

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 Number: 2022/058317

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

4 March 2024

In the matter between:

H[...], F[...]

Applicant

And

I[...], M[...], Z[...]

Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] This is an application for relief under Rule 43 of the Uniform Rules of Court. The applicant claims maintenance *pendente lite* for herself in the amount of R20 000 per month, and for the minor child in the amount of R13 000 per month. She also claims payment for the minor child's reasonable expenses for education and related expenses; that she and the minor child be retained as dependants on the respondent's medical aid, or medical aid with similar or better benefits, and that the respondent to pay all excess and shortfalls not covered by the medical aid; and contribution towards costs in the amount of R250 000. The application is opposed by the respondent.

Order

[2] In this matter *pendente lite* I made the following order on 12 October 2023 ("the order"):

1. The respondent shall pay maintenance (excluding lodging) to the applicant in the amount of six thousand rands (R6000.00) per month. First payment to be made within seven (7) days from the date of this order and thereafter on or before the 1st of each subsequent month.

2. The respondent shall pay maintenance (excluding lodging) for the minor child in the amount of four thousand six hundred rands (R4600.00) per month payable to the applicant. First payment to be made within seven (7) days from the date of this order and thereafter on or before the 1st of each subsequent month.

3. The respondent shall pay maintenance for lodging for the applicant and minor child in the amount of eight thousand three hundred rands (R8300.00) per month payable to the applicant. First payment to be made on or before the commencement date of the lease agreement and thereafter on or before the 1st of each subsequent month.
4. The respondent shall make payment of the monthly fees, including but not limited to registration fees, school clothing, stationary, books, school tours and day trips, extra classes and ancillary school costs in respect of the minor child's current school, Fig Tree Montessori Pre-school, and extra mural activities and related expenses, which payments shall be made directly to the school and/or service provider/s.
5. The respondent shall retain the applicant and minor child as dependants on his medical aid, or medical aid fund with similar or better benefits and shall pay all excess and shortfalls not covered by the medical aid fund, including but not limited to costs in respect of necessary medical, dental, orthodontic, pharmaceutical, hospitals, surgical and/or intervention and/or vaccination expenses.
6. The applicant's claim for contribution towards legal costs is dismissed.
7. The respondent's application for striking out of paragraphs 6.2 to 10, 11.1 to 11.87 and annexure "HF1" to the founding affidavit is dismissed.

8. The applicant is granted leave to file a further affidavit dated 16 August 2023.
9. The applicant is ordered to pay the costs occasioned by the filing of the aforesaid further affidavit on an attorney and client scale.
10. The respondent is granted leave to file a sworn reply dated 15 September 2023.
11. The costs of the rule 43 application be costs in the cause.

[3] I made the *ex-tempore* rulings in the orders reflected in paragraphs 7 to 8 above on 2 October 2023. I have incorporated the said orders into the written order on request by the parties.

[4] The respondent has requested reasons for paragraphs 1 to 7 of the order. Those reasons follow below.

Background facts

[5] The parties married in terms of the Islamic Rites on 23 November 2014. One minor child was born out of the marriage on 22 January 2020. The applicant left the common home with the minor child in July 2022. They reside with her parents. The respondent issued applicant with written Talaq on 1 August 2022. The divorce summons was issued on 13 December 2022. The divorce is opposed and is pending. The Rule 43 application was instituted on 14 March 2023, and it was amended on 12 April 2023. The opposing affidavit and striking out application were filed on 26 April 2023. The respondent filed a supplementary affidavit on 4 August 2023. The applicant filed an application to file a further affidavit on 16 August 2023. The respondent filed a sworn reply dated 15 September 2023.

Maintenance pendente lite

[6] I deal first with the maintenance claim for the minor child and applicant. The Republic of South Africa has acceded on 16 June 1995 to the Convention on the Rights of the Child¹. Article 27 of the Convention requires “*the States Parties to recognise the right of every child to a standard of living which is adequate for the child’s physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child.*”

[7] Section 15 of the Maintenance Act² provides for the duty of the parents to support their children. Subsections (2) and (3) read as follow:

“(2) The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.

(3) (a) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration-

(i) that the duty of supporting a child is an obligation which the parents have incurred jointly;

(ii) that the parents respective shares of such obligation are apportioned between them according to their respective means; and

(iii) That the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage;

(b) Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.”

[8] The purpose of Rule 43 has been stated as follows:

*“Primarily **Rule 43** was envisaged to provide temporary assistance for women, who had given up their careers or potential careers for the sake of matrimony with or without maternity, until such time as at a trial and after hearing evidence maintenance claims could be properly determined. It was not created to give an interim meal- ticket to women who clearly at the trial would not be able to establish a right to maintenance. The grey area between the two extremes causes problems.”³*

¹ signed at New York on 20 November 1989

² Act 99 of 1998

³ B v S (16158/16) [2018] ZAGPJHC 534 (16 August 2018); Nilsson v Nilsson 1984 (2) 294 (C) at 295F, cited in MCE v JE unreported decision of the North Gauteng High Court (14/09/2011) under case number 13495/2011

[9] The applicant stated that she is not employed. She has attempted to find employment at various places but to no avail. She has attached documents pertaining to her unsuccessful employment applications. She continues to look for employment. She has an accounting degree. She is currently studying for a CIMA qualification (accounting) to better her chances of finding employment and increase her earning potential. She commenced her further studies in January 2023, and it is a three-year course.

[10] Prior to the birth of the minor child she was employed as a finance officer at First National Bank and her net salary was approximately R18 000. She was utilizing her income to pay for household expenses, including medical aid for both herself, and the respondent. After the birth of her child, she worked for a further six months. Then they discussed her future employment and agreed that she should resign from work and care for the minor child full time. She was naturally concerned about their expenses at that time because she did not know how much the respondent earned. He assured her that he would be in a position to pay for the household expenses that she paid for with her income. From that time the respondent paid for all the household expenses and maintenance needs of their family. He paid for, *inter alia*, the medical aid, bond, rates and taxes, water, electricity, car payments, insurance and domestic worker.

[11] During March 2022, he bought the former matrimonial home for R2.7 million and paid transfer costs, including transfer duty in the amount of approximately R300 000. He also paid a substantial deposit of approximately R1 million.

[12] In 2016 her mother bought a property and transferred it into her name. It is rented out and she receives the monthly rental amount into her FNB bank account in the amount of R4 800. From this amount, R811.67 is deducted for water, rates and electricity. She has no other source of income. She is also a co-owner of a second property registered in her name and her mother's name as part of his succession plan. Her parents operate a business on the premises, and she does not derive any income from it.

[13] She left the previous common home during July 2022 and moved to her grandparents' home for 3 months for religious purposes and thereafter moved to her parents' home. The main reason why she made that move was to stabilize the changes brought about by the respondent's actions to both her and the minor child's lives. She has subsequently made the decision to move to alternative accommodation for herself and the minor child. She attached the relevant quotations for alternative accommodation expenses. The minor child attends pre-school at Fig Tree Montessori school. At present her parents are maintaining her and the child in respect of accommodation and basic necessities because she does not have means. She has utilized her savings to cover the child's expenses. She attached her FNB bank statement showing the balance in her account.

[14] The respondent is not contributing towards the maintenance for the child and herself. He is also not paying the pre-school fees. Her attorneys of record requested maintenance from the respondent on numerous occasions. He was provided with her banking details in August 2022, but he failed to pay cash maintenance. His first tender to pay maintenance was in March 2023, but he failed to pay. The applicant and minor child are currently registered as beneficiaries on the respondent's medical aid. He also pays for the cell phone contract that she use and which he calls to exercise telephonic contact with the minor child.

[15] The applicant in the divorce action is seeking rehabilitative maintenance for herself in the amount of R20 000 for a period of 5 years; and maintenance, including R10 000 cash, for the minor child.

[16] The respondent is an admitted attorney of this Court. He is employed as the Head of Legal and Company Secretary at Robert Bosch (Pty) Ltd, an international company. He earns a nett salary of R68,171.74 per month plus a discretionary performance bonus. His expenses amount to R113,723.23 per month. He has a monthly shortfall of R45 000. He cannot afford to pay the requested cash maintenance.

[17] He made the following contentions. The expenses claimed by the applicant were inflated, exaggerated, and not incurred. He made tenders towards the minor child's

school fees and maintenance to which no response was received. The expenses for accommodation were not discussed with him before the application was launched. The applicant does not require maintenance because she is young, highly qualified and able to obtain employment. The applicant is in all likelihood working in her family's business which she has previously done. The applicant has not disclosed to the court how she survived for over a year without his financial support.

[18] The applicant disputed the contentions made by the respondent. She stated that she has no other source of income. The respondent's allegation in this regard was just a speculation. She denied that she has never requested maintenance from him before filing this application. She attached correspondence between her attorneys and respondent as proof, and referred to the contact application where this issue was raised. It should be noted that the attached correspondence was not disputed. He made a first tender in March 2023 to pay maintenance and pre-school fees. He had the applicant's banking details and the pre-school's information, but he failed to pay. Clearly, the respondent was not honest to this Court.

[19] She stated that the respondent's plea of poverty was a fabrication. During the time he was not paying maintenance, his bank accounts show that he *inter alia* paid R580 000 in legal fees to Clarks attorneys, R102 000 to World of travel, R25 361 to Royal Travels for his airplane tickets, R26 224.40 for an unknown purpose, and R68 936 in respect of forex exchange. He agreed to further pay Clarks attorneys legal fees in the amount of R15 000 per month. In my view the reasonable inference to be drawn from his bank accounts and Financial Disclosure form is that he understated his income and inflated his monthly expenses to avoid paying maintenance for the applicant and minor child.

[20] I have considered the expenses of both parties and minor child. During the argument in court the parties agreed that there were some duplications in the table of expenses. I have adjusted them accordingly. In determining the amounts, I took into account the following factors: That the applicant resigned from her employment by agreement between the parties in order to care for the minor child; that prior to the separation, the parties were living a decent life where the respondent was paying for all the household expenses; the right of the minor child to a standard of living

which is adequate for her development; the applicant's actual and reasonable expenses; the parties' respective income; and their assets.

[21] The respondent is in a stable employment and earns a considerable income. In my view he is able to meet the expenses for the applicant and minor child. He has conceded that he has not paid maintenance for the applicant and minor child for over a year. He was provided with the applicant's banking details in August 2022. He needs to stop avoiding his obligation to pay maintenance.

Contribution towards costs

[22] Rule 43(1)(b) provides for a spouse to claim a contribution towards the costs of a pending matrimonial action. The applicant claimed contribution towards costs in the amount of R250 000. She stated that she cannot proceed on equal footing with the respondent without the initial contribution towards her legal costs. In support of her claim, she referred the Court to the substantive application brought by the respondent, that allegedly cost her R436 390.16. She attached her counsel's invoices in respect of that application. She stated that she needs the funds to pay her legal team for the Rule 43 application and divorce action.

[23] The respondent opposed the relief sought by the applicant on the basis that she has not made out a case for it in respect of a divorce action, and she is not entitled to contribution towards the costs of the interlocutory applications. He relied for this submission on the case of *JM v GM and Others*⁴ where it was held that:

“Although a rule 43 costs contribution order may not be limited to party and party costs and may include attorney and client costs, it is well established principle that an applicant seeking a contribution under the rule is not entitled to obtain a contribution to, or recover, costs in interlocutory applications. The rationale for this principle is that spouses who are successful in interlocutory applications in divorce actions will generally be awarded costs of the interlocutory application. If a successful spouse, in addition, is awarded a costs contribution in terms of rule 43 for the same interlocutory application, the result would be a duplication of the costs award which is clearly inequitable.”

⁴ (3145/2015)[2019]ZAECPEHC 23 (9 April 2019).

[24] The spouse claiming a contribution towards costs is required to show that he or she has inadequate means of his or her own to fund the litigation⁵. The quantum of the contribution to costs which a spouse may be ordered to pay lies within the discretion of the presiding judge. In exercising the discretion, the court must have regard to the circumstances of the case, the financial position of the parties, and the particular issues involved in the pending litigation.⁶

[25] I agree with the respondent that the applicant is not entitled to contribution towards the costs of interlocutory applications. The applicant failed to provide the relevant information on the particular issues involved in the pending divorce action. She did not provide an estimated bill of costs and invoices to assist the court in determining this issue. I found that the applicant has not established a claim for contribution towards costs, and it must fail.

Application to strike out

[26] The respondent brought an application to strike out paragraphs 6.2 to 10, 11.1 to 11.87 and annexure “HF1” to the founding affidavit in terms of Rule 6(15) of the Uniform Rules of Court on the basis that they are irrelevant. I have perused the relevant paragraphs and annexure and I do not intend to repeat same herein.

[27] Rule 6(15) provides that “*the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate costs order, including costs as between attorney and client. The court*

⁵ Greyling v Greyling 1959 (3) SA 967 (W).

⁶ Van Rippen v Van Rippen 1949 (4) SA 634 (C) at 639

shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

[28] Irrelevant matter means allegations which do not apply in hand and do not contribute one way or the other to a decision of such matter.⁷ A decisive test is whether evidence could at the trial be led on the allegations now challenged in the pleading. If evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.⁸

[29] In dealing with the requirement of prejudice, the respondent in his heads of argument referred the court to the case of *Vaatz supra*, where the court stated that *".... If a party is required to deal with scandalous or irrelevant matter the main issue could be side-tracked but if such matter is left unanswered the innocent party may well be defamed. The retention of such matter would therefore be prejudicial to the innocent person."*

[30] The applicant submitted that the said paragraphs and annexure are relevant in that they introduce the history of the matter, and they are also relevant to the determination of the issue of maintenance. For example, the respondent confirmed his responsibility to maintain the child and his willingness to pay reasonable maintenance in his application for contact.

[31] The history of a case is often permissible as an introduction to allegations founding the cause of action.⁹ I am not persuaded that the historical background

⁷ *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566-E.

⁸ *Golding v Torch Printing and Publishing Co (Pty) Ltd and Others* 1948 (3) SA 1067 (C) at 1090.

⁹ *Richter v Town Council of Bloemfontein* 1920 OPD 172 at 173/4

should be struck out. Further, the respondent has failed to show in his application to strike out how he will be prejudiced in this case if it be not granted. The application to strike out does not meet the requirements of Rule 6(15) and it must fail.

[32] I therefore make the order as set out above.

**MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division**

(Electronically submitted by uploading on Caselines and emailing to the parties)

Date of Reasons: 4 March 2024

Counsel for the Applicant: Adv N Van Niekerk
Instructed by: Krynauw Attorneys

Counsel for the respondent: Adv R Adams
Instructed by: NM Aboo Attorneys