

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

CASE NO: 26138/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

10 June 2022

In the matter between:

L [....] 1 K [....] M [....]

Applicant

and

L [....] 2 R [....]

Respondent

JUDGMENT

MIA, J

[1] The applicant herein is the plaintiff in divorce proceedings instituted in the Gauteng Division of the High Court of South Africa, Johannesburg. She brings this application for relief *pendent lite* in terms of Rule 43 of the Uniform Rules of Court (“the Rules”). The applicant seeks the following:

- 1.1 Primary care of the minor children born of the marriage between the parties, subject to the respondent’s rights of contact with the minor children, which are further subject to the scholastic, extramural and religious requirements of the minor children, including:

1.1.1 every Wednesday, when the respondent shall collect the minor children from school and return the minor children to school on the following Thursday morning;

1.1.2 every alternate weekend, when the respondent shall collect the minor children from school on Friday afternoon and return them to school on the following Monday morning; and

1.1.3 half of every long school holiday.

1.2 Furthermore, the applicant seeks maintenance in the amount of R8000.00 per month until the children are self-supporting which amount is to escalate in accordance with the consumer price index on the anniversary of the order.

1.3 The respondent shall retain the minor children as dependents on his current medical aid and gap cover, or any other medical aid and gap cover of similar or equal benefits which he may become a member in substitution of the current medical aid, and the respondent shall pay all monthly premiums, subscriptions, fees, expenses and/or other charges in connection therewith, including any shortfall in cover, until such time as the minor children are self-supporting.

1.4 The respondent shall pay for all medical, psychotherapy, dental, orthodontic, ophthalmic, physiotherapy, surgical, homeopathic, pharmaceutical, occupational therapy treatment and/or any other treatment in respect of the minor children which may not be covered by the medical aid scheme until such time as the minor children are self-supporting.

1.5 The respondent shall pay for all of the minor children's educational fees and expenses in respect of tuition and all ancillary charges at St Andrews School for Girls and/or such other private school

of equal status, extramural activities and/or aftercare and/or additional tuition, extra lessons/classes/intervention as well as all books, textbooks, stationery, school uniforms, sporting equipment, sporting clothes, sporting and/or extramural activities, camps and outings engaged in by the minor children, and/or any other school-related expenses, as and when each cost becomes due and payable.

1.6 The respondent shall pay the following in respect of maintenance towards the applicant:

1.6.1 R20 000.00(twenty thousand Rand) per month without any deduction, set-off or retention on any basis whatsoever, payable on the first day of each successive month following the granting of this Order. The aforementioned amount shall escalate annually on each anniversary of the granting of this Order, in accordance with the prevailing consumer price index (CPI) according to Statistics South Africa at the time of each such anniversary, compounded annually;

1.6.2 The respondent shall do any and all things necessary in order for the applicant to continue exercising uninterrupted and continuous use of the respondent's white Jeep Grand Cherokee vehicle (vehicle registration number: HW 30 WB GP) ("the vehicle"), and to make any and all payments in relation to the vehicle, including finance instalment costs, maintenance and/or service and/or replacement parts and/or expenses, comprehensive insurance costs including any excess payments, tracking device costs, as well as licencing and/or statutory costs in respect of the vehicle; and

1.6.3 The respondent shall make a contribution towards the applicant's legal costs in the sum of R120 000,00 (One Hundred and Twenty Thousand Rand) payable in twelve equal monthly instalments of R10 000,00 (Ten Thousand Rand), payable on the first day of each successive month following the granting of this Order, without any deduction, set-off or retention on any basis whatsoever. Costs of this

application are to be borne by the respondent on the attorney and client scale.

[2] The respondent opposed the application and filed a counter claim in which he sought an order in the following terms:

2.1 That the respondent shall continue to pay the following expenses in terms of the minor children:

2.1.1 The current medical aid monthly premium, and 50% of the additional costs not covered by the medical aid;

2.1.2 A contribution of 50% to the minor children's schooling expenses, which will include school fees with school uniforms and shoes, work books, text books and stationary; and

2.1.3 A further contribution of 50% to the minor children's extramural activities, which activities forms part of the extra murals of the school and will be reasonable.

2.2 The primary care alternatively the shared residency of the minor children to be investigated and reported on by an independent expert. Pending the outcome of the expert's report, the parties will have shared residency of the minor children born from the marriage and the rights of contact of each party will be the following:

2.2.1 The respondent will collect the minor children on a Monday afternoon at school. The minor children will remain in the care of the respondent until the following Monday morning when he drops the minor children at school;

2.2.2 The applicant will thereafter collect the minor children at school on the Monday afternoon and the minor children will remain in her

care until the following Monday morning when she drops the minor children at school;

2.2.3 The minor children will be with the respondent on Father's Day;

2.2.4 The minor children will be with the applicant on Mother's Day;

2.2.5 Long and short holidays will be shared between the parties, with Easter, Christmas Year, New Year alternating between the parties. Costs of this application is costs in the cause.

[3] I will refer to the parties throughout as in the application.

[4] The applicant and respondent were married on 9 February 2013 in Hartbeespoort. Their marriage was out of community of property subject to the accrual system. The marriage still subsists. The applicant initially spent her time taking care of the home and looking after the children aged 8 and 4 years old. She recently completed a law degree through UNISA. She has since commenced employment as a candidate attorney. She will complete her term as a candidate attorney shortly. She is not guaranteed employment but will be in a position to seek employment once her contract ends. She relies on a helper to assist with the care of the children. The respondent is self-employed and is a director or member of four different business entities. The parties separated in 2019. The applicant obtained a protection order against the respondent to prevent abusive behaviour.

[5] The parties attempted a shared residency arrangement whereby the children resided with each parent on alternating weeks. The arrangement did not work. Both the applicant and respondent agreed that the children should reside with the applicant and have alternate weekend contact with the respondent as well as every Wednesday. This arrangement has been in existence for approximately a year. The children also have adjusted and settled into this routine.

[6] It is evident from the affidavits filed by both the applicant and the respondent, that the applicant and respondent enjoyed a certain lifestyle that is described as luxurious. This is evident from the private schools the children attend, the BMW vehicle the respondent drives and the Jeep vehicle the respondent paid for the applicant to drive and still pays for. The applicant states that they dined out often and this is not disputed by the respondent. The respondent refuses to pay for the applicant and the children to have the continued benefit of this lifestyle and contends that he cannot afford it. The dispute between the applicant and respondent has arisen because the respondent refuses to pay for the applicant and the children's costs which he covered previously. Moreover, he wishes to change the children's living arrangement which he agreed to a year ago.

[7] The issues for determination are thus:

- a. The interim care and contact of the minor children as requested by the applicant and the counterclaim by the respondent.
- b. Whether an order for a forensic assessment is necessary.
- c. Maintenance per the applicant's claim and the respondent's counterclaim. Whether the respondent is able to continue to maintain the applicant and the children on the same level they are accustomed to or the respondent's counterclaim.
- d. Whether the applicant is entitled to costs as requested.

[8] Whatever the outcome may be in the divorce proceedings, the Rule 43 procedure seeks to provide a streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in respect of maintenance and costs.¹ The purpose of the relief is to regulate the position between the parties until the

¹ *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) at 345F.

court finally determines all the issues between them, including their respective rights and obligations.

CARE AND CONTACT OF THE MINOR CHILDREN

- [9] The children have been in the care of the applicant for over a year. This occurred after the parties attempted a shared residence arrangement for a period of two months. This arrangement did not work. The respondent agreed to the minor children residing with the applicant, where they have been stable for a significant period. The respondent's suggestion that the respondent is a weekend father emanates from the respondent rather than from the applicant and appears to be a response to the application for interim maintenance. The request for shared residence which necessitates a change to the children's routine and stability is without motivation and does not take the best interests of the children into account. This explains the request that an order be granted appointing an expert to investigate what is in the best interest of the minor children in relation to care and contact.

FORENSIC ASSESSMENT

- [10] The respondent raises no cogent concerns regarding the applicant which justify a referral to inquiry at present. The parties may wish to refer the matter to the office of the Family Advocate once their circumstances change. At present there appears to be no reason to refer the matter for an enquiry. The respondent denies the use of narcotics and this has not been raised as a concern by the applicant. The issue of domestic violence may well be an issue that the Family Advocate enquires into. At this stage, the interim order to prevent abuse against the applicant indicates that the parties are not sufficiently co-operative to enable a shared residence arrangement to be implemented. An order to investigate a shared residence arrangement will be futile.
- [11] In circumstances where the respondent indicates he cannot afford the children's basic medical expenses which only provides for hospital cover and gap cover, the appointment of a psychologist to support the children during

this change would be more practical to help the children adjust to the change in circumstances and appropriate than the appointment of a forensic psychologist. The Office of the Family Advocate will probably in due course enquire into the domestic violence and its impact on the care and contact on the children. There may well be a change in circumstances as the parties navigate this part of their lives as single parents alternately as a blended family with a new sibling on the way. The change in circumstances and any adjustment challenges that arise would be the more appropriate time to consider whether there should be any change to the children's care and contact should any issue arise.

RESPONDENT'S ABILITY TO MAINTAIN APPLICANT AND THE CHILDREN ON THE SAME LEVEL

[12] The standard of living that both applicant and respondent enjoy is apparent from the assets they own. Both parties recently inherited from their parents. The applicant has invested her inheritance to her advantage and increased its value to her benefit and it covers a part of her and the children's current living expenses. The respondent states that he maintained their luxurious lifestyle as a direct result of his inheritance which is diminishing and almost depleted. He also states that the applicant assisted him with these expenses. Given that they no longer live together it is apparent that the applicant covers the expense in the home that she resides with the parties' children, not for the home in which the respondent resides with his new partner.

[13] Notwithstanding the depleted inheritance, the respondent has retained his luxury vehicle and the home in an exclusive estate, whilst pleading that he is unable to maintain the applicant and the children. He indicates that his income is R10 000.00 per month and lists his expenses as R85 000,00 per month. Having regard to the amount which he states he inherited, this source could not have maintained the luxurious lifestyle the parties lived until they separated. The applicant is at present investing her inheritance in order to maintain herself and the children and in doing so is assisting the respondent in his maintenance obligation as he maintains she has always done. In

purchasing a home to accommodate herself and the children where the respondent states under oath he is almost penniless, the applicant is assisting with the maintenance of the children in providing a home. The amount which the applicant requests is a portion of her requirement. The children's maintenance requirements are not questioned. The respondent simply declares he is unable to pay the expenses without making proper financial disclosure. It is apparent that the respondent receives an income into his credit cards each month. He has not and refuses to sell his assets and has been advised not to by his counsel.

[14] There is a clear pattern that the respondent omitted to pay accounts related to the estate. These include the municipal and rates account and the vehicle. It is clear that the respondent is not willing to release assets he alleges he cannot afford such as his motor vehicle or the house. Counsel indicated that he was advised not to do so until the Rule 43 was decided. This places the respondent in the position where it appears he intentionally refuses to take on the financial responsibility of maintaining his family. Whilst the respondent's answering affidavit makes reference to settlement, it is apparent that all actions point to the contrary. This intentionality extends to the refusal to provide full financial disclosure. It is evident that funds are paid into his credit card and transferred to other accounts. The respondent has not demonstrated a change in his circumstances to justify a change in the maintenance obligation toward his family that they have been accustomed to and that he has maintained for himself.

[15] There is no reason for the respondent not to be able to sustain the luxurious lifestyle which the parties lived and were able to afford and that he maintains for himself. Both parties have received inheritances from their father's. The respondent contends that he has utilised his inheritance to maintain the family. The applicant has invested her inheritance and utilises same for the maintenance of herself and the children. This contributes to the applicant and the children's maintenance and assist's the respondent as the applicant has provided a home for the children. The request for spousal

maintenance for the interim period is neither excessive nor unreasonable having regard to the resources the respondent has access to.

[16] The manner in which the applicant has applied her resources appear to be resourceful and designed to assist her and her children over a period. In circumstances where the respondent suggests his circumstances are changing and he does not provide complete disclosure, it would not be in the interests of the applicant and the children to erode the capital which maintains them. It will indeed be unjust and result in difficulty for the applicant and the minor children and is inequitable. Having considered both the applicants claim and the respondents counterclaim, the respondent has not placed evidence before this court which justify an order based on the counterclaim.

[17] Both counsel for the applicant and respondent referred to the matter of *AF v MF*². The bulk of the application related to submissions regarding the financial disclosure of the respondent and scrutiny of the respondent's documents. This would not have been necessary if the respondent had made proper disclosure. The late filing of the answering affidavit was not opposed. The respondent has not made out a case for a change to the children's residence or a referral for forensic investigation and in addition, has not taken the court into his confidence with regard to financial disclosure. There is no need to postpone a costs order for the determination of another court and there was no request to do so. For the reasons I have indicated above and the respondent's conduct it would be appropriate for the respondent to pay a contribution to the applicant's costs.

[18] In *Cary v Cary*³ Donen AJ stated:

“By similar reasoning in this matter applicant is entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against her husband. The applicant would not be able to present her case fairly unless she is empowered to investigate

² [2020] 1 All SA 79 WCC.

³ [1999] 2 All SA 71 (C) at 77.

respondent's financial affairs through the forensic accountant appointed by her. That is 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."

[19] The only issue outstanding was the accrual in the estate. The care and contact were raised opportunistically and unreasonably by the respondent. In the interim the applicant should be adequately equipped to prove her case. The exigencies of a Rule 43 does not make it practical to explore an order in terms of Rule 38A and I did not request the parties to address me in respect thereof. Should the parties circumstances change financially this could be explored. Counsel for the respondent submitted that the applicant did not put up a bill of costs in this application in support of the amount of R120 000.00. Thus regarding the contribution toward future costs whilst the applicant should be in a position to litigate an equal basis, I deem an award of R60 000.00 appropriate at this stage. The amount is to be paid in six monthly instalments of R10 000.00.

[20] For the reasons above, I make the following order, *pendente lite*:

ORDER

1. An order is granted in terms of the Amended Draft Order Marked "X"

S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	E Xavier
Instructed by	:	Biccardi Bollo Mariano Inc

On behalf of the respondent : Adv N Smit
Instructed by : Brooks Wepener Attorneys

Date of hearing : 7 June 2022
Date of judgment : 10 June 2022