REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 38460/2010

Not reportable

Not of interest to other judges

Revised.

4/2/2015

In the matter between

J, M **Applicant**

and

J B **Respondent**

JUDGMENT

MADIMA, AJ

Introduction

[1]. The Applicant is the Plaintiff in the main action for divorce scheduled to be heard on 6 February 2015 in the above Honourable Court. The Respondent is the Defendant in that action. This therefore makes this application urgent.

[2]. The parties were married in 2003 in Zimbabwe. It is common cause that their

marriage and its patrimonial consequences are governed in accordance with the laws of that country. The marriage still subsists. The parties have an 11 years old daughter.

[3]. It appears that the parties' marriage regime is, according to the laws of Zimbabwe, one out of community of property. This is significant as I allude to below.

[4]. The Applicant initiated divorce proceedings against the Respondent simultaneously with a Rule 43 application. On 17 November 2010 this Court granted the Applicant an interim maintenance order. This Order provided that the Respondent shall pay to the Applicant R6 000.00 per month as well as the sum of R4 000.00 as a first contribution towards her legal costs.

[5]. On 18 July 2011 the Respondent issued a Rule 43(6) application seeking a variation of the interim order of 17 November 2010, because according to him, a material change in circumstances had arisen as the Applicant had obtained gainful employment with an income of her own. This application was dismissed with costs.

[6]. The Respondent issued a second Rule 43(6) application. This however was settled by the parties before it reached Court. The terms of the settlement are not in dispute. The Applicant however claims that the various applications by the parties have depleted her finances and finds herself burdened with legal fees in the amount of more than R144 000.00.

[7]. It appears that the parties attempted on several occasions to agree to a settlement without much success. The matter was set down for a hearing on 19 October 2013. The trial could not proceed and the matter was referred to case management for 31 October 2013.

[8]. The matter was obviously not ripe for Court because of the lateness of the

holding of the pre-trial conference and other issues relating to discovery of documents.

[9]. On 24 October 2013 the Applicant launched another Rule 43(6) application in which she sought an increase in the monthly maintenance and an order that the Respondent make a contribution of R286 379.73 towards her legal costs.

[10]. On 4 February 2014 the Rule 43(6) application came before Honourable Wepener J It was not entertained. The Court ordered that the matter be referred to case management. This however never happened.

[11]. The Applicant's Rule 43(6) application was re-enrolled and argued on 24 March 2014. The Honourable Makume J ordered an increase of the maintenance payment for the minor daughter from R2 000.00 to R3 000.00. On refusing a contribution to the Applicant's further legal costs, the Court held that

> *"It is evident that the only reason why this matter has not become settled at this stage, is because the Applicant only wants a settlement on her own terms, namely that she and the minor child must remain in the matrimonial home, for which the Respondent must pay. I have no doubt that the Applicant is being unreasonable and difficult in insisting on retaining the common home without paying for it ....the issues in this matter are not complex and should have been settled Jong ago. ... I am not persuaded that the failure to either settle this matter or bring the matter to finality through trial is to be blamed on the Respondent. It is the Applicant herself who must shoulder the blame. Accordingly, I cannot accede to the request for a further contribution to legal costs."*

[12]. In the instant application, the Applicant seeks a contribution to her legal costs in respect of the action set down for 6 February 2015. The Applicant argues that the realization by the parties that their marriage is out of community of property had necessitated the amendment of pleadings as well as the

employment of an expert as far as the laws of Zimbabwe are concerned. I must state that the Respondent denies this. He offers as evidence the fact that he has transacted without the need of the Applicant's say so and permission. He submits for example that he purchased the house in which the Applicant lives in his own name.

[13]. The Applicant argued that section 7(1) of the Matrimonial Causes Act (Zimbabwe) (Act 5:13) empowers the Court hearing the divorce action to make an order for the *"division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other."* The above Act provides for other orders that the Court hearing the divorce would make. I do not get into that.

[14]. The Respondent raised a point in limine asserting that the Applicant is attempting to use this application as an appeal against the previous Order of Honourable Makume J.

[15]. There are numerous decisions of our Courts that deal with Rule 43(6) applications. [See *Muhlman v Muhlman 1984 (1) SA 413 (W), Du Plooy v Du Plooy 1953 (3) SA 848 (T), Dodo v Dodo 1990 (2) SA 77 W, Cary v Cary 1999 (3) 615 (C), Nicholson v Nicholson 1998 (1) SA (W).]* I again do not deal with any of these cases specifically with respect to these proceedings.

[16]. The Applicants argues that she will not be able to present her case adequately and on the same scale as the Respondent if not afforded a contribution of her legal costs.

[17]. Absent such a contribution to the Applicant's legal cost, the Applicant , so it was argued on her behalf, will have no choice but to accept the expert summary filed by the Respondent, the valuation of the immovable property as claimed by the Respondent, as well as what the Respondent claims is the value of his share options in Imara Capital Holdings Limited.

[18]. I do not believe that the trial Court will not be able to deal with the issues arising from the matrimonial laws of Zimbabwe. The expert evidence, in the event it is required will aid the Court to arrive at a fair outcome for the parties. The Applicant's claim that throughout her marriage she was under the impression that it was under the regime of community of property until very late is not honest. The Applicant is an accountant. She is obviously sophisticated. She wants this Court to believe that no bells rang when the Respondent was able to purchase a property without her involvement. It is at that stage or in earlier that she knew that hers was a marriage out of community of property.

[19]. It is trite that a Court may vary , in terms of Rule 43(6) its order for maintenance *pendente lite,* in the event of a material change of the personal circumstances of either party or child.

[20]. The Applicant's main contentions are that the Respondent's net earnings have increased from R66 754.74 to R82 491.00 whilst hers increased from R17 893.25 to R19 458.20 . This, according to the Applicant entitles her to her Rule 43(6) relief.

[21]. In the dismissed Rule 43(6) application of 2 April 2014, the Applicant sought a contribution of R286 379 .00. In the instant application the Applicant requests an amount of R290 000.00. The difference between the two amounts is about R4 000.00. Not significant for the trouble that Applicant has put herself through.

[22]. It is significant to note that the Respondent already supports the Applicant and their minor child in the amount of R29 150.00 per month. He pays for the mortgage bond of the property that Applicant and the minor child resides in. He pays for the Applicant's motor vehicle and its maintenance as well as insurance. I must say that he currently maintains the Applicant and their minor child very well.

[23]. There is therefore no incentive for the Applicant to conclude the divorce

expeditiously as she is aware that she will be worse off financially after the divorce is concluded. The parties as already stated above, are married out of community of property. The Applicant knows that she will have to vacate the property she lives in at the moment and downscale drastically if she is to live within her means. The Applicant will have to forgo a substantial part of the financial support she currently enjoys aftyer the divorce is finalised.

[24]. I am in full agreement with the Respondent's submissions that the Applicant, in launching this application seeks to usurp the functions of the trail Court.

[25]. I further agree completely with the finding of Honourable Makume J in the dismissed application of 2 April 2014. The so-called changed circumstances of the Respondent cannot be used by the Applicant to come before this Court and seek to appeal the Order of 2 April 2014 via the backdoor.

[26]. The Applicant's renewed Rule 43(6) application is an abuse of the process.

[27]. I shall not deal with the rest of the issues raised by both the Applicant and the Respondent. I leave that to the trial Court.

[28]. In the circumstances I am accordingly satisfied that the application should fail.

[29]. My order is as follows:

29.1. The Rule 43(6) application is dismissed.

29.2. The Applicant to pay the cost of the application .

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TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Adv E R Venter
Instructed by:	C Bekker & Associates
	011 781 3009

On behalf of the First Respondent: Adv Van der Berg

Instructed by:	Clarks Attorneys
	011 783 1066

Dates of Hearing:	2 February 2015
Date of Judgment:	4 February 2015