REPUBLIC OF SOUTH AFRICA

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

CASE NO: 12496/2019

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
REVISED.

SIGNATURE

11/02/2020
DATE

In the matter of:

S. V M (BORN M) **APPLICANT**

S. A **RESPONDENT**

JUDGMENT

Bam AJ

A. Introduction

1. This is an application in terms of Rule 43 of the Uniform Rules of this Court. Applicant, Ms S, who is the plaintiff in a pending divorce action, launched the present application during October 2019. The application is opposed. In her papers, applicant seeks an order authorizing maintenance for herself and three minor children, *pendente lite;* interim contact arrangements between the respondent (her husband) and the children pending finalization of the divorce action; and contribution towards her legal costs. Aside from the interim contact arrangements, applicant sets out the relief she requires from this court in the following terms: That respondent pay:

   (i) Maintenance for herself in the amount of R5 000 per month;

   (ii) Maintenance of R5 000 per child, per month. For three children, this amounts to R15 000;

   (iii) Monthly premiums to retain the applicant and the three children on the applicant's current medical scheme. The premiums at present are R4 218 per month;

(iv) The children's school fees at a private school totaling an amount of R10 630 per month (in respect of all three children);

(v) An amount of R9 008.58 in respect of arrears towards municipal rates and taxes. The amount is to be paid in two equal installments of R4 504.29;

(vi) Contribution towards the applicant's legal costs of R20 000, to be paid in four equal installments of R5 000; and finally

(vii) Payment of the costs of this application.

2. In furtherance of the application, applicant has annexed a schedule of expenses wherein she sets out her and the children's monthly expenses with a total amount of R53 575. 29. She adds that every month, she has a shortfall of R27 692.

3. The respondent, a practicing architect, recently took up a position as partner in a firm of architects in Johannesburg as of 1 April 2018. In his papers he accuses the applicant of making unwarranted and unreasonable demands, all with the intention of dragging out the divorce action. He avows in his opposing affidavit that he already pays monthly, a substantial amount which he quantifies as R26 318 from his salary of R36 182 towards the applicant's and the children's expenses. With the remainder, he pays his car installments, fuel, food and toiletries. He states that he resides with his parents.

4. Having read the record, it is pellucid that apart from the alleged default on the part of the respondent of omitting to pay some accounts or short paying some, as alleged, the respondent does pay a substantial amount of his salary towards his family's expenses. Ms Segal, counsel for the applicant, made the submission that applicant has come to court to have respondent discontinue paying for the expenses directly to the various service providers and instead have him pay money directly into her bank account. Applicant further accuses the respondent of picking and choosing the expenses he pays on a monthly basis. As a consequence, at any given month, applicant is in a state of panic as she does not know which service provider/s will threaten suspension of service. She, nonetheless, asks the court to order that respondent continue paying medical aid subscriptions and school fees directly to those service providers.

5. There are a number of disputes in the parties' submissions. Given the nature of this application[1], I only attempt to deal with those disputes which are necessary for the resolution of this application. It was based on the disputes of fact and other critical considerations, such as answering what is in the children's best interests, that I reserved judgment so as not to rush into making an order which might turn out to be inappropriate and cause harm to the family. [*See in this regard the representations of the Cape Law Society [2015] as submitted to the Law Society of South Africa in*

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[1] It is trite that an application in terms of Rule 43 must be short and to the point. The purpose of the rule is to deal with applications of this nature as inexpensively and expeditiously as possible. The rule achieves this object by (a) requiring the applicant to deliver a sworn statement in the nature of a declaration setting out the relief claimed and the grounds thereof (Rule 43(2)) and (b) requiring the respondent to deliver a sworn reply in the nature of a plea (Rule 43(3)).The filing of more than two sets of affidavits or supporting affidavits may constitute an abuse of the process if the court does not exercise its discretion in terms of Rule 43 (5)It is only in special circumstances that a departure from this rule will be countenanced. S v S (5039/2014) [2015] ZAFSHC 108 (18 June 2015) at para 3

connection with the Uniform Rules 43 (High Court) and Rule 58 (Magistrates' Court). A summary of which may be gleaned from the decision of TS v TS[2] .]

6. One must also bear in mind that although the rule 43 procedure is meant to provide interim relief to a party in need, several factors invariably come into play which tend to prolong finalization of the divorce action between the parties; thus, rendering what was meant to be interim relief to somewhat permanent status[3]. Furthermore, dealing with the matter perfunctorily without focusing on its specifics could have a detrimental effect on the young children.

Background

7. The parties were married in September 2007, out of community of property, with inclusion of the accrual system. As already adumbrated, the marriage produced three young children whose ages range between nine, seven and three. They reside with the applicant.

8. Applicant describes herself as an unemployed, and unemployable, housewife who graduated with a degree in architecture. She states that she is not registered with the professional body of South African Architects, neither has she written the necessary

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[2] (28917/2016) [2017] ZAGPJHC 244; 2018 (3) SA 572 (GJ) (7 August 2017), para 11 "4. An inappropriate[13] **Rule 43** order or a too onerous one or one that simply does not enable a party and the family to carry on with the proceedings in a reasonable manner, often puts an end to the matter or affects the matter inequitably with the result that settlements are reached or orders are granted which do not serve equity or justice. This has often caused parties to question the fairness of the process and the Rules and procedures available to them. Furthermore, it is difficult to meet the requirements of the application of a variation of a Rule 43 Court Order."

[3] See in this regard the informative comments regarding Rule 43 applications, how courts tend to approach them the unintended consequences on the interests of the childrenTS v TS note 2 supra from para 7

professional exams, owing to lack of professional experience. Upon the court's enquiries as to the age of the applicant, counsel submitted that she is 27. She states that. notwithstanding her efforts, she could not find employment in her line of qualification. She has also unsuccessfully applied to be a receptionist but claims she was not successful. The situation is compounded by the school hours of the children, coupled with their extra mural activities, making it difficult for her to engage in full time employment. Under the circumstances, concluded counsel, applicant could well be considered unemployable. I diligently enquired from counsel during the day of the hearing how applicant arrived at the conclusion that she is unemployable, a conclusion I do not take lightly. After all, the record suggests that applicant had worked briefly after attaining her degree and there is no suggestion that she suffers from any health challenges. Counsel suggested that applicant is 27 and has been a devoted housewife, married to a staunch Greek Orthodox husband who not only refused her permission to work, he refused having his children taken care of by a child minder. He would allow only the grandmothers from either side to look after the children. The respondent, in his papers, disputes applicant's contentions in this regard and states that applicant, on her own volition, stopped working before the birth of their first child. Outside of the parties' dispute on this narrow issue which I do not need to resolve, I found the conclusion that applicant is unemployable astonishing, to say the least. The only disadvantage is that applicant has not written the relevant professional exams and has not had much practical professional exposure. However, this is not a unique problem and many young graduates of various ages including of applicant's age, face the same challenges at various stages

of their lives. I accept that there are challenges in restarting one's life after having spent time at home as a homemaker; however, many parents in similar situations, often women, some at advanced ages and impelled by financial difficulties, do find a way to make it work. Whether they call upon the help of family or entrust their young children to reliable aftercare, they eventually find a harmonious balance for the needs of the family. I consider that applicant will, if she makes a concerted effort, find employment in order to generate income and support her family. I reject that she is unemployable.

9. Applicant states that when the marital relationship was still intact, the parties resided in their matrimonial home in Johannesburg until respondent's departure in March 2018. The immovable property itself is owned by the applicant's mother. The terms on which applicant and respondent were allowed use of the property were that they maintain the property and pay the attendant municipal charges, including rates and taxes. It is in this respect that applicant seeks the outstanding amount of R9008 which she states is arrear municipal charges. The respondent disputes liability for this amount. He avers that he has always paid the rates in full. He adds that, since his departure, applicant placed a tenant in the outbuilding on the property from which she collects income of about R6 500. It is as a result of the presence of the tenant that the water and electricity usage shot up. Applicant does not deny that she collects rentals from the tenant but avers that this helps to subsidize her and the children's expenses.

10. Applicant further accused the respondent of short paying medical aid by R455 and that he sometimes neglects to pay DSTV and other service providers. In so far as the children's extra mural activities are concerned, respondent is accused of neglecting to pay for the third daughter. He only pays for two children, according to the applicant.

11. It is against this background that I now turn to consider the issues between the parties which may be crystallized as follows: *(i)* maintenance for the applicant and the three children at the rate of R20 000 monthly; *(ii) contribution towards legal fees of R20 000*; *and (iii) interim contact arrangements*.

i) ***Maintenance for the applicant and the three minor children;***

12. I consider it trite that, when entertaining an application of this nature, reasonableness of the request and the means must be taken into account. The starting point then is to consider respondent's means.

13. As I read through the record, I could not help wondering how a family, supported from employment income of roughly R36 000 per month, could have expenses of around R53 500 per month. After all, the record suggests that the respondent is the sole bread winner and only generates income from employment. There is no submission that there are complex financial structures and arrangements in the way respondent makes his money.

14. The main contention advanced on behalf of the applicant in this regard is that respondent used to be paid a bonus twice a year when they were still living together. She mentioned that she found it odd that respondent's salary had not increased since his appointment as partner as of February 2018. The respondent, whilst confirming that he is partner in his firm, sought to qualify the nature of the bonus that is paid to him, and submitted supporting documents from his employer which confirm that he is a salaried partner. He is not entitled to, and has never been paid, any dividend. He has been paid a discretionary bonus in the past, the amount of which is determined solely by the employer, based on the financial performance of the entity and individual performance. Significantly, respondent does not receive a thirteenth cheque. It was at this point that Ms Smith, counsel for the respondent, handed in a supplementary affidavit and submitted that during November 2019, when the applicant's attorneys of record enquired about bonuses paid to the respondent, the respondent had no information as to whether he was going to be paid a bonus. As a consequence, he answered the question in the negative. It was only during December 2019 that he was informed that he was eligible and was subsequently paid an amount of R53 000 as a discretionary bonus. After paying tax, his total net pay for that month was R68 512, including his regular emoluments. From this amount, respondent paid the applicant an amount of R12 000 and utilized an amount of R20 000 towards his legal fees.

15. Ms Segal, counsel for the applicant, implored the court to factor in the bonuses when weighing what is fair, even going so far as suggesting that courts do factor in bonuses when considering means. But this submission cannot be correct. It depends

on the nature of the bonus paid. It could be that the respondent was paid a biannual bonus in the past, but economic climates do not remain static. Judging from public information, the built environment in South Africa is said to be one of the hardest hit in the current economic down turn. In respondent's circumstances, not only would it defy logic to regard a discretionary bonus as regular monthly emoluments, it would be unfair as respondent has no entitlement to a bonus. In addition, there is no evidence that the respondent is paid a thirteenth cheque. The matter simply boils down to the unassailable conclusion that respondent earns roughly R36 100 per month. It is this amount that will be used as the basis for what is reasonable and within his means.

16. It is common cause that when the parties resided together as a family unit, respondent's monthly income was utilized to fund the family's monthly expenses. In addition, applicant's parents made a substantial contribution to their lifestyle by funding expenses to the extent of R17 000 on a monthly basis. It is not clear from the applicant's papers whether the subsidy still continues; however, applicant states that her parents used to pay her an amount of R8 000. In addition, they paid for the household groceries of R4 000, household repairs and maintenance in the amount of R1 500, and medical expenses (occupational and physiotherapy for the children) in the amount of R3 500. The cash of R8 000 was used to pay additional food, groceries, toiletries and cosmetics and other expenses. On enquiring from the respective counsel as to why the respondent does not pay for groceries, counsel for the respondent submitted that the applicant's parents pay for groceries.

17. Applicant seeks maintenance of R5 000 per month for herself, and a further R15 000 for the three children, which brings the monthly cash amount sought to R20 000. She adds that respondent should be ordered to carry on paying medical aid contribution of R4218, and the children's school fees of R10630. The total amount sought from respondent is therefore about R34 600 (rounded off) which is still insufficient considering that the applicant and the children's expenses amount to R53 000. This is to be measured against respondent's monthly income of roughly R36 100.

18. I alluded earlier to a schedule attached to applicant's papers which sets out her monthly expenses, including those of the children. I see no need to reproduce the schedule in this judgment. The point is, in respect of each line item, there is a corresponding amount which the applicant has divided by the number four. For example, for rates, she lists the amount of R4 039 which she divides by the number four (the three children and herself). The quotient is then multiplied by three which gives the figure R3 029 which she marks as the minor children's amount. How one can apportion rates according to a person, including minor children, escapes me, but that is applicant's way of justifying the amounts she seeks against the respondent. She says nothing about the tenant's share in the rates. The allegation regarding the arrear municipal charges is vague. The respondent's bank statements demonstrate that he pays municipal charges on a monthly basis. Had it been a case of him having skipped a particular month, I have no doubt that the applicant would have named the exact month and year as grounds to substantiate the request. Accordingly, no amount will be allowed for arrear rates and taxes. Another example is that of monthly groceries, toiletries and household cleaning items, in respect of which she lists an

amount of R11 597. This figure is divided by four and an amount of R8698 is noted as the children's amount. The list goes on until applicant reaches the total of R53 575.29, of which about R36 000 accounts for the three children's monthly expenses.

19. Section 7 (2) of the Divorce Act[4] sets out what should be taken into account with regard to the maintenance of a spouse by the other. Although the criteria set therein refers specifically to divorce proceedings, I consider that there is no harm in adapting the criteria to proceedings in terms of Rule 43. The factors include, *inter alia*, '*the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, and any other factor which in the opinion of the court should be taken into account.*'

20. As I have mentioned, the family's income (the respondent's income), simply cannot support the lifestyle sought by the applicant. This is clear, otherwise there would have been no need for the applicant's parents to pay R17 000 per month towards their expenses. Consequently, there are some expenses which the applicant will have to consider cutting down. I may add that the applicant should also step up efforts to find employment. It might be that she will start at a low base, probably not in her line of training, but that will still assist with some of the family's maintenance requirements.

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[4] DIVORCE ACT 70 OF 1979

21. To conclude the point on maintenance required for the children and the applicant, there is evidence that the respondent already pays a substantial amount towards the family's expenses. That his means cannot meet all that the applicant demands simply suggests that applicant has a choice to either tone down the family's expenses drastically to a level commensurate with the family's income or begins looking at ways to generate income. An order then will be issued that respondent pay a reasonable amount towards the applicant's and the children's expenses. The respondent will further be ordered to continue paying school fees and medical aid contributions directly to the providers.

ii) Contribution of R20 000 towards legal fees;

22. In her request for contribution towards legal fees, applicant provided no fee estimates nor invoice. She states in her papers: '*The respondent is in a far superior financial position to that which I am in, I have no employment and no assets or savings with which to fund my legal costs. The respondent has a stable employment, receives bonuses and has a provident fund. I require an initial contribution towards my legal costs in the same of R20 000.*' In response, respondent accused the applicant of being unreasonable in her approach to the divorce citing, *inter alia*, that applicant had launched divorce proceedings in 2018 and then withdrew the action. Ms Smith implored the court to refuse any contribution towards costs, stating there is no justification for the amount sought. She referred the court to a decision of this

division in *LP-R v LJR*[5] in which the court denied contribution towards legal costs. Whilst taking into account the reasoning of the court in that case, as well as in several others[6], I refer to *T v T* where the court, referring to *Rippen v van Rippen*, 1949 (4) SA 634 (C) at p. 638, commented as follows on the question of contribution towards costs:

> "The quantum which an applicant for a contribution towards costs should be given is something which has to be determined in the discretion of the Court. In the exercise of that discretion, 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 particular issues involved in the pending litigation, the wife must be enabled to present her case adequately before the Court."
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> '[19] In Nicholson v Nicholson 1998 (1) SA 48 (W) at 50C - G Wunsh J said the following:
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> "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."

23. Aside from the fact that there is no case made by the applicant for legal costs, this is a relatively simple case considering what is in issue. Shorn of verbiage, and what I conclude are incautious demands made by the applicant, she wants to be paid

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[5] 2017 JDR 1252 (GP)

[6] see for example, MCE v JE (13495/2011) [2011] ZAGPPHC 193 (14 September 2011); ACC v ALC (27058/2012) [2012] ZAGPPHC 193 (24 August 2012); AF v MF (6664/19) [2019] ZAWCHC 111; 2019 (6) SA 422 (WCC) (28 August 2019)

money so she can control her own life. I formed this view after carefully reading the papers. I have already noted that the respondent's bank account and his pay slips do not characterise him as someone who is shying away from maintaining his family. In addition to what the respondent pays on a monthly basis, applicant seeks the whole of respondent's monthly income. It is on this basis that I am inclined to refuse applicant's request for contribution towards legal costs.

24. At this point I am compelled to note my observation before I consider the issue of access arrangements. The entire theme coming across from reading applicant's papers is that the only outcome she will accept is where everything she desires is acceptable; anything else is rejected. It is this all-or-nothing attitude that must have stood in the way of resolving what would otherwise have been a relatively simple question of trading off direct cash into applicant's bank account *vis a vis* payment to service providers. The entire pursuit of respondent, including the present application, is borne out of applicant's push for a lifestyle that the respondent cannot afford. He could not afford it when they were still living as a family, and still cannot afford it now as they are separated. Quite simply, the applicant has painted herself as an unreasonable person.

iii) interim contact arrangements

25. On the day of the hearing, a draft order was handed into court in which interim contact arrangements are proposed by the parties. A further clause has been inserted in the draft order in manuscript and it reads: '*That pending the report and*

recommendations of Mrs Marilyn Davis-Shulman, the respondent shall exercise interim contact with the minor children as follows:

> *'4.2 every weekend on either Saturday or Sunday, on an alternating basis, for a period of 6 hours, from 10h00 to 16h00. The respondent shall be entitled to remove the children from [the applicant's] to exercise contact.'*

17. I have read the papers and noted the disagreements between the parties which I do not intend to canvass in this judgement. It seems to me that the parties should cool down their emotions and allow the children's best interests to come first. Notwithstanding the issues now raised by the applicant, there is no history of the respondent conducting himself as someone who lacks judgment towards his children to the point where he must be completely denied removing the children on weekends from applicant's home, provided that such access takes into account the children's routine and reasonable needs for rest and preparation for school. The arrangements are fully detailed in the draft order and shall be made part of the order I intend to issue.

B. Conclusion

18. In order to do justice and be fair to both parties, I conclude that the respondent must be called upon to pay maintenance for the applicant in the amount of R3800 per month *pendente lite*. In addition, respondent will be ordered to pay maintenance at

the rate of R2500 per month per child whilst continuing to pay medical aid contributions and school fees directly to the service providers.

C. Order

19. (i) The application by the applicant partially succeeds.

(ii) The respondent is hereby ordered to pay maintenance for the applicant, in the amount of R3800 per month and a further amount of R2500 per child per month, *pendente lite,* by way of direct payment into applicant's chosen bank account. The first amount is to be paid within FIVE (5) days from date of this order and subsequent amounts on the first day of each month.

(iii) Respondent is further ordered to continue paying contributions to retain the applicant and the three children on the applicant's medical aid. In addition, respondent shall pay private school fees for the three children. Both amounts are to be paid directly to the service providers.

(iv) In addition, it is further ordered that:

(a) Applicant and respondent shall continue to hold full parental responsibilities and rights in respect of the minor children as provided for in Section 18 (2) (a) to (d) of the Children's Act 38 of 2005;

(b) The minor children's primary residence shall remain with the applicant.

(c) The respondent shall have reasonable and age appropriate rights of contact to the minor children as recommended by Clinical Psychologist, Mrs Marilyn Davis-Shulman.

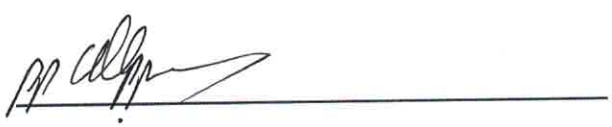
(d) Pending the report and recommendation of Mrs Marilyn Davis- Shulman, the respondent shall exercise interim contact with the minor children as follows:

(i) Daily telephonic contact;

(ii) On Monday and on Wednesday, the respondent shall take the children to school;

(ii) Every weekend on either Saturday or Sunday, on an alternating basis, for a period of 6 hours, from 10h00 to 16h00, the respondent shall be entitled to remove the children from the applicant's home to exercise contact;

(e) The costs of this application will stand over for determination in the final divorce action.



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ACTING JUDGE OF THE HIGH COURT,