

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



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

CASE NO: 2023/021747

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

02 February 2024

.....
.....
DATE

SIGNATURE

In the matter between:

E[...], T[...] J[...] A[...]

Applicant

(Identity Number: [...])

and

E[...], V[...] R[...] (born V[...])

Respondent

(Identity Number: [...])

JUDGMENT

Von Ludwig AJ

1. Rule 43 applications are one of the most important but most difficult aspects of divorces. Litigants are given one affidavit each to provide to the court what is essentially a very detailed synopsis of what is usually a somewhat detailed claim pertaining to children and/or money.
2. With the introduction of the Financial Disclosure Form the litigants are required to address the financial aspects in much more depth than was usually done previously in Rule 43 applications, and a Court is given significantly more help in adjudicating the money aspects. However, with these forms still in their relative infancy and litigants not always attaching the correct degree of import to the fact that they are deposed to under oath, and with the relatively limited time available to a court to adjudicate a Rule 43 Application, these applications are still difficult to draft, argue and adjudicate.
3. Add to this that in most instances where the help of Rule 43 is sought, it is because the parties are at loggerheads and have not been able to reach amicable or mediated resolutions. A Rule 43 application means that the parties are already in litigation and this usually implies scant meeting of the minds. Thus very few Rule 43 Affidavits are without allegations of undesirable conduct by each party against the other about relationships with children and the spending, earning and concealing of money.

4. It is an old saying that in disputes there is “your version, my version and the truth”. In Rule 43 applications there are often many more versions a court has to consider; especially as regards children there is seldom a wholly objective “truth”.
5. The court is then tasked to determine what is best for the children, and how whatever money is determined to be available, or at worst accessible for interim purposes, can be apportioned in a way that ensures all role players are able to live and continue through the litigation (or hopefully towards a resolution) in the best possible way for their particular set of circumstances.
6. Fortunately, in this matter the parties have agreed to defer to the experts as regards what is best for the children and have agreed the basic terms of an assessment process which is recorded below as part of the Order achieved by consent. The Applicant is commended for seeking this as his initial relief, and tendering to pay for it, and it is to the benefit of the children (and one hopes the family, as a post-divorce unit as well) that Respondent has agreed.
7. Clearly the sooner this is done, the better for everyone, but the Applicant has seen the need to add the rider that, due to affordability, it cannot be done until the former common home is sold. The Court has added a further rider to this, enjoining negotiations with Kriel and Meyer as regards fee arrangements and terms, and a hope that funds might be accessed sooner, since it clearly

serves the best interests of the children for the issues to be addressed and finality achieved for all.

8. Moving to the Interim maintenance the best this court is able to do is attempt to find, as most courts in this position do, a middle road, which ensures that the children most especially, but also the parties, are able to meet their needs within a close approximation of their current lifestyle without the sole income earner having to incur excessive expenditure.
9. Much is made of the allegation that Respondent could/ can work, but the fact is that at the time this court is sitting, she is not working and has no income. Applicant's tender ensures she has the former common home to live in, with its costs covered, but contends there is very little left for daily expenses, likewise with the children.
10. The Court has had no alternative but to work through her expenses claim (which this court finds excessive and unrealistic even for someone living the extremely comfortable lifestyle the parties obviously used to enjoy) and allocate appropriate figures to the necessary categories. The Court is permitted to take, and has taken, judicial cognisance of the costs of things, most especially as a specialist family court dealing frequently with these applications.
11. As such the Court has arrived at the figures which are ordered below. Far from what the Respondent sought, but also almost double what the Applicant

offered, this is a result which will leave both parties unhappy, but Respondent and the children must eat, get about, have toiletries and other usuals, and the home must run. The Applicant has been able to access interim funds from somewhere and must continue to do so in the short term. It is up to the parties to ensure that the litigation proceeds expeditiously so that this is not longer than it needs to be. And whilst parties should stay out of Court if at all possible, there is always a remedy if the circumstances of either should change materially.

12. Which takes us to the requested contribution to Respondent's costs. Applicant contends that he cannot afford to give one, and Respondent contends that there is a great deal she needs to do to protect the rights of herself and the children in the main litigation. Once again it fell to the Court to return to the papers and the figures and make the most realistic adjustments possible.

13. Respondent does not work and cannot be expected to sell the only real asset she has, the apartment in which her mother lives, to fund her litigation. Even if she did, it is unlikely she could fund it on the same level as the Applicant will be able to fund his, which, especially given that she litigates the maintenance claims of the children too, as well as her own accrual and possible spousal maintenance claims, she must be able to do.

14. Applicant is a salaried individual and denies having any other sources of income. Yet even on his own version what he will need for himself as regards

living costs, together with what he tenders for Respondent and the children, is significantly more than his salary and he thus expects to be able to access additional funds somewhere. Whence and for how long is not for this court to know.

15. Applicant has been able to pay almost R200 000 for his legal costs to date, and to allow the Respondent to litigate on the same level there cannot be a contribution of less than that. Respondent has shown what costs she has incurred to date, and has also provided a comprehensive list of what she contends needs to be done to get her to first day of trial. She aims for R864 000 to cover past and future.

16. Having worked through her estimated bill of costs the Court finds her estimation to be on the high end, and she has sought all her costs from the Applicant. Whilst this Court agrees with past cases which have held that there is nothing to prohibit a claimant from receiving a contribution to past costs, and nothing to limit a "contribution" to only a portion of costs, many of her estimates are towards the highest end of the time-to-be spent or the expense scale. Accepting that she will need the experts she lists, and of course counsel, she does not have to spend on them quite the amount of money and time she has estimated. With adjustments made to this bill of costs I am satisfied that she can bring herself to trial with the contribution ordered herein at the same level on which the Applicant will litigate.

17. Paragraphs 1 to 6 are almost by consent (with some practical amendments made by this Court to which I draw the attention of the parties). Interim contact was an issue. Given that the assessment which will lead to the eventual contact recommendation is likely to not be as immediate as it ought for the sake of the children to be, I consider it important for the children to pay proper attention to their contact with their father (and he to his with them reciprocally) and I have thus created a hybrid of the proposals of both parties as regards contact which I consider to be important to ensure that by the time the assessment takes place the children/father relationships have not eroded further.

18. As regards the costs of this application, neither in my view, been substantially successful. Neither therefor deserves to have a costs order for or against either, I thus do not follow one of the standard methods of passing the buck to a colleague to adjudicate when the main action is dealt with (if it indeed goes to trial). The effect of “no order as to costs” would be the same as the order I do make, but I specifically wish the parties to be aware that the practical effect of the Order I make is that they each pay their own costs hereof and I thus say so specifically.

In the totality of the above I thus make the following order :

1. Ms. Tanya Kriel, with the assistance of Ms. Sharon Maynard (“the Experts”) shall carry out a full forensic assessment regarding the best interests of T[...]

T[...] E[...] and T[...] A[...] E[...] (“the Minor Children”), with specific reference to the parental responsibilities and rights as defined in section 18(2) of the Children’s Act, 38 of 2005 that the Applicant and Respondent should hold and exercise, inclusive of the Minor Children’s care, primary place of residence and the contact that the non-residential parent should have with the Minor Children. This assessment shall be conducted once the former matrimonial home situated at [...] [...] [...] [...] , [...] [...] [...] , [...] [...] , Alberton has been sold, provided that if the Applicant is able to afford the costs thereof, or negotiate terms for payment thereof that are affordable to him, sooner than the sale of the former common home, the assessment shall begin as soon as affordable or the terms for payment are negotiated, at which time the Respondent shall co-operate and participate in the assessment, and procure that the children likewise co-operate and participate therein.

2. The parties shall make themselves available for all interviews, assessments and psychometric testing with the Experts, as required by the Experts when called upon to do so and shall both cooperate with the investigation to be conducted by the Experts regarding the best interests of the Minor Children, subject to the following:

2.1. Both parties shall, if required by the Experts sign whatever consent forms are necessary providing their irrevocable consent to the Experts assessing and interviewing the Minor Children;

- 2.2. Ms. Tanya Kriel is directed to investigate the best interests of the Minor Children, to conduct whatever interviews, assessments and psychometric testing (to be conducted by Ms. Sharon Maynard) she believes is necessary of the parties, collateral sources, and of the Minor Children and to provide the Court and the parties with her written recommendations and opinions for such recommendations regarding the best interests of the Minor Children;
- 2.3. Ms. Tanya Kriel shall be entitled to enlist the services of specialist mental health professionals/medical practitioners in order to assist her with the investigation and/or any other experts should she deem it necessary;
- 2.4. The parties shall make available to the Experts all documentation and information as required by the Experts when called upon to do so and ensure that they instruct the relevant service providers on their behalf to do the same;
- 2.5. On receipt of the report of Ms. Tanya Kriel either party may apply to this Court for a variation of this Order and may supplement the files of record.
3. That the Applicant is liable for the full costs incurred in relation to the forensic assessment and report to be provided in terms of paragraphs 1 and 2 above.

4. Pending the outcome of the forensic assessment referred to above and any subsequent order by the Court pursuant thereto, both parties shall, *pendente lite*, retain full parental responsibilities and rights in respect of the Minor Children, as envisaged in section 18(2) of the Children's Act, 38 of 2005, as amended and subject to the provisions contained in paragraphs 5, 6 and 7 below.

5. The Minor Children shall attend bonding therapy with the Applicant to be conducted by the Minor Children's respective therapists, being Sheetal Vallabh in respect of T[...] and Zaakirah Mohamed in respect of T[...], at the Applicant's cost, which bonding therapy shall insofar as it is covered by the Applicant's medical aid commence immediately, and the remainder of which shall continue once the former matrimonial home situated at [...] [...] [...] [...] , [...] [...] [...] , [...] [...] , Alberton has been sold, provided that if the Applicant is able to afford the costs thereof, or negotiate terms for payment thereof that are affordable to him, sooner than the sale of the former common home, the therapy shall continue or begin as soon as affordable or the terms for payment are negotiated, at which time the Respondent shall procure that the children co-operate and participate therein. Such therapy shall continue until the respective therapists of each child each provide a written recommendation for it to cease with respect to each particular child.

6. The Minor Children's primary residence shall vest with the Respondent.

7. The Applicant shall be entitled to the following contact with the Minor Children:

7.1. Daily telephone/video call contact with the Minor Children at a reasonable time which contact may be replaced by a WhatsApp message by either the relevant child or the Applicant, to which the recipient must respond, to ensure that there is some form of communication between the Applicant and each of the children each day.

7.2. Every alternate weekend, when the Applicant is in Johannesburg, from Friday at 15:00 until Monday at 07:00 when the Applicant will return the Minor Children to the Respondent's residence, provided that if either child does not wish to exercise such contact that child shall address the Applicant, by way of a telephone call or a WhatsApp message (assisted by his or her therapist if necessary) to provide, in courteous terms, their reason for not wanting to exercise such contact. And provided that if the Applicant is not able to exercise such contact, he shall do likewise to both children.

8. The Applicant shall contribute towards the Minor Children's maintenance as follows:

8.1. The Applicant shall effect payment of a monthly amount of R15 500.00 (fifteen thousand five hundred rand) per month per child

for T[...] and T[...], for as so long the applicable child continues to reside with the Respondent, directly to the Respondent by way of electronic funds transfer into the Respondent's elected bank account by the 5th day of each calendar month following the granting of the Order herein.

- 8.2. The Applicant shall make such cash payments to the major but dependent child E[...] as he and E[...] may agree, with the proviso that insofar as the Respondent requires E[...] to make any contribution towards food and other consumables whilst he is at the Respondent's home during the day (or if he should return to Respondent's home to live for any period) she and E[...] shall agree on such sum which is to be paid by E[...] to Respondent.
9. The Applicant shall effect payment of a monthly amount of R27 150.00 (twenty seven thousand one hundred and fifty rand) per month in respect of the Respondent's maintenance, directly to the Respondent by way of electronic funds transfer into the Respondent's elected bank account by the 5th day of each calendar month following the granting of the Order herein.
10. The Applicant shall contribute towards the following expenses directly to the applicable service providers, which amounts are for the interim maintenance of the Respondent, T[...] and T[...] in equal one-third shares (save where the contrary is obvious from the narration) :

	<u>EXPENSE</u>	<u>AMOUNT AND METHOD TO PAY</u>
10.1.	Bond (Former matrimonial home)	As it appears on the monthly bond statement, or any payment arrangement or moratorium he is able to negotiate direct with the bank, provided that any shortfall between the monthly amount and any arranged or deferred sum shall be paid by him from his share of the proceeds of the sale of the home, such payment to be made direct to bank
10.2.	Levies (Former matrimonial home)	As they appear on the monthly levy statement, direct to service provider
10.3.	Short term insurance on former matrimonial home building and contents, and vehicles driven by Respondent, T[...] and E[...]	Direct to service provider
10.4.	Electricity as appears on the municipal account of the former matrimonial home	Up to a maximum of R4 800 per month, direct to the service

		provider
10.5.	Rates and taxes	As appear on the municipal account of the former matrimonial home up to a maximum of R8 143 direct to the service provider
10.6.	Water	As appears on the municipal account in respect of the former matrimonial home up to a maximum of R9 412 direct to the service provider
10.7.	Medical Aid – Discovery Health	Premium for Respondent, E[...], T[...] and T[...] of R11 560.00 or the premium for the same cover as that which they currently enjoy insofar as it may escalate, direct to the service provider.
10.8.	School fees	R27 135 direct to the school
10.9.	Domestic worker (Sarah)	R4 000 direct to Sarah
10.10	Gardener	R2 000 direct to gardener
10.11	MWeb	R195 direct to MWeb

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10.12	Pocket money	Directly to T[...] and T[...] of R2 000.00 each, with a payment direct to E[...] as arranged between Applicant and E[...]

11. The Applicant shall make a contribution to the Respondent's legal costs in the total sum of R452 000.00 (four hundred and fifty two thousand rand) which shall be payable by way of one instalment of R100 000.00 within 7 days from date hereof, R100 000.00 by end February 2024 and the remainder in two equal instalments by the ends of March and April 2024 respectively.
12. Each party shall be liable for their own costs of this application.

C VON LUDWIG AJ

ACTING JUDGE OF THE

HIGH COURT, JOHANNESBURG

DATE OF HEARING: 30 January 2024 & 01 February 2024

DATE OF JUDGMENT: 02 February 2024

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