

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 079417/2024

(1) REPORTABLE: **NO**

(2) OF INTEREST TO THE JUDGES: **NO**

(3) REVISED: **NO**

DATE: 13 December 2024

Signature:

In the matter between:

M[...] T[...] O[...]

Applicant

And

T[...] S[...]

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The applicant is the estranged husband of the respondent. He is before court by way of application in terms of Rule 43 of the Uniform Rules of Court. The respondent opposes this application and has launched a counterapplication there against.

[2] Three children were born out of the marriage which still subsists pending a divorce action, which the applicant has launched. The children are **T O** (a female child born on 04 December 2006), two boys being **S O**, (born on 15 October 2011) and **I O** (born on 11 May 2015).

[3] The applicant seeks primary care of the three children born from the marriage with specific rights of contact to be awarded to the respondent, in the alternative for a shared care regime to be implemented. The applicant makes provision for a third alternative, namely that the minor children remain in the respondent's primary care, with specific rights of contact to be awarded to him.

[4] The applicant makes specific tenders regarding the respondent and the minor children's maintenance. The maintenance tenders are tailored to the alternative care/contact scenarios referred to hereinabove.

[5] The applicant prays for the appointment of a clinical psychologist to conduct a psycho-legal evaluation of the family and to report to the court on his/her findings. The applicant prays that the cost of the psycho-legal evaluation be shared between the parties.

The respondent's counterapplication:

[6] The respondent prays for primary care of the children with specific rights of contact to be awarded to the applicant.

[7] The respondent asks for a contribution towards her and the children's maintenance from the applicant and also prays for arrears maintenance.

[8] The applicant opposes the counterapplication.

B. BACKGROUND

[9] The parties were married in terms of Islamic rites on 8 June 2001. They were subsequently married in terms of the civil law on 15 October 2001.

[10] The marital property regime of out of community of property with the exclusion of the accrual system regulates the parties' marriage.

[11] The applicant is a Chartered accountant, the respondent has a diploma in IT and dressmaking.

[12] The applicant was employed during the marriage and was also the breadwinner. The respondent was employed from time to time during the marriage and conducts her own bakery business from home for the past few years.

[13] Three minor children were born from the marriage in 2006, 2011 and 2015 respectively. The middle child has been diagnosed with ADHD.

C. ISSUES FOR DETERMINATION

[14] The crisp issues for determination in this application are:

14.1 Primary residence of the two minor children.

14.2 The necessity of the appointment of a clinical psychologist to attend to a forensic investigation into the best interests of the children relating to primary residence and contact.

14.3 Applicant's contact with the two minor children.

14.4 Applicant's entitlement to seek an order of the parties' daughter who will be turning 18 in December 2024.

14.5 Quantum of cash portion of the children's and spousal maintenance to be paid by the applicant.

14.6 The extent of the applicant's obligation to continue to make payments of specific and identified household expenses as he has always done.

14.7 Applicant's obligation to make payment of the two minor children's private school education and the soon to be major dependant child's university fees and associated costs.

14.8 Applicant's obligation to make payment of medical expenses not covered by the medical aid scheme in respect of the children and the respondent.

14.9 Payment by the applicant of arrear maintenance.

14.10 Contribution towards the respondent's legal costs.

14.11 Costs of the counterapplication.

Applicant's contentions

[15] The applicant acknowledges that the parties led a comfortable lifestyle during the subsistence of the marriage, with the minor children attending a private school, R[...] in Morningside, Sandton.

[16] Applicant received drawings from Deloitte, where he is a partner, annually ranging between R 250 000.00 and R 600 000.00.

[17] The parties were both intimately involved in the children's care during the subsistence of the marriage. The applicant however expresses a concern that the respondent pressures the minor children as she is very performance driven.

[18] The applicant then alleges that the respondent also inflicted acts of verbal and emotional abuse towards the children. He has attached transcriptions of recordings that he made to his affidavit. He says the extent of the abuse towards the children has escalated since the applicant moved out of the marital home and for that reason he now prays for primary care.

[19] The applicant alleges that his financial situation deteriorated materially when the drawings from Deloitte were decreased materially. The applicant states that he simply cannot sustain the lifestyle the parties previously led, and certain adjustments must be made. The respondent, according to the applicant, simply refuses to accept this, and she in fact expects a higher lifestyle to be sustained by the applicant.

[20] Certain adjustments were already made to the parties' financial circumstances. The respondent's BMW X3 motor vehicle was sold and replaced with a more moderate Toyota Cross Hybrid motor vehicle.

[21] The applicant submits that since separation of the parties the respondent has systematically estranged the eldest child, T O from the applicant. The respondent has now extended her 'gatekeeping tactics' to all the children.

[22] The respondent is inexplicably against the appointment of a clinical psychologist to conduct a psycho-legal evaluation as prayed for by the applicant.

D. THE LEGAL POSITION

i. The best interests of the minor children

[23] Section 7 of the Children's Act 38 of 2005 ("the Act") provides for and deals with the concept of the best interests of children. It lists at least 23 factors that must be taken into consideration in all proceedings, actions or decisions concerning a child.

[24] In *Van Deijl v Van Deijl*¹, a matter concerning custody and guardianship, it was held that in deciding on the best interests of the child, regard must be had to the following considerations: The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must

¹ 1966 (4) SA260 (R) referred to in Commentary on the Children's Act RS 9, 2018 – p9.

also be taken into account and in the case of older children their wishes in the matter cannot be ignored.

[25] *McCall v McCall*² is a case where the court was concerned with two separated parents who competed for the custody of their 12 year-old son. In the event, custody was awarded to the father because his child stated a clear preference to be placed in his father's care. The court recognized that effective communication could be seen as a prerequisite to be able to address a child's emotional and intellectual needs as contemplated in section 7(1)(c) of the Act.

ii. Maintenance pendente lite

[26] In *Taute v Taute*³ it was held that orders for maintenance that are issued pursuant to Rule 43 are intended to be interim and temporary and cannot be determined with the degree and precision and closer exactitude which is afforded by detailed evidence. It was further held that interim maintenance will be determined according to the marital standard of living of the parties, the actual and reasonable requirements of the spouse seeking the maintenance (usually the housewife), and the capacity of her husband to meet such requirements. The court concluded that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Similarly, the court found that more weight will be attached to the affidavit of a respondent who evinces willingness to implement his lawful obligations than one who is obviously, albeit on paper, seeking to evade them.⁴

iii. Contribution towards legal costs

[27] In *Dodo v Dodo*⁵ it was held that: "*The husband's duty of support includes the duty to provide the wife with costs for her litigation with her husband.*" This approach conforms with Section 9(1) of the Constitution which reads: "*Everyone is equal before the law and has the right to equal protection and benefit of the law.*"

² 1994 (3) SA201 (C).

³ 1974 (2) SA675 (E).

⁴ *Taute v Taute* at 676H.

⁵ 1990 (2) SA 77 (WLD) at 96F.

[28] In the matter of *Van Rippen v Van Rippen*⁶ it was stated that the quantum to pay contribution to costs which a spouse might be ordered to pay lies within the discretion of the presiding officer considering the circumstances of the matter, the financial positions of the parties and other issues involved. The court emphasised the importance of enabling the financially weaker spouse to present her case adequately. The court laid emphasis on fairness and the equitable treatment of vulnerable parties in divorce proceedings.

E. DISCUSSION

[29] The parties pending divorce is mired in bitterness and spite, seemingly on both sides, sadly and inevitably catching the children in the middle of it all. A close dispassionate scrutiny of the disputes between the parties appears to me that the parties could benefit from the intercession of a good mediator in preparation for the divorce hearing.

[30] The applicant conveys a willingness to discharge his obligations towards his children from his submissions.

[31] The difficulty arises as regards applicant's prayer for exclusive primary residence of the two minor children. No case is made for such a drastic departure from the norm. Having regard to the legal authorities, a case has to be made for the court to depart from the maternal preference rule.

[32] The oldest child is on the cusp of the age of legal majority and can decide for herself which parent to primarily reside with, practical sense cannot exclude the need for her to be nurtured and guided by her mother, with reasonable contact with her father. Her decisions in this respect should be respected.

⁶ 1949 (4) SA 632.

[33] It is undesirable to uproot the minor children from their established routine and schooling environment due to the acrimony between their parents. Were this to eventuate, it would be a sad day indeed.

[34] As regards spousal maintenance pending the divorce, the facts are self-expressing, having regard to the earning power of the respective parties and their history of being a housewife on the part of the respondent as compared to the applicant's station in life as a driven high-level professional.

[35] Lastly but not least is the issue of contribution by the applicant towards the legal costs of the respondent. That there is a disparity in the parties' earnings can hardly be denied. This is an apparent inequality of arms that can only be mitigated by an order for contribution.⁷

[36] The only difficulty is the quantification of the said contribution. The respondent has submitted proof of payment for legal costs of R30 000,00 and R80 000,00 in support of her claim for legal expenses.⁸

[37] The fact that the respondent never worked in a meaningful way but applied herself to being a home builder and carer of the children cannot be held against her. The party praying for a contribution towards legal costs should be enabled to conduct her litigation against her spouse on an equal basis. In *BJM v WRM*⁹ the court took into consideration all these facts and the standard of living which the parties had become accustomed to in awarding a considerable amount as contribution for legal costs.

[38] Having regard to the interim nature of Rule 43 proceedings and the urgency that attend this matter, the court has considered the application and counterapplication in a holistic manner and comes to the outcome that eventually follows hereunder.

⁷ Caryl v Caryl 1999 (3) SA 615 (C).

⁸ Annexure "AA7".

⁹ (Case number: 9405/2022) [2023] ZAGPJHC 401 (24 April 2023).

[39] The parties have bandied allegations of abuse against one another and of the children. The applicant seeks an order appointing a clinical psychologist to investigate affairs at the marital house. Due to the urgency of the matter, and the overtures made for a meeting with the Deputy Judge President mid-stream while judgment was reserved, such an order would only serve to further delay the conclusion of this interlocutory application. I will consequently defer to the court hearing the divorce action to decide on the necessity of same.

[40] In the final analysis, the court has taken into account the amount of the contribution and the maintenance the respondent is seeking as well as the application and counterapplication in their totality, it is without doubt clear that the respondent has established a real and pressing need for the maintenance of herself and the children as well as contribution towards litigation costs.

[41] The following order is accordingly made:

1. The children **S O**, a son born 15 October 2011, and **I O**, a son born 11 May 2015, shall primary reside with the respondent. The applicant shall exercise contact with the two children subject to their religious, educational, extra mural and social activities as follows: —

1.1 Three weekends a month, from Friday afternoon to Sunday at 17h00, the applicant shall collect the children and return them to the respondent's residence;

1.2 Half of all long and short school holidays;

1.3 Alternate mid-term breaks, public holidays and long weekends;

1.4 On the applicant's birthday;

1.5 Eid shall alternate between the parties;

1.6 On Father's Day;

1.7 Half of the available time on the children's respective birthdays;

1.8 Daily telephonic/other electronic/audio-visual contact between 18h00 and 19h00;

1.9 Additional contact as agreed to by the parties.

2. The applicant, M[...] T[...] O[...] with identity number 7[...], shall contribute towards the maintenance of the respondent and the parties' 3 (three) children, *pendente lite*, as follows:

2.1 R62 849,00 (Sixty two thousand eight hundred and forty-nine Rand)) per month, payable in advance into a bank account designated by the respondent, *pro rata* on the date of this order and all subsequent payments being due on or before the first day of each and every succeeding month and which amount shall escalate annually on the anniversary date of the first of such payments in accordance with the percentage rate increase in the Consumer Price Index based on the latest figures available as published by the Department of Statistics or its equivalent or its successor;

2.2 Payment of 100% of the costs relating to the private school education of the two male children at R[...] School and in respect of the female child's university or tertiary educational institutions at an institution of her choice, payable directly to the relevant educational institution. These costs shall include but not limited to:

2.2.1 tuition fees, special levies and related educational expenses;

2.2.2 extramural activities both in and out of school or university and/or tertiary educational institutions and equipment and outfitting necessary for such extramural activities;

2.2.3 sporting activities both in and out of school or university and/or tertiary educational institutions and equipment and outfitting necessary for such sporting activities. Tournament and tour fees- and such associated costs;

2.2.4 school uniforms, books and stationery;

2.2.5 school functions, tours and outings;

2.2.6 transportation costs;

2.2.7 requisite computer equipment and computer software, including tablets and/or iPads as required by the educational institution.

2.3 Payment of 100% of the costs associated with the respondent and children being registered as dependent beneficiaries of a comprehensive medical aid scheme and 100% payment of all medical costs, which costs are payable on demand into a bank account designated by the respondent, which costs shall include but not be limited to:

2.3.1 any excess medical or health related expenses not paid for by the medical aid scheme;

2.3.2 hospitalisation and/or pharmaceutical, consultative, dental, hospital, surgical, ophthalmic, optometric (including the costs of spectacles and contact lenses), chiropractic, orthodontic, homeopathic, dermatological expenses;

2.3.3 remedial therapy, speech therapy, hearing therapy, occupational therapy, physiotherapy, psychotherapy, psychological and psychiatric therapy not comprehensively indemnified by the medical aid scheme.

2.4 The applicant shall continue to make monthly payment of the following expenses, directly to the relevant service providers: —

2.4.1 Mortgage bond instalments on the Waterfall matrimonial home;

2.4.2 Rates, water and electricity of the Waterfall matrimonial home;

2.4.3 Levies of the Waterfall matrimonial home;

2.4.4 Insurance of building and household content in respect of the Waterfall matrimonial home;

2.4.5 Respondent's vehicle insurance and tracker device subscription;

2.4.6 Respondent's vehicle maintenance, vehicle licensing and tyres;

2.4.7 Respondent's cellular phone;

2.4.8 **T O's** cellular phone;

2.4.9 Children's therapy sessions and life coaching;

2.4.10 Respondent's and **T O's** gym membership;

2.4.11 Tutoring for children;

2.4.12 Extra mural sports for children, inclusive of cricket coaching, cricket tournaments, karate, swimming and soccer, competition fees of all sports; and Madrassah fees for children.

2.5 The applicant shall within 7 (seven) days of this order reimburse the respondent of any and all expenses as referred to in paragraph 2.4 above, which she has already made payment of on behalf of herself and the children.

2.6 The applicant shall pay a contribution towards the legal costs of the respondent in the amount of R300 000,00 (three hundred thousand Rand),

into the respondent's attorneys trust account, payment to be made within 7 days of this order.

3. The costs of this application and counterapplication to be in the divorce.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 31/10/2024

Date of Judgment: 13/12/2024

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 13 December 2024.