

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



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

RULE 43 CASE NO: 10237/2037

WITH CASE NO: 4001/2023

In the matter between:

K F Applicant

and

M F Respondent

Heard: 5 October 2023

Delivered: 13 October 2023

JUDGMENT

LESLIE AJ:

1. This is an application brought in terms of Rule 43 of the Uniform Rules of Court for maintenance *pendente lite* and a contribution towards the costs of the pending divorce action between the parties.
2. The parties were married in August 1992. They concluded an antenuptial contract which incorporated the accrual system. They have lived separately since March 2022. The applicant instituted divorce proceedings in March 2023. The parties have four children, the youngest of whom is 18. The maintenance of the children is not an issue in the present application.
3. The applicant has an honours degree in psychology and she is currently finalising her PhD in Neuroscience at the University of Cape Town. She has not worked since 1997 and has spent most of her adult life raising the children.
4. The respondent was the sole breadwinner in the marriage. He was one of the founders of the Tribeca Coffee Company International Group. The parties are in dispute as to the extent and sources of the respondent's wealth. On the respondent's version, the amount available to him to fund his monthly expenses totals R285,822.88 per month. The applicant alleges that the respondent has access to considerably more than this (chiefly through two trusts, the trustees of whom have been cited as parties in the divorce action) – in the region of R700,000 to R800,000 per month.
5. Given the nature of these proceedings, it is not possible to resolve this dispute with any precision at this stage. Suffice it to say that I accept for present purposes that the respondent is in a position to regularly access more than R285,000 per month.

This is borne out *inter alia* by the fact that on his own version the respondent's expenses are in the region of R366,766.59 per month (this includes payments he currently makes to or on behalf of the applicant).

6. From the papers overall my impression is that the parties enjoyed a very comfortable existence during their marriage - whether this should be described as a life of "relative luxury" as the applicant puts it, or an "above average modest lifestyle" as the respondent puts it, is neither here nor there.
7. In this application, the applicant seeks a maintenance order in a monthly amount of R96,925.00. Over and above this, she seeks the respondent to continue paying for her medical aid (and any medical expenses not covered by the medical aid), cell phone contract, and levies and other costs associated with her accommodation at Unit 602 Fresnaye ("the Fresnaye apartment"). The applicant also seeks an annual amount of R260,000 in respect of her holidays and local and overseas travel.
8. In addition, the applicant seeks payment of certain lumpsum amounts, pertaining to moving costs, furniture items and renovations of the Fresnaye apartment. These total R297,202.
9. The applicant furthermore seeks an order allowing her the continued use of a holiday home situated in Nieu Bethesda (together with reimbursement for payment of domestic staff there) and an order allowing her the continued use of a Volkswagen Beetle (together with payment of licensing, insurance and maintenance costs associated with the vehicle).

10. The respondent currently pays, and tenders to continue paying, a total monthly amount of R80,488.36, made up as follows:
 - 10.1. R70,000 per month to the applicant;
 - 10.2. R7081 to Discovery Health to retain the applicant as a beneficiary of the medical aid scheme;
 - 10.3. R428.63 to insure the Volkswagen Beetle; and
 - 10.4. R2978.73 being the premium in respect of the applicant's cell phone account.
11. As a contribution towards her legal costs, the applicant seeks an amount of R475,000 in respect of costs already incurred and an amount of R555,000 going forward. This is exclusive of the payment of an industrial psychologist (in an amount not exceeding R35,000) to assess the applicant's earning capacity.
12. The respondent has tendered an amount of R250,000 as a contribution towards the applicant's past and future costs.
13. The procedure in Rule 43 is intended to provide an inexpensive and expeditious mechanism to enable a spouse (in the nature of things, usually the wife) to claim maintenance from the other spouse pending the finalisation of the divorce. 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.

14. Each case is dependant 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.¹
15. The applicant relocated from the marital home in Pretoria to Cape Town (in order to complete her PhD) in March 2022. On the applicant's version, from March 2022 onwards, the respondent continued paying the applicant's living expenses, over and above the rental of an apartment in Fresnaye (502 Fresnaye). She alleges that it was only from 1 January 2023 that the respondent reduced her allowance to what she regarded as the unreasonable figure of R70,000 per month.
16. In assessing the quantum of a reasonable maintenance amount going forward, the period March to December 2022 provides a useful yardstick.
17. The applicant alleges that, during this ten-month period, she received a total of R1,333,259 from the respondent – averaging R133,326 per month.
18. The respondent does not dispute that he paid this amount. However, his versions is that during this period he did not only pay for the applicant's living expenses. In addition, he made certain once-off, extraordinary payments largely aimed at funding the applicant's relocation and settling in costs in Cape Town. When these additional expenses are removed from the equation, the respondent's version is that the monthly amount paid in respect of living expenses was about R63,000.
19. In support of his version, the respondent annexed a print-out of the text message (WhatsApp) exchanges between the parties from 2022. The content of these

¹ *Taute v Taute* 1974 (2) SA 675 (E) 676E-F. In that case, it was held that, regardless of the wealth the respondent, extraordinary or luxurious expenditure should not be included in a Rule 43 maintenance order.

messages supports the respondent's version that he made significant once-off payments (for example for beds and bedding, a fridge, mashing machine, and other items).² These additional amounts, which are substantial, have not been taken into consideration in the applicant's calculations at all.

20. Overall, it is reasonable to conclude that, after she left the marital home in March 2022, the applicant managed to sustain herself in a comfortable lifestyle on a monthly amount in the region of R60,000 to R70,000.
21. This amount is broadly in keeping with what the respondent claims was paid to the applicant as an "allowance" in 2020 and 2021. The applicant claims that the amount that she received prior to leaving the marital home was R75,000 per month.
22. In late 2022, the parties engaged in an informal mediation through a mutual friend who is a legal practitioner. In the course of that process, the applicant produced a breakdown of her estimated monthly expenses, which amounted to R70,950. The applicant's treatment of this schedule in her sworn statement is confused. On the one hand she alleges that the schedule was introduced by the respondent, not her. On the other hand, she describes it as a work in progress and not comprehensive – suggesting that it was indeed her attempt at providing a summary of her expenses.
23. The respondent is emphatic that the schedule was produced by the applicant. Attached to his sworn statement is an email from the mediator forwarding the schedule to him for discussion the following day. The respondent has also attached what amounts to a counter-proposal to the schedule, including a response to various

² As would be expected, in the nature of things, not all of the additional expenditure itemised by the respondent in his sworn statement are reflected in the WhatsApp exchange. The point is that the WhatsApp exchange bears out his version that the total payments made (R1,333,259) cannot only be ascribed to routine maintenance payments, as was claimed by the applicant.

line items on the original schedule, which arrives at a monthly maintenance amount of R59,950.

24. I have no hesitation in accepting that the original schedule was produced by the applicant. It was her estimate of her monthly living expenses. The respondent initially made a lower counter-proposal, but ultimately acquiesced in paying an amount of R70,000 per month.
25. It is significant that the applicant's initial budget of R70,950 is broadly in line with the respondent's version of the amount of the "allowance" previously received by the applicant – particularly during 2022 after she had left the marital home and had relocated to Cape Town.
26. In January 2023, the applicant produced a new schedule (the second schedule) which contained a significantly increased estimate of her monthly expenses – R110,869. This estimate, however, contains a number of items that do not fall within the ambit of the applicant's daily living expenses (for example: life insurance of R3600, saving of R5000, share investments of R10,000, pension fund of R5000, children's expenses of R10,000 (bearing in mind that none of the children reside with the applicant) and staff costs of the Nieu Bethesda holiday home – more on which below – of R10,000). If these amounts are excluded from the budget, as they should be, then again the total would revert to around R70,000.
27. In March 2023, the applicant produced yet another budget of monthly expenses (the third schedule). On this occasion, the applicant claimed that she required R128,298.69 per month – an increase of R18,000 from the second scheduled and R58,000 from the first schedule.

28. The amount of R128,298.69 appears excessive. For example, around R15,000 per month is claimed for personal care (excluding a Pilates class (R3466) which is a new expense). Nearly R20,000 per month is claimed for groceries, which by any standards is excessive for one person's needs. The schedule also includes a loan repayment of R7551.88, which is in respect of renovations to the applicant's new apartment which were not consented to by the respondent, as well as R15,388.75 in respect of overseas holidays.
29. In my view, the third schedule is artificially inflated and is out of kilter with the applicant's reasonable requirements.
30. It is significant that the respondent's household monthly expenses (excluding legal fees and bond repayments) amount to R109,551 - bearing in mind that two of his adult children are currently living with him. This supports the view that an amount of R70,950 is adequate to maintain the applicant in the lifestyle to which she is accustomed – particularly if her reasonable medical, accommodation and transport costs are catered for separately, as set out below.
31. In addition to the monthly payment of R70,950, I consider the following to be appropriate and reasonable *pendente lite*:
- 31.1. The applicant will continue as a beneficiary on the respondent's medical aid scheme and be reimbursed by the respondent for reasonable medical costs not covered by the medical aid;
- 31.2. The applicant's cell phone contract amount will continue to be paid by the respondent;

- 31.3. The respondent shall be responsible for paying certain expenses in connection with the applicant's accommodation, including levies, rates and taxes, household insurance and internet;
- 31.4. The respondent shall be responsible for certain payments in connection with the Volkswagen Beetle, including licensing, insurance and maintenance costs.
32. The applicant claimed an amount in respect of the costs of domestic staff at the Nieu Bethesda holiday home. However, the respondent has confirmed that he is responsible for these costs directly. As an aside, one of the applicant's prayers was for an order allowing her the continued use of the holiday home. The respondent confirmed that this access to the holiday home had never been in dispute. Although it may not have been strictly necessary to include this as a separate prayer, I see no reason why an order in the terms sought should not be granted, excluding the costs of the staff - for which the respondent will remain directly responsible.
33. The applicant claimed a substantial amount in respect of local and overseas holiday travel. *Pendente lite*, this claim is, in my view, inappropriate. It is precisely this type of "luxurious" claim that Rule 43 is not intended to address.³ The monthly maintenance amount of R70,950 ought to be sufficient for the applicant to afford the costs of domestic air fares between Cape Town and Johannesburg from time to time.
34. In prayer 2 of her notice of motion, the applicant claims (in an amount just short of R300,000), various amounts in connection with her accommodation at Unit 602

³ See for example, *ALG v LLG* (9207/2020) [2020] ZAWHC 83 (25 August 2020) para 12, where Binns-Ward J held that: "I also consider that any provision for holidays as a special item of expenditure is unwarranted having regard to the intended interim nature of rule 43 relief. The parties should rather focus on bringing the principal proceedings to judgment or resolution as soon as possible."

Fresnaye. These amounts are in respect of the purchase of various items such as a couch, a stove (including installation), a television, bedroom cupboards and an alternative power source (totalling R214,241), in addition to what is termed moving and settling in costs (R40,224), and payment of contractors in respect of renovations undertaken by the applicant after moving in (R42,737).

35. In the matter of *Greenspan v Greenspan* 2000 (2) SA 283 (C), the court held that it had no power to award lump sum payments in terms of Rule 43(1) – similar to those claimed in the present matter. The court therefore refused to award amounts that were *inter alia* claimed in respect of the purchase of furniture items.
36. Ms Anderssen, who appeared for the applicant, correctly pointed out that in *Greenspan*, the court relied on the Full Bench decision of this division in *Zwiegelaar v Zwiegelaar*,⁴ where it had been found that a court had no power under section 7(2) of the Divorce Act 70 of 1979 to order what amounted to lump sum maintenance payments. The outcome in *Zwiegelaar* was subsequently overturned on appeal by the SCA,⁵ which held that, under section 7(2), it was competent for the trial court to have awarded the appellant “a sum of money as part of her maintenance requirements for the purchase by her of household necessities in order to establish a home – she having been ordered out of the common home.”⁶ On this basis, Ms Anderssen submitted, in effect, that *Greenspan* was no longer good law and should not be followed.
37. I disagree. The court in *Greenspan* was dealing with a maintenance claim *pendente lite* under Rule 43, whereas the claim in *Zwiegelaar* involved a “final” maintenance

⁴ 1999 (1) SA 1182 (C).

⁵ *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA).

⁶ Paragraph 16.

order under section 7(2) of the Divorce Act – until the appellant’s death or remarriage, whichever occurred first.

38. Although the court in *Greenspan* relied on the Full Bench decision in *Zwiegelaar* to support its conclusion, it was at pains to point out that there were additional considerations, in a Rule 43 application, militating against awarding lump sum amounts *pendente lite*.⁷

“In my view, the reasoning underlying the reasoning in the *Zwiegelaar* case applies with even greater force to Rule 43 applications, given their nature. Rule 43 is designed to afford an expeditious and inexpensive procedure for the granting of interim relief ...⁸ Unlike in ordinary motion proceedings, where the parties are not so strictly limited in the number of affidavits they may file nor are they discouraged from setting out their versions fully in the papers, by contrast Rule 43 is designed to afford an inexpensive procedure for granting interim relief.”

39. The court also had regard to the fact that, under Rule 43(6), in the event of a material change in circumstances, it is open to a court to vary its earlier maintenance decision *pendente lite*. This supports the inference that once-off or lump sum maintenance payments were not contemplated under Rule 43, since they are not capable of variation once paid.⁹

⁷ Paragraph 12.

⁸ Authorities omitted.

⁹ See the contrary finding of Reinders J in the Free State Division in the unreported matter of *M.W.U v B.D.U* (<https://www.saflii.org/za/cases/ZAFSHC/2016/215.pdf>) paras 7-8. The court there held that the SCA decision in *Zwiegelaar* bound it in a Rule 43 application – a conclusion with which I am in respectful disagreement for the reasons set out above.

40. More pertinently, the decision in *Greenspan* is on point and it remains binding on this court (notwithstanding the judgment of the SCA in *Zwiegelaar*, which dealt with section 7(2) of the Divorce Act) unless I am persuaded that it is clearly wrong. This is not the case.
41. Consequently, in light of *Greenspan*, the applicant's claims for lumpsum payments in respect of furniture and fittings, and relocation and renovation costs are, in my view, not competent.
42. Even if I am wrong on this point I would not exercise my discretion to award these amounts to the applicant on the facts. It would not be reasonable to require the respondent to make payment of the amounts claimed, having regard to the fact that he has already paid a substantial amount (in the region of R800,000) towards the applicant's relocation and set up costs after leaving the marital home. Moreover, a fair portion of the amounts claimed are related to renovations undertaken by the applicant, to which the respondent voiced his objection. At the time when the apartment was purchased by the respondent, it had recently undergone a R1 million renovation.
43. As regards the applicant's claim for a contribution to costs, it is not disputed that the applicant is entitled to some contribution, since she is not in a financial position to pay legal costs herself. Nor does the respondent take issue with the proposition that the applicant is entitled to claim for legal costs already incurred.¹⁰ The quantum is disputed, however.

¹⁰ See the judgment of Davis AJ in *AF v MF* 2019 (6) SA 422 (WCC) paras 44-45.

44. The principles that inform the court’s discretion in awarding a contribution to costs were set out in by Ogilvie Thompson J in *Van Rippen v Van Rippen*¹¹ at 639:

“In the exercise of that discretion 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.”

45. Remarking on the above dictum, Binns-Ward J made the following observations in *A.L.G v L.L.G*¹² para 19:

“It is an approach that recognises that a contribution towards costs is not the same as a warrant to litigate at any scale of the applicant’s choosing if that is disproportionate to the apparent reasonable requirements of the case or the means of the parties and the scale upon which the respondent is litigating. An entitlement to a contribution towards costs should also not be seen as equating to risk-free litigation. ... That the provision of an equality of arms be balanced with maintaining an equitable exposure of both of the adversaries to the risks of the chilly consequences of the ill-considered incurrence of costs is a factor to be borne in mind in the exercise of the court’s discretion. It will encourage a realistic approach by both parties to the litigation and incentivise them to focus on reaching early and mutually beneficial settlements where that is reasonably possible.”

¹¹ 1949 (4) SA 634 (C).

¹² Unreported decision (9207/2020) [2020] ZAWCHC 83 (25 August 2020).

46. As it was expressed in *Micklem v Micklem*:¹³

“A wife seeking a contribution towards costs is not entitled to payment in full of the costs she avers will be incurred in presenting her case to the Court nor all costs incurred to date. ... And what are essential disbursements is adjudged against the background of (a) the depth of his purse and (b) his own scale of litigation”

47. In the present matter, the applicant’s claim for incurred costs is R475 000. Having regard to the detailed schedule of costs, it is clear that at least a portion of these costs (exceeding R100,000) are connected to the Rule 43 application. These include the costs associated with compiling maintenance schedules and issuing subpoenas. Costs associated with the Rule 43 application are not claimable under Rule 43.¹⁴

48. The respondent’s costs incurred in the divorce to date are around R290,000. Although the applicant disputes this amount, it cannot be gainsaid at this stage of the proceedings. In my view, I consider this to be an appropriate amount as a contribution towards the applicant’s past costs.

49. Going forward, the applicant claims a costs contribution of R555,000 – more than double her costs to date. This appears to be on the excessive side. The substantive issues in dispute concern the quantum of the accrual, which involves a related dispute about the treatment of the assets of two trusts, and the quantum of the applicant’s spousal maintenance.

¹³ 1988 (3) SA 259 (C) 262I-263A.

¹⁴ *Micklem v Micklem* 1988 (3) SA 259 (C) 263B.

50. While the treatment of the trusts' assets introduces some complexity to the matter, on the whole it does not strike me that the litigation going forward will (or ought to) be particularly arduous or complicated. As far as the maintenance claim is concerned, much of the preparatory work for that claim has been undertaken in these proceedings.
51. In my view, it would be reasonable to award an amount of R290,000 as a contribution to the applicant's future costs, which is double her reasonable costs in the divorce to date. Overall, the amount of R580,000 should enable the applicant to adequately place her case before court.
52. The applicant claims, in addition, an amount not exceeding R35,000 plus VAT in respect of the fees of an industrial psychologist to assess the applicant's income earning capacity. This appears reasonable to me, since the applicant's employability will be one of the issues contested in the divorce action.
53. As far as the costs of this application are concerned, in my view it would be appropriate that costs stand over for determination by the trial court hearing the divorce action under case number 4001/2023.

Order

In the premises, I make the following Order:

1. The respondent is ordered to pay maintenance to the applicant *pendente lite* as follows:

- 1.1. By paying to the applicant the amount of R70,950 on the first day of each month, as from 1 June 2023, without deduction or set-off, to a bank account specified by her from time to time in writing, and the cash amount shall escalate annually by the CPI for the middle-income group on 1 June each year;
- 1.2. By retaining the applicant, at his cost, as a dependent on his current medical aid or providing similar benefits and by paying the cost of all expenditure, not covered by the medical scheme, in respect of medical, dental, surgical, hospital, orthodontic and ophthalmological treatment needed by the applicant, including any sums payable to a physiotherapist, occupational therapist, speech therapist, practitioner of holistic medicine, psychiatrist or psychologist and chiropractor, the costs of medication and the provision where necessary of spectacles and contact lenses. Within 10 calendar days of the applicant having provided the respondent with copies of the relevant invoices, he shall reimburse her for any expenses referred to herein above or he shall pay the supplier or medical practitioner directly, whichever is applicable;
- 1.3. By retaining and renewing the applicant's cell phone contract on the same or similar package, at his cost, which shall include allowing her the benefit of the free upgrade of her cell phone;
- 1.4. By paying the following expenses in respect of the applicant's accommodation at Unit 602, Fresnaye Heights, either directly to the

institution or provider as the case may be or by reimbursing the applicant within 10 calendar days of the applicant providing the relevant invoice:

- 1.4.1. the levies and any special levies;
- 1.4.2. the municipal rates and taxes;
- 1.4.3. household content insurance premiums;
- 1.4.4. internet / fibre monthly subscriptions;

- 2. The respondent shall allow the applicant the continued use of the Volkswagen Beetle and pay the vehicle's licensing fees, short term insurance premiums, annual maintenance and service, reasonable repairs (including replacement, as required, of shocks, brakes and brake pads) and the replacement of tyres (as well as costs incurred for wheel balancing and alignment) as and when required. Within 10 calendar days of the applicant having provided the respondent with copies of the relevant invoices, he shall reimburse her for any expenses referred to herein above or he shall pay the supplier or contractor directly, whichever is applicable;
- 3. The respondent shall allow the applicant reasonable continued use of the holiday home situated at 2 Pienaar Street, Nieu Bethesda;
- 4. The respondent shall make the following contributions to the applicant's legal costs:

- 4.1. A contribution of R290,000 to the applicant's past costs in the divorce action, to be paid within 30 calendar days of the date of this order directly into the trust account of the applicant's attorneys of record;
 - 4.2. A contribution of R290,000 to the applicant's future costs in the divorce action, to be paid within 30 calendar days of the date of this order directly into the trust account of the applicant's attorneys of record; and
 - 4.3. Payment of the fees of Ms Deborah Atkins, to a maximum of R35,000 (plus VAT) on presentation of the invoice.
5. The costs of this application shall stand over for later determination by the trial court hearing the divorce action under case number 4001/2023.

G.A. LESLIE

Acting Judge of the High Court

Appearances

For the applicant:

J Anderssen

Instructed by Mandy Simpson Attorneys

For the respondent:

L Buikman SC

Instructed by Jurgens Bekker Attorneys