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

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D3532/24

In the matter between:

S[…] K[…] **APPLICANT**

and

M[…] N[…] **RESPONDENT**

ORDER

The following order is issued:

1. *Pendente lite* primary residence of the minor children:
   a. Z[…] A[…] N[…], a girl born on […]2013;
   b. Z[…] A[…] N[…], a girl born on […] 2017; and
   c. Z[…] A[…] N[…], a girl born on […] 2020.

   is awarded to the applicant.
2. *Pendente lite* the respondent is ordered to pay maintenance to the applicant for herself and the minor children as follows:
   a. by effecting payment by debit order in favour of a bank account nominated by the applicant in writing of an amount of R55 000 on or before the first day of

each consecutive month, together with a pro rata amount for the month in which the order is granted, such to be paid by way of a transfer of the amount into the account of the applicant within five days of the granting of this order;

b. by effecting payment of all reasonable and necessary medical, dental, surgical, orthodontic and ophthalmic treatment, hospitalisation, prescribed medicines, spectacles and/or contact lenses and similar medical expenses in respect of the applicant and the minor children.

c. by paying all the reasonable expenses incurred by the applicant in respect of the education of the minor children including but not limited to all educational fees, after care fees, books, stationery, school uniforms and clothing, extra lessons and occupational or speech therapy where recommended by the school or a medical practitioner, school levies and school tours and excursions together with all reasonable costs of the minor children's extra mural activities, sporting and cultural activities and sporting equipment in connection therewith.

d. The respondent is to pay a once off payment to the applicant in an amount of R50 000 for the cost of furnishing her residence, payment is to be made within 14 days of date of this judgment.

3. The respondent is directed to contribute an amount of R40 000 towards the applicant's costs in the divorce proceedings between the parties, such amount to be paid into the trust account of the applicant's attorneys, no later than 30 July 2024.

4. The costs of the application are reserved for decision by the court determining the divorce action between the parties.

JUDGMENT

DAVIS AJ

Introduction

[1] The applicant approached this court in terms of Uniform Rule 43, seeking interim maintenance and a contribution to her legal costs, pending the finalisation of her action for divorce from the respondent.[1]

[2] On 2 April 2024, such application was served on the respondent together with the divorce summons prompting the respondent to file his notice of opposition, on 16 April 2024, to oppose the relief sought. On 14 May 2024, the respondent then filed an application for condonation for the late delivery of his sworn reply and counterclaim to the interim relief sought by the applicant. I will refer to the parties as cited in the first application.

[3] The purpose of Uniform Rule 43 applications it to ensure that no party is substantially prejudiced and lacks resources to maintain a reasonable standard of living enjoyed by the parties during the marriage when pursuing their cases in the main divorce action. Courts are required to consider the applicant's reasonable needs and the respondent's ability to meet them. [2]

Condonation

Late filing of the opposing papers

[4] The respondent did not file any opposing affidavits until 14 May 2024, when he filed his affidavit and counter-claim. His reply is out of time and he seeks leave

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[1] Summons issued out of this Division on 2 April 2024 praying for a Decree of Divorce and interim relief in terms of Uniform Rule 43.

[2] *M G M v M J M* [2023] ZAGPJHC 405 para 9.

for condonation of the late filing of these papers. The applicant has opposed the application for condonation.

[5] The respondent avers that he was not in wilful disregard of the timeframes provided for in the rules of court. He believes that he has satisfied the court that there is sufficient and good cause for excusing his non-compliance with the rules. This application, he states, deals with the best interests of children and his rights in respect of his children. The argument is, in such circumstances where the conduct is not *mala fide* and where the prejudice to the applicant is minimal then condonation should not easily be refused.

[6] The applicant opposes condonation, pointing out the delay caused by him which pertained to the the change in legal representation and apparent workload as a surgeon is insufficient. The applicant submits that the papers do not make out a proper case for condonation.

[7] Condonation is not merely for the asking:

'It is a well-established principle in our law that it is in the interests of the administration of justice to require adherence to well established rules and that those rules should in the ordinary course be observed.'[3]

[8] In the matter of *Grootboom v National Prosecuting Authority*, the Constitutional Court stated that:

'It is axiomatic that condoning a party's non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.'[4]

[9] Further, in this case, the court at paragraph 23 stated that:

'It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with

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[3] *James Brown and Hamer v Simmons* 1963(4) SA (A) at 660 E-G

[4] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para 20.

the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'[5]

[10] This was reiterated by the court at paragraph 50 as follows:

'In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted.'[6]

[11] Whereas some of the submissions in opposition to condonation being granted are not without merit, the respondent's explanation is on certain aspects inadequate. Regardless it is in the interests of justice that condonation be allowed. Primarily on the grounds that the matter concerns the best interests of three minor children. His application raises important issues pertaining to their well-being. The prejudice to the applicant was, in my view, insufficient to warrant the refusal of condonation. In all litigation involving or concerning children, the best interests of the children affected are paramount and must be properly ventilated and considered. It is for these reasons that I granted condonation.

Applicant's claim

[12] *Pendente lite* the applicant seeks the following:

a. that she be awarded primary residence of the minor children;
b. *pendente lite* the respondent be directed to pay maintenance to the applicant for her and the minor children as follows:
    i. R108 138 per month maintenance for expenses;
    ii. a once off payment of R171 000 for household furniture;
    iii. payment of all reasonable and necessary medical and dental expenses for the children and the applicant;
    iv. payment of all educational costs for the minor children including all extramural activities;
    v. payment of R50 000 as a contribution to the legal costs of the applicant.

[5] Ibid para 20.
[6] Ibid para 50.

Respondent's counterclaim:

[13] In the counterclaim the respondent seeks, *pendente lite*, an order granting the parents joint full co-parental rights and responsibilities in terms of s 18 of the Children's Act 38 of 2005 in respect of the minor children.

[14] The respondent seeks that the primary residence of the children be his residence or in the alternative that he be given substantial and regularly access to the children.

a. the respondent will pay R2000 per month per child;
b. payment of all reasonable and necessary medical and dental expenses for the children.
c. payment of all educational costs for the minor children including all extra mural activities.
d. an order directing that the applicant be removed as a dependent from the respondent's medical aid with immediate effect.

[15] By the completion of argument, it is not in issue that pending the investigations and recommendation of the family advocate being completed that the status *quo* should remain, the children should reside primarily with the applicant, with reasonable access been afforded to the respondent.

[16] During argument, the respondent had conceded that, in addition to the minor children, the respondent would also retain the applicant on his medical aid. The *lis* between the parties is now limited to the amount of the maintenance contribution and the payment sought for legal fees by the applicant. It is common cause that the lifestyle enjoyed by the parties while they lived together was largely funded by the respondent who appears to be a successful surgeon.

Uniform Rule 43 lawfare

[17] The claim and original counterclaim represent a regular challenge to courts dealing with interim maintenance claims. Whereas Uniform Rule 43 properly used is a speedy and temporary relief designed to assist disadvantaged, often destitute, litigants, and quite properly in terms of the paramountcy principle enshrined in s 28(1)[7] of the Constitution of the Republic of South Africa 1996, to protect children it has become an arena for protracted and overly prolix litigation often with results that are at odds with the goal of the litigation.[8] The papers filed in this matter are merely another example of this travail.

[18] Unfortunately as seen in B.D v D.R[9] this is a regular occurrence:

'In recent times, and if the court roll is anything to go by, applications for interim maintenance have morphed into unrealistic, super- inflated claims by applicants, using the rule as a measure or yardstick to gain advantage in the main action. In certain instances, substantial interim maintenance has been awarded to applicants which has had, in some instances, the un-intended consequence of claimant's not being inclined to finalise the main divorce action. In my view, the basic tenets of the rule have been forgotten and is more often than not, abused.'[10]

[19] In *Taute v Taute*[11] the court stated that there is no general principle upon which an application under Uniform Rule 43 can or must be based. Each case must depend on its own particular facts. *Taute* also reiterated that a claimant for maintenance *pendente lite* was not entitled, as of right, and without more, to maintenance sufficient to keep him or her in the same lifestyle as that enjoyed during the marriage. Hart AJ stated thus:

'The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified.'[12]

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[7] S 28(2) reads as follows: 'A child's best interests are of paramount importance in every matter concerning the child'.

[8] For a detailed example of the challenges see; G.R.W v S.L.W (24049/2022) [2023] ZAGPJHC 2023

[9] *B.R v D.R* [2023] ZAWCHC 59.

[10] Ibid para 3.

[11] *Taute v Taute* 1974 (2) SA 675 (E).

[12] Ibid at 676H.

[20] *Taute*[13] also referred to *Levin v Levin*,[14] where the following was said:

'To decide the issues I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously, my findings are in no way binding on the trial Court and indeed after hearing the evidence it may emerge that some or all of the inferences I have drawn are wrong. On this basis I now turn to the issues as they emerge from the papers*."*

[21] This division has always been conscious of the often disparate financial resources of litigants in these disputes, for this reason our courts have stressed the need for a full and proper disclosure in Uniform Rule 43 proceedings by the litigants.

[22] In *MGB v DEB*[15] Lopes J considered the duty of disclosure in divorce proceedings. At paragraph 40, the learned judge quoted approvingly from numerous English cases as follows:

'In cases of this kind; where the duty of disclosure comes to lie on a husband; where a husband has - and his wife has not - detailed knowledge of his complex affairs; where a husband is fully capable of explaining and has had opportunity to explain, those affairs, and where he seeks to minimise the wife's claim, that the husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference - especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative. The obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings - insofar as such inferences can be properly be drawn."

[23] These principles apply with equal force to applications in terms of Uniform Rule 43 applications. In *Du Preez v Du Preez*[16] at paragraph 15 the following was stated:

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[13] *Taute* above fn 11.
[14] *Levin v Levin and Another* 1962 (3) SA 330 (W) para D.
[15] *M G B v D E B* [2013] ZAKZDHC 33; [2013] 4 All SA 99 (KZD); 2013 (6) SA 86 (KZD).
[16] *Du Preez v Du Preez* [2008] ZAGPHC 334.

'..there is a tendency for parties in Rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs.'[17]

Additionally, at paragraph 16 it provides that:

'…A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume, there is a duty on applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith *(uberrimei fidei)* and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with "clean hands" and on that ground alone the court will be justified in refusing relief.'[18]

[24] Our courts have always emphasised the need for utmost good faith by both parties in Uniform Rule 43 proceedings and the need to disclose fully all material information regarding their financial affairs.

[25] In *B v B*,[19] the Supreme Court of Appeal stated the following about those who fail to fully disclose their financial status:

'The attitude of many divorced parties, particularly in relation to money claims where they control the money, can be characterised as "catch me if you can". These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be "caught" and have to disgorge what is in law due to the other party.'[20]

Applicants averments

[26] The applicant married the respondent in 2009 and have lived as husband and wife ever since. They have three girls, the eldest born in 2013 and the youngest in 2020. She is a qualified primary school teacher working part-time and earns R6 500 per month.

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[17] Ibid para 15.
[18] Ibid para 16.
[19] *B v B* [2014] ZASCA 137.
[20] Ibid para 39.

[27] She left the matrimonial home on 10 March 2024. I do not intend to record all the reasons for why she left the matrimonial home, it suffices to record that she objected to the respondent pursuing another relationship with her close friend that would seemed to be destined to result in a polygamous marriage. Many of the difficulties that she details in her papers seem to be as a result of the relationship between the respondent and her former best friend.

[28] She has been living with her brother in his rented accommodation but will be required to source her own accommodation as her brother is relocating overseas. In accordance with her standard of living with the respondent, before she left the marital home, she claims R108 138 per month excluding a once-off claim for furniture in the amount of R174 000.

[29] Although she does not know the financial worth of her husband, he is a successful surgeon at Umhlanga Netcare Hospital. He owns his own laparoscopic clinic. He is the trustee of two trusts and a director of three companies; and he invests in crypto currencies and she believes he might have invested as much as R950 000 in crypto currency.

[30] She believes the marital home is worth about R10 million . The respondent owns two luxury motor vehicles and a Hyundai Staria worth approximately R1 million . She believes that the respondent can afford the maintenance that she seeks.

Respondent's averments and Counter-Claim

[31] In respect of maintenance, the respondent seeks an order order that he provides the amount of R2000 per child per month, that being R6000 per month for the three children. He also offers to pay all reasonable and necessary educational costs and all reasonable medical and dental costs for the children. Initially, he sought to exclude the applicant from his medical aid but conceded in argument that she should remain on the medical aid of the respondent.

[32] The affidavit filed by the respondent spends a number of pages outlining the marital difficulties that the respondent has had with the applicant since 2014. Most of it is singularly unhelpful in a Uniform Rule 43 application, it is of little assistance in a Rule 43 application.

[33] Intriguingly, in light of his financial disclosure that follows, he states that at paragraph 26 of his affidavit, 'I have the ability and financial means to adequately provide for all the minor children's needs. I have consistently demonstrated my commitment to ensuring the minor children's well-being by providing a stable and nurturing environment and I have no reservations regarding my ability to continue to doing so in the future.'

[34] He states he earns a salary of R79 536 on average, he does not deal with the allegations set out by the applicant in her founding affidavit,.

Applicant's response to the counterclaim

[35] The applicant deposed to an affidavit dealing only with the respondent's allegations pertaining to the issue of custody of the children. It is a comprehensive denial of the respondent's claims as to her inappropriate parenting of the children. The respondent no longer pursues any order for primary residence in these proceedings, instead that issue can only be properly determined after input from the family advocate.

Analysis of Financial Disclosure

[36] Counsel for the applicant has subjected the respondent's financial disclosure bundle to a searing and unforgiving analysis. This analysis reveals that the submissions made by the respondent in his affidavit are at best extremely misguided, at worst they are quite simply a disingenuous attempt to obfuscate his financial position.

[37] Without overly belabouring the record, the funds he has at his disposal and in particular his disposable income as evinced by his spending at luxury boutiques, holidays make a mockery of his allegation that his income is limited to his salary. The

respondent has failed to disclose bank accounts that he seems to be linked to when one follows the flow of funds and it is evident that he has deliberately set out in his affidavit information to mislead or hide from the court his true financial position.

[38] As set out above, the respondent's financial status comfortably allows for an appropriate inference to be drawn that is, he is perfectly able to do afford the provision of an appropriate amount of maintenance *pendente lite*. The respondent in his own affidavit perhaps unwittingly concedes that he is perfectly able to support his children when he stated: 'I have the ability and financial means to adequately provide for all the minor children's needs'. The manner in which he supported his children and the lifestyle of his family prior to the split is not seriously in dispute.

[39] Whereas the respondent has been less than forthcoming with his financial standing. This does not mean that the applicant is therefore entitled to the full amount of her claim. The procedure in Uniform Rule 43 is intended to provide an inexpensive and expeditious mechanism to enable a spouse to claim maintenance from the other spouse pending the finalisation of the divorce.[21] Given its temporary nature and purpose of affording speedy relief to a spouse who may have been cut off from financial support on which she was dependent, the issues cannot be determined with the same degree of precision as in a trial.

[40] Each case is dependent on its own facts. However, the general governing principle is that the applicant is entitled to reasonable maintenance *pendente lite* having regard to the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements. It does not necessarily entail the granting of a wish list[22].

[41] When dealing with the amounts claimed by the applicant, the claim is excessive and would constitute an unfair burden on the respondent notwithstanding the manner in which he proceeded in this claim. I am of the view by examining the 'wish-list' of the applicant and making appropriate adjustments that in the circumstances the applicant's maintenance in respect of herself and the three

[21] *Micklem v Micklem* 1988 (3) SA 259 (C) 262I 263A
[22] *KF V MF* [2023] ZAWCHC 253 at para 14.

children should be fixed at R55 000 per month. This is separate to the agreement that the respondent will maintain the applicant and the three minor children on his medical aid and pay all expenses in respect of the three minor children's education including all related expenses which include extramural activities. I exercise my discretion in favour of the applicant in respect of the once off claim for a furniture allowance.

Contribution to legal costs

[42] In *H v H*,[23] Victor J said that 'It is without doubt clear that the dispute about the care of the children, the interim maintenance, and the contribution to legal costs must be viewed through the prism of the Constitution and of course also in relation to the Children's Act.' [24]

[43] This prompts the notion that 'Ultimately, the respondent to a rule 43 application is under a common law duty to make a contribution to the applicant's costs if it is needed and he is able to do so. However, this a duty that must also be interpreted through the prism of the Constitution since South Africa's is a legal system over which the Constitution reigns supreme.'[25] Failure to do would make substantial equality in matrimonial litigation in many instances illusory.

[44] 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 that 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 situation is in my view inherently unfair. In my view the obligation on courts is to promote the constitutional rights to equal protection and benefit of the law is trite and awards should be made to ensure this occurs[26].

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[23] *H v H* [2022] ZAGPJHC 904; [2023] 1 All SA 413 (GJ); 2023 (6) SA 279 (GJ).
[24] Ibid para 3.
[25] Ibid para 105.
[26] *H v H* (44450/22) [2022] ZAGPJHC 904; [2023] 1 All SA 413 (GJ); 2023 (6) SA 279 (GJ) (30 September 2022).

[45] In marriages out of community of property, with the application of the accrual system, as is the case in this matter, both parties retain their individual estates which would be combined when their marriage is dissolved and divided into half for the spouse whose estate shown a smaller accrual to benefit. During divorce proceedings, the spouse whose estate shows smaller growth may not have the same financial resources to properly place their case before the court. Hence, the financially stronger spouse would be expected to reasonably contribute towards the costs of the financially weaker spouse. The same is true for marriages out of community of property and profit and loss.[27]

[46] A primary duty of support is owed between spouses, and a wife who is without means should be entitled to look to the husband, if he has sufficient means, to fund her reasonable litigation costs. I believe that an amount of R40 000 is a fair and reasonable amount for the respondent to contribute towards the applicant's costs in the divorce proceedings.

Order

[47] Accordingly, I make the following order:

1. *Pendente lite* primary residence of the minor children:
   a. Z[…] A[…] N[…], a girl born on […] 2013;
   b. Z[…] A[…] N[…], a girl born on […] 2017; and
   c. Z[…] A[…] N[…], a girl born on […] 2020.

   is awarded to the applicant.

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[27] See *Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 637-638, where it was stated that: 'The claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origin in the Roman-Dutch procedure, and has been sanctioned through many decades in our practice. It is true that the Court may in these applications for contribution more liberally assess the requirements of a wife married in community of property than it will those of one married out of community of property; it is also true that in regard to the question of the merits of her case, the position of a defendant is somewhat less meticulously scrutinised than that where she is the plaintiff. But in my view the application for a contribution towards costs essentially remains what its name indicates; it is the making available of funds to the applicant for the purpose of enabling her adequately to place her case before the Court.'

2. *Pendente lite* the respondent is ordered to pay maintenance to the applicant for herself and the minor children as follows:
   a. by effecting payment by debit order in favour of a bank account nominated by the applicant in writing of an amount of R55 000 on or before the first day of each consecutive month, together with a pro rata amount for the month in which the order is granted, such to be paid by way of a transfer of the amount into the account of the applicant within five days of the granting of this order;
   b. by effecting payment of all reasonable and necessary medical, dental, surgical, orthodontic and ophthalmic treatment, hospitalisation, prescribed medicines, spectacles and/or contact lenses and similar medical expenses in respect of the applicant and the minor children.
   c. by paying all the reasonable expenses incurred by the applicant in respect of the education of the minor children including but not limited to all educational fees, after care fees, books, stationery, school uniforms and clothing, extra lessons and occupational or speech therapy where recommended by the school or a medical practitioner, school levies and school tours and excursions together with all reasonable costs of the minor children's extra mural activities, sporting and cultural activities and sporting equipment in connection therewith.
   d. The respondent is to pay a once off payment to the applicant in an amount of R50 000 for the cost of furnishing her residence, payment is to be made within 14 days of date of this judgment.

3. The respondent is directed to contribute an amount of R40 000 towards the applicant's costs in the divorce proceedings between the parties, such amount to be paid into the trust account of the applicant's attorneys, no later than 30 July 2024.

4. The costs of the application are reserved for decision by the court determining the divorce action between the parties.

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DAVIS AJ

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Date of Hearing	:	12 June 2024
Date of Judgment	:	20 June 2024