


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 127136/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
11 June 2025	
DATE	SIGNATURE

In the matter between:

S Z M (born N)

Applicant

and

M N M

Respondent

JUDGMENT

DOMINGO, AJ

Introduction

[1] The applicant (wife) and respondent (husband) were cited in court papers by their full names. There are minor children involved in this proceeding and in terms of section 28 of the Constitution of the Republic of South Africa, Act 108 of 1996 [Constitution] the interests of minor children must be protected, including in

divorce proceedings, accordingly, it is now standard practice that where children are involved the parties and children will be referred to by their initials only.

- [2] The applicant approached this court in terms of Rule 43 of the Uniform Court Rules, for interim relief pending the finalisation of the divorce proceedings between the parties. This is an opposed Rule 43 application, in which the applicant seeks interim relief for spousal maintenance, child maintenance for three children (only one of which was born from the marriage), care, contact and guardianship arrangements and contribution to legal costs.
- [3] On the 18 February 2025, the applicant's Rule 43 application was postponed to to provide leave in terms of Uniform Rule 43(5) for the filing of the applicant's supplementary affidavit and for the respondent to file his supplementary opposing affidavit within five days of the court order. The court also ordered the respondent to pay maintenance *pendente lite* for the minor child born of the marriage in an amount of R2 500.00 (Two Thousand Five Hundred Rand) per month on or before the 25th day of February subject to reconsideration by the Judge hearing the matter on the next hearing date.
- [4] The respondent seeks access and contact with the minor child born of the marriage.

Background

- [5] The parties married each other in terms of Customary Law on 1 July 2022 and the marriage was celebrated on 24 September 2022. However, on the 13 February 2023 the parties entered into an antenuptial contract and the parties registered their civil marriage on 21 February 2023. On attendance at court both parties' counsel acknowledged that the parties recognised their marriage as a civil marriage out of community of property with the accrual system.
- [6] The applicant instituted the divorce action between the parties, by serving the divorce combined summons on the respondent on 8 November 2024. The respondent has filed a notice of intention to defend and also filed a plea and counterclaim to the divorce.

- [7] One child was born from the marriage, and it is submitted by the applicant that she brought with her two children from her previous relationship. It is submitted by the applicant that the parties agreed to form a blended family in terms of the customary marriage, it was negotiated and agreed between the families, that the respondent would marry the applicant together with her two children born of a previous relationship as it is custom in terms of the Zulu Culture, customs and traditions. The applicant also provided this court with a whatsapp communication where the applicant claims the communication further provides evidence that the respondent agreed to a blended family. The respondent averred that he had not agreed to form a blended family.
- [8] The minor child born of the marriage is N Z M (female, presently 2 years old). The two minor children from the applicant's previous relationship are E I N, (female, presently 15 years old) and L P N (male, presently 11 years old).

Issues for determination and relief sought

- [9] The applicant seeks the following relief:
- 9.1 The applicant seeks interim relief in regard to interim contact, care, and guardianship of the minor children and that the minor children shall reside with the applicant.
 - 9.2 The respondent shall have reasonable and regular physical and telephonic contact with the minor children.
 - 9.3 The respondent be ordered to pay maintenance *pendente lite* in the amount of R6 000.00 (Six Thousand Rand) per month, for child maintenance, per minor child, in favour of the children.
 - 9.4 The respondent is ordered to pay maintenance *pendente lite* in the amount of R14 000.00 (Fourteen Thousand Rand) per month, for spousal maintenance in favour of the applicant.
 - 9.5 The respondent be ordered to pay all the applicant's and minor children's medical expenses not covered by the applicant's medical aid.

- 9.6 The respondent be ordered to make a contribution towards the applicant's legal costs in the amount of R200 000.00 (Two Hundred Thousand Rand) payable to the applicant's legal representative of record by way of 10 (ten) equal monthly instalments.
- 9.7 The respondent be liable for the legal costs of this application only if opposed.

Contact, care, guardianship and maintenance of the minor children

(a) Applicant and respondent's submissions

- [10] At the time of the hearing, the parties were still awaiting the Family Advocate's report. The applicant submitted that she had no issue with the respondent having regular contact with and access to the minor child, N Z M as long as it would be in the best interest of the minor child.
- [11] The respondent submitted that he had not seen the minor child, his daughter in five (5) months, except for the time he was called for an interview with the Family Advocate, which was an hour, and he could not spend time with his daughter since they were busy with the Family Advocate interview. The respondent averred that he has made a lot of effort to be a responsible father to his daughter, but the applicant has refused him access and contact to his daughter, for example, on the respondent's birthday, he was told that he could only call his daughter between 12h00 and 13h00. He had requested time to spend with his daughter on his birthday on 6 December 2024, which was denied.
- [12] The applicant submitted that the respondent made it clear that, he did not want a relationship with the two children E I N and L P N, from the applicant's previous relationship. The applicant further submitted that she cannot force the respondent to continue to have a relationship with the two minor children, which she called his stepchildren, and this had already been explained to the two minor children. The applicant submitted that the Family Advocate's report and recommendations in respect of this matter is still awaited.

- [13] After the hearing, the applicant's counsel submitted the Family Advocate's report and recommendations on the 12 May 2025. The report only dealt with the minor child born of the marriage and not the two minor children born from the applicant's previous relationship as noted from the report the request made to the Office of the Family Advocate was only in respect of the minor child born of the marriage.
- [14] In regard to the minor child born of the marriage, the family advocate recommended that both the applicant and respondent retain full parental responsibilities and rights with regard to care of the minor child, as contemplated in section 18(2)(a) of the Children's Act 38 of 2005 [Children's Act]. The parental responsibilities and rights with regard to the guardianship of the minor child as contemplated in section 18(2)(c) and 18(3) of the Children's Act, be awarded to both parties jointly. The residence of the minor child be awarded to the applicant. The specific parental responsibilities and rights with regard to contact with the minor child as contemplated in section 18(2)(b) of the Children's Act be awarded to the respondent, in a phased in manner in accordance with the yearly age of the minor child.
- [15] As regards, the parties' child born of the marriage, the applicant averred that the respondent made it very clear that he would be 100 percent responsible for the minor child's maintenance, this was evidenced by a WhatsApp communication between the parties.
- [16] The applicant submitted that the respondent in his opposing affidavit pleaded that he pays R2 500.00 for the minor child's maintenance and R2 000.00 for family support, without providing supporting documentation. Furthermore, the applicant submitted that the respondent claimed to pay R2 500.00 for the minor child's baby food and R1 000.00 for medication (excess) but has also not provided any supporting documents.
- [17] The respondent submitted that he denies any legal obligation of financial support to the two minor children from the applicant's previous relationship. It is further submitted by the respondent, that he is not legally bound to support the two minor children, as he has not legally adopted the children, he has never been a legal

guardian to the children, their biological father is still alive and their biological father has not waived his parental rights over his children.

[18] It is submitted by the respondent, that he has always known about the two minor children, but he has never been involved in their financial support, the children had always lived with their maternal grandmother in Kwa-Zulu Natal, until December 2023 when the applicant brought them to their matrimonial home under the pretence that they were visiting for the festive holidays, However, the children never left thereafter. The respondent also submitted that the children at some point in time also lived with their biological father.

[19] The respondent alleges that the applicant never discussed the two minor children's stay with the respondent, and this had in fact created more arguments between the parties. It is further submitted by the respondent that the applicant deliberately imposed the children onto the respondent, which created an increased financial burden on an already constrained financial situation in their household. It is submitted by the respondent that he only lived with the children for ten (10) months, and now he is expected to support them. The respondent averred that during the two minor children's stay at the matrimonial home, he provided essentials for the household and if the children benefitted from that it cannot be perpetual, when circumstances have changed and he is no longer living with them, or they are no longer staying in the same household. It is submitted by the respondent that the applicant should seek maintenance from the two minor children's biological father; the father of the two minor children is very capable of supporting the children as he has a viable business in KwaZulu Natal.

[20] It is submitted by the applicant that the respondent assumed an *in loco parentis* role of the two minor children; the respondent provided financial support, presented himself as responsible for the children to the blended family and the community, and had been actively involved in their lives, including moving one of them to a private school, and spoiling them with luxury which they had become accustomed with. The applicant further submitted that the two minor children were not receiving any maintenance from their biological father, because the respondent made it clear that, he did not want the applicant to pursue

maintenance for the two minor children from their biological father. The applicant contended that the respondent thus, created a reasonable expectation of continued financial and emotional support to all the minor children which was abruptly terminated when he vacated the matrimonial home leaving the applicant and the children destitute.

[21] The applicant's counsel directed this court to the case of *N.M v B.M and Others*¹ where the court considered the concept of the reliance on representations made by a stepparent and found that, the idea that a stepparent's actions and commitments during the marriage can create expectations and obligations that may persist after separation. The court interpreted section 28(1)(b) of the Constitution to include extending the right to parental care to stepparents who have assumed an *in loco parentis* role. A more interventionist approach is required from courts, as it is not in the best interest of children for a stepparent to abruptly abandon them when the marriage ends and there are pending divorce proceedings.

[22] In the present matter the applicant submitted that the respondent unprovoked, arranged for the applicant's two children from the previous marriage to be brought to Pretoria from KwaZulu Natal in November 2023, to come live with them and form a blended family. The applicant has submitted that the respondent on the 26 July 2024, transferred an amount of R1 500 from the respondent's bank account to the applicant's bank account for the payment of one of the minor children's (L P N) school fees. Thus, the applicant submitted that the respondent assumed an *in loco parentis* role in respect of the applicant's minor children and that pending the determination of the divorce, the respondent must be ordered to pay interim maintenance for the minor children as he created this reasonable expectation.

[23] It is submitted by the respondent that he admits being legally responsible for N Z M, as he is the biological father of the minor child but denies any parental responsibilities and rights in respect of the applicant's two minor children. Since the respondent is the biological father of the minor child, it is submitted by the

¹ (1138/2024) [2024] ZAWCHC 254 (11 September 2024).

respondent, that he seeks the courts assistance in obtaining access and contact with the minor child, so that he can exercise his parental responsibilities and rights towards the minor child in terms of section 18(2) of the Children's Act.

[24] To this effect, the respondent submitted that he is already paying R2 500.00 towards the maintenance of the minor child, N Z M. The respondent submitted that he has also been buying essential items for the minor child, but the applicant contended that these items are irrelevant and would have the respondent rather send her money and she buys the items for the minor child. It is further submitted by the respondent that he is also paying for the minor child's medical aid and has undertaken to pay for the minor child's day care and transport based on affordability.

[25] It is submitted by the respondent that he is willing to contribute R1 000.00 for the minor child's, portion of accommodation.

Spousal maintenance

(a) Applicant and respondent's submissions

[26] The applicant submitted that at all material times during the subsistence of the parties' marriage, the applicant was a housewife and financially dependent on the respondent. The applicant further submitted that the respondent instructed her to devote her time to the general upkeep of their common household and raising and taking care of the children.

[27] It is submitted by the respondent that the applicant was employed at OUTsurance as a call centre agent. She resigned in July 2022, realising that she was facing dismissal charges. While the applicant submitted that one of the reasons she resigned was due to health issues related to a miscarriage. The respondent further submitted that the applicant is currently employed by an international company. The applicant maintained that she is unemployed.

[28] The respondent denied that the applicant needs any financial support from him in the form of spousal maintenance, on the basis that the applicant can sustain

herself and furthermore, it is submitted by the respondent that he cannot afford to pay the applicant R14 000.00 spousal maintenance.

- [29] It is submitted by the applicant that the respondent abruptly abandoned the applicant in October 2024 on his own volition and has never given the applicant any financial support for the minor child who he claims to be 100 percent responsible for.
- [30] It is submitted by the respondent, that he did not abandon the family home, it is averred by the respondent that the applicant served the respondent with an application for a domestic violence protection order, where the respondent was called upon to answer for the domestic violence that the applicant claimed against the respondent.
- [31] The respondent averred that to avoid entrapment by the applicant, as it had become clear that she was vindictive, he found it necessary to vacate the matrimonial home. As a result, it is submitted by the respondent, that he had to find alternative accommodation and upon that he then terminated his lease agreement for the rent of the matrimonial home, as he could not afford paying rent for two accommodations. Subsequent to this, the respondent submitted that the applicant then served him with divorce summons, this clearly indicated to him that there was no longer a healthy marriage between them, and the environment was hostile which necessitated the respondent to leave the matrimonial home.
- [32] Thus, it is averred by the applicant that with the termination of the rental agreement, the applicant and the three minor children have been left destitute, as they are unable to pay the rental. Since the rental contract has been terminated by the respondent, the applicant and the children have been requested to vacate the rental property. It is submitted by the applicant that the rental agent also offered to pay for the storage of the applicant's movables should the applicant elect to vacate the premises. The applicant contends that the rental agent is acting on behalf of the instructions of the respondent.
- [33] It is submitted by the respondent that through this application, the applicant believes that the respondent should maintain or continue to pay the rent of the

matrimonial home. Whereas, upon the termination of the lease, the respondent was no longer liable or responsible for payment of that rental.

[34] The respondent has submitted that the applicant has been advised to either contribute to paying the rent or vacate the rental property, but she has insisted on staying there, knowing very well that she cannot afford the accommodation and this is the same position that the respondent is currently in, he cannot afford to pay that rental.

[35] It is submitted by the applicant that the respondent was responsible for the following monthly payments:

- 35.1 Rent in the amount of R10 000.00 per month.
- 35.2 Water, sanitation and electricity for the rental property in the amount of R2 000.00 per month.
- 35.3 Motor vehicle instalment in the amount of R4 149.31 per month.
- 35.4 Personal loan instalment with FNB in the amount of R1 176.78 per month.
- 35.5 Medical Aid premiums with Discovery in the amount of R2 854.00 per month.
- 35.6 Motor vehicle insurance in the amount of R1 600.00 per month.
- 35.7 Life Cover with FNB in the amount of R254.53 per month.
- 35.8 Hospital Plan with FNB in the amount of R150.50 per month.
- 35.9 Funeral cover with OUTsurance in the amount of R600.00 per month.
- 35.10 A monthly allowance in the amount of R3 500.00 per month.
- 35.11 Car tracker with Netstar in the amount of R200.00 per month.
- 35.12 Groceries in the amount of R4 500 per month.
- 35.13 Minor children's school fees in the amount of R3 500 per month per child.

- [36] As such, the applicant contended that the respondent should be ordered to continue to pay for the household expenses and maintenance for the applicant and the three minor children until such time as the applicant is self-sufficient.
- [37] It is submitted by the applicant drawing on the respondent's bank statements that he provided the applicant a monthly allowance in August 2024 of R3 500.00 and paid her expenses in an amount of R16 947.00. In September 2024, the respondent provided the applicant a monthly allowance and paid her expenses which amounted to R25, 070, 00, her expenses for the month totalled R15 758.60. While in October 2024, the respondent provided the applicant with a monthly allowance of R2 800.00 and paid her expenses which totalled R9 105, 30.
- [38] The respondent conceded in his answering affidavit that he had been paying the essential household expenses as a requirement of subsistence for their daily living. He contended that the loans, medical aid premiums, life cover, the funeral cover, the hospital plans, and the school fees are expenses that were acquired by the applicant at the time when she was employed or with the assistance of her mother. The respondent also averred that the expense for groceries is exaggerated by the applicant, as he would spend approximately R2 000.00 per month for the entire household.
- [39] The respondent averred that the applicant has made many unreasonable financial demands, all in the name of her saying that she is unemployed and that the respondent promised to financially take care of her and her children. The respondent further averred that the applicant has not disclosed to this court that she has some source of income evidenced by her bank accounts, and therefore she can sustain herself.
- [40] The applicant contended that he never agreed to paying the school fees of the two minor children born of the applicant's previous relationship, as a result he refused to enrol the children into any school, it submitted by the respondent that the applicant and her mother eventually registered the children at the school and agreed to payment terms with the school. The applicant also submitted that at

no point during the two minor children's stay at the matrimonial home did he purchase any luxury items for the children.

[41] It is averred by the respondent that the applicant is insensitive to his health condition (the applicant has chronic hypertension, chronic renal failure and anaemia of chronic disease), which causes the respondent to attend dialysis treatment three times a week, and he also takes oral medication daily). The respondent submitted that he is deeply affected by this condition, to the point that he cannot perform in accordance with what is expected of him at work, he has been on disability insurance from his employment (OUTsurance), which has reduced his salary and his earning capacity. The respondent submitted that his disability insurance will be subject to review in May 2025, to which there is a chance that the employer might not renew the disability salary, and this is the money that the respondent uses to pay for his treatment and medication.

[42] It is submitted by the respondent that he supplements his income by operating as a traditional healer. He at times sells herbal medication and also treats people traditionally, to which he submitted he does not make much from, but this income keeps him afloat on a month-to month basis.

[43] It is averred by the respondent that the applicant wants to exploit him financially, for all that he earns. It is submitted by the respondent that the applicant was employed at OUTsurance before she resigned in July 2022. The applicant is a highly skilled individual, who is capable of earning an income. It is further submitted by the respondent that the applicant is healthy, full bodied, and abled person, with full mental capacity, who claims to be unemployed to exploit the respondent's situation, to the point where the applicant is claiming that the respondent pay for the maintenance of her two minor children that is not biologically the respondent's children. It is submitted by the respondent that the applicant is self-sufficient and can support herself and she should also pay her own legal fees as arranged. Furthermore, the applicant should find affordable accommodation for herself and the children.

Contribution to Legal Costs

(a) Applicant and respondent's submissions

- [44] It is submitted by the applicant, that she sought to obtain legal assistance from the Legal Aid Offices and was told that, she will have to complete a form in order to pass the means test and wait for the outcome which may take weeks to process due to the long list of applications for free legal assistance. The applicant further submitted that she was told that there is no guarantee that even if she passes the means test, that there may be no immediate help for her as Legal Aid is understaffed and the availability of lawyers is limited. Therefore, the applicant submitted that she had no choice but to seek private legal representation to assist her with this matter, and she made arrangements to pay her legal costs in instalments of R1 500.00 per month. To date she has not made any payments, it is submitted by the applicant that she hopes she will be able to obtain assistance from friends and family as she could not pay the required legal fee deposit.
- [45] It is averred by the applicant that the importance of equality of arms in divorce litigation should not be underestimated especially where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse, may be forced to settle for less than that to what she is legally entitled to, simply because she cannot afford to go all the way to trial. It is submitted by the applicant, that her case is no different, and it is further submitted by the applicant that the respondent controls the purse strings of the parties' finance, he has been able to deploy financial resources in the service of his legal action and has since the commencement of the action and this present application, paid his attorney R60 000.00.
- [46] It is submitted by the applicant that she has no-one to assist her to pay her legal costs which keeps mounting as long as the legal action proceeds. The applicant further submitted that this court has an obligation to promote and safeguard the constitutional rights to equal protection and benefit of the law² and access to the court³; it requires that courts come to the aid of spouses who are without means to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.

² See section 9(1) of the Constitution.

³ Section 34 of the Constitution.

[47] The applicant directed the court to the case of *Van Ripken v Van Ripken*⁴ where the court articulated the guiding principle to the exercise of that discretion as follows:

"[T]he Court, should, I think, have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the Court."

[48] The applicant submitted that her right to dignity so far has been impacted, as she has been deprived of the necessary means to litigate against her husband in the pending divorce action; she may be forced to settle for less and/or walk out with nothing. In approaching the question of an appropriate contribution towards the applicant's legal costs, the applicant implored the court to follow the approach in *Zaduck v Zaduck*⁵ where the court declined to follow the rule that a contribution to costs should not cover all the wife's costs; the court stated:

"[T]he correct approach is to endeavour or ascertain in the first instance the amount of money which the applicant will have to pay by way of costs in order to present her case adequately. If she herself is unable to contribute at all to her costs, then it seems to me to follow that the respondent husband must contribute the whole amount required. I see no validity in the contention that in those circumstances he should only be required to contribute part of the amount involved."

[49] It is submitted by the applicant that the contribution to legal costs was calculated considering the rate at which the main divorce action is going, if the action continues for a long period of time, the applicant may find herself without legal representation.

[50] The respondent submitted that the applicant is the instigator of all the legal proceedings. She started with the protection order, which was served on the respondent on 21 October 2024. The respondent was then served with the divorce summons on the 11 November 2024, and then he was served with the Rule 43 application on 26 November 2024. All these legal proceedings are

⁴ 1949 (4) SA 634 (C) at para 37.

⁵ 1966 (1) SA 78 (R) at 81 A-B.

running simultaneously, with the application for the protection order being dismissed with costs, as the applicant did not appear in court for that matter, along with her legal representatives. In turn, the respondent submitted that he had to appear in the domestic violence matter with his legal representatives. Furthermore, the applicant filed for a Rule 43 application, which was postponed, due to the applicant's non-compliance with the Rule 43, rules and directives of court; the applicant filed a replying affidavit, in the name of a supplementary affidavit, the court then postponed the matter to allow the respondent to respond to the the issues raised by the applicant in her supplementary affidavit.

- [51] The respondent has submitted that the applicant is claiming a legal cost contribution fee of R200 000.00, there is no information where these figures come from, the rates of the legal representative, and there is no pro-forma invoice to the suggested figure. The respondent further submitted that he is finding it hard to pay his own legal fees which are less that the applicant's. It is averred by the respondent that if the applicant cannot afford her legal fees, then she should find a legal representative she can afford.

Financial disclosure

(a) Applicant and respondent's submissions

- [52] The applicant directed the court to the following in order to determine the respondent's financial position. The respondent is a businessman and the sole director of a company. Apart from being a director of a company the respondent is also gainfully employed by OUTsurance and is on disability. It is submitted by the applicant that the respondent paid all the domestic expenses by transferring funds to the applicant's bank account, and this is evidenced by the amounts reflected in the applicant's bank statements.
- [53] The applicant directed the court to the transactions of the respondent's disclosed bank statements as attached to his financial disclosure forms and some later discovered per reply in terms of a Rule 35 Notice. The applicant created an excel spreadsheet for ease of reference to deal with the respondent's monthly income and expenditure as extracted from the bank statements.

- [54] It is submitted by the applicant that for the month of August 2024, the respondent's combined income from his business and OUTsurance salary was R160 160.20. The respondent's household expenses for the month of August 2024, paid for by the respondent was R46 149.39.
- [55] It is submitted by the applicant that for the month of September 2024, the respondent's combined income from his business and OUTsurance salary was R189 460.29. The respondent's household expenses it is submitted by the applicant amounted to R46 149.39.
- [56] It is further submitted by the applicant that the respondent's bank account shows that he was responsible for the household expenses inclusive of the applicant's financial needs (see paragraph 37 above).
- [57] The applicant averred that the above-mentioned figures does not reflect the true and accurate figures of the respondent's income and expenditure, because the respondent on a social media platform claimed to be transacting in cash to avoid SARS. The respondent submitted that the SARS social media posting was made in the context of him responding to someone's comments and it was not related to his own financial dealings.
- [58] The respondent has alleged that the applicant is employed by an international company and is involved in a business with a friend. The applicant submitted that, "he who alleges must prove."⁶ The respondent has made these allegations without tendering any proof thereof.
- [59] The respondent submitted that his chronic illness has resulted in him having been granted a disability grant from his employer which allows him to earn R16 612.36 monthly, which will be reviewed in May 2025. Regardless, of his disability payment the respondent averred that it is still impossible for him to meet the financial demands of spousal support. The respondent has submitted that at the end of each month his expenses exceed his income.
- [60] The respondent averred that the applicant has not managed her finances very well and has contributed to her own financial struggles, this she did by the

⁶ See *S v Mmaki and Others* (13/2017) [2017] ZAFSHC 93 (20 June 2017) at para 20.

countless loans she took out without consulting the respondent. He further averred that when the applicant resigned from her previous work she cashed out all her benefits including her provident/pension fund and she never disclosed to the respondent what she did with the funds as she did not contribute to the upkeep of the household.

Costs

[61] It is submitted by the applicant that the respondent has opposed the application, as such an appropriate punitive costs order is warranted. The applicant has requested a cost order on a party and party scale C.

[62] It is submitted by the applicant that Rule 41A 9(b) of the Uniform Court Rules, mentions that one possible consequence for a party who unreasonably refuses the referral of the matter to mediation is “costs of the action or application.” As a result, if the matter is not referred to mediation and the court finds that the costs incurred could have been avoided had the parties referred the matter to mediation, the court may choose not to award costs to the party which refused to refer the matter to mediation. The applicant directed the court to the case of *Koetsioe and Others v Minister of Defence and Military Veterans*⁷ where it was stated:

“In my view, it is clear that this matter could have (and still can) benefit from mediation. The blunt refusal by the applicants to even consider, let alone attempt it is, in the circumstances of the case, which include their own breach of their undertaking, so disconcerting, that I shall reflect upon it when considering the issue of costs as this court is entitled to do in terms of Rule 41 A(9)(b).”

[63] The applicant submitted that she invited the respondent to rather have this matter mediated and the respondent refused stating that, “*the issues dealt with in a Rule 43 application are delicate and will need the court to adjudicate upon them.*” It is averred by the applicant that issues such as contact and access to the minor child, N Z M could have easily have been dealt with *inter parties* through mediation long before this matter made it way to this court’s roll as the

⁷ [2021] ZAGPPHC 203 (6 April 2021) at para 6.5.

respondent had already accepted 100 percent responsibility towards the minor child's maintenance and accommodation.

[64] It is submitted by the respondent that previously, costs of this application were reserved on the day of hearing this application. The respondent prays for the cost of this application to be awarded to him, including the costs for the postponement of the 18 February 2025 application which was occasioned by the applicant.

Discussion

[65] In *M G M v M J M*⁸ the court held:

"The purpose of Rule 43 applications is to ensure that no party is substantially prejudiced and lacks resources to maintain a reasonable standard of living enjoyed by the parties during the marriage when pursuing their cases in the main divorce action. Courts are required to consider the applicant's reasonable needs and the respondent's ability to meet them."

(a) Contact, care, guardianship and maintenance of the minor child

[66] The parties are in agreement that the primary residence of the minor child born of the marriage should be awarded to the applicant. The applicant has also submitted that she has no problem with the respondent having regular contact with the minor child, as long as it is in the best interests of the child. This aligns with the recommendations of the Family Advocate that both parties retain full parental responsibilities and rights with regard to care and guardianship of the minor child as set out in section 18(2)(a) of the Children's Act. I am in agreement that this will be in the best interest of the minor child.

[67] The Family Advocate's recommendations provide for age related phased in contact of the minor child with the father which in my view is in the best interest of the minor child taking into account the age of the minor child.

[68] Regarding maintenance, the respondent has submitted that he is already paying R2 500.00 per month towards the minor child, this is in accordance with the *pendente lite* maintenance order granted on 18 February 2025 and he is willing

⁸ [2023] ZAGPJHC 405 at para 9.

to pay an extra R1 000.00 towards the minor child's housing accommodation costs. In the circumstance, I have decided on a *pendente lite* maintenance payment amount of R3 500.00 per month for the minor child, N Z M.

(b) Blended Family

[69] It is in dispute whether the parties agreed on a blended family, that is the respondent stepping in and taking on full parental responsibilities and rights for the two minor children. The applicant submitted that the parties agreed to form a blended family in terms of the customary marriage negotiations; it was negotiated and agreed between the families that the respondent would marry the applicant together with her children born from a previous relationship as it is custom to do so in terms of Zulu culture. The applicant has not provided the court with any confirmatory affidavits from any of the family members who negotiated the terms of the customary marriage, which could corroborate the applicant's submission that the respondent agreed to marry her with her children as is custom in Zulu culture. The marriage certificate presented to this court is a civil marriage and not a customary marriage. It is common cause between the parties that the marriage before this court is a civil marriage, out of community of property with accrual. While I am mindful of the role of culture and custom in communities, this court is precluded from taking into account negotiations that were made during a customary marriage ceremony when the parties instead opted to register a civil marriage out of community of property with the accrual system and not register the customary marriage under the Recognition of Customary Marriages Act 120 of 1998.

[70] I now proceed with a WhatsApp message sent by the respondent to the applicant, which the applicant submitted indicates the respondent stepped in as *in loco parentis*. The WhatsApp message is as follows:

"Applicant: *Z deserves growing up in a family environment with parents, unlike us.*

Respondent: *That's why I'm so determined about the house, plus the kids are depending on me to save their lives, I cannot mess this up.*

Applicant: *Mina ngizobona negezenzo coz amzwi angiwakholwa (loosely translated, "I will see by your actions.")*

Respondent: *Ok no problem."*

[71] The above communication does *prima facie* provide an inference that the respondent wanted to take responsibility for the applicant's two minor children born from her previous relationship.

[72] The applicant has also submitted one month's evidence of a school fee payment made by the respondent for one of the minor children in July 2024. However, the applicant submitted that the respondent pays the two minor children's school fees monthly; this is not very clear from the financial disclosure information, particularly payments of R3 500.00 made in this respect either directly to the school or to the applicant.

[73] The relief sought by the applicant is that the respondent should pay maintenance *pendente lite* in the amount of R6 000 per child per month. The applicant has not provided this court with a breakdown of the maintenance needs of the two minor children per month. Thus, I am not satisfied on how the applicant reached the amount of R6 000 per child, per month. Furthermore, the applicant has also submitted that she has informed the two minor children that the respondent does not want any contact with them. I am concerned about the best interest of the children in this matter. The applicant has submitted she is awaiting the Family Advocate's report in regard to the two minor children. The report submitted to this court after the hearing only deals with the parties' minor child born of their marriage and has not dealt with the blended family and the applicant's two minor children. There is no evidence before the court on the social, psychological and emotional relationship the children have with the respondent. Thus, a Family Advocate's report will be helpful to the court to determine the nature of the relationship between respondent and the two minor children and establish whether the respondent did indeed take on the role of *in loco parentis*.

[74] In the case of *N.M*⁹ the court placed great emphasis on the representations made by the stepparent to the family and society at large, the case brought to the fore the very complex issue of stepparent maintenance and indeed challenged the traditional understanding of parental responsibilities and rights. While I am of the view that one has to take into account the lived realities of modern family life, including customary family life juxtaposed with that of the common law position that a stepparent is not automatically subject to maintain a stepchild, while interpreting the concept of parental care as set out in section 28(1)(b) of the Constitution and as set out in section 18(2)(a), (b) and (d) of the Children's Act; I am of the view that each matter must be decided on the facts before the court. In the premises, unlike the *N.M*¹⁰ case as submitted and argued by the applicant's counsel, in this matter, I find that there are insufficient facts before me to establish and consider the social and emotional bonds formed, particularly between the two minor children and the respondent in order for me to find that the family is indeed a blended family and that the respondent took on the role of *in loco parentis*. Thus, the question whether the respondent indeed agreed to a blended family, I will leave to the trial court; this includes the question whether the respondent assumed the liability to maintain the applicant's two minor children.

(c) Interim Spousal maintenance

[75] This application is for interim spousal maintenance; the applicant is currently unemployed. There is no substantial evidence presented to this court that the applicant is employed by an international company as alleged by the respondent. When it comes to spousal maintenance, the respondent's financial statements reflect that he did cover the household expenses, including rental, as well as the applicant's personal expenses, which included *inter alia* her insurances, medical aid, and he provided her with a monthly allowance. Based on the financial disclosure information provided by the applicant and the respondent, the respondent, paid the applicant an amount which ranged from R13 000.00 to R25 000.00 monthly to cover the applicant's expenses, which included the provision

⁹ *Supra* note 1.

¹⁰ *Supra*.

of a monthly allowance. Therefore, the respondent's averments that the applicant is in no need of spousal maintenance is not persuasive in my view. I am in agreement with the applicant that the respondent indeed held the "purse strings" in the marriage. It would be an injustice if this court did not grant spousal maintenance to the applicant, particularly given the fact that the respondent abruptly left the marital home, cancelled the rental agreement and left the applicant without the ability to pay for rent, water and electricity with the expectation that she has to fend for herself and all her children. This court must determine the applicant's need for spousal maintenance on the current *status quo*. The applicant has submitted that she has undertaken to seek employment, thus in the interim pending the finalisation of the divorce proceedings, having regard to the financial disclosure information and the totality of evidence presented in this case, I will grant the relief sought by the applicant for interim spousal maintenance in the amount of R14 000.00. I am of the view that the spousal maintenance will be able to cover the costs of the applicant's medical expenses not covered by the medical aid scheme, thus I will not grant the relief sought by the applicant that excess medical expenses be paid by the respondent.

(d) Contribution to legal costs

[76] It is trite that a contribution towards legal costs is granted to achieve an equality of arms between litigating parties in a divorce proceedings; this includes the court taking into account the financial means of both parties and the complexity of the divorce case to ensure both parties can engage legal counsel and partake in the legal proceedings on an equal footing.¹¹ In this matter, the applicant is unemployed, while the respondent is gainfully employed and has a lucrative traditional healer business. Thus, there is a financial disparity between the parties.

[77] The applicant is claiming an amount of R200 000.00 for contribution to legal costs, payable by way of 10 equal monthly instalments, which amount to R20 000.00 per month.

¹¹ See *EVG v AJJV* [2023] ZAGPJHC 1473 (22 December 2023).

[78] It is submitted by the applicant that she did approach Legal Aid, however, she had no choice but to seek alternate legal representation due to being informed by Legal Aid, that should she pass the means test, they could not guarantee that she would receive immediate legal assistance as they are understaffed. The applicant submitted her legal fee arrangement in which she undertook to pay her legal representatives a monthly instalment of R1 500.00 per month. However, the applicant has not provided the court with her legal fees to date and future payments. The applicant has submitted that to date she has not made any payment towards her legal costs. I am in agreement with the respondent's counsel that the applicant has not provided this court with information regarding how the R200 000.00 cost contribution figure was calculated, what are the rates of the legal representatives and a pro-forma invoice with the suggested amount.

[79] Having regard to the totality of financial information regarding the respondent and the applicant's financial disclosure's, I find the applicant's request of R200 000 for contribution towards legal costs unsubstantiated. In the premises, based on the applicant's legal fee arrangement and the case law on this matter raised by the applicant's counsel, I grant the applicant a contribution to past and future legal costs in the amount of R1 500 per month.

Costs

[80] In light of the circumstances and the context of this application, including the 18 February 2025 hearing, it is fair and just to both parties that costs are costs in the cause.

[81] I will leave the issue of the refusal to mediate and the cost consequences thereof in terms of Rule 41A(9)(b) to the trial court for determination.

Pendente Lite Order

[82] In the premises, I accordingly make the following *pendente lite* order:

82.1 Both parties shall retain full parental responsibilities and rights with regard to the care of the minor child born of the marriage as

contemplated in section 18(2)(a) of the Children's Act 38 of 2005
[“the Children's Act”]

82.2 Both parties shall retain guardianship of the minor child born of the marriage in accordance with the provisions of section 18(2)(c) of the Children's Act.

82.3 The parental responsibility and right of primary residence of the minor child born of the marriage is vested with the applicant.

82.4 Specific parental responsibilities and rights in respect of contact with the minor child born of the marriage as contemplated in section 18(2)(b) of the Children's Act be awarded to the respondent, which specific parental responsibilities and rights be exercised as follows:

82.4.1 From now until age 2 and half years

82.4.1.1 Tuesday and Thursday midweek visits at the applicant's home for two (2) hours from 14h00 until 16h00.

82.4.1.2 Alternate Saturday and Sunday contact at the applicant's home for three (3) hours from 14h00 until 17h00.

82.4.1.3 The respondent to spend two (2) hours with the minor child on her birthday and on Father's Day under the supervision of the applicant.

82.4.1.4 Video-calls on Mondays, Wednesdays and the alternate Sunday of no contact at 17h00.

82.4.2 From age 2 and half until 3 years

82.4.2.1 One midweek visit with removals from 14h00 until 17h00.

82.4.2.2 Alternate weekend contact on Saturday and Sunday from 09h00 until 17h00 with removals.

82.4.2.3 Video-calls to be maintained on Mondays, Wednesdays and the alternate Sunday of no contact at 17h00.

82.4.3 From age 3 until 4 years

82.4.3.1 Alternate weekend contact from Saturday 09h00 until Sunday 17h00.

82.4.3.2 The parties to share the minor child's birthday.

82.4.3.3 The child to spend the day with the respondent on Father's Day and with the applicant on Mother's Day.

82.4.3.4 Video-calls to be maintained on Mondays, Wednesdays and the alternate Sunday of no contact at 17h00.

82.4.4 From age 4 until 5 years

82.4.4.1 Alternate weekend contact from Saturday 09h00 until Sunday 17h00.

82.4.4.2 The parties to share the minor child's birthday.

82.4.4.3 The child to spend the day with the respondent on Father's Day and with the applicant on Mother's Day.

82.4.4.4 Video-calls to be maintained.

82.4.5 From age 5 until 6 years

82.4.5.1 Alternate weekend contact from Saturday 09h00 until Sunday 17h00.

82.4.5.2 The parties to share the minor child's birthday.

82.4.5.3 The child to have two (2) holidays of five (5) days each with the respondent per annum.

82.4.5.4 The child to spend the day with the respondent on Father's Day and with the applicant on Mother's Day.

82.4.5.5 Video-calls to be maintained.

82.4.6 From age 6 until 7 years

82.4.6.1 Alternate weekend contact from Friday 17h00 until 17h00 on Sunday.

82.4.6.2 The minor child to spend two (2) holidays of ten (10) days each with the respondent per annum.

82.4.6.3 The parties to share the minor child's birthday.

82.4.6.4 The child to spend the day with the respondent on Father's Day and with the applicant on Mother's Day.

82.4.6.5 Video-calls to be maintained.

82.4.7 From the age of 7 onwards

82.4.7.1 Alternate weekend contact from Friday 17h00 until 17h00 on Sunday.

82.4.7.2 The parties to alternate and share the short and long school holidays with Christmas and New Year to rotate.

82.4.7.3 The parties to share the minor child's birthday.

82.4.7.4 The child to spend the day with the respondent on Father's Day and with the applicant on Mother's Day.

82.4.8 Regular telephonic contact to be maintained.

82.5 The respondent shall contribute towards the maintenance of the minor child born of the marriage as follows:

82.5.1 The respondent to pay a cash component in an amount of R 3 500.00 per month, on or before the 25th day of each month, which payment shall be made into the applicant's nominated bank account free from any surcharges or deductions and which amount shall escalate annually, on or before the 25th day of each month in which this order is granted at a rate equal to the average consumer price index published by the Department of Statistics for the immediate twelve (12) preceding months.

82.5.2 The respondent is to retain the minor child on his medical aid.

82.5.3 The respondent to be liable for payment of any medical expenses regarding the minor child born from the marriage not covered by the respondent's medical aid scheme. Payment of any medical surcharges to be made directly to the service providers, unless the applicant paid the said

expenses in full, in which event the respondent (the non-paying party) shall reimburse the applicant (the paying party) within seven (7) days from receipt of proof of payment.

82.5.4 The respondent shall be liable and responsible for the payment of the minor child's school fees and transport to and from school, which payments are to be made directly to the service providers, to allow the minor child to reach her full potential.

82.5.5 The respondent shall be liable to pay all the school levies, school books, school uniforms, all school outings and tours, extra-mural activities, sporting activities, any equipment and clothing required for the aforesaid extra-mural and sporting activities, and extra-tuition in respect of the minor child.

82.6 The respondent shall pay maintenance *pendente lite* to the applicant in the amount of R14 000.00 per month, on or before the first (1st) of each month, which payment shall be made into the applicant's nominated bank account free from any surcharges or deductions and which amount shall escalate annually, on or before the first (1st) day of each month in which this order is granted at a rate equal to the average consumer price index published by the Department of Statistics for the immediate twelve (12) preceding months.


82.7 The application that the respondent pay all the applicant's medical expenses not covered by her medical aid is dismissed.

82.7 The respondent shall contribute towards the applicant's legal costs she has incurred and the applicant's future legal costs up to and including the end of the divorce trial, in an amount of R1 500.00 per month, payable to the applicant's representative of record, the first instalment to be paid within one month from the

date of this order, and thereafter on or before the third day of each succeeding month into a trust bank account nominated by the applicant's representatives of record.

82.8 The applicant's application for *pendente lite* maintenance in the amount of R6000.00 and care, contact, guardianship arrangements and payment of medical expenses not covered by the applicant's medical aid scheme for the two minor children born from the applicant's previous marriage is dismissed.

82.8 That the costs of this application and the postponement hearing (18 February 2025) costs, will be costs in the pending divorce action.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on 11 March 2025. The date of hand down is deemed 11 June 2025.

APPEARANCES

For the Applicant: ADVOCATE MP ZWANE instructed by MP ZWANE

For the Respondent: ADVOCATE TEBOGO NGOEPE instructed by DLAMINI
LEGAL INCORPORATED

