

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 427 / 2021

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
26 October 2023	
Date	signature

In the matter between:

P[...] **N[...]**

Applicant

And

B[...] **M[...]**

Respondent

Delivered: Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 26 October 2023.

JUDGMENT

CORAM: VAN NIEKERK AJ

1. This is an application terms of which uniform rule 43, wherein the applicant seeks an order that:
 - 1.1 the Family Advocate's recommendations incorporating the contact agreement be made an order of court;
 - 1.2 specific parental responsibilities and rights with regard to contact to the minor children, as contemplated in section 18(2)(b) of the Children's Act 38 of 2005 ("**the children's act**"), to be exercised by the parties in the following manner, as endorsed by the office of the Family Advocate:
 - 1.2.1 residence of the minor children to alternate on a weekly basis from a Friday after school until the following the Friday when the minor children will be dropped off at school;
 - 1.2.2 daily telephonic and/or any form of electronic contact is to be exercised by both parties when the minor children are in the care of the other party between 06h30 and 07h00 and between 19h00 and 20h00;
 - 1.2.3 the weekend of Mother's Day and Father's Day, respectively, to be spent with the respective party from Friday after school until Sunday 19h00;

- 1.2.4 long weekends to alternate between the parties from after-school the day before the long weekend begins until 13h00 on the last day of the long weekend;
- 1.2.5 when the minor children's birthdays fall on a weekday, the non-contact/non-resident party will spend time with the children from after-school until Sunday 19h00;
- 1.2.6 the June/July school holidays to alternate and be shared on the following basis:
 - 1.2.6.1 the first half of the holiday will commence from after-school, the day school closes until 19h00 on the day which constitutes the middle day of the holiday, whereafter the second half of the holiday will commence until 19h00 two days prior to the re-opening of schools;
 - 1.2.6.2 the first half of the June/July holiday to be spent with the applicant;
 - 1.2.6.3 the December school holidays to be shared and alternate;

1.2.6.4 the first half of the holiday will commence from after-school, the day school closes until 19h00 27 December, whereafter the second half of the holiday will commence, until 19h00 two days prior to the re-opening of schools;

1.2.6.5 the first half of the December school holiday to be spent with the applicant;

1.2.6.6 public holidays that are not attached to a long weekend to form part of the residency;

1.2.6.7 short school holidays to alternate between the parties.

1.3 the respondent contributes towards her monthly maintenance in an amount of R3,500.00;

1.4 the respondent contributes towards the two oldest children's stationary;

1.5 the respondent contributes towards the two oldest children's school fees;

- 1.6 the respondent contributes an amount of R3,500.00 towards the applicant's Standard Bank home loan;
 - 1.7 the respondent contributes an amount of R20,000.00 towards and legal costs, which amount is payable in four equal instalments of 5,000.00 each; and
 - 1.8 the respondent pays the costs of this application on an attorney and own client scale.
2. Only proprietary aspects of the divorce are in dispute between the parties, and they agree that an order relating to their contact with the minor children may be made in the terms as set out above.
 3. The applicant instituted divorce proceedings against the respondent in and during or about September 2021 ("**the divorce action**").
 4. In and during or about June 2022, the applicant instituted an application in terms of uniform rule 43, in terms of which she sought interim relief pending the finalisation of the divorce action, including maintenance for herself and the minor children and a contribution towards her legal costs.
 5. The applicant also sought orders relating to the contact rights to be exercised in respect of the minor children, but this aspect has now been resolved by agreement between the parties, which agreement is in

accordance with recommendations made by the office of the Family Advocate. Thus, matters surrounding contact with the minor children are no longer controversial and the parties have asked that an order, in accordance with the Family Advocate's recommendations, be made an order of court.

6. Therefore, these proceedings relate solely to maintenance issues.
7. In his replying affidavit, which is dated 6 July 2022, the respondent tendered to pay a rental deposit on behalf of the applicant and to contribute an amount of R3,500 per month, as a cash contribution, pending the outcome of the divorce action.
8. Payment of the amounts referred to above were to be made in order to facilitate the applicant relocating to a rental property which is in closer proximity to the respondent's place of residence, thereby making contact with the minor children easier.
9. I am told that the applicant accepted this tender and that the respondent duly made payment of the tendered rental deposit, but that he failed to make payment of the monthly contribution in an amount of R3,500.00 per month, and that this failure necessitated the rule 43 application being re-enrolled for hearing.
10. Both the applicant and the respondent have delivered supplementary

affidavits in order to provide updated details relating to, in particular, their respective financial positions.

11. The parties' respective supplementary affidavits have been received, in order to ensure the hearing of this matter on all of the available facts.

12. In heads of argument delivered on behalf of the applicant, it was submitted that:

12.1 the applicant has a net monthly salary of R21,622.79;

12.2 the applicant's total personal monthly expenses amount to R17,893.51;

12.3 the applicant expends an amount of R12,331.00 per month on expenses related to the minor children;

12.4 the applicant has a deficit, in an amount of R11,301.74, and that she has no means to cover her reasonable monthly expenses.

13. In his supplementary affidavit, which contains updated information regarding his financial position, the respondent alleges, under oath, that his "*primary source of income*" is derived from rental received from an immovable property situate at [...] Road, Eastleigh, Edenvale ("**the Georgina property**"). The rental which he receives from the Georgina

property amounts to R16,000.00 per month.

14. Coincidentally, the respondent's monthly expenses amount to R16,000.00 per month.
15. Accordingly, the respondent contends that he is not able to afford to make payment of the R3,500.00 per month which he had tendered in his previous replying affidavit.
16. However, during argument it appeared that a total amount of R181,080.60 was deposited into the respondents current account on 1 July 2023 and 11 July 2023, respectively. Counsel for the respondent, correctly, conceded that the respondent had not dealt, at all, with the payment of amounts in excess of R180,000.00 supplementary replying affidavit.
17. The respondent's failure to explain deposits in excess of R180,000.00 into his current account in the month of July 2023 constitute a material nondisclosure on his part.
18. It is trite that there is a duty on parties in rule 43 applications to act with the utmost good faith, and to disclose fully all material information regarding their financial affairs.
19. Turning to the applicant's need for maintenance.

20. In tendering payment of a monthly contribution of R3,500.00, in his initial replying affidavit, the respondent acknowledged the applicant's need for such a payment. The fact that the respondent is now allegedly unable to make this payment does not derogate from this acknowledgement. The unexplained deposits in a cumulative amount in excess of R180,000.00, in the month of July 2023, suggest that the respondent is in a financial position to make payment of the monthly amount of R3,500.00, as he had previously tendered and that he is not being candid in his financial disclosures.
21. Having regard to the maintenance needs in respect of the minor children, the applicant alleges that her monthly contribution towards the maintenance of the minor children is an amount of R12,331.00 per month. This amount does not include a contribution, on the part of the minor children, towards rental, because the list of expenses provided by the applicant, was compiled before she rented a property closer to the respondent's place of residence. The list of expenses provided by the applicant in her supplementary founding affidavit is not particularly helpful, as it refers only to medical aid expenses, the cost of stationery, the cost of winter uniforms, school fees for the oldest two of the three minor children and a standard bank home loan instalment of R3,500.00 per month.
22. Accepting the more detailed list of expenses as contained in her original

founding affidavit, even though these expenses are more than a year out of date, it is apparent that (excluding rental), the applicant's monthly maintenance obligation, in respect of the minor children, is in the vicinity of R12,000.00 per month.

23. In his supplementary replying affidavit dated 29 September 2023, the respondent alleges that his monthly maintenance obligation respect of the minor children is R16,000.00 per month. This includes payment of an amount of R4,200.00 per month, in respect of a nanny for the minor children. The applicant's list of expenses contain no contribution towards a nanny.
24. If the amount of R4200.00 per month is deducted from the applicant's R16,000.00 per month contribution towards the maintenance of the minor children, it is apparent that there is parity between the contributions made by each of the respective parties towards the monthly maintenance of the minor children.
25. Under the circumstances, it seems fair that the respondent contributes an equal amount towards the stationery expenses of the two oldest minor children, being L[...] M[...] and L[...] M[...].
26. Insofar as a monthly contribution towards the applicant's standard bank home loan is concerned, no case has been made out in her founding affidavit, or her supplementary founding affidavit, in this regard.

27. In assessing the applicant's entitlement to, and the quantum of, a contribution towards the applicant's costs, the court exercises its discretion. Regard must be had to the dominant object of the rule, namely to enable the other spouse to present her case adequately.
28. Regard must also be had to the circumstances of the case, the financial position of the parties and the particular issues involved in the pending litigation.
29. Regarding the applicants claim for a contribution towards her legal costs, it is significant that neither of the parties to the litigation appear to be wealthy and/or in a position to fund extravagant litigation. Although, the respondent's failure to explain deposits of approximately R180,000.00 into his current account in July 2023 raises a concern regarding the candour with which he has disclosed his financial position.
30. Moreover, the issues in dispute between the parties are proprietary in nature and are not particularly complex, which is particularly so when one has regard to the respective parties' financial positions.
31. The applicant's claim for a contribution towards her costs in an amount of R20,000.00 is not extortionate, and is less than the estimate given to her by her attorneys of record, which estimate amounts to R23,000.00 up until trial.

32. Bearing in mind the undisclosed deposits amounting to in excess of R180,000.00 in the month of July 2023, it seems that the respondent has the financial means to contribute towards approximately half of the applicant's anticipated costs (as per the estimate given to her by her attorneys), which will enable her to adequately put her case forward.
33. In the circumstances, I make an order in the following terms:
1. specific parental responsibilities and rights with regard to contact to the minor children, as contemplated in section 18(2)(b) of the Children's Act 38 of 2005 ("**the children's act**"), to be exercised by the parties in the following manner, and as endorsed by the office of the Family Advocate:
 - 1.1 residence of the minor children to alternate on a weekly basis from a Friday after school until the following the Friday when the minor children will be dropped off at school;
 - 1.2 daily telephonic and/or any form of electronic contact is to be exercised by both parties when the minor children are in the care of the other party between 06h30 and 07h00 and between 19h00 and 20h00;
 - 1.3 the weekend of Mother's Day and Father's Day, respectively, to be spent with the respective party from

Friday after school until Sunday 19h00;

- 1.4 long weekends to alternate between the parties from after school the day before the long weekend begins until 13h00 on the last day of the long weekend;
- 1.5 when the minor children's birthdays fall on a weekday, the non-contact/non-resident party will spend time with the children from after school until 19h00;
- 1.6 when the minor children's birthdays fall over a weekend, the non-contact/non-resident party shall spend time with them from 12h00 to 18h00;
- 1.7 when the parties' birthdays fall over a weekend, he/she shall spend that weekend with the minor children from Friday after school until Sunday 19h00;
- 1.8 when the parties' birthdays fall on a weekday, he/she will spend that weekend with the minor children from Friday after school until Sunday 19h00;
- 1.7. the June/July school holidays to alternate and be shared on the following basis:

- 1.7.1 the first half of the holiday will commence from after school, the day school closes, until 19h00 on the day which constitutes the middle day of the holiday, whereafter the second half of the holiday will commence until 19h00 two days prior to the re-opening of schools;
- 1.7.2 the first half of the June/July holiday to be spent with the applicant;
- 1.8 the December school holidays to be shared and alternate as follows
 - 1.8.1 the first half of the holiday will commence from after-school, the day school closes until 19h00 27 December, whereafter the second half of the holiday will commence, until 19h00 two days prior to the re-opening of schools; and
 - 1.8.2 the first half of the December school holiday to be spent with the applicant.
- 1.9 public holidays that are not attached to a long weekend to form part of the residency; and

- 1.10 short school holidays to alternate between the parties.
2. the respondent is directed to make payment of an amount of R3,500.00, per month, towards the maintenance of the applicant;
 3. the respondent is directed to make payment of an amount equivalent to 50% of the cost of L[...] M[...] and L[...] M[...]’s stationery expenses;
 4. the respondent is directed to make payment of a contribution towards the applicant’s legal costs in an amount of R12,000.00, payable in four equal instalments of R3,000.00 each, commencing on the first of the month following date of this order; and
 5. costs of the rule 43 application to be costs in the cause.

D Van Niekerk AJ

REPRESENTATIVES:

For the applicant: Adv Tumelo Loabile -Rantao

Attorney for the applicant: Weavind and Weavind Inc.

For the respondent: Adv. Tonia Carstens

Attorneys for the respondent: Theron Inc

Hearing date: 13 October 2023

Delivered: 26 October 2023