IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
15/10/2024	
DATE	SIGNATURE

CASE NO: 2024/067811

In the matter between:

In the application by

V[...] D[...] B[...], H[…] E[…] Applicant

And

V[...] D[...] B[...], S[…] Respondent

JUDGMENT

E EKSTEEN, AJ:

Order

[1] In this matter I make the following order:

1. Both parties shall remain as co-holders of parental responsibilities and rights in respect of the minor children, as envisaged in Section 18(2) of the Children's Act;

*2. The parties shall appoint the clinical psychologist, Ms Claire O'Mahoney ("**the psychologist**"), to conduct a forensic assessment, and to provide written recommendations regarding the primary residency, care, and contact regime that is in the best interests of the minor children. The assessment and recommendations shall include:-*

2.1. the psychometric testing of both the applicant and the respondent;

2.2. the attendance to and production of results by the applicant and the respondent of a 6-month hair follicle test for drugs and alcohol;

2.3. an investigation into the applicant and the respondent's use of prescribed medication, alcohol, or any other substance;

2.4. a recommendation as to whether all or some of the applicant and respondent's parental responsibilities and rights of the minor children, should be terminated; and

2.5. a recommendation as to who should be awarded specific parental responsibilities and rights of the minor children, and the nature and extent of such parental rights and responsibilities;

*3. The costs of the psychologist, including all hair follicle tests, consultations, assessments and report writing shall be shared by the applicant and the respondent on an equal basis. In the event that the applicant cannot pay her portion of the costs then the respondent shall pay it on her behalf, with such payments to be considered in the divorce action under the above case number ("**the divorce**");*

4. Pending the finalisation of the assessment and publication of the recommendations of the psychologist, the minor children's primary residence shall be with the applicant and the respondent shall exercise reasonable rights of contact to the minor children, as follows:-

4.1. sleepover contact from 17:00 on every Wednesday and Thursday evenings to Friday morning, whereafter the children will be returned to school;

4.2. sleepover contact every second Friday from 17:00 to Monday morning, whereafter the children will be returned to school;

4.3. half of every long and short school holiday;

4.4. equal share between the applicant and respondent of the children's birthdays ;

4.5. sleepover contact with the children from the day preceding the respondent's birthday, to the day after his birthday and the same to apply to the applicant; and

4.6. equal share between the applicant and respondent of Christmas and New Years;

5. Pending the finalisation of the assessment and publication of the psychologist's recommendations,

5.1. the applicant shall communicate via email to the respondent, weekly on Sunday afternoons, a timetable for the upcoming week with each of the minor children's planned extramural school and sport activities, remedial sessions, and known homework requirements;

5.2. in the event that any of the minor children do not attend any planned extramural school activity, sport activity, remedial session, and/or do not do homework, and/or is absent from school on a

particular day, then the parent in whose care the minor children are at that stage shall communicate promptly via email to the other parent the reason(s) for the minor children not attending to the activities and/or homework;

5.3. in the event that any one of the applicant and respondent responsible for dropping off and/or collecting the minor children from school, sport, and/or remedial sessions is not able to attend to the task on that particular day due to work commitments, such a parent shall communicate promptly via email to the other parent the name and contact number of the person that will attend to this task on his or her behalf; and

5.4. in the event that the parent of the minor children at whose house the minor children sleep on a particular day is, due to work commitments, not able to ensure that the minor children do their respective homework and/or remedial work, such a parent will promptly communicate via email to the other parent the name and contact number of the person that will attend to this task on his or her behalf;

6. Pending the finalisation of the assessment and publication of the psychologist's recommendations, the applicant and the respondent would not consume alcohol, or any other substances while the children are in their presence or care;

7. Within 5 days of this order, the applicant shall provide the respondent with the names, contact details and fees of the minor children's remedial education providers and/or tutors;

8. The respondent shall continue to pay monthly -

8.1. the minor children's current school fees in the sum of R22,248, and subsequent increases in the school fees;

8.2 the costs of the minor children's extracurricular activities, in the sum of R3,000;

8.3. the cost of any additional lessons that the children require from a tutor(s) and/or remedial education providers(s), in the sum of R12,500, and subsequent increases in the fees;

8.4 the minor children's educational books, stationery, outings, and sports, in the sum of R4,800;

8.5 the applicant and the minor children's medical aid contribution in the sum of R7,202, and subsequent increases in the premium;

8.6 the salaries of the applicant's gardener and domestic worker in the sum of R8,100; and

8.7. R5,000 to the applicant's credit card;

9. Both parties shall be equally liable for payment of all excess medical expenses in respect of the minor children which are not covered by the respondent's medical aid scheme. In the event that the applicant cannot pay her portion of the medical expenses then the respondent shall pay it on her behalf, with such payments to be considered in the divorce;

10. The parties are permitted to supplement their papers within 30 days of receiving the written recommendations from the psychologist;

11. The cost of the rule 43 application and counter-application will be costs in the divorce.

[2] The reasons for the order follow below.

Introduction

[3] This is a judgment in the Family Court. The application before me is in terms of rule 43 of the Uniform Rules of Court for interim relief and launched by Me V[...] D[...] B[...], the respondent in a counter-application and the defendant in a divorce action under the above case number. Unless otherwise indicated by the context Me V[...] D[...] B[...] is referred to in this judgment as "*the applicant*".

[4] Mr V[...] D[...] B[...] is the plaintiff in the divorce action. He is opposing the application before me and also launched the counter-application. Unless otherwise indicated by the context, he will be referred to in this judgment as "*the respondent*".

[5] The application and counter-application were launched on an urgent basis in July 2024. The parties elected not to proceed with their respective applications on an urgent basis. Consequently, I do not have to make a finding on urgency, despite the parties having dealt with it in their respective applications.

[6] The relief sought in the application and counter-application pertain to, *inter alia*, the respondent's rights of contact to the minor children, a cash contribution to the applicant, and a contribution to the applicant's legal costs.

[7] On 18 September 2024 counsel for the parties argued the application and counter-application before me. At the conclusion, I allowed the parties the opportunity to file supplementary affidavits and submissions dealing with specific amounts in their respective bank accounts that were not explained or sufficiently addressed in their respective affidavits. These supplementary affidavits and submissions were filed on 26 and 30 September 2024, respectively.

<u>The respondent's right of contact to the minor children</u>

[8] It is common cause that two children were born from the marriage between the applicant and the respondent. They are now 9 and 13 years old, respectively. Also, the applicant and the respondent have been separated since September 2022, after the respondent moved out of the matrimonial home. Since then, the applicant has been the primary caregiver of the minor children with the respondent exercising reasonable contact that include weekly sleepover contact, equal share during school

holidays, equal share on the children's birthdays, the respondent's birthday, and an equal share over Christmas and New Years and other public holidays.

[9] It is similarly common cause that the respondent instituted the divorce action on 20 June 2024 and seeks an order for, *inter alia*, the continuation of the contact regime that he has enjoyed for the past two years. The applicant instituted a counter-claim on 19 July 2024 and although she asks for an order awarding specific parental responsibilities and rights of reasonable contact between the respondent and the minor children, she does not define the nature and extent of the contact. To the allegations contained in the particulars of claim that the respondent seeks particular defined contact, she pleads that he should be afforded age-appropriate contact. The applicant does not seek to restrict the respondent's contact in any way, despite advancing his alleged habitual abuse of alcohol and cannabis as one of the reasons for the breakdown of the marriage relationship.

[10] Four days after instituting the counter-claim, the applicant launched the rule 43 application before me and seeks, *pendente lite* to limit the respondent's contact with the minor children on allegations of, *inter alia*, alcohol and cannabis abuse.

[11] In support of the application, the applicant relies on hearsay reports from the minor children concerning the respondent's alleged drinking and him leaving them alone at home, or in the care of a nanny. These reports are undated but considering a letter from the applicant's attorneys the alleged events predated the summons in the divorce action.

[12] Similarly, in support of the application, the applicant relies on a hair follicle test result from respondent on 17 July 2024. This test revealed the respondent's alcohol usage as falling within a chronic excessive category. It showed no result for cannabis usage. According to the respondent, he told the applicant that he had attended a wedding shortly before the test and that he overindulged in alcohol at this wedding. The minor children were, however, not in his care at the time. He apparently provided the applicant with the test because that was what she demanded so that he could have contact with the minor children.

[13] I note the date of the above test was two days before the applicant instituted her counter-claim in the action for a divorce. Yet, in her counter-claim the applicant was satisfied with the respondent having unrestricted age-appropriate contact with the minor children. According to the applicant she did not take issue with this because she was "…*emotionally exhausted*…" and worried about the minor children "…*who missed their father*…".

[14] The respondent denies that he has a substance problem. He admits that he drinks socially and uses cannabis oil to help him sleep at night, when the minor children are not in his care. He claims to be a fitness fanatic with a healthy liver function. In support of this he provided a copy of his recent liver function test.

[15] The respondent also provided an undertaking, pending a forensic assessment on the best interest of the children, that he would not consume alcohol and cannabis while the children are in his presence or care. Also, he would make use of the i-Sober application to provide the applicant with breathalyser test results when he collects or drops off the children, and would not introduce the minor children to any of his romantic partners.

[16] The respondent claims that the applicant launched the application with ulterior motives because it was around the time that he inquired from the minor children their view on him seeing another person romantically. The applicant denies that she launched the application with any ulterior motive. She claims she only has the best interest of the minor children at heart.

[17] I have considered all the correspondence and communications attached to the parties' respective affidavits. It appears that for almost two years the respondent enjoyed a certain contact regime with the minor children, but this was unilaterally altered by the applicant not too long after the respondent inquired from the minor children on their view on him seeing another person romantically. What followed were various allegations of alcohol and substance abuse, as well as the respondent's failure to ensure that the minor children met appointments and attend to homework while they are in his care. In answer to these allegations, the respondent claims that the applicant is abusing alcohol and prescription medication.

[18] The applicant denies that she abuses alcohol and prescription medication and offer to undergo tests, but the respondent must pay for these tests.

[19] The respondent, in his counter-application, seeks an order for the reinstatement of the contact regime which he enjoyed with the two minor children for the past two years until the applicant altered it unilaterally. He also seeks an order for the appointment of an independent psychologist to conduct a forensic assessment of the children and the parties, and to provide a written recommendation on the issues of residency and contact. The applicant recorded in her answering affidavit to the counter-application that she has consented to the appointment of a forensic psychologist, albeit that she insists that the respondent pays 100% of the costs occasioned by this assessment.

[20] With the above versions in mind, I turn to the applicable legal principles that applies to all matters concerning minor children. The principle is the best interests of the minor children. This principle is entrenched by the Constitution of the Republic of South Africa and repeated in section 7 of the Children's Act 38 of 2005 ("*the Children's Act*"). I accept that the factors set out in section 7 of the Children's Act do not exist in a vacuum, as each case is different and I must take into account the context and facts of the case in order to determine the best interests of the minor children. The court's discretion when considering the best interests of the minor children is not circumscribed in the narrow or strict sense of the word and requires no onus in the conventional sense. In *Cunningham v Pretorius* Murphy J remarked that:-[1]

> "*What is required is that the court acquires an overall impression and brings a fair mind to the facts set out by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value judgment, about what it considers will be in the best interests of the minor child*."

***** Amounts in this judgment are rounded to exclude cents.

[1] *Cunningham v Pretorius* 2008 JDR 1022 (T) at paragraph [9]

[21] In the case of *P V P*[2] the learned judges said -

> "*In determining what custody arrangement will best serve the children's interests in a case such as the present, a Court is not looking for the "perfect parent" – doubtless there is no such being. The Court's quest is to find what has been called 'the least detrimental available alternative for safeguarding the child's growth and development'.*"

[22] There is a clear dispute between the applicant and the respondent. Both parties are seeking to paint each other in the worst possible light with allegations of alcohol and substance abuse on the one hand and alcohol and prescription medication abuse on the other hand. They both claim to use, or have used, cannabis for medicinal purposes – the respondent uses the oil to assist him to sleep, and the applicant sought cannabis as a muscle relaxant for when she had back pain and tried to substitute her pain medication. They have clearly reached a stage in their relationship where they cannot communicate with one another and make decisions in the best interest of the minor children.

[23] Thus, I am of the view that it is imperative for a forensic assessment to ensue to test the veracity of these allegations through objective evidence such as psychometric assessments. Such an approach would serve the best interests of the minor children and would allay the fears of both parents. I am of the view that a forensic psychologist is best equipped to make recommendations in this regard. The parties seem to have agreed that Ms Claire O'Mahoney is appointed as forensic psychologist.

[24] The question that then remains is the interim period, pending the outcome of the forensic psychologist's investigation and written recommendations, because the parties cannot reach an amicable solution in this regard.

[25] The allegations of alleged alcohol and other substance abuse is of concern, albeit that both parties deny these respective allegations. In light of the respondent's

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[2] 2007(3) All SA 9 (SCA) at paragraph [24]

above undertakings and both parties' willingness to undergo tests gives some level of comfort in the interim.

[26] Another concern raised by the applicant is that the respondent on occasions caused the minor children to arrive late at school or not attend school at all, not do homework, not attend sport commitments, failed to personally pick the minor children up from school, and left the minor children at home alone at night. The respondent answers each of these allegations.

[27] I am of the view, to alleviate any concern regarding the minor children's school and sport activities, homework, transport, and supervision, either parent responsible for these tasks on a particular day, but not available due to work commitments, should forthwith communicate that to the other with the name and contact number of the third party that will attend to the particular task on his or her behalf.

[28] Consequently, I am of the view, pending the outcome of the forensic psychologist's investigation and written recommendations, that it is in the best interest of the minor children to continue with the established routine and contact regime that was in place when the respondent moved out of the matrimonial home more than 2 years ago. This contact regime allows for the applicant to retain the primary residence while the respondent has contact rights that include sleepovers on specific weekdays and weekends.

Interim maintenance in the form of a cash contribution

[29] It is common cause that the minor children live alone with the applicant, and she is their primary resident parent. The minor children also have special needs and need additional therapy and remedial attention. They are also both in an assisted learning school. The applicant is the parent responsible for the minor children's day-to-day care. The respondent pays, *inter alia*, the minor children's school fees and medical aid premiums, provided the applicant with a motor vehicle, pays motor vehicle insurance, pays the salaries of the applicant's gardener and nanny, and monthly pays the applicant R5,000 into her credit card account.

[30] The applicant seeks an order *pendente lite* that the respondent pay her a monthly cash amount of R100,000, and continue to keep the minor children on his medical aid scheme while paying further medical excess expenses, school fees and other related fees, the respective salaries of the gardener and the nanny, as well as the remedial education costs for the minor children.

[31] I have considered the established legal principles for a claim for maintenance *pendente lite*. As stated in *Taute v Taute* 1974 (2) SA 675 (ECD) at 676 D-H:[3]

> "*The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent upon 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."*

[32] Maintenance *pendente lite* is intended to be temporary and cannot be determined with the same degree of precision as would be possible in a trial where evidence is adduced. A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands,[4] while the quantum does not depend on the desire of the party obligated but must be determined in accordance with the requirements of the one to be supported and the ability of the one who must pay.[5]

[33] In *Botha v Botha*[6] Satchwell J held "[t]*he issue of support must be based on a contextualisation and balancing of all those factors considered to be relevant in such a manner as to do justice to both parties*."

[34] The financial disclosure form ("*FDF*") of the respective parties is therefore important. The purpose of the FDF deposed to under oath is to enable each party to properly assess their respective positions, to present argument based on a more informed position, to have an available remedy for misrepresentation or material non-disclosure, and to enable the court to make an order based on an informed

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[3] 1974 (2) SA 675 (ECD) at 676 D-H
[4] *Levin v Levin & Another* 1962 (3) SA 330 (W) at 331D
[5] *Barlow v Barlow* 1920 OPD 73
[6] *Botha v Botha* 2009 (3) SA 89 (W) at para [115]

decision.[7]

[35] The FDF states that a failure to make a “full and accurate” disclosure may result in an adverse court order. Thus, the lack of financial disclosure is a critical consideration when scrutinising a claim for maintenance.

[36] With the above well-established legal principles in mind, I turn to the applicant’s alleged income and expenses.

[37] According to the applicant, she has a recruitment business that does placements for which she receives a placement fee. Her business has, however, taken a turn for the worse and she does not expect any income for the foreseeable future. The applicant explains she has not been able to secure new business and has already retrenched all her staff. The applicant does, however, not explain the reason for the downturn in her business, the steps she has taken to facilitate new business, or even whether she has looked for alternative employment. Instead, she claims that she looks after the minor children which impacts her ability to earn an income.

[38] There is no evidence before me that the applicant did not contribute financially to the household when she and the respondent were still living together, or that the applicant is not able to earn an income.

[39] The applicant claims her income in the past year was R333,300 but she does not expect any income in the coming year. According to her, she has borrowed R700,000 for approximately 7 months of the year to meet her financial commitments and her last financial resource was a credit facility on her credit card in the amount of R30,000, which facility has now run out.

[40] The applicant claims she had savings available but utilised it all for security upgrades at her home. Consequently, she requires funds to pay the house, water and electricity, food and daily living expenses, the minor children’s remedial classes, and clothes, but have no funds to do that.

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[7] *Taute v Taute* 1974 (2) SA 675 (E) at 676 H; *TS v TS* 2018 (3) SA 572 (GJ) ; *E v E* 2019 (5) SA 566 (GJ)

[41] The respondent challenged the applicant's expenses and claims, *inter alia*, that the applicant paid for unnecessary renovations at her house and luxurious holidays. He also claims that in February 2024 the applicant had at least R1,4 million in her bank account, but failed to provide any explanation for how she utilised these funds. He concluded that the applicant's bank statements and FDF do not lend credence to her allegation regarding her alleged dire financial position.

[42] As indicated above, I allowed the applicant the opportunity to supplement her papers to explain how she utilised the R1,4 million she had in her bank account in February 2024. According to the applicant -

> [42.1] she received payment for services *in lieu* of placements effected through her company, approximately 7 months after such placements; and
>
> [42.2] once she had received the money in her account in February 2024, she transferred R400,000 to her FNB bank account to pay off debt; R100,000 to her bond account to cover arrear bond payments; R10,000 to her Discovery bank account to settle debt; and the sum of R109,836 to her father as a repayment of money he advanced her. In addition, she paid the sum of R424,552 as commission, which payments were business expenses. The balance of R411,538 she used to pay her monthly expenses for the months following. (It appears that the total amount paid by the applicant was the sum of R1,455,926.)

[43] The applicant does not provide copies of her business' financial records and financial statements, her salary advice, or her tax returns, despite the respondent's challenge to her financial situation and the lack of these supporting documents. Similarly, she does not explain why she had to pay commission to third parties in the sum of R424,552, or the nature of such commission, in circumstances where her business is to earn placement fees. Similarly, she does not explain why she repaid a loan to her father in the sum of R109,836 in circumstances where she indicated in her FDF that her father owed her R80,000.

[44] In her supplementary affidavit, the applicant explains that she used some of the above funds she had received in February 2024, (without disclosing the amount), to pay for her Zanzibar holiday with the minor children, as well as the costs incurred for her planned holiday to Thailand which she subsequently cancelled. She is awaiting the reimbursements occasioned by this cancellation. The applicant does not disclose what amount would be reimbursed, or when this reimbursement is expected.

[45] Consequently, the applicant's explanation of how she utilised the R1,4 million still leaves more questions than answers.

[46] Relevant to the applicant's expenses, she claims she pays expenses such as the monthly bond premium to her home, water and electricity charges, food, daily living expenses, medical expenses, remedial classes, therapy classes, outings and clothing, which expenses she can no longer afford. Consequently, she seeks an order that the respondent pays, in addition to what he is already paying, all her and the minor children's day-to day expenses, food and house expenses.

[47] It appears from her FDF that the applicant claims her monthly expenses are in the sum of R110,860, which amount includes those expenses paid for by the respondent in the sum of R44,500. Thus, it is not in dispute that the respondent pays the minor children's school fees, medical aid, remedial teacher, insurance premiums and the nanny and gardener, albeit the total amount he pays in this regard is in dispute. The applicant maintains that despite these payments by the respondent it does not remedy her dire financial situation at home.

[48] The respondent claims that:-

> [48.1] From 31 January 2024 to 29 June 2024 the applicant had spent on average an amount of R700 per month at liquor stores. In answer to this allegation, she explained that she also purchases her cigarettes from these stores and alcohol for her father when he visits her. Ther is no evidence as to which transactions relate to cigarettes and which to her father, or how often her father visits her; and

[48.2] The bank statements attached to the applicant's application are out of date, and/or do not correspond with various transactions which are not accounted for by the applicant.

[49] Consequently, the respondent challenges the applicant's spending as well as her actual and reasonable monthly financial requirements.

[50] In addition, the respondent claims that he does not have the financial means to meet the financial requirements claimed by the applicant. In this regard, the respondent states he is employed by a sports supplement company. He is not a statutory director of the company, but his job description is sales director. He also owns 9,79% share in another company but this does not generate an income for him.

[51] The applicant challenges the respondent's income. She claims that the respondent owns, or is a shareholder in the company he works for. In answer to this the respondent explains that the entity is owned by his sister and her husband, and he is not a shareholder. This is also confirmed in their confirmatory affidavits.

[52] In terms of the respondent's FDF he earns a net monthly salary of R984,960, ostensibly R82,080 per month. I however note from his salary advice that his net salary is R71,335. He explains he receives the following benefits from his employer, per month: -

[52.1] The use of a vehicle, which he is required to pay back on a monthly basis at a reduced rate. (Apparently, this is the motor vehicle he gave to the applicant to use);

[52.2] The use of an Amarok vehicle which is the vehicle that the respondent drives and which he is required to pay back to his employer on a monthly basis at a reduced rate;

[52.3] A petrol allowance of R5,000;

[52.4] Rental payment of his home in an amount of R42,000 per month;

[52.5] Payment of his, the applicant and the children's medical aid benefit together with gap cover;

[52.6] Payment of a life insurance policy;

[52.7] Payment of the children's school fees in the amount of R22,248, which amount the respondent requested his employer to pay and deduct from his gross salary.

[53] In note that the above benefits are not recorded in the salary advices attached to the respondent's FDF.

[54] On 17 April 2024 the respondent received R226,046. He explains this amount was from the Road Accident Fund in settlement of a claim he had after a motor vehicle accident.

[55] The applicant challenged various payments in the respondent's account that were not explained. She seeks to infer from these amounts that the respondent earns an additional income that he did not disclose. I invited the respondent to similarly file a supplementary affidavit to explain the additional sums in his bank account.

[56] In the respondent's supplementary affidavit he sets out the additional amounts he had received. The respondent explains these include payments from a Mr Crafford in respect of travel expenses he had paid for him, fuel reimbursements from his employer, repayment of a loan, a tax refund, transfers between his bank accounts, and reimbursements for flight tickets he had paid. Attached to his supplementary affidavit are various confirmatory affidavits and supporting documentation in this regard. I am satisfied that these payments do not support a finding that the respondent earns an additional income that he did not disclose.

[57] In terms of the respondent's FDF, he pays the children's expenses when they are with him, as well as an aggregated monthly amount of R62,850 for -

[57.1] the minor children's school fees, in the sum of R22,248;

[57.2] the costs of the minor children's extracurricular activities, in the sum of R3,000;

[57.3] the cost of any additional lessons that the children require from a tutor, in the sum of R12,500;

[57.4] the minor children's educational books, stationery, outings, sports and extramural, in the sum of R4,800;

[57.5] the applicant and the minor children's medical aid contribution in the sum of R7,202;

[57.6] the salaries of the applicant's gardener and domestic worker in the sum of R8,100; and

[57.7] a cash contribution of R5,000 to the applicant's credit card.

[58] The respondent recorded in his FDF his total expenditure as R186,000. This amount clearly includes those expenses paid by his employer before he receives his net salary, albeit that they are still his expenses.

[59] The applicant insist that the respondent is a man of considerable means which is evident from the numerous luxurious motor vehicles, motorbikes and a race car he drives, as well as a house at Vaal Dam with boats and skis he owns. In answer, the respondent explained that his employer owns the motor vehicles which vehicles are branded and used for marketing purposes for the company. As marketing director, the respondent drives these motor vehicles from time-to-time, during the course of his duties. The same applies to the motorbikes, the vehicle that pulls these motorbikes, and the race car at the Res Star racetrack. Relevant to the house at Vaal Dam, with a boat and skis, the respondent explained they all belong to either his employer or his brother. He added that he uses this house over weekends and pays its levies, rates and taxes in lieu of its use.

[60] Based on the above explanations from the respondent, I cannot find that the respondent lives a lavish lifestyle at the expense of the applicant and the minor children.

[61] It is established law that an applicant is entitled to reasonable maintenance *pendente lite*, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements. I, however, attached more weight to the affidavit of the respondent who evidences a willingness to implement his lawful obligations to the minor children,[8] than that of the applicant that did not make a full and frank disclosure of her income and financial position.

[62] In applying the aforesaid legal principles to the present facts, I am of the view that the applicant has not discharged the onus to show that the respondent's contributions fall short, or that he is not paying in accordance with his means.

[63] I am of the view that the respondent should continue to pay *pendente lite* those amounts he has been paying since he moved out of the matrimonial home, as recorded in his FDF. There, however, appears to be a dispute between the parties as to the precise amount the respondent is paying. Thus, for the avoidance of doubt regarding these amounts, the payments are included in the above order.

Contribution to legal costs

[64] According to the applicant she had to borrow money from her father to defend the divorce action and launch the rule 43 application. She also borrowed money from her father to buy food, for 6 months. In addition, the applicant claims that she owes her attorneys R120,000, which payment she cannot afford. Consequently, the applicant seeks an order that the respondent contributes to her legal costs in the action, in an amount of R500,000.

[65] It is established law that a claim for contribution towards costs is *sui generis* and based on the duty of support spouses owe each other. I am bound by section

[8] *Taute v Taute 1974 (2) SA 675 (E) at 676 H*

9(1) of the Constitution of the Republic of South Africa, to guarantee both parties have the right to equality before the law and the equal protection of the law.

[66] In *S v S and Another*[9] Nicolls AJ noted:

> *"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. … 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".*

[67] In *SH v MH*[10] Victor J held that it is important to emphasise that rule 43 must be interpreted and applied through the prism of the Constitution, with specific regard to the right to equality. The right to equality is at the heart of a rule 43 matter because where one party cannot afford burdensome legal costs, so she cannot make her case effectively before a court, on an equal footing with the other party. Where a party is not able to place her case effectively before court, as a result of limited resources, the right of access to justice is called into question. In fact, there is an obligation on courts to promote the constitutional rights to equal protection and benefit of the law and access to courts and that requires courts to come to the aid of spouses who are without means and to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.[11]

[68] In general, the position is that the wealth of the husband, usually the party ordered to make the payment, is not determinative of the amount ordered as the intention of a contribution is to cover the applicant's reasonable needs of preparation

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[9] 2019 (6) SA 1 (CC) at para [3]
[10] *SH v MH* 2023 (6) SA 279 (GJ) at pars 73, 81, 88 and 91
[11] *AF v MF* 2019 (6) SA 422 (WCC) at paras 39 to 41

for trial up to and including the first day of trial.[12] Consequently, parties ought to be in a position to litigate on even footing with one another. As to "*what is 'adequate' will depend on the nature of the litigation, the scale on which the husband is litigating and the scale on which she intends to litigate, with due regard being had to the husband's financial position*."[13]

[69] In support of the applicant's claim for a contribution to her legal costs, she attached a pro forma statement of account. It appears from this statement that the applicant claims R101,000 for the costs occasioned by the rule 43 application; R105,200 for preparing for the trial and attending the first day of trial; R100,000 for the costs occasioned by a psychologist; and R100,000 for the costs occasioned by a forensic auditor.

[70] From the pleadings, it appears that the parties are married out of community of property, without the accrual. There is no property claim between them, albeit that the applicant seeks to make out a claim for redistribution in terms of section 7(3) of the Divorce Act. The parties have not yet attended a pre-trial meeting and it is not clear how many witnesses will testify. Consequently, the nature of the trial pre-preparation is not evident. Included in the costs for the preparation for the trial are costs occasioned by the issuing of subpoenas. These costs are unexplained in light of the discovery process allowed for in the Uniform Rules of Court.

[71] Furthermore, the applicant claims that she owes her attorneys R120,000. The applicant does not explain how she can owe her attorneys R120,000 in circumstances where she had borrowed money from her father to pay to defend the divorce action and launch the rule 43 application. Also, the applicant has made out no case for the appointment of a forensic auditor and a psychologist, nor does she include any quotations for their services.

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[12] *Dodo v Dodo* 1990 (2) SA 77 (W) at 98; Carey v Carey 1999 (3) SA 615 (C); *Senior v Senior* 1999 (4) SA 955 (W) at para 10

[13] *Muhlmann v Muhlmann* 1984 (1) SA 413 (W) at 418G; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262H-263A; *Greenspan v Greenspan* 2000 (2) SA 283 (CPD) at 290, para 17; The essential principles in determining this issue was summarised in *Senior v Senior* 1999 (4) SA 955 (WLD) at 962 D-H

[72] It is established law that the court has a discretion whether or not to grant a cost order including an order for a cost contribution. This discretion must be exercised judicially.

[73] Save for stating that the respondent owes the applicant a duty of support by virtue of their spousal relationship, it is incumbent on the applicant to prove her expenses and that she does not have sufficient income. I am of the view that the applicant has not succeeded in doing so. Accordingly, she has failed to demonstrate why she is entitled to a cost contribution. Having failed to prove her case, the ineluctable conclusion is that she is not entitled to a contribution towards her legal costs.

[74] As a consequence, and considering all the above, I am of the view that the application for an order that the respondent contributes to the applicant's legal costs is unreasonable. Accordingly, at this stage the applicant has failed to make out a case for a contribution towards her legal costs.

Conclusion

[75] For the reasons as set out above, I make the order in paragraph 1.

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

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CaseLines. The deemed date of publication will be the date of the judgment.

Date of hearing: **18 September 2024**
Date of judgment: **15 October 2024**

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