

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

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

DATE: **13 SEPTEMBER 2021**

Case No: 2020/27617

In the matter between:

AC

Applicant

and

SM

Respondent

JUDGMENT

WILSON AJ:

1 The applicant (“Mrs. C”) is a Spanish citizen, who married the respondent (“Mr. M”) in 2008, and then moved with him to South Africa in 2012. Although she has degrees in business administration, Mrs. C has no right to work in South Africa. For a time she had a critical skills permit, but that expired. Despite a series of efforts to obtain employment (which have for most of that time implied also the need to take steps to obtain a work permit) Mrs. C has not been able to advance her career outside the marital home since she moved to South Africa. Her primary occupation has been as a caregiver to the parties’ two children, and as a homemaker.

2 In 2017, the parties separated. Mr. M moved out of the marital home, in which Mrs. C still resides with the parties' two children. An action for divorce was instituted in 2020. As a result of what Mrs. C considers to be Mr. M's unreasonable conduct in making erratic maintenance payments, and his initial refusal to allow her to relocate abroad with the parties' children (where Mrs. C would be able to find employment), Mrs. C now seeks court-ordered maintenance in terms of Rule 43 in order to support herself and the children. She also seeks a contribution to her costs in the main action.

3 While Mrs. C lacks a regular or dependable income, Mr. M is a successful management consultant. In the papers, he alleges that his career prospects have recently become uncertain. This appears partly to be the result of the economic impact of the COVID-19 pandemic, and partly the result of performance management issues his employer appears recently to have raised with him. The fact remains, however, that Mr. M is in well-remunerated employment (nobody suggests that his net salary is anything less than R96 000 per month), while Mrs. C must, on any assessment of the facts, get by on considerably less than that.

4 Rule 43 is meant to provide prompt and temporary relief to a spouse in need of maintenance, and assistance with legal costs pending the finalisation of the divorce action. The test, at least in respect of maintenance *pendente lite*, is simple and straightforward. The amount awarded is the product of an examination of Mrs. C's reasonable needs, and Mr. M's ability to meet those needs, having regard to the standard of living the parties enjoyed when they lived together (see *Taute v Taute* 1974 (2) SA 675 (E), 676D-H). Judgements about the propriety of either party's spending, or their willingness to find work, play no role in the analysis – unless, of course, they provide evidence of the means and needs to which a court must have regard.

5 As the Constitutional Court has observed, applicants in Rule 43 applications are “almost invariably” women, who have forgone the opportunity to secure independent means because they have devoted themselves to making a home and raising children (*S v S* 2019 (6) SA 1 (CC), paragraph 3). The assumption of this role is often driven by powerful social expectations about the role women ought to play

within the family, and the limits of what they can expect to achieve outside it, at least for so long as they have young children.

6 In this case, it seems clear to me that Mrs. C subordinated her career prospects to the needs and interests of her family by moving, with Mr. M, to a country in which both he and she knew it would be difficult for Mrs. C to seek work.

Maintenance *pendente lite*

7 I set all of this out because it highlights the extraordinary position Mr. M adopted before me in argument. His stated view (to some extent ameliorated in post-hearing written submissions made on his behalf) is that Mrs. C should get a job, and support herself. Beyond retaining Mrs. C on his medical aid, and paying 50% of any “reasonable” costs not covered by medical aid, Mr. M initially refused to tender anything at all towards Mrs. C’s maintenance. I was referred, instead, to paragraph 130 of Mr. M’s supplementary affidavit of 30 July 2021, in which he undertakes a maintenance contribution of just R4000 per month to the parties’ children, over and above their school fees, their medical expenses and the costs associated with housing them in the former marital home.

8 In light of the rules and principles applicable to Rule 43 applications, Mr. M’s position unsustainable. Mr. M’s failure to engage reasonably with his obligations has made my task in determining the true nature of those obligations significantly harder. This is unfortunate. It is in Mr. M’s interests, and those of the parties’ children, that I make an order that is fair and equitable, having regard to the parties’ reasonable means and needs.

9 Ms. Segal, who appeared for Mrs. C, sought to assist in that task by placing a series of tables before me that summarise the parties’ respective financial positions, based on the information disclosed on the papers. It was accepted by both parties that the tables contain no new factual matter, and that they are merely an interpretation of the facts disclosed on the papers. However, in fairness, I gave Mr. Courtenay, who appeared for Mr. M, leave to file supplementary written submissions on the content of the tables, by no later than 13 August 2021.

10 Those submissions concede that Mr. M's net monthly income, encompassing both his net salary and some investment returns, is at least R124 000 (about R1 000 less than the amount calculated in Ms. Segal's tables). The submissions nevertheless assert that the tables are not a "proper reflection" of Mr. M's "take-home income" (paragraph 5 of the submissions). There follow a series of calculations that seek to equate Mr. C's true income with his take-home salary.

11 The position taken in Mr. C's post-hearing written argument is, at first blush, internally contradictory. I have some difficulty in understanding the assertion that Mr. C's "net income" is not in fact a "proper reflection" of his "take-home income". However, evaluated fairly and as a whole, the post-hearing submissions appear, in substance, to assert that, in determining Mr. C's maintenance obligations, I should have regard to Mr. C's take-home salary, and not his actual income.

12 That position obviously cannot be accepted. I find that Mr. M's net monthly income is at least R124 000, and that this is the relevant figure for assessing Mr. M's ability to meet his monthly maintenance obligations.

13 It is on the basis of this figure that Ms. Segal motivated Mrs. C's maintenance needs. These are substantially comprised of R24 456 per month for Mrs. C's and the children's maintenance; payment school fees and other educational costs for the parties' children; payment of medical expenses for Mrs. C and the children; payment of costs associated with maintaining the erstwhile marital home, where Mrs. C still lives with the parties' children; and payment of the cost of an annual return economy class air ticket to Europe for Mrs. C and each of the children.

14 At their most extensive these obligations are to a value of somewhere in the region of R80 000 per month. Mrs. C also seeks an order linking the cash component of this amount to the consumer price index. The other payments constituting the overall obligation for which she contends are envisaged to be made directly by Mr. M to the service providers involved. This includes just over R24 000 per month in school fees at an exclusive private school. These fees are not to be met from Mr. M's income, but from the liquidation of some of Mr. M's investments. There

is some disagreement between the parties about whether it is appropriate for the children to continue at that school. However, for the moment, that is where the children are, and will remain, unless and until the parties agree to move them elsewhere.

15 Having regard to Mr. M's income, I am satisfied that the claim for Mrs. C's and the children's maintenance, educational expenses for the children, medical expenses for the children and Mrs. C, and the costs of maintaining the erstwhile family home should be allowed. I am not satisfied that I should order a specific amount for an economy class trip to Europe annually, that I should link the amounts payable to the consumer price index, or that I should make an order that embraces certain other costs, for example homeopathic medical treatment, that are sought on Mrs. C's behalf.

16 In the (in my view unlikely) event that inflation so eats into the maintenance due as to materially affect her financial position, or that of the children, then Mrs. C is at liberty to approach the court again alleging a material change in circumstances at that stage. It is to be hoped that the divorce will be finalised before that becomes a realistic prospect.

17 The effect of my order is that Mr. M's maintenance obligations will burden his net monthly income in the approximate sum of R50 000. (The school fee contributions will be met, as I have recorded, from the liquidation of capital). That appears to me to be eminently reasonable, at least as a temporary measure while the main action is finalised.

The application for a contribution to Mrs. C's legal costs

18 Mrs. C seeks a contribution to costs in the sum of R108 000. By the standards of the amounts usually expended on divorce proceedings of this nature, this amount is quite modest. Mr. M's response is a flat denial that he can afford to make the contribution. But the facts show that he can. I will, though, spread the payments to be made over eight months rather than the four that Mrs. C asked for.

19 It is, of course, open to the parties to forestall the expenditure of those legal costs by coming to a reasonable agreement as to the division of the marital estate. In that event, any unexpended funds will have to be repaid to Mr. M. The amounts due to him, if any, will no doubt form part of the calculation of any such settlement.

20 As is usual in matters of this nature, the costs of this application will be costs in the main action. Although Mr. M's approach to this litigation, and to his obligations to Mrs. C and the parties' children, has not disclosed a realistic appreciation of the duties that lie upon him, his stance does not rise to the level of litigious misconduct, and I do not think I should penalise him with the costs of this application.

21 For all these reasons, I make the following order *pendente lite*–

21.1 The respondent is granted leave to file his supplementary affidavit dated 30 July 2021.

21.2 The respondent is directed to pay maintenance as follows –

21.2.1 R24 456 per month to the applicant, from 1 September 2021. The first payment must be made within 5 days of the date of this order. Subsequent payments must be made on or before the first day of every calendar month; and

21.2.2 the parties' minor children's school fees, and any costs associated with extra-mural activities that are pursued under the auspices of the children's schools; and

21.2.3 the reasonable costs associated with the erstwhile marital home, Unit [...], La B[...], [...] M[...] Road, Morningside, Johannesburg ("the property"), including the monthly mortgage bond instalments due to SA Homeloans, the rates and taxes due on the property, levies due on the property, utilities supplied to the property, homeowners' and household contents insurance and the costs associated with securing the property.

21.3 The respondent shall retain the applicant and the parties' children on his current CAMAF medical aid scheme, or on another scheme of his choice with similar benefits.

21.4 The respondent shall meet any costs for non-elective medical treatment not covered by the medical aid to which the applicant and the parties' children are subscribed.

21.5 The respondent shall contribute R108 000 to the applicant's legal costs, in monthly instalments of R13 500, payable from 1 October 2021, and then on or before the first day of each month thereafter until the contribution is paid in full.

21.6 The costs of this application are costs in the main action.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 13 September 2021.

HEARD ON:	5 August 2021
FURTHER WRITTEN SUBMISSIONS ON:	13 August 2021
DECIDED ON:	13 September 2021

For the Applicant:	L Segal SC
Instructed by Clarks Attorneys	

For the Respondent:	RM Courtenay
Instructed by Sterling Attorneys	