IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/6614

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 03 November 2022

In the matter between:

K [....] S [....] C [....] Applicant

And

K [....] M [....] E [....] Respondent

JUDGMENT

ENGELBRECHT AJ

INTRODUCTION

1. This is an application for relief in terms of rule 43(6) of the Uniform Rules of Court (URC). In essence, the applicant relies on asserted material changes in circumstance to motivate for relief aimed at lessening his maintenance responsibilities whilst also changing the arrangements concerning interim care of and contact with the minor children. The applicant seeks also to have prior obligations not complied with to be extinguished retrospectively.

2. As discussed more fully below, the application is unopposed, formally at least. This places a heightened duty on the Court to consider the competence of the relief sought as a matter of both law and fact. The particular relief that is sought requires a careful analysis of URC 43(6) in context, as well as the facts asserted. I deal with these matters at the outset, and a last-minute application for postponement from the Bar before turning to analysis of the merits.

RULE 43(6) IN CONTEXT

3. Rule 43 regulates interim relief in matrimonial matters, and it is intended to be an expeditious procedure for the benefit of a spouse that seeks maintenance *pendente lite* and a contribution towards costs of a matrimonial action, as well as to regulate interim care of and contact with any child.

4. The procedure as prescribed provides for application to be made and a reply to the relief sought to be filed within 10 days of service of the application. In accordance with URC 43(3)(c), "*In default of delivery of a reply … the respondent shall be automatically barred"*, and URC 43(4) provides that, as soon as possible after the expiry of the 10-day period for delivery of the reply, the registrar must bring the matter before court, on 10 days' notice to the parties. URC 43(5) provides that the court "*may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision"*.

5. URC 43(6), relied on as the basis for the present application, allows for the court to vary its decision "*in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs providing inadequate"*. Importantly for present purposes, URC 43(6) prescribes that the same procedure applies in the case of a URC 43(6) application as is described in the preceding paragraph. The requirement for the grant of relief in terms of URC 43(6) is that there should be a "*material"* change in circumstances, a requirement that must be strictly interpreted.

THE POSTPONEMENT APPLICATION

6. The application before this court was served on the respondent's (then) attorneys on Friday, 23 September 2022.

7. According to correspondence of 5 October 2022 handed up at the hearing of the application, attorney Ceri Von Ludwig (Ms Von Ludwig) took over the matter. Ms Von Ludwig asked for an additional week to file the opposing affidavit, and the applicant's attorney consented to an extension of the time period for the filing of the answer to 14 October 2022, to allow Ms Von Ludwig to familiarize herself with the case and prepare the affidavit.

8. Having secured the extension, the respondent's attorney on the next day proposed that settlement negotiations be engaged upon before she set out to prepare an answering affidavit on behalf of her client. On 7 October 2022, the applicant's attorney reverted: the applicant was willing to engage in *bona fide* discussions, but in the first instance he sought to secure restoration of the practical share and contact arrangement that had been in place prior to the launch of the application.

9. In a response of 11 October 2022, Ms Von Ludwig asserted that the relief sought in the application was only for the variation of maintenance, and not in contact (despite the fact that annexure P to the application, being a draft order to which express reference is made in the notice of motion, sets out precisely the relief that is being sought and includes the order in respect of contact). Be that as it may, Ms Von Ludwig asserted that her client would "*simply file her R43(6) Opposing Affidavit and will revert to the contact as set out in the original R43 Order, and include in her 43(6) Answer a Counter application for an increase in maintenance since the children will be spending more time with her"*.

10. None of this came to pass: on the same day (11 October 2022), the applicant's attorney "*encouraged"* the respondent to file her answering affidavit, indicating that the parties were unlikely to resolve their issues *inter se,* but no answer

was filed on the 14th of October 2022 (or indeed at any time since), and no counter-application was made.

11. The applicant's attorneys then made application for a date on the unopposed roll, as it was entitled to do in the absence of opposition. On 19 October 2022, Ms Von Ludwig recorded in correspondence that she had "*not been able to get my client's Opposing Affidavit in by the date to which you initially gave me the extension"*, and also expressing reluctance to "*waste time and costs on the Opposing Affidavit"* if there was a possibility of amicable resolution of the matter. She indicated that, subject to the response regarding further engagements, "*I will be filing my client's Opposing Affidavit soonest"*.

12. The response was simple: the applicant was willing to engage in talks, but not suspend the obligation of the respondent to file an answering affidavit. That response was made on 20 October 2022, and Ms Von Ludwig was also favoured with an e-mail attaching the indexed and paginated bundle in this application.

13. Again on the same day, Ms Von Ludwig promised that her "*client's affidavit will be filed, together with an application for condonation, and you are cautioned not to waste the time of the court and the costs of both clients in setting this matter down unopposed. It is trite that a court in these circumstances will not proceed unopposed once it is advised there is opposition and if you proceed as such you will be exposing your offices to sanctions for misconduct since this can never be construed as protecting the interests of your clients (and certainly not those of the children)"*.

14. Ms Von Ludwig never made good on her promise (which, if truth be told, read a bit like a threat). In various correspondence, including correspondence of 27 October 2022, she alluded to how devastating the allegations in the answer would be and objected to the propriety of filing an answering affidavit if settlement talks were to have any hope of success. Of course, she was consistently advised that the applicant would not absolve her client of the obligation to file an affidavit pending settlement. She could either accept that fact and file the answering affidavit or run the risk that the court would entertain the application without the benefit of her client's version. Essentially, Ms Von Ludwig took the gamble. Her correspondence of

20 October 2022 explains why: she was convinced that a court would not entertain the application for so long as it was known that there was some form of opposition, although no affidavit opposing the application had been filed.

15. Ms Von Ludwig's strategy was implemented when, on the morning of 31 October 2022, she sent counsel (unaccompanied by an instructing attorney) to ask for a postponement of the application. By the time counsel for the respondent arrived at Court to ask for such a postponement, counsel for the applicant had been on her feet for quite some time, addressing me on the merits of the application. No papers were filed or even handed up in support of the postponement "*application"*; counsel had just been sent into the lion's den to request the postponement at the eleventh hour (indeed, at 5 seconds to midnight, proverbially speaking).

16. I refused the request for a postponement. Litigants have an election to participate in proceedings or not. What they cannot do is to adopt stratagems that stand in the way of the resolution of matters brought before the Court. As the Constitutional Court explained in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*,[1] in the context of a rescission application, there is a difference between a party who presence is precluded and a party whose absence is elected. A party cannot play the "*absent victim*" if they know about the proceedings.[2] This sentiment must include that parties cannot absent themselves from proceedings in a calculated manner, only to arrive in the nick of time to demand a postponement to allow for their participation.

17. I reiterate this Court's extreme displeasure at the manner in which the respondent's attorney conducted the process. Postponements are not simply there for the asking. They are certainly not to be sought from the Bar, at the last minute, by counsel given a hospital pass, and only once it has become self-evident that other delaying tactics had been ineffective to avoid the hearing of the application.

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1 2021 JDR 2069 (CC).

2 Ibid para 61

18. A URC 43(6) application, which must adhere to the prescripts of a URC 43 application more generally, demands that an answering affidavit be filed. Where a respondent fails to file an answer within the prescribed time, such a respondent is barred from filing an answer. Despite various promises that an answer would be filed, this was never done. Although it would have assisted the deliberations of this Court to have the benefit of an answer, the delays on the part of the respondent cannot stand in the way of the expeditious determination in respect of the relief sought by the applicant. This would run contrary to the spirit of URC 43 proceedings.

19. The Court's displeasure at the conduct of the respondent's case is partly in recognition of the benefit that would have resulted from access to the version of the respondent and which I am deprived of in the preparation of this judgment. I have the grasp the nettle and seek to ensure a fair outcome, having only the version of the applicant before me.

20. In this regard, wish to record my gratitude to counsel for the applicant, who showed consummate professionalism in her appearance before me, particularly in bringing to the Court's attention the novelty of certain of the relief sought and in her willingness to concede difficulties. Ms Bezuidenhout's conduct was an expression of the best traditions of the Bar, and I commend her. It aids the deliberation of the Court immeasurably when reliance can be placed on the balanced submissions of counsel in an unopposed matter.

21. Having disposed of the reasons underpinning my refusal of the "*postponement application"*, I then turn to the facts.

THE FACTS

<u>The applicant's financial position</u>

22. According to the facts set out in the founding affidavit in the present application, the applicant pays (or is at least obliged to pay) approximately R48 655.82 as his total monthly contribution towards the maintenance of the minor children and the respondent. This includes payment of an amount of R10 000 per

child for maintenance, together with school fees, payments for extra-mural activities, medical aid for the respondent and the minor children and payments in respect of the property in which the respondent resides with the minor children. This maintenance obligation, in accordance with the order in the URC 43 proceedings, was imposed at a time when the applicant earned a salary of just over R72 000 per month.

23. According to the applicant's payslips attached to the affidavit, that salary dropped to just under R37 000 per month by June 2021. Since January 2022, the applicant has received an average monthly salary of close to R50 000, *i.e.* his current salary only just covers his maintenance obligations under the URC 43 order, and his salary in 2021. In addition to those obligations, the applicant must also cover the bond repayments in respect of the property he resides in (just over R16 000 per month), maintenance of that property (R1 200 per month), groceries for him and for the minor children when they reside with him (R6 500 per month), debt repayments (R5 000), payment of a Telkom internet account (R510 per month), , and credit card repayments (about R1 600 per month). The applicant has provided this Court with evidence of him recovering a loan he had made to the business and of him obtaining further loans to assist him in meeting his obligations under the URC 43 order. The applicant has further sold assets and deployed monies received in consequence of an insurance claim to meet his obligations. Despite this, the applicants lists any number of outstanding debts that he has been unable to meet, including repayment of the bond of the property in which he resides and outstanding school fees. Indeed, the respondent has secured a warrant of execution in consequence of the non-payment of maintenance in accordance with the URC 43 order, and the failure to maintain the property in which the respondent resides.

24. The lower salary the applicant now enjoys, and his financial woes, are said to be a consequence of the effect of the Covid-19 pandemic and "*other outside commercial and market related factors"* on the business of which he is a director and employee. Indeed, the income statement of that entity shows that it is running at a loss. The applicant does not foresee a swift return to normality in the business, and he says that he has "*exhausted all financial options available to me to try and continue to pay my maintenance obligations"*. He asserts that he is "*close to being insolvent"*.

25. Added to this, the applicant says that the shared contact arrangement practically in place (although not in accordance with the URC 43 order) means that "*I now cater for all of the costs of [the minor children's] maintenance requirements for at least two weeks of every month"*, so that the financial arrangements under the URC 43 order need to be adjusted to reflect this reality. As he puts it, "*The respondent no longer requires the cash maintenance contemplated in terms of the order to maintain the children because they spend and live half of the month with me"*. The contact and care arrangement is discussed more fully below.

The respondent's financial position

26. Turning to the position of the respondent, the applicant asserts that her financial position has improved significantly since the hearing of the URC 43 application and the grant of the URC 43 order. At the time of the URC 43 application, her income was said to be in the region of R7 000 per month, but it is estimated that she earns much more now.

27. There is of course no version presented by the respondent, in circumstances where no answering affidavit was filed. The court does have the benefit of access to bank statements that form part of the application for a warrant of execution.

28. The savings account bank statement for account number [....] (the Savings Account) reveals that, as at 1 February 2022 the applicant held an amount just in excess of R40 000 in that account. She received funds in the amount of almost R66 000 in the period from 1 February 2022 to 3 May 2022 (the period covered by that statement). R60 000 is accounted for by three payments in the amount of R20 000 with the reference "*Mart"*, which is understood to be a reference to the applicant. There was also a payment of R4 000 with the reference "*KI WOOD"* and a payment of R1 839 with the reference "*BAND PAYMENT 14/04*". In that same period, according to the statement, she made transfers to "*savvy – [....]"*, which is a reference to a current account in her name (the Current Account), statements for which also form part of the application for the warrant. The total transfers to the Current Account amount to R67 000 for the period.

29. A further statement for the Savings Account, covering the period from 3 May 2022 to 27 June 2022, reveals payments just short of R20 000 for the period, including just one payment of R10 000 bearing the reference "*Mart"*. Other payments include R1 000 with the reference "*B Lundie"*, R2 000 with the reference "*GERMAN CLUB 28/05"* and R2 000 with the reference "*BAND PAYMENT 16/06"*. Transfers to the Current Account in that period amount to R28 000. By the end of June, the amount of just over R40 000 held in the Savings Account in the beginning of February had been depleted to about R23 600.

30. Two statements for the Current Account, in respect of the periods (i) 16 April 2022 to 18 May 2022 and (ii) 18 May 2022 to 18 June 2022 show the transfers from the Savings Account into the Current Account, together with R8 500 of payments with the reference "*GATSBYPARTY"*.

31. In addition to the payments reflected on the bank statements, the applicant has provided the court with an estimate of the respondent's income based on indications from the respondent on work that she was doing (on which she relied when making arrangements regarding the care of the children). Based on this analysis, the applicant estimates that the respondent may have earned an income of around R31 500 in addition to the payments reflected in the bank statements, in the period from 15 July 2022 to 28 August 2022. He says that this estimate is not a full reflection, and that it does not account for all cash payments that she receives from "*numerous work opportunities"*. It is the version of the applicant that "*the respondent receives payments in cash when attending to music gigs and her bank statements are not a true reflection of her income"*, and also that "*the respondent receives payments in cash when attending to Sangoma work and her bank statements are not a true reflection of her income"*. On account of this, the applicant asserts that "*there is no reason why the respondent cannot now make significant monthly monetary contributions towards the maintenance of the children"*.

Care of and contact with the children

32. As regards the care and contact with the children, the applicant also contends that the position is materially altered.

32.1. In terms of the URC 43 order, the applicant is to have contact with the children on every alternate weekend from 17h00 on Fridays until 17h00 on Sundays.

32.2. However, the applicant says that the "*respondent has rarely ever complied with this contact arrangement save for a brief period in December 2020"*. He alleges that "*From the period April 2021 to date the respondent agreed to allow me further rights of care and contact to the children that the Order allowed for. This accords with the family advocate report filed in this matter"*. In addition, it is alleged that "*In or around the period March 2022 the respondent and I entered into a verbal agreement in terms of which both the respondent and I expressly agreed and consented to equal shared care and contact to the children which contact is detailed in a schedule compiled by Mrs Stella Coetzee (our mediator at FHL Divorce Mediation). … Albeit that the mediation was not finalized, we have kept to the agreed care and contact arrangement since March 2022. Again, this equal shared care and contact accords with the family advocate report filed in this matter."*

32.3. Elsewhere, the applicant contends that the "*equal shared contact has been applicable for approximately 7 (seven) months and the children are now accustomed to the routine of such care and contact"*.

32.4. The allegations stand uncontested in circumstances where the respondent failed to file an answering affidavit, timeously or at all.

33. I pause to mention that the Family Advocate's report was available to the court that heard the URC 43 application, such report having been provided on 25 September 2020. That report recommended in the best interests of the children that the parties continue with implementation of a "*shared residency regime"* then in place, but it would seem that the court was persuaded otherwise by the submissions on behalf of the respondent.

34. What is new, however, is the schedule shared with the parties on 9 March 2022 that reflects an arrangement in accordance with the order concerning care and contact now being sought. As mentioned, the applicant says that this arrangement has been in place for some time now (despite the terms of the URC 43 order). This is given force by the transcript of a WhatsApp message of 1 August 2022 that the respondent sent to the applicant that starts "*Hi, it's me. Listen, on Wednesday … Wednesday this week is supposed to be mid-week change over day…"*. In another message of 5 August 2022, the respondent requests "*maybe we can do a slightly later change over on Monday"*. The messages suggest a "*change over"* arrangement during the week, and not one that is confined to the weekends as provided for in the URC 43 order.

ANALYSIS

Introduction

35. Against this legal and factual backdrop, it is necessary to consider:

35.1. whether the orders sought can competently be granted; and

35.2. to the extent that they can, whether a proper case has been made out in accordance with the requirements of URC 43(6).

The order sought

36. The applicant seeks an order directing–

36.1. that monthly maintenance arrears due by him to the respondent for the period June 2022 to September 2022 in the total of R55 000 be extinguished;

36.2. various amendments of the rule 43 order of 9 October 2020 (the URC 43 order) to reflect changes in the practical arrangements concerning care and residence of, and contact with, the minor children;

36.3. amendment to paragraph 4 of the URC 43 order concerning the applicant's obligation to make payment in respect of medical expenses;

36.4. amendment to paragraph 5 of the URC 43 order, so as to reduce the monthly maintenance obligation of the applicant from R10 000 per child to R1 500 per child;

36.5. substituting paragraph 6 of the URC 43 order with an order obliging the applicant to pay the monthly bond repayments, household insurance premiums, municipal costs, water and electricity, security charges and levy payments in respect of the property upon which the respondent resides (the Alabama property) *pendente lite*; and

36.6. deleting paragraph 8 of the Order, which obliges the applicant to make a contribution of R30 000 towards the legal fees of the respondent, payable in three instalments of R10 000, commencing 20 October 2020.

The prayer in respect of the arrears maintenance

37. The first prayer, for the extinction of the debt in respect of the arrears maintenance was described as "*novel"* by Ms Bezuidenhout in her address to the court. Indeed, as she frankly conceded, it is not an order that this court can grant. Simply put, URC 43(6) does not provide a mechanism to extinguish maintenance obligations not met retrospectively. If a party cannot comply with maintenance obligations due to changed circumstances, the appropriate course of action is to approach the court with a URC43(6) application; it is not to default and then later seek to extinguish the debt. I do not need to dwell on this issue much further, since Ms Bezuidenhout made the fair concession.

38. However, Ms Bezuidenhout sought to persuade me that alternative relief to the relief contemplated in the notice of motion was competent.

39. Reliance was placed on the judgment in *Dodo v Dodo,*[3] a case where the applicant had lost her job and where she could not find alternative employment. For that reason, she was awarded increased maintenance and the order was made retrospective. The analysis of the court in *Dodo* makes the point that the appropriate date for retrospectivity is from the launch of the application, to avoid delays in bringing the application. Of course, in the present case the application was only made well after the first date of non-compliance with the URC 43 order, and the relief sought was not for the retrospective reduction of the maintenance obligation.

40. Be that as it may. Ms Bezuidenhout placed emphasis on the court in *Dodo* granting the respondent in the case a reprieve in respect of a portion of the maintenance to be paid, because of the burden of the accumulated maintenance that he had to assume. Whilst the *Dodo* judgment provides precedent for a reprieve to be granted in circumstances where increased maintenance is ordered, it cannot be relied on for as a basis to grant a reprieve in respect of overdue payments. In the present case, the horse has bolted: the applicant failed to comply with his obligations under the URC 43 order, and the respondent has already taken steps to enforce compliance with the URC 43 order. Even if the court has great sympathy for the predicament in which the applicant finds himself, it has not been presented with a basis in law that can be relied on to grant him the reprieve that he seeks. The order sought cannot be granted, even in amended form.

<u>The prayer for changed care and contact arrangements</u>

41. As is recorded in the initial part of this judgment, URC 43(6) requires that circumstances must have changed "*materially"* for an order to be granted under the provision. This begs the question whether there has been such a material change that warrants an alteration to the care and contact arrangements as provided for in the URC 43 order.

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[3] 1990 (2) SA 77 (W),

42. At the time of the URC 43 application, there was a shared card and contact arrangement in place and the Family Advocate recommended that this should remain so. The court in the URC 43 application did not follow that recommendation, and rather provided for the applicant only to have the children with him on alternate weekends, as described more fully above. This court can only speculate on the reasons for this approach, and I am not inclined to enter upon speculation. What is demanded of this court is to establish whether there has been a material change since.

43. It seems to me that there has been such a material change, as follows. At the time the URC 43 order was made, the respondent had vehemently opposed the shared care and contact arrangement, relying for the purpose on various allegations concerning the applicant's shortcomings as a father. Two years have elapsed since. The minor children are older, and various WhatsApp messages that the respondent sent to the applicant bears evidence to the fact that she often places reliance on the applicant in respect of the care of the minor children. Indeed, given the content of the messages placed before this court, it would seem that the respondent's work responsibilities have increased significantly and that there is a practical need for greater involvement on the part of the applicant than what is envisaged in the URC 43 order. The arrangement that the applicant asks to be sanctioned by this court has been in place for a significant period of time, and it must be accepted that the minor children have become accustomed to this arrangement (on the unopposed version before me).

44. In my view, it is undesirable to retain in place the terms of the URC 43 order if this does not reflect the reality of the care and contact arrangement. Such a situation leads to uncertainty for both the applicant and the respondent, and it has an impact on the appropriate maintenance obligation to be imposed upon the applicant. The matter is simple: if, despite the terms of the URC 43 order, the minor children are in fact spending much more time with the applicant, then the terms of the URC 43 order in respect of maintenance, as well as care and contact, will not be in accordance with the reality. This is not a desriable position.

45. In the assessment of this court, there are two material changes that warrant a change to the care and contact arrangement.

45.1. The first is that the respondent has had a change of heart: whilst she had objected to the shared care and contact arrangement in the course of the URC 43 proceedings, she has apparently accepted since that such an arrangement is practical. This is borne out by the conduct of the parties (adhering to a shared care and contact arrangement) and the recordal by the mediator of a proposal as discussed between the parties. Although the respondent appears to vacillate in her position on care and contact, her conduct as evident from the papers leans more in favour of a shared care and contact arrangement than against.

45.2. The second material change is the position of the respondent insofar as her work obligations are concerned. The URC 43 order was granted towards the end of 2020, at a time when Covid-19 restrictions still placed a significant strain on the activities of musical performers like the respondent. It stands to reason that the end of the Covid-19 restrictions would have led to an increase in performance opportunities for the respondent, and this conclusion is certainly borne out by the communications concerning her performances at various "*gigs"*, in excess of the ones identified in the URC 43 application. Added to that is other endeavours such as the respondent's services as a sangoma, which also demands that she place greater reliance on the applicant in respect of the care of the minor children. This is also evidenced in her WhatsApp communications.

46. The requirement of material change having been met, the question still arises whether the order sought would be in the best interests of the minor children. Personally and in a general sense, I have my doubts about an arrangement where young children are moved from one house to another, and with different arrangements every week. However, precedent such as *Krugel v Krugel*[4] places emphasis on the benefits of shared care and contact arrangements and I must

[4] 2003 (6) SA 220 (T).

accept that the benefits of regular contact with both parents under a shared care and contact arrangement are beneficial to the minor children despite any personal misgivings that I might have. In any event, on the version before me, the minor children have been subjected to such an arrangement for at least seven months, and they have adjusted to the arrangement. In the circumstances of the particular case, it also seems to be in the best interests of the minor children that the proposed order be made, since it allows for both the applicant and the respondent to attend to their work-related responsibilities at different times when the minor children are with the other party. The reality appears to be that the work-related commitments of the respondent require an alteration of the care and contact arrangement.

47. In all of these circumstances, I consider the proposed order in respect of the care and contact of the minor children to be an appropriate one, and I propose to make an order to give effect to the proposal.

The relief aimed at lessening the maintenance obligation

48. The relief sought under this head is three-fold: it pertains to the monthly maintenance contribution in respect of the children, the obligation to pay for medical costs and the maintenance of the property in which the respondent resides (with the children, when they are with her).

49. Insofar as the order concerning the obligation to pay for medical costs is concerned, the change sought to be introduced is that prior permission for incurring medical costs be obtained. I see a difficulty with the introduction of this requirement, particularly where it may concern emergency procedures. Another concern is that a review of the papers exchanged between the parties in the URC 43 application reveals differing views about appropriate medical care for the children: if the applicant's consent is required for every medical expense, one can imagine that interminable disputes will arise. These concerns must be balanced against the financial circumstances of the applicant, as discussed hereinabove. The order that I propose to make seeks to balance the competing interests, in that I accept the need for a change to the regime to protect the applicant from costs that he simply cannot

bear, but subject to conditions that secure the best interests of the minor children in emergency situations.

50. The relief sought in respect of the maintenance of the property in which the respondent resides raises yet another conundrum. The applicant is the owner of the property, and he must be the one to is and remains responsible for its maintenance. It cannot be expected of the respondent to bear reasonable maintenance costs when she enjoys nothing more than a right to reside in the property, and she has no financial interest in the property. The order as it currently stands must be read to provide for the applicant to bear all "*reasonable"* expenses in respect of repairs and maintenance reasonably required. The changed circumstances relief on in the application do not provide a basis for absolving the applicant from such responsibility. In the present application, the applicant says that the quote for repairs and maintenance provided to him is not reasonable. That is not a matter on which this court can express an opinion, since it is not being called upon to answer the question whether the expenses are reasonable, but rather to absolve the applicant of certain of his responsibilities. The applicant must, within his means, ensure that the property in which his children resides with the respondent remains inhabitable. If he considers that a quote presented by the respondent is unreasonable, he must obtain alternative quotes for work that is reasonable required. I do, however, consider that the material change in circumstances requires that the obligation placed on the applicant to bear costs in relation to another property that the respondent might move to should be excluded. Patently, a move to another property in respect of which the applicant would have to incur further costs would not be affordable in the circumstances.

51. This brings me to the prayer for the reduction in the maintenance obligation from R10 000 per child per month to R1 500 per child per month. There are various considerations to be taken into account in this regard, given the discretion that the court enjoys.

52. As I have indicated, I am minded to grant the order in respect of the care of an contact with the minor children. This obviously has an impact on the financial contribution that the applicant may be expected to make. The changed financial

circumstances of both the applicant and the respondent are also reflected in the summary of the facts set out hereinabove.

53. It seems clear that the applicant's decline in financial fortunes has coincided with the improved financial position of the respondent. The difficulty that confronts this court is that it is difficult to ascertain with any degree of certainty how much the respondent earns. The one thing that is certain, however, is that the respondent's income is not stable, because her income depends on the number of "*gigs"* she is able to book and the demand for her services as a sangoma. It would be imprudent to make absolute findings on the respondent's income in these circumstances. So, for example, the reduction in the amount available in the Savings Account over the period covered by the available bank statements suggests that she has had to spend some money saved over time to cover day-to-day expenses, irrespective of cash income that she has been able to generate and which is not reflected in the bank statements. This court takes note of the fact that she was able to build her savings whilst the applicant was still paying maintenance in accordance with the URC 43 order, which is not the intention with a maintenance order. On the other hand, it is not sustainable to expect of the respondent to provide for the maintenance of the minor children from savings, since the trajectory shows that such savings would then soon be depleted.

54. In circumstances where the minor children are expected to spend half of their time with the applicant where they were expected only to spend alternate weekends with him under the URC 43 order, it seems reasonable that the maintenance obligation be adjusted to reflect this reality. However, even taking this and the financial woes of the applicant into account, it does not seem fair and reasonable to reduce the maintenance amount to a mere R1 500 per month per child. Notably, the URC 43 order was made two years ago, and the rising food and fuel costs that are a matter of public record must be borne in mind.

55. In light of the changed care and contact arrangement that I propose to provide for in the order, and taken due account of the financial position of the parties insofar as I am able to assess it in light of the evidence before me, I consider an amount of R3 000 per month per child to be reasonable as a contribution for maintenance. This

is a significant reduction in the responsibility of the applicant given his financial circumstances, but not as significant as has been requested. After all, in light of the uncertainty surrounding the income of the respondent and the acceptance that her income may fluctuate, the children's well-being may be adversely affected if sufficient maintenance is not provided for. This court also seeks to avoid a situation where yet another application is made, this time by the respondent, to advance a case for increased maintenance. I consider that the proposed order of R3 000 per child per month strikes the appropriate balance between the rights and interests of the parties, and of the minor children. The applicant asserts that groceries for himself and the minor children amount to about R6 500 per month. Bearing in mind that there may be additional costs relating to the minor children in addition to groceries, I consider as fair a maintenance order that allows for the payment of R6 000 in respect of the needs of the minor children for the periods that they spend with the respondent.

<u>The relief aimed at absolving the applicant from the obligation to contribute to legal costs</u>

56. This relief has in common with the relief to expunge the responsibility of the applicant to make payment of arrears maintenance that the obligation to be complied with was fixed by reference to certain dates. The contribution to legal costs was to have been paid already in the three months after the grant of the order, and at a time prior to the onset of the applicant's financial woes as set out in the papers. Notably, the payslip in support of the claim of a reduction in salary in 2021 is dated June 2021.

57. Properly evaluated, the order sought is not one that is based in a material change of circumstances but rather in a failure by the applicant to comply with his duties under the URC 43 order in the latter part of 2020 at a time when, on his own version, he was not yet subjected to the lower income. This court cannot come to his assistance in this respect. As is the case with the prayer in respect of the extinction of maintenance, the court has some sympathy for the applicant's financial predicament, but the sympathy cannot be translated into jurisdiction. The applicant must comply with the URC 43 order in respect of legal costs.

ORDER

58. In the circumstances, I make the following order (in which reference to "*the respondent"* is to be read as reference to the applicant in the present application and *vice versa*, given that the order adopts the terminology used to refer to the parties in the URC 43 application on the basis that the current order provides for a variation of the URC 43 order):

58.1. The Rule 43 Order handed down on 9 October 2020 (the Order) is varied as follows:

58.1.1. Paragraph 2 of the Order is deleted and substituted as follows:

"*The primary care and residence of the minor children shall vest in the applicant and the respondent equally pendente lite."*

58.1.2. Paragraph 3 of the Order is deleted and is substituted as follows:

"*It is ordered that the applicant and the respondent share primary care of and contact with the minor children on a weekly basis in accordance with the following schedule with times for the exchange of the minor children on the appointed days to be adjusted depending on the extra-mural activities of the minor children and/or the work commitments of the applicant and the respondent.*

3.1 The minor children shall stay with the applicant from Monday to Wednesday night, and with the respondent from Thursday to Sunday night in week one.

3.2 The minor children shall stay with the applicant on Monday, Tuesday and Thursday night, and with the respondent on Wednesday night and from Friday to Saturday night in week two.

3.3 The minor children shall stay with the applicant on Monday, Tuesday, Saturday and Sunday night, and with the respondent from Wednesday to Friday night in week three.

3.4 The minor children shall stay with the applicant from Monday to Thursday night, and with the respondent from Friday to Sunday night in week 4.

3.5 The schedule shall be adjusted as appropriate to accommodate special occasions such as birthdays, mother's day and father's day and arrangements regarding holidays, as required."

58.1.3. Paragraph 4 of the Order is deleted and substituted as follows:

"*The respondent is directed to pay the applicant's and minor children's medical expenses including all medical aid premiums and excess medical expenses not covered by medical aid, provided that the respondent agrees in writing to such medical treatment prior to same being undertaken, pendente lite, unless emergency medical care is reasonably required, in which case the prior written agreement shall not be required."*

58.1.4. Paragraph 5 of the Order is deleted and substituted as follows:

"*The respondent is ordered to pay to the applicant monetary maintenance for each of the minor children in the amount of R3 000 per month, the first payment to be effected on or before the 1st day of December 2022, and monthly thereafter on or before the first day of the succeeding month, pendente lite."*

58.2. Paragraphs 1, 6,7, 8, 9 and 10 of the Order remain unaffected.

58.3. Nothing in this order shall be read to extinguish any liability in place on the date immediately preceding the order.

58.4. The costs of this application in terms of rule 43(6) shall be costs in the main action.

MJ ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Date of hearing : 31 October 2022

Date of judgment : 03 November 2022

Appearances:

Attorneys for the applicant : MATTHEW KERR-PHILLIPS ATTORNEYS

Counsel for the applicant : ADV F BEZUIDENHOUT