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**REPORTABLE**

**IN THE NORTH GAUTENG HIGH COURT,  
PRETORIA [REPUBLIC OF SOUTH AFRICA]**

**Case no: 52079/12**

**DATE:01/11/2012**

**In the matter between:**

**B, A**

**Plaintiff**

**and**

**B, P**

**Defendant**

**JUDGEMENT**

**LEGODIJ.**

Judgment reserved: 16/10/2012

Judgment handed down:

[1] What is envisaged in Rule 43 of the uniform Rules has become the subject of contention before me.

[2] The issue is whether the relief sought by the applicant in paragraph 2 of her prayers is competent under Rule 43? The question was raised by the court in the course of argument and parties were requested to file written heads of argument in addition to their oral submissions that were made on the 16 October 2012.

[3] The relief sought in paragraph 2 of the applicant's prayers is stated as follows:

"2. The respondent shall pay maintenance as follows;

2.1 By continued payment of the following expenses:

2.1.1 The bond over the common home.

2.1.2 Municipal relief and taxes and utilities levies of the common home.

2.1.3 School fees in her current school and all related schooling expenses.

2.1.4 Extra mural activities of the minor child inclusive of the gear, clothing and other related expenses in respect thereof.

2.1.5 Short term household insurance, together with house owners insurance and All Risk Insurance together with the applicant's Discovery Policy nr. 5100016089.

2.1.6 House security premiums (ADT)

2.1.7 DSTV subscription and TV licence.

2.1.8 Maintenance and up keep of common home.

2.1.9 Maid salary, UIF and bonus.

2.1.10 Gardener's salary.

2.1.11 The applicant's and minor child's monthly cell phone accounts.

2.1.12 Undisturbed use and all maintenance costs together with fuel of the Mercedes Benz CDI with registration number "..... GP"

2.1.13 By retaining the applicant and minor child as dependants on his current medical aid with the same benefits and paying all reasonable medical expenses, including but not limited to all expenses which are not covered by the Medical aid"

[4] 'By continued payment of the following expenses', in 2.1 of the quotation above, is premised from the following set of facts:

[4.1] that the respondent has repeatedly intimidated and threatened her, for example, that he threatened to cut the minor child and the applicant off from all financial resources,

[4.2] that on various occasions the applicant had to hand over her credit card to the respondent as the applicant failed to ask the respondent's permission for even small and necessary day to day grocery purchases 24 hours ahead of purchase,

[4.3] that the respondent threatened to cut off both the minor child's and the respondent's cell phones and that both accounts are in the respondent's name,

[4.4] that the respondent threatens to deprive the applicant the use of the vehicle that she is currently driving and that he has threatened to keep the applicant stranded,

[4.5] that on various occasions the applicant had to stay at home away from work as the respondent refused her to use the car,

[4.6] that the respondent had threatened to report the car as stolen to the SAPS and have the applicant arrested should she drive the vehicle without his prior consent, and

[4.7] that most recently the respondent instructed the applicant to return to the common bedroom failing which, he will finally cut the applicant and the minor child off from all financial

resources.

[5] The applicant and respondent are husband and wife. They live in the same common home although not sharing same bedroom. They have only one minor child, a girl doing grade 11 at Abbots College Silver Lakes.

[6] Of relevance, Rule 43 (1) provides that the rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- (a) Maintenance pendente lite.
- (b) A contribution towards the costs of a pending matrimonial action.
- (c) Interim custody of any child.
- (d) Interim access to any child.

[7] It is clear from the provisions of the sub-rule (1) (a) that it is concerned with payment of maintenance pending finalisation of matrimonial proceedings.

[8] The object as I see it; is that those who are entitled from claiming maintenance should find it easy, inexpensive and expeditious to get maintenance without being burdened with long protracted matrimonial disputes.

[9] It is a sub-rule that serves to ensure that children and the estranged spouses who are dependent on the other for support, are not deprived of such a support due to the fact that divorce or matrimonial proceedings are still pending.

[10] It is not an interdict that is envisaged in the sub-rule and it should not serve as such. The sub-rule was never meant to settle the scores or to resolve issues which may not even form

the subject of divorce or matrimonial proceedings.

[11] Inasmuch as a suggestion could have been made in the matter of *Gunston v Gunston* 1976 (3) SA 179(W) that a wife or a husband could be entitled to bring an action to restrain the other spouse from disposing of assets pendente lite under sub-rule (1)(a), I cannot agree with this interpretation.

[12] A claim of non-disposal of property forming part of the joint estate cannot be equated to a claim for payment of maintenance pendente lite as envisaged in the sub-rule. It will be an interdict claim that can be sought to protect disposal of such a property, but that cannot in my view, be claimed under Rule 43.

[13] 'By continued payment of the expenses' referred to in 2.1 of the quotation under paragraph 4 above, is in my view, a disguised interdict, but it is not a claim for maintenance pendente lite.

[14] Guided by the nature of the facts set out in paragraph 4 of this judgment, as a cause of the action for the relief sought, it is clear that the applicant is not asking for maintenance pendente lite, but rather a declaratory order that the respondent be found to be obliged to continue to provide maintenance as he is doing.

[15] Put differently, the applicant indirectly wants the respondent to be interdicted from deviating to provide maintenance as he has been doing. The relief sought is not due to failure to maintain, but rather due to threats of possible deviation from the pattern of maintenance to which the applicant and her daughter are accustomed to. This is not sanctioned under Rule 43. Therefore, it cannot be a competent relief under Rule 43.

[16] One needs to be careful that rule 43 is not abused. As I understood counsel for the applicant, it was necessary to bring the application and relief sought under Rule 43, as the applicant did not want to react or take legal steps only when the respondent had acted in terms of his threats. The suggestion around this was that it would be too expensive for the applicant, and secondly that it would cause a delay to the prejudice of the applicant and the minor child.

[17] Dealing with the threats, the applicant seems to have been particularly worried due to the fact that there were threats to cut off the cell phone payments, to stop paying for the credit card or cards of the applicant and to cut off the facility to use petrol card.

[18] In paragraph 10.8 of the answering affidavit, the respondent amongst others stated as follows:

"I have constantly quarrelled with the applicant in the past and recently due to her spendthrift manner and her refusal to cut down her excessive spending in view of my worsened financial position. The applicant has not been cut off from any financial resources. On two occasions, I did take possession of the credit card as the applicant had simply excessively abused that facility. She did however receive it back the next morning. I was simply trying to manage my poor financial position under circumstances where the applicant was wasteful, financially irresponsible and ignoring the reality of our financial situation. I tried to get the applicant to live within our means, but she did not wish to do so. I did request of the applicant to consult me before spending unnecessarily and excessively on the credit card account. The credit card was not taken (and later returned) due to the applicant not having asked my permission as is alleged by her"

[19] The cell phones and the credit cards when used must be used responsibly. They are an easy use of facilities. It is nice and good to use them. However, if not carefully and responsibly used, they can turn into a huge liability, so huge that they can turn into a financial disaster.

[20] The respondent as a provider for all these facilities should be entitled to ensure that there is control in the usage of the facilities. The fact that he tried all tricks to exert pressure on the applicant to ensure responsibility and care in the usage of the cell phone accounts, the credit and petrol cards cannot be the basis for the institution of Rule 43 proceedings and to claim the relief as sought by the applicant.

[21] By the way, in terms of paragraph 3.1 of the applicant's prayers, she claims for R40 000 per month for herself and the minor child. This is said to be for maintenance. It transpired during argument that this is a somewhat an alternative to prayer 2 insofar as it might be having a bearing on the maintenance, including household things.

[22] Further in the course of argument counsel for the applicant indicated that in the event the credit cards are not used by her, she should then be paid R10 000 and not R40 000. Later the submission around R10 000 was withdrawn on the suggestion that it was not the correct instruction.

Then a sum of about R20 000 was mentioned to replace the credit card or cards.

[23] What remains however is that the respondent never stopped from maintaining as he has been doing all along. In his own words as stated in paragraph 4 of the answering affidavit:

'4.The applicant, our daughter and myself continue to occupy the matrimonial home and it is obvious that the applicant intends to remain in occupation thereof with me pendente lite. I am presently paying for most of our household expenses and necessarily. It is most opportune and unreasonable of the applicant to try and secure an order as she presently does and she is not entitled thereto. The applicant and our daughter are properly maintained, as they have been in the past. An order is not necessary in view of the existing status quo'

[24] In the circumstances of the case, I cannot agree more with the respondent. Therefore even if I was to be wrong with regard to the incompetency of the relief sought under paragraph 2 of the applicant's prayers, I am not satisfied that the applicant is entitled to anything more than what the respondent has provided in the past and continues to provide. Therefore, there is no need to make an order as prayed for.

[25] Counsel for the applicant also sought to suggest that to wait until the respondent had acted in terms of his threats, would be too expensive for the applicant and prejudicial in the sense that there could be a delay. Any carrying out of threats, if it amounts to failure to pay maintenance, should entitle the applicant to bring Rule 43 application and if circumstances so justify on an urgent basis. Less costs of litigation envisaged under Rule 43 would still be applicable.

[26] Whilst still on the issue of costs of litigation, it was suggested that for the applicant to resort to other legislative frameworks, like Domestic Violence Act's provisions, would be too expensive for the applicant. I do not think so.

[27] Let me just start by saying, the applicant if she really felt so strong about the threats, she



could have resorted to the provisions of Domestic Violence Act 116 of 1998.

[28] Remember, in terms of section (2)(d) of the Act, domestic violence in relation to 'economic abuse', is described as consisting of unreasonable withholding of economical or financial resources from a complainant who is legally entitled thereto or which the complainant requires of necessity including the withholding of household necessities from the complainant or refusal to pay mortgage bond repayments or rent in respect of the shared residence or the unreasonable disposal of household effects or other property in which the complainant has an interest.

[29] The laying of complaint of domestic violence in terms of the Act requires to be acted upon immediately. The complainant is assisted at no costs irrespective whether a complaint is made at court or at a police station.

[30] In court, the complainant is assisted by the Magistrate who assists in the presentation of the complainant's case. It is a very speedy and cheap process. Sometimes an interim order is given there and then before the respondent could be heard or served with papers.

[31] As regards contribution towards costs, the applicant is claiming R30 000. I am not satisfied that the applicant has made a case in this regard. Therefore, R2000.00 contribution towards costs should be reasonable for now.

[32] Finally, the applicant and respondent are still staying together at the same common home with the minor child. I do not think I need to worry at this stage to make an order as to where and with whom the minor child should stay. In any event, she is 17 years old and I

have not been told about her own choice regarding prayers 1.1 and 1.2 of the applicant's prayers.

[33] Consequently an order is hereby made as follows:

33.1 A relief as sought in paragraph 2 of the applicant's prayers is hereby dismissed in its entirety.

33.2 A relief as sought in paragraph 3.1 of the applicant's prayers is also dismissed.

33.3 The respondent is hereby ordered to make contribution towards costs of the applicant in the divorce proceedings in the amount of R2000.00.

33.4 Costs of the present application to be determined in the divorce proceedings.

M.F. LEGODI

JUDGE OF THE HIGH COURT

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