



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 4 November 2022

Case No. 22224/2019

In the matter between:

SAT

Applicant

and

GJT

Respondent

Summary

Rule 43 applications – trend toward prolixity and irrelevance in affidavits filed – trend may have to be arrested with punitive costs orders affecting legal representatives' rights to collect fees.

JUDGMENT

WILSON AJ:

- 1 On 25 June 2019, the respondent, Mr. T, instituted an action for divorce against the applicant, Mrs. T. Just over a year later, after the parties' efforts to

settle the divorce action had failed, Mrs. T instituted these proceedings, under Rule 43. She seeks interim orders, pending the resolution of the divorce action, governing the residence and contact regime to apply to the parties' minor children, requiring Mr. T to pay her the maintenance necessary to allow her to take care of herself and the children when they are with her, and directing Mr. T to make a contribution to her costs in the divorce action.

- 2 Rule 43 sanctions a quick and inexpensive interim procedure in which the court protects the interests of children, and ensures that neither spouse is prejudiced in the defence of their rights during a contentious divorce action.
- 3 The material issues in any Rule 43 application are generally no more extensive than where the best interests of the parties' children lie; what the applicant's reasonable maintenance requirements pending divorce are; whether the respondent can reasonably meet those needs; and whether the applicant is entitled to the contribution to costs they seek, in the amount that they seek it. These issues are assessed in light of the standard of living the parties enjoyed during the marriage (see *Taute v Taute* 1974 (2) SA 675 (E), 676D-H).
- 4 A court is not required to examine the parties' affairs "with the same degree of precision as would be possible in a [divorce] trial where detailed evidence is adduced" (Erasmus, *Superior Court Practice*, RS17, 2021, D1-580). Accordingly, what is required from the parties is a "simple statement of facts" bearing in mind that the procedure is an interim one. The point is to "keep the issue[s] simple" (*Grauman v Grauman* 1984 (3) SA 477 (W) 479 A-B and 479F).

- 5 This legally mandated simplification of the parties' affairs might sometimes lead a court hearing the Rule 43 application to draw some inferences from the (hopefully sparse) facts placed before it that turn out to be inaccurate in light of more detailed evidence later produced in the main action (*Levin v Levin* 1962 (3) SA 330 (W) 331D-E). But, given the interim nature of the proceedings, that does not matter, so long as the parties and their children are protected against financial impoverishment and emotional alienation until the divorce action is finalised, and a full and final financial reckoning can be made in the main divorce proceedings.
- 6 It is often observed that Rule 43 proceedings are frequently allowed to stray beyond the issues that they are meant to address, and to become inappropriately costly and involved. This case is a good example of that tendency. The application has taken over two years to finalise. The papers in it run to 2330 pages. Three sets of affidavits have been filed, instead of the usual one. Despite a directive issued to the parties that they jointly produce "a hardcopy set of those papers on the court file that [they] agree are necessary for the determination of the matter" (Wilson AJ, *Family Court Roll*, 10 October 2022, paragraph 2), the approach was to print out all 2330 pages and deliver them to me in five lever arch files just over 48 hours before the matter was due to be argued.
- 7 The papers are replete with inappropriate and irrelevant *ad hominem* attacks. Mrs. T speaks to what she considers to be Mr. T's controlling personality and secretive approach to his financial affairs. Mr. T misses few opportunities to emphasise what he believes to be Mrs. T's duplicitous nature and her financial

profligacy. The undertone (not very far beneath the surface of Mr. T's affidavits) is that Mrs. T's financial greed has driven her to emotional instability.

- 8 The papers fail, for the most part, to focus attention on the material issues.
- 9 Faced with similar situations, Judges of this Division have struck Rule 43 applications from their rolls and prevented the parties' attorneys from collecting fees for the work done on the application concerned (see *Du Preez v Du Preez* 2009 (6) SA 28 (T) and the cases cited there). I will not follow that example here, because I am not convinced that it would do anyone any good to enlarge this litigation, and because I have not heard the parties' legal representatives on the possibility of a special costs order being made. Given the parties' respective financial positions, and the order I intend to make on the merits, I am not convinced that either of the parties would be unduly prejudiced by my failure to make a special costs order in this case.
- 10 I am, however, impelled to record my dissatisfaction at the way in which this matter has been litigated, and to observe that special costs orders of the nature granted in the *Du Preez* case may well have to become more frequent if the unfortunate trend towards overworked Rule 43 applications is to be arrested.

The merits of the application

The parties' minor children

- 11 The parties are substantially in agreement about the contact and residence regime to apply to their children pending the resolution of the divorce action.

The agreed arrangement envisages shared custody and joint exercise of full parental rights and responsibilities.

- 12 The only real points of difference between the parties are the identity of a “parenting co-ordinator” to be appointed, and who should pay the costs of that co-ordinator. There was also a dispute about the parenting co-ordinator’s powers, particularly whether the co-ordinator will be able to issue directions binding on the parties.
- 13 This court has in the past criticised arrangements that seek to delegate parental powers to third parties (see *Hummel v Hummel* 2012 JDR 1679 (GSJ), paragraphs 8 and 9). The Children’s Act 38 of 2005 makes clear that the true role of a third party professional is to assist parents to agree on and implement their own parenting plan (see section 33 (5) (b) of the Act).
- 14 But the parties in this case do not envisage the production of a parenting plan within the meaning of the Act. Instead, the parties foresee disagreements about the implementation of the shared contact and residence arrangement, or other situations in which they will need help to make decisions about their children’s best interests. It seems clear to me that the parenting co-ordinator’s role is to facilitate that sort of joint decision making. It is not to exercise the parties’ parental powers for them if they cannot agree on the best route forward.
- 15 For these reasons, there is no legal or practical basis on which I can clothe the parenting co-ordinator with formal legal power to determine what the Act requires to be left to the parties and that the parties themselves agree should be left to them. In the order I shall make, the parenting co-ordinator’s identity

will be agreed between the parties or determined by me. The parenting co-ordinator will play the role of a mediator, charged with assisting the parties to co-operate on the implementation of the parts of the order addressing the children's interim residence and contact regime, or on any other matter concerning the children's best interests. Where the parties cannot agree on one or more of these issues, even after mediation, they will be free to approach the Family Court, if necessary on an urgent basis, for a ruling on the action to be taken.

16 I am not inclined to incorporate the "Powers of the Parent co-ordinator / case manager" document presented to me into the order I shall make. The document seems to me to lack the precision that court orders should normally possess. However, given that the parties seem content with most of its provisions, I accept that those parts of the document that do not purport to endow the parenting co-ordinator with binding decision-making powers might usefully lay the basis for a shared understanding of how the parenting co-ordinator will perform their function.

17 It seems to me that Mr. T should meet the costs of the parenting co-ordinator, as it is more likely to be within his means to do so. As the parenting co-ordinator's role is more narrowly defined in my order than the parties originally envisaged, I do not think that this is an unreasonable burden to place on Mr. T.

Spousal maintenance

18 Mr. and Mrs. T are people of considerable means. Mr. T is a successful businessman. Mrs. T, while not currently employed, is a beneficiary of a

substantial trust, the SLFT, with assets in excess of R20 million. Mr. T is also the beneficiary of a trust, the WT, which holds substantial resources. Mr. T is coy in the papers about exactly what the WT's resources are. This is most likely because there is to be extensive debate in the main action about whether the WT's assets will form part of the accrued marital estate to be divided on divorce. However, a bank statement dated 1 August 2022 puts the WT's cash on hand at just over R3 million. It is clear from that statement that the WT's funds are being used to pay Mr. T's legal fees in the divorce action. It is also clear on the papers that the WT has held, or currently holds, significant share options or proceeds from the exercise of those options. At least some of the shares are in the company that Mr. T works for.

19 Mr. T paints himself as an ordinary salaried employee of that company, but I cannot accept that this portrayal is accurate. Apart from the share options held by the WT, Mr. T accepts that he has benefitted, in the past, from very large bonuses and incentives, running into millions of rand every year. Ms. Nathan, who appeared for Mrs. T, relied on these bonuses and incentives to advance the proposition that Mr. T's true net monthly income is in the region of R300 000. In addition, during happier times, Mr. T was able to arrange regular payments from the company to Mrs. T to allow her to meet various expenses for her and the family.

20 Mr. T strenuously disputes Ms. Nathan's characterisation of his income. He states that the incentive scheme from which he used to benefit is no longer operative, and that his bonuses are now limited to no more than R360 000 per year, if they are paid at all. Mr. T says that his income is otherwise made up

of R208 005 per month in salary and R20 000 per month in a car allowance. He discloses a net monthly income of R128 000.

- 21 However, Mr. T's averments about his financial affairs raise more questions than they answer. I cannot say what his true relationship with the WT is, but there plainly is a relationship, and it clearly holds significant benefits for Mr. T. Nor do I think that it is realistic to accept that Mr. T's generous incentives from the company he works for – and of which he is a director – were recently spontaneously and drastically curtailed against his will. Those averments sit awkwardly with the fact of the WT's share options in the company, and the fact that the company has been used to extend a line of income to Mrs. T in the past, even though Mrs. T never actually worked for the company.
- 22 I am driven to the conclusion that Mr. T has not disclosed all that he should have, and that what he has disclosed is not an accurate reflection of his true financial means.
- 23 This is significant, because the mainstay of his defence to Mrs. T's maintenance claims is that he simply cannot afford them. Because of his selective disclosures, I cannot assess exactly what Mr. T can afford, but I am satisfied that it is a great deal more than his salary would suggest – especially having regard to the very large incentives he has received from the company in the past. In any event, to the extent that Mrs. T's maintenance requirements are reasonable, I do not think that I can disallow them merely because Mr. T has not met her case – that he has millions of rands at his disposal – with a detailed account of his true financial situation.

- 24 Mrs. T is unemployed and has spent her married life as a homemaker. She has forgone many of economic opportunities that she would ordinarily have in order raise the parties' children. She is now obviously in need of maintenance as a result. Mr. T retains a duty to maintain Mrs. T and the children, and I do not understand his position to be anything other than one of unconditional acceptance of that duty.
- 25 The question is what the ambit of that duty is. Mrs. T's stated monthly cash maintenance requirements are just over R40 000 for her, just over R27 000 for the parties' daughter, JT, and just under R25 000 for the parties' son, MT. On his own version, this would leave Mr. T with approximately R30 000 for his own expenses.
- 26 As I have already said, Mr. T's version has some glaring absences, but I do not think that Mrs. T's maintenance requests for the children are realistic. The parties intend to share custody of the children, and Mr. T has already tendered to pay the children's school fees and medical expenses directly. The question is really what it will cost Mrs. T to care for the children for the half of their lives they will spend with her.
- 27 The parties do not quantify the costs associated with the children in quite those terms on the papers, but a monthly allowance of R30 000 for both children, in addition to Mrs. T's own maintenance of R40 000, seems to me to be reasonable, when regard is had to the very high standard of living the parties enjoyed when they lived together, and the fact that Mr. T will continue to pay for Mrs. T's domestic assistance, medical aid, school fees and some extra-curricular activities for the children, as well as medical aid for Mrs. T.

28 I am confident that this is well within Mr. T's means.

Contribution to Costs

29 Mrs. T seeks a contribution to her costs in the divorce action. It has long been held that an applicant for a contribution to the costs of a pending divorce action must show that they have insufficient means of their own to participate effectively in that action (See *Von Broembsen v Von Broembsen* 1948 (1) SA 1194 (O)).

30 Although the SLFT does not appear to play a role in funding Mrs. T's ordinary expenses, there is no dispute that Mrs. T has had access to the resources of the SLFT to fund her participation in the divorce action. The contribution she seeks – in excess of R3 million – is well within the means of the Trust, even taking into account the fact that Mrs. T is not the only beneficiary of the Trust. Mrs. T characterises the assistance she has received from the SLFT as a loan that requires repayment. Mr. T hotly contests this. He suggests that it is more akin to a grant or a gift. But the classification of the payments seems to me to be beside the point. Mrs. T is a beneficiary of the Trust. The assistance it has already provided to Mrs. T is within the Trust's means, and consistent with its purpose. In these circumstances, if the funding Mrs. T has already received to meet her legal costs is a loan, then it is a very soft one.

31 Ms. N, a trustee of the SLFT, has deposed to an affidavit expressing a reluctance on the Trust's part to continue funding Mrs. T's costs in the divorce action. But Ms. N also accepts that it is within the ambit of the Trust's purpose to assist Mrs. T to participate in that litigation. These two propositions are obviously in tension with each other.

- 32 On these facts, Mrs. T clearly has access to funds from the SLFT to help her pay her legal expenses. I cannot accept that Mrs. T truly lacks the resources necessary to protect her interests in the divorce action, and her application for a contribution to her costs must be refused.
- 33 Ms. Nathan justified the very extensive contribution to costs Mrs. T seeks by reference to my judgment in *MC v JC* [2021] ZAGPJHC 373 (8 September 2021). But in *MC*, I was faced with an exceptionally well-resourced respondent and a completely impecunious applicant. In this case the balance of economic power, insofar as I can discern it on the papers, is far less skewed. The two cases are plainly distinguishable.

Costs

- 34 Each party seeks costs on the attorney-client scale against the other. I have already set out why I think that neither party has conducted this litigation in a manner of which I can genuinely approve. I am not convinced that any costs order is justified at this stage. The costs of this application will be the costs in the divorce action.

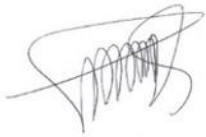
Order

- 35 For all these reasons, I make the following order –
- 35.1 The parties shall retain the full parental rights and responsibilities enumerated in Section 18 (2) of the Children’s Act, 38 of 2005, in respect of their children.
- 35.2 The parties will continue to act as co-guardians of their children.

- 35.3 The parties will share primary residence and contact with the children, unless they agree otherwise in writing.
- 35.4 The children's residence will alternate between the applicant and the respondent every week, commencing on the first Thursday after this order is handed down.
- 35.5 Each party is entitled to spend a reasonable period of time with the children on their respective birthdays.
- 35.6 The applicant is entitled to spend the day with the children on Mother's Day. The respondent is entitled to spend the day with the children on Father's Day.
- 35.7 The parties will share contact with the children during public holidays and school holidays equally.
- 35.8 The children will spend the period of 23 to 27 December 2022 ("the Christmas period") with the respondent. They will spend the period 28 December 2022 to 3 January 2023 ("the New Year period") with the applicant.
- 35.9 The children will spend the Christmas period in 2023 with the applicant, and the 2023/2024 New Year period with the respondent.
- 35.10 Each party will be entitled to exercise reasonable telephonic contact with the children when the children are not in that party's care.
- 35.11 The terms set out above may be varied by written agreement between the parties.

- 35.12 The parties will appoint a parenting co-ordinator. The parenting co-ordinator will assist the parties on reaching agreement on the way clauses 35.1 to 35.11 above will be implemented, and on any other matter involving the children's best interests that the parenting co-ordinator considers it necessary to raise, or which the parties raise with the parenting co-ordinator.
- 35.13 The respondent will meet the costs of the parenting co-ordinator. The identity of the parenting co-ordinator will be agreed between the parties alternatively determined by Wilson AJ on written application made by either party on notice to the other. A written application made in terms of this paragraph must include the names and qualifications of at least three professionals, together with the parties' submissions on their suitability.
- 35.14 The respondent will pay R70 000 per month to the applicant to enable the applicant to maintain herself and to meet the needs of the parties' children while they are in her care. The first payment will be made within seven calendar days of the date of this order. Each subsequent payment will be paid on the first banking day of each month thereafter.
- 35.15 The respondent will continue to maintain the applicant and the parties' children on a comprehensive medical aid.
- 35.16 The respondent will continue to pay the children's school fees.

- 35.17 The respondent will continue to pay all other expenses set out in annexure GT17 to his sworn reply, which appears at page 008-1238 on the Caselines entry for this matter.
- 35.18 The application for a contribution to the applicant's costs in the divorce action is refused.
- 35.19 The costs of this application will be the costs in the divorce action.



S D J WILSON
Acting Judge of the High Court

HEARD ON: 13 October 2022

DECIDED ON: 4 November 2022

For the Applicant: S Nathan SC
Instructed by Nowitz Attorneys

For the Respondent: AA de Wet SC
Instructed by Steve Merchak Attorneys