

SOUTH AFRICA / JUDGMENT

Y.M v T.J.M (26526/2022) [2023] ZAGPPHC 582 (13 July 2023)

[2023] ZAGPPHC 582**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mncube

CASE / FILE NUMBER

26526/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NUMBER: 26526/2022****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE:** 13 July 2023**SIGNATURE:** In**the matter between:**

Y.

M

APPLICANT

And

T.J.

M

RESPONDENT

SUMMARY: Family

-Notice of Motion- Rule 43 of the Uniform Rules- Interim maintenance- Applicant to establish a need for interim maintenance and the ability by the Respondent to afford.

ORDER

- Held:** Both parties retain their parental responsibilities and rights in terms of section 18, 19, 20 of the Children's Act 38 of 2005 in respect of the minor children subject to that hereunder.
- Held:** The primary residency and care of the minor children is awarded to the Applicant.
- Held:** The Respondent is entitled to specific parental responsibilities and rights with regard to contact with the minor children as contemplated in section 18(2) (b) of the Children's Act 38 of 2005 in that the Respondent be entitled to contact under supervision of the Applicant or a person nominated by her every alternative weekend on Saturday from 09H00 to 12H00 and Sunday from 12H00 to 15H00 at the Applicant's parents' place of residence.
- Held:** The Respondent is ordered to contribute towards the maintenance of the minor children and the Applicant as follow-
- By** paying an amount of R42 600 per month from the 1 August 2023.
- The** Respondent pays the school/day care/ pre-school fees of the minor children within seven days when such fees are due.
- Held:** The Respondent pays the expenses in respect of the minor children's school requirements (including uniforms, stationary, aftercare, clothing, extra mural activities, and all clothing and equipment in respect of the extra mural activities).
- Held:** The Respondent to continue the monthly medical aid premium payments as well as any expenses not covered by the medical aid.
- Held:** The Respondent to make available the Toyota Fortuner or roadworthy motor vehicle of a similar nature to the Applicant for her use pendente lite within 15 days of this order.
- Held:** The Respondent to contribute towards the Applicant's legal costs in the amount of R805 903.
- Held:** The Respondent's counter application is dismissed.
- Held:** The costs of this application are costs in the divorce action.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an opposed application instituted in terms of Rule 43 of the Uniform Rules in which the Applicant seeks the following relief pendente lite-

‘1. That both parties retain their parental responsibilities and rights in terms of section 18, 19, 20 of the Children’s Act 38 of 2005 in respect of the minor children subject to that hereunder.

2. That primary residency and care of the minor children be awarded to the Applicant.

3. That the Respondent be entitled to specific parental responsibilities and rights with regard to contact with the minor children as contemplated in section 18(2) (b) of the Children’s Act 38 of 2005 in that the Respondent be entitled to contact under supervision of the Applicant or a person nominated by her every alternative weekend on Saturday from 09H00 to 12H00 and Sunday from 12H00 to 15H00 at the Applicant’s parents’ place of residence.

4. That the Respondent be ordered to contribute towards the maintenance of the minor children and the Applicant as follow-

4.1 By making payment of an amount of R15000 per month maintenance in respect of the minor children from the first day of the month

following upon the date of the granting of an order herein.

4.2 That the Respondent[1] pays the school/day care/ pre-school fees of the minor children as and when they fall due.

4.3 That the Respondent pays the expenses in respect of the minor children’s school uniforms, stationary, aftercare, clothing,

extra mural activities, and all clothing and equipment in respect of the extra mural activities.

4.4 That the Respondent will continue payment of the monthly medical aid premium of the minor children and the Respondent will pay all extra

5. Further and/or alternative relief.’

[2] The Applicant who is the plaintiff in the main divorce action is

represented by Adv. Stevens. The Respondent who is the defendant in the main action is represented by Adv. Schoeman. The

Respondent has filed a counter claim in which he seeks the following relief –

‘1. That both parties retain their parental rights and responsibilities in terms of section 18, 19, 20 of the Children’s Act, Act 38 of 2005, in respect of the minor children born of the marital relationship between the parties.

2. That primary care and residency of the minor children is awarded to the Applicant, Y.M.

3. That the Respondent, T.J.M., be awarded specific parental responsibilities and rights regarding contact with the minor children, as contemplated in Section 18 (2) (c) of the Children’s Act, Act 38 of 2005 as follows-

3.1 Contact every alternative Saturday and Sunday, from 9h00 to 17h00. The Respondent shall collect the minor children from the Applicant’s residence and again return them at the end of each contact session.

3.2 The Respondent shall not travel with the minor children during said contact session outside a 200km radius from Pretoria.

4. That the Applicant pays the costs of this Counter- application, only in the event of opposition.

5. That further and/or alternative relief be awarded to the Respondent as the Honourable Court may deem meet.’

FACTUAL BACKGROUND:

[3] The parties were married on 17 September 2016 which marriage is out

of community of property subject to accrual. There are three minor children born out of the relationship. The applicant moved out of the marital home on 21 November 2021 following an alleged altercation she had with one of the respondent’s sisters and resides with her parents with the minor children. Divorce summons were issued on 20 September 2022. The Applicant instituted the current Rule 43 application on 2 December 2022.

ISSUES FOR DETERMINATION:

[4] The issues for determination are whether or not the Rpplicant has

proven the need for maintenance pendente lite and whether or not the respondent has the means to supply those needs.

SUMMARY OF EVIDENCE:[2]

Applicant’s Case:

[5] In her sworn statement the Applicant avers that she seeks relief for three purposes: Firstly on the basis that she is struggling to find employment since she no longer resides with the Respondent. She is attempting to manage her own material printing business called Fat Quarter which does not generate any profit at the moment. She is staying at her parental home with the parties’ three young children in Centurion which is approximately 280

kilometres away from where the respondent resides. She has approached relief from this Court and alleges that the Respondent refuses to reconsider his current contribution in light of the birth of the third child. She alleges that there will be a substantial accrual in the Respondent's estate which is hidden behind the veil of a company called AP Martinson Boerdery (Pty) Ltd and the trust called AP Martinson Family Trust. To her knowledge the Respondent, his two sisters and his brother are the beneficiaries of the Trust which owns shares in the company which owns a 1600 hectares farm valued at twelve million rand (R12 000 000). Throughout their marriage, the Respondent was responsible for the financial needs of the family.

- [6] Applicant avers that the respondent currently contributes six thousand rand (R6000) for her and the children's maintenance which is insufficient. The Respondent pays towards the medical aid premium for her and the children and used to pay for the children's extra medical costs that were not covered by the medical aid. She alleges that since September 2022 the Respondent no longer pays for the extra medical costs that are not covered by the medical aid. She avers that the respondent lives out of the Company and or the Trust and earns R5500 (five thousand five hundred rand) as a salary and all of the Respondent's expenses is paid by the Company or Trust. She alleges that while she resided in the home which was situated within the farm, she received an amount of R6500 (six thousand five hundred rand) which funds were used for entertainment, medical aid, clothes and other luxuries. She was provided with a motor vehicle, a Toyota Fortuner at the time she resided with the Respondent which she utilized as her personal vehicle. When she left the premises, she was not allowed to leave with any motor vehicle. Her parents loaned her a vehicle which she must return and the Respondent should be directed to provide her with a motor vehicle pendente lite
- [7] Secondly she seeks relief in order to obtain an order pertaining to the Respondent's right of contact with the minor children who makes demands to exercise his right of contact by removing the minor children for extended periods. She alleges that the Respondent is incapable of looking after all three children and it is in the best interests of the children that Respondent should be awarded supervised contact pending a full clinical evaluation. She seeks supervised contact because of suicide attempts by the Respondent during November 2021 and makes several allegations why she avers that supervised contact is in the best interests of the minor children.[3] Thirdly she seeks relief that the Court makes an order that a Clinical Psychologist be appointed to conduct a forensic investigation and to provide a report on right of contact that is in the best interests of the minor children pendente lite.
- [8] The Applicant alleges that during the marriage, she enjoyed a comfortable lifestyle and enjoyed annual holidays which lifestyle was funded by the Company. She avers that the Respondent enjoys expensive

hobbies. The respondent and his family utilise cash to pay for purchases. She has completed her financial disclosure form. She

alleges that she completed a project for Educor which was a contract work and received payment for the work. She has two current accounts with First National Bank and ABSA Bank and two credit card accounts with a debt of twenty five thousand rand. She relies on her parents for financial assistance. She wishes to move out of her parental home and the average rental for three bedroom house is between eleven thousand rand to seventeen thousand rand. She alleges that it is necessary for her to secure a full time domestic help to look after her children. She avers that the expenses listed in her financial disclosure form are reasonable. She alleges that she is unable to generate sufficient income to pay for the existing expenses and she has a shortfall every month. She avers that the Respondent has access from the family business to pay for all of his other monthly expenses and expensive hobbies.

[9] In respect to legal costs, the Applicant alleges that she has no

assets to utilize towards legal costs and relies on her parents to lend her money in order to pay her attorney and her legal fees are eighty one thousand seven hundred and eighty seven rand and seventy six cents (R81 787, 76) and estimates a further legal costs as set out in the draft bill of costs. She avers that this application was unnecessary consequently she prays for punitive costs.

[10] In her replying affidavit, the Applicant alleges that it would not be in the interests of the minor children to travel for four hours from the farm where the Respondent resides to Pretoria. She submits that

the Respondent should exercise contact with the minor children as set out in her founding affidavit until such time that final reports from a Psychologist and Family Advocate are received. She avers that the Respondent accepted Mrs Van Jaarsveld's recommendations for five months before he decided not to follow such recommendation. She denies the averment that she does not have a strong bond with the minor children. She repeats the allegation that the Respondent finds it psychologically overwhelming to have contact with the minor children at the same time and denies the veracity of the reason the Respondent provides for not having contact with the minor children at the same time. She denies that she is attempting to alienate the minor children from the paternal family and from the Respondent.

[11] Confirmatory affidavits were made by Ms J.E. Van Der Westhuizen, Mr E. G., Ms E.E.G and Mr P.J. G who aver that the contents of their confirmatory affidavits are within their respective

personal knowledge and are true and correct. They all confirm the applicant's founding affidavit as far as it relates to them to be true and correct.

Respondent's Case:

[12] The respondent avers in his opposing affidavit that he is a farm worker. He denies that the applicant has been unsuccessful in obtaining employment and alleges that she has failed to elaborate on other positions she has applied for. He alleges that the applicant is the business owner of Snoesig, The Darning Mushroom, Sleep Serenity Program and has interests in Flutterby Design as well as working as a moderator where she earns an income in cash or in kind. He avers that

he made several attempts to solace their issues. He alleges that on 2 December 2021 while he was in a psychiatric hospital, the applicant's father and brother collected the applicant's belongings and the minor children's belongings.

[13] The Respondent avers that he is contributing to the maintenance of the minor children as follows- by making cash payment of six thousand rand, by paying 100% of the school fees of the one minor child L, by

paying the cost of the therapist of the minor child L, by paying 100% of the medical aid contributions, and paying one half of all the medical expenses not covered by the medical aid. He alleges that the Applicant worked on the farm and received a salary which income was jointly used towards the needs of the household and avers that the applicant earned more than him throughout the greater part of their marriage. He concedes that they lived off from the produce of the farm and avers that the Applicant despite the offer of the farm produce of milk, maize, eggs, meat, she flatly refused. He alleges that the liabilities attached to the farm far outweigh the value.

[14] He denies the averment that he is refusing to reconsider his financial contribution but maintains that he is contributing to the best of his abilities. He concedes that he revoked the contact agreement reached with the assistance of Ms Van Jaarsveld and avers that the terms are not in the best interests of the minor children. He alleges that he is exercising his right of contact under protest and it is impossible for him to build his relationship with the minor children under the circumstances. He denies that he lives off the Trust or the Company and avers that it was his father who paid for his hobbies. He alleges that his shortfalls are funded by the loan account from his father. He concedes that he suffered from

depression for which he sought help and the symptoms have improved. He alleges that he is capable of looking after his minor

children and only requested to see one child at a time on the basis that they fought for his attention and has been exercising

unsupervised contact since May 2022. He denies the various allegations made by the applicant in relation to his family. He

concedes that the vehicle was provided for the applicant for her personal use.

[15] He avers that the family lived a comfortable lifestyle because the applicant earned a significant amount from her enterprises and she paid for the holidays from her enterprises. He alleges that he does not have the means to provide for domestic help. He avers that he cannot pay more than what he is contributing.

THE APPLICABLE LEGAL PRINCIPLES:

[16] Rule 43 of the Uniform Rules (Rule 43) proceedings are interim in nature pending the finalization of the divorce action where all issues can be properly ventilated. Rule 43 is not meant to provide an interim meal ticket to a person who at the divorce action will not be able to establish a right to maintenance. [4] The purpose of maintenance pendente lite is to supplement expenses which the applicant cannot meet.[5] It is also recognised that another purpose of Rule 43 is to provide a speedy and inexpensive remedy primarily for the benefit of women and children.[6]

[17] 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) (a) An applicant applying for any relief referred to in subrule (1) shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor, together with a notice to the respondent corresponding with Form 17 of the First Schedule.
- (b) The statement and notice shall be signed by the applicant or the applicant’s attorney and shall give an address for service within 15 kilometres of the office of the Registrar, as referred to in rule 6(5)(b).
- (c) The application shall be served by the sheriff: Provided that where the respondent is represented by an attorney, the application may be served on the respondent’s attorney of record, other than by the sheriff.
- (3) (a) The respondent shall within 10 days after receiving the application deliver a sworn reply in the nature of a plea.
- (b) The reply shall be signed by the respondent or the respondent’s attorney and shall give an address for service within 15 kilometres of the office of the Registrar, as referred to in rule 6(5)(b).

- (c) In default of delivery of a reply referred to in paragraph (a), the respondent shall be automatically barred.
- (4) As soon as possible after the expiry of the period referred to in paragraph (a) of subrule (3), the Registrar shall bring the matter before the court for summary hearing, on 10 days' notice to the parties: Provided that no notice need be given to the respondent if the respondent is in default.
- (5) 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.
- (6) The court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.'

[18] Courts are enjoined in such applications to ensure that financial burden is alleviated by ensuring that the legal framework operates effectively. See *S v S* supra para [3]. There is a duty on parties in Rule 43 applications to disclose fully all material information regarding their financial affairs to enable the Court to make an order that is just and expeditious.

[19] In a Rule 43 application, the onus is on the applicant to make out a case with regard to the need for the maintenance pendente lite and the respondent's ability to pay[7]. One of the fundamental principles for an award of maintenance is the ability to pay on the spouse from whom the claim for

maintenance is sought. The approach to such applications was articulated in *Levin v Levin* 1962 (3) SA 330 (W) which held 'To decide the issue I am compelled to draw inferences and to look to the probabilities as they emerge from the papers.'

[20] In *MC v JC* (29301/2020) [2021] ZAGPJHC 373 (8 September 2021) para [4] it was held 'The aim of any Rule 43 order is, then, to avoid substantial prejudice to either party pending divorce. It is not to provide a precise account of what is due to or from either party, according to the parties' or the court's sense of morality, propriety, the blameworthiness of the parties' conduct during the marriage, or their habits of living after the separation.'

[21] The principle in respect of contributions towards legal cost is that it is based on the duty of support that spouses owe to each other. The assessment of the quantum is at the discretion of the court at

the scale commensurate with the means of the parties.[8] There are constitutional considerations in such applications. Section 9 of the Constitution of South Africa of 1996 provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

[22] Once an applicant has shown that there is a need for support, in order to determine whether the maintenance sought is reasonable, various factors are taken into account such as

- (i) Applicant's actual and reasonable requirements or needs;

- (ii) The standard of living of the parties during the marriage;
- (iii) Respondent's ability to pay the maintenance that is required.

SUBMISSIONS:

- [23] All submissions made by Counsels for the parties as well as cited case law have been considered. Counsel for the Applicant argues that when comparing the maximum nett earning of the Respondent with the current contributions he is making, it is clear that the respondent is not disclosing his full earnings. The submission is that the Applicant cannot continue leaning on her parents when the Respondent has the means his family. Counsel argues that it is highly unlikely that the Respondent's father is the person who funds his hobbies.
- [24] Counsel for the Applicant places reliance to the matter of SC v SC (20976/2017) [2018] ZAGPJHC 30 where Spilg J held at para [25] 'The Respondent's lifestyle reveals that his income and benefits received from whatever source is greater than the amount that he has been prepared to declare in these papers.' Counsel submits that the duty of support is based on the relationship, a need to be supported and adequate resources on the part of the person called upon to support. Regarding contribution towards legal costs, Counsel for the Applicant contends that this is based on the duty of support spouses owe each other and is granted in order to put the parties on equal footing to litigate as well as to enable the Applicant to put the case before the Court adequately. The contention is that the importance of the equality of arms in divorce litigation should not be underestimated.
- [25] Counsel for the Respondent argues that the matter is not ripe for hearing in the absence of the final recommendation by the Family Advocate. The contention is that the Applicant is using the children to settle family disputes. Counsel argues that the Applicant has not made out a case for contribution towards legal costs. The submission is that the Respondent is a farm worker on the farm which is owned by a private company. The contention further is that in addition to the contributions that the Respondent makes, he has offered to provide farm produce to the Applicant and he cannot afford to contribute more. Counsel highlights the applicable legal principles including the need for parties to make full disclosure.

The submission is that the Applicant seeks a meal ticket.

- [26] Counsel for the Respondent argues that the golden thread in matters concerning children is that the interests of children is paramount places reliance to the matter of McCall v McCall 1994 (3) SA 201 (C). The contention is that the judicial approach is to jealously guard the sanctity of the marital family. Counsel highlights factors

that the Court must consider as compounded by Section 7 of the Children's Act 38 of 2005. The argument is that this Court must align itself with the Respondent's submissions regarding the involvement of the Family Advocate. Counsel submits that provision must be made for the Respondent to exercise contact to ensure the continued involvement, companionship love and support by both parents which will enhance the children's sense of security.

EVALUATION:

[27] The Respondent in his opposing affidavit and the Applicant in her replying affidavit seek condonation for the late delivery of their affidavits which condonation is not opposed which is granted in the interest of justice. Regarding the merit of the application, I have assessed the evidence holistically. The starting point is that Rule 43 must be interpreted within the prism of the Constitutional values which must advance the Bill of Rights. The first issue is whether or not the Applicant has proved that she has a need. The allegations she makes to wit 'I am unable to generate sufficient income in the circumstances to pay for the existing expenses' is indicative of the fact that she has the need for maintenance. Her further averment that currently she is being assisted by her parents to make up the short fall further demonstrates this fact. Put differently, there would be no logical reason which would cause the Applicant's parents to help her financially if she was self-sufficient and did not require assistance. The Applicant's averment that the amount that the Respondent pays currently for the maintenance is insufficient is substantiated.

[28] The Applicant's initial financial disclosure form reflects that she has capital liabilities in the amount of R82 265 (eighty two thousand two hundred and sixty five rand) which are credit cards. She has listed Fat Quarter material printing business as her business interest and initially indicated that she does not generate any

income from. She has disclosed that she is a beneficiary to Grobler Familie Trust and PS Grobler Familie Trust which are both dormant. She has disclosed that she received an amount of R11 250 (eleven thousand two hundred and fifty rand) for contract work.

[29] She lists the following maintenance requirements for herself and the minor children -

MAINTENANCE REQUIREMENT AMOUNT 1. Lodging R15 000 2. Groceries R5500 3. Baby nappies R500 4. Water R700 5. Electricity R1200 6. Telephone and cell phone R900 7. Domestic Helper R4000 8. Gardener R1000 9. Clothes R1400 10. Car instalments R5600 11. Car maintenance R500 12. Car fuel R3000 13. Car licence R100 14. Car insurance R1000 15. Parking R50 16. Day care fees R3000 17. Books (school) R200 18. Extramural activities R1000 19. Therapy R2500 20. Medical Aid R6000 21. Medication R500 22. Other medical expenditure R1000 23. Life insurance R500 24. Household insurance R300 25. House maintenance R300 26. Household appliances R200 27. Kitchenware R50 28. Linen R200 29. Netflix R200 30. Security alarm system R300 31. Television licence R200 32. Food for pets R500 33. Veterinarian R200 TOTAL R57600

[30] On the acceptance that the Applicant has proved that she is in need of maintenance and that her parents are financially helping her financially, the denial by the Respondent that the Applicant has been seeking employment makes no logical sense. It would be illogical and thus improbable for the Applicant who is experiencing financial shortfall to meet her expenses would want to be a financial burden to her parents. I find the Respondent's version that the Applicant

earns an income in cash or in kind from several businesses to be improbable for the same reasoning that she ought not to be experiencing a monthly shortfall to the extent that she does.

[31] The next issue to determine is whether the Respondent has the means to provide such maintenance. The Applicant's averment is that she was provided with a Toyota Fortuner while she resided with the Respondent for her personal use. This is a material factor. This fact shows the length that the Respondent took to make his wife and children were comfortable. It makes no logical sense why the provision to use this vehicle was withdrawn. The evidence is that the Applicant had to borrow her parents' vehicle. The Applicant has a constitutional right to dignity as guaranteed in section 10 of the Constitution which is being adversely affected as the facts show. I am of the humble view that the withdrawal of

the vehicle equates to the denial of the basic standard of living which in turn amounts to the denial of a person's right to dignity.

[32] There is no real dispute that the parties lived a comfortable lifestyle. The only issue is who provided the lifestyle. The Applicant alleges under oath that the standard of living she and the respondent enjoyed was that they only needed to buy basic groceries because the business paid for all of their needs. She positively attests that it was the agreement they reached with the Respondent that she must not work but instead to look after the children. She avers that despite looking for employment she has not been successful. When assessing the Applicant's ABSA bank statements for example, there are payments made into her account by P.J.G. which in my view substantiate her averments that she is receiving assistance from her parents. This is unacceptable that the Applicant's parents should be burdened to provide her with financial support. The duty of support lies with the Respondent.

[33] I find the Applicant's version on the reasons which caused her to move out of the marital home to be persuasive and probable. Put simply, it is highly improbable that the Applicant would pack

and leave her marital home with two small children to go back to her parental home for no plausible reason. The Respondent concedes in his opposing papers that he was in Cape Town when the Applicant left the marital home and he is in no position to gainsay the Applicant's version. It follows that the Applicant has the right to proper housing not only for herself but for the minor children. The amount for the rental is comparatively reasonable when one has regard to the prevailing rental market. It cannot be emphasised enough that the minor children have the right to adequate housing as guaranteed in sections 26 and 28 of the Constitution.

[34] It is interesting that the Respondent does not specifically address the averment that the Applicant makes that he used to pay for all of the medical expenses which were not covered by the medical aid but stopped since September 2022. The Respondent concedes in relation to the extra medical expenses that he is currently paying

one half of these expenses. I cannot find any logical reason from the papers which caused the change to take place other than to reasonably infer that the Respondent now wants the Applicant to contribute to those extra medical expenses because the marriage has broken down.

[35] In respect to legal costs, the Applicant has attached annexure YM14 which makes a projection of substantial litigation requiring the services of senior Counsel who charges R3000 (three thousand rand) per hour bringing the total legal fees at R805 903 (eight hundred thousand nine hundred and three rand). Annexure YM14 articulates and substantiates why the services of Senior Counsel are required. I find the argument by the Applicant's Counsel persuasive in that equality of arms in divorce litigation is important. Case law is full of examples of the importance of equality and the levelling of the plane in litigation. Taking into consideration the circumstances of this case, and the issues involved with special reference to the determination of the accrual, the likelihood of further interlocutory litigation, the facts of this matter show that it is in the interest of justice to enable the Applicant to litigate fairly and competently. I am satisfied that the Applicant has shown the need for legal costs and the projected fees that the interest of justice permits that the Applicant should litigate on the same level as that of the Respondent.

[36] In regard to the Respondent's counter application, I am satisfied that it is in the interest of justice and the minor children that the status quo remains pending a final report. Despite the allegations and counter allegations made by both parties, the final determination of the Respondent's right of contact should be reserved for the divorce trial. In any event, should a final report becomes available before the divorce is finalized, the Respondent has options as compounded by Rule 43 (6). It follows that the counter application must fail.

[37] The Respondent gives little explanation on how he meets his living expenses other than a generic averment that his father helps him. I am satisfied that the respondent is able to meet his financial obligations somehow. He alleges that he is utilising a loan from his father but fails to indicate the terms of repayment if any. All that he states in his financial disclosure form is the outstanding amount of R17 626,61. The Respondent lists loans to the value of R18 000 but does not provide details thereof. This remark is within the context that he is the party from whom maintenance is claimed and in order to assist the Court to make an informed decision on his ability to pay.

[38] The Respondent lists his needs as follows-

EXPENDITURE AMOUNT a) Food R1000 b) Toiletries R150 c) Laundry R100 d) Lunches R400 e) Telephone and cell phone R509 f) Clothing R100 g) School uniforms R50 h) Personal care R50 i) Car fuel R3000 j) School fees R2472 k) Crèche R3000 l) Books R20 m) Stationery R100 n) Outings R100 o) Sports R100 p) Extra murals R100 q) Extra educational expenses R100 r) Medical aid

R7356 s) Doctor R1000 t) Household appliances R30 u) Kitchenware R20 v) Linen R30 w) Other items R30 x) Personal loans R1000 y) Religious contributions R100 z) Charities R40 aa) Gifts R300 bb) Pets R100 cc) Vet R40 dd) Other (unspecified) R3800 Total R30 317,00

[39] The version by the Respondent that he does not receive assistance from the Company or Trust simply rings hollow when the probabilities are considered. If I consider the earnings of the Respondent and the various financial obligations, the numbers are not adding up. This is the typical scenario that my Brother Spilg J remarked on in SC v SC supra. The evidence persuades me to infer that the Respondent was able to meet his obligations to support not only his minor children but his wife prior to the breakdown of the marriage and he can still provide for them pendente lite. The version that his father paid for his hobbies is unconvincing and improbable. Counsel for the Respondent submits that having contact with parents ensures a child's sense of security. I am in firm agreement. The facts in this matter are that the Respondent does have contact albeit supervised. In an ideal situation, the Respondent would have no restrictions in the exercise of his contact. The evidence, which is acceptable to this Court is that one of the minor children has an unfortunate challenge of bed wetting which has made it necessary to provide therapy. Other averments are that after contact, there is a change with the children after contact. I elect not to make a factual finding on the veracity thereof. These allegations must be fully ventilated at the trial. For the purposes of these proceedings, I am satisfied that it is in the interest of the minor children that supervised contact remains.

CONCLUSION:

[40] In conclusion, having considered all the facts I am satisfied that the Applicant is need of maintenance pendente lite and the maintenance requirements are reasonable. I am further satisfied that the Applicant's version is more probable that the Respondent has means to provide.

COSTS:

[41] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially[9]. A just and equitable costs order is that costs of this application be cost in the cause.

ORDER:

[42] In the circumstances the following order pendente lite is made:

[42.1] Both parties retain their parental responsibilities and rights in terms of section 18, 19, 20 of the Children's Act 38 of 2005 in respect of the minor children subject to that hereunder.

[42.2] The primary residency and care of the minor children is awarded to the Applicant.

[42.3] The Respondent is entitled to specific parental responsibilities and rights with regard to contact with the minor children as contemplated in section 18(2) (b) of the Children's Act 38 of 2005 in that the Respondent be entitled to contact under supervision of the Applicant or a person nominated by her every alternative weekend on Saturday from 09H00 to 12H00 and Sunday from 12H00 to 15H00 at the Applicant's parents' place of residence.

[42.4] The Respondent is ordered to contribute towards the maintenance of the minor children and the Applicant as follow-

[42.5] By paying an amount of R42 600 per month from the 1 August 2023.

[42.6] The Respondent pays the school/day care/ pre-school fees of the minor children within seven days when such fees are due.

[42.7] The Respondent pays the expenses in respect of the minor children's school requirements (including uniforms, stationary, aftercare, clothing, extra mural activities, and all clothing and equipment in respect of the extra mural activities).

[42.8] The Respondent to continue the monthly medical aid premium payments as well as any expenses not covered by the medical aid.

[42.9] The Respondent to make available the Toyota Fortuner or roadworthy motor vehicle of a similar nature to the Applicant for her use pendente lite within 15 days of this order.

[42.10] The Respondent to contribute towards the Applicant's legal costs in the amount of R805 903.

[42.11] The Respondent's counter application is dismissed.

[42.12] The costs of this application are costs in the divorce action.

MNCUBE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Applicant: Adv. B.D. Stevens On instructions by: Boshoff Smuts Inc Waterford Court Office Park, Unit A 03 Corner Rabie and Glover Avenue Lyttleton On behalf of the Respondent: Adv. A.J Schoeman On instructions by: De Oliveira Serrao Attorneys 225 Rautenbach Avenue Waterkloof Pretoria. Date of Hearing: 30 June 2023 Date of Judgment: 13 July 2023

[1] Citation of the respondent on the notice of motion is 'defendant'.

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- [2] Some of the various allegations and counter allegations made by both the applicant and respondent have been omitted from this judgment, save for the averments deemed relevant for the issues for determination.
- [3] Refer to the applicant's sworn statement for these allegations.
- [4] See *Nilsson v Nilsson* 1984(2) SA 294 (C) at 295F.
- [5] See *Botha v Botha* 2009 (3) SA 89 (WLD) at 106C.
- [6] See *S v S and Another* [2019] ZACC 22 (27 June 2019) para [43].
- [7] See *EH v SH* 2012(4) SA 164 (SCA).
- [8] See *Glazer v Glazer* 1959 (3) 928 (W).
- [9] See *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) it was held 'The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant consideration.'
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