

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



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: 23/02/2024 **Signature:**

Case No. 022106/2023

In the matter between

M[...], Q[...]

Applicant

and

V[...], S[...]

Respondent

JUDGMENT

MAHOMED AJ

INTRODUCTION

The applicant applies for an order in terms of R43 of the Uniform Rules of Court, for maintenance for each of the children, spousal maintenance, and a contribution toward legal costs. The care and contact regarding the children, except for their participation in extracurricular activities and consultations in that regard, have generally been agreed upon and to be made an order of the court. Furthermore, the applicant applies for leave to file a supplementary affidavit, in terms of R43 (5) of the Rules. The respondent opposes both the applications.

BACKGROUND

1. The parties were married in 2006 out of community of property, with a benefit in the accruals. At the date of their marriage both were newly qualified medical doctors. They are a relatively young family, with two minor children, the youngest is 5 years old. Both children are at private schools. The applicant is a general practitioner and the respondent during their marriage specialised as a plastic surgeon, and thereafter as a general surgeon. Initially they enjoyed a comfortable life which has progressed through the years to enable them to live a luxurious lifestyle, for the better part of their 18 years together. The marital home is in an upmarket suburb of Johannesburg, with five bedrooms, valued at R6,2 million and the applicant drives a luxury vehicle valued at R1 million,

albeit it is registered in the respondent's name. they shop at upmarket stores and their children enjoyed all the benefits of a wealthy lifestyle. They own timeshare in upmarket resorts in the Sabie area and in Durban and they travelled on two international holidays together. The evidence is that the respondent is well travelled as he attended and participated in several international conferences over the years and continues to do so, for his continued education and when he is invited as a speaker.

2. The evidence is that the respondent, left the marital home in May 2022 after their marriage had irretrievably broken down, he lives in a garden cottage temporarily, in an upmarket area, he has paid a deposit of R560 000 on a new apartment he plans to purchase in the upmarket area of Melrose Arch, he drives an Amarok vehicle also of substantial value.

3. Their marriage broke down, when the respondent became involved in an extramarital affair, although it is disputed that it is the sole reason for the breakdown. Since the respondent moved out of the marital home in May 2022 the parties have attempted to settle their disputes over approximately 18 months, however no significant progress was made on any of the monetary aspects in this application. The further evidence is that much money has already been spent to date on legal services, to attorneys, mediators, and clinical psychologists. In March 2023, the

respondent issued summons for a divorce, the applicant has filed her plea and counterclaim, and the pleadings have closed.

THE R43 APPLICATION

4. In this application for interim relief, the applicant prays for an order for maintenance of R20 000 for each of the children, R30 000 for spousal maintenance, a contribution toward her legal costs and orders in respect of the children's sporting and other extramural activities. The respondent currently pays for the household expenses, the children's education and he pays over a cash allowance of R36 000 per month to the applicant. It is contended that the amount is insufficient to afford her and the two children the lifestyle they are used to. In order to succeed in her claim, the applicant must prove her need for maintenance and for a contribution toward her legal costs. Furthermore, she must demonstrate that the respondent can afford to pay the amounts claimed.

5. The evidence is that the applicant has never known the full extent of the respondent's financial position, however she noted from their lifestyles and the respondent's spending habits, he was financially sound and able to provide for their luxurious lifestyle. Although she ran a medical practise as a general practitioner, her income was relatively small, and they agreed she would use that income for

personal needs. She and the children relied on him for their monthly expenses. The evidence is the applicant could not reconcile the financial information the respondent provided in his answering papers with their lifestyle, she was of the view that he had understated his financial position. In his financial disclosure document, he stated his total income to be R300 000 per annum. However, when one considers he pays in R89 000 per month as maintenance, the amount appears illogical. The applicant has requested his financial information throughout the 18 months that the parties were in settlement negotiations, however the respondent's erstwhile attorney Dollie provided only limited information which was of little assistance to her. The respondent contended that he could not afford the increase in maintenance nor even a contribution to her legal costs.

IN LIMINE

APPLICATION IN TERMS OF R43 (5)

6. The applicant applied for leave to file a supplementary affidavit in which she demonstrates the respondent's ability to afford the additional amounts she claims. Rosenberg SC appeared for the applicant and submitted that, the financial information provided in the answering papers

are vague and not in line with the respondent's lifestyle, the applicant was forced to issue subpoenas on various institutions to obtain more reliable information to assist the Court to determine the respondent's ability to pay and order appropriate maintenance pendente lite.

7. It was contended that the applicant seeks only R34 000 more in maintenance and an amount as a contribution to costs. Counsel submitted that the documents obtained by subpoena are all related and material to the issue of the respondent's ability to pay the maintenance, it was submitted that he ought never to have disputed the filing of a further affidavit, because he deliberately failed to make full disclosure of the value of his income and assets and this opposition increases legal costs. The applicant cannot afford to pay her legal fees she has already incurred substantial legal costs. Her attorney has had to agree to work at a reduced rate to accommodate her in the litigation and the delays and failure to settle this dispute is due to the respondent attitude and behaviour over the 18 months since the separation.
8. Rule 43 (5) provides:

"The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision."

9. Woodward SC appeared for the respondent and submitted that it was not necessary for the applicant to issue subpoenas for his financial documents, affordability was never an issue, he contends that the applicant fails to set out a need or that the amounts she claims are reasonable. It was submitted that he pays an amount of R89 000 per month, including a cash payment of R36 000 and the school and medical expenses for the children. Furthermore, the respondent contends that over the months since June 2022 the applicant has never complained that the maintenance amount was insufficient for their needs.
10. Woodward SC contended that the applicant obtained the information simply to embarrass the respondent. It was contended that the applicant is being strategic in this application in that she seeks to pre-empt an order for her maintenance on divorce, where she claims maintenance for her lifetime. Counsel argued that the applicant is a young professional, she has worked over the years, she can support herself. The claim for increased maintenance is meritless, the applicant failed to demonstrate a need.
11. Furthermore, counsel argued that this is not the proper forum to apply for leave to file a further affidavit, in an interlocutory proceeding. Counsel referred the court to the judgement by Lamont J, where it was held that the respondent ought to have been given

notice of the subpoenas. It was submitted that the documents were obtained unlawfully, they are not sought for purposes of trial nor do the subpoenas require a witness to provide evidence in court on the documents. It was further argued that the applicant failed to comply with Rule 38 (1) (b) when she directed the third party to submit documents directly to the applicant's attorney rather than to the Registrar, the attorney cannot be the proper custodian of documents obtained by subpoena.

12. Rosenberg SC argued that the applicant has tried to procure the information on the respondent's earnings for over 18 months, without success. Counsel reminded the court that it was only "after the documents were obtained", that the respondent no longer disputes his ability to pay maintenance. The information on his financial disclosure form is unreliable and does not make logical sense, when regard is had to the amount he pays in maintenance. Ms Rosenberg submitted that it cannot make logical sense that he pays over R89 000 per month, from an income of only R300 000 per annum as he stated under oath however, he continues to live the same lifestyle as he used to during the marriage. The applicant requires the information, she has never known the full extent of the respondent's position and their accruals, and none of his legal representatives meaningfully cooperated with her over the months. It was proffered that she spent a substantial amount of money in legal

costs in her efforts to prove he can afford to pay an increase in maintenance and contribute toward her legal costs.

13. Ms Rosenberg submitted that the respondent knew of the subpoenas, he instructed Vericclaim, who manage his medical claims, to furnish the information requested, moreover the respondent's attorney, a senior practitioner, handed over copies of his ledger when requested without objections, and the banks informed the respondent of the subpoenas. The applicant received no objections to disclosure nor has a third party claimed privilege.
14. It was contended that the respondent could have applied for the subpoenas to be set aside, he did nothing and cannot now claim he suffers prejudice. The information was correctly sought for purposes of trial, the pleadings have closed, and the information is relevant to the application before this court and the trial court. Furthermore, the respondent has replied to all the submissions made in the supplementary papers, in regard to his financial information.
15. Ms Rosenberg proffered that the applicant has substantially complied, and the non-compliance should be condoned , due to the complaint she has again served the subpoenas through the office of the Registrar and

no rights of third parties as to information in the documents subpoenaed were affected in any way.

16. In *Bader v Weston*¹, it was held that “a court will not reject additional affidavits against the filing of more than one set of affidavits solely upon the basis of any alleged rule of practise.” In *Eke v Parsons*², regarding the filing of a re-enrolled (“second summary judgment application”), the court stated:

“without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That however does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from the strict observance of the rules.”

17. It is common cause that the applicant has been trying to establish the extent of the respondent’s finances over several months and the documents are the objective evidence of his finances. The dispute appears to be in the main a financial one, the documents are discoverable and in terms of the practise directives the respondent has failed to furnish bank statements for six months for every bank account, preceding the period of investigation. He filed only selected statements.

¹ 1967 (1) SA 134 C

² (CCT214/14) ZACC 30, 2015 (11) BCLR 1319(CC), 2016 (3) SA 31 (CC) 29 September 2015

18. A full and proper disclosure was not forthcoming even after the issue of action proceedings and in compliance with the requirements of the Practice Directive. It was contended that the respondent was obstructive prior to the issue of summons, he caused unnecessary conflict, he accused the applicant's attorney of being conflicted, he disputed the attorneys reduced rates to assist the applicant in the litigation, he suddenly withdrew from the mediation process without a reason, he without reason terminated the mandate of his erstwhile attorney.
19. I am of the view that the applicant had no other option but to issue the subpoenas for a proper disclosure. It is noteworthy that his ability to afford payment of maintenance was no longer an issue "only after the documents became available" after the subpoena was served. I noted his position in his answering papers that he could not afford the increase in maintenance.³ The respondent had no intention to make full disclosure to the court and there can be no fair judgment regarding monetary aspects without the full and proper information, albeit that respondent argued that there fundamental flaws in the applicants calculations, there are other aspects in regard to his lifestyle and the like, which are not disputed, which will assist the court in making a fair decision.

³ Caselines 07-168

20. I am of the view that the subpoena was served for a legitimate purpose and used for the purpose only. It is noteworthy that there was significant change in the respondent's stance, on his affordability, from the one held throughout the 18 months of negotiations. I noted various judgments regarding the filing of a further affidavit and the procedures to issue of a subpoena, I am of the view the facts in this case are distinguishable. In casu the respondent failed to exercise his remedies in relation to the subpoenas , he complained of. He responded to the allegations in relation to the information obtained through subpoenas, in his supplementary reply. In my view it is a case of the "the horse had bolted." Furthermore, where a party fails to cooperate, in disputes of this nature, that party should expect inaccuracies and guesstimates, as a spouse, often the applicant wife, is left guessing and speculating. I agree with Rosenberg, SC, it is regrettably, a situation of "catch me if you can." The court is also mindful of the party's marital regime and the financial information is relevant to the accruals, that information cannot be classified as "privileged" between spouses. Those are the special circumstances that inform the granting of leave to file a further affidavit. The applicant commenced by requesting information, the respondent failed to appreciate the impact of this R43 procedure, he did not take it seriously, as he provided incorrect and incomplete details on his finances.

21. Rule 43 does not provide for an appeal, the documents are pertinent to the relief sought and to a fair and reasonable order for interim relief, in the interest of both parties and more importantly their children. Accordingly, the non-compliance is condoned, I find that it is in the interest of justice that the supplementary affidavit and its contents are admitted.

INTERIM MAINTENANCE

22. The applicant was responsible for the care of the children, and their home. Although disputed, the parties agreed that the applicant mother would focus on their home and family and therefore she divided her time between her home and her professional life, her career aspirations to specialise in paediatrics and internal medicine had never materialised. She had also to provide the necessary support for the respondent to pursue his career aspirations and indeed, he appears to have done well for himself as he acquired his specialist qualifications. The result is that the applicant has not had much time to devote to her earnings net worth is substantially lower than that of the respondent's, a specialist plastic surgeon and general physician. It is noteworthy that she does not own a vehicle, or even a retirement plan, as a mid-career professional, obviously relied on the respondent's good will and support for her future finances.

23. As a couple they pooled resources and as a family they all enjoyed a luxurious lifestyle. Since the parties have separated the applicant and her children no longer enjoy the same lifestyle as they used to, the respondent's contributions are insufficient to meet their expenses. However, the objective evidence⁴ is that the respondent continues to enjoy a similar, if not better lifestyle, he travels only business class, has paid a deposit of R560 000 on a home for himself (effectively he will be running two homes), he lives the life of a wealthy man.
24. The applicant suffers certain ailments⁵, which limits her capacity to work on a full time basis, although this is disputed, the parties agreed that she would work on a part time, half a day basis. The parties agreed that she would retain her income and pay for any incidental home expenses. Although the respondent argued that she can work and earn her income to pay her expenses, he does not provide details on her likely earning capacity.
25. The evidence is that the applicant has no assets, and her monthly income after expenses is between R10 000 and R15 000⁶, she has cash on hand at R700 000. Woodward SC submitted that upon analysis of her financial statements, the applicant's business has grown, she has always

⁴ Caselines 08-22 -25

⁵ Caselines 07-14 par 5.8 and 5.9

⁶ Caselines 07-17 par 6.2

maintained a positive balance in her bank. It was submitted that she can earn, she must simply put in a full day at her rooms. Furthermore, it was argued that she overstated her monthly expenses and has in some cases duplicated expenses, she included non-recurring costs or items not spent at all in her listed expenses. Counsel, submitted that her financial disclosure documents are unreliable and the amount the respondent pays to her is in fact sufficient for her needs.

26. The applicant included her business net profit and her list of expenses⁷, and her professional expenses, which is hotly disputed by the respondent. The respondent argued that several items were not business expenses and that the list is unreliable. Rosenberg SC submitted that the expenses listed are reasonable and necessary, but conceded that the amount of R5 000 for a retirement annuity ought not to have been included on the list, counsel accepted that this would be a valid reduction in the amount claimed. Counsel argued that when the court has regard to the respondent's schedule of income and expenses, which the applicant presented as extracted from his bank statements, the respondent is a wealthy person and lived accordingly. It was argued that his family must also enjoy the same privileges and lifestyle. Counsel proffered that the respondent travels overseas extensively and only on business class, but refuses to install an inverter for his family, to enjoy a

⁷ Caselines 07-18 and 19

comfortable lifestyle. It was proffered that he has those facilities in the cottage he occupies temporarily and will enjoy the same comfort and safety in the new home he plans to purchase. His family relies on torches and candles in their 5 bedroomed home. It cannot be that he cannot afford such a critical service for his children in a large home.

27. It was submitted that the applicant has a need for an increase as she cannot meet both her and the children's expenses, on the R36 000 that the respondent pays over. Although the respondent pays service providers for the necessary household expenses, the applicant must herself be placed in funds to attend to the incidental expenses that arise in their home, she should not be forced to run cap in hand each time she requires a necessary service for their home. The parties are constantly arguing and the applicant has had to seek therapy to manage the abuse, she is to put with each time the parties have to communicate. Counsel argued that the respondent has only recently adopted a tight fisted attitude toward the applicant and the children, after he left the marital home.
28. The applicant contended that on analysis of the bank statements and records from Vericclaim, a medical aid billing company, which she obtained, she established that the respondent earned approximately

R10. 7 million for the period June 2022 to June 2023, from his practise⁸, his income from investments for that period was R1 604 750. The respondent argues that the calculations are incorrect and unreliable as several of the banking transactions are inter account transfers as he created loan accounts, the applicant included VAT in several of the calculations. It was contended that the figures presented are unreliable.⁹ The respondent contended that the applicant has inflated her expenses and understated her income, however he failed to indicate what her income and expenses are likely to be.

29. Rosenberg SC submitted that it is not disputed that the respondent's personal expenses for the same period is R2.1 million¹⁰. Although, he argued that the international travel was for conferences he attended which were not sponsored, he failed to reflect them in his financial statements as a business expense, the court is to rely on his say so. Furthermore, the applicant compared the figures against his financial disclosure document, in which the respondent declared personal expenses as R32 158 per month, plus his maintenance payments at R89 313 per month, at a total R121 471 per month. The amounts do not make logical sense against an annual income of only R300 000 as declared in his financial disclosure form. The applicant disputes the

⁸ Caselines 08-16

⁹ Caselines 08-142 par 7.1.5

¹⁰ Caselines 08-20 21

travel figures disclosed as R2000 per month whilst the bank transactions reflect amounts for airline tickets in the range of R65 000 to R80 000, well more than what he declared. The respondent argued that the applicant does not have membership at a gym but included a monthly amount in her list of expenses, her medical costs were a once off charge, which could have been paid by the medical aid, if she had given the invoices to him, however she sets those figures out as recurring expenses. It was submitted that her disclosure documents and her list of expenses is inflated and unreliable.

CONTRIBUTION TO LEGAL COSTS

30. The respondent tendered R150 000 for the applicant's future legal costs, he has paid R54 000 for her legal costs, including for mediation services, when they attempted to settle the matter.

31. The respondent in his reply to the applicant's supplementary papers stated that "at this early stage he is unable to estimate his future costs of litigation"¹¹. His bank statements reflect he has spent R758 717 for the period June 2022 to March 2023¹². On 2 March 2023, the respondent paid R500 000 as a deposit to his attorney.¹³

¹¹ Caselines 07-183 para 71

¹² Caselines 08-28

¹³ Caselines 08-145 146

32. The applicant is represented by a senior and a junior counsel and together with her attorney, who is working at a reduced rate, combined the parties legal costs for professional services is on par, “the applicant has three representatives for the price of two that the respondent pays for.” The applicant claimed she required the services of a junior counsel to carry out the extensive analysis of the financial documents and a costs consultant drafted her schedule of estimated future costs. The respondent has hotly disputed on the items charged for and their reasonable costs, however it was argued that it is draft document, it provides a fair indication of the likely costs of litigation and in the absence of any indication from the respondent as to his future legal costs, the applicant is again left to speculate and has provided the court with fair estimates.
33. The evidence is that the applicant has incurred costs of R825 596, to date and she has paid R362 886 from her limited savings. Her anticipated legal fees up to trial certification will be R1 254 948.21, if not settled at that stage R163 959 are the further fees to be incurred to the first day of trial. Thereafter she will require R95 000 per day for each day of trial. She annexed a bill of costs¹⁴, the respondent disputed several items, and argued items were not necessary, they were an overcharge, the items were duplicated, the items charged were premature and

¹⁴ Caselines 07-50

contended that the amount of R150 000 is sufficient, however he fails to provide any indication of his future costs, the applicant is left to speculate, and she has an amount outstanding to her attorney.

JUDGMENT

34. I have addressed the point in limine, and it need not be repeated.

SPOUSAL MAINTENANCE

35. Each application for spousal maintenance must be decided on its own facts. The applicant is a medical practitioner however her earning capacity has been limited as she has had to divide her time between her practise and her motherly duties. She has also the contend with certain health problems which must impact on her earnings. She will require to employ the services of an expert to assess her employability to gauge her income potential.

36. The writer E Bonthys,¹⁵ sets out the true reality of women in the working environment, *“as a consequence of gender discrimination, women tend to be poorer than men and to earn less in the marketplace. Stereotypical roles also entail that women tend to devote more time and effort to childcare and housework which further impacts on their earning*

¹⁵ “Public Policy

capacity.” In casu, it is not disputed that the applicant spent more of her time on the children and home than the respondent. I noted Ms Woodward’s submissions that the applicant’s savings have been intact and grew each year, however the facts demonstrate that the respondent has earned a lot more and has grown a substantially larger estate over the same period.

37. The respondent is a man of means. His counsel submitted that he has never argued his ability to pay, although I am not persuaded on this point, I am of the view that this point of affordability was the main obstacle to a settlement of the disputes between the parties. The facts demonstrate that the respondent changed tack,¹⁶ on his ability to afford maintenance, after his financial documents became available. Moreover, on his version, the respondent has access to capital, he takes large loans from his business to finance his lifestyle. The business pays for his cellphone costs, his car insurance, the repayments on his vehicle. It is noted that in the past year since the parties separated and after he left the martial home, he paid R89 000 per month for the household expenses, and all the children’s educational expenses, including their extramural activities.
38. It is not disputed there is a significant disparity in their respective incomes and that the respondent has through the years paid for most expenses.

¹⁶ Caselines 07-168 , 07-27 para 12.10

He has always paid for his family's living expenses and they are entitled to live a similar high standard of living which they were used to. The applicant contended that the respondent has continued to live on the same high standard and that she noted from his bank statements, the objective evidence she placed before this court, that the respondent's spending habits are no different from when they lived together.

39. In *CC v NC*¹⁷ the court stated that an applicant is entitled to reasonable maintenance dependent on the marital standard of living of the parties, albeit that a balanced and realistic assessment is needed, based on the evidence concerning the prevailing factual situation.
40. I considered the list of expenses the applicant annexed to her papers, together with her business expenses, they appear reasonable, albeit that certain items are non-recurring, the increase she claims is not unreasonable having regard to the respondent's expenses, and his earning potential from the various products and services he offers. Ms Rosenberg conceded that she cannot claim R5 000 for a retirement annuity, but reminded the court that the respondent has refused to pay for certain home expenses, and the applicant will have to cover those costs.

¹⁷ (16742/21) [2021] ZAWCHC 227 (9 November 2021)

41. Rosenberg SC, highlighted , by reference to entries in his bank statements, that on a recent international trip to Turkey, the respondents paid for two debits for preferred seats on an airline, he was travelling with another, on his version he donated a substantial sum of money to his mother. He travelled business class, lived in five star accommodation in several international destinations, purchased expensive spectacles on two consecutive days, paid a substantial deposit for a home in an upmarket area, purchased an expensive camera, presumably to pursue a hobby, and the like, his family should also enjoy the same lifestyle. The respondent argued that she can work harder longer and earn more, however he does not offer any evidence on how much more she can earn, to make up the shortfall for his family's expenses.

42. The applicant stated that she has not realised her full earning potential over the years, as compared to the respondent, the parties agreed that she would focus on their children and home and run her general medical practise only to keep up with practise. She and their children relied almost entirely on the respondent's support for their needs and the maintenance he pays is insufficient to afford them the lifestyle they enjoyed. It is interesting to note that she does not have a retirement plan as a mid-career professional, unless she was indeed relying on the respondent for her support. Woodward SC proffered that the applicant failed to submit her medical bills to the respondent who could have

claimed it off their medical aid. It is clear from the facts that the parties are no longer able to speak to one another and in my view she should not have to run to him each time she has to pay for a necessary expense. It is common cause she has medical problems. Although the applicant pays most services providers, directly, she must be placed in funds to meet incidental expenses, which in upmarket areas can cost above the average and for a large home requires more maintenance.

43. The application for an increase is pendente lite, the respondent would not be seriously prejudiced if he must keep his family financially comfortable. I am not persuaded that he has never quibbled about affordability, he appears to use his financial strength as leverage.

44. His refusal to renew a motor plan on a vehicle, to install an inverter and to install security cameras in the marital home, is noteworthy and inexplicable. Those are necessary expenses for the safety and wellbeing of his children and the applicant but of course she is no longer in his favour, he therefore punishes her and regrettably the children suffer. It cannot be that he is unable to afford those costs. I am inclined to grant her the claims for both the children at R20 000 each and herself at R25 300.

45. Her constitutional rights to dignity¹⁸ cannot be compromised, she should not have to go cap in hand to the respondent each time, he has refused to pay for very critical necessities. The facts demonstrate a recent trend of “tight fisted and spiteful behaviour”, and it is likely to continue until the matter is finalised. In **Glazer v Glazer**,¹⁹ the court stated:

“I think that a wife is entitled to a reasonable amount according to her husband’s means, not necessarily according to what he thought was reasonable.”

CONTRIBUTION TO LEGAL COSTS

46. In **H v H**²⁰ Victor J, stated:

“it would be unwise to ignore the gendered dynamic of rule 43, and a judge must exercise a discretion against this background and the exercise of the discretion must take place through the prism of the Constitution.”

47. Section 9 of the Constitution provides for the right to equality and section 39 provides for access to courts.²¹ Rule 43 exists to provide an equality

¹⁸ Section 10 Act 108 1996

¹⁹ 1959 (3) SA 930 D_E

²⁰ Case No. 44450/22 JHC p 20 [77-78]

²¹ See fn 19

of arms between the parties so that a disadvantaged party is placed in the same position to present their case as the other spouse.

48. In divorce litigation the equality of arms is critical and in casu, the applicant will require the appoint various experts , on her employability, to track the respondent's financial dealings, to determine her earning capacity given her medical condition and her commitments as the primary care giver. The respondent in his answering papers initially, indicated that he expected to spend R180 000 in legal costs, however in his reply to the answering papers he indicated that he was unable to estimate his future costs. The evidence is that at the date of the hearing of this application, the respondent had already spent approximately R700 000 (R500 000 is paid as a deposit) for the fees of senior attorney and a senior counsel.
49. I must consider the reasonable needs of the applicant and the financial means of the respondent to contribute to her legal costs. In applying a discretion, regarding a contribution toward costs, a court is to have regard to the issues in dispute, the scale at which parties are litigating and the respondent's means to pay.
50. The applicants costs as at the date of this application is R 825 596, the evidence is that she paid R362 886, from her savings and R462 709 is

outstanding to her attorney. Although the amount is disputed, the parties appear to be on par on their spend. It is of no assistance to a court, when one party fails to provide an estimate on future costs, that party must bear the risk. The applicant estimates the respondent will spend about R1 million in the future.

51. The applicant has provided a comprehensive bill of costs comprising over 200 items,²² which is hotly contested. Woodward SC submitted that there were unnecessary, judicial pretrial attendances included for issues that were already agreed between the parties, the cost consultant was not entitled to a drawing fee, of R47 000, a charge for the Family Advocate is invalid, that office does not charge a fee, the indexing and paginating, is now automated on caselines and those costs now fall away on a bill, costs for only one copy can be allowed and service by email, is the usual practise, a candidate attorney is charged out at the same rate as the attorney. The use of both an accountant and forensic auditor, was unnecessary, the accountant, Jeena who services both parties should be sufficient, to assess the value of the respondent's business for determination of the accruals, the respondents business is relatively simple to assess.

²² Caselines 07-46-49

52. In **AF v MF**²³, Davis AJ, held, the quantum of contribution to costs which a spouse may be ordered to pay lies in the discretion of the presiding judge, In **Van Rippen v Van Rippen**, Ogilvie Thompson J , as he was then, set out the guiding principle for the exercise of that discretion, as follows:

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

53. I had regard to the circumstances of this case and noted that the parties have failed to settle their disputes on three previous attempts, in the main a financial dispute. Much money has been spent to date and very little progress has been made, the parties argue constantly when at settlement discussions, regrettably even the attorneys are at loggerheads with one another. There are several household items that need to be in place, to ensure that the children are safe and secure.
54. The applicant has gone to great lengths to set out the income and expenses of the respondent, and naturally the respondent has disputed all contentions, including the objective evidence in his bank statements.

²³ 2016(6) SA 422 WCC at par [27] - [48]

55. I have also had regard to the huge disparity in income earned by the parties, over the past financial year. I noted that initially the respondent indicated he would spend R180 000 on his future legal costs, however in his response in the supplementary papers, he contended he could “not provide an indication as to his future legal costs at this early stage”. The court relies on the input of parties to order a fair amount as a contribution toward costs. I am of the view that the respondent can contribute more than the R150 000 he has tendered, our courts have confirmed “*the paramount consideration is that she should be enabled adequately to place her case before the court.*”

56. The court went on to state:

“the importance of equality of arms in divorce litigation should not be underestimated, where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse- usually the wife- will be forced to settle for less than to which she is legally entitled, simply because she cannot afford to go to trial. On the other hand the husband who controls the purse strings, is well able to deploy financial resources in the service of his cause. That strikes me as inherently, unfair. In my view the obligation on courts to promote the constitutional rights to equal protection and benefit of the law, and access to courts, requires that courts come to the aid of spouses, who are without means, to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs. “²⁴ Our courts have held that in the light of the constitutional imperative, on equality and dignity, and fairness, that costs already incurred are to be considered.

²⁴ AF v MF

57. In **VR v VR**, the court stated:

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

58. In **Cary v Cary**,²⁵ the court held that there should be “*an equity of arms*” for the divorce trial to be fair. ... *An applicant would not enjoy equal protection unless she is equally empowered with the sinews of war.*”

59. I agree with the court in **Glazer v Glazer**,²⁶ where the Learned Judge stated:

“ ... cannot call upon her (i.e. the respondent cannot call upon the applicant) to realise all she has, which is a very small in any event, and pay everything out of that, and then only if she has exhausted her assets, apply for a contribution. The scale upon which she is entitled to litigate, in my view is a scale commensurate also with the means of the parties. People in this position are not expected to litigate upon the basis that they have to watch every penny that is spent in litigation,. Litigation can be conducted luxuriously or economically. I do not say that she is entitled to every luxurious expense in litigation, but she is entitled to litigate upon the basis you would expect rich people to litigate. She is the wife of a rich man who is obviously going to litigate against her upon a luxurious basis.”

60. The court is also mindful of the fact that the parties seek to assess and divide an accrual, the respondent has access to funds in the larger accrual, he uses it for his litigation, I do not see why she should not be

²⁵ 1999 (3) SA 615 (C)

²⁶ 1959 (3) SA 928 (W)

able to access the same benefit to litigate her matter to ensure she receives her fair share of the accruals. The applicant's right to equality before the law²⁷ must be protected and she cannot be denied equal protections due to her inability to afford legal services.

61. I considered Woodward SC's criticism of the bill of costs. The applicant seeks a contribution of R1 254 948.97 for her future costs and R 456 668. 32 for her past legal expenses. The order for a contribution toward costs is based on the duty of support and is not meant to be as a contribution to part of the costs. In **Zaduck v Zaduck**, the court stated"

"The correct approach is to endeavour to ascertain in the first instance the amount of money which the applicant will have to pay by way of costs in order to present her case adequately. If she is unable to contribute to all her costs then, it seems to me to follow that the respondent husband must contribute to the whole amount required."

62. I considered the amended bill of costs and am of the view that an amount of R850 000 toward the future costs up to trial stage is fair.

²⁷ S 9(1) Constitution Act 108 of 1996

63. The applicant's past costs in the sum of R456 668.32,²⁸ a debt she owes her attorney is payable, the court has noted that the respondent may have spent approximately R750 000 to date in costs.
64. Regarding the contribution toward costs, I agree with Wilson J,²⁹ that should the matter become settled before the trial certification, monies not expended are to be returned, within 10 days of settlement.
65. I am not inclined to order any costs beyond the first day of trial and accordingly the application is postponed sine die.

Accordingly, I make the following order, pendente lite:

1. The Applicant and the Respondent retain full parental responsibilities and rights as provided for in Section 18(2)(a) to (d) of the Children's Act 38 of 2005 ("the Children's Act") in respect of R[...] V[...] and A[...] V[...] ("the children"), namely the parental responsibilities and rights:
 - 1.1. to care for the children;

²⁸ Caseline HOA 04-69 and 05-19

²⁹ MC v JC Case No. 29301/2020

- 1.2. to maintain contact to the children who shall reside primarily with the Applicant subject to the contact arrangement set out in prayer 3 below;
 - 1.3. to contribute towards the maintenance of the children in respect of whom the Respondent shall contribute towards the support of the children as set out in prayer 4 below;
 - 1.4. to act as guardians of the children;
2. The parties make joint decisions in respect of the following matters relating to the children:
- 2.1. their school education and, in due course, tertiary education, including the choice of school or tertiary institution to be attended by each of them;
 - 2.2. the extra-mural and extra-curricular activities in which the children should participate;
 - 2.3. their religious upbringing, it being agreed that the children will be raised in accordance with the Islamic faith;

- 2.4. their mental and medical healthcare save in the case of emergency in which event the party in whose care the child is when the medical emergency arises shall attend to such emergency and shall notify the other parent thereafter by providing full particulars of the medical emergency;
 - 2.5. any decision which is likely to significantly impact on either party's right of contact to the children;
 - 2.6. any decision which is likely to significantly change or have an adverse effect on the children's living conditions, education, health, personal relationships with other party or family members or the general wellbeing.
3. The Respondent exercise reasonable rights of contact to the children, such contact to include:
 - 3.1. In the first week of every two-week cycle during school term time:
 - 3.1.1. every Tuesday from 17h00 when the Respondent shall collect the children from the Applicant's home until Wednesday morning when the Respondent shall deliver the children to school;

- 3.1.2. every Friday from 17h00 when the Respondent shall collect the children from the Applicant's home until Monday morning when he will deliver the children to school;
- 3.1.3. In the second week of every two-week cycle during school term time:
 - 3.1.3.1. every Wednesday afternoon from 17h00 until Thursday morning when the Respondent will deliver the children to school;
- 3.1.4. One half of every school holiday, each half to alternate each year;
- 3.1.5. Every alternate mid-term school break save that the long winter half school term break shall be divided equally between the parties;
- 3.1.6. Half of the available time on each Eid;
- 3.1.7. Father's Day from 09h00 to 18h00 on the understanding that the Applicant shall be entitled to have the children with her from 09h00 to 18h00 on Mother's Day;

3.1.8. Half of the available time on each child's birthday by agreement between the parties on the understanding that the Applicant shall be entitled to half of the available time on the children's birthdays if the children are not in her care;

3.1.9. A reasonable period of time on the Respondent's birthday if same does not fall during his contact period on the understanding that the Applicant shall have a reasonable period of time on her birthday if same does not fall during her contact period.

3.1.10. Reasonable telephonic and electronic contact when the children are not in the care of the Respondent on the understanding that the Applicant have reasonable telephonic and electronic contact with the children when the children are in the care of the Respondent.

4. The Respondent shall pay maintenance for the children as follows:

4.1. R20 000.00 per month per child, on or before the 1st day of each month from the grant of the order, directly to the Applicant;

- 4.2. The amount set out in paragraph 4.1 above shall be increased annually on the 1st day of the month succeeding the anniversary date of this order and every 12 months thereafter in accordance with the average increase as recorded in the Consumer Price Index for the Republic of South Africa as notified from time-to-time by the Director of Statistics or his equivalent, for the preceding year;
 - 4.3. All the children's school-fees at a private school, inclusive of school levies, school-books, school uniforms, all school outings and tours, extra-mural activities, extra tuition, sporting activities, any equipment and clothing required for the aforesaid extra-mural activities, extra tuition and sporting activities;
 - 4.4. The monthly premium to retain the children on a comprehensive medical aid scheme. In addition, the Respondent shall pay all the children's medical and related expenses not covered by the medical aid scheme, inclusive of hospital, dental, orthodontic, prescribed pharmaceuticals, therapeutic and related expenses.
5. The Respondent shall pay maintenance for the Applicant, as follows:
 - 5.1. R25 300.00 per month, on or before the first day of each month from the grant of the order.

- 5.2. That the amount set out in paragraph 5.1 above shall be increased annually on the 1st day of the month succeeding the anniversary date of this order and every 12 months thereafter in accordance with such rise as has occurred in the Consumer Price Index for the Republic of South Africa as notified from time-to-time by the Director of Statistics or his equivalent;
- 5.3. That the Respondent retains the Applicant on his current medical aid and pays all premiums in respect thereof;
6. The Respondent shall extend the motor plan on the Land Rover Velar with registration number [...] ("the motor vehicle") currently in the Applicant's possession and ensure that the motor vehicle is in good working order;
7. The Respondent shall pay directly to the service-providers in relation to the upkeep, maintenance and expenses in relation with the matrimonial home, the following:
 - 7.1. Electricity and water charges;
 - 7.2. Municipal rates and taxes;
 - 7.3. House and vehicle insurance premiums;

- 7.4. Security and armed response charges;
 - 7.5. Costs of security cameras;
 - 7.6. Pool pump and pool maintenance charges;
 - 7.7. DStv/Mnet subscription;
 - 7.8. Internet costs;
 - 7.9. The cost of Wifi.
8. The Respondent shall install an inverter in the matrimonial home, suitable to the needs of the children and the home, within 1 week of this order.
 9. The Respondent pays a contribution towards the Applicant's costs, as follows:
 - 9.1. R456 668 .32 in respect of legal costs she has incurred.
 - 9.2. R850 000 in respect of her costs up to and including trial certification, if not utilised, the balance to be returned within 10 days of settlement.

10. The application for costs beyond the first day of trial is postponed sine die.
11. The costs of this application shall be in the cause.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 23 February 2024.

Date of hearing: 1 December 2023

Date of judgment: 23 February 2024

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