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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO :92910/2016

11/1/2018

In the matter between:

A M C P

Applicant

and

I M P

Respondent

Date of Hearing : 09 January 2018

Date of Judgment : 11 January 2018

JUDGMENT

MANAMELA, AJ

Introduction

[1] On 19 July 2017, Kubushi J of this Court granted an order (the Rule 43 Order), under the same case number as appearing above, on application in terms of Rule 43 of the Uniform Rules of this Court (the Rule 43 Application). The applicant in the Rule 43 Application is applicant in the current application. The Rule 43 Order contains a raft of orders, to do, in main, with parental rights and responsibilities; primary care and residence, and contacts rights, in respect of minor child, as well as, maintenance for the minor child and the respondent.

[2] The applicant seeks variation of the Rule 43 Order in terms of Uniform Rule 43(6),¹ on the basis that, there has been a material change in his and the respondent's circumstances. The application is opposed by the respondent and the respondent included a counter application on the basis that, there has been indeed a material change in her and the minor child's circumstances.

[3] The application came before the Court, as an unopposed motion, on Tuesday, 09 January 2018. Mr E Janse van Rensburg appeared for the applicant and Ms NM Krige for the respondent at the hearing. This judgment was briefly reserved until today, Thursday, 11 January 2018, to allow sufficient reflection on the issues and for the order to be given to be accompanied by brief reasons. However, I will not delve deeper into the issues, due to the pending divorce action and other proceedings between the parties in this judgment. But, I deem it necessary to narrate the material part of the background issues of the matter (to the extent that they are common cause between the parties), after the preliminary points raised at the hearing or in the papers.

Points in limine

[4] The respondent raised, in her answering affidavit, three points *in limine* as follows: firstly, that the applicant has not made out a case for variation of the Rule 43 Order; secondly, that the application is unreasonably voluminous, as it contains 44 pages of annexures, 95% which is completely irrelevant to the application, and thirdly, that the applicant is utilising the Rule 43(6) process to serve as an appeal for a

¹ Rule 43(6) reads in the material part: "The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child..."

reconsideration of the facts presented in the Rule 43 Application, and consequently, disposed of in terms of the Rule 43 Order.

[5] Argument by counsel on the abovementioned preliminary points was contemporaneous with argument or submissions on the merits. There was also, in this regard, submissions to the effect that the applicant had already launched another application in terms of Uniform Rule 42 for "rectification" of aspects of the Rule 43 Order, as according to the applicant the Rule 43 Order "contains certain errors that should be rectified". The Rule 42 application is also opposed by the respondent and therefore pending before the Court.

[6] I considered the preliminary points not requiring immediate ruling before attention was to be given to the merits. I chose to deal with the matter in wholesale manner, although some of my comments made at the hearing, in interactions with counsel, may have been telling regarding the direction of my potential rulings on the issues. I will deal with the issues at, what I consider, opportune moments below.

Relevant brief background

[7] The parties were married to each other on 01 March 2001 out of community of property. As stated above, there is a pending divorce action before this Court, issued under different a case number 42916/2016 as the one cited above.² The action is oppose or defended by the respondent.

[8] One minor child was born out of the marriage between the parties. The respondent and the minor child left the common household at the end of August 2017 and are currently renting a house. In terms of the Rule 43 Order the respondent has the primary care and residence of the minor child, with the applicant allowed reasonable exercise of rights of contact, whilst both parties retain full parental rights and responsibilities in respect of the minor child.

[9] It is said that when the parties met, the respondent was involved in a business of her own, offering recruitment services. She went into another business after the former was closed down, which also eventually ceased and she is currently unemployed. On

² There was a dispute or confusion regarding the case numbers to the Rule 43 Order and this application, but ultimately counsel for the applicant pointed out that both ought to share the same case number as

the other hand, the applicant manages and owns a security services business, under the name Global - Glad Developers CC, trading as Axon Security (Axon). The applicant shares his residential premises with Axon's business operations.

[10] In April 2017, three months before the Rule 43 Order (on 19 July 2017) and about four months (around end of August 2017) before the respondent and minor child vacated the parties' matrimonial home, the applicant launched the Rule 43 Application.

[11] The Rule 43 Order was granted on 19 July 2017. On 28 September 2017, the applicant deposed to the affidavit in support of the current application. This was barely over two months after the Rule 43 Order was granted and a month after the respondent (and minor child) left the joint household. I hasten to point out that, the timing of this application and the other dates aforementioned would have a bearing on the outcome of the relief sought by the applicant.

Applicant's alleged material change in circumstances

[12] The applicant states that when the Rule 43 Application was brought, he was normally paying for all the respondent's expenses, including groceries and therefore the respondent did not have any need for maintenance. The corollary, the applicant suggests, is that his financial situation was not addressed for purposes of the Rule 43 Order. Kubushi J agreed that the respondent did not actually need maintenance, the applicant, ably assisted by his counsel, submits. This is obviously disputed by the respondent. But, I find it inconceivable that the Court would have held as suggested and still granted the Rule 43 Order.

[13] Regarding the alleged material change in circumstances, the applicant's submissions can be summarised as follows. Axon experienced or is experiencing financial problems, which has led to a steady decline in its income and the business has actually lost a few contracts in the last few months to a year. Its gross income fell from approximately R5.5 million to less than R4.5 million, and thereby resulting in a loss of about R1 million per month over the past year (i.e. as at 28 September 2017, being the date of the founding affidavit). This has had a concomitant effect on the applicant's

income from the business of Axon, which comprises his R100 000.00 monthly salary and (as counsel for the applicant submitted at the hearing) benefits payable by Axon to the applicant.

[14] In motivation of both the decline in the applicant's income and deterioration of Axon's financial situation, the applicant attached Axon's bank statements for the months of April to July 2017, to his papers. Conspicuous by their absence are the applicant's personal bank statements, which, in my view, points to the absence of full disclosure (of vital financial information on the part of the applicant), inherent in proceedings relating to maintenance.³ The applicant did include, however, his salary advices for the months of April to July 2017, which confirm his gross income of R100 000.00 and net income of around R66 000.00, after statutory and other deductions, have been made. Evidently, the salary advices and Axon's statements are for the period when the Rule 43 Order was granted, save for a few days thereafter towards the end of July 2017. Therefore, all this information was available at the time the Rule 43 Order was made and nothing material differs in both applications, in this regard. The inclusion of the irrelevant or outdated bank statements unnecessarily added to the volume of the papers and consequently the costs or expenses of the matter.⁴ This is impermissible in terms of Rule 43 and the respondent's complaint was justified in this regard and the Court shall ameliorate the situation through an appropriate costs order.

[15] The question to be considered is whether the decline in the financial situation of the business of Axon may serve as a material change in the financial circumstances of the applicant. The applicant submits that this is so, as he derives his only income from the business. I agree that this may well be so, but the applicant has failed to establish this fact. During the hearing, I incessantly enquired from counsel for the applicant as to why the decline in the income of the business would automatically and immediately represent a decline in the income of the applicant. I do not remember getting a satisfactory answer, save for something along the following lines: the decline in the income of the business, as the sole source of the income of the applicant, represents the decline or deterioration in income of applicant or has an adverse effect on the

³See *Buch v Buch* 1967 (3) SA 83 (T).

⁴See *Andrade v Andrade* 1982 (4) SA 854 (O); *Visser v Visser* 1992 (4) SA 530 (SE).

applicant's financial position. Yes, the decline in income of the business may lead to the inability of the business to afford payment of applicant's emoluments, just as it would possibly lead to the inability to pay other debts of the business, as and when they become due. This would ordinarily require rationalisation or adjustment of the financial obligations of the business, but not exclusively of the applicant's income. In other words, such a decline would have a bearing on many relationships and necessarily the applicant's alone. Such rationalisation or adjustment may require of applicant (wearing his proverbial hat, as a manager or member of Axon, and dictated by his rational business acumen) to make the necessary cuts in the expenditure of the business. But, there is nothing in the current application to confirm that what was paid to the applicant before the Rule 43 Order, be it by way of salary or benefits, has no longer been paid or met by Axon, after the grating 9f the Rule 43 Order.

[16] The applicant also submitted that the fact that the respondent has moved from the common household and is now in a position to supply "us" (ostensibly the applicant an this Court), with the current and true financial position to enable the Court to determine the nature and extent of maintenance required, represent a material change in circumstances. This may well be so, but the applicant did not proffer any shred of evidence in his founding affidavit as to what those changes are. This Court grants orders similar to the Rule 43 Order on a basis in which amounts based on estimates are used. It would be impossible to dispense justice if any party involved in such matters would hardly a month thereafter after app the Court for variation of the particular order because he or she thinks there has been a material change in circumstances, without being able to tell the Court the nature and extent of the alleged change, which has to be material. It beckons such party to fathom (and consequently establish) what the actual changes are, before embarking on expensive litigation. Nothing prevented the applicant in this matter from firstly trying to establish from the applicant as to what changes there were after her move from the common house before instituting an application with the hope that the respondent will oppose and divulge such changes in her opposing affidavit. It ought to be borne in mind that, the applicant has alleged luxurious lifestyle on the part of the respondent and by extension the minor child, but has failed to establish such. Effectively, the applicant has made a failed attempt at an impermissible

appeal or rehearing of the Rule 43 Application. This too justifies the respondent's preliminary objection and shall be visited upon with an appropriate costs order.

[17] Although, the application alludes to change in personal circumstances regarding the primary residence of the minor child, there is nothing suggesting or establishing that the contact regiment set out in the Rule 43 Order ought to be tinkered with. Also, nothing forceful, if anything, came from counsel's oral submissions in this regard. Therefore, no need for variation is found to have been established and consequently none will be ordered. Besides, I consider it logical that, the Rule 43 Order was made in anticipation of the moving out of the common household by the minor child and the respondent.

[18] , Therefore, I find that the applicant has failed to establish that there has been material change in circumstances warranting interference with the Rule 43 Order. In my view, that the application was clearly ill-conceived and constitutes abuse of the process of this Court,⁵ is manifested by the timing thereof, as well as, material contained in the application. As stated above, the applicant deposed to the founding affidavit on 28 September 2017, about a month and half after the Rule 43 Order was granted, and included substantially documents pertaining to the period before the granting of the Rule 43 Order. This type of conduct is not what is contemplated by the rule and will not be countenanced by the Court.⁶ It is prejudicial to the respondent, who, quite bekown to the applicant, is unemployed and it unnecessarily clogs the court rolls and dispensing of justice . Therefore, for the reasons stated above, applicant will be ordered to pay the respondents costs of application on a scale of attorney and client.

Respondent's counter application

[19] As stated above, the respondent included as part of her answering affidavit, a counterapplication seeking the variation of the Rule 43 Order in respect of maintenance payable. She alleged that there has been material change in circumstances, significantly due to her (and the minor child's) move out of the matrimonial home. It is also submitted that the applicant refuses to pay for some of the expenses, like life

⁵ See *Nienaber v Nienaber* 1980 (2) SA 803 (O).

⁶ See *Visser v Visser* 1992 (4) SA 53 (O).

policy, pension and legal costs, sanctioned by the Rule 43 Order, as he believes that the order is wrong

[20] The respondent has made very specific submissions regarding the changes in paragraph 45 of her affidavit. Considerable amount of time was also spent on the items listed therein during the hearing of this application . From the applicant's side it was also submitted that, the respondent deliberately left her own business which was lucrative and as a qualified and experienced businesswoman, she should be making effort to seek employment or new business ventures, instead of staying home , unemployed. Further, it is also submitted that the respondent has various assets, including property.

[21] I have considered the submissions made on behalf of both parties regarding maintenance of the respondent and the minor child. In my view the figures submitted in terms of the counterapplication appear reasonable , but cannot all be allowed in their entirety, particularly those relating to accommodation; water and lights; DSTV; internet; domestic worker; vehicle fuel; groceries and household expenses, to mention but only just a few. I have exercised my discretion, which is naturally not based on considerations with scientific precision, in allowing and reducing some of the expenses. In my view , an appropriate amount for the maintenance of the respondent and the minor child ought to be in the amount of R88 700.00. This amount will be substituted for the R80 000.00 in terms of the Rule 43 Order.

[22] Apart from the aforementioned amount the applicant will remain liable for payment of the items in terms of paragraphs 3 and 5 of the Rule 43 Order. Also, those items forming of the relief sought by the applicant in the pending Rule 42 application are not affected by the order to be made herein, the same being applicable to the remainder of the Rule 43 Order.

[23] In arriving at the above conclusion, I have been mindful of the submissions made by counsel for the applicant regarding ability to afford the payments required by the applicant. I am not swayed by the submissions made on behalf of the applicant in this regard, particularly due to non-disclosure of primary evidence in the form of bank statements by the applicant.

Conclusion

[24] Therefore, as with her opposition of the application, the respondent is successful in her counterapplication. Costs, on a normal party and party scale, shall follow this outcome with regard to the counter application.

Order

[25] For the abovementioned reasons , the following order is made ***pendente lite***:

1. that, the issues dealt with in the pending Rule 42 application, brought under the same case number as appearing above, and directed towards the order granted by Kubushi Jon 19 July 2017, are not amended by this order;
2. that, the application based on Rule 43(6) of the Uniform Rules of this Court brought by the Applicant is dismissed, and the Applicant is liable to the Respondent for costs of the application based on a scale of attorney and client, such costs shall include costs of the hearing of the application on 09 and 11 January 2018;
3. that, the counterapplication by the Respondent is granted and the order granted by Kubushi J on 19 July 2017 is varied as follows:
 - 3.1 that, the monthly amount payable by the Applicant as maintenance in terms of paragraph 4 of the order, is increased from R80 000.00 to R88 700.00, and
 - 3.2 that, the first payment payable in terms of varied amount of R88 700. 00 stated in 3.1 hereof, shall be on or before 01 February 2018.
4. that, the Applicant is liable to the Respondent for costs of the counter application based on a scale of party and party, such costs shall include costs of the hearing of the counterapplication on 09 and 11 January 2018.

K. La M. Manamela
Acting Judge of the High Court
11 January 2018

Appearances:

For the Applicant	:	Mr E Janse van Rensburg
Instructed by	:	Baartman & Du Plessis Attorneys Montana, Pretoria
For the Respondent	:	Ms NM Krige
Instructed by	:	Martini-Patlansky Attorneys c/o Friedland Hart Solomon Nicholson Monument Park, Pretoria

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 92910/2016

On the 11th day of January 2018

Before His Lordship Manamela AJ:

In the application between:

A M C P

Applicant

and

I M P

Respondent

ORDER

Having read the papers; after hearing argument on behalf of the parties and based on the reasons summarised in the written judgment accompanying this order, the following order, is made ***pendente lite***:

1. that, the issues dealt with in the pending Rule 42 application, brought under the same case number as appearing above, and directed towards the order granted by Kubushi Jon 19 July 2017, are not amended by this order;
2. that, the application based on Rule 43(6) of the Uniform Rules of this Court brought by the Applicant is dismissed, and the Applicant is liable to the Respondent for costs of the application based on a scale of attorney and client, such costs shall include costs of the hearing of the application on 09 and 11 January 2018;
3. that, the counterapplication by the Respondent is granted and the order granted by Kubushi J on 19 July 2017 is varied as follows:
 - 3.1 that, the monthly amount payable by the Applicant as maintenance in terms of paragraph 4 of the order, is increased from R80 000.00

- to R88 700.00, and
- 3.2 that, the first payment payable in terms of varied amount of R88 700. 00 stated in 3.1 hereof, shall be on or before 01 February 2018.
4. that, the Applicant is liable to the Respondent for costs of the counterapplication based on a scale of party and party, such costs shall include costs of the hearing of the counterapplication on 09 and 11 January 2018.

BY ORDER