago, the applicant has been financially dependent on the respondent.
19. The applicant accepts that she is able to earn an income in the future and has agreed to see an industrial psychologist. She does however point out that she was last employed in February 2017 and that employment is difficult to obtain in the current economic climate.
20. The applicant believes that it would be in the best interests of the children (given the recent disruption to their lives) that she continue to be available to them on a full-time basis until they have adjusted to their parents living separate lives.
21. I am also mindful of the fact that the applicant is currently being treated for anxiety and depression.
22. The applicant's assets are, by all accounts, negligible. She has a motor vehicle that is listed as an asset to the value of R 120 000.00. Her liabilities, include credit card debt, loans from her parents, unpaid legal fees and costs orders against her, totalling approximately R 1 million.

The respondent's current financial position

23. The respondent is an active director of 18 companies, including the firm of attorneys and a number of H[...]’s franchises. His assets total in excess of R 14 million whereas his liabilities total about R10 million. The applicant explains that she does not know what the respondent's monthly income is but makes the point that his alleged gross salary of approximately R 100 000.00 does not tally with the position taken by his legal representatives that he has contributed between R 170 000.00 and R 180 000.00 per month to the household.
24. The respondent does not dispute that he can afford the maintenance claimed by the applicant. For this reason, he alleges that the details of his financial circumstances are not relevant. However, he takes issue with two aspects: (a) the applicant's entitlement to such maintenance in light of her conduct to date; and
- (b) the reasonableness of the maintenance claimed.

The parties' respective positions in respect of maintenance

25. The applicant explains:

25.1. In the respondent's Particulars of Claim, he tendered rehabilitative maintenance to the applicant in the amount of R 25 000.00 per month for a period of 24 months. This notwithstanding, in a Special Plea to the applicant's Counter Claim, the respondent seeks the dismissal of her claim for spousal maintenance.

25.2. In a letter dated 12 July 2023, the respondent has tendered to pay an amount of R 10 000.00 per month in respect of the maintenance of his children and he has indicated that his intention is to no longer pay the applicant any spousal maintenance based on the doctrine of "unclean hands".

26. As to the respondent's position:

26.1. As stated, he does not dispute that he can afford the maintenance claimed by the applicant but he does dispute the accuracy of her maintenance schedule which, he argues, is not a true reflection of the applicant's actual and reasonable needs.

26.2. He disputes the reasonableness of the cash maintenance claimed by the applicant, especially in light of the fact that this amount of R 67 500.00 per month is being claimed in addition to all of the expenses that he already pays on behalf of the applicant and the minor children.

26.3. He currently pays approximately R 148,000 per month towards the applicant and the minor children which includes, inter alia, the bond, rates and taxes as well as utilities in respect of the former matrimonial home, the alarm, short-term insurance, DStv,

Internet in respect of the former matrimonial home, the salaries of the gardener, domestic worker and childminder at the former

matrimonial home, medical aid, school fees for the minor children as well as extramural activities, together with a range of other

expenses.

26.4. He explains that the aforementioned expenses do not include the expenses that he incurs on behalf the children in his own household such as rental, food, clothes, entertainment, additional medical expenses and the medication when they are in his care or the salary of the childminder and the au pair employed to assist him with the children at his home.

27. The applicant further explains that the respondent has failed and/or refused to pay the money into her Capitec account despite being requested to do so and that he insists on making payments into an Absa account so as to enable him to have access to her bank account, to control and monitor her transactions.

The applicant's maintenance needs

28. As to the applicant's maintenance needs, she has prepared a schedule which reflects a total monthly expenditure as being in the amount of R 67 326.32 made up as follows:

28.1. R 37 483. 16 is the total monthly expenditure in respect of the applicant herself.

28.2. R 14 921.58 is the total monthly expenditure in respect of each of the two minor children, thereby resulting in a total of R 29 843.00.

29. The respondent takes issue with various aspects of the applicant's alleged expenses, which I address at a later stage in this judgment.

30. The applicant continues to occupy the marital home with the minor children when they are in her care.

THE RESPONDENT'S FIRST GROUND OF OPPOSITION TO THE APPLICATION: UNCLEAN HANDS

31. In opposition to the applicant's claim for maintenance pendente lite and a contribution to her legal costs and, in the alternative, the extent thereof, the respondent has raised two main arguments:

31.1. First, that in circumstances where he is reliant on his name, fame, reputation and avocation as an attorney and business owner to earn an income and remain financially capable of maintaining the applicant and the children, the applicant's conduct in publishing defamatory content about him on social media and in seeking to ruin him and injure his name, fame, reputation and avocation as an attorney and business owner is so tainted with turpitude that her claim for spousal maintenance constitutes an abuse of process and her "unclean hands" warrants the exercise of the Court's power to non-suit her in her claim in reconvention for spousal maintenance in the divorce action as well as in her claim for maintenance and a contribution towards costs in these proceedings.

31.2. Second and in the alternative, that the court is empowered in terms of section 7 (2) of the Divorce Act 70 of 1979 ("the Divorce Act") to consider various factors when determining whether to award spousal maintenance – and the extent of such maintenance – upon divorce, including the conduct of the spouses during the marriage. According to the respondent, even if the Court finds that the applicant's unclean hands does not warrant the exercise of the Court's power to non-suit her in

her Claim in Reconvention for spousal maintenance, it is a factor that should have a detrimental impact on the extent of any such

maintenance awarded to the applicant upon divorce and in this application. (In the course of argument, it was made clear that the respondent considered the applicant's conduct to be a relevant consideration in whether maintenance pendente lite should be ordered and if so, the quantum thereof but did not found this argument on section 7(2) of the Divorce Act.)

.32.1. First, that on or about 25 June 2023 the applicant posted a video interview of the celebrity, Ms Sharon Osbourne opening up to an interviewer about what it was like to be married to rockstar Mr Ozzy Osbourne (Mr Osbourne) over the years. In the interview, Ms Osbourne describes Mr Osbourne as struggling with an alcohol and drug addiction problem, going to rehabilitation, making promises never to drink again, and being drunk on the same afternoon as his discharge from the rehabilitation centre. Ms Osbourne further describes Mr Osbourne as

an angry person and a confessed sex addict, saying that she accepted her life and stayed with him because of her love for him and their children's sake. Ms Osbourne also declared how broken she was after learning that Mr Osbourne had been unfaithful to her and that she had to get treatment for her head because she could not cope with anything. On the same post on her Facebook page, the applicant replied to her own post unprovoked. The response had a screenshot of the respondent's face as the number one

Winelands business

owner in South Africa. It is alleged that the applicant's posting said, alternatively implied that the Osbourne's tumultuous marriage and Mr Osbourne's horrible conduct can be attributed to the respondent. According to the respondent, in having acted as aforesaid, the applicant was implying or suggesting to the public that the reason for her unhinged behaviour is that she is in a position akin to Ms Osbourne (broken and under psychiatric treatment) as a result of the respondent's conduct and abuse. The respondent alleges that in having so acted, the applicant intends to ruin his reputation. According to the applicant, she posted this video and many other motivational posts because they motivate and inspire her and not, as the respondent asserts, as an oblique reference to him. She also denies that there was anything defamatory about the posting.

32.2. Second, the applicant's intention to ruin the respondent financially was conveyed to Ms Geldenhuys during a telephone call on or about 14 April 2023. The applicant denies this allegation and avers that she is in no position to financially ruin the respondent,

that she has not done so and that she has no intention of doing so. On the contrary, according to the applicant, it is the respondent who had told an acquaintance of his that if he divorced the applicant, he would take the children and leave her with nothing.

32.3. Third, the applicant posted on her public Facebook page, a post addressed to ### South Africa, which was an embarrassing video of the respondent which she had recorded in March 2020. The video showed the respondent as inebriated in the privacy of his own home, walking around the room looking for his missing cell phone. According to the respondent, the publication of this video harmed his

reputation, caused him severe embarrassment and infringed his dignity. The applicant attached a message to the aforementioned video

in her Facebook post to ### South Africa stating as follows: “### South Africa, your number one business owner that is making millions for you can’t even pay his children’s medical expenses” or words to that effect. The applicant deleted this post from her public Facebook account shortly after it had been posted. However, the respondent alleges that one of his business partners saw the post and brought it to his attention (and conveyed it to another business partner), thereby causing him great emotional trauma and embarrassment. According to the applicant, the respondent himself, in one of the interdict applications accepted that the video was taken down shortly after it had been posted and that only one person saw the video.

33. As to the impact and consequences of the above-mentioned conduct, the respondent alleges that:

33.1. The applicant’s wrongful and harmful conduct is directly affecting his business in that the Facebook postings had been discussed in the course of work engagements.

33.2. He brought an urgent application to interdict the applicant from defaming him on social media pending an action for defamation to be instituted. That application was successful and an order was granted on 7 July 2023 (“the defamation interdict”), in circumstances where the applicant did not oppose the application.

33.3. If the applicant’s conduct had continued, it could have had devastating financial consequences for him and his business particularly in light of the cancel culture trend.

33.4. The applicant’s conduct in defaming him on social media and in

injuring his name, fame and reputation, dignity and avocation as an attorney and business owner led him to invoke the doctrine of unclean hands in respect of her claim for spousal maintenance in the divorce action.

34. The applicant asserts that the respondent has suffered no harm as a result of the aforementioned incidents and maintains that she has not defamed him. She further asserts that if the respondent contends otherwise, his recourse is to have this issue ventilated in the action proceedings that he had instituted against her. It should not, according to the applicant, prevent her from approaching this Court for maintenance pendente lite.

THERE IS NO MERIT TO THE RESPONDENT’S RELIANCE ON THE DOCTRINE OF “UNCLEAN HANDS”

35. In my view, the respondent’s reliance on the doctrine of unclean hands as a basis on which to immunise him from paying maintenance or as a basis on which to reduce the extent of maintenance that he is liable for must fail for reasons set out hereunder.

There is no authority that the doctrine of unclean hands as applied in the present context finds application in Rule 43 proceedings

36. Neither of the parties were able to refer the Court to any authority where offensive / defamatory conduct by one party against the other party in Rule 43 proceedings could have the effect of depriving a party of maintenance entirely or of reducing a maintenance claim.

The doctrine of unclean hands finds no application on the evidence

37. The doctrine of unclean hands concerns the honesty of a party's conduct. It holds that where a party seeks to advance a claim that was obtained dishonestly or mala fide, that party should be precluded from persisting and enforcing such a claim.[17]
38. It is well established that it is not enough to disentitle a party to relief as a result of an illegality: such illegality must have taken the form of fraud or, at the very least, dishonesty. [18]
39. In *Mostert v Nash* 2018 (5) SA 409 (SCA) ([2018] ZASCA 62) at par 25 the SCA applied, as a point of departure, the right of access to courts which is a right of cardinal importance for the adjudication of justiciable disputes. In light of this right, the SCA held that while courts are entitled to prevent any abuse of process, it is a power that should be sparingly exercised. It held that where the procedures of the court are being used to achieve purposes for which they are not intended, that will amount to an abuse of process.
40. This reasoning was more recently reiterated in *Maughan and Another v Zuma* 2023 (5) SA 467 (KZP) where the Court held:

"[95] Our courts have also found an abuse of process to exist where a litigant comes to court with 'unclean hands', and have dismissed a litigant's claim. Such power is sparingly exercised, as it prevents a

litigant from having their day in court, which right is constitutionally entrenched in s 34 of the Constitution. The Constitutional Court has endorsed the approach of dismissing a claim on the grounds of abuse 'because the litigant who would bring it is disqualified from doing so by reason of their abuse'."

41. It is clear from the above principles that, properly construed, the respondent's complaint does not fall within the doctrine of unclean hands. According to the answering affidavit, the doctrine of unclean hands "is a legal principle in common law which dictates that a party seeking relief from a court cannot have acted unethically or unjustly in relation to the matter at hand." The respondent goes on to state: "The party must come to court with clean hands in order to receive a favourable outcome." This does not accord with the legal principles referred to above.
42. In any event, on the allegations that the respondent relies on, it is clear that there is no basis for reliance on the doctrine of unclean hands.

The applicant's conduct ought not to bear on the exercise of the Court's discretion in a maintenance claim under Rule 43

43. I am bound to exercise my discretion judiciously in the determination of this matter. I have no hesitation in stating that the applicant's conduct as described is unfortunate. This notwithstanding, I am not satisfied that conduct of this nature ought to have any bearing on a maintenance claim pursuant to Rule 43 for at least the following reasons:

43.1. First, there can be little doubt that proceedings pursuant to Rule 43 provide an indispensable mechanism to ensure that substantial prejudice to one party in pending divorce proceedings is avoided. It offers a particular lifeline to women given the gendered nature of the maintenance system. While, in this instance, the care arrangements for the minor children are shared equally between the

parties, I cannot lose sight of the fact that the applicant has, for many years, sacrificed her career in order to stay home with the minor children. In so doing, she has been financially dependent on the respondent and, as matters stand, is in no position to be financially self-sufficient. In addition to being financially dependent on the respondent, the applicant also suffers from depression and anxiety in respect of which she is presently receiving treatment. It is clear, on my reading of the evidence, that the applicant is in no position to meet her own expenses.

43.2. Second, Rule 43 also provides an indispensable mechanism in order to ensure that children can be properly cared for by providing for their reasonable maintenance needs and, in so doing, by ensuring that their best interests remain paramount. In my view, the best interests of the child would undoubtedly be compromised if their maintenance needs were only secure only while they were in the care of their father. In this matter, the children are to share their time in equal parts between both their parents. It follows, in my view, that their reasonable maintenance needs ought to be provided for while they are in the care of their mother. I am also mindful of the fact that, given the recent disruption in their children's lives, it would be in their best interests for the applicant to continue to be available to them on a full-time basis until they have adjusted to their parents living separate lives.

43.3. Third, maintenance relief under Rule 43 arises from the parties' duty of support. Rule 43 proceedings provide an important mechanism for giving effect to parties' reciprocal duty of support. One of the invariable consequences of marriage is the reciprocal duty of support.[19] In *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] ZACC 8; 2000

(3) SA 936 (CC) at par 52 O'Regan J notes:

"The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The 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...."

43.4. The respondent's argument will undoubtedly make severe inroads

into the reciprocal duty of support pending the divorce proceedings.

43.5. Fourth, Rule 43 applications do not accord with normal motion proceedings in that the rule does not make provision for a replying affidavit. While Rule 43(5) gives the court a discretion to hear such evidence as it considers necessary, this does not alter the fact that generally Rule 43 applications are determined on the basis of two sets of affidavits. In these circumstances, I am of the

view that the interests of fairness call for caution in following the respondent's suggested approach.

43.6. Fifth, the impact of the respondent's arguments on this score cannot be under-estimated. Ultimately, it will result in complex questions (underpinned by serious disputes of fact) and implicating a range of constitutional rights (such as the right to freedom of expression) being determined on an urgent basis in the context of proceedings that exist for a very specific purpose. For this reason too, I do not accept that it is in the interests of justice to do so.

43.7. Sixth, while Rule 43 proceedings are, by their nature, intended to be robust and interim in nature, they cannot be used to determine the merits of a defamation claim pre-emptively as well as the consequences thereof. There are separate proceedings that may be pursued (and in respect of which there is pending litigation) to determine the merits of those claims.

THE RESPONDENT'S SECOND GROUND OF OPPOSITION TO THE APPLICATION: UNREASONABLE EXPENSES

44. According to the respondent, in assessing the applicant's claim for interim maintenance, the Court should:

44.1. Censure the applicant's "distasteful, unacceptable"

exaggeration and misstatement of her expenses and inclusion of "extraordinary or luxurious expenditure".

44.2. Express its displeasure at the applicant's refusal to obtain employment, despite being highly qualified and capable of doing so, and in considering that the children are only with the applicant 50% of the time.

45. The respondent argues that the applicant's schedule of expenses does not constitute a true reflection of the applicant's actual and reasonable needs in that she has misstated her financial affairs and exaggerated her expenses.

46. The legal principle in respect of exaggerated expenses and misstatements of the true nature of financial affairs are well established. In *Du Preez v Du Preez* 2009 (6) SA 28 (T) the Court held:

"[15] ... 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. Counsel habitually, acting no doubt on instruction, unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in rule 43 applications. To my mind the practice is distasteful, unacceptable, and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. Parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury and, in certain circumstances, may be the crime of defeating the course of justice. Should such conduct occur in rule 43 proceedings at the instance of the applicant, then relief should be denied.”

47. The difficulty with the respondent’s reliance on “misstated expenses”, “exaggerated expenses” and “extraordinary or luxurious expenditure” is that no factual or other basis is provided for the statements made, save for two instances where the respondent contends that he is paying for those costs (the delivery of firewood and the applicants gym membership). For the rest, the respondent contents himself with bald statements that certain costs are “inconceivable”, “unreasonable”, “not reasonable”, fictitious and/or “extravagant”. In these circumstances (and particularly in light of the applicant’s historical spend), it is not possible for the Court to make a determination as to whether these expenses have in fact been misstated and/or are exaggerated.
48. In the circumstances, I am of the view that the respondent has not made out a case to seriously suggest that the expenses claimed by the applicant are unreasonable so as to bring it within the purview of the Court’s censure in Du Preez.

THE ASSESSMENT OF REASONABLE MAINTENANCE FOR THE APPLICANT AND THE MINOR CHILDREN

49. Having had due regard to the maintenance claimed by the applicant, the marital standard of living of the parties, the applicant’s actual and reasonable requirements and the capacity of her husband to meet the maintenance claimed, as well as the further considerations referred to above, I am of the view that:

49.1. The respondent ought to pay the applicant an amount of R35 000.00

(Thirty Five Thousand Rand) per month in respect of spousal maintenance.

49.2. The respondent ought to pay the applicant an amount of R 15 000.00

(Fifteen Thousand Rand) per child per month towards the maintenance of the minor children.

CONTRIBUTION TO LEGAL COSTS

50. The respondent argues that because a contribution to costs in matrimonial litigation flows from the duty of support between the spouses, the applicant’s “unclean hands” have disqualified her from such entitlement.

51. It is further contended that the applicant's estimated costs are exorbitant and provide for future steps in litigation that may never be required, "especially considering that there is an exception in the respondent's Special Plea, which must be determined first and which may delay the further progress of litigation, and the fact that there have not been any attempts at settlement discussions or mediation to date."

52. While the question of the quantum of a contribution towards costs, lies in my discretion, I am guided by the following well-established principles:

52.1. The circumstances of the case, the financial position of the parties, the particular issues involved in the pending litigation and enabling the party to present her case adequately before the Court. [20]

52.2. The scale on which the respondent is litigating.[21]

52.3. When assessing a spouse's reasonable litigation needs, a court will have regard to what is involved in the case, the scale on which the parties are litigating, or intend to litigate, and the parties' respective means.[22]

52.4. The legal rules pertaining to the reciprocal duty of support between spouses are gender-neutral, so that an indigent husband may claim support from an affluent wife. But the reality must be acknowledged that, given traditional childcare roles and the wealth disparity between men and women, it has usually been women who have had to approach the courts for a contribution towards costs in divorce litigation.[23]

52.5. The applicant is entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against her husband.[24]

53. I am in full agreement with this Court's dictum in AF v MF 2019 (6) SA 422 (WCC), where the Court held:

"[49] In my view it is arbitrary to apply an inflexible rule that a wife who has no means of funding the balance of her legal costs is nonetheless only entitled to part of the costs which she reasonably requires to fund her litigation. It is like expecting a motor vehicle to get from point A to point B on three-quarters of a tank of petrol when the journey requires a full tank of petrol, or feeding a person 1600 calories per day when they really need 2000 calories per day to function optimally: in both cases the lack of vital resources retards or defeats the endeavour.

[50] To my mind logic and fairness dictate that if the wife is indigent and the husband has the wherewithal to fund his own, as well as all the wife's reasonable costs, he should be ordered to do so. Since legal costs are covered by the duty of spousal support, there can be no justification for a situation where the husband, who controls the purse strings, pays for all his legal costs upfront, while the wife without means is forced to borrow to fund the shortfall, or to ask her attorney to carry the case without full payment. As I have already mentioned, I consider this an unacceptable impairment of the right to dignity and equal protection of the law."

54. Turning then to the evidence in this matter, the following is of relevance:

54.1. There is no suggestion that the respondent cannot afford the contribution to costs in the amount sought.

54.2. The applicant has set out a basis for the estimated legal fees in respect of the divorce action in an amount of R 1.3 million, which does not include any of the legal expenses incurred in any of the prior urgent applications.

54.3. The applicant has also explained (notwithstanding the contrary view taken by the respondent) as to why it is necessary to appoint a forensic accountant and/or a forensic actuary.

54.4. According to the applicant, the contribution to legal costs that she

seeks to get her to the first day of a divorce trial cannot be regarded as unreasonable when compared to the extent and manner in which the respondent litigates. In this regard, the applicant notes that her claim is for a contribution of R1 .3 million whereas the two interdict applications alone have cost the respondent in the region of R 700 000.00 of which one was unopposed.

55. I do not accept, that in the exercise of my discretion, I ought to approach the question of the contribution to costs on the basis that there is a pending exception and/or “the matter may settle” particularly given that on the respondent’s own version, they have not been any attempts to settle the matter to date. I also do not accept that reliance may be placed on the doctrine of unclean hands for reasons given.

56. Having considered the evidence as against the guiding legal principles, I am of the view that the applicant’s claim for a contribution towards costs in an amount of R1 .3 million is reasonable in the circumstances.

CARE ARRANGEMENTS IN RESPECT OF THE MINOR CHILDREN

57. As stated, the parties have, to a large extent, settled the issues concerning contact, alcohol testing and the appointment of a Parenting Co-ordinator. On 22 November 2023 the parties sent the Court the terms of a draft Order that they had agreed to in that regard. On having considered the content thereof, I am satisfied that it accords with the best interests of the child principle.

58. The only remaining issue for me to determine on that score is that of the costs of the Parenting Co-ordinator. I am of the view that, in light of the parties’ respective financial circumstances, the maintenance pendente lite and all other relevant circumstances as set out in this judgment, the respondent ought to be responsible for 80% of the costs of the Parenting Co-ordinator and the applicant ought to be responsible for 20% of those costs.

ORDER

59. In the result, I make the following Order:

59.1. Pending the determination of the divorce action:

59.1.1. The respondent shall pay the applicant an amount of R35 000.00

(Thirty Five Thousand Rand) per month in respect of spousal maintenance.

59.1.2. The respondent shall pay the applicant an amount of R 15 000.00

(Fifteen Thousand Rand) per child per month towards the maintenance of the minor children.

59.1.3. The respondent shall continue to maintain the former marital home, including but not limited to payment of the monthly bond, municipal charges, DStv, Internet and security system.

59.1.4. The respondent shall continue to pay the monthly salaries of the applicant's nanny/ domestic worker and gardener.

59.1.5. The respondent shall continue to pay the cost of the applicant's cell phone subscription and top up data and airtime.

59.1.6. The respondent shall continue to maintain the children and the applicant as dependants on the respondent's Discovery medical aid plan (or any other plan with equivalent benefits) by payment of any and all premiums, excess or copayments in respect of such medical aid plan.

59.1.7. The respondent shall make payment of all the applicant and the minor children's reasonable medical expenses not covered by the respondent's medical aid plan, including but not limited to, medical, dental, surgical, pharmaceutical, hospital, orthodontic and ophthalmic (including spectacles and contact lenses) expenses, as well as any sums payable to a physiotherapist, psychiatrist, a psychological therapist, speech therapist and/or play therapist. The respondent shall pay for any such expenses directly to the supplier within five days of being presented with an invoice in respect thereof. Should the applicant be required to make payment of any of the aforesaid expenses, then the respondent shall reimburse the applicant for such expenses incurred within five days of being presented with an invoice in respect thereof.

59.1.8. The respondent shall pay for the minor children's school fees and all the additional expenses incurred in respect of their education, such expenses to include, and without limiting the generality of the foregoing, all additional tuition fees, the cost of extracurricular school and sporting activities (including camps, tours and outings), coaching and club membership fees and the cost of all extramural activities in which the minor children participate, as well as the cost of all books, stationary, school uniforms, equipment (including computer hardware and software) and attire relating to the minor children's education and the sporting and/or extramural activities engaged in by them. The respondent shall pay for such expenses directly to the supplier and/or school and/or club, as the case may be within five days of being presented with an invoice in respect thereof. Should the applicant be required to make payment of any of the aforesaid expenses, then the respondent shall reimburse the applicant for any such expenses incurred within five days of being presented with an invoice in respect thereof.

59.1.9. The respondent shall continue to maintain the applicant's

vehicle, which includes making payment of all licensing fees, repairs, annual services and insurance premiums.

59.2. The respondent shall effect payment to the applicant of an amount of

R65 000.00 (Sixty Five Thousand Rand) per month for the cash maintenance as provided for in paragraphs 59.1.1 and 59.1.2,

effective from 1 October 2023 without deduction or set-off on the first day of every month by way of electronic transfer or debit

order, into such bank account as the applicant may nominate from time to time.

59.3. The respondent shall pay an initial contribution towards the applicant's legal fees in an amount of R1 .3 million (One Million and Three Hundred Thousand Rands), such amount being payable within 21 days of an Order being granted.

59.4. Pending the determination of the divorce action:

59.4.1. The care, contact and residence in respect of the minor children born of the marriage, being A[...] M[...] K[...] and A[...] C[...] K[...] ("the children"), shall be shared equally between the parties as follows:

- (a) Until Wednesday, 13 December 2023, the contact will be shared on a 2:2:5:5 basis as provided for in the court order of Nuku J, dated 11 April 2023;
- (b) For the duration of the school holidays from Thursday, 14 December 2023 to Tuesday, 16 January 2024, the contact will be shared on a 7:7 basis, as recommended by Martin Yodaiken in his additional report dated 10 November 2023;
- (c) From Wednesday, 17 January 2024, the contact will be shared on a 2:2:3 basis as follows:

Monday Tuesday Wednesday Thursday Friday Saturday Sunday Week 1 Mother Mother Father Father Mother Mother Mother Week 2 Father Father Mother Mother Father Father Father
- (d) The children will be collected from school or daycare by the party in whose care they will be that night and returned to school by the same party on the morning on which the contact shall shift to the other party;
- (e) While the children are in the care of one parent, that parent shall ensure that they have contact with the other parent by way of a video call or a telephone call at least once a day, at a time to be pre-arranged between the parties;
- (f) Decisions effecting the children's everyday care and routine shall be made by the parent in whose care they are at the relevant time.

59.4.2. Before making any decision, which is likely to change significantly,

or to have an adverse impact on, the children's living conditions, education, health, personal relations with a parent or

family member or generally the children's wellbeing, the parties shall endeavour to reach an agreement on this decision in

writing in accordance with the provisions of section 31 of the Children's Act 38 of 2005. In the event that the parties are

unable to make a decision jointly, the dispute shall be referred to the parenting coordinator ("the PC"), who shall have the following powers and be authorised to:

- (a) mediate joint decisions in respect of the children;
- (b) make any recommendations in respect of any issue concerning the welfare or affecting the best interests of the children, which recommendations shall not be binding upon the parties unless they constitute directives made pursuant to paragraph (c) below;
- (c) make directives binding on the parties and the children until a court of competent jurisdiction order otherwise, limited to the following specific aspects:
 - (i) variation of the contact arrangements which do not substantially alter the basis of the time share allocation provided for in this order;
 - (ii) time, manner and frequency of telephonic and/or video contact that the children shall have with the one parent while in the care of the other;

59.4.3. The PC shall be Advocate Diane Davis SC.

59.4.4. To ensure the safety and well-being of the children:-

- (a) The PC is authorised and empowered to direct the parents to undergo alcohol breathalyser tests by means of their personal iSober breathalyser devices, referred to below, immediately before, immediately after and during the period when the children are in their care, and to provide immediate results to the PC, such tests to be imposed randomly and at the discretion of the PC;
- (b) Should either parent form the reasonable suspicion that the other parent is abusing alcohol while the children are in that parent's care, they are entitled to request that the PC direct the other parent to undergo breathalyser tests, and the PC, in her discretion, is empowered to direct either parent to undergo such breathalyser tests, as addressed above;
- (c) In the event that the results of the breathalyser test indicate alcohol consumption by either parent before and/or while the children are in the said parent's care, the PC is empowered to suspend such parent's contact with the children and/or direct that the children be temporarily removed from the care of such parent and placed in the care of the other parent, on such terms as the PC deems appropriate, including the imposition of further testing;

- (d) The PC is further authorised and empowered to direct either or both parents to undergo Ethyl glucuronide (EtG) urine tests, to be performed by the SA Mobile Drug Testing Unit, and to be provided with the test results as soon as same becomes available, should the need arise for additional testing. In the event that the results indicate alcohol consumption by either parent, the PC is empowered to impose a more rigorous alcohol testing regime in respect of that parent, for

as long as she deems necessary;

- (e) Both parents are directed to acquire iSober breathalyser devices and download the iSober app to their personal cell phones, the costs of such devices to be paid by the Respondent. (iSober breathalyser devices will enable the parents to perform remote breathalyser tests on themselves and the test data then becomes available in real-time

for sharing and analysis on the iSober App, which results will be accessible to the PC on the said app. The breathalyser tests are matched with photographic identity verification of the user, their GPS position, date and time of the test as well as the serial number of device used.)

59.4.5. When making directives, the PC shall be mindful of the children's best interests and the PC's directives shall always be subject to the oversight of a court of competent jurisdiction and only be binding on the parties for as long as a court of competent jurisdiction has not ordered otherwise.

59.4.6. The costs occasioned by the appointment of the PC shall be shared between the parties on the following basis: (a) the respondent shall be responsible for 80% of the costs of the PC; and

- (b) the applicant shall be responsible for 20% of the costs of the PC.

59.4.7. Without detracting from the above, the PC shall have the power to vary the arrangements regarding payment of her costs, if, in her opinion, either parent's conduct warrants such a change, or in the instance of a dispute arising between the parties and a directive being issued, direct payment of all or a portion of the costs occasioned by such dispute, against any one of the parents.

59.4.8. The PC shall render her account on a monthly basis.

59.5. The respondent shall pay the costs of this application.

PILLAY AJ

Acting Judge of the High Court

APPEARANCES For the Applicant Advocate J Bernstein Instructed by H T De Villiers Attorneys Inc. (ref: R Smit) For the Respondent Advocate B Pincus, SC Advocate A Thiart Instructed by Patton Williams Inc. (ref: N Williams)

[1] Taute v Taute 1974(2) 675 (EC) at 676B.

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- [2] S v S 2019
- (6) SA 1 (CC) ([2019] ZACC 22) at par 43.
- [3] JG v CG 2012
- (3) SA 103 (GSJ).
- [4] Taute v Taute 1974(2) 675 (EC) at 676D-E.
- [5] Taute v Taute 1974(2) 675 (EC) at 676H.
- [6] Buttner v Buttner 2006
- (3) SA 23 (SCA) ([2006] 1 All SA 429) at par 36. See too: Reynecke v Reynecke 1990
- (3) SA 927 (E) at 932J - 933F.
- [7] CT v MT and Others 2020
- (3) SA 409 (WCC) at par 19.
- [8] CT v MT and Others 2020
- (3) SA 409 (WCC) at par 20.
- [9] S v S 2019
- (6) SA 1 (CC) ([2019] ZACC 22) at par at par 3.
- [10] S v S 2019
- (6) SA 1 (CC) ([2019] ZACC 22) at par 3.
- [11] As well as S v S 2019
- (6) SA 1 (CC) ([2019] ZACC 22).
- [12] At par 27.
- [13] At par 28.
- [14] At par 29. See too: Volks NO v Robinson and Others (CCT12/04)
- [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 February 2005) at par 49 and 62 to 66.
- [15] At par 30.
- [16] At par 31.
- [17] Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH (CCT 237/21) [2022] ZACC 42; 2023 (4) BCLR 461 (CC) at FN1.
- [18] Cambridge Plan AG and Another v Moore and Others 1987 (4) SA 821 (D) at 842F – H citing Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd and Others 1976

(4) SA 218 (T) at 221H.

[19] Bwanya v The Master of the High Court 2022

(3) SA 250 (CC) at par 36.

[20] Van Rippen v Van Rippen 1949

(4) SA 634 (C) at p 639.

[21] Nicholson v Nicholson 1998

(1) SA 48 (W) at 50C – G.

[22] AF v MF 2019

(6) SA 422 (WCC) at par 29.

[23] AF v MF 2019 (6) SA 422 (WCC) at par 30.

[24] Cary v Cary 1999

(3) SA 615 (C) at 621D.

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