

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: 23867/2019

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.**

In the matter between:

B[....] S[....]

Applicant

and

G[....] R[....] S[....]

Respondent

JUDGEMENT

Mfenyana AJ

Introduction

[1] The applicant approached this court seeking relief in terms of the provisions of Rule 43 of the Uniform Rules of this court. The application is a sequel to a divorce action instituted by the applicant against the respondent on 4 April 2019, and pending before this court.

[2] The application is opposed by the respondent.

[3] In the notice of motion, the relief sought by the applicant is set out as follows:

“1. That the parties retain full rights and responsibilities in respect of their minor son, D[....], subject thereto that the child’s primary residence vests with the Applicant, and subject to the Respondent’s rights of contact to him at all times, such contact to be arranged between the Respondent and D[....] directly”.

[4] As far as the financial aspects of the relief sought go, the applicant seeks the following:

“2. That the respondent be ordered to continue payment of the following expenses:

- 2.1 bond instalment and respect of the parties’ communal home;*
- 2.2 Rates & taxes, water, electricity and estate levy in respect of the parties’ communal home;*
- 2.3 the telephone and ADSL costs of the parties’ communal home;*
- 2.4 The cell phone costs of the parties’ minor son;*
- 2.5 The wages of the gardener working at the parties’ communal home;*
- 2.6 The costs associated with the upkeep and maintenance of the swimming pool at the parties’ communal home;*
- 2.7 the purchasing of clothes and shoes for the parties’ minor son;*
- 2.8 The purchasing of school clothes for the parties’ minor son;*
- 2.9 The payment for the maintenance costs, services and repairs of the vehicle used by the Applicant;*
- 2.10 Payment of the vehicle license and insurance in respect of the vehicle used by the Applicant;*
- 2.11 Payment of all school fees and school-related expenses in respect of the parties’ minor son;*
- 2.12 Payment of the medical aid fund premium in respect of the Applicant and the parties’ minor son, as well as payment of all their*

medical expenses which are not covered on the medical aid fund. In this respect the Respondent is ordered to maintain the Applicant and their minor son on the same medical aid fund with the same benefits that they enjoyed previously, and in the event of the Applicant being removed, she must be re-instated as a member of the medical aid fund without delay.

2.13 Payment of pocket money to the parties' minor son;

2.14 Payment of all necessary and reasonable maintenance costs to the parties' communal home;

2.15 Payment of the Mnet/DSTV monthly subscription costs to enable the Applicant and the minor child to make use of this facility;

2.16 Payment of the TV licence for the televisions used at the parties' communal home;

2.17 payment of the Apple a Netflix account".

[5] In addition, the applicant seeks payment of an amount of R30 775.00 per month in respect of maintenance for the applicant and the parties' minor son. She also seeks a cost contribution towards her costs of the divorce action in the amount of R250 000.00, payable within 10 days of the granting of the order.

[6] Finally, the applicant seeks an order that the respondent pays the costs of this application.

[7] Rule 43 provides:

(1) This 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 matrimonial action, pending or about to be instituted;
- (c) Interim care of any child;
- (d) Interim contact with any child.

[8] The purpose of a Rule 43 application is self-evident from the provision itself and need not be restated. It is also interlocutory in nature.

Background facts

[9] The applicant and the respondent were married to each other in 2000 in community of property. They have two children, the youngest of whom is 17 years old, and still a minor. The eldest child is 21 years old, and is still dependent on the parties for her maintenance and wellbeing. Throughout their marriage, the respondent took responsibility for most of the parties' financial and household requirements. This includes *inter alia* paying for school fees for the children, the purchase of the parties' home, motor vehicles, mobile phones, medical aid expenses, insurance premiums, clothing and groceries. Meanwhile, the applicant tended to the purchasing of groceries and personal items for herself and the children, as she was given access to the respondent's bank card alongside a monthly allowance of R10 000.00. She left employment after the birth of the parties' first child in 2001 and has not been employed since then.

[10] The status of the applicant's employment is in dispute between the parties, as the respondent contends that the applicant is self-employed, running a cleaning business although she puts very little effort in its marketing and development. This is denied by the applicant. The respondent further argues that the applicant turned down a job offer which would see her earning approximately R45 000.00 per month, and which would enable her to assist with household responsibilities, and particularly see to her own maintenance. The applicant also denies having received such a job offer.

[11] In her founding affidavit, the applicant paints a picture of a fairly comfortable lifestyle enjoyed by the parties. She states that in 1994 she worked as a cashier at a food outlet. In 1995 she obtained a 3-month post matric basic computer skills and typing qualification. In 2001, following the birth of the parties' first born child, she resigned and has not worked since, as she and the respondent decided that she should 'be available for the children's needs'. She states that therefore for the past 20 years, she has 'fulfilled the role of a typical housewife'. She further states that the respondent's income had always been sufficient to cater for their monthly needs and there was thus 'no need' for her to work again. They maintained a reasonably good

standard of living, went on holiday every second year in Zimbali, Balitto and Zebula, and went to Dubai and Stockholm for her 40th birthday, all of which were paid for by the respondent. She is now 47 years old.

[12] What the applicant considers to be her and the children's reasonable living expenses and maintenance are set out in her founding affidavit and include an amount of R35 775.00 over and above what is currently paid for by the respondent. Some of the items which are paid for by the respondent, including bond repayments, school fees, rates and taxes and other expenses not in dispute, have not been quantified, but account for the bulk of the parties' household expenses. The amount of R35 775.00 is in respect of items for the applicant and the children, which the applicant states are not adequately provided by the respondent. Her contention is that she should take over these responsibilities from the respondent and provide these items, on condition the respondent pays the stipulated amount to the applicant to do so on her own terms. These items range among others, from cellphone expenses, clothes, holidays, entertainment, replacement of towels and other household goods, haircare, make-up, and 'unforeseen expenses'.

[13] As far as groceries and household items are concerned, the applicant admits that the respondent is providing for these, albeit inadequately, as he does not buy what the applicant and the children like, and reserves the 'treats' for himself. She further states that the respondent has threatened to discontinue her medical aid benefits. On this basis, she states that she considers it necessary that the court intervenes to prevent this from happening.

[14] Of the R35 775.00 (additional expenses) the applicant's expenses account for R18 225.00, just over half of the amount claimed. Groceries and household items (R12 000) are also paid for by the respondent. This leaves an amount of R5 550.00 for the children's expenses, pet food, and the domestic worker. The domestic worker is also partially paid for by the respondent, for the services she provides once a week, as opposed to the applicant's requirement that the domestic worker provides services twice a week.

[15] In paragraph 24, the applicant states: *“I will request an order for the Respondent to continue payment of the expenses listed hereinabove wherein it is indicated that he pays the expenses directly”*. This is the essence of the application.

[16] The applicant further states that she earns an amount of approximately R5 000.00 a month from her business and will thus deduct this amount from the amount she and the children require. This leaves an amount of R30 775.00 per month in maintenance for the applicant and the minor child. Very little is said about the major dependent child throughout the application. Whether this is by default or design, it stands to reason that the respondent is currently providing for the major dependent child's maintenance, school fees and upkeep and as stated by the applicant, has purchased a car for the major dependent child.

[17] As part of the maintenance she seeks, the applicant also requires the respondent to pay for repairs to her motor vehicle which she states is old and out of motor plan.

[18] The opposing affidavit was filed 12 days out of time. The applicant did not object to the late filing thereof and by agreement between the parties, it was accepted into evidence. In it, the respondent avers that the application is an abuse of the process of court, as by her own admission, the applicant states that the respondent has been paying for the majority of the applicant's maintenance requirements and all the children's expenses since the parties separated on or around January 2017. Although the parties consider themselves to be separated, they still live under the same roof and are thus separated from bed and table. The respondent avers that what he is not paying for are the applicant's luxury items, which she pays from her own income. Arising from this contention is whether the expenses required by the applicant are necessary expenses within the contemplation of Rule 43.

[19] The respondent further avers that the applicant fears that the respondent may stop paying for the applicant's and children's maintenance he is currently paying for, which fears, he argues, are unsubstantiated and vague. Thus the respondent states that the application is not only disingenuous, but unnecessary, and a tactic devised

by the applicant to delay the finalisation of the divorce proceedings as she stands to benefit from his pension increasing in value with each month that goes by. He denies that the applicant is a housewife and states that she runs a business and spends the remainder of her time socialising. The applicant does not deny that she owns her own business and submits that she earns an amount of R5 000.00 per month.

[20] According to the respondent, because the applicant is not at home most of the time, he, together with the domestic worker attend to the housework, and out of necessity, the respondent cooks all the meals for the family. Importantly, the respondent avers that the only contentious issue between the parties is whether the applicant should be granted rehabilitative maintenance or lifelong maintenance as she claims, and adds that he has tendered rehabilitative maintenance for a period of 6 months. As such, the respondent places in dispute the issue of lifelong maintenance required by the applicant. This brings into sharp focus the issue of whether the applicant is entitled to seek lifelong maintenance by way of a Rule 43 application.

[21] The respondent further argues that the only reason the parties still share a household is to provide structure to the minor child until he attains majority, stating that this is line with an agreement reached following several family engagements. This is however denied by the applicant, as she states that she and the children are more comfortable when the respondent is not around. The respondent further contends that in view of the fact that the applicant often spends nights away from the matrimonial home with her boyfriend, it has become necessary for him to be home to attend to the minor child's day to day needs and provide guidance and discipline. The respondent further contends that the divorce proceedings have been ripe for hearing since June 2021 and there is no reason why the divorce should not be finalised. He contends that despite the numerous various settlement offers he has made, the matter remains unresolved, the only outstanding issue being the lifelong maintenance required by the applicant. He contends that the applicant stands to receive a cash injection upon finalisation of the divorce, from the sale of their matrimonial property which is common cause between the parties, as well as her 50% share of his pension interest.

[22] In respect of the allegation that the respondent terminated the applicant's access to his credit card, the respondent contends that this was necessitated by the applicant's abuse of the credit card which he saw as a deliberate act to place him under undue hardship.

The applicant's supplementary affidavit

[23] It is trite that the Rule 43 mechanism makes no provision for filing of a replying affidavit. On 23 February 2022, the applicant filed a notice in terms of which she sought leave to file a supplementary affidavit. This, the applicant contended, was necessitated by untruthful and unfounded allegations made by the respondent in his opposing affidavit, which if left unchallenged would be prejudicial to the applicant and could not have been foreseeable to the applicant. These allegations pertain to the applicant's absence from the matrimonial home to sleep over at her boyfriend's place, the allegation that she receives some form of maintenance from her boyfriend, that she turned down a job offer, and that she has taken a passive role in marketing her business, and the state of the applicant's vehicle. She decries the fact that the respondent has taken out a new cellphone contract which requires her to take money out of her pocket and top up.

[24] On the strength of Rule 43(5), I considered that it was prudent that all issues relevant to the determination of the application be ventilated during the course of the hearing. I therefore granted leave for the applicant's supplementary affidavit to be admitted into evidence.

[25] Save for pointing out certain untruths in the respondent's opposing papers, the bulk of the applicant's supplementary affidavit appears to be a rebuttal of the allegations contained in the opposing affidavit, something which Rule 43 does not permit.

[26] I do not understand the applicant's supplementary affidavit to be taking the matter much further. Save for pointing out certain misleading statements in the respondent's opposing affidavit, there is no reason why some of the issues raised therein cannot be aired out in the trial in due course. Having said that, it is incumbent on any of the parties to respond to any allegations that party believes are not correct,

particularly if such corrections have a bearing on the relief sought. To that extent the necessity of filing the supplementary affidavit remains apposite.

For determination

[27] There are two issues before this Court. The first is whether the applicant is entitled to utilise the Rule 43 procedure to bring a claim for lifelong maintenance. The second issue is whether the applicant is entitled to a contribution towards her legal costs.

Discussion

[28] It is not in dispute that the respondent is already providing for the majority of the maintenance and living expenses required by the applicant. This much is contained in the applicant's own submissions. What appears to be the case is that the applicant seeks to ensure future maintenance under the auspices of the Rule 43 procedure. Lifelong maintenance is not maintenance *pendente lite*. She also seeks an order compelling the respondent to continue paying maintenance he is already providing. The applicant's contention is that the respondent has threatened to stop payment in some cases, particularly in respect of the medical aid cover. He also does not provide some of these items to the satisfaction of the applicant. It is not a matter of necessity or non-payment, but of choice as she contends that the respondent imposes his preferences on the applicant and the minor child or the children, and for that reason she prefers to be saddled with the responsibility of purchasing these items herself. She does not seek maintenance *per se*.

[29] The difficulty with this scenario is that it is not what Rule 43 proceedings are intended for. Rule 43 proceedings are by their nature provisional, and aimed at providing 'on the spot' relief and avoid a situation where one party, more often, the wife, is left destitute. This is not the case with the applicant in these proceedings. Quite to the contrary, the applicant continues to enjoy a fairly comfortable lifestyle, which the respondent has continued to pay for even after the parties' separation over four or so years ago. He has also tendered to pay for the applicant's rehabilitative maintenance for a period of 6 months which offer the applicant has rejected even in

her supplementary papers as she contends is not sufficient to sustain her, presumably for life. I cannot agree with the applicant in this regard. Rule 43, to my mind, is designed to cater for a party's maintenance needs pending the finalisation of the main action.

[30] In *Taute v Taute*¹ the court had the following to say in relation to a party's entitlement to maintenance pending divorce:

“The applicant is entitled to reasonable maintenance *pendente lite* dependent upon ... the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements...”²

[31] It is also trite that ‘neither spouse has a right to maintenance upon divorce’.³ The issue of maintenance post- divorce is a matter of discretion and not a right. It owes its existence to the Matrimonial Property Act which gave the court a general discretion to award maintenance to the innocent spouse. In terms of the Divorce Act, the court is permitted to make a maintenance award which it finds “just”. In so saying, the court must look at the specific circumstances of each case in order to determine what would be just in the circumstances.

[32] The applicant's claim paints a picture of a regular man who is required to pay maintenance for a king. What is more is that this court is as a result required to regulate the domestic affairs of the parties' household, quite apart from ensuring that *pendente lite*, reasonable maintenance is provided, as envisaged in Rule 43.

[33] At the hearing of this matter, much was made of the fact that the applicant has become accustomed to the lifestyle the respondent has provided for her. This is however not the point. The point is that the applicant is currently enjoying this lifestyle, but seeks lifetime maintenance to be sanctioned by this court post divorce and not *pendente lite* sanction that. This cannot be. I cannot see how it would be ‘just’ to order the kind of maintenance order sought by the applicant.

¹ 1974 (2) SA 675 (E)

² at 676E

³ *Strauss v Strauss* 1974(3) SA 79 (A).

Cost contribution

[34] The concept of a contribution towards the costs of a divorce action emanates from the duty of support that spouses owe each other. This accords with the right to equality in terms of the Constitution⁴, in that the divorcing spouse who has no source of income (usually the wife) is entitled to a contribution towards her legal costs to ensure she has an equal opportunity to defend and present her case. This has been followed in various decisions of our courts and has become established.

[35] In Cary v Cary⁵ the court concluded that the applicant was entitled to a contribution towards the costs which would ensure equality of arms in the divorce action against her husband. The court held:

“...applicant will not enjoy equal protection unless she is equally empowered with 'the sinews of war'. The question of protecting applicant's right to and respect for and protection of her dignity also arises in the present situation, where a wife has to approach her husband for the means to divorce him.”

[36] In resisting the applicant's claim for a cost contribution, it was argued on behalf of the respondent that the applicant had chosen to litigate at a higher scale and had employed the services of senior counsel while the respondent did not and further that the divorce action was in any case, close to finalisation.

[37] In Friedman v Friedman⁶ the court stated that the duty of support extends to debts already incurred in the course of litigation, whether to family or to an attorney, a court should protect the dignity of that spouse by ordering a contribution to costs sufficient to repay those debts to the extent that the court considers the expenditure reasonable.

[38] The court went further to state that it was constitutionally bound to err on the side of the 'paramount consideration that the applicant should be enabled adequately to place her case before the Court'.

⁴ Act 108 of 1996

⁵ *Cary v Cary* 1999 (3) SA 615 (C); [1999]2 All SA 71 (C)

⁶ Unreported: Case No. 6664/2019, WC

[39] The question therefore is whether the applicant has made out a case for a cost contribution. She must demonstrate that the respondent owes her a duty of support, that she has a need to be maintained, and that the respondent has adequate resources to discharge this duty. I think she has. The only issue remaining, being the quantum of such cost contribution. The guiding principle in exercising the discretion which the court has in this regard was formulated in *Van Rippen v Van Rippen*⁷ as follows:

"... 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."

[40] The various considerations at play in making a determination include the respondent's financial means and his own scale of litigation. He stated that the applicant has chosen to litigate at an expensive scale and has employed the services of senior counsel for the Rule 43 application and for the trial, while the respondent has only utilised the services of his attorney and only employed a junior counsel to oppose the Rule 43 application brought by the applicant. According to the documents filed of record, the respondent made a payment of R25 000.00 to his attorneys on or around June 2021. On the other hand the applicant's legal fees to date of trial are estimated at R322 482.70. Of this amount, the Rule 43 application accounts for an amount of R88 203.00, leaving a balance of R234 279.70 for the divorce action.

[41] While it is necessary that the applicant be enabled to present her case adequately, and her entitlement to the duty of support by the respondent is not in question, that is not to say that the applicant has a blank cheque to litigate extravagantly on the understating that the respondent will 'foot the bill'. In *Botha v Botha* the court held:

⁷ 1949 (4) SA 634 (C).

“The issue of support must be based on a contextualisation and balancing of all those factors considered to be relevant in such a manner as to do justice to both parties.”⁸

[42] Thus, I consider a cost contribution in the amount of R180 241.50 to be reasonable in the circumstances.

[43] I was inclined to dismiss the application with costs had it not been for the concession made by the respondent in his draft order, to the effect that he has no difficulty with an order to continue paying for what he had already been paying for. Nevertheless it remains the case that there was no need for the institution of this application. For this reason, I am disinclined to grant the costs of the application.

Conclusion

[44] As previously stated, Rule 43 proceedings are temporary and cannot be used to substitute or influence the court's decision on divorce. The question is whether as matters stand, the applicant has been placed in a situation that she and the children born between the parties are deprived of maintenance so as to warrant the intervention of this Court. There seems to be nothing which warrants the intervention of this Court by way of a Rule 43 remedy in my view.

[45] In the circumstances I make the following order:

1. Leave is granted for the filing of the applicant's supplementary affidavit.
2. The respondent is ordered to continue paying the following expenses *pendente lite*:
 - 2.1 *Bond instalment in respect of the parties' communal home;*
 - 2.2 *Rates & taxes, water, electricity and estate levy in respect of the parties' communal home;*
 - 2.3 *the telephone and ADSL costs of the parties' communal home;*
 - 2.4 *The cell phone costs of the parties' minor son;*

⁸ (2005/25726)(2008)ZAGPHC 169 (9 June 2008)

- 2.5 *The wages of the gardener working at the parties' communal home;*
- 2.6 *The costs associated with the upkeep and maintenance of the swimming pool at the parties' communal home;*
- 2.7 *the purchasing of clothes and shoes for the parties' minor son;*
- 2.8 *The purchasing of school clothes for the parties' minor son;*
- 2.9 *The payment for the maintenance costs, services and repairs of the vehicle used by the Applicant;*
- 2.10 *Payment of the vehicle license and insurance in respect of the vehicle used by the Applicant;*
- 2.11 *Payment of all school fees and school-related expenses in respect of the parties' minor son;*
- 2.12 *Payment of the medical aid fund premium in respect of the Applicant and the parties' minor son, as well as payment of all their medical expenses which are not covered on the medical aid fund. In this respect the Respondent is ordered to maintain the Applicant and their minor son on the same medical aid fund with the same benefits that they enjoyed previously, and in the event of the Applicant being removed, she must be re-instated as a member of the medical aid fund without delay.*
- 2.13 *Payment of pocket money to the parties' minor son;*
- 2.14 *Payment of all necessary and reasonable maintenance costs to the parties' communal home;*
- 2.15 *Payment of the Mnet/DSTV monthly subscription costs to enable the Applicant and the minor child to make use of this facility;*
- 2.16 *Payment of the TV licence for the televisions used at the parties' communal home;*
- 2.17 *Payment of the Apple and Netflix account".*
- 2.18 *Food, groceries & cleaning materials for communal home;*
- 2.19 *Children's toiletries;*
- 2.20 *Applicant's cellphone contract (the Applicant to top up at her own expense);*
- 2.21 *Payment of domestic worker's wages at communal home;*
- 2.22 *Children's haircare expenses;*

2.23 Daughter's cosmetics and make-up;

2.24 Applicant's reasonable fuel expenses (Applicant currently makes use of Respondent's petrol card);

2.25 Pet food for pets at the communal home;

2.26 Vet expenses for pets at the communal home;

2.27 Replacement of household goods, linen & towels in communal home as is reasonably required.

3. The respondent is ordered to make a cost contribution towards the applicant's costs of the divorce action in the amount of R234 279.70 within 60 days of this order.

4. The prayer for costs in respect of the Rule 43 application is refused.

S MFENYANA AJ

ACTING JUDGE OF THE HIGH COURT

HIGH COURT, PRETORIA

For the Applicant : Adv. I Vermaak-Hay

Instructed by : Arthur Channon Attorneys

For the Respondent : Adv. N. M Krige

Instructed by : Snyman de Jager Attorneys

Heard on : 28 February 2022

Judgement handed down on : 21 April 2022