

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 9889/2012

DATE: 18 DECEMBER 2015

In the matter between:

[S.....] [F.....] [P.....]

Applicant

And

[S.....] [R.....] [P.....] (formerly [B.....]
[E.....]) **Respondent**

Case Summary:

Application in terms of Rule 43(6) for reduction of maintenance – Applicant resigning from employment and alleging no income – Applicant continuing lifestyle and paying substantial expenses – Applicant’s action in resigning of his own volition – cannot be regarded as a material change in circumstances for the purposes of Rule 43(6).

JUDGMENT

WEINER J

[1] The applicant herein launched an application in terms of Rule 43(6) of the Uniform Rules of Court. In such application the applicant sought a variation of the Rule 43 order granted on 10

August 2012 (“the 2012 order”). The applicant sought, *inter alia*, the deletion of prayer 1 of the 2012 order, which related to a cash amount being payable to the respondent in the amount of R25 000,00 per month in respect of maintenance for the respondent and the minor child, [M.....]. The 2012 order also obliged the applicant to make payment of certain direct expenses including the bond instalments on the former matrimonial home and various ancillary costs as well as educational expenses incurred in respect of [M.....] and his extramural activities.

[2] The applicant seeks to have the cash maintenance order deleted and certain of the direct expenses either deleted and/or reduced. For example he seeks an order that the water and electricity which he was obliged to pay be limited to R2 500,00 per month and that the landline be limited to R500,00 per month.

[3] The basis of the applicant’s application is that there has been a substantial change of circumstances. The applicant was, at the time of the 2012 order, employed as a mechanical engineer and executive director of Murray & Roberts Ltd (M&R). He states that with effect of 31 May 2015 he resigned from M&R.

[4] He contends that:

[4.1] He suffered a heart attack during 2004.

[4.2] In July 2008 he was diagnosed with lung cancer and received chemotherapy.

[4.3] In March 2010 he was again diagnosed with lung cancer which necessitated a lobotomy of the left lower half of his lung.

[4.4] In April 2015 he was informed that he was in remission.

[4.5] He experienced “*extremely stressful circumstances*” in his employment with M&R in early 2015 as a result of restructuring in M&R. He assessed that there was a high likelihood of him being retrenched.

[4.6] As a result of this stress and the stress imposed upon him by the divorce action he “*felt compelled to resign with effect from 31 May 2015*”.

[4.7] He has accordingly been unemployed since 31 May 2015.

[4.8] He secured a short-term contract with a company styled Emvelo (Pty) Ltd as a technical consultant from October 2015 to December 2015. He will receive a gross amount of R50 000,00 per month after which he will be unemployed again.

[5] The applicant states that he has converted two retirement annuities with Liberty Life and PPS. The fund value was approximately R320 000,00 and he received another lump sum payment of R106 000,00. Accordingly he contends that he did not earn any income for the months of June, July, August and September 2015 and from December 2015 he will be unemployed.

[6] Upon his resignation from M&R, he received an amount of approximately R580 000,00 which constituted four months’ salary. He has been utilising this amount to defray his expenses and obligations. He has liquidated his share portfolio in an amount of R239 000,00 and has transferred R200 000,00 to his Standard Bank Money Market account.

[7] The applicant sets out that his monthly expenses average approximately R175 000,00 per month which is made up of:

[7.1] The expenses in respect of the three children (who are now majors, but not self supporting) in an amount of approximately R60 000,00 per month.

[7.2] The amounts payable in terms of the Rule 43 order amounting to approximately R50 000,00 per month.

[7.3] His personal expenses amounting to approximately R65 000,00 per month.

[8] He contends that, in respect of his assets, he has realised what he can. He presently owns a 50% share in a property situated in Blue Hills which is an undeveloped stand; the other 50% is owned by Claire Malik (Malik), who, it is common cause, is now residing with the applicant as man and wife. There was apparently a bond on the Blue Hills property in the amount of R200 200,00 and the property is only worth R2 750,000.

[9] The applicant also submits that, at the time that the 2012 order was granted the respondent was unemployed. She is now employed as an accountant with Vision 2000 and must be earning between R15 000,00 to R25 000,00 per month. The respondent, in the divorce proceedings has stated that she will hope to earn approximately R5 000,00 per month. He states that even on this ground, he is entitled to a reduction in the maintenance payable by him.

[10] Another reason that the applicant seeks a reduction is that [M.....] is no longer residing at the former matrimonial home and therefore the respondent no longer has to provide food, groceries and other household requirements for him. The use of water and electricity and the fuel costs must have reduced; [M.....] receives an allowance from the applicant and he is on the applicant's medical aid scheme and he pays all excess medical expenses.

[11] The applicant also sets out that, at the time of the 2012 order, his personal expenses were approximately R36 000,00 per month and they are now R65 000,00 per month. He states that he is paying rent of R15 000,00 per month and half of the bond instalments on the Blue Hills property in the sum of R14 800,00 per month. He also has to make provision for [M.....'s] accommodation in Stellenbosch where he is at university. The applicant contends that the respondent has liquid assets and that she should dispose of these, which amount to approximately R560 000,00, according to the applicant.

[12] In terms of the order he seeks, the applicant still tenders to make payment of the majority, if not all, of the expenses incurred by the respondent and to continue to make all payments in respect of the children as well as continue to make payment in respect of his own expenses. I will deal with the illogicality in this argument below.

[13] The applicant has attached to his application some 23 pages of annexures dealing with his bank account, his expenses, his investments, etc.

[14] The respondent, in reply, states that she is only employed intermittently on an *ad hoc* basis by Corporate 2000 Imports CC as an invoice clerk. She denies that she is an accountant. She also states that the applicant has failed to take the court into his confidence in regard to his present financial position.

[15] The respondent alleges that since approximately 2011, the applicant has been involved in a relationship with Malik and they live together, as husband and wife, at [1.....] [B.....] [P.....] Road, [M.....]. In June 2014 the applicant and Malik caused a company (Complete Crane Hire (Pty) Ltd) (Complete Crane) to be registered and incorporated. The certificate from CCIPC confirms that the applicant is a director of such company.

[16] The applicant addressed a letter to Standard Bank (it is not possible from the letter to ascertain the date thereof but from the contents it appears that it must have been written in or about 2014). In such letter the applicant confirms the following to the bank:

[16.1] Application is being made for a home loan relating to the purchase of Stand [7.....], [B.....] [H.....] [E.....] Estate. He has been estranged from his wife (the respondent) for three years and he is in a relationship with Malik. Because he is involved in a divorce, the situation *“does limit taking advantage of opportunities one of which is the acquisition of a residence for Claire and I”*. They are currently renting and it would be *“difficult to further complicate the divorce process by acquiring property into my estate which will be under contest”*.

[16.2] He states further in the letter that he wishes to register the property in Claire’s name while he stands as surety and that when his divorce is finalised, he will be registered as a joint owner and take on the full debt liability.

[16.3] He has assisted Claire in starting her own business that provides crane brokerage and on-hire services. Such business has been operating for four months and has generated profits in excess of R800 000,00. In addition he has been allocated substantial M&R shares that mature over the next three years. The current valuation is in excess of R6 million.

[16.4] Attached to such letter is the profit and loss statement for Complete Crane Hire and Rigging as at 13 April 2015 and it shows a profit for the year of some R1,7 million.

[17] In addition, the respondent contends that when the applicant resigned from his employment at M&R he caused a company Saieva and Company (Pty) Ltd to be registered and incorporated. This occurred sometime in September 2015.

[18] The respondent also submits that the applicant, in the previous Rule 43 application, failed to inform the court that his gross income was approximately R216 000,00 per month; in addition he earned a bonus of R800 000,00 in September 2012 and a bonus of R412 000,00 in March 2012. In September 2012 he earned a further bonus of R800 000,00 and he received certain other benefits including a travel allowance and share options. The applicant's September 2014 salary advice reflected his net earnings in that month of R982 000,00 which included an annual performance bonus of R1,4 million and R55 000,00 which he earned from his share options.

[19] Since Marco has been enrolled at university, the applicant has deducted an amount of R1 800,00 from the maintenance which he pays the respondent.

[20] In dealing with the applicant's contention that her expenses must have reduced when [M.....] went to live in [S.....], the respondent states that [M.....] comes home regularly during the holidays and on some weekends and often brings friends with him. Her expenses have accordingly not reduced. She states that they have increased over the past years.

[21] In dealing with the applicant's resignation from his employment and his health the respondent states that the applicant is an athlete who has adopted a healthy lifestyle. In 2014 he took part in 'Ironman', a strength championship hosted by Standard Bank for athletes partaking in swimming, cycling and running events. He runs ultra distance marathons every year and intends doing the Comrades Marathon next year. He is also in remission from his lung cancer. The respondent criticises the applicant for resigning when, if he ran the risk of being retrenched, he would have received more from the company than he did when he resigned. He would have received a bonus in September 2015 of approximately R1,4 million. He must have received a portion of that up to May 2015. He was also entitled to certain shares which would have vested in November 2015 and August 2016. Some of these shares would still have vested on the date of

the applicant's resignation. He had received dividends in the past from shares even though they had not yet vested in him.

[22] The respondent states that she has a B.Com degree majoring in Industrial Psychology and Business Administration and is not an accountant. She attaches the schedule of payments that she has received which is substantially less than R5 000,00 a month. The respondent contends that she is employed from time to time as an invoice clerk on a temporary basis whenever the close corporation requires her services. She is paid R100.00 an hour. She has also attached a schedule listing entities and parties who have interviewed her in order to obtain employment, none of which have been successful.

[23] The respondent claims that the application should be dismissed with costs. Alternatively, that the maintenance order remains in force and that the respondent pay various other expenses. This, in effect, amounts to a counter-application for an increase in maintenance to which the applicant chose not to reply.

[24] In analysing the applicant's application, the applicant has argued that there has been a material change in circumstances and accordingly Rule 43(6) is applicable. The applicant must show not only that there has been a change in circumstances, but that same was not of his own volition. See Davis v Davis[\[1\]](#)

[25] The applicant chose to resign from his employment where he was earning a substantial income as well as very lucrative bonuses and the right to have shares vest in him during the course of 2015 (and thereafter). He apparently did this with no plan for the future. One is well aware of stressful situations at work but the applicant places nothing before this Court to show that his stress levels were such that he gave up all of the above, without any thought of how he was going to continue meeting his expenses. He alleges that he is unemployed and therefore he is no longer in receipt of any income.

[26] The applicant has not stated that he is unable to pay what he is presently paying for the applicant, the respondent and the children (other than the cash amount of approximately R23 000,00). He undertakes to continue making those payments as well as the payments for the children and as well as his own expenses. These amount to approximately R150 000 per month. He fails to disclose to the court how he intends to do this.

[27] The question must be asked; how is the applicant intending to meet his obligations unless he had ensured that, in giving up his employment, he would be earning sufficient to meet these expenses? As the respondent has pointed out, the applicant has apparently registered two companies. Although he states one is Malik's company, it is clear that he is a director thereof and that it is trading profitably.

[28] In addition it appears that the applicant has registered these companies and acquired a residential property for his life with Ms Malik. The registration of the companies must have been done with the purpose of earning an income there from sufficient to meet his monthly obligations.

[29] The applicant has contended that he has not had an opportunity to respond to the allegations which the respondent put up in regard to the registration of these companies and the property purchased. As stated above, in effect, the respondent launched a counter-application and the applicant was entitled to respond thereto. I asked the applicant's counsel whether the applicant wished to respond. This invitation was declined.

[30] I accordingly find that the applicant has failed to make out a case for a reduction in maintenance and that the version that he puts forward cannot be accepted for the reasons stated above.

[31] Insofar as the respondent's application amounts to a counter-application, this cannot succeed as the respondent has not made out a case in her application for a variation other than that her expenses may have changed or increased.

[32] In the premises the following order is made:

[32.1] The applicant's application in terms of Rule 43(6) is dismissed.

[32.2] The respondent's counter-application is dismissed.

[32.3] Costs are to be costs in the cause.

[32.4] The restrictions set out in Rules 43(7) and (8) are waived.

S WEINER

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Appearances

For the Applicant: A De Wet

Instructed by: Steve Merchak Attorneys

For the Respondent: S. Georgiou.

Instructed by: David G Sonderup Attorneys

Date of Hearing: 27 November 2015

Date of Order: 27 November 2015

Date of Judgment: 18 December 2015

[\[1\]](#) 1993(1)SA 293 SE at 295-296