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

CASE NO.: 27380/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
13/07/2022

In the matter between:

P[....] M[....]1 **Applicant**
(I.D No. [....])

and

M[....]2 S[....] M[....]1 **Respondent**
(I.D No. [....])

JUDGEMENT

Mfenyana AJ

Introduction

[1] The applicant seeks 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 2 June 2021, which action is pending before this court.

[2] The application is opposed by the respondent.

[3] The particulars of the relief sought by the applicant are set out in the founding affidavit. The essence of it is that the applicant seeks an order that the respondent pays an amount of R9 684.72 per month towards the applicant's maintenance; as well as a contribution towards his costs in the amount of R10 000.00 payable in monthly instalments of R2 000.00.

[4] The applicant further seeks an order that the respondent pays the costs of this application.

[5] 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.

[6] 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.

For determination

[7] The issue for determination is whether the applicant has made out a proper case for maintenance *pendente lite* and whether he is entitled to a contribution towards his costs of litigation.

Background facts

[8] The applicant and the respondent were married to each other in community of property on 3 November 1990. There are no minor children born of the marriage between the parties, all of the parties' children having attained majority.

[9] It is the applicant's contention that throughout their marriage, the parties supported each other financially even though the respondent always earned a higher salary than him. It is further the applicant's contention that he was previously employed as a pastor but is presently unemployed due to his age and lack of qualifications. However the applicant further submits that the respondent "earns a higher salary than (him) and has a duty to assist (him) with (his) maintenance needs."[1]

[10] Finally, the applicant avers that he is not in a position to meet his own monthly financial needs including food and accommodation, and will be left destitute if he does not receive assistance from the respondent. As he contends that the divorce action will not be finalised without proceeding to trial, the respondent states that the respondent should be ordered to make a contribution towards his costs as she is in a position to afford this expense.

[11] In his founding affidavit, the applicant sets out what he considers to be his reasonable monthly living expenses. These include an amount of R974, 76 for insurance policies; R794.00 for medical aid expenses, R57.56 for email hosting, car insurance and tracker amount to a total of R1 194.70, a funeral policy in the amount of R563.70, R2 900.00 for utilities and municipal expenses, R2 100.00 for groceries. Medical expenses not covered by medical aid stand at R1 100.00. All in all, the applicant seeks payment of an amount of R9 684.72 from the respondent in respect of his monthly living expenses.

[1] Founding Affidavit, para 6.4

[12] Save for stating that the major children do not require any maintenance, the applicant says nothing more about them.

Condonation

[13] The rule 43 application was served on the respondent on 29 November 2021. On 14 December 2021 the respondent served her notice of intention to oppose the application. Not having received the answering affidavit or any further correspondence from the respondent, the applicant on 25 January 2022 proceeded to set the matter down for hearing on 28 February 2022.

[14] On 18 February 2022, the respondent filed her answering affidavit. This prompted the applicant to address a letter to the respondent in which the applicant opposed the filing of the said answering affidavit particularly in the absence of a condonation application. On 23 February 2022 the respondent filed an application/ affidavit seeking condonation for the late filing of her answering affidavit. She further sought costs against the applicant in the event that the applicant opposed the condonation application.

[15] At the commencement of the proceedings, counsel for the respondent stated that the respondent had good prospects of success and that his failure to file the answering affidavit on time should be condoned. He further submitted that there would not be any prejudice to the applicant, were the late filing of the answering affidavit to be condoned. I disallowed the admission of the respondent's answering affidavit having satisfied myself that no proper case had been made out by the respondent for condonation it being the case that the only reason for the late filing thereof was the respondent's supposed inability to travel to Pretoria to depose to the answering affidavit as she had no funds.

[16] The respondent asserts in her affidavit in support of the condonation application that the delay in filing the answering affidavit is not excesive and merely 11 days. This is not correct. The answering affidavit was filed some two months out of time. No reasons are proferred by the respondent for this material miscalculation.

Discussion

[17] On the strength of Rule 43(5), I proceeded to hear submissions from both counsel on the consideration that it was prudent that issues relevant to the determination of the application be ventilated during the course of the hearing.

[18] It was submitted on behalf of the applicant that he is presently unemployed because of his age and qualifications. I was not pointed to any evidence indicating that the applicant is unemployable whether as a consequence of his age or his lack of qualifications. There was also no indication what the required qualifications are for the applicant's desired employment, it being so that he had been employed all along even in the absence of those qualifications. The significance of that evidence is that it would enable the court to determine whether or not the applicant is a candidate for old age pension. If he is, such old age pension could mitigate the applicant's maintenance needs. No explanation was offered also why the applicant's qualifications only became relevant now as he was previously employed for a period exceeding 15 years. There is also no evidence that the applicant ever applied for an old age pension.

[19] The confirmation letter filed by the applicant in support of his unemployment status does not state the reasons why he left the church and simply states that he was employed from 1 May 2006 to 15 August 2021. Neither does it indicate the retirement age for pastors.

[20] On behalf of the respondent it was submitted that the amount required by the applicant amounts to 50% of the respondent's salary and that the respondent could thus not afford the applicant's maintenance needs as it was simply not practical, also bearing in mind that she was also supporting their grandchildren. The respondent further contended that the amounts stipulated by the applicant were amplified and no explanation was provided for his standard of living. Mr Baloyi, counsel for the respondent argued that the standard of living alleged by the applicant was not *bona fide* and the applicant had failed to provide proof of these expenses. He further argued that the parties had been living apart for approximately 10 years. The respondent questioned the applicant's motive in not seeking another church in which to serve. She further stated that nothing prevented the applicant from getting medical

attention from a public hospital. As a matter of fact, so continued Mr Baloyi, the respondent's financial means are hardly sufficient even for her own needs. The respondent thus concluded that the respondent could not afford the maintenance required by the applicant, alternatively that an amount of between R2000.00 and R2500.00 would be reasonable in the circumstances. As far as the contribution for costs is concerned, the respondent argued that the applicant was not entitled to it and the respondent could in any event not afford it.

The Law

[21] It is trite that "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] The question that arises therefore is whether in the circumstances of the present matter, what is required by the applicant is 'actual and reasonable' maintenance within the contemplation of the law. It is necessary to examine what the applicant considers to be his reasonable monthly expenses. Apart from an amount of R2 100.00 for groceries, the remainder of his monthly expenses is in respect of insurance and funeral policies, medical aid and related expenses, email hosting, car insurance and tracker, municipal charges and utilities. While the applicant is entitled to maintenance, these expenses are not necessary for the applicant's subsistence. They are not dire maintenance needs. It cannot be said that the applicant would be left destitute were these requirements not met. I do not intend to deal with the applicant's exepenses individually, but it bears mentioning that an expense such as email hosting is nothing short of luxury, particularly in the circumstances of the applicant. The same goes for the medical aid. It is not a necessity for the applicant's subsistence unless he himself can afford it. The reality of it is that these choices come at a cost. It is not as if the applicant has no alternative. State hospitals and less expensive alternatives are options which are available to the applicant. The matter however does not end there.

[22] The next part of the enquiry, and flowing from the above is whether the respondent has 'the capacity to meet' the applicant's maintenance requirements.

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[2] *Taute v Taute 1974 (2) SA 675 (E) at 676E*

Whilst the applicant is in terms of the law entitled to maintenance, his right to maintenance is also dependent on affordability by the respondent. It was submitted on behalf of the respondent that she cannot afford the maintenance claimed by the applicant. With a measly salary of R20 000.00 a month, she shoulders the responsibility to see to her own maintenance, as well as the maintenance of her grandchildren as their parents are unemployed. As the grandparents, both the applicant and the respondent have an obligation in law to maintain their grandchildren if their parents are unable to do so. As such, the respondent finds herself in the unenviable situation of shouldering a 100% of this responsibility as the applicant made no effort to assist, even during the time he was employed, spanning in excess of 15 years. The reality of the situation is therefore that the respondent is unable to meet the applicant's maintenance needs, the bulk of which as I have already found are not basic maintenance needs and are not reasonable. What is more is that the applicant has not provided proof of any of the expenses he alleges.

[23] The remaining amount pertaining to his grocery expenses should also be subject to the same scrutiny as all the other expenses, namely, whether they are actual and reasonable, and whether the respondent has the capacity to meet them.

[24] It has not been proved that the applicant has no source of income and is thus unable to meet his financial needs. The evidence before this court in the form of the applicant's financial disclosure reveals that he holds investments in different financial institutions. In the past twelve months the applicant received an amount of R17 699,82 from his investments. He will, according to the financial disclosure further receive an amount of R25 881,84. This obviates any need for maintenance and is in contradistinction to his claim that he is unable to maintain himself.

[25] The evidence before me as depicted above does not support the applicant's contention that he is unable to maintain himself.

Cost contribution

[26] 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 Constitution[3], in that the divorcing spouse who has no source of income is entitled to a contribution towards legal costs to ensure that spouse an equal opportunity to defend and present their case.

[27] To show that the applicant has made out a case for a cost contribution he must demonstrate that the respondent owes him a duty of support, that he has a need to be maintained, and that the respondent has adequate resources to discharge this duty. Save for stating that the respondent owes the applicant a duty of support by virtue of their spousal relationship, the applicant's submissions fall flat on the remaining grounds. The bulk of the applicant's needs are not, as already stated, reasonable maintenance needs. The respondent evidently does not have adequate resources to discharge this duty of support.

[28] If regard is had to the respondent's own scale of litigating, there can be little doubt that she is frugal in her approach. There are no bells and no whistles about her litigation. Neither of the parties can afford a higher scale of litigation. I did not get the sense that any of the parties is litigating extravagantly.

[29] It is trite that the court has a discretion whether or not to grant a cost order including an order for a cost contribution. This discretion must be exercised judicially. The guiding principle in exercising the discretion which the court has in this regard was formulated in *V*an *Rippen v Van Rippen*[4] 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."

[30] Notwithstanding the fact that this court refused the condonation application for the late filing of the respondent's answering affidavit, the applicant has failed to prove his case. Maintenance *pendente lite* is not for the mere taking. It is incumbent on the applicant to prove his expenses. He failed dismally to do this.

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[3] *Act 108 of 1996*
[4] *1949 (4) SA 634 (C).*

[31] It also follows that in his failure to support his allegations in respect of his maintenance expenses, he similarly failed to demonstrate why he is entitled to a cost contribution. He has not demonstrated that he has a need to be maintained or that the respondent has sufficient resources to discharge this duty. Having failed to prove his case, I am unable to come to a conclusion that the applicant is entitled to any cost contribution.

Conclusion

[32] On the strength of the applicant's application and indeed his submissions, he failed to adduce any evidence in support of his expenses. This made it impossible for the court to determine what his expenses are, as his claim is simply uncorroborated. Having allegedly lost his employment, he does not say whether he received a pension payout and if so, how much, as that would go a long way in mitigating against his loss of income. Rather vaguely, the applicant's financial disclosure merely indicates that he received no pension payout although the circumstances thereof are not stated. He did not make any submissions whether he has applied for Unempoyment Insurance Fund (UIF) benefits as a result of losing his employment which would also go a long way in alleviating his maintenance burden. This court is left none the wiser.

[33] In ***Botha v Botha*** the court held:

> "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."[5]

[34] I cannot see how ordering the respondent to meet the applicant's unproven maintenance requirements can do justice to any of the parties.

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

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[5] *(2005/25726)(2008)ZAGPHC 169 (9 June 2008)*

1. The application for condonation for the late filing of the respondent's answering affidavit is refused.

2. The application for maintenance *pendente lite* is dismissed.

3. The applicant's claim for a contribution towards his costs of litigation is dismissed.

4. There shall be no order as to costs.

S MFENYANA AJ
ACTING JUDGE OF THE HIGH COURT
HIGH COURT, PRETORIA

For the Applicant	: Adv. M F Jooste
Instructed by	: Weyers & Lombard Inc.
For the Respondent	: Adv. A Baloyi
Instructed by	: MM Mazwi Incorporated
Heard on	: 2 March 2022
Judgement handed down on	: 13 July 2022