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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 990/2024

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between: -

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

Applicant

and

A[...] J[...] A[...]

Respondent

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **21 June 2024**.

ORDER

- i) The applicant and respondent shall retain full parental rights and

responsibilities in respect of the minor children: [MA], [JA], [JRA], and [MTA] (the minor children) in accordance with section 18(2) of the Children's Act 38 of 2005.

- ii) The primary residence of the minor children shall be with the plaintiff subject to the respondent's right to contact with the minor children:
 - a. On every alternative weekend from 13h00 on a Friday to 07h00 on a Monday.
 - b. On every alternative weekend or public holiday from 16h00 on the day preceding the long weekend or public holiday to 16h00 on the last day of the or specific public holiday.
 - c. On each of the minor children's respective birthdays from 08h00 to 13h00 alternatively from 13h00 to 18h00 subject to the parties agreeing in advance of the children's birthdays and subject to the educational, extra-mural, and related requirements of the minor children.
 - d. Every year on the respondent's birthday from 08h00 to 16h00.
- iii) The respondent's rights of contact to and with the minor children shall be exercised subject to the reasonable educational, extramural, and religious needs of the minor children.
- iv) The respondent's rights of contact to the minor children shall be exercised subject to the minor children's reasonable educational, extramural and religious needs and commitments.
- v) The respondent shall have telephonic contact with the minor children in the evenings between 18h00 and 19h00.

- vi) The respondent shall pay the school fees of the minor children directly to the school.
- vii) The respondent shall retain the minor children on his medical aid.
- viii) The respondent shall contribute to the maintenance needs of the applicant and the minor children in the amount of R45 510.00 commencing on the first day of the month following the date of this order, directly into the applicant's bank account as follows:

L[...] A[...]

First National Bank – Cheque Account

Account Number: 6[...]

Branch Code: 2[...]

- ix) The respondent shall make a contribution towards the applicant's legal costs in the divorce action in the amount of R100 000.00 payable over a period of five months in instalments of R20 000.00 commencing on the month following the date of this order. The said amount shall be paid into the trust account of the applicant's attorneys as follows:

Van der Merwe Saayman Fourie Inc.

ABSA Bank

Account number: 4[...]

Branch Code: 6[...]

Ref: H[...]

- x) The costs of this application shall be costs in the divorce action.



JUDGMENT

MFENYANA J

INTRODUCTION

- [1] This is an opposed application in terms of Rule 43. The applicant seeks maintenance for herself and their four minor children, as well the care, contact and primary residence of the minor children, pending a divorce action she recently instituted in this Court. At the commencement of this application, the summons had not yet been served on the respondent. The applicant also seeks a contribution towards her costs of litigation in the amount of R100 000.00, to be paid in five monthly instalments of R20 000.00.
- [2] At the outset, it is worth stating that although the application is opposed, the primary residence, care and contact of the minor children have become settled between the parties, including the respondent's contact with the minor children on their birthdays. What remains in dispute are the amount of maintenance to be paid by the respondent, as well as his contribution towards the applicant's costs of litigation.
- [3] As for the amount of maintenance, the applicant seeks an amount of R68 430.00 per month for herself and the minor children whereas the respondent offers to continue paying for various maintenance requirements of the applicant and the minor children. These requirements amount to R33 980.00. The respondent further offers to retain the minor children on his medical aid.
- [4] The remainder of the relief sought by the applicant pertains to the minor children's school fees which the applicant contends are in

arrears, and the respondent disputing same. There is however no dispute between the parties concerning the respondent's liability for the minor children's school fees, and thus, this issue requires no further expansion.

- [5] It is worth stating this early, on that the purpose of a Rule 43 application is self-evident from the provision itself. For purposes of the present application, as invoked by the applicant, it is for maintenance, and contribution towards costs pending divorce proceedings.

FACTUAL BACKGROUND

- [6] The parties were married to each other on 14 February 2015, out of community of property excluding the accrual system. Two children were born of their marriage. They are presently 8 and 3 years old. Following the death of the applicant's sister and her husband, the parties adopted the applicant's late sister's twins, who are presently 11 years old.

- [7] It is clear from the reading of the papers that the primary residence and contact of the minor children are not strongly contended. The real dispute turns on their maintenance. At the heart of the dispute is the reasonableness of the maintenance requirements of the applicant and the minor children, and whether the respondent is in a position to afford such maintenance.

- [8] The applicant's contention as depicted in her sworn statement, and the Financial Disclosure Form is that her and the minor children's maintenance requirements amount to R110 433.30 per month. The minor children's expenses make up for R69 749.52 of this amount. The applicant avers that it is within the respondent's ability to pay an amount of R68 430.00 per month in respect of her maintenance and the minor children's, which she considers to be necessary and reasonable, given their standard of living throughout their married life.

- [9] In line with this standard of living, the parties employed three domestic workers, an *au pair*, and two gardeners. While conceding to the exorbitance of this expenditure, the applicant contends that all three aides are necessary as she is employed, and works from 08:00 until 12:30 for five days in a week. She further contends that after work she assists the minor children with their extra-mural activities, homework, preparing food and other household chores, while the *au pair* helps with driving. One domestic worker is assigned to the applicant, and the other to the respondent on a rotational basis, for seven days a week for each of them. She also travels to Cape Town for approximately two or three nights for at least two or three times in a year, during which time the *au pair* sleeps in and takes care of the minor children.
- [10] Regarding her employment arrangements and income, the applicant states in her sworn statement that she is employed at Chubby Chick and Lekratek and earns salaries of R18 311.06 and R9 747.40 per month respectively. She also receives a salary of R16 200.00 from Z[...]’s Company, a business owned by the respondent. These amounts to a total of R44 258.46 per month. She further avers that since January 2024, she has been contributing to medical aid in the amount of R4 926.50. This is disputed by the respondent as he claims that Chubby Chick contribute 50% of the medical aid and the remaining 50% already deducted on the applicant’s salary slip.
- [11] The applicant’s investment and banking portfolios reflect low values of which I consider too negligible to have any impact on this application.
- [12] It is the applicant’s contention however, that her salary in respect of Chubby Chick is expected to decrease in the next year to R10 962.64 which would bring her monthly salary down to R36 910.34. No explanation was provided for this expected decrease in salary.
- [13] Consequently, the applicant avers that she is not able to meet the maintenance needs of the minor children and herself. She avers that

the respondent is, on the other hand, able to provide for these needs, but has elected not to, as a reaction to the divorce proceedings.

- [14] Concerning the living arrangements of the parties, the applicant avers that they have always enjoyed a luxurious lifestyle financed by the respondent, and resided in a house valued at R25 million which is registered in the respondent's trust. She further contends that they went on holidays to various international destinations on the respondent's company jets and chartered helicopter flights, which became their means of transportation for vacations and outings, and routinely dined at restaurants every two weeks.
- [15] The applicant further avers that their luxurious lifestyle is evidenced by the fact that both herself and the respondent own motor vehicles which are both paid up, and valued at R1.4 million and R2 million respectively, having been offered to her as a gift from the respondent. The respondent however denies that his motor vehicle is paid up, and avers that it has a balance of R1.4 million, for which he pays an instalment of R29 000.00 per month. The applicant avers that the respondent is a very wealthy man who can afford to pay the maintenance she and the minor children require.
- [16] It is further the applicant's contention that after leaving the matrimonial home with the minor children, she had to rent a property for R28 000.00 per month, for which she not only had to pay a deposit and monthly rental, but also had to buy furniture for herself and the minor children. She avers that she took out a loan in the amount of R444 758.08 from the Van der Walt Trust, payable over a period of 60 months in instalments of R7 412.63 commencing from February 2024.
- [17] It is common cause that the applicant is a beneficiary of the Gert van der Walt Trust. It is further common cause that the applicant is a trustee of the [J & M Trust]. The [J & M Trust] was created by the applicant's late sister with the twins as the only beneficiaries. The applicant avers

that she receives no income from these two trusts, something which is disputed by the respondent.

- [18] In opposing the application, the respondent avers that the applicant has exaggerated her and the children's maintenance needs, to create an impression that the respondent has limitless access to funds without providing any evidence therefor. He avers that he is not able to meet the applicant's excessive demands, and that the applicant has several resources to fund her exorbitant alleged needs.
- [19] The respondent questions the reasonableness and accuracy of the maintenance requirements alleged by the applicant, contending that the applicant has not substantiated these expenses. He deals with these expenses in sequence. I do not consider it necessary to deal with all of the items listed by the respondent, save to the extent I consider necessary for the determination of this application.
- [20] Importantly, the respondent denies that the applicant's lodging costs R28 000.00 as alleged by the applicant and questions the fact that the applicant did not attach the three quotations as indicated in her sworn statement. He contends that the cost of lodging for the applicant and the minor children is R18 500.00. This averment is supported by a rental invoice provided by the applicant which shows the rental amount as R18 500.00. This would have an impact on the minor children's and the applicant's expenses.
- [21] With regard to the amount of R60 000.00 per annum (R5000.00 per month) required by the applicant for holidays, the respondent avers that the applicant and the minor children have free holiday accommodation provided by the applicant's family and this should reduce the amount required by the applicant and the minor children. He further contends that the applicant does not require any amount for house maintenance as this is the responsibility of the landlord, as the property is leased.

- [22] He further questions the fact that the applicant requires an amount for household appliances when she alleged that she spent over R400 000.00 to put up the house, which amount he also disputes as a simulated transaction as the applicant is a beneficiary of the trust and receives income from it, as well as a further amount of R10 000.00 from the applicant's family business. He further disputes that the applicant and the minor children require an amount of R2 000.00 for gifts. He disputes the amount to be spent on holidays, and various other requirements of the applicant and the minor children.
- [23] In her sworn statement, the applicant admits that in the past she received rental income of R10 700.00 from a property owned by the Gert van der Walt Trust. It is not in dispute that the property has since been sold. While the respondent contends that following the sale of the property, the applicant would continue to receive benefits, this is not supported.
- [24] It is further the respondent's contention that the family can manage with two domestic workers as opposed to three. In this regard, he avers that the third domestic worker was about to resign, as she had fallen pregnant. He offered to continue paying the salaries for the two domestic workers. I have already found that no case was made out for three domestic workers. The amount attributable to the third domestic worker can in my view, serve to reduce the applicant's and the minor children's requirements on the basis of necessity. In my view, given the parties' previous living arrangements, it may have been reasonable for the parties to employ three domestic workers. Following the re-arrangement in the parties' living arrangements, that need may have dissipated.
- [25] Importantly, the respondent avers that the applicant declined full- day employment which shows that she is not willing to take steps towards her own maintenance while expecting the respondent to meet her exorbitant maintenance needs. He further contends that the applicant

intends to enjoy a higher standard living than they were accustomed to, at his expense, and refuses to accept that two households are more expensive to run than one.

[26] Ultimately the respondent contends that an amount of R54 000.00 per month is fair and reasonable for the applicant and the minor children, excluding the costs of medical aid, which he offers to cover.

[27] It is not in dispute that the property occupied by the respondent belongs to the AJA Trust. The parties are however at loggerheads in relation to the running and control of the trust, as the applicant contends that it is the respondent's alter ego. The respondent however contends that the AJA Trust has three trustees including the respondent and his father. He further contends that his father is the driving force behind the AJA Trust as he has invested large sums of money in the property occupied by the respondent. He denies that the AJA Trust is his alter ego as he has to consider and obtain consent from the other two trustees should he wish to encumber the property.

DISCUSSION

[28] I do not intend to deal with those aspects of the application for which the parties have reached agreement. Of relevance is that the respondent has also offered to continue paying for the applicant's expenses to an amount of R33 980.00 as opposed to the R68 430.00 claimed by the applicant which the respondent alleges is exorbitant.

[29] What is noteworthy is that, save for challenging the reasonableness of the amounts claimed by the applicant, and reducing them in what I consider to be an arbitrary fashion, the respondent provides no documentary evidence for his conclusions. He also does not dispute that these requirements are necessary for the applicant and the minor children. He simply disputes the amounts thereof, which he considers to be exorbitant. This, in my view attests to the lifestyle of the parties. It

therefore does not avail the respondent to subjectively guess what amounts would be reasonable in the circumstances. He has not provided a shred of evidence for the majority of his contentions.

[30] Of concern, is that the respondent submits that his only income is derived from his salary of approximately R64 000.00. He provides no bank statement to support this averment and has not made full financial disclosure of his assets and liabilities. The applicant avers that this Court should draw an adverse inference from the respondent's conduct, in so far as he has failed to properly set out his financial position. I agree. A party who fails to produce material evidence, although such evidence is known to be within that party's reach or knowledge risks an adverse inference being drawn against them. In the case of the respondent, this appears to be a deliberate effort.

[31] The measly financial capacity disclosed by the respondent are not in tandem with lifestyle led by the parties throughout their marriage. He admits that the parties went on holiday for approximately seven times throughout their marriage. What he says is that two of these holidays were funded by his father, and two were paid for by his company. He does not account for the rest. The reasonable inference to be drawn from this is that the respondent has no explanation. What it further reveals is that he is a man of means, and has employed his financial ability to provide a luxurious lifestyle for his family. All these cannot be achieved from a salary of R64 000. 00 as submitted by the respondent.

[32] It is trite that the adequacy of maintenance needs largely depends on whether such requirements are necessary and reasonable for the sustenance of the applicant and the minor children. The maintenance needs of the applicant and the minor children are, no doubt, influenced by what they are accustomed to. By all accounts, they were living in the lap of luxury. The minor children have also become accustomed to this standard of living. While the respondent argues that the applicant seeks to achieve a higher standard of living than what she has been

accustomed to, he fails to support this averment in any way. There is also no case made out by the respondent why the maintenance amount, save for the school fees and medical aid contribution, should not be paid directly to the applicant as the primary caregiver of the minor children.

[33] With regard to the applicant's earning capacity, her bank statements indicate that between July 2023 and January 2024 she received various amounts in her bank account. This does not evince a sense that the applicant is unable to contribute towards her maintenance requirements. That being the case, the applicant does not seek to obtain the full amount required for her and the minor children's maintenance needs from the respondent. To my mind, this is an acknowledgement of her own responsibility towards hers and the minor children's maintenance.

[34] It is trite that orders for maintenance issued pursuant to a rule 43 application are interim and temporary in nature. The main purpose is to come to the aid of a spouse, who without such relief would be left destitute. I must interpose at this point, to state that what may be considered 'destitute' will vary from case to case. A party who, by a stroke of fortune receives a monthly allowance of R100 000.00 per month might be considered destitute if they were to be required to live on a meagre amount of R20 000.00 per month. I presume that the attendant difficulties would include the fact that such spouse would have to alter their entire living arrangements, habits, and even forego some of their bare necessities. More often than not, in these circumstances, the minor children bear the biggest brunt of such changes.

[35] In the present case, while the respondent continues to contribute towards the maintenance of the minor children and the applicant, this is demonstrably, not enough to meet their reasonable needs, even with the applicant's contribution. The applicant contends that the

respondent's offer and attitude to the whole maintenance issue is a 'knee-jerk' response to the divorce. There may be merit to this contention if one considers that the amount required is well within the means of the respondent.

[36] It is so that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands – similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than one who is obviously, *albeit* on paper, seeking to evade them.¹

[37] Having said that, it remains imperative that the rights of applicants, who are often women, and in a less favourable financial position, be taken heed of. In *S v S*², the Constitutional Court observed that women occupy the lowest economic rung in society, and are in a less favourable financial position than their husbands. The Court went further to state that:

“ It is women who are primarily left to nurture their children and shoulder the related financial burden. To alleviate this burden our courts must ensure that the existing legal framework, to protect the most vulnerable groups in society, operates effectively.”

[38] The applicant in this case, is no different. She shoulders the responsibility to nurture the parties' four minor children primarily on her own, in changed circumstances than those the family, especially the minor children have been accustomed to. The wellbeing of the minor children largely rests on her as the primary caregiver. It stands to reason, in my view, that she should be spared of financial hardship,

¹ *Taute v Taute* 1974 (2) 675 E, para 676H.

² 2019(6) SA 1(CC)[2019]ZACC 22, para 3.

where that is achievable. In this case, it is.

[39] In *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)*³ 2003 (2) SA 363 (CC) (2003 (2) BCLR 111; [2002] ZACC 31) the Constitutional Court implored the courts to ensure that the rights of 'all are protected' when it held that '(i)t is a function of the State not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.'⁴

[40] The respondent argues that the applicant has exaggerated her expenses and has not provided documentary proof of her expenses. He points out, as an example, the rental amount claimed by the applicant, which appears to be inflated by almost R10 000.00. He argues that the applicant cannot claim an amount for house maintenance on a leased property. He further argues that the applicant has concealed her income from the Gert van der Walt Trust post the sale of the property from which the applicant received rental income. He argues that the [J & M] Trust has the twins as the only beneficiaries and the applicant as Trustee. He concedes his obligation to contribute to the maintenance of the twins whom he and the applicant have legally adopted. He however contends that in the event the applicant experiences a shortfall, occasioned by her excessive lifestyle, these funds would be available as a source of maintenance. He does this, without providing so much as a fragment of evidence substantiate his allegations. His attitude can best be described as nonchalant.

[41] All these averments are made without providing a shred of evidence to

³ 2003 (2) SA 363 (CC) (2003 (2) BCLR 111; [2002] ZACC 31).

⁴ Paragraph 28.

substantiate them. To my mind, I understand the respondent to be saying that the applicant, likewise, bears a responsibility to provide maintenance to the minor children.

[42] In *Du Preez v Du Preez*⁵ the Court held in relation to exaggerated expenses and misstatements:

“... there is a tendency for parties in rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to correct the relevant information. Counsel habitually, acting no doubt on instruction, unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in rule 43 applications. To my mind the practice is distasteful, unacceptable, and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. Parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury and, in certain circumstances, may be the crime of defeating the course of justice. Should such conduct occur in rule 43 proceedings at the instance of the applicant, then relief should be denied.”

[43] The applicant has made out a case that she and the minor children are in need of maintenance. However, as I have already stated, such amount excludes the amount of R9 500.000, being the difference between the actual cost of rental and the amount claimed by the applicant. The amount of R5000.00 for the third domestic worker should also be discounted from the amount as no case was made out for it, nor is it reasonable for the applicant's household requirements.

⁵ 2009 (6) SA 28 (T).

There is also merit to the respondent's contention that the maintenance of a rental property at a cost of R1000.00 per month, is the responsibility of the owner. This is especially relevant if consideration is had to the fact that rule 43 maintenance is temporary. As for household appliances, both parties approbate and reprobate. The applicant cannot submit to have taken out a loan (which forms part of her and the minor children's expenses) to set up at her new home, and in the same breath claim an amount of R1000.000 per month for household appliances. Whether this be for repairs or replacement, to my mind, it does not accord with the interim nature of rule 43 relief. All these come to a total of R16 500.00 which ought to be deducted from the amount claimed.

[44] Taking this into consideration, as well as the financial capacity of each of the parties, I am of the view that the respondent should contribute an amount of R45 510.00 in respect of the maintenance of the applicant and the minor children. This excludes the amount of R6 420.00 for school fees, payable by the respondent, directly to the school.

CONTRIBUTION TOWARDS COSTS

[45] The concept of a contribution towards the costs of a divorce action emanates from the duty of support that spouses owe each other. This accords with the right to equality in terms of the Constitution⁶, in that the divorcing spouse who has no source of income (usually the wife) is entitled to a contribution towards her legal costs to ensure she has an equal opportunity to defend and present her case. This is an established principle in our law.

[46] The applicant avers that her financial position is far below that of the respondent and for that reason she is entitled to a contribution towards the costs of the divorce. She further contends that she anticipates that

⁶ Constitution of the Republic of South Africa, 1996.

the divorce will be protracted as the respondent is of the view that she is not entitled to anything else other than spousal maintenance and maintenance for the minor children. She anticipates that various experts will be engaged by the parties, also in view of the fact that the AJA Trust is involved in the divorce action. In this regard, she obtained a pro forma invoice from her legal representative, projecting the fees for the divorce action at R221 934.58. She contends that a cost contribution of R100 000.00 would be reasonable, taking into account their respective income.

[47] In *Cary v Cary*⁷ the court concluded that the applicant was entitled to a contribution towards the costs which would ensure equality of arms in the divorce action against her husband. The court held:

“...applicant will not enjoy equal protection unless she is equally empowered with 'the sinews of war'. The question of protecting applicant's right to and respect for and protection of her dignity also arises in the present situation, where a wife has to approach her husband for the means to divorce him.”

[48] I must hasten to add that while it cannot be denied that both parties have access to sources of income in their respective capacities, the applicant has demonstrated that she is not able to litigate at the scale at which the respondent is, and would be outwitted financially if a cost contribution was not ordered.

ORDER

[49] In the result I make the following order:

- i) The applicant and respondent shall retain full parental rights and responsibilities in respect of the minor children: [MA], [JA], [JRA],

⁷ *Cary v Cary* 1999 (3) SA 615 (C); [1999]2 All SA 71 (C).

and [MTA] (the minor children) in accordance with section 18(2) of the Children's Act 38 of 2005.

- ii) The primary residence of the minor children shall be with the plaintiff subject to the respondent's right to contact with the minor children:
 - a. On every alternative weekend from 13h00 on a Friday to 07h00 on a Monday.
 - b. On every alternative weekend or public holiday from 16h00 on the day preceding the long weekend or public holiday to 16h00 on the last day of the or specific public holiday.
 - c. On each of the minor children's respective birthdays from 08h00 to 13h00 alternatively from 13h00 to 18h00 subject to the parties agreeing in advance of the children's birthdays and subject to the educational, extra-mural, and related requirements of the minor children.
 - d. Every year on the respondent's birthday from 08h00 to 16h00.
- iii) The respondent's rights of contact to and with the minor children shall be exercised subject to the reasonable educational, extramural, and religious needs of the minor children.
- iv) The respondent's rights of contact to the minor children shall be exercised subject to the minor children's reasonable educational, extramural and religious needs and commitments.
- v) The respondent shall have telephonic contact with the minor children in the evenings between 18h00 and 19h00.

- vi) The respondent shall pay the school fees of the minor children directly to the school.
- vii) The respondent shall retain the minor children on his medical aid.
- viii) The respondent shall contribute to the maintenance needs of the applicant and the minor children in the amount of R45 510.00 commencing on the first day of the month following the date of this order, directly into the applicant's bank account as follows:

L[...] A[...]

First National Bank – Cheque Account

Account Number: 6[...]

Branch Code: 2[...]

- ix) The respondent shall make a contribution towards the applicant's legal costs in the divorce action in the amount of R100 000.00 payable over a period of five months in instalments of R20 000.00 commencing on the month following the date of this order. The said amount shall be paid into the trust account of the applicant's attorneys as follows:

Van der Merwe Saayman Fourie Inc.

ABSA Bank

Account number: 4[...]

Branch Code: 6[...]

Ref: H[...]

- x) The costs of this application shall be costs in the divorce action.

S MFENYANA
JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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Date reserved: 19 April 2024

Date of judgment: 21 June 2024