REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 6664/19

In the matter between:

A F Applicant

and

M F Respondent

JUDGMENT DELIVERED ON 28 AUGUST 2019

DAVIS, AJ:

1. This is an application for relief *pendente lite* in terms of Rule 43 of the Uniform Rules of Court ("the Rules"). The applicant ("the wife") is the plaintiff and the respondent ("the husband") the defendant in a pending divorce action. Pleadings

have closed and the husband has recently launched an application for a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court, alleging that the parties have entered into a binding settlement agreement. The wife disputes that the action has been settled, and opposes the separation application.

2. The wife seeks orders directing the husband, *inter alia,* to pay a contribution of R 750 000.00 towards her costs in the divorce action and to increase the cash maintenance which he pays from R 32 000.00 to R 42 500.00 per month. Ms Buikman SC, appeared for the wife, and Mr Pincus SC appeared for the husband, together with Ms Small.

3. The husband alleges that the cash amount of R 32 000.00 per month which he pays for his wife and son is sufficient for their reasonable needs, and disputes that an increase to R 42 500.00 per month is required. He tenders payment of an amount of R 150 000.00 as a contribution towards the wife's legal costs in the divorce action, and contends that he is not liable to contribute towards the wife's past legal costs which exceed R 750 000.00.

4. At the hearing Ms Buikman handed me a lengthy draft order based on the notice of motion. I was informed that most of orders sought were not in dispute. It seems that they simply serve to codify what the husband is in any event paying. I therefore confine myself in this judgment to those areas where the parties remain at odds, namely:

4.1. the *quantum* of the contribution to costs;

4.2. whether or not the cash maintenance should be increased from R 32 000 to R 42 500;

4.3. whether or not the husband should be ordered to pay a contribution of R 100 000 per annum towards the wife's annual holidays;

4.4. whether or not the husband should be ordered to pay the monthly allowance of R 10 000 which he currently pays the parties' major daughter, or whether this should be allowed to remain a private arrangement between him and the daughter.

5. The parties were married out of community of property in 1996, with the incorporation of the accrual system. They have two children, a daughter of 21 years who is presently undergoing military training in Israel, and a son of 17 years who is currently in grade eleven and will finish his high school education in 2020. Both children are still dependent on their parents for financial support.

6. The husband is employed as the joint chief executive officer of a well-known company, said to be one of South Africa's largest manufactures of fencing wire, which supplies local, continental and international markets. The company appears be a family business: it was established by the husband's maternal grandfather, and his father is the current chairman of the company. The husband

earns a handsome income of some R 7 million per annum. In addition to his salary he receives *ad hoc* payments from the company and substantial distributions from a family trust of which he is a beneficiary. He frequently travels overseas on business with all expenses paid by the company. The company also pays for the husband's cell phone, motor vehicle, computer and an annual holiday.

7. His assets include the proceeds of the sale of the former matrimonial home in Norwood, Johannesburg, which was sold for R 3.8 million in December 2018, a 50% share of a property on the Vaal Dam, cash in excess of R 1.4 million, a provident fund worth some R 11.6 million and an interest in a trust which he values at some R1.8 million. His liabilities amount to some R 82 000. One may accept, for present purposes, that his net asset value is in the region of R 20 million. Significantly, he owes nothing for legal costs. The husband concedes that he is able to afford what the wife is asking. Affordability is not an issue in this case: it is the wife's entitlement which is contested.

8. The wife is 49 years old. She qualified with a Bachelors degree in Pharmacy in 1990 and worked full-time until the birth of her children. She ceased working after her son was born as the husband earned sufficiently well to maintain the family comfortably. When the parties separated in 2014, the wife moved to Cape Town with the children while the husband remained in Johannesburg. In 2016 she obtained part-time employment as a pharmacist at the University of Cape Town Lung Institute where she dispenses medication to patients who participate in

clinical trials. She is paid hourly and states that she generally works four hours per day, four days per week.

9. If one has regard to the wife's total monthly earnings between 1 March 2017 and 28 February 2018, one arrives at an average monthly income of R 17 677 for the 2018 financial year. Her average monthly income for the period 1 March 2018 to 28 February 2019 increased to R 19 204. According to the wife the increased income over that period can be attributed to the fact that she worked more hours than usual in 2018 because an exceptional number of trials were being conducted by the Lung Institute, which generated extra work. She points out that her work load this year has decreased, and that her average monthly income for the first four months of 2019 has dropped to R 13 214.

10. Given the fluctuations in the wife's income, it seems to me that the fairest, most reliable measure of her average income can be arrived at by having regard to her earnings over the entire twenty-five month period from March 2017 to April 2019. Her average monthly income calculated over this period amounts to R 17 986.67. For purposes of this application, therefore, I will accept that the wife's average monthly income amounts to R 18 000 per month (which is less than the figure of R 19 342 which the husband attributes to her).

11. The husband contends that the wife is able to work longer hours, thereby increasing her earnings. She, however, maintains that she is not able to withstand the stress of longer work hours on account of her struggles with

depression and Bipolar Disorder. I do not consider it necessary to entertain this dispute. To my mind it is reasonable for the wife to continue in part-time employment, as she has since November 2016, while she is dealing with the ongoing stress of the divorce litigation. Furthermore, it is undoubtedly in the best interests of her son, who will be writing matric during 2020, that she be more available to him as a parent during that challenging time of his life.

12. The wife owns no immovable property. She lives in rented accommodation paid for by the husband. Her assets are modest, comprising household contents and personal effects of unspecified value and her motor vehicle valued at R 100 000. As at 23 May 2019 she had savings of R 14 694.74 in her bank account.

13. The husband alleges that the wife has neglected to include her jewellery in her list of assets, but he gives no indication of how extensive or valuable the jewellery collection is. I have little doubt that if it was significant, he would have said so. Short of the wife being possessed of a large, valuable jewellery collection - which I doubt is the case - she cannot reasonably be expected to dispose of her jewellery in order to fund her legal costs.[1]

---

[1] See *Glazer v Glazer* 1959 (3) SA 928 (W) at 931 G - H where Williamson J said the following of a wife with meagre assets married to a wealthy man : *'' In my view a woman in the position of the petitioner, married to a person in the position of the respondent, is not called upon to realise all she possesses in order to finance her action. He can support her fully, and included in support is the support that she requires in the sense of the expenses necessary to put her case before the Court.''*

14. On the papers before me it is clear that the wife has no means to fund her case in the divorce action, and that the husband is well able to afford to pay her reasonable legal costs.

15. The issues in the divorce action are the extent of the wife's accrual claim and her entitlement to lifelong maintenance. Again, the husband appears to concede his ability to pay the wife's reasonable maintenance requirements, but it is her entitlement to maintenance which is contested. In my view the wife has made out a *prima facie* case in respect of her claim for lifelong maintenance.

16. Against that backdrop, I turn to deal with the disputed issues.

THE CLAIM FOR A CONTRIBUTION TOWARDS COSTS

17. In her founding affidavit the wife alleges that she has incurred legal costs totalling approximately R 905 442 in respect of the divorce action. There is a discrepancy between that figure and the figure of R 872 632 referred to in a letter written by the wife's attorney on 11 February 2019 dealing with the wife's legal costs in the divorce action.

18. The difference of R 32 810 may presumably be accounted for by the lapse in time between 11 February 2019 when the letter was written and 18 April 2019 when the founding affidavit in this application was deposed to. Although it does not appear from the papers, the indications are that the increased costs are likely attributable to the preparation of this Rule 43 application, in which case they are

not costs of the pending action and should therefore not be taken into account when ordering a contribution to costs in terms of Rule 43.[2]

19. The wife states in her founding affidavit that she spent R 71 000 on her erstwhile attorney in Johannesburg, that she borrowed R 409 271 from her family in order to place her attorneys in funds to enable them to institute and prosecute the divorce proceedings, and that she currently owes her attorneys R 388 361 for attendances in respect of the divorce action. The total of these three amounts is R 868 632. (This figure differs slightly from the figure of R 872 632 referred to in annexure "AF 3", and I will accept the lower figure based on what is stated in the wife's founding affidavit.)

20. It appears from the letter in annexure "AF 3" that the wife's total legal costs incurred to date include expenditure of R 107 828 already incurred in respect of counsel, experts and miscellaneous disbursements. The balance comprises attorney's fees. The hourly rates charged by the wife's attorney and counsel are not unreasonable and are in keeping with the standard charges in this area of legal practice. It bears emphasis in this regard that the husband has to date spent some R 1 235 556 on his own legal costs.

21. The figure of R 868 632 in respect of the wife's past legal costs must be reduced by the amount of R 75 000 which the husband paid as a contribution towards the wife's legal costs in November 2017. I can therefore accept that the wife owes

---

[2] See the unreported judgment of Rogers J in *Manitsas v Manitsas* (WCD Case No 8698/2019; judgment delivered on 10 July 2019) at para 11.

debts totalling R 793 632 to her family and her attorney in respect of her legal costs incurred to date (excluding the costs of this application).

22. Mr Pincus contended that there was insufficient proof that the wife has indeed borrowed R 409 271 from her family to fund her legal costs. It is so that the wife relies solely on her statement under oath that she has incurred the loan. However her failure to provide documentary proof is understandable in the light of the fact that lengthy affidavits and voluminous annexures are actively discouraged in Rule 43 proceedings. The wife's attorney has stated in writing that the wife's total costs to date are in the sum of R 872 632 to date, of which R 388 361 remains unpaid. Her costs are not unreasonable, having regard to what the husband has spent on legal costs to date. The funds to settle the R 409 271 of the wife's costs which has already been paid had to have come from somewhere, since the wife clearly did not have the means to pay them herself. In the circumstances I consider that I may safely accept her *ipse dixit* in this regard.

23. The wife has not indicated how much of the amount of R 750 000 claimed for costs is to be earmarked for her future legal expenses and how much is to be utilised to settle her indebtedness for past legal costs. She states that the amount of R 150 000.00 which the husband has tendered up to and including the first day of trial is inadequate to enable her to *"pay anything towards the debt that I have incurred with my attorney or family in respect of costs or to contribute meaningfully towards my future costs."* As regards her future legal expenses, she

lists various attendances relating to trial preparation and states that she needs to spend a further R 61 750 on experts.

24. The litigation landscape has altered somewhat since this application was launched on 18 April 2019. On 22 July 2019 the husband filed a special plea in the divorce action, alleging that the divorce action was settled in terms of an agreement concluded between the parties on or about 29 March 2018. On 26 July 2019 the husband launched an application for the separation of this issue in terms of Rule 33(4) of the Uniform Rules. The wife opposes the separation application, and, by agreement between the parties, I made an order postponing the separation application to 5 December 2019 for hearing on the semi-urgent roll.

25. If the separation application were to succeed, and the husband's special plea of a settlement were to be upheld, the future pre-trial attendances and expenses listed by the wife in her founding affidavit would be redundant. To me it makes no sense to order a contribution towards the costs of trial preparation which may never be incurred. And while the wife may well require a contribution towards the costs which she is likely to incur in resisting the separation application and, if it succeeds, the hearing of the separated issue, I am not in a position to make a determination in that regard as the issue has not been canvassed in the papers. Should the wife require a contribution towards those costs, she will have to bring a further application in terms of Rule 43. That is an unfortunate, but unavoidable, consequence of the late launching of the separation application.

26. The remaining question is whether or not the wife is entitled under Rule 43 to recover a contribution towards her past or arrear costs.

Can a court order a contribution to costs already incurred?

27. The claim for a contribution towards costs in a matrimonial action originated in Roman-Dutch procedure and is well-established in our practice.[3] Rule 43 of the Uniform Rules regulates the procedure to be followed where a contribution to costs is sought. The substantive basis of the claim is the reciprocal duty of support between spouses,[4] which includes the cost of legal proceedings.[5]

28. The *quantum* of the contribution to costs which a spouse may be ordered to pay lies within the discretion of the presiding judge. In *Van Rippen v Rippen*[6] Ogilvie Thompson J, as he then was, articulated the guiding principle for the exercise of that discretion in the following frequently cited *dictum*:

> *"... the Court should, I think, have the dominant object in view that, having regard to the circumstances of the case, the financial position of the parties, and the*

---

[3] See Van Loggerenberg *Erasmus Superior Court Practice* citing, *inter alia, Van Rippen v Van Rippen* 1949 (4) SA 634 (C) at 37. See, too, E Spiro *''Contributions towards costs in Matrimonial Causes''* (1948) 65 SALJ 419 for the historical origins of the claim.

[4] *Lyons v Lyons* 1923 TPD 345; *Chamani v Chamani* 1979 (4) SA 804 (W) at 806 E; *Nicholson v Nicholson* 1998 (1) SA 48 (WLD) at 50 B; *Cary v Cary* 1999 (3) SA 615 (C) at 619 I. See, too, Sinclair *The Law of Marriage* Vol 1 442 - 443.

[5] See cases cited at note 4 *supra*.

[6] *Supra* note 3.

particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the Court." [7]

29. This formulation neatly encapsulates the twin criteria of reasonable needs and financial means which feature in the test for ordinary maintenance.[8] When assessing a spouse's reasonable litigation needs, a court will have regard to what is involved in the case, the scale on which the parties' are litigating, or intend to litigate, and the parties' respective means.[9]

30. The legal rules pertaining to the reciprocal duty of support between spouses are gender neutral, so that an indigent husband may claim support from an affluent wife.[10] But the reality must be acknowledged that, given traditional child-care roles and the wealth disparity between men and women, it has usually been women who have had to approach the courts for a contribution towards costs in divorce litigation.

31. In answering the question whether a court may order a contribution to legal costs which have already been incurred, it is helpful, as a starting point, to consider the position regarding retrospective orders for the payment of spousal maintenance,

---

[7] *Van Rippen (supra)* n 3*,* at 639.

[8] See, for example, *Prophet v Prophet* 1948 (4) SA 325 (O) at 319.

[9] See, for example, *Nicholson v Nicholson (supra)* n 4 at 50 C - G where Wunsh J stated that:

''The applicant is entitled, if the respondent has the means and she does not have them, to be placed in the position adequately to present her case, relevant factors being the scale on which the respondent is litigating and the scale on which the applicant intends litigating (I would have qualified this by reference to what is reasonable having regard to what is involved in the case), with due regard being had to the respondent's financial position.''

[10] See *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 139 H to 140 A.

for legal costs in a matrimonial action are a species of support and the same rules should logically apply.

32. At common law a claim for arrear spousal maintenance is barred by virtue of the principle *in praeteritum non vivitur* (one does not live in arrear),[11] the argument being that if the spouse managed on her own resources, there was no need for support.[12] An exception to this rule is recognized where the spouse has incurred debts in order to maintain herself.[13,14]

33. Since the *in praeteritum non vivitur* rule does not operate where a spouse can show that she had to incur debts in order to maintain herself, logic would suggest that it should likewise not apply where she has had to incur debts to fund her legal costs. The question, then, is whether there is anything in precedent or principle which militates against allowing a claim for past legal costs in such circumstances.

34. In *Nicholson v Nicholson*[15] Wunsh J disallowed the amounts claimed by the applicant in respect of legal costs which had already been incurred, simply

---

[11] *Oberholzer v Oberholzer* 1947 (3) SA 294 (O).

The full version of the maxim is *''Non enim quisquam in praeteritum vivit aut alendus est'':''A person does not live nor have to be maintained in arrear''* (Voet 2.15.14; Gane's translation.)

[12] See *Woodhead v Woodhead (supra)* n 10 at 140 A - B.

[13] *Africa v Africa* 1985 (1) SA 792 (SWA) at 794 D; *Cary v Cary (supra)* n 4 at 622 E.

[14] The rule also does not apply where arrear spousal maintenance is owed in terms of a court order or maintenance agreement, or where the arrears are in respect of money spent by a spouse on behalf of a child. See P Q R Boberg *Law of Persons and the Family* 252.

[15] *Supra* n 4.

stating that *"they cannot be covered by a contribution towards the costs".*[16] No reason was given, or authority cited, for this proposition.

35. In *Senior v Senior*[17] Shakenovsky J followed the approach of Wunsh J in *Nicholson* and excluded the arrear costs from the applicant's claim for a contribution toward costs, again without furnishing reasons or citing authority.[18]

36. In *Petty v Petty*[19] Webster J agreed with the submission by the respondent's counsel that *"past attorney/client costs may not be considered as they do not fall within the purview of Rule 43".*[20] This statement too was unsubstantiated by reason or authority.

37. A different approach was adopted in the Western Cape Division to the question of whether past legal costs could be allowed in terms of Rule 43. In *Cary v Cary*[21] Donen AJ carefully considered the authorities and the constitutional imperatives involved. He observed at the outset that he was obliged to exercise his discretion under Rule 43 in the light of the fundamental right to equality and equal protection before the law. He reasoned that there should be *"equality of arms"* in order for a divorce trial to be fair, and came to the conclusion that:

---

[16] *Nicholson v Nicholson (supra)* n 4 at 52 J.

[17] 1999 (4) SA 955 (W).

[18] At 966 H - I.

[19] [2002] 2 All SA 193 (T).

[20] At 196 c.

[21] *Supra* n 4.

> *"... applicant is entitled to a contribution towards he 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 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. I therefore regard myself as being constitutionally bound to err on the side of the 'paramount consideration that she should be enabled adequately to place her case before the Court'. The papers before me indicate that respondent can afford to pay the amount claimed and that he will not be prejudiced in the conduct of his own case should he be ordered to do so".* [22]

38. The learned judge considered that the applicant's claim for a contribution to costs was based on the duty of support and was not barred by the principle *in praeteritum non vivitur* because the applicant could show that she was claiming for debt incurred to keep herself.[23] He went on to say that:

> *"Applicant has timeously applied for an order of the Court. To treat an order for a contribution towards the necessarily incurred unpaid debts amounting to R 59 500 as a retroactive award is entirely artificial. Finally I should point out that the constitutional imperatives referred to above (which were not considered in Nicholson's case) also impel me to reject Mr Rogers' submission* [that costs already incurred may not form the subject of an order in terms of Rule 43]".

---

[22] *Cary v Cary* (supra) n 4 at 621 D - G.

[23] *Cary v Cary* (supra) n 4 at 622 E.

39. In the Free State Division Van der Merwe J followed *Cary* in the unreported decision of *Du Plessis v Du Plessis.*[24] He acknowledged the relevance of the fundamental right to equality before the law and agreed that costs already incurred may be included in the consideration of an appropriate contribution towards costs under Rule 43. He rejected the contrary approach taken in *Nicholson*[25] and *Senior*,[26] which he regarded as artificial and wrong in principle.[27]

40. I find myself in wholehearted agreement with the approach adopted by Donen AJ and Van der Merwe J, which accords with the injunction in s 39(3) of the Constitution[28] to promote the spirit, purport and objects of the Bill of Rights when developing the common law.

41. The importance of equality of arms in divorce litigation should not be underestimated. Where there is a marked imbalance in the financial resources available to the parties to litigate, there is a real danger that the poorer spouse - usually the wife - will be forced to settle for less than that to which she is legally entitled simply because she cannot afford to go to trial. On the other hand the husband, who controls the purse strings, is well able to deploy financial resources in the service of his cause. That situation strikes me as inherently unfair. In my view the obligation on courts to promote the constitutional rights to

---

[24] [2005] ZAFSHC 105 (16 September 2005).

[25] *Nicholson v Nicholson (supra)* n 4.

[26] *Senior v Senior (supra)* n 17.

[27] *Du Plessis v Du Plessis (supra)* n 23 para 9.

[28] Constitution of the Republic of South Africa, 1996.

equal protection and benefit of the law,[29] and access to courts[30] requires that courts come to the aid of spouses who are without means to ensure that they are equipped with the necessary resources to come to court to fight for what is rightfully theirs.

42. The right to dignity[31] is also impacted when a spouse is deprived of the necessary means to litigate. A person's dignity is impaired when she has to go cap in hand to family or friends to borrow funds for legal costs, or forced to be beholden to an attorney who is willing to wait for payment of fees - in effect to act as her "banker". The primary duty of support is owed between spouses, and a wife who is without means should be entitled to look to the husband, if he has sufficient means, to fund her reasonable litigation costs. (The same of course applies if the husband is indigent and the wife affluent.) And where an impecunious spouse has already incurred debts in order to litigate, whether to family or to an attorney, I consider that a court should protect the dignity of that spouse by ordering a contribution to costs sufficient to repay those debts (at least to the extent that the court considers the expenditure reasonable). As I have already indicated, I consider that the wife's legal costs incurred to date are reasonable, having regard to the attendances listed in the founding affidavit and

---

[29] Section 9(1) of the Constitution states that "*Everyone is equal before the law and has the right to equal protection and benefit of the law.*"

[30] Section 34 of the Constitution states that *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

[31] Section 10 of the Constitution states that *"Everyone has inherent dignity and the right to have their dignity respected and protected."*

the fact that the husband himself has to date spent well in excess of R 1.2 million on legal costs - substantially more than the wife.

43. Mr Pincus referred me to the decision in *Greenspan v Greenspan*[32] in support of an argument that a court cannot order a spouse to pay off the debts incurred by a spouse because a court has no jurisdiction to award lump sum payments under Rule 43. The wife in *Greenspan* claimed a once-off payment of R 150 000.00 in order to settle various debts in respect of the purchase and renovation of immovable property and miscellaneous living costs. The *ratio* of the decision in *Greenspan* was that the lump sum sought was not competent in terms of Rule 43(1)(a), since that rule envisages periodic maintenance payments.

44. In *Greenspan* the court was not dealing with the repayment of a debt incurred in order to fund legal costs. In my view the decision in *Greenspan* is not authority for the proposition that a court cannot order payment of a lump sum as a contribution to costs in order to settle a debt owing for legal costs already incurred. In my view rule 43(1)(b), which deals with contributions towards legal costs, permits lump sum payments. Indeed that is the way contributions towards legal costs use usually ordered to be paid.

45. For all these reasons I hold, as a matter of principle, that a court is entitled to take into account legal costs already incurred, including debts incurred to fund legal costs, in the assessment of an appropriate contribution to costs in terms of

---

[32] *Greenspan v Greenspan* 2000 (2) SA 238 (C).

Rule 43. Like Donen AJ, I believe that constitutional imperatives support this conclusion and impels the rejection of the contrary approach taken in the cases of *Nicholson,*[33] *Senior*[34] and *Petty,*[35] referred to above.

46. Having determined that there is nothing in principle or precedent standing in the way of ordering a contribution to costs in order to repay debts incurred to fund legal costs, the question is what how much of those costs should be paid? Should all, or only a part of the past costs be paid by way of a contribution under Rule 43?

47. In my view the obligation to pay a <u>contribution</u> towards a wife's legal costs does not necessarily postulate an obligation only to pay for <u>part</u> of those costs:[36] the extent of the contribution should logically depend on how much, if anything, the wife herself is able to contribute. Yet it has often been said that a wife who applies for a contribution to costs under Rule 43 is only entitled to part, but not all, of her costs.[37] Indeed this appears to have been elevated to a fixed rule. In *Micklem*[38] Van den Heever J, as she then was, rightly observed[39] that this rule

---

[33] *Nicholson v Nicholson (supra)*n 4.

[34] *Senior v Senior (supra)* n 17.

[35] *Petty v Petty (supra)* n 19.

[36] Cf *Dodo v Dodo* 1990 (2) SA 77 (W) at 98 F where Wulfsohn AJ stated that, *''as the application is merely for a 'contribution towards her costs', those very words mean that she is not entitled to all her costs.''*

[37] See, for example, *Van Rippen v Van Rippen (supra)* n 4 at 638 - 639; *Service v Service* 1968 (3) SA 526 (D) at 528 D - E; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262 I - J; *Nicholson v Nicholson (supra)* n 4 at 51 H - I; *Senior v Senior (supra)* n 17 at 962 G.

[38] *Micklem v Micklem* (supra) n 37.

[39] *Micklem v Micklem* (supra) n 37 at 262 I - J.

might clash with the paramount consideration referred to in *Van Rippen*[40] that a wife should be enabled adequately to place her case before court.

48. To my mind the correct approach to the question of an appropriate contribution towards costs is that adopted in *Zaduck v Zaduck*[41] by Davies J, who declined to follow the rule that a contribution to costs should not cover all the wife's costs. The learned judge held that:[42]

> *" … the correct approach is to endeavour to ascertain in the first instance the amount of money which the applicant will have to pay by way of costs in order to present her case adequately. If she herself is unable to contribute at all to her costs, then it seems to me to follow that the respondent husband must contribute the whole amount required. I see no validity in the contention that in those circumstances he should only be required to contribute part of the amount involved."*

49. In my view it is arbitrary to apply an inflexible rule that a wife who has no means of funding the balance of her legal costs is nonetheless only entitled to part of the costs which she reasonably requires to fund her litigation. It is like expecting a motor vehicle to get from point A to B on three quarters of a tank of petrol when the journey requires a full tank of petrol, or feeding a person 1600 calories per day when they really need 2000 calories per day to function optimally: in both cases the lack of vital resources retards or defeats the endeavour.

---

[40] *Van Rippen v Van Rippen* (supra) n 4 at 638 - 9.

[41] *Zaduck v Zaduck* 1966 (1) SA 78 (SR).

[42] At 81 A - B.

50. To my mind logic and fairness dictate that if the wife is indigent and the husband has the wherewithal to fund his own as well as all the wife's reasonable costs, he should be ordered to do so. Since legal costs are covered by the duty of spousal support, there can be no justification for a situation where the husband, who controls the purse strings, pays for all his legal costs upfront, while the wife without means is forced to borrow to fund the shortfall, or to ask her attorney to carry the case without full payment. As I have already mentioned, I consider this an unacceptable impairment of the right to dignity and equal protection of the law.

51. In my respectful opinion the constitutional imperatives to which I have referred require that we jettison the arbitrary rule that a wife may not, by way of a contribution towards costs under rule 43, be awarded <u>all</u> the costs which she reasonably requires to present her case. The court's discretion regarding the quantum of costs should not be fettered by fixed rules, but should be exercised in the light of the reasonable litigation needs of the parties, having regard to their particular circumstances, and their respective ability to pay.

52. To be clear, I am not suggesting that a court should award an impecunious wife all her estimated litigation costs in advance, regardless of the stage of the litigation. Obviously where future costs are under consideration, a court will take into account that the matter may settle, and will only award what is reasonably

required at that particular stage of the litigation, knowing that further contributions to costs may be ordered if required.[43]

53. But where the costs have already been incurred, as in this case, there is no uncertainty as to whether or not the costs will in fact be incurred. With past costs one is dealing with a known quantity, and so the relevant questions are: a) whether the costs were reasonably incurred by the applicant; b) how much the applicant can afford to pay towards the costs; and c) how much the respondent can afford to pay towards the costs.

54. As I have indicated, I consider the legal costs which the wife has incurred to date to be reasonable. It is clear that the wife has no means to fund any portion of these costs herself. It is also clear the husband can well afford to pay the amount of which the wife is claiming, as he has cash in excess of R 1.4 million.

55. Since I can see no justification for an arbitrary rule that a wife cannot be awarded all the legal costs which she reasonably requires to present her case, I would have been inclined to order a contribution in the amount of R 793 632[44] to cover the whole of the wife's arrear legal costs. However, since the wife has only claimed a contribution of R 750 000 for her costs, that is the amount which I will award.

---

[43] Rule 43(6) provides that the court may vary its decision in the event of a contribution to costs proving inadequate.

[44] See paragraph 21 above for the calculation of the amount.

56. I should, for the sake of completeness, deal with the argument advanced by Mr Pincus that the wife should not be afforded relief in circumstances where she did not apply timeously for a contribution to costs and allowed her legal costs to accumulate. It is indeed so that where a court is asked to make a retrospective maintenance order, the application should be brought expeditiously in order to avoid the accumulation of arrears which may unduly burden the spouse who is ordered to pay.[45] This principle would apply *a fortiori* where an arrear contribution towards legal costs is sought. But this is not a relevant consideration in the present application given that the husband can well afford to pay the amount claimed.[46]

THE CLAIM FOR INCREASED CASH MAINTENANCE

57. The husband funds payment of the following expenses relating to the wife and children: rental, medical and pharmaceutical expenses, educational costs in respect of the son, the expenses of the major daughter in Israel, cell phone expenses, short term insurance and the children's allowances. The cash maintenance which the wife seeks to have increased from R 32 000 to R 42 500 is over and above these expenses. It covers food, clothing, entertainment, personal grooming, petrol and other miscellaneous expenses for the wife and son.

---

[45] See *Dodo v Dodo (supra)* n 36 at 95 A - C.

[46] *Dodo v Dodo (supra)* n 36 at 95 C.

58. The husband tenders to continue paying cash maintenance of R 32 000 per month and funding the other expenses, as he has done since the parties separated in 2014. It is not in dispute that during 2018 the husband paid some R 1 237 495 in respect of the support of the wife and children, which equates to approximately R 103 000 per month. The effect of the increase sought by the wife would mean that his expenditure would increase to approximately R 120 000 per month, taking into account cost of living increases in respect of the expenses which the husband already funds.

59. The husband's case is not that he cannot afford to pay the increased cash maintenance: his stance is that it is not reasonably required, and that the wife's demands are excessive. He contends that the wife's list of expenses bears no relation to her actual monthly expenditure as revealed by an analysis of her bank statements, and that she has falsely inflated her expenses.

60. The wife's case, however, is that the husband unilaterally reduced the cash maintenance in February 2017 from R 40 000 to R 32 000 when the daughter left home and moved to Israel, and that he has not increased it since. She contends that since 2017 she has had to reduce her lifestyle and scrimp to make ends meet. Her argument is that her list of expenses represents her reasonable expenditure, not her actual expenditure, because her actual expenditure has been unreasonably curtailed by the husband. She is concerned that the lifestyle of the son, who lives with her, is diminished as a result.

61. The wife is entitled to support on a scale commensurate with the social position, life style and financial resources of the parties. It would be reasonable to maintain her in a position similar to that which she would ordinarily be accustomed while she was living together with the husband. In the words of Williamson J, *"she is entitled to a reasonable amount according to her husband's means, not necessarily according to what he thought was reasonable."*[47]

62. I have carefully scrutinised the wife's list of expenses, which total R 68 976. Although it is not customary to give detailed reasons for amounts awarded in Rule 43 applications, I think it important to explain why I have allowed and disallowed certain of the amounts claimed by the wife:

62.1. I have deducted amounts claimed as provisions for the replacement of household appliances, furnishings and computer equipment. To my mind Rule 43 does not envisage the claiming of <u>provisions</u> for the replacement of capital items, as opposed to expenditure actually incurred.

62.2. I have deducted the amount of R 3 500 claimed for hosting Shabbat dinner once a month, and the amount of R 708 per month claimed for hosting Jewish New Year and Passover dinners every year. It seems to me that these costs are adequately covered by the generous amount of R 15 000 claimed for groceries, which I have allowed (having particular regard to the fact that the wife is required to feed a teenage son);

---

[47] See *Glazer v Glazer (supra)* n 1 at 930 E.

62.3. I have reduced the wife's claim for clothing, shoes, accessories and sports/fitness attire from R 6 500 per month, which I consider excessive, to R 3 000 per month, which strikes me as more reasonable.

62.4. I have deducted R 2 000.00 from the R 10 856 which the wife claims in respect of grooming, cosmetics and toiletries for herself and her son, which amount strikes me as unduly extravagant.

62.5. I have deducted the amount claimed for payment of the wife's pharmaceutical membership fees since this forms part of the expenses which the husband already funds, and tenders to continue paying.

62.6. I have allowed the R 600 per month which the wife claims to fund extra expenses associated with having her daughter come home for an annual three-week visit. I do not consider it unreasonable that the wife should incur extraordinary expenditure of some R 7 200 during that period. Put differently, I do not think it fair and reasonable for someone of the wife's social station to be deprived of the wherewithal to go places and do special things with her daughter when she comes to visit - all of which comes at an additional cost.

63. Other than the deductions referred to above, I can find nothing in the wife's list of expenditure which I regard as excessive having regard to this particular family's socio-economic and cultural situation. On the contrary, I regard the expenses

listed as entirely in keeping with people of this level of wealth and social standing.

64. I have deducted a total of R 12 621 from the wife's expenses claim of R 68 976, leaving a balance of R 56 355 in respect of expenses which I regard as fair and reasonable for the wife and son. Given that the wife earns approximately R 18 000 on average, this leaves her with a shortfall of approximately R 38 355, which I will round up to R 38 500.

65. I therefore intend to order that the husband pay the wife monthly cash maintenance in the amount of R 38 500. I further intend to order that the said amount be increased annually in accordance with the percentage increase in the headline inflation of the Consumer Price Index. I am confident that it is appropriate to make such an order given that affordability on the part of the husband is not an issue. I intend to make the order effective from 1 May 2019, being the first payment date after the application was instituted, for the reasons stated by Wulfsohn AJ in *Dodo v Dodo*.[48]

CONTRIBUTION TOWARDS HOLIDAY COSTS

66. The wife asks that the husband be ordered to contribute R 100 000 per annum towards the cost of her annual holidays, which involve overseas travel. The

[48] *Dodo v Dodo (supra)* n 36 at 95 F - I.

husband argues that this is excessive and has tendered to pay R30 000 towards the costs of a trip to Croatia which the wife has booked for this year.

67. It is clear from the papers that overseas travel has been a regular feature in the life of this family. The husband argues that most of the overseas trips which he took with the wife were funded wholly or substantially by his employer as they were business related. It is not uncommon for business to be combined with pleasure in order to take advantage of sponsored or tax-deductible travel. And the husband, employed in what is akin to a family business, has been in a unique position to structure his travel to maximum benefit. In my view none of this derogates from the fact that regular overseas travel formed part of the lifestyle of this family, which the wife is now entitled to maintain.

68. It is worthy of note that the husband still travels overseas frequently, and although it is mostly business travel, I have little doubt that he manages to combine business with pleasure. On his own admission he has a girlfriend in Austria, who he must visit from time to time.

69. Moreover, it weighs heavily with me that the parties have a daughter who resides in Israel. I consider it only reasonable that the wife and son should be placed in a position to visit her once a year. According to the wife the cost of a trip to Israel for her and her son is R 70 000.

70. I am not empowered under Rule 43(1)(a) to order a lump sum payment towards the wife's annual holiday costs. Instead I intend to order monthly payments in the

amount of R 6 000 per month in respect of holiday costs, which amount in total to R 72 000 per annum towards holiday travel costs, which I regard as fair and reasonable.

MAINTENANCE FOR THE MAJOR CHILD

71. The parties' daughter is 21 years old and resides in Israel, where she is performing military service. She will presumably study once she has completed her military training. It is common cause that she is still dependant on the parties for financial support.

72. The husband asserts that he pays R 10 000 a month directly to the daughter. The wife asks that the husband be ordered to pay R 10 000 per month to the daughter in respect of her maintenance requirements. She states that she can find no trace in his bank statements of the payments which he allegedly pays to the daughter, and her concern is that, if the husband does not make these payments, she will be forced to support the daughter from the cash maintenance intended for herself and the son.

73. The husband does not dispute the wife's allegation that the payments which he makes in respect of the daughter are not apparent from an analysis of his bank statements. This suggests two possibilities: either the payments are not in fact being made, or they are being funded from an undisclosed source. It is not necessary for present purposes to resolve this mystery.

74. Section 6 of the Divorce Act 70 of 1979 enjoins a court not to grant a decree of divorce until it is satisfied that satisfactory arrangements have been made with regard to the welfare of any minor or dependent child of the marriage. It therefore seems to me that a court dealing with an application in terms of Rule 43(1)(a) for maintenance *pendente lite* should also be satisfied that major children of the marriage who are still financially dependent on the spouses are properly provided for.

75. In my view courts should be alive to the vulnerable position of young adult dependants of parents going through a divorce. They may be majors in law, yet they still need the financial and emotional support of their parents. The parental conflict wrought by divorce can be profoundly stressful for young adult children, and it is particularly awkward for the adult child where the parents are at odds over the *quantum* of support for that child. Moreover, where one parent is recalcitrant, the power imbalance between parent and child makes it difficult for the child to access the necessary support. It is unimaginably difficult for a child to have to sue a parent for support - the emotional consequences are unthinkable.

76. In my view it is important to protect the dignity[49] and emotional well-being[50] of young adult dependants of divorcing parents by regulating the financial

---

[49] See s 9(1) of the Constitution, quoted above at n 29.

[50] See s 12(2) of the Constitution, which states that, *''Everyone has the right to bodily and psychological integrity…''.*

arrangements for their support in order to eliminate family conflict on this score and create stability and security for the dependent child.

77. It must be said in fairness that the husband has paid all expenses for both children without demur, and there is no reason to believe that he will not continue doing so. But given the high levels of acrimony between the parties and the vigour with which this application was opposed, I think that it would be prudent to pre-empt any possible future conflict surrounding the daughter's maintenance by regulating it by court order. There can, after all, be no possible prejudice to the husband if he is paying the daughter R 10 000 per month, as he says, and intends to carry on doing so.

COSTS

78. The bulk of the argument before me was directed at the question of the wife's entitlement to recover a contribution towards legal costs in arrears. As the wife has succeeded on what was essentially a point of law, I see no reason not to grant the wife the costs of the application on the basis of the usual rule that the costs follow the result. In my view the trial court will be in no better position to decide on the costs of this application, and I do not intend to burden it with the task.

79. I was also asked to determine the costs of an application for a postponement brought by the wife when the initial hearing date allocated by the Registrar of 23 May 2019 proved to be too early for the wife's legal team to deal with the

husband's answering affidavit. The difficulty appears to have arisen because the wife's attorneys, having agreed that the husband could file his answering affidavit a week late on 14 May 2019, proceeded to request the Registrar on 9 May 2019 to allocate a date for the hearing of the matter. It was anticipated that the Registrar would allocate the date of 30 May 2019, but in the event he set the matter down for hearing a week earlier.

80. The wife's request for a postponement was refused by the husband on the basis that he had incurred costs by briefing counsel. The wife was accordingly obliged to prepare a formal application for a postponement to be heard on 23 May 2019. For reasons which do not appear on the papers the postponement application was never argued, and I was informed from the bar that the parties utilised the day of 23 May for settlement talks (which, unfortunately, did not bear fruit).

81. Ms Buikman asks that the wife be awarded the costs of the postponement application, excluding the costs of the day on 23 May 2019. Mr Pincus asks that husband be awarded the wasted costs of the postponement application. I am not inclined to accede to either request.

82. In my view the wife should bear the costs of the postponement application since it was an error of judgment on the part of her attorneys, who applied for a date before the husband's answering affidavits had come in, which lead to the need for a postponement in the first place. That would not have happened if they had

but waited another six days to see whether the answering affidavit would require a reply.

83. On the other hand, the husband's opposition to the postponement application strikes me as unreasonable. It was clear that the matter could not run, and the sensible thing would have been to agree to the postponement and use the day for other necessary attendances or settlement discussions so as to avoid wasted costs - as was indeed done.

84. I therefore intend to make no order as to costs regarding the postponement application, which has the effect that each party must bear his or her own costs in that regard. That result strikes me as fair and just.

CONCLUSION

85. In all the circumstances, and in the light of the reasons aforesaid, I consider it appropriate to make an order in the following terms:

1. Pending the determination of the divorce action between the parties, the respondent shall maintain the applicant and the children born of the parties' marriage, ("the children" and individually "N" and "R"), as follows:

1.1 by payment to the applicant of an amount of **R 38 500** (thirty-eight thousand five hundred rands) per month in respect of the applicant's and N's expenses (including household and further

expenses she incurs when R visits her), with effect from **1 May 2019**, without deduction or set off on the first day of every month, by way of electronic funds transfer or debit order, into such bank account as the applicant may nominate from time to time;

1.2 by bearing the costs of retaining the applicant, N and R (should she return to the Republic of South Africa and require medical aid cover) as dependant members of the current medical aid scheme and by bearing the costs of all reasonably incurred medical expenses in private health care which are not covered by the medical aid scheme, including but not limited to, medical, dental, surgical, pharmaceutical (including levies and all required supplements) hospital, orthodontic and ophthalmic (including spectacles and contact lenses) expenses, any sums payable to a physiotherapist/chiropractor, psychiatrist, therapist (including psychotherapist, speech therapist or occupational therapist), practitioner of holistic medicine, and other medical expenses including vitamins and supplements which are not covered by the aforesaid medical scheme. The respondent shall reimburse the applicant for any such costs incurred by her or pay the relevant service provider within 5 days of receipt of the relevant invoice or receipt;

1.3 by allowing the applicant the continued use of her card in respect of his Investec Private Bank account, number […], to pay for her, N's

and R's medical expenses (excluding medical aid premiums) as contemplated in paragraph 1.2 above;

1.4 by bearing all the costs incurred in respect of the children's education, such costs to include, without limiting the generality of the aforegoing, all secondary and tertiary education fees, including school fees (in private education), additional tuition and tutor fees and the cost of all extra mural activities and holiday activities in which they may participate, as well as the costs of all books, stationery, uniforms, equipment (including computer hardware and software and printing consumables), attire relating to their education and the sporting and/or extra mural activities engaged in by them and accommodation and transport costs. The respondent shall reimburse the applicant for any such costs incurred by her or pay the relevant service provider within 5 days of receipt of the relevant invoice or receipt;

1.5 by payment of the following expenses in respect of the applicant's residence and related expenditure:

1.5.1 the monthly rental payable in respect of their accommodation and the annual increases in respect thereof; alternatively and in the event of the applicant being required to move from such accommodation, payment of the equivalent sum towards the monthly rental in respect of such

alternative accommodation as well as the rental deposit required in terms of the lease agreement;

1.5.2 in the event of the applicant and N being required to move to alternative accommodation, the costs of moving the household contents and her and the children's personal possessions to the alternative accommodation, including insurance payable in respect thereof;

1.5.3 homeowners and household insurance premiums and any excess.

1.6 by payment of the applicant's and the children's cell phone contracts and call costs;

1.7 by payment of the applicant's, N's and if relevant, R's gym membership contracts;

1.8 by payment of the applicant's South African Pharmaceutical Council membership fees;

1.9 by payment of the amount of **R 1 200** (one thousand two hundred rand) per month to N in respect of his allowance, without deduction or set off, on or before the first day of the month;

1.10 by payment of the amount of **R 10 000** (ten thousand rand) per month to R in respect of her allowance, without deduction or set off,

on or before the first day of the month;

1.11 by payment of the following costs in respect of the applicant's motor vehicle:

1.11.1 comprehensive vehicle insurance (including excess);

1.11.2 the costs of licensing, AA membership, maintenance, repairs and servicing, including replacement of tyres and wheel balancing when necessary and the costs of a hire car when the vehicle is being serviced or repaired.

2. The respondent shall pay the applicant **R 6 000** (six thousand rand) per month, with effect from **1 May 2019**, without deduction or set off, into such bank account as the applicant may nominate in writing, as a contribution towards the costs of annual holidays for the applicant and N.

3. The amounts referred to in paragraphs 1.1 and 2 above shall increase annually each year in accordance with the percentage increase in the headline inflation of the Consumer Price Index as published by Statistics South Africa during the preceding year, the first such increase to be effective as of 1 May 2020.

4. The respondent is directed on or before 30 September 2019 to pay a contribution of **R 750 000** (seven hundred and fifty thousand rands) towards the legal costs incurred by the applicant to date in the divorce action, such amount to be paid into the trust account of the applicant's

attorneys.

5. The respondent is ordered to pay the costs of this application on the scale as between party and party.

_____

D M DAVIS, AJ

Date of hearing:	29 July 2019
Appearance for the applicant:	Ms L Buikman SC Instructed by Catto Neethling Wiid Inc, Ms A Catto
Appearance for the respondent:	Mr B Pincus SC with Ms C Small Instructed by Barkers (Durban), Ms M Domingos c/o Edward Nathan Sonnenbergs, Mr A Hoeben