

**REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**(NORTH GAUTENG HIGH COURT, PRETORIA)**

Case No: 60169/2018

18/12/2019

In the matter between:

**E[....] N[....]**

**Applicant**

and

**T[....] N[....]**

**Respondent**

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**JUDGMENT**

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Maumela J.

1. This is an application in terms of Rule 43 of the Uniform Rules. The applicant is Erika Nagel. The respondent is T[....] N[....]. The Applicant seeks an order in terms of which the Respondent is ordered to pay a contribution at an amount of R50 000,00 per month. The applicant charges that the Respondent did not disclose his monthly expenses but only indicated his monthly to be R95 000.00. She states that the Respondent makes no offer towards her upkeep. She makes the point that the

Respondent failed to comply with the provisions of Rule 43(3).

2. Rule 43(3) provides as follows: *"The Respondent shall within ten days after receiving the statement deliver a sworn reply in the nature of a plea, signed and giving an address as aforesaid, in default of which he shall be ipso facto barred."* Applicant makes the point that as a result of the Respondent's failure to deliver a sworn reply, the court lacks the wherewithal with which to make a proper comparison on the basis of which to make an informed ruling. In his own version, the Respondent states an amount of R30 000.00 per month would be contributed to the joint household expenses and currently, the Respondent contributes nothing.
3. In the case of *TS v TS*<sup>1</sup>; Spilg J expressed the view that a duty of frank disclosure of each party's financial position is implicit within the context of a contested divorce. There is a dispute between the parties regarding whether the Respondent should or should not contribute towards the Applicant's maintenance. Were the court to decide that Respondent must make monthly contributions towards the Applicant's maintenance, it also has to determine the amount at which he should do so.
4. The Respondent states that he never threatened to remove the Applicant from the medical aid. The purpose of Rule 43 is to deal with applications of this nature as inexpensively and expeditiously as possible. The Rule is not designed to provide an interim meal-ticket to any of the parties unless he or she establishes a right to maintenance at the trial. See *Nilsson v Nilsson*<sup>2</sup>. Rule 43 caters for four types of relief pendente lite namely:
  - (a). Maintenance;
  - (b). A contribution towards cost;
  - (c). Interim custody of a minor child and
  - (d). Interim access to a minor child.
5. Our law provides that applicants in terms of Rule 43 are entitled to

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<sup>1</sup> (28917/2016) [2018] ZAGPJHC 29 (2 March 2018) at 597I- J.

<sup>2</sup> 1984 (2) SA 294 (C) at 295 E - F.

reasonable maintenance, pending the outcome and finalisation of the divorce matter. For this purpose, the court has to take the following into consideration:

- 5.1. The standard of living of the parties during the subsistence of the marriage;
- 5.2. The Applicant's actual and reasonable requirements and
- 5.3. The income of the Respondent.

6. In the case of *Taute v Taute*<sup>3</sup>, the court stated that it was found that a Court will be far more inclined to allow an application made on reasonable grounds than one that contains extravagant amounts and that a Respondent who shows a willingness to maintain his spouse and/or children will be heeded with greater sympathy than one who is shown as avoiding his obligations.
7. It has to be heeded that the Applicant brings this application for interim maintenance. In this application, to the best possible extent, she clearly and concisely sets out her income and expenditure. The Applicant charges that the Respondent failed to set out his income and expenditure and that he has also proved to be reluctant to maintain his spouse despite the fact that the law enjoins him to do so.
8. The Respondent submits the following:
  - 8.1. That he earns a basic salary of R45 000.00.
  - 8.2. That he receives a further R 50 000.00 on a monthly basis from investments. Therefore, his total income is R 95 000.00 per month;
  - 8.3. That he has four immovable properties and no outstanding bonds;
  - 8.4. During the subsistence of the marriage, the parties went on holiday in Thailand, Germany; Victoria Falls; they also went on boat cruises.
  - 8.5. That during the subsistence of the marriage, the respondent used to contribute an amount of R 20 000.00 per month to the joint household expenses. He submits this was merely a temporary agreement.

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<sup>3</sup> 1974 (2) SA 675 (ECO) at page 676 H.

9. The Applicant submits that in May 2019, she was retrenched in the Respondent's company. She used to fund some of her needs herself. The Respondent charges that the applicant was not sufficiently frank in disclosing her needs. In the case of *Du Preez v Du Preez*<sup>4</sup>; at paragraphs [15]-[16], the court stated the following:

*"[15] However, before concluding, there is another matter that gives me cause for concern, deserving of mention and brief consideration. In my experience, and I gather my colleagues on the bench have found the same, there is a tendency for parties in rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to correct the relevant information. Counsel habitually, acting no doubt on instruction, unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in rule 43 applications. To my mind the practice is distasteful, unacceptable, and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings, parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury and, in certain circumstances, may be the crime of defeating the course of justice. Should such conduct occur in rule 43 proceedings at the instance of the applicant, then relief should be denied. "*

*[16] Moreover, the power of the court in rule 43 proceedings in terms of rule 43(5) is to 'dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.' The discretion is*

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<sup>4</sup> 2009 (6) SA 28 (GNP).

*essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume there is a duty on applicants in rule 43 applications seeking equitable redress to act with the utmost good faith (uberrimae fidei) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with 'cleanhands' and, on that ground alone, the court will be justified in refusing relief."*

10. In the case of *Nilsson v Nilsson*<sup>5</sup>, the court stated the following: *"Primarily Rule 43 was envisaged to provide temporary assistance for a woman, who had given up careers or potential careers for the sake of matrimony with or without maternity, until such time as at a trial and after hearing evidence, maintenance claims and, if children had been born, custody claims could be properly determined. It was not created to give an interim meal ticket to a woman who quite clearly at the trial were not be able to establish a right to maintenance."*
11. In the book, 'Superior Court Practice', at B1-314; Erasmus, stated: *"...Maintenance pendente lite is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced. The applicant is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified."*

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<sup>5</sup> Supra , at page 295 E - F.

*It has been said that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Similarly, more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his or her lawful obligations than to that of one who is seeking to evade them."* (own emphasis added).

12. In the case of *Micklem v Micklem*<sup>6</sup>, the court stated: *"The fact that a husband has unlimited means does not in our law entitle his wife to unlimited spending. There is a difference between her wants and her needs.(Grasso v Grasso<sup>7</sup>) . What she is entitled to, is to maintain the standard of living to which she was accustomed; not to increase that."*
13. In her publication; Family Law Service (LexisNexis)<sup>8</sup>; Shafer,: stated the following: *"An ex lege duty of support can exist only when three prerequisites are present; namely:*
  - (a). a relationship;*
  - (b). need on the part of the person to be supported; and*
  - (c). adequate resources on the part of the person who is called upon to provide support."*
14. In the case of *Taute v Taute*<sup>9</sup>, the court stated the following: *"I say with respect that I agree entirely with these remarks which are most appropriate in the present matter. The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified. I have found nothing however in the decisions to which I have been referred which justify in such maintenance the inclusion of extraordinary or luxurious expenditure*

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<sup>6</sup> 1988 (3) SA 259 (C) at 262 H.

<sup>7</sup> 1987 (1) SA 48 (C) at 59G - H.

<sup>8</sup> In Chapter C2.

even in the case, for example, of *Glazer v Glazer*<sup>10</sup>, where the husband is described by Williamson, J. (as he then was), as being 'very wealthy' or 'very rich'. The quantum of maintenance payable must in the final result depend upon a reasonable interpretation of the summarized facts contained in the founding and answering affidavits as indeed is contemplated and intended by Rule 43. It is also in my view helpful to take cognizance of the approach made in the affidavits by the applicant and the respondent respectively, bearing in mind that normally it is not the practice in these matters (although permissible) to test the evidence viva voce. A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands - similarly more weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to one who is obviously, albeit on paper, seeking to evade them<sup>11</sup>." The quantum of reasonable maintenance pendente lite falls therefore to be determined in the light of the facts established as probabilities on the papers before me<sup>12</sup>. If she requires to supplement her income pendente lite there is nothing in the papers before me to suggest that she cannot obtain some form of congenial and lucrative, albeit temporary employment; this would certainly tend to alleviate the boredom of a healthy woman living alone in a flat with nothing to occupy her time - apparently prior to her fairly recent marriage to the respondent she was able to occupy herself pleasantly and presumably profitably on several occasions although not trained to any specific kind of employment."

15. The respondent charges that applicant's application amounts to an abuse of the process. He alleges that the applicant has misstated, alternatively failed to make a full disclosure regarding her financial circumstances. In that regard, the respondent points out the following concerning the applicant:

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<sup>9</sup> Supra, at page 676 D-H.

<sup>10</sup> 1959 (3) SA 928 (W).

<sup>11</sup> At page 678D.

- 15.1. That the applicant did not disclose her true financial position and the income earned from her labour law consulting services;
  - 15.2. That she is the owner of a 3-bedroom immovable property in Johannesburg;
  - 15.3. That her bank statements reflect an income of R35,891.23 per month;
  - 15.4. He charges that the applicant over-inflated her expenses and is claiming expenses on a higher scale than what obtained during the subsistence of their the marriage.
  - 15.5. That the bank statements she attached do not support her alleged expenses. The respondent also points out that the applicant frequently travels despite her alleged back injury.
16. The respondent claims that the applicant gets a monthly income at an amount of R35,891.23 per month. It is not disputed that during the subsistence of the marriage, the respondent used to contribute an amount of R 20 000.00 per month to the joint house-hold expenses. At that time, the applicant was still employed within the respondent's company. To a particular extent, she was able to contribute towards the monthly expenses of the house-hold. Applicant is no longer employed.
  17. It is trite that the applicant is entitled to reasonable maintenance pending the outcome and finalisation of the divorce matter<sup>13</sup>. The fact that the law allows reasonable expenses, insinuates that a respondent in a rule 43 application may not be ordered to contribute to the upkeep of a former spouse more than what such a respondent can afford.
  18. The applicant does not dispute the respondent's claim that he earns a total amount of R 95 000-00 per month. While the marriage between the two parties, subsisted, the applicant was also employed and thus she partly contributed to the monthly expenses of the household. The respondent confirms that at that time he would contribute an amount of R 20 000-00

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<sup>12</sup> At page 678G



towards the upkeep of the family. However, the applicant is no longer employed. The law requires that subject to the financial ability of the respondent, he or she should be obligated to maintain more or less the same standard at which he or she was during the subsistence of the marriage.

19. Having taken into consideration the standard of living of the parties during the subsistence of the marriage, the applicant's actual and reasonable requirements and the income of the respondent<sup>14</sup>, the court made a determination. In the result, the court makes the following order:

ORDER.

- 19.1. The respondent is ordered to pay to the applicant a monthly amount of R 35 000-00 as maintenance.
- 19.2. The above amount shall be payable on or before the 7<sup>th</sup> of January 2020. Subsequent payments shall be made on or before the 7<sup>th</sup> of each succeeding month.
- 19.3. Payment shall be made directly into an account the number of which shall be availed by the applicant to the respondent's legal representative on or before the expiry of 7 days from the day of this order.
- 19.4. Owing to the fact that this order is made over the 2019- 2020 festive season, the applicant shall by way of an SMS message or WhatsApp, relay to the respondent the amount payable, the account number into which it shall be paid, the date by which it should be paid, and the applicable case number before this court, provided that in such message, the applicant shall only communicate the information mentioned under 19.4. without deviation or addition.
- 19.5. The respondent shall retain the applicant on his medical aid.

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<sup>13</sup> See Taute v Taute supra.

<sup>14</sup> Taute v Taute 1974 (2) SA 675 (E) at 676 E

19.6. This order shall subsist until it is substituted by another order of a competent court.

19.7. The respondent shall pay the costs of this application.

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**T.A. Maumela.**

**Judge of the High Court of South Africa.**