

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

REPUBLIC OF SOUTH AFRICA



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

CASE NO. 58415/2021

- (1) REPORTABLE:
- (2) OF INTEREST TO OTHER JUDGES:
- (3) REVISED: YES

18 December 2023

In the matter between:

E[...]: K[...] A[...]

Applicant

And

E[...]: W[...] N[...]

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court Online and by release to SAFLII. The date for hand- down is deemed to be handed down on 18 December 2023.

JUDGMENT

MAHOMED AJ

The applicant seeks an order for interim maintenance and a contribution toward her costs in terms of Rule 43 of the Uniform Rules of Court. The maintenance, access and contact in respect of the minor child has been agreed upon and a parenting plan agreed to in March 2023 is to be made an order of this court. The parties were married in 2010 and separated in 2017, a year after their minor child was born. The minor child is 7 years old, and the respondent pays R23 000 per month in respect of her maintenance.

The applicant is a biokineticist in private practise and the respondent is an engineer and a businessman. In 2017, when their relationship broke down, due to the respondent's extra marital relationship, the applicant left the marital home and lived with her parents. The respondent continues to live in the marital home. During their marriage, the parties were both avid adventure seekers and enjoyed a comfortable lifestyle, when they travelled to several international destinations and climbed mountains together, the respondent continues to enjoy several hobbies, including skydiving and aviation. ¹ Recently, in 2022, he went on an expedition to climb the K2 mountains which borders China and Pakistan, considered the ultimate climb by mountaineers. In his answering papers he stated:

*"we were both professionals, earning independent incomes which we pooled, to ensure that we lived comfortable lifestyles."*²

The Submissions

1. Advocate Kotze who represented the applicant contended that even without her income the respondent continues to enjoy a similar lifestyle to the one they enjoyed together, however the applicant is expected to make do with living with her parents. The applicant cannot continue to rely on her parents whilst he continues to live in the matrimonial home at an estimated cost of R10 000 per month. He has a duty to maintain her by virtue of their marriage until divorce.

¹ Caselines 016-30 to 32

² Caselines 016-321

2. Leibenberg SC appeared for the respondent and submitted, that the applicant has not demonstrated any need. She claims cost for her accommodation six years later. She has lived comfortably with her parents and must continue to do so. The respondent only pays for her medical aid. Counsel submitted that the applicant is being strategic and wanting to ensure that she secures an award for her maintenance at divorce.
3. Advocate Kotze proffered that the applicant was of the belief that the respondent was unable to pay for her maintenance and therefor never claimed any until when during the exchange of documents for discovery, she learnt that he earned a much higher income per month than she had understood. It was submitted further that he has various business interests and can afford to contribute toward her legal costs in the amount of R300 000, payable over three months. The evidence is that the respondent has already spent this amount to date on his litigation.³ The parties are now due to attend a pretrial conference on a date to be confirmed.
4. Mr Kotze argued that the respondent has failed to disclose material information to support his claims regarding the costs of his litigation and his hobbies in aviation and skydiving. No information is before the court to support his contentions that he no longer flies his planes and the related costs of jet fuel and related expenses. No log books to demonstrate flying hours, maintenance costs and the like regarding his hobbies, which are considered "large ticket" items in most budgets.⁴
5. The applicant has only the information the respondent furnished to support his opposition, which is incomplete, and the applicant contends that it will be necessary for her to employ the services of a forensic investigator to track money flows from the various businesses he operates. The respondent transfers R70 000 per month into a business entity WME Projects but derives no benefit from it. He explains this away

³ Caselines 016-75

⁴ Caselines 016-31

as a loan and that he holds a loan account which is an asset in their estate. However, no details are available about the terms of the loan, and the conditions of repayment. Furthermore, respondent contends that he obtained a loan from his employer Kenmore Crushing Solutions CC to fund his litigation costs without any further information as to the terms thereof and the repayment conditions and to date has incurred costs to the value that the applicant claims, the past and anticipated combined.

6. The evidence is that in 2022 the respondent went on an expedition to climb K2, considered the ultimate climb, on the border of China and Pakistan. The average costs of this climb are between R500 000 to R700 000. His evidence is that he obtained loans from his employer, other expenses were sponsored, and he took three month unpaid leave to finance his adventure. No details are provided for the applicant to follow a money trail, the applicant and the court are to rely only on his say so. The respondent's bank statements reveal that he pays in monies into his bond on average R35 800 above the monthly instalments. Mr Kotze submitted that the respondent receives income from several sources ⁵ besides Kenmore Crushing Solutions CC, that he earns a monthly income on average of R110 081, as set out in bank statements, and if one has regard to his expenses of R64 150, he can afford to pay the applicant what is claimed. It was submitted that the way he managed finances, provides overwhelming evidence that he is in a financially sound position to afford to pay for her accommodation and legal costs.
7. It was submitted that the court should not order the applicant to use her investments of R480 000, to fund her litigation and that the contribution toward costs is a sui generis claim, it emanates from the spouse's reciprocal duty to maintain one another. Moreover, maintenance is payable from income not from investments or capital unless there are no funds available from income. The applicant's investments are

⁵ Caselines 016-13 -14

part of the estate and the accrual which will benefit both parties on division, the applicant saved and managed her monies to grow her investments.

8. Mr Kotze submitted the applicant needs financial assistance with her accommodation she earns income from her practise and a small rental from property which she has leased out. The applicant's monthly income, amounts to R18 578 and expenses are at R54 094, including accommodation of R15 000. Counsel submitted there is a huge deficit that she carries. She has funded her legal costs from proceeds she received from the sale of property which the parties sold and to date she has incurred costs of R63 000. Her anticipated legal costs are far less than the respondent is projected to pay, given his spend to date.
9. It cannot be fair that she, an adult, and a mother, has still to live with her parents. It was proffered that the applicant, endeavours to make do with shared living to meet monthly expenses to afford her child a comfortable life and a future. Her income is from a limited source and being a private practitioner, her income is erratic however expenses remain.
10. Mr Kotze submitted that the respondent must be ordered to pay the costs of this application, as he refused to fulfil his obligations arising from the common law reciprocal duty of support.
11. Liebenberg SC submitted that the applicant has failed to demonstrate a need and that the R43 procedure is not an "interim meal ticket." There is no evidence put before this court as to why only six years later she needs to live in her own home. Counsel argued that she owns her own residential property, and she ought to live there. The respondent pays her maintenance for their minor child and pays for the applicant's medical aid. Ms Liebenberg argued further that the applicant has investments valued at R480 000 , she ought to pay for her legal costs from the investments she reflects in the financial disclosure form.

12. In her financial disclosure form ⁶, she sets out her property with equity of R283 000, and she owns another property with her father for which she has no expenses. In May 2022, the applicant had R66 000 cash and investments of R378 000⁷. She has no liabilities, and her income is R18 000 per month.⁸
13. It was argued that the applicant lists expenses at R122 042.54⁹, but many are either duplicated or not expenses she incurs, her bank statements do not reflect the expenses as stated. It was argued further that her personal expenses are only R20 000, and she has enough from her earnings to meet those expenses. It was submitted further that she does not defend the action in good faith because the only issue in dispute is her maintenance.
14. The respondent's expenses¹⁰, which reflect R23 600 for the minor child and R50 000 are personal expenses and are reasonable. His legal costs are high due to the applicant's voluminous discovery. He receives a nominal rental from one property and owns a microlight and a Yak (aeroplanes), however they are owned in shares with others, and he does not fly much. He denied the aviation costs as filed by the applicant. His expedition to K2 was sponsored by his employer who gave him a loan of 15 000 USD which was equivalent to three months of his gross income, when he took unpaid leave to pay for those expenses. Additional funds were raised through the mountain club where he is a member. His legal fees were also a loan from his employer, Kenmore Crushing Solutions, it was a staff loan, and he spent R285 000 to date in legal costs.
15. As to contribution toward costs the applicant failed to tell the court of the issues in dispute in the action, she does not defend in good faith, she does not need money

⁶ Caselines 016-170

⁷ Caselines 016-178-9

⁸ Caselines 016-350

⁹ Caselines 09-26

¹⁰ Caselines 01-350

she has cash and investments of R480 0000. In a year she saved R70 000, since issue of application, she must use those monies to finance her litigation.

16. Liebenberg SC argued that the respondent only receives a nett salary and a small income from rental, he does not have any other income to contribute to her legal costs. He should not be ordered to use his investments and incur a further liability to pay her contribution, whilst her assets remain untouched.

17. Counsel submitted the applicant's financial disclosure documents demonstrates that she is the spouse with the bigger estate in terms at assets and liabilities, she saved R70 000 in the year between her financial disclosure form and her application. She has through the six years held a credit balance in her bank. Counsel proffered that the applicant's attorneys ledger does not reflect that she used proceeds from sale of property to pay costs, their bill of costs and ledger are contradictory, and she fails to set out the need for a forensic accountants/investigator.

18. It was proffered that the applicant does not make out a case for spousal maintenance or a contribution to costs, but in fact this application is merely to establish a lifestyle and a basis for maintenance in the divorce action. The respondent draws from an access bond and any loans he makes creates a loan account which is an asset in their estate. The applicant has over the past six years shown she can look after herself and must be ordered to continue.

19. In reply Mr Kotze stated that accommodation is a need , the respondent conveniently lives in the marital home at an estimated cost of R10 000 per month. Counsel argued that accommodation costs do not appear in the bank statements as an expense, and not incurred because she cannot afford accommodation costs.

20. It was argued that on comparison of the expenses of the parties, it is noteworthy that the respondent spends almost four times more than the applicant and even the minor child's expenses are higher than those of the applicant.

21. Counsel reiterated that the allegations of loan accounts as assets, cannot be sustained as none of them are supported by evidence which could easily have been accessed and included in this application. The respondent is opportunistic when he contended that the issues are simple and that the legal costs unnecessary. The issues are complex as the applicant is forced to employ a forensic investigator to track money flows and a substantial amount of her legal costs to date is due to the detailed discovery sought by the respondent.

JUDGMENT

Spousal Maintenance

22. The substantive law governing interim maintenance is our common law, and the obligation to pay maintenance is founded in a spouse's duty of support.

*' From its beginning until its termination, a civil marriage imposes a reciprocal common law duty of support on the spouses, provided that the spouse who claims maintenance needs it and the spouse from whom it is claimed is able to provide it.'*¹¹

23. In *Excell v Douglas*¹², the court held that if the husband must support his wife and their separation is due to his misconduct, his duty to support continues. It is not disputed that the parties in better days, appreciated that they relied on each other to enjoy a lifestyle together. They supported one another in meeting their financial commitments.

24. In *H v H*, Victor J¹³ stated,

¹¹ *Oberholzer v Oberholzer* 1947 (3) SA 294 O, *Reyneke v Reyneke* 1990 (3) SA 927 (E)

¹² 1924 CPD 472, *Heaton and Kruger Casebook on Family Law* [18], *Pickles v Pickles* 1947 (3) SA 175 W, *Oelofse v Grundling* 1952 (1) SA 338 (C)

¹³ Case No 44450/2022, reported on 30 September 2022, p 2, par[3]

“ It is without doubt clear that the dispute about the care of the children, the interim maintenance, and the contribution toward legal costs must be viewed through the prism of the Constitution and of course in terms of the Children’s Act.”

25. Section 26 of the Constitution provides.

“everyone has a right to adequate housing.”

The applicant has relied on her parents for her housing in the past six years, whilst the respondent continues to live in the matrimonial home, the applicant derived no benefit from this home. I considered the social status of the parties, their lifestyles when they lived together. In my view, the applicant’s need for housing lies not only in her ability to afford or source housing, but also fundamentally in her rights to dignity,¹⁴ and in the respondent’s reciprocal duty in our common law to maintain her.

26. I agree with Mr Kotze that the fact that housing is not reflected as an expense, it does not follow that she has no need. She has a need as any person and in my view, it is inextricably linked to her constitutional guarantee of a right to dignity. Her delay in applying for her spousal maintenance cannot absolve the respondent of his duty of support, the duty remains, until the marriage is dissolved, on death of a spouse or beyond against the deceased estate.¹⁵ The duty of support is gender neutral and either spouse has a right to claim support from the other, “depending on their means”, until the dissolution of the marriage relationship.

27. The respondent’s submissions that the applicant has thus far been living comfortably with her parents and should continue to do so, is unsustainable and opportunistic, it is his legal duty to accommodate her. It is noteworthy that he continues to live in the matrimonial home whilst she was forced to leave, because she felt disrespected due to his infidelity. She “needed accommodation ” and looked to her parents, who out of their love for her and their grandchild accommodated her.

¹⁴ Section 10 Constitution Act 108 of 1996

¹⁵ Act 27 of 1990

28. I noted Mr Kotze explanation that his client applied only at this stage for maintenance because she was of the understanding that the respondent was unable to afford it. The evidence is that upon perusal of documentation she received in discovery, she noted that the respondent was able to pay for her accommodation and her litigation costs. It cannot be fair that she and her minor child continue to burden parents to accommodate her. The amount of R15 000 for her accommodation appears to be reasonable, given their lifestyle during their marriage.
29. I considered the submissions by both counsel on the reliability of the financial disclosure forms of the other party and it is regrettable that the parties have, albeit to varying degrees, been less than candid or inaccurate about their expenses and/or means.
30. Mr Kotze argued that the applicant's proven expenses are significantly less than the respondents and that her income is modest when compared to that of the respondent. The respondent, including his budget for hobbies, which is not disputed, declared expenses of R74 408,13 per month¹⁶ against a net income of R73 243.99¹⁷. However, to my mind it is difficult to imagine that he would nevertheless afford to take three months unpaid leave to pursue a hobby. I noted that the respondent has had and continues to hold interests in several business entities, which served as a source of revenue for any loans and sponsorships he required. He has the means to raise capital and indeed has done so on his version, to fund his personal projects even at the risk of denuding the accruals.
31. It was proffered that the applicant has been prudent with her monies over the years. The investments are part of the accruals and obviously to benefit both parties at division of the estate.

¹⁶ Caselines 016-317

¹⁷ Caselines 016-316 para 12

32. The respondent on the other hand granted loans and created loan accounts, which to my mind would expose the accruals to unnecessary financial risks. I refer to his version that he created loan accounts and therefore assets for the accrual, when he regularly loaned monies to WME Projects, in which he holds a 47% interest but derives no income from it.¹⁸ It is noteworthy that he fails to provide details of the terms of loans advanced, the duration of the loan nor anything about the returns on the investments. Furthermore, I noted that the respondent has failed to support material allegations regarding his loan for his expeditions, or details of his expensive hobbies. The respondent must bear the risk of his failure to do so, and it is not unreasonable to take the view that it is an attempt to avoid scrutiny of his actual financial position.

33. On a conspectus of the evidence it is clear to me that the respondent has access to capital, he simply does not prioritise his basic and fundamental duty toward his spouse. I am of the view he can afford to pay her accommodation costs.

Contribution to Costs

34. The contribution toward costs is provided for in Rule 43 of the Uniform Rules of Court ("R43") and seen through the prism of the Constitution is founded on the right to equality. The contribution towards costs is sui generis, it is an incident of the duty of support with spouses owe each other.¹⁹

35. The rationale behind a duty to contribute toward legal costs is to ensure that there is an equality of arms in litigation of the divorce and that neither party is prejudiced due to the lack of resources to pursue a claim in the main action, a party must be assisted to conduct the litigation fairly and timeously.

¹⁸ Caselines 016-315 par 9.2

¹⁹ Charmani v Charmani 1979 (4) SA 804 (W) at 806 F-H, also Van Rippen v Van Rippen 1949 (4) SA 634 (C)

36. Victor J in *H v H*²⁰, stated that,

“the disadvantaged party is placed in a position to defend their case. So fundamentally, the application of the Rule 43 necessarily involves the right to equality and Judges should, when exercising their discretion, interpret and apply R43 in the light of the constitutional right to equality.”

37. The writer J Heaton²¹ states,

“it is a financially dependent spouse who applies for a contribution towards costs frequently in circumstances where the other spouse controls the family resources pending orders in respect of division of assets on divorce. The fact that the applicant spouse has no access to resources is yielded like a strategic weapon to bullying in equitable settlement from an under resourced spouse who faces the other spouse’s legal arsenal without the funds for his or her own legal team.”

38. The evidence is that a substantial amount of legal costs incurred to date has been incurred in reply to the respondent’s demands for discovery. The applicant’s attorney’s bill of costs²² appear reasonable in the circumstances where a pretrial notice has been served.

39. Section 34 of the Constitution²³ provides:

“ everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.”

40. It is not disputed that the respondent continues to pursue a similar lifestyle to the one the parties enjoyed before they separated. I noted Ms Liebenberg’s submissions about his ownership of the aircrafts and the related costs however the related

²⁰ Case No 44450/2022 Date 12/09/2022 par 85

²¹ The Law of Divorce and Dissolution of Life Partnerships in South Africa (Juta 2015) at 544

²² Caselines 016- 76 to 82

²³ Act 108 of 1996

expenses were not fully substantiated and ought not to have been difficult to access for example, the log book for the aircrafts, the terms and conditions of loans he received, the proof of costings and payments for his expensive expedition which he had undertaken and the terms and conditions of the loans he gave out to his business entity were not before this court.

41. Instead, the court is forced to speculate and to rely on only his say so on his means to afford the maintenance and a contribution to costs. I am of the view that he could afford a contribution toward costs if he prioritised his obligations as a spouse. He enjoys a similar lifestyle, without her financial inputs when they “pooled resources” to live a lifestyle.²⁴

42. In VR v VR²⁵, Van der Linde J stated,

“perhaps the issue can be turned around, whether the respondent should contribute to the applicant’s legal costs is not the respondent’s gift to give, he has a legal obligation to do so.”

43. The evidence is that the applicant used some of the proceeds of the sale of their property for her litigation costs, to defend herself against him, whilst she invested the rest which is an asset in the accruals and will in fact benefit him. The respondent cannot say the same about his financial management of the accruals and it may be necessary to employ the services of a forensic accountant to track down the money flows to ensure that she gets her fair share of the accruals. It is noteworthy that the parties in casu, both professional persons, decided to marry with the accruals, this to me means they both took their money seriously and intended to grow their estate together, the applicant must be empowered to recover her fair share of the accruals.

²⁴ See footnote 2

²⁵ June 2019 para [17]

44. The Constitution Act provides for rights of equality²⁶, she must enjoy the same rights to conduct her litigation and ensure she receives her fair share of the accruals.

45. In *Glaser v Glaser*²⁷, the court stated,

“ in this comparatively, simple preliminary application he has appeared through senior counsel and junior counsel. I think she is entitled to litigate on somewhat the same sort of scale as that upon which he can be expected to litigate.... It would be a heavily disputed action requiring experienced legal skill for its proper preparation and presentation ... “... cannot call upon her (that is, the respondent cannot call upon the applicant) to realise all that she has, which is very small in any event, and pay everything out of that, and then only if she has exhausted her assets, apply for a contribution. I do not see why in a case like this she has to be awarded only a certain amount just to tide her over up to the time of trial and that then a further application should be made... the applicant will not enjoy equal protection unless she is equally empowered with the sinews of war. The question of protecting applicant's right to and protection of her dignity arises in the present situation, where a wife has to approach her husband for the means to divorce him ”

46. Having regard to the circumstances of this matter, the applicant's constitutional rights, the financial position of the parties, the issues involved, the essential disbursements and the scale on which the parties litigate, I am of the view that the legal costs of R300 000 claimed, payable over three months is fair and is therefore awarded.

47. There is no dispute regarding the maintenance in respect of the minor child and in March 2023 the parties have agreed to a parenting plan.

Accordingly, I make the following order pendente lite:

²⁶ S9 Act 108 of 1996

²⁷ 1959(3) SA 928 W at 932

- 1) The parties retain their full parental responsibilities and rights in respect of their daughter G[...].
- 2) G[...]'s primary residence vests with the applicant.
- 3) During school term:
 - 3.1 The respondent or his mother shall be entitled to collect G[...] from school every Tuesday afternoon and return her to the applicants home at 17h30.
 - 3.2 The respondent shall have contact with G[...] on alternate weekends from 16h00 on Friday until 17h00 on Sunday.
 - 3.3 Public holidays shall alternate between the parties subject thereto that:
 - 3.3.1 if a public holiday is on a weekend, the party in whose care G[...] would be in the ordinary course, shall have G[...] also on the public holiday.
 - 3.3.2 if a public holiday falls in a school vacation, the party in whose care G[...] is for that portion of the school vacation, shall have G[...] also on the public holiday.
 - 3.4 G[...] shall spend Mother's Day with the applicant, and if the day does not fall on a weekend when the applicant is to have G[...] in the ordinary course, then G[...] shall spend the Saturday night before Mother's Day from 1700 with the applicant.
 - 3.5 G[...] shall spend father's day with the respondent, and if the day does not fall on a weekend when the respondent is to have G[...] in the ordinary course,

then G[...] shall spend the Saturday night before Father's Day from 17h00 with the respondent, until 17h00 on father's day.

3.6 All school vacations and mid-term breaks shall be shared equally between the parties in age-appropriate blocks of time, subject thereto that:

3.6.1 in even years, G[...] shall spend Christmas Eve and Christmas Day with the respondent, and in odd years with the applicant.

3.6.2 in even years, G[...] shall spend the Easter long weekend with the applicant, and in odd years with the respondent.

3.7 G[...]’s birthday shall be shared between the parties on the basis that:

3.7.1 in even years, G[...] shall spend the night prior to her birthday with the defendant and the night of her birthday with the plaintiff.

3.7.2 in odd years, G[...] shall spend the night prior to her birthday with the plaintiff and the night of her birthday with the defendant.

3.7.3 the parent with whom G[...] spends the night before her birthday shall deliver her to school on the morning of her birthday, alternatively, and in the event of the birthday falling on a weekend, shall deliver G[...] to the other parties home at 08h00 on the morning of the birthday.

- 3.8 On the occasion of each party's birthday, G[...] shall spend the night prior to his/her birthday with that parent as well as the night of the birthday, when G[...] shall be delivered to the parent who is entitled to have the child in the ordinary course.
- 3.9 In the event of either party being unable to care for G[...] overnight whilst in that party's care in the ordinary course, the other party shall have the first right of refusal to care for G[...].
- 3.10 Each party shall have reasonable daily telephonic, electronic and telecommunication access, such as SMS, email, web cam and Skype access to G[...] while she is in the care of the other party.
4. The respondent shall pay the applicant R15,000 per month for her accommodation.
5. The respondent shall contribute an amount of R300, 000 towards the legal costs of the applicant payable in three instalments, to commence within two weeks of this order.
6. The costs of this application shall be in the action.

MAHOMED AJ

Date of Hearing:

Date of Judgment: 18 December 2023

Appearances

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