

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



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case Number: 4770/2023

In the matter between:

E[...] L[...]

Applicant

and

H[...] L[...]

Respondent

HEARD ON: 12 OCTOBER 2023

CORAM: JORDAAN, AJ

DELIVERED ON: 26 FEBRUARY 2024

[1] On the 09th of July 1999 the Parties entered into a marriage out of community of property with inclusion of the accrual system, which marriage still subsists. Two sons were born from this marriage who are both still minors.

[2] Due to the irretrievable breakdown of the marriage, the Respondent instituted divorce proceedings on the 11th of July 2023 to which the Applicant filed a Plea and a Counterclaim– this divorce action is still pending in this Court.

[3] The Applicant, subsequent to the divorce action being instituted, filed this application in terms of rule 43 of the Uniform Rules of Court, for maintenance and ancillary relief *pendente lite*, seeking an order in the following terms: -

“15.1 That specific parental responsibilities and rights regarding the minor children’s residence and daily care as contemplated in Section 18(2) of the Children’s Act, Act 38 of 2005, be awarded to the Applicant pendent lite.

15.2 That specific parental responsibilities and rights regarding reasonable contact with the minor child as contemplated in Section 18(2) of the children’s Act, Act 38 of 2005, to be awarded to the Respondent pendent lite in the following manner: -

15.2.1 public holidays to alternate between the parties.

15.2.2 short school holidays to alternate between the parties and long school holidays to be shared equally.

15.2.3 reasonable telephonic contact be allowed.

15.2.4 reasonable contact be awarded at all reasonable times.

15.3 That specific parental responsibilities and rights regarding guardianship of the minor children, as contemplated in Section 18(2)(c) and 18(3) of the Children’s Act, Act 38 of 2005 be awarded jointly to the Applicant and the Respondent.

15.4 That the Respondent be ordered to pay maintenance pendent lite to the Applicant in the amount of R7 000,00 per month, first payment at the end of the month upon which the order is granted, thereafter payable on/or before the last day of every subsequent month.

- 15.5 *That the Respondent be ordered to pay maintenance pendente lite to the Applicant for the two minor children, **H J C L** and **G S L** per month per child, first payment to be made at the end of the month of which this order is granted, and thereafter before the last day of each subsequent month.*
- 15.6 *That the Respondent be ordered to pay: -*
- 15.6.1 *the monthly school- and hostel fees of **H J C L** pendente lite, directly to the [...] School in H[...], and;*
- 15.2 *the monthly tutoring fees for **G S L** pendente lite, directly to [...], C[...].*
- 15.7 *That the Respondent be ordered to pay the Applicant and the minor children's fair and reasonable medical-, dental-, pharmacy-, hospital- and related medical expenses which are not covered by the Applicant's medical aid fund pendente lite.*
- 15.8 *That the Respondent be ordered to make a contribution to the applicants legal costs in the amount of **R10,000**.*
- 15.9 *That the cost of this application be cost in the divorce action, under the case number **3523/2023**.*
- 15.10 *That further and or alternative relief be granted to the Applicant.”*

[4] At the hearing, the Parties agreed to prayers 15.1, 15.2, 15.3, 15.5, 15.6.1 and 15.2(which should read 15.6.2) and the Respondent offered prayer 15.7 in respect of the minor children to the exclusion of the Applicant. The Applicant waived 15.4, thus no longer pursuing her spousal maintenance claim and similarly waived prayer 15.8, thereby no longer pursuing a contribution to legal costs.

[5] What remained in contention between the Parties was:

1. the inclusion of the Applicant in prayer 15.7 pertaining to the payment of fair and reasonable medical-, dental-, pharmacy-, hospital- and related medical expenses which are not covered by the Applicant's medical aid fund *pendente lite*; and

2. that costs of this application be costs in the divorce action, under case 3523/2023.

[6] Rule 43 provides:

“ This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters-

(a) Maintenance pendente lite;

(b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;

(c) Interim care of any child;

(d) Interim contact with any child.”

[7] Rule 43 was not created to give an interim meal ticket to an applicant who quite clearly at the trial will not be able to establish a right to maintenance.¹ The purpose of Rule 43 is to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under common law in regard to maintenance and costs.²

[8] Turning to the facts of the case. Th Applicant is employed as an administrative assistant at C[...] in C[...] earning a monthly salary of R11 519,20. In addition the Applicant receives monthly monetary payments from Contantia Trust in the amount of approximately R38 302.16 derived from maize, rental property and lease of land, thus a combined income of R49 821.36. This income from the Trust is disputed by the Respondent stating that it is at least R4 914,00 per month more thus giving the Applicant a combined income of R56 988.00 per month.

[9] In respect of the medical aid the Applicant contend that she was forced to obtain a new medical aid fund since the Respondent instructed her to remove him(the Respondent) from the medical aid. The Applicant was unable to effect the Respondent's removal and then proceeded to remove herself and the two

¹Nilsson v Nilsson 1984 (2) SA (C) 294

²Zaphiriou v Zaphiriou 1967 (1) SA 342 (W)

children from the medical aid and took out a new medical aid for her and the two children.

- [10] The Respondent refutes this, stating that the Applicant without his knowledge removed herself and the two children from the medical aid and he was surprised to see the reduced medical aid deduction in July 2023 and furthermore that the medical aid and gap cover is in any event paid from the monetary contribution that he makes every month.
- [11] Counsel for the Applicant submitted that the Applicant seeks that the Respondent pay for her expenses not covered by the medical aid. Counsel for the Respondent countered that the gap cover in any event covers the Applicant and the Applicant has not made out a case in her application that any additional medical cover is needed by her. Respondent's Counsel further submitted that even in the Applicant's Plea and Counterclaim to the divorce action she did not claim for maintenance for herself, she also did not claim medical aid cover or gap cover for herself.
- [12] As a matter of law, the Applicant should in her papers establish a need for her claim from the Respondent for medical-, dental-, pharmacy, hospital- and related medical expenses which are not covered by the Applicant's medical aid fund. In the application the Applicant prays for an order for Respondent to pay for her medical expenses not covered by the medical aid without alleging the basis therefor. The Applicant further failed to claim same in the pending divorce action.
- [13] Having regard to the principle in Nilsson³ that Rule 43 was not created to give an interim meal ticket to an applicant who quite clearly at the trial will not be able to establish a right to maintenance. This Court finds that the principle finds application in the instant case and accordingly find that the Applicant failed to establish a need for her claim that the Respondent be ordered to pay the fair and reasonable medical-, dental-, pharmacy-, hospital- and related medical expenses of the Applicant which are not covered by the medical aid.

³Nilsson v Nilsson 1984 (2) SA 294 (C)

[14] The Applicant submitted that the Costs of this application be costs in the divorce action, under case 3523/2023 as the application needed to be brought because the Respondent offered maintenance of R6 000,00 per month per child after the divorce not *pendent lite*.

[15] Counsel for the Respondent requested that costs be awarded in their favour and in turn submitted that the Applicant should be ordered to pay the costs of the Rule 43 application as the Respondent tendered the maintenance *pendente lite* and it was therefore superfluous to bring the Rule 43 application.

[16] The Court is in agreement with the sentiments submitted on behalf of the Respondent which was buttressed by the Applicant's withdrawal of her claims for maintenance at Court.

[17] In the result the following order is made:

17.1. Specific parental responsibilities and rights regarding the minor children's residence and daily care as contemplated in Section 18(2) of the Children's Act, Act 38 of 2005 is awarded to the Applicant *pendente lite*;

17.2. Specific parental responsibilities and rights regarding reasonable contact with the minor child as contemplated in Section 18(2) of the Children's Act, Act 38 of 2005, are awarded to the Respondent *pendente lite* in the following manner:

17.2.1. public holidays to alternate between the parties;

17.2.2 school holidays to alternate between the parties and long on school holidays to be shared equally;

17.2.3 reasonable telephonic contact to be allowed;

- 17.2.4 reasonable contact to be awarded at all reasonable times.
- 17.3. Specific responsibilities and rights regarding guardianship of the minor children, as contemplated in capital Section 18(2)(c) and 18(3) of the Children's Act, Act 38 of 2005 are awarded jointly to the Applicant and the Respondent *pendente lite*.
- 17.4. Respondent shall pay maintenance *pendente lite* to the Applicant for the two minor children, **H J C G** and **G S L** and in the amount of R6000,00 per month per child, first payment to be made at the end of the month on which this Order is granted, and thereafter the last day of each subsequent month.
- 17.5. Respondent shall pay:
- 17.5.1 the monthly school- and hostel fees of **H J C L** *pendente lite*, directly to [...] School in H[...], and;
- 17.5.2 the monthly tutoring fees for **G S L** *pendente lite*, directly to [...] C[...].
- 17.6. Respondent shall pay the minor children's fair and reasonable medical-, dental-, pharmacy-, hospital- and related medical expenses which are not covered by the Applicant's medical aid fund, *pendente lite*.
- 17.7. Applicant's claim that the Respondent be ordered to pay the Applicant's fair and reasonable medical-, dental-, pharmacy-, hospital- and related medical expenses which are not covered by the Applicant's medical aid fund *pendente lite*, is dismissed.
- 17.8. Applicant shall pay the costs of this Rule 43 application to the Respondent.

M.T. JORDAAN

Acting Judge of the High Court, Free State Division

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