

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

CASE NO: 81094/18
22/5/2019

In the matter between:

K[....] N[....]

APPLICANT

And

P[....] M[....]

RESPONDENT

JUDGMENT

COLLIS J:

INTRODUCTION

1. This is an opposed Rule 43 application. The parties as alleged in the founding affidavit were married to each other traditionally on 18 February 2012. The marriage still subsists and they were married in community of property.
2. Two minor children were born into this marriage.
3. The issues to be determined can succinctly be tabulated as follows:

- 3.1 Whether the applicant is entitled to a contribution towards her legal costs as claimed by her in the amount of R 25 000.00.
 - 3.2 Whether the applicant is entitled to an order directing the respondent to make payment of maintenance in respect of each minor child in the amount of R 9 222.00 per month.
 - 3.3 Whether the Respondent should be ordered to re-imburse the applicant for 50% of the school fees and school related expenses paid by her during January 2019, in the amount of R 46 309.50.
4. Rule 43 is a self-contained rule. It regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. The application is initiated by a notice to the respondent which should accord with the prescribed form of the Rules of Court. This form must be accompanied by the applicant's affidavit and only two sets of affidavits are allowed.

CONTRIBUTION TO LEGAL COSTS

5. In as far as a contribution towards her legal costs is concerned the applicant in this regard requests a contribution in the amount of R 25 000.00 from the respondent. In her founding affidavit¹ she sets out that she will request this contribution towards her legal costs and that this amount will be sufficient and considered reasonable to cover her initial legal expenses. She furthermore asserts that the respondent is financially in a much better position than what she is and it therefore would be just and equitable if the respondent is ordered to pay this amount as a contribution.
6. The respondent in opposition sets out that the applicant has refused to engage with him meaningfully and instead has elected to litigate on an unwarranted and unnecessary scale and he should not be burdened with her legal costs. In addition to this, the respondent alleges that the applicant earns more than him and has refused to engage his attorneys in

order to resolve the impasse.²

7. A claim for a contribution towards costs is *sui generis* and is based on a duty of support spouses owe each other.³ In order for the applicant to succeed she carries the duty to show that she has insufficient means of her own.⁴ In the absence of either a statement of account having been filed by her such as in the present matter or a confirmatory affidavit by her attorney confirming the legal fees already spent by her, I am not persuaded that the applicant has discharged her *onus* to be awarded a contribution towards her legal costs to the extent which she now seeks.
8. That having been said, the sum to be contributed is determined by the court's view of the amount necessary for the applicant to put her case adequately before the court.⁵
9. Furthermore, it has been held that the court in exercising its discretion in determining the amount as a contribution towards the costs to be awarded this court was bound by the provisions of section 9(1) of our Constitution to guarantee both parties the rights to equality before the law and equal protection of the law.⁶
10. In the absence of a statement of account or a confirmatory affidavit filed by her attorney of record, I am inclined to award her only a contribution of R10 000.00 towards her legal costs.

MAINTENANCE TOWARDS MINOR CHILDREN

11. The applicant and the respondent are the proud parents of two minor children aged 12 and 7 years respectively. In paragraph 14 of the founding affidavit the applicant sets out in great details in a tabulated format the monthly expenses incurred by her in respect of the minor children. As per this tabulation, she makes provision for necessities such as accommodation and medical aid fund, but also claims luxuries which this court considers as unreasonable and unnecessary. By way of example the

¹ Founding Affidavit para 19 p 16

² Answering Affidavit para 62 p 47

³ Van Rippen v Van Rippen 1949 (4) SA 634 (C) at 637

⁴ Griesel v Griesel 1981(4) SA 270 (O) at 277A

⁵ Nicholson v Nicholson 1998 (1) SA 48 (W) at SOD

applicant sets out an amount of R 2500.00 per child for food, which is the same amount of food which she allocates herself as an adult. She further allocates a cost for a hair salon expense of R300 per child per month, which equally is considered to be unreasonable and excessive.

12. In addition to the above stated amounts the applicant has allocated R1 500 for outings and restaurants, R160 for pocket money and R250 for unforeseen expenses. None of these expenses, this court considers reasonable more so that no proof of these expenses have been annexed to the founding affidavit.
13. In response, the respondent in paragraph 44 replied, that he denied the expenses so listed are true and correct and that he is of the belief that the applicant exaggerates her maintenance requirements. In relation to her listed expenses he tenders maintenance payment of R 3000 per child per month *pendente lite*. He also tenders to retain the children on his medical aid and to pay a 50% contribution of the expenses which are not covered by the medical aid scheme. He further tenders that he will pay for Karate and Tennis lessons, but that he will pay such service providers directly. The same applies for the school transport, which he likewise offers to pay directly.
14. During the hearing, counsel for the respondent increased the maintenance offer to R5000 per child per month. This tender so made is considered substantially more than what this court would have awarded the applicant under the circumstances and as such this court will award the amount so tendered.

CLAIM RE-IMBURSEMENT FOR SCHOOL FEES

15. In her founding affidavit, more specifically paragraph 10 thereof, the applicant sets out that during January 2019 she paid an amount of R 92 619.00 in respect of the children's school fees after having enrolled them at Summerhill College private school in Midrand. In addition to this, she unilaterally paid an additional amount of R12 438.21 for stationary and

⁶ Carey v Carey 1999 (3) SA 615 (C) at 621B -D.

other school necessities. In respect of these amounts so paid, she seeks a 50% re-imbursement from the respondent.

16. In opposition the respondent in paragraph 39 sets out that the applicant has provided this court with no proof of how the amount of R12 438.21 was calculated. Furthermore, that she has failed to take this court into her confidence by providing proof of her income which she alleges is approximately R 40 000.00 per month.⁷
17. In addition to this, he sets out that on the 4 March 2019 he has paid an amount of R 84 960.00 directly to the school, albeit it that he was not consulted on their enrolment.
18. The applicant who seeks a re-imbursement alleges the school fees per term amount to R 23 480 in respect of Persia and R 19 000 in respect of Iman. Having regard to the listed amounts so stated, it is clear that the joint school fees amount of R 42 480 per term in respect of the children and in respect of this expense parents are held jointly and equally responsible. In the absence of both parents being consulted in the decision in respect of the choice of school being made jointly, fairness dictates that any unilateral decision made by one parent cannot be foisted upon another. In the present instance this is exactly what has transpired and clearly given the respective incomes of both parents the school fees are excessive and not sustainable in future.
19. Having regard to the fact that the school year has already commenced and progressed halfway through this year and considering the payment of R84 960 having been made by the respondent on 4 March 2019, this court will merely order the respondent to pay the applicant an amount of R 21 240 at the beginning of each of the remaining two terms.
20. In the result it therefore follows that the applicant has failed to proof her claim of being awarded a 50% re-imbursement in respect of the school fees which she has paid during the enrolment of the children at the beginning of the school year.

⁷ Founding affidavit para 16

ORDER

In the result the following order is made:

1. The primary residence of the parties' minor children is awarded to the applicant;
2. The Respondent is awarded specific parental right and responsibilities in respect of maintaining contact with the minor children to be exercised in the following manner:
 - 2.1 Rights of removal for every alternate weekend from Friday after school until Sunday at 17h00;
 - 2.2 Rights of removal for every alternate short school holiday and half of each long school holiday. Christmas should rotate between the parties;
 - 2.3 Rights of removal for half of the available time of each child's birthday;
 - 2.4 Rights of removal for every alternate Public Holiday, for Father's day and the Respondents' birthday. The applicant shall be entitled to keep the children with her for Mother's day and her birthday;
 - 2.5 The right to contact the minor children telephonically at all reasonable times.
3. The Respondent is ordered to pay half of the minor children's school fees (private school fees) including half any registration fees subject to the parties agreeing on the choice of school.
4. The respondent is ordered to pay maintenance to the applicant in respect of the minor children in the amount of R 5 000.00 per child per month, the first payment to be made on or before 1 June 2019 and thereafter on or before the 7th of every month. The Respondent is ordered to enrol both children on his medical aid.
5. The Respondent is further ordered to pay the applicant an amount of R 21 240 at the beginning of term 3 and 4 in respect of the school fees for the current academic school year 2019.
6. The Respondent is ordered to make a contribution towards the applicant's

legal costs in the amount of R 10 000-00 (Ten Thousand Rand only)
payable within ten (10) court days of date of judgment.

7. Costs in the action.

COLLIS J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Appearances:

Counsel the Applicant	: Adv. I. Vermaak-Hay
Attorney for the Applicant	: Arthur Channon Attorneys
Counsel for the Respondent	: Adv. R. Courtenay
Attorney for the Respondent	: Riva Lange Attorneys
Dates of Hearing	: 10 April 2019
Date of Judgment	: 22 May 2019