IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: **97132/16**

In the matter between:

P[....] E[....] O[....] I[....] Applicant

and

W[....] A[....] H[....] Respondent

JUDGMENT

MAHON AJ

[1] This is an application for the variation of the order granted by this court, per the Honourable Crutchfield AJ, on 23 June 2017. The application is in terms of Rule 43(6) of the Uniform Rules of Court.

[2] The order which the applicant seeks to vary, was granted pursuant to an application in terms of Rule 43. A tender by the respondent in that application (the applicant in the present application) in terms of Rule 34(1), culminated in the granting of the order, albeit that argument was seemingly presented in regard to certain aspects of the relief granted.

[3] The applicant now seeks a variation of that order on the grounds that there has been a material change in the applicant's financial circumstances, as contemplated in Rule 46(3).

[4] At the outset of the matter, I was required to deal with an application for condonation for the late delivery of the respondent's replying affidavit. The condonation application was opposed by the applicant. However, given the time which has elapsed since the delivery of the replying affidavit, it appeared to me that there was no prejudice to the applicant which arose as a result of the late delivery of the replying affidavit. Indeed, the applicant's counsel, quite properly, indicated that whatever prejudice may have been suffered by the applicant at the time of the late delivery of the affidavit had been ameliorated by the significant period of time which had, since, elapsed.

[5] I accordingly granted the application for condonation.

[6] The applicant's contention that there has been a material change in his financial circumstances which justifies a variation of the previous order, is premised upon the following allegations in the applicant's founding affidavit:

[6.1] on 15 July 2019, the applicant was advised by his employer that his salary would be "*almost halved*" as a result of down-sizing measures being implemented by the company which were aimed at preserving its economic sustainability;

[6.2] with effect from 1 July 2019, the applicant's gross salary was reduced from R80 200.00 (which he had been earning as at the beginning of 2019) to R40 000.00, with a net salary of R24 323.61; and

[6.3] when added to the applicant's monthly retirement annuity payments of R5 039.46, the applicant is said to receive a total income of R29 363.27 per month, a drastic reduction from his previous income which he received at the time of the previous order.

[7] An adjunct observation is that the applicant is the founder of a company by the name of [….] (Pty) Limited, which is apparently a member of the [….] (SA) (Pty) Limited and the applicant has been associated with the group for the last 25 years. [….] (Pty) Limited specialises in the fruit and vegetable packaging and processing industry, both locally and internationally and has, at all material times, been responsible for the payment of the applicant's salary.

[8] It appears that the applicant is no mere employee of the company, but is a significant shareholder and occupied a position of significant influence within the company.

[9] The catalyst for the alleged material change in the applicant's circumstances, is the significant reduction in the applicant's salary with effect from 1 July 2019, as evident from the payslips provided by the applicant. This is said to have occurred as a result of down-

sizing measures being implemented by the company which were aimed at preserving its economic sustainability

[10] The difficulty with the application is that, other than providing copies of his salary slips reflecting the reduction in salary, there is a paucity of information demonstrating the impact which the reduction in salary has had on his overall financial circumstances. What is more, a period of no less than 15 months has elapsed since the applicant's founding affidavit was deposed to and the extent to which the allegations contained in the founding affidavit accurately reflect his current financial circumstances, is accordingly unclear.

[11] Moreover, whilst it may seem tempting to conclude that a 50% reduction in salary would, of necessity, result in a material adverse change in financial circumstances on the part of the applicant, one cannot assume that this is so, particularly in light of the amount of time which has elapsed since the date that the founding affidavit was signed.

[12] In **AP v IP 2018 JDR 0349 (GP)** this court observed that the decline in the financial situation of the applicant's could serve as a material change in the financial circumstances of the applicant as he derived his sole income from the business but found that the applicant had failed to establish that fact. The reason for this is that the applicant in that matter had failed to account for the rationalisation or adjustment of the financial obligations of the business and the

impact that this would have had on its ability to meet its obligations to the applicant.

[13] Although the facts in that matter were different, the same principle applies by parity of reasoning. Without being provided with the full conspectus of the applicant's financial affairs, I am unable to conclude that the reduction in salary (as opposed to total income) would, of necessity, result in a material adverse change in financial circumstances on the part of the applicant.

[14] A considered reading of Rule 43(6) suggests to me that, in order to succeed in demonstrating a material change in circumstances, one must make a full and frank disclosure in regard to all of the numerous and varied elements which make up the broad overview of the applicant's financial situation.

[15] It is therefore unsurprising that the respondent criticises the applicant on the basis that he ought to have done more to demonstrate the impact of the reduction in salary upon his overall financial affairs. Thus, by way of example, the respondent states that one would, at least, have expected the applicant to have provided income tax assessments or returns, IRP5's and details of dividends paid from his shareholdings, amongst others.

[16] The contents of the applicant's financial disclosure forms, regrettably, do not meaningfully address these deficiencies. By way of example, I was referred to a copy of the applicant's bank statements which reflect a credit of R100,000.00 on 17 December

2019 which would, at face value, contradict the applicant's suggestion that he earns a net monthly income of R29 363.27. The respondent's counsel invited me to infer that this constituted undisclosed dividends but the fact of the matter is that I am unable to reach any conclusion on the nature of this credit.

[17] Confronted with these difficulties, counsel for the applicant submitted, in the event that this court were inclined to regard the applicant's disclosure of his financial information as insufficient for purposes of the present application, that rather than dismissing the application, the court should call for further evidence by way of affidavit as contemplated in Rule 43(5).

[18] However, I regret to say that I have a number of difficulties with this submission:

[18.1] Firstly, the criticisms to which I refer were pertinently raised by the respondent in her replying affidavit which was delivered on 2 November 2019, more than a year ago. Whilst I am mindful that the applicant regarded the respondent's replying affidavit as irregular by virtue of its lateness, the delivery of the affidavit nonetheless put the applicant to an election. He could either elect not to respond to the criticisms raised in the hope that his objection to the late delivery of the replying affidavit would be upheld and that such criticism would not be considered or he could, at that stage, have sought the leave of the

court to deliver a further affidavit addressing these criticisms or, at the very least, clarifying the allegations contained in his founding affidavit. Having elected to stay supine, it is difficult to accept the applicant's invitation to invoke the provisions of Rule 43(5) at this late stage, after the proverbial shoe has started to pinch;

[18.2] Secondly, it does not appear to me that Rule 43(5) was intended to address the situation in which the applicant now finds himself. At this juncture, I pause to observe that the respondent's disclosure of her financial affairs was not without criticism from the applicant as well. For this reason, counsel for the applicant correctly submitted that the object of Rule 43 is that applications of the kind contemplated therein should be dealt with as inexpensively and expeditiously as possible and that prolixity of averments and the unnecessary proliferation of papers and affidavits should be avoided.[i] This can be readily accepted but I do not interpret the provisions of Rule 43(6) as contemplating a mere *de novo* hearing of a Rule 43 application. Whilst it may, indeed, involve a robust consideration of the parties' competing needs and means, it seems to me that one can only embark upon such an enquiry after the prerequisites of Rule 43(6) have been met, namely, that the applicant has established "*... a material change occurring in the circumstances of either*

> *party or a child, or the contribution towards costs proving adequate*".[ii] As previously stated, the sole basis for the applicant's application was a material change occurring in his circumstances. As I see it, the applicant bears the onus of establishing that fact before the court should embark upon an enquiry as to the extent to which the variation sought by the applicant is appropriate, taking into account the competing needs and means of the parties.

[19] I am accordingly of the view that in an application under Rule 43(6), the applicant bears the onus of establishing that a material change has occurred in the circumstances of either party or a child, or a previous contribution towards costs proving inadequate. Although that onus is to be considered in the light of the robust and expedient nature of Rule 43 proceedings, it is nonetheless an onus which is to be discharged on a balance of probabilities. To succeed in that endeavour, an applicant must demonstrate, not only that a change or even a significant change in circumstances has occurred but must place sufficient facts before the court to enable it to determine the materiality of that change in the context of the applicant's broader financial circumstances. This would, at the very least, entail a detailed exposition of all available sources of income and would not merely be limited to the income earned from his (now reduced) salary.

[20] On the information provided by the applicant, I am unable to determine what the impact of the reduction in salary is to the applicant and its materiality in light of the applicant's broader financial circumstances. I am accordingly of the view that the applicant has failed to discharge his onus in this regard.

[21] During her submissions, the applicant's counsel raised the applicant's concern that if the court were to dismiss the application, rather than inviting further evidence as contemplated in Rule 43(5), the interest of justice would not have been served because the applicant would be bound to the existing order and would be left without a remedy under circumstances where, on his version, material evidence exists which is supportive of his alleged material change in circumstances. This might have been the case if the court, having had regard to the contents of the founding affidavit and the financial disclosure forms presented by the applicant, found that there was in fact no change in circumstances or that such change as had occurred, was not material. That is not the finding of this court. On the contrary, as I have stated previously, I consider myself unable to determine whether a material change of circumstances has occurred because of the dearth of information provided.

[22] I turn now to the question of costs.

[23] The parties' submissions related not only to the costs of the present application but to the costs which had previously been reserved

when the matter was postponed on a previous occasion, 18 November 2019.

[24] The respondent sought to cast the blame for the previous postponement and the concomitant wasted costs, at the feet of the applicant as a result of the late delivery of the applicant's financial disclosure forms. The applicant, for his part, submitted that there was insufficient factual matter before me to conclude that he was responsible for the wasted costs previously incurred. He did not, however, if I understood the argument correctly, suggest that the respondent was responsible for the incurrence of those wasted costs or that the respondent should be held liable for those costs. Instead, I was urged to merely maintain the reservation of those costs or, *alternatively*, order that those costs should be in the course of the main divorce proceedings.

[25] It seems to me that the costs incurred in regard to the postponed hearing are costs which are clearly incidental to the current application. It would, in the circumstances, not be appropriate to reserve those costs or to order that they be costs in the main divorce proceedings unless I was inclined to do so with the balance of the costs of this application. Based on the submissions made to me in regard to those costs and in the light of my decision in regard to the costs of this application which I deal with more fully below, I am disinclined to reserve the costs of the previous postponement and would rather direct them to follow the result of the present application.

[26] As for the costs of the present application, I was urged by the respondent's counsel to visit a punitive cost order upon the applicant for what the respondent described as an abuse of process and a material non-disclosure of relevant information which the respondent attributed to a deliberate concealment of information on the part of the applicant.

[27] I am unable to find that the applicant has abused the court process or that the present application was directed at harassing the respondent. I cannot, on the papers before me, conclude that the application was vexatious.[iii] The paucity of financial information provided by the applicant appears to me to have arisen as a result of a miscalculation or error in judgment, rather than evidencing an intention to conceal financial information. A failure to provide financial information ought to be considered in the light of the peculiar facts of every case. In this matter, I do not consider the applicant's failure to deal with his financial position as conduct of the nature described in **Du Preez v Du Preez 2009 (6) SA 28 (T) at paras [15] to [17]**.

[28] Finally, as to the question of whether the applicant should be ordered to pay the costs of this application or whether those costs should be in the course of the main divorce proceedings as, so it was submitted, is the usual order in Rule 43 applications, I observe, yet again, that I do not regard the present application as a *de novo* application in terms of Rule 43 involving a consideration of the respective parties' needs and means. Such applications, almost

invariably, result in minor victories being achieved by either party in regard to the various components of the respective competing versions. This very often culminates in an order which is quite disparate from that which had been proposed by either party. An order directing the costs of such an exercise to be in the main divorce proceedings appears to me to be eminently sensible.

[29] However, where a party fails to discharge the onus which it bears, with the result that such an exercise does not arise, the difficulty in apportioning the costs does not present itself. Therefore, having found that the applicant has failed to discharge his onus, I see no reason why the costs of the present application should not follow the result.

[30] I accordingly make the following order:

1. The application in terms of Rule 43(6) is dismissed with costs, such costs to include the wasted costs arising from the postponement which occurred on 18 November 2020.

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D MAHON

Acting Judge of the High Court, Pretoria

APPEARANCES:

For the applicant: Adv A Saldulker

Instructed by: Robin Twaddle Attorneys

For the respondent: Adv P V Ternent

Instructed by: Kim Meikle Attorney

Date of hearing: 1 February 2021

Date of judgment: 3 February 2021

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[i] *See Harwood v Harwood 1976 (4) SA 586 (C) at 588E; Jeanes v Jeanes 1977 (2) SA 703 (W) at 706F and PT v LT 2012 (2) SA 623 (WCC) at 634E.*

[ii] *Rule 43(6) provides that: "The court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate."*

[iii] *See In Re Alluvial Creek, Ltd. 1929 CPD*