

SOUTH AFRICA / JUDGMENT

S.N v S.R (2023/036122) [2023] ZAGPJHC 1298 (14 November 2023) [2023] ZAGPJHC 1298

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

2023/036122

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

Case Number: 2023/036122

In the matter between: SN
Applicant
And
SR
Respondent

JUDGMENT

Nkutha-Nkontwana J:

Introduction

[1] The applicant and the respondent are married out of community of property with the accrual system as of 25 August 2007. Two minor children were born of the marriage, a 12-year-old boy and 8-year-old girl. The applicant moved out of the matrimonial home on 21 November 2021 and the minor children have been primarily residing with her. On 24 March 2022, the respondent filed for a divorce. In these proceedings, the applicant seeks an order in terms of Rule 43 of the Uniform Rules of Court.[1]

[2] The parties agree that the minor children should remain in the primary care of the applicant; and that the respondent will exercise

contact with the minor children as outlined in prayer 1 of the applicant's affidavit. They accordingly seek, inter alia, an order in those terms.

[3] What remains for determination are the following

issues:

[a] Maintenance pendente lite for the applicant and two minor children;

[b] Retrospective maintenance;

[c] The applicant's continued use of the motor vehicle in her possession; and

[d] A contribution towards the applicant's legal fees.

[4] The respondent is opposing the order sought by the applicant and, in limine, takes issue with the applicant's supplementary affidavit.

Discretion to allow further affidavits

[5] It is well accepted that Rule 43 proceedings are interim in nature pending the resolution of the main divorce action. The premise is expeditious intervention by the courts to alleviate the adverse realities faced by claimants, usually women, who find themselves impoverished when litigating against their spouses who have, historically, always had and still do have stronger financial positions in divorce proceedings.[2]

[6] The procedure is straightforward as the applicant seeking interim relief is required, in terms of Rule 43(2)(a), to do so on notice with a "sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor, ..." A respondent wishing to oppose the application is required by Rule 43(3)(a) to deliver "a sworn reply in the nature of a plea." The parties are expected to file concise affidavits and to avoid prolixity.[3]

[7] Instructively, Rule 43 does not provide for the filing of replying affidavits as of right. Moreover, the Court does not have a discretion to permit departure from the strict provisions of Rule 43(2) and (3) unless it decided to call for further evidence in terms of Rule 43(5).[4]

[8] In this case, that applicant, without leave of the court, filed a supplementary affidavit in response to the allegations in the

respondent's answering affidavit. This step is impugned by the respondent as irregular. In response, the applicant

contends that she is seeking the Court to exercise its discretion in terms of Rule 43(5) and grant her leave to file a supplementary affidavit.

[9] The parties accept that there is no provision to file further affidavits in terms of Rule 43. Whilst that is the case, in *E v E; R v R; M v M*,^[5] the full bench of this Court, which both parties referred to, observed that:

"In terms of Rule 43(5), the court does have a discretion to call for further evidence despite the limitations imposed by Rule 43(2) and (3). The problem with the present Rule 43(2) and (3) is that invariably, in most instances, the Respondent will raise issues that the Applicant is unable to respond to due to the restriction, unless the court allows the Applicant to utilise Rule 43(5). This process will result in conflicting practices as it has already happened in a number of cases and as highlighted by Spilg J in TS.

Applicant 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." (Emphasis added.)

[10] Even though the respondent impugns the filling of the supplementary affidavit, he has filed an answering supplementary affidavit. It is apparent that the averments in the affidavits and information provided are pertinent to the determination of issues in dispute. Thus, I am inclined to exercise my discretion in terms of Rule 43(5) to allow the filling of further affidavits.

Maintenance pendente lite

[11] The test applicable is trite and accepted by the parties. The applicant is only entitled to reasonable maintenance pendente lite. In deciding whether a case for a reasonable maintenance has been made, the court looks at: (i) the standard of living of the parties during the marriage; (ii) the applicant's actual and reasonable requirements; and (iii) the respondent's income (although

the use of assets can also sometimes be considered).[6]

Applicant's financial position

- [12] The applicant did not finish her High School education as she left school in Grade 10 (formerly Standard 8). She has not been employed during the course of the marriage relationship. On 13 February 2023, she secured employment as a temporary administrator, earning R3 500.00 per month. As a result, she contends that she is unable to generate income for herself that would fulfil all her maintenance requirements as well as that of the minor children who primarily reside with her.
- [13] It is clear from the applicant's Financial Disclosure Form ("FDF"), that she had a total amount of R3 923.03 in her FNB and Capitec bank accounts. She is claiming a monthly cash maintenance amount of R41 849.00 for herself and the minor children; which would cover expenses in relation to the rental and all other ancillary expenses (such as water and electricity; the property; groceries; toiletries; clothing; and unforeseen expenses for herself and the minor children).
- [14] The applicant is also seeking reimbursement for the expenses she had incurred in obtaining a hospital plan consequent to the respondent's decision to remove the applicant from his medical aid. She seeks further that the respondent either reimburse her for a medical aid where she is the principal member on the same standard as enjoyed by the respondent and the minor children, alternatively, that the respondent reinstates the applicant as a beneficiary on his medical aid; and the respondent pay her expenses not covered by the medical aid.
- [15] It is common cause that the respondent pays for all expenses associated with the minor children's education and medical needs, including medical aid instalments. The applicant seeks an order directing the respondent to continue paying for these expenses.

The respondent's financial position

- [16] The respondent is the sole member of [...] CC (close corporation). The core business consists of producing dog food. The respondent avers that the close corporation is not financially viable because of the loadshedding. Instead of producing 100 tons of dog food per month to break even, in the last 12 months, the close corporation has failed to meet the target. The respondent is also a 50% shareholder in [...] (Pty) Ltd, which was registered in October/November 2022, a fledgling business which has not generated a profit.
- [17] The parties are joint owners of an immovable property known as Portion [...] of Erf [...], Township Rensburg. The close corporation paid for the purchase of the property, the extensions and all other expenses relating to the property. The property, according to the respondent, is valued at R850 000.00. This property generates a rental income of R5 800.00.
- [18] The respondent contends that he makes a monthly maintenance contribution for the minor children of about R23 337.00, which includes a R10 000.00 cash payment. His own personal monthly expenses are about R39 415.00. The respondent

contends that he cannot afford to contribute more than what he has been contributing. In any event, the applicant and the minor children do not require any more than what he is providing every month which includes expenses for accommodation; the children's

school fees; medical expenses; and monthly maintenance, so he further contends.

[19] As a result, the respondent calls into question the reasonableness of the applicant's maintenance requirements and contends that the applicant and the minor children would not be left destitute if these requirements are not met.

[20] The respondent has tendered to pay R10 0000.00 towards the maintenance of the minor children. He concedes that he is currently contributing a reduced amount of R8 000.00 and has terminated the monthly premiums towards the applicant's

retirement annuity because he could not afford same. It is also not in dispute that the respondent stopped paying rent for the property where the applicant and minor children reside.

[21] I now deal with the submissions by the parties. The importance of making a full and proper disclosure of financial affairs in a Rule 43 application cannot be overstated.[7] In *Du Preez v Du Preez*, [8] the court bemoaned the conduct of the litigants who, with the assistance of their legal representatives, misstated the nature of

their financial affairs. Dismissing the claim by the applicant, the court held that:

"A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume there is a duty on applicants in rule 43 applications seeking equitable redress to act with the utmost good faith (uberrime fidei) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure

would mean that he or she is not before the court with 'clean hands' and, on that ground alone, the court will be justified

in refusing relief."

[22] Similarly, in the present case, the respondent failed to take the Court fully into his confidence in relation to his financial affairs. The close corporation's financials rendered an insufficient help in determining the true state of affairs when it comes to the respondent's income. That is so because the affairs of the close corporation are melded with the respondent's private affairs.

[23] I struggled to make sense and to reconcile the different figures in respect of expenditures in the FDF and the financial statements. The respondent wants the Court to accept that the additional debts he has included in the FDF, which are not appearing in the financial statements, were omitted by the close corporation's accountant without providing an explanation for the said omission. Moreover, the close corporation is also contributing R7 375.15 towards the immovable property registered in the parties' names. This property is

generating income of R5 800.00 per month from rental. It is not clear how these transactions are accounted for in the financials.

- [24] There is another hurdle facing the respondent. I have noted that there are transactions that are reflected in his private bank account which constitute income for the close corporation. The explanation proffered by the applicant for the state of affairs muddies the water even more. When one is faced with such glaring inconsistencies, it follows that the integrity of the financial statements gets compromised and, likewise, the whole information in respect of the financial affairs of the close corporation.
- [25] Thus, the respondent's averment that the close corporation is in financial trouble is not verifiable. Moreover, since there is no information disclosed in respect of the respondent's personal income in the form of a payslip and/or personal income tax information (IRP5), the contention about paucity of his means is unsustainable.[10]

- [26] On the contrary, the monthly cash maintenance contribution required by the applicant and the minor children encompasses the following actual and reasonable expenses:

Expenditure Amount 1. Lodging/ Rental R7 500.00 2. Groceries and personal care R15 000.00 3. Water and electricity R3 500.00 4. Lunches R 2 000.00 5. Telephone R1 000.00 6. Medical aid (Applicant) R2 303.00 7. Wi-Fi R949.00 8. Netflix R199.00 9. Tracker R200.00 10. Fuel R8 000.00 11. Clothing R1 200.00 Total: R41 851.00 Total less the cost of applicant's medical aid (see paragraph 30 below for reasoning) R39 548.00

- [27] The respondent seems to suggest that the applicant and the minor children would not be left destitute if these requirements are not met. I disagree. These expenses comprise of basic daily necessities and implicate the constitutional rights of the minor children.[11] The court sitting as the upper guardian of all minor children, is enjoined to take into consideration all factors present in order to determine the best interest of minor children.[12]

- [28] I accept that the respondent is making some contribution towards the minor children's expenses, including school fees. However, he has a constitutional duty to meet all their needs including lodging, food, etc.; and a common law duty to maintain the applicant,

a duty that will terminate upon divorce. It is evident from the above schedule of expenses that the R 10 000.00 tendered by the respondent for the maintenance of the minor children is not adequate at all.

- [29] In addition, nothing much turns on the respondent's impugn against the applicant's lover whom he accuses to be responsible for the breakdown of his marriage and cohabiting with the applicant. The applicant denies that her lover is responsible for the breakdown of their marriage or is in a cohabitation relationship with her. Still, even if the applicant was cohabiting with her lover and he was maintaining her, that would not absolve the respondent of his duty which stems from common law; namely, a reciprocal duty of support that exists between spouses, of which the provision of maintenance is an integral part, and which only terminates upon divorce.[13]

- [30] In my view, the respondent does have the means and ability to pay for the reasonable maintenance for the applicant and the minor children. Yet, I have deducted the medical aid expense in the amount of R2 303.00 because the applicant seeks an order directing the respondent to pay all monthly premiums and instalments for her as a principal member on a medical aid with similar benefits she enjoyed while on the respondent's medical aid; alternatively, that she be reinstated as a member on the respondent's current medical aid.

Retrospective maintenance

- [31] The applicant also claims for retrospective maintenance of R192 000.00. She contends that since she left the matrimonial home, she has been loaned funds by her lover to cover the deficit from the R10 000.00 that was contributed by the respondent. The R10 000.00 only covered the rental of the property which amounts to R7 500.00 per month and electricity and service fees which amounts to about R2 500.00 per month. The applicant contends that, in order to re-pay the loan extended to her by her lover, she was loaned amounts of R118 000.00 and R75 000.00 by her father.
- [32] The respondent denies that he is liable to pay the retrospective maintenance debt. On 12 May 2022, he, through his attorneys of record, sent a letter to the applicant's attorneys seeking a list of what the applicant believes is a fair and reasonable amount which she required for the maintenance of the children, taking into consideration the contributions he was already making. That letter was not favoured with a response. Curiously, the applicant was already threatening a Rule 43 application at that time.
- [33] This application was only served and filed on 25 April 2023, almost a year from the date the respondent requested the list of maintenance needs. The applicant failed to give an explanation for not responding to the respondent's correspondence dated 12 May 2022 and for the delay in launching this application. What is apparent from the founding affidavit is that from May 2022, the applicant sought loans from her lover and took another loan from her father to re-pay her lover. She shunned the respondent's request and willingness to increase the maintenance.
- [34] In common law, a claim for arrear spousal maintenance is barred by virtue of the principle in *praeteritum non vivitur* (one does not live in arrears), the argument being that if the spouse managed on her own resources, there was no need for support.[14] An exception to this rule is recognised where the spouse has incurred debts in order to maintain herself. However, in *Dodo v Dodo*,[15] the court made the following observations:

"...[A] person seeking a maintenance order, or a variation thereof for an increase or for a reduction or for a suspension of payments, should do so expeditiously in order to avoid the accumulation of arrears of maintenance that the spouse liable to pay may be burdened with, a substantial liability which he can ill-afford to pay. The same expeditiousness would be required in order to avoid a party, being subjected to the reduction or suspension, being incommoded for a period until that party knows of the Court order." (Emphasis added.)

- [35] The applicant has not provided any explanation for the delay. While the respondent would be compelled to pay all the arrears of maintenance that have accumulated up to May 2022 and, consequently, be saddled with a substantial liability which he cannot meet. In any event, I am not empowered under Rule 43(1)(a) to order a lump-sum payment towards retrospective maintenance. This notion was well expounded in *Greenspan v Greenspan*[16] where it was held that:

“Unlike in ordinary motion proceedings, where the parties are not so strictly limited in the number of affidavits they may file nor are they discouraged from setting out their versions fully in their papers, by contrast Rule 43 is designed to afford an inexpensive procedure for granting interim relief. The parties to Rule 43 proceedings are limited in the material they may place before Court, and the Courts actively discourage lengthy affidavits and bulky annexures ... Furthermore, the term ‘maintenance pendente lite’ means ‘maintenance during the period of litigation’. Therefore, there is no distinction in principle to be made between the interpretation of the relevant words in s 7(2) of the Divorce Act and Rule 43(1)(a). Surely the framers of Rule 43(1) would not have contemplated the making of an order under Rule 43 which a Court could not competently make either under the Maintenance Act of 1963 or the Divorce Act of 1979. In my view, the framers of Rule 43 clearly contemplated orders which were capable of variation. This is so because of the provisions of Rule 43(6) in terms of which the Court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child. Once a lump sum payment has already been made it can hardly be varied. Surely this further militates against attributing to the framers of the rule any intention that claims for lump sum payments should be adjudicated upon under Rule 43. In my judgment, the answer to the above question is surely that a Court has no jurisdiction under Rule 43(1)(a) to award lump sum payments. (Emphasis added.)

- [36] Nonetheless, to the extent that the maintenance claim implicates the constitutional rights of the minor children, the respondent cannot be absolved of his duty to maintain because of the delay and resultant prejudice.[17] Thus, in my view, the retrospective maintenance claim may be dealt with during the divorce trial.

Toyota Land Cruiser 200

- [37] The applicant seeks to retain the exclusive use of a Toyota Land Cruiser 200 with registration number [...] (Land Cruiser). The Land Cruiser was purchased by the close corporation but the applicant has been driving it with the blessing of the respondent. Recently, the respondent demanded that applicant returns it.
- [38] The applicant is refusing to surrender the Land Cruiser and asserts that during the marriage relationship, she enjoyed sole and exclusive use of the Land Cruiser to cater for her day-to-day necessities as well as that of the minor children. Furthermore, it forms part of the respondent's maintenance obligation towards, not only the applicant, but also the minor children.

[39] The Land Cruiser is the subject matter in an application for rei vindication in terms of which the respondent seeks an order compelling the applicant to surrender it. The respondent contends that the close corporation cannot afford to expend a monthly amount of R23 721.24,

which includes the finance agreement. Hence, he intends to sell the Land Cruiser for what is outstanding on the finance agreement, which will improve his financial position. The respondent has tendered to the applicant the utilisation of a 2022 Toyota Urban Cruiser, a tender she rejected outrightly.

[40] I note that the respondent's contention is inconsistent with the communication of 12 May 2022, alluded to above, where his attorneys of record explicitly state that the Land Cruiser is the respondent's asset. To be precise, they stated that:

"Obviously the monthly instalment on the vehicle in your client's possession which is currently paid by the Close Corporation will obviously be taken into consideration against our client's loan account, with the result that it is in fact an expense of our client and not that of the Close Corporation."[18]

[41] To my mind, to the extent that the Land Cruiser is part of the matrimonial estate, the applicant should be allowed usage pendente lite; alternatively, until there is an agreement between the parties on an alternative motor vehicle. Accordingly, the respondent cannot hide behind the corporate veil.

[42] The respondent's contention that he needs to dispose of the Land Cruiser in order to improve his financial position is untenable. Especially because he conceded that he has purchased a sail boat and, by the way, has failed to provide the proof of the alleged purchase price of R1 500.00.

There is also a purchase of a motorcycle that the respondent is yet to account for. These, in my view, are assets of pleasure as opposed to the Land Cruiser that is utilised to transport the minor children. Up until there is full disclosure of the respondent's financial affairs, the proposed financial austerity remains fanciful.

Contribution towards costs

[43] The applicant seeks contribution towards her legal costs in the amount of R100 000.00. The respondent has only tendered R5 000.00 and refuses to disclose what he is currently spending towards his own legal costs. Moreover, he is accusing the applicant of irresponsible use of her legal representatives as she is always represented by her attorney and counsel even during mediation or round table discussions. While the respondent appears with his attorney without counsel during the mediation discussions.

[44] It is well accepted that a claim for contribution towards costs is sui generis and based on the duty of support spouses owe each other. In *AF v MF*, [19] the court made the following pertinent point:

“The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse — usually the wife — will be forced to settle for less than that to which she is legally entitled, simply because she cannot afford to go to trial. On the other hand the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. In my view the obligation on courts to promote the constitutional rights to equal protection and benefit of the law, and access to courts, requires that courts come to the aid of spouses who are without means, to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.”

The right to dignity is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow funds for legal costs, or forced to be beholden to an attorney who is willing to wait for payment of fees — in effect to act as her ‘banker’. The primary duty of support is owed between spouses, and a wife who is without means should be entitled to look to the husband, if he has sufficient means, to fund her reasonable litigation costs. (The same of course applies if the husband is indigent and the wife affluent.)”

[45] The R5000.00 tendered by the respondent is abjectly inadequate given the complex nature that the divorce litigation has become and already there is an issue about legal consequence of the parties’ antenuptial contract. Thus, in my view, an amount of R50 000.00 as a contribution towards costs by the respondent to the applicant would suffice.

Conclusion

[46] In all the circumstances, and in light of the reasons alluded to above, I deem it appropriate to make an order in the following terms:

Order

1. In the best interest of the minor children, the applicant and respondent shall have full parental rights and responsibilities as envisaged by section 18 (2) of the Children's Act 38 of 2005, that the primary residence of the minor children is with the applicant and the respondent to exercise the following rights of contact:
 - 1.1 Removal rights in respect of R every Monday and Wednesday from after school to 17h00.
 - 1.2 Removal rights in respect of L every alternative Monday or Wednesday, the days to alternate weekly from after school to 17h00.
 - 1.3 Removal rights every alternative weekend from Friday after school until Sunday at 17h00.
 - 1.4 Every short school and long school holiday to be shared between the parties and the period over Christmas shall alternate annually between the parties.
 - 1.5 Every alternative public holiday from 09h00 to 17h00.

1.6 On the respondent's birthday and Father's Day from 09h00 to 17h00 subject thereto that it shall not interfere with the minor children's school routine. The same shall apply for the applicant in respect of her birthday and Mother's Day.

1.7 Telephonic and/or video call contact every day from 19h00 to 20h00.

1.8 The respondent's contact with the minor children will be with due regard to their social, school, and extramural activities and responsibilities.

1.9 The respondent will be obliged to collect and return the minor children before and after each contact period.

2. Pending the determination of the divorce action between the parties, the respondent shall pay maintenance for the applicant and the two minor children (R and L) as follows:

2.1 By paying cash maintenance for the applicant and the minor children in the sum of R39 548.00 (thirty-nine thousand five hundred and forty eight) per month, payable in advance and directly to the applicant, without set off or deduction, into a bank account

nominated by the applicant from time to time, on or before the first day of every month, to commence within 7 (seven) days of the date of this order and to operate retrospectively for that month, and thereafter on the first day of each month;

2.2 By payment of all educational expenses for the minor children, such which include, school fees; hostel and/or boarding fees; additional tuition and tutor fees; all books, stationery; uniforms; outings; excursions; and school levies;

2.3 By paying for all the costs of extra lessons and remedial lessons as may be required;

2.4 By paying for all the costs of all extra-mural and sporting activities, including the clothing; equipment; and gear required therefor; as well as the costs for school or other tours; and the costs of competitions;

2.5 By paying for all the costs of retaining the minor children on the respondent's present medical aid, including all monthly instalments which are payable in respect of such membership;

2.6 By paying all monthly premiums and instalments for the applicant as a principal member on a medical aid plan equivalent to the medical aid plan which was enjoyed during the marriage relationship and which is currently being enjoyed by the respondent and minor children; alternatively, reinstating the applicant as a member on the respondent's current medical aid.

2.7 By paying for all the applicant's and minor children's medical and dental; optical; ophthalmic; orthodontic; surgical; hospital; therapeutic; and pharmaceutical expenses which are not covered by the medical aid;

2.8 In the event of the applicant incurring any of the expenses as referred to in prayers 2.1 to 2.7 above, the respondent shall reimburse the applicant within 5 (five) calendar days of receiving proof of payment, invoice or any till slip of such expense being paid.

3. The applicant is to maintain exclusive use of the motor vehicle known as a Toyota Land Cruiser with registration number [...], and the respondent is to pay for all service and replacement of tyres and licencing fees.
4. The respondent contributes R50 000.00 towards the legal costs of the applicant payable within 30 days of the date of this order.
5. The claim for retrospective maintenances in the amount of R192 000.00 is postponed sine die.
6. Costs shall be costs in the cause.

P Nkutha-Nkontwana J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearances:

For the Applicant:

Adv L Van der Westhuizen

Instructed by:

Rabie Botha Incorporated

For the Respondent:

Adv F Bezuidenhout

Van der Berg Attorneys

Date of Hearing: 05 October 2023

Date of Judgment: 14 November 2023

[1] Rule 43 provides: “(1) 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.”

[1] Rule 43 provides:

“(1) 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.”

[2] E v E; R v R; M v M 2019

(5) SA 566 (GJ) at para 25.

[3] Maree v Maree 1972

(1) SA 261 (O) at 263H; Zoutendijk v Zoutendijk 1975

(3) SA 490 (T) at 492C; Visser v Visser 1992

(4) SA 530 (SE) at 531D; Du Preez v Du Preez 2009

(6) SA 28 (T) at 33B; TS v TS 2018

(3) SA 572 (GJ) at 585A.

[4] Rule 43(5) provides: “The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision.” See E v E, R v R, M v M above n 2 at paras 33, 43, 48, and 52.

[4] Rule 43(5) provides:

“The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision.”

See E v E, R v R, M v M above n 2 at paras 33, 43, 48, and 52.

[5] E v E; R v R; M v M id at paras 58-9.

[6] See Taute v Taute 1974

(2) SA 675 (E) at 676D-H; CD v JHD [2022] ZAGPPHC 456 at paras 55-6.

[7] TS v TS 2018 (3) SA 572 (GJ) at para 22.

[8] 2009 (6) SA 28 (T) at paras 4-7.

[9] Id at para 16.

[10] TS v TS above n 7 at para 12.

- [11] See: Section 28(2) of the Constitution and section 9 of the Children's Act.
- [12] See *Kotze v Kotze* 2003
- (3) SA 628 (T) at 630G which was endorsed by the Constitutional Court in *Mpofu v Minister for Justice and Constitutional Development and Others* [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at para 21.
- [13] See *EH v SH* 2012
- (4) SA 164 (SCA) at para 11.
- [14] See *Dodo v Dodo* 1990
- (2) SA 77 (W) at 95G-J; *AF v MF* 2019
- (6) SA 422 (WCC) at para 33.
- [15] *Id* at 96A-B.
- [16] *Greenspan v Greenspan* 2000 (2) SA 283 (C) at para 12.
- [17] *Fluxman v Fluxman* 1958
- (4) SA 409 (W) at 413G.
- [18] See *Caslines* at 08-84.
- [19] 2019 (6) SA 422 (WCC) at paras 41-2.

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