



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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO.: 13755/2022

DATE 19/05/2023

D, A. E.

Applicant

and

D, A. J.

Respondent

Neutral Citation: *D, A. E. v D, A. J.* (Case No:13755/2022) [2023] ZAGPJHC 528
(19 May 2023)

JUDGMENT

MOKOENA AJ

INTRODUCTION

1. This is an opposed Rule 43 application in terms of the Uniform Rules of Court.

2. At the hearing counsel for the respondent first wished to address me on the *point in limine*, rightfully so, however, given the nature of these proceedings, the prolix papers filed by the respondent as well as the fact that a minor child was involved, I deemed it not in the interests of the parties or minor child to proceed on the point *in limine* first.
3. I informed counsel for the respondent that I will hear the applicant's arguments on the merits, then I will hear the respondent's arguments on the point *in limine* and then on the merits and judgement on the point *in limine* and merits will be reserved.

The point *in limine*

4. In opposing the application, the respondent raised one point *in limine* which related to no cause of action. The respondent's point *in limine* is premised on the following aspects:

4.1. the applicant is a self-supporting businesswoman who earns a substantial income from Monsa Medical Pty Ltd¹ ("Monsa"), her rental properties and Fredka French Bulldogs ("Fredka")²;

4.2. she is the owner of no less than 4 (four) immovable properties exceeding a value of R 6,000,000.00;

¹The applicant is the sole director of Monsa.

²The applicant is the sole proprietor of Fredka.

- 4.3. he covers all the expenses for the minor child including but not limited to expenses for comprehensive medical aid and private schooling without any contribution from the applicant and which position is evident from the applicant's papers; and
- 4.4. the applicant claims for R 85,000.00 as a contribution towards her legal costs without dealing with the merits or basis of such an exorbitant claim and at best the applicant is only entitled to an initiating contribution of R 10,000.00 in Rule 43 applications.
5. In *Taute v Taute*³ the court stated that there is no general principle upon which an application under Rule 43 can or must be based on. Each case must depend on its own particular facts.
6. The considerations that are enumerated in section 7(2) of the Divorce Act 70 of 1979 which provides for a claim for spousal maintenance in the absence of an order in divorce proceedings are similarly useful in Rule 43 proceedings. These factors include the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, and any other factor which in the opinion of the court should also be taken into account.⁴
7. The amount of maintenance payable, if any, must in the final result depend upon a reasonable interpretation of the summarised facts contained in the applicant's

³ 1974 (2) SA 675 (E).

⁴HM v SM JDR 2736 (GJ).

affidavit and respondent's reply thereto as is contemplated and intended by Rule 43. The Court has a duty to conduct its own independent analysis of an applicant's list of expenses and satisfy itself that the expenses are reasonable and in the case of spousal maintenance, necessary.

8. I am of the view that the respondent's point *in limine* is misplaced and therefore should not be upheld.

9. The applicant then seeks an order *pendente lite* authorising maintenance for herself, maintenance for the minor child, primary residence of the minor child be awarded to her, certain structured contact arrangements between the respondent and the minor child and contribution towards her costs. The applicant further seeks the respondent continue to make payment of the following monthly expenses:
 - 9.1. monthly medical aid contribution for the applicant and minor child on a comprehensive medical aid scheme;

 - 9.2. all medical related expenses not covered;

 - 9.3. school fees, compulsory school expenses and all other school related expenses; and

 - 9.4. extra-mural activities and everything associated therewith.

10. The applicant has included her and the minor child's monthly expenses in her application⁵ as well as in the financial disclosure form ("FDF")⁶. The applicant claims for maintenance for herself and the minor child in the sum of R 95,070.00 and R 85,000.00 contribution towards her legal costs.
11. The applicant describes her occupation as that of a businesswoman.⁷ The respondent is a semi-retired orthopaedic surgeon.⁸ The respondent avows in his reply *inter alia* the applicant is not in need of maintenance, the applicant is a self-supporting businesswoman who earns a substantial income from Monsa, rental income and income from Fredka, she has accumulated savings and has various immovable properties. The respondent further avows that the applicant fails to disclose that her live-in partner earns a salary of R 55,000.00 and contributes to the applicant's expenses.
12. There are several disputes in the parties' submissions, however, given the nature of this application, I will only deal with those disputes necessary for the resolution of this application. During the course of argument, it was evident there is an interim arrangement in place regarding the minor child and the respondent, in that, the respondent spends alternative weekends and mid-week contact with the minor child every Wednesday and drops her off at school on a Thursday morning.

THE PURPOSE OF RULE 43 PROCEEDINGS

⁵ Applicant's affidavit: paragraph 36, p 004-14 – 004-16.

⁶ Applicant's FDF: p 012-53 – 012-54.

⁷ Applicant's FDF: p 012-33.

⁸ Respondent's reply: paragraph 1, p 004-59 and Respondent's FDF: p 013-4

13. The purpose of the Rule is to provide a party in divorce proceedings with a speedy and inexpensive remedy instead of waiting for a prolonged battle of a divorce action which remedy enables the party to seek maintenance, a contribution towards the costs of matrimonial action pending or about to be instituted, interim care or contact with a child *pendente lite*.
14. I would be remiss if I did not state that the applicant instituted these proceedings on 12 April 2022 and proceeded to apply for a date for the hearing of this application on 08 March 2023, almost one year later. This is worrisome given the purpose of Rule 43 applications. In my view the respondent correctly contends that the applicant had to have received some form of income for her to have survived the previous 11 (eleven) months. Counsel for the applicant also did not proffer any explanation as to why the application was set down for hearing almost one year later.
15. It is evident the procedure laid down in Rule 43 is intended for the parties to approach the court and argue their matters in a prompt and expeditious manner so as to enable the court to promptly hear evidence, decide the matter and render its judgment swiftly.
16. Counsel for the applicant also argued the respondent filed a lengthy reply comprising of some 76 (seventy-six) pages excluding annexures and that this Court should mark its displeasure with the respondent's prolix papers, irrelevant and outdated annexures by granting a punitive cost order against the respondent.

17. Counsel referred to several case law⁹ in the applicant's heads of arguments¹⁰ to this end. Whilst I commented on the respondent's prolix reply and expressed the Court's dissatisfaction therewith, I also found it necessary to state that given the limiting nature of Rule 43 applications, the respondent's prolix papers would be permitted.
18. It is important to note that I am mindful of instances where affidavits contain irrelevant and outdated matter that is of little to no assistance to courts, however, where the information is relevant and material, it is my respectful view that chastising parties for the length of their affidavits might not be fair or justified under the circumstances. It goes without saying, that the right to equality and the right to a fair trial is also at the heart of Rule 43 proceedings.
19. Courts have largely acknowledged the importance of Rule 43 proceedings.¹¹ Counsel for the respondent contended that in order for the court to come to a judicious decision in relation to maintenance that requires lengthy papers, the court will condone same. I am inclined to agree with counsel in that regard because the court hearing the Rule 43 application is then armed with all the facts and supporting documentary evidence to arm it in arriving at a just and proper determination of issues. Counsel for the respondent referred me to the *TS* and *E* cases.

SALIENT FACTS

⁹*Du Preez v Du Preez* 2009 (6) SA 28 (T); *Colman v Colman* 1967 (1) SA 291 (C) at 292A; *Smit v Smit* 1978 (2) SA 720 (W) at 722 G; *Patmore v Patmore* 1997 (4) SA 785 (W) at 788 D.

¹⁰ Applicant's Heads of Argument: Paragraph 45, p 004-416 – 004-419.

¹¹*TS v TS* 2018 (3) SA 572 (GJ). See also *E v E* 2019 (5) SA 566 (GJ).

20. The parties were married to each other out of community of property with the exclusion of the accrual system on 07 September 2013. There is one minor child born of the marriage.
21. The minor child resides with the applicant and spends every fortnight with the respondent as well as one midweek overnight stay every Wednesdays. The respondent drops the minor child off at school on Thursday mornings. The minor child attends Reddam pre-primary school.
22. As adumbrated previously the applicant is a businesswoman and the respondent is a semi-retired orthopaedic surgeon. The applicant is presently 44 years old¹² and the respondent is 70 years old.
23. It is common cause that the applicant vacated the matrimonial home in February 2022.
24. The applicant instituted divorce proceedings against the respondent at the same time she launched this application on 12 April 2022. The respondent filed his plea and four claims in reconvention on 07 June 2022. The applicant filed her plea in reconvention on 26 September 2022. The parties have made discovery. The respondent filed a Notice in terms of Rule 37 calling upon the applicant to attend a pre-trial conference. The applicant filed a Notice in terms of Rule 28 on 15 March 2023 and the respondent filed an objection thereto on 27 March 2023. This in summary are where the divorce proceedings are at.

¹²The Applicant turns 45 years on 27 May 2023.

25. The applicant instituted an enquiry with the Office of the Family Advocate during April or May 2022 and their report was delivered on 07 November 2022.

26. It is common cause the marriage has irretrievably broken down. It is also common cause that the applicant lives with her partner, this was also conceded by counsel for the applicant during argument. It is further common cause the parties attempted mediation involving settlement discussions and were not successful.

APPLICANT'S CLAIM

27. The applicant claims the following relief in terms of her draft order provided to the Court on 24 April 2023:

"1. The Respondent pay the following maintenance pendente lite:

1.1 Maintenance for the Applicant and minor child in the sum of R 95 070.00 per month;

1.2 Respondent to continue to make payment of the following monthly expenses;

1.2.1 monthly medical aid contribution for the Applicant and the minor child on a comprehensive medical aid scheme;

1.2.2 all medical related expenses not covered;

1.2.3 school fees, compulsory school expenses and all other related expenses;

1.2.4 extra mural activities and everything associated therewith;

2. Primary residency of the child be awarded to the Applicant;

2.1 Respondent to have the following structured contact:

2.2 Alternative weekends from Friday, 13:00 to Monday, back to school;

2.3 Every Wednesday night sleep over from 17h00 to school the following day;

2.4 Father's Day;

2.5 Respondent's birthday;

2.6 Shared long and short holidays, Christmas, New Year and Easter alternating between the parties;

2.7 reasonable daily telephone contact;

3. A contribution towards the Applicant's legal costs in the sum of R85k payable within five (5) days of date of the Court order."

THE RESPONDENT'S TENDER

28. In the respondent's reply he tendered to continue maintaining the minor child as follows:

28.1. maintenance for the minor child in the amount of R 10,000.00 per month¹³;

28.2. pay for the minor child's medical aid and extraordinary medical expenses¹⁴; and

28.3. pay for the minor child's school fees and educational expenses¹⁵.

29. The respondent's draft order contains the following:

"1. The Applicant's application in respect of maintenance for herself and the minor child is dismissed with costs.

2. The Family Advocate's recommendation in relation to contact and care of the minor child is granted as follows: -

2.1 Both parties retain their full parental responsibilities and rights with regards to the care, contact, guardianship and maintenance of the minor child as contemplated in Section 18(2)(a)(b)(c) and (d) of the Children's Act No. 38 of 2005;

2.2 Primary residence of the minor child is to be shared by the parties. One week with the Applicant and one week with the Respondent. They will alternate weeks, from a Sunday afternoon whereby the minor child

¹³Respondent's reply: Paragraph 20.2, p 004-71.

¹⁴Respondent's reply: Paragraph 20.2, p 004-71.

¹⁵Respondent's reply: Paragraph 20.2, p 004-71.

will spend a week with one party until the next Sunday afternoon when they drop off the minor child at the other party's residence;

- 2.3 *Mid-week contact to be exercised by the non-resident parent from after school on a Wednesday until the following morning when the minor child will be dropped off at school;*
- 2.4 *All the short school holidays (March/April and September/October) to alternate between the parties;*
- 2.5 *All the long school holidays (June/July and December/January) is equally shared by the parties. In terms of December/January school holidays, the first half of the holiday will commence from 17h00 the day school closes until 17h00 on 26 December whereafter the second half will commence until 17h00 two days before school re-opens;*
- 2.6 *On the minor child's birthday, if it falls in the Respondent's week, the Applicant will spend time with the minor child from 16h00 – 18h00 if it is on a weekday and from 09h00 – 13h00 and vice versa. Parties are open to make their own arrangement however in an event that they cannot agree, they should follow the above;*
- 2.7 *On Mother's day, if it falls on the Respondent's week, the Applicant will spend the day with the minor child from 09h00 to 17h00 and vice versa;*

2.8 *It is important that the parents consult each other as prescribed in terms of Section 31(2)(a) of the Children's Act 38 of 2005 which states that: "Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that a person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child."*

2.8 *In the event of a deadlock concerning the issues affecting the minor child, the parties to appoint a mediator to assist resolving such disputes, failing which the Court shall be approached to resolve the dispute." (sic)*

30. The respondent makes no mention of the tender proposed in his reply.

STANDARD OF LIVING

31. The applicant describes their standard of living when they lived together in her FDF as follows:

"Regular Trips Overseas. Last 3 trips: 2x to Poland and 1x Trip to Greece

Local Trips every 3 or so months. Eg To Cape Town and Knysna

Always staying in 5 star hotels. Flying Business Class overseas.

We both drive luxury cars, me a Land Rover Velar and my husband an Audi Q7.

Eating out at top restaurants on all trips and eating out at top restaurants 2 to 3 times per week.

Shopping at top brands line Louis Vuitton and Dolce & Gabbana.

All grocery shopping has always been done at Woolworths.

On average R20000 per month on grooming for myself such as nails, spas, botox, fillers, lasers beauty products etc.”¹⁶ (sic)

32. The respondent describes their standard of living when they lived together in his FDF as follows:

“ABOVE AVERAGE STANDARD OF LIVING OF A MIDDLE INCOME EARNING SOUTH AFRICAN, WHICH INCLUDED REGULAR OVERSEAS TRAVEL VISISTS TO VARIOUS RESTAURANTS AND SHOPS; GROCERY SHOPPING AT FOOD LOVERS MARKET AND WOOLWORTHS. WIFE DRIVES LAND ROVER VELAR, DR DYBALA DRIVES AUD Q7. WIFE USE MONSA MEDICAL PTY LTD AS ALTER EGO FOR LUXURIES SPENDING ON HERSELF. ¹⁷ (sic)

THE APPLICANT’S INCOME

¹⁶Applicant’s FDF: p 012-26.

¹⁷Respondent’s FDF: p 013-21 - 013-22.

33. The applicant is a self-employed business woman.¹⁸ The applicant is also the sole director¹⁹ in Monsa. Further, the applicant is also an employee of Monsa and draws a salary from Monsa.²⁰
34. As a self-employed business woman, the applicant is the breeder of French bulldogs. The applicant alleges she makes around R 140,000.00 per annum from the business and that the expenses could be as high as R 100,000.00 per annum. She includes copies of her Nedbank savings account into which she receives monies for this transaction marked annexure "AD5." This annexure comprises of bank statements for the periods 27 September 2021 to 08 February 2022 and records one transaction in the amount of R 25,000.00 claimed to be a dog sale on 29 September 2021.
35. The respondent alleges *inter alia* in his reply that majority of Fredka's expenses are paid for by Monsa, that she has understated the income from Fredka and she also receives cash sums from the sale of puppies which are deliberately omitted from Fredka's books²¹.
36. The applicant owns 3 (three) immovable properties in South Africa, 2 (two) of the properties are situated in Germiston and 1 (one) property is situated in Bedfordview. The applicant also owns an apartment in Poland.²² It is evident that all the properties are paid up but for the one that the applicant lives with the minor

¹⁸ Applicant's affidavit: Paragraph 19, p 004-10 and Applicant's FDF: paragraph 1.8, p 012-4

¹⁹ Respondent's reply: Paragraph 18.2, p 004-63, annexure RA2, p 004-137

²⁰ Applicant's affidavit: Paragraph 16, p 004-8 and Respondent's reply: Paragraph 18.3, p 004-101 - 004-64.

²¹ Respondent's reply: paragraph 27.2, p 004-102 - 004-106 and annexures RA16.1 to RA16.23, p 004-338 - 004-360.

²² Applicant's affidavit: paragraphs 21 - 24, p 004-10 - 004-11.

child in Bedfordview which had a balance outstanding of R 909, 745.00 on 27 January 2022.

37. The applicant earns an income from one of the rental properties in Germiston in the amount of R 10,000.00 per month which is paid into the applicant's Nedbank current account.²³ The applicant states that her father lives in the other Germiston property and does not pay her any rental. This is disputed by the respondent.
38. The applicant does not state whether she derives any rental income from her apartment in Poland. The respondent states that she does, however, he does not place any evidence in support of this contention.
39. As aforesaid, the applicant is the sole director and an employee at Monsa. During argument counsel for the respondent argued that even though the applicant's son appears to be an employee of Monsa, he is in fact a "ghost employee" and in as far as he receives an income from Monsa, it is the applicant who in fact receives this income. This was not disputed by counsel for the applicant, however, he did not see the relevance of Monsa to these proceedings.
40. The applicant alleges that due to the impact of Covid in the beginning of 2020 she did not draw a salary for many months and has only drawn a salary in March 2021 for R 17,270.47 and in January 2022 for R24,510.14.²⁴ Oddly, the applicant only elects to attach Monsa's bank statements for the period January 2022 to March 2022.²⁵

²³Applicant's affidavit: paragraph 24, p 004-11.

²⁴Applicant's affidavit: paragraph 16, p 004-8 – 004-9.

²⁵Applicant's affidavit: paragraph 16, p 004-9.

41. The applicant also attaches an extract of the last financial statements of Monsa. She does not attach the full financial statements as she more properly ought to have. Nevertheless, it is evident from the financial statement employees cost to the company was R 1,224,362.00 for 2021 and R 1,639,943.00 for 2020.²⁶ Evidently the applicant earned sufficient income for the periods 2020 and 2021.
42. I carefully considered the applicant's current account statement for the periods 02 December 2021 to 04 February 2022 and observed several credit transactions from Monsa which I can only assume are salaries or drawings by the applicant. These transactions are as follows:
- 42.1. 02 December 2021 – Monsa – R 10,000.00;
 - 42.2. 17 December 2021 – Monsa- R 10,000.00
 - 42.3. 25 January 2021 – Monsa – R 20, 000.00;
 - 42.4. 02 February 2022 – Monsa – R 30,000.00;
 - 42.5. 04 February 2022 – Monsa – R 24, 510.14.
43. These amounts add up to R 94,510.14. The applicant does not explain what these credit transactions are for and I cannot simply ignore these transactions.
44. I have also considered Monsa's bank statements for the periods January 2020 and February 2020²⁷. The following first 3 (three) amounts were paid to or in favour of the applicant and the last transaction was paid to or in favour of the applicant's son or "ghost employee" which is understood to be the applicant herself:

²⁶Applicant's affidavit: paragraph 18, p 004-9 – 004-10 and Annexure AD4, p 004-35.

²⁷Respondent's reply: Annexure RA 10.6, p 004-284 – 004-286.

- 44.1. 13 January 2020 – R 20,000.00;
- 44.2. 13 January 2020 – R 89,804.82;
- 44.3. 24 January 2020 – R 49,104.82;
- 44.4. 24 January 2020 – R 20,918.80.

45. These transactions alone add up to R 179, 828.44.

46. Further to the above, I have carefully considered annexures RA 14.1 to RA14.23²⁸ in the respondent's reply which consists in proof of banking transactions relating to Monsa for the periods March 2020 to December 2020. Several of these transactions consist in drawings and salaries for the applicant and her son or "ghost employee". Even if one were to exclude the amounts in drawings and salaries in favour of the applicant's son or "ghost employee" for this period, the applicant alone earned the following income and/or made the following drawings for this period:

- 46.1. 03 March 2020 – R 49,104.82;
- 46.2. 01 April 2020 – R 20,000.00;
- 46.3. 01 April 2020 – R 49,104.82;
- 46.4. 24 April 2020 – R 10,000.00;
- 46.5. 24 April 2020 – R 49,104.82;
- 46.6. 25 May 2020 – R 10,000.00;
- 46.7. 25 May 2020 – R 49,666.90;
- 46.8. 29 June 2020 – R 20,000.00;

²⁸Respondent's reply: Annexures RA1 – RA14, p 004-309 – 004-331

- 46.9. 28 September 2020 – R 20,000.00;
- 46.10. 28 September 2020 – R 49,666.90;
- 46.11. 02 October 2020 – R 20,000.00;
- 46.12. 31 October 2020 – R 20,000.00;
- 46.13. 24 November 2020 – R 49,666.90;
- 46.14. 24 November 2020 – R 10,000.00; and
- 46.15. 15 December 2020 – R 49,666.90.

47. For the applicant then to state under oath that she has not drawn a salary since 2020 but for one salary in March 2021 and one salary in January 2022 is not only a blatant untruth, it is deceptive and disingenuous to say the least. Such conduct is seriously frowned upon by this Court. Then there are also the applicant's IRP 5/IT3(a) ²⁹ which confirms she earned income for the period she alleges not to have. This will be taken in consideration when determining whether the applicant is entitled to spousal maintenance.

48. It is not in dispute that the applicant's partner lives with her, however, the applicant has not stated what her partner's contributions to the household expenses are. She has also not made an apportionment for him in this regard. This is a material omission.

THE APPLICANT'S EXPENSES

²⁹Respondent's reply: Annexure R15.1, p 004-332 – 004-334

49. The applicant has listed various expenses for her and the minor child in her affidavit.³⁰ It is worth repeating that the applicant has not apportioned any of the household expenses in as far as her live-in partner is concerned.
50. These expenses include bond repayment, food, cleaning material, levies, cellphone and internet, domestic worker, gardener, clothes and shoes, motor vehicle instalment, motor vehicle maintenance and fuel, vehicle licence and parking fees, medical aid, annuity, life insurance, entertainment, homeware replacement, credit card, gym membership, gifts, TV licence/DSTV, education policy, pets and vet, father's help and expenses, haircuts and grooming.
51. For the minor child the applicant claims school uniforms, sport clothing and equipment, school fees, aftercare, stationery, school outings and medical aid. The applicant states that the respondent has been paying for these expenses.³¹ It is not in dispute that the respondent has also been paying the applicant a cash component of R 10,000.00 per month towards the minor child's maintenance.
52. I have carefully considered the applicant's expenses and I will not necessarily deal with them in a chronological order. The applicant claims R 4,150.00 for her and R 4,150.00 for the minor child for bond repayments, a total of R 8,300.00 is claimed. The applicant records in her FDF that the bond repayments are R 9,121.62, the whole amount of which she pays for.³² This can

³⁰Applicant's affidavit: Paragraphs 33 – 37, p 004-13 – 004-16.

³¹ Applicant's affidavit: paragraph 38, p 004-16

³²Applicant's FDF: p 012-36

also be evidenced from the applicant's bank statements even before the applicant vacated the marital home. This expense is disallowed.

53. The applicant claims R 1,500.00 for car instalments, however, it is evident from her FDF, there are no amounts outstanding on the vehicle she owns.³³ This expense is disallowed.

54. The applicant claims a total of R 8,600.00 for levies and rates and taxes for her and the minor child. Monsa's bank statements for the period 01 January 2022 to 08 March 2022³⁴ evidences that the Monsa bank account is not only used for the payment of rates, taxes and levies for the applicant's bonded property, but for her two other paid-up properties in Germiston as well. These expenses are disallowed.

55. The applicant's states in her affidavit that she pays for the utilities, levies, necessary repairs and assists her father at the cost of R 6,000.00.³⁵ We know this not to be entirely true. This expense is also disallowed.

56. The applicant claims an amount of R 5,000.00 for her and the minor child for internet and cellphone. It is evident that these expenses are also paid for by Monsa.³⁶ This expense is disallowed.

³³Applicant's FDF: p 012-45 – 012-46

³⁴Applicant's affidavit: annexure AD3, p 004-23 – 004-26.

³⁵Applicant's affidavit: paragraph 22, p 004-11.

³⁶Applicant's affidavit: Annexure AD3, 004-23-004-26.

57. In as far as the applicant claims R 1,000.00 for an education policy for the minor child, the respondent has tendered to pay for all the minor child's educational expenses. Insofar as the applicant can provide the necessary proof to the respondent in this regard, I see no difficulty with the respondent paying for same based on his tender. This expense too is disallowed.
58. In as far as the applicant claims for medical aid, it is evident from her bank statements that she has been making these payments by herself.
59. In as far as the applicant claims for pets and vet in the sum of R 4,000.00 monthly. There is no indication from the papers that the applicant or minor child has a pet. To the extent these expenses relate to Fredka then the applicant has already stated in her papers she pays for these expenses. Accordingly, these expenses are disallowed.
60. In as far as the applicant claims for food, cleaning material, lunches, gifts, hair and grooming, reading and entertainment in relation to the minor child, the R 10,000.00 cash component tendered by the respondent and which the respondent has already been paying for several months in my view suffices to cover these expenses, which are exorbitant and unjustified, for instance, a minor child could not possibly consume food and use cleaning material to the value of R 5,000.00 per month or purchase clothes and shoes monthly to the value of R 5,000.00. The minor child is 4 (four) years old. Several of the applicant's expenses have been justifiably criticised by the respondent.

THE RESPONDENT'S INCOME AND EXPENSES

61. The respondent states in his reply that his income is R 154,405.96³⁷ made up as follows:

- 61.1. R 64,962.96 – salary;
- 61.2. R 30,000.00 – investments;
- 61.3. R 59,443.00 – rental income

62. The respondent did not disclose any further sources of income. During the course of argument, counsel for the applicant argued that the respondent did not make full disclosure of his financial affairs. Counsel for the respondent argued in turn that there was no need for full financial disclosure and the respondent disclosed what was necessary for the purposes of this application. I do not agree with counsel for the respondent. The very nature of these proceedings and the practice directive imposes on the parties to make full, frank and clear disclosure to the Court of all financial and other relevant circumstances.

63. The FDF is a document that must be taken seriously by both parties to the proceedings. The need for its introduction was set out in *TS* and the judgement was confirmed by the Full Court of this division in *E v E, R v R, M v M*.³⁸

64. In *TS* the court stated the purpose of an FDF deposed to under oath is to enable each party to more properly assess their respective positions, to present

³⁷Respondent's reply: paragraph 39.7, p 004.124 – 004-125. Annexures RA18 and RA19, p004-387 – 004-388.

³⁸2019 (5) SA 566 (GJ).

argument in a more informed position, to have an available remedy for misrepresentation or material non-disclosure and to enable the court to make an informed decision. In *E v E* the Full Court stated the benefit of financial disclosure is that the parties will not have to file lengthy affidavits, the parties will be forced to be transparent with each other and with the court from an early stage thereby making early settlement possible and placing the court in a better position “to decide the matter in a manner that does justice to the parties and takes care of the best interests of the minor children.”³⁹

65. The respondent sets out his monthly expenses at R 138,429.84⁴⁰.

66. It is common cause from the papers that the respondent is the only customer of Monsa and has been since its inception. The applicant has stated that without the respondent's orders Monsa would have to liquidate or be wound up. It is apparent the applicant fears that the respondent will divert or stop business from Monsa sometimes in the future. The respondent did not conduct himself aforesaid at the time of his filing his papers and a reasonable inference can be drawn that he has not done so to date.

67. The respondent denies that he was the main provider for the applicant. He goes on to state in his reply that the applicant is self-supporting, she is a woman of substantial wealth with ample income with which to support herself and the expenses can be easily covered by the income she earns from Monsa, Fredka

³⁹*E v E* paras 56 – 57.

⁴⁰Respondent's reply: paragraph 39.7.5, p 004-125 – 004 – 126.

and her rental income from her various properties and if needs be this can be supplemented by her live-in partner.⁴¹

68. The respondent avers that he has offered to cover all the expenses for the minor child notwithstanding the applicant's reciprocal duty to do same and the manner in which she has split the expenses between herself and the minor child is disingenuous and self-serving.⁴²

69. As adumbrated previously, the respondent has not made full disclosure to this Court's dissatisfaction. Regrettably, the applicant has also not been candid and forthcoming with this Court in as far as her income and earnings are concerned.

MAINTENANCE FOR THE APPLICANT AND MINOR CHILD

70. Insofar as the minor child is concerned, the applicant claims a total of R 36,450.00. The applicant has excluded the educational and medical aid costs which are being paid for by the respondent but no provision has been made for the R 10,000.00 cash component that the respondent pays to the applicant for maintenance for the minor child.

71. It is evident the applicant is earning an income from Monsa. It is also evident the applicant uses the Monsa bank account at her beck and call. The applicant is in a position to contribute towards the minor child's expenses however she has not made provision therefore.

⁴¹Respondent's reply: paragraph 39.2 and 39.3, p 004-115.

⁴²Respondent's reply: paragraph 39.2 and 39.4, p 004-115.

72. The respondent has tendered and is in fact paying the applicant a cash component of R 10,000.00 for maintenance for the minor child. He has tendered to pay and is in fact paying for all the minor child's educational and medical expenses. The respondent's total contribution towards the minor child monthly likely exceeds R 20,000.00. In the circumstances, I consider the tender made by the respondent to be reasonable.

73. In as far as the legal position concerning spousal maintenance is concerned, the position is trite.⁴³ Even where parties are married out of community of property with or without the application of the accrual system and the duty of support that arose when they got married⁴⁴, Rule 43 proceedings permits the financially weaker spouse to approach the Court directing the financially stronger spouse pay them maintenance *pendente lite* and a contribution towards the costs of the divorce proceedings.

74. The court found in *Grasso*⁴⁵ where money is of no issue, there is no reason why a wife on becoming an ex-wife should not in appropriate circumstances enjoy the same standard of living and good things she enjoyed whilst the married existed.⁴⁶

⁴³Section 7(2) of the Divorce Act 70 of 1979.

⁴⁴See *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) paragraph 90, where it was held that '[t]he decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship'. Further at paragraph 112, it was held that the duty of support '... is an integral part of the marriage contract and has immense value not only to the partners themselves but to their families and also to the broader community. The duty of support gives rise to the special rule that spouses, even those married out of community of property, can bind one another to third parties in relation to the provision of household necessities which include food, clothing, medical and dental services'.

⁴⁵1987 (1) SA 48 (C).

⁴⁶*Grasso* at 52 C-D.

75. In an application for spousal maintenance the applicant must demonstrate the respondent owes her a duty of support, the applicant must establish the need to be maintained⁴⁷ and that the respondent has adequate resources to discharge this duty. In my view, the applicant has not established the need to be maintained. Apart from the applicant's material non-disclosure of her income and earnings, the applicant has also throughout failed to state what her live-in partner's contributions are, if any.

76. I have considered the parties standard of living and lifestyle when they resided together. Consequently, there are some lifestyle habits the applicant will have to consider cutting down. The applicant is the sole director of Monsa. I have stated previously a careful reading of Monsa's bank statements demonstrates that the applicant uses this account at her beck and call. The respondent effectively invites the applicant to procure other customers for Monsa.⁴⁸ This inevitably would have the benefit of her increasing her salary and drawings. The respondent also states if the applicant made an effort and adopted sound business practices, she can adopt the lavish and luxurious lifestyle she desires.⁴⁹ I am inclined to agree with the respondent in this regard.

CONTRIBUTION TO COSTS

77. The applicant seeks an amount of R 85,000.00 towards her legal costs. The applicant has not provided neither fee estimates nor an invoice. In my view, this is

⁴⁷*Taute v Taute* 1974 (2) SA 675 (E).

⁴⁸Respondent's reply: paragraph 25.1, p 004-89.

⁴⁹Respondent's reply: paragraph 36.2, p 004-114.

pertinent.⁵⁰ The applicant's request seems to be premised on the fact that the respondent is in a far more superior financial position than she is. Counsel for the respondent implored the court to refuse any contribution towards costs as there is no justification for the amount sought.

78. In *VS v AS*⁵¹ Bam AJ (as he was then) made reference to *T v T*, where the court referring to *Ripen v van Ripen*⁵² commented as follows on the following on the question of contribution toward costs –

“The quantum which an applicant for a contribution towards cost should be given is something which has to be determined in the discretion of the Court. In the exercise of that discretion, the Court should, I think, have the dominant objective 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.”

79. I also observed the applicant made a payment from Monsa for her legal fees at one stage.⁵³ The applicant still has Monsa at her disposal and it is conceivable she continues to use this account for her own personal expenses which might include her legal fees. If the respondent wanted to financially harm the applicant and consequently her lifestyle, it is likely that he would have stopped making purchases from Monsa, this he has not done. I do not believe the applicant has

⁵⁰ See *MCE v JE* [2011] ZAGPPHC 193 (14 September 2011) at para 12; *Cary v Cary* 1999 (3) SA 615 (C) at 618C and *LP-R v LJR* 2017 JDR 1252 (GP).

⁵¹ (12496/2019) [2020] ZAGPJHC 27 (11 February 2020)

⁵² 1949 (4) SA 634 (C) at 638 – 640.

⁵³ Applicant's affidavit: Annexure AD3, p 004-24.

made out a case for legal costs and it is on this basis I am inclined to refuse the applicant's requests for contribution towards her legal costs.

CONTACT ARRANGEMENTS

80. I have set out earlier in this judgement what each draft order proposes in as far as contact and care arrangements are concerned. I will not repeat them here.

81. I have carefully considered the report by the Office of the Family Advocate and I see no reason not to adopt their recommendations which shall be incorporated into part of the order I intend to issue.

COSTS

82. The applicant does not seek costs of the application. The respondent seeks the application for maintenance for the applicant and minor child be dismissed with costs.

83. Whilst the respondent has been making payments pursuant to his tender, there is no order in place to this effect. There is no telling what might happen if there is no order in place pending finalisation of the divorce proceedings and this would not be in the best interest of the minor child.

84. Both parties have been selective in the manner in which they have disclosed financial documents and financial information before this Court much to this

Court's dissatisfaction. I am therefore not inclined to grant costs in either party's favour notwithstanding the applicant did not claim for costs and leave this for the trial court to decide.

ORDER

85. In the circumstances, I make the following order:

85.1. The point *in limine* is dismissed.

85.2. The applicant's claim for spousal maintenance is dismissed.

85.3. The respondent shall, *pendente lite*:

85.3.1. pay maintenance for the minor child in the sum of R 10,000.00 into a bank account nominated by the applicant from time to time, on or before the first day of every month, within 5 (five) days of the date of this order and to operate retrospectively for that month and thereafter on the first day of each month.

85.4. pay the monthly premium for the minor child to remain as a dependant on the respondent's comprehensive medical aid scheme;

85.5. pay all excess medical expenses incurred in respect of the minor child that are not covered by the medical aid scheme, including but not limited to dental, orthodontic, ophthalmological, psychotherapy, physiotherapy,

homeopathic, occupational therapy, pharmaceutical and other medical or related costs incurred.

85.6. pay the minor child's school fees, compulsory school expenses and all other school related expenses;

85.7. pay for the minor child's extra-curricular activities and everything associated therewith.

85.8. It is further ordered:

85.8.1. Both parties retain their full parental responsibilities and rights with regards to the care, contact, guardianship and maintenance of the minor child as contemplated in section 18(2) (a) (b) (c) and (d) of the Children's Act 38 of 2005;

85.8.2. primary residence of the minor child is to be shared by the parties such that the applicant spends one week with the minor child and respondent spends one week with the minor child. The parties will alternate weeks from a Sunday afternoon whereby the minor child will spend a week with one party until the next Sunday afternoon when they drop off the child at the other party's residence.

85.8.3. Mid-week contact to be exercised by the non-resident parent from after school on a Wednesday until the following morning when the minor child shall be dropped off at school;

- 85.8.4. All the short school holidays (March/April and September/October) to alternate between the parties;
- 85.8.5. All the long school holidays (June/July and December/January) are equally shared by the parties. In term of the December/January school holidays, the first half of the holiday will commence from 17h00 the day school closes until 17h00 on 26 December whereafter the second half will commence until 17h00 two days before school re-opens;
- 85.8.6. On the minor child's birthday, if it falls in the respondent's week, the applicant will spend with the minor child from 16h00 – 18h00 and from 09h00 – 13h00 if it is one a weekend and vice-versa. The parties are open to make their own arrangements however in the event they cannot agree, they should follow the above;
- 85.8.7. On Mother's Day, if it falls on the respondent's week, the applicant will spend the day with the minor child from 09h00 to 17h00 and vice versa;
- 85.8.8. It is important that the parties as the parents consult with each other as prescribed in terms of section 31(2) (a) of the Children's Act 38 of 2005 which states that: "Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that a person must give due

consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.”

85.8.9. In the event of a deadlock concerning issues affecting the minor child, the parties are to appoint a mediator to assist resolving such disputes, failing which the Court shall be approached to resolve the dispute.

86. The applicant is not entitled to a contribution towards her legal costs.

87. The costs of this application will stand over for determination in the final divorce action.



**E MOKOENA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 15:00 on 19 May 2023.

Counsel for the applicant: Advocate W F Wannenberg
Instructed by: Luita Cirone Attorneys

Attorney for the respondent: Advocate S Nathan SC
Instructed by: Eugene Marais Attorneys

Date of the hearing: 24 April 2023

Date of judgment: 19 May 2023