

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 5593/2020
Reportable

In the matter between:

F[...] S[...]

Applicant

vs

Z[...] B[...]

Respondent

Matter Heard: 22 May 2023

Judgment Delivered: 20 June 2023

JUDGMENT

MANTAME J

Introduction

[1] On 11 August 2021 the respondent instituted a Uniform Rule 43(6) application for the variation of his maintenance contribution pursuant to the order granted by Salie-Hlophe J in her Rule 43 application on 6 August 2020. It is unclear why this application took almost two (2) years to serve before this Court. However, it appears that the plausible reason was the respondent's legal representatives failed to obtain financial instructions timeously. That was demonstrated by the frequent change of his legal team in this dispute, and failure by the applicant to file answering affidavit timeously.

[2] After the aforementioned application was not prosecuted for a considerable period, the applicant instituted an application seeking an order that the respondent be held in contempt of an order granted by Salie-Hlophe J on 6 August 2020. This application served before this Court on 22 December 2022, when it was postponed for the further filing of papers. These two applications are now before this Court for determination.

Background Facts

[3] Gathering from the volume of documents that have been accumulated to date in the divorce action and the interlocutory applications filed to date (amounting to some four (4) lever arch files), the parties are embroiled in an acrimonious divorce.

[4] The parties were married by both Muslim rights and civil law. However, the divorce (*"talaq"*) was finalised and became official in April 2019. However, it is the civil marriage that appears not to be capable of being resolved as a result of the discordant attitude that has been displayed by parties, despite different justices of this Court encouraging settlement of this matter.

First application

[5] The respondent stated that he is unable to afford the excessive amount that Salie-Hlophe J ordered him to pay. While he has complied with this order most of this period, he has suffered economic hardships. At the moment, he is the sole breadwinner and is maintaining two (2) households, the ongoing legal costs and the

ongoing education expenses for the children. Since the granting of this order, he has been forced to live beyond his means, and depleted the discretionary funds that were set aside for other responsibilities.

[6] In fact, the respondent blamed the applicant for the delay in the resolution of Rule 43(6) application for one and a half years in order to hold onto an order that he can ill afford. He indicated that she failed to file answering affidavits as stipulated in the Uniform Rules of Court. While he cannot comment on the applicant's ill-health, to his understanding she completed her cancer treatment in March 2020 and she currently maintains an active lifestyle.

[7] It is unfortunate that he is now confronted with contempt proceedings, which could result to him being incarcerated through no fault of his own. His salary is the only suitable benchmark to provide for his family. He has contributed more than R400 000.00 since the granting of the Rule 43 order. The order granted was clearly above his earnings. The respondent has attempted to rectify his defaults without any success. The respondent has since suffered a reduction in her monthly income. In addition, the Rule 43 order previously made is extremely broad providing the applicant a sense of entitlement to any relief at any given time.

[8] The respondent stated that the applicant has no prospects of success in the contempt proceedings as she may have some difficulty in satisfying the requirements of contempt. In order for the court to grant a contempt order, the applicant must prove that his conduct was wilful.

[9] The order of Salie-Hlophe J requires him to pay an amount of R20 000.00 per month. This payment is usually short as there are no funds left at the end of the month and his discretionary funds are depleted. The Rule 43(6) proceedings were instituted to demonstrate that the respondent could no longer afford to pay the stipulated amount. However, he confirmed that he made a payment to the applicant on 21 December 2022 of an amount of R14 000.00 which settled the arrear amount she claimed in prayer 3 of the notice of motion. Even then, this was made possible by the receipt of bonus. It is incorrect for the applicant to suggest that he is currently paying R15 000.00 a month to his attorneys. In fact, he still owes his attorney a sum of money for previous attendances. He is constantly confronted with expenses of capital nature which he cannot afford, like the replacement of a rusted gate, which did not need to be replaced. For instance, he is not obliged to pay for expenses in paragraph 4 of the notice of motion as it was not agreed between the parties. Equally, the submission of old invoices in batches whereas he has indicated that same should be sent to him within ten (10) days, have proved to be burdensome as they would have accumulated into thousands of rands. He is unable to pay these huge amounts of money within thirty (30) days. For instance, in October 2022, the respondent spent approximately R41 240.00 in meeting the needs of the applicant and the children as well as the maintenance of her vehicle, medical expenses of approximately R11 073.00, tuition fees of R2700.00.

[10] The respondent contended that imposing a sanction of direct imprisonment on him would be a gross violation of his rights and that the relief sought by the applicant constitutes an abuse of process.

Second application

[11] The applicant asserted that she is the wife and the sole primary caregiver of the parties' children. She found herself in financial peril as a housewife battling cancer. Due to her limited resources and financial constraints, she was forced to exhaust her credit card and borrow money from her family to meet the needs of her household.

[12] The applicant persisted that the respondent is able to pay but refused to pay maintenance as ordered by the Court. She confirmed that she received payment of R14 000.00 on the eve of the contempt of court application hearing. However, he had failed to purge contempt with regard to his additional maintenance obligations and the cost order. Prior to this payment of R14 000.00, the respondent made a short payment for the months of November and December 2022 of R7000.00 per month.

[13] Despite the Rule 43 order mandating the respondent to be responsible for various maintenance obligations, including medical expenses for the applicant and the children, educational expenses, household maintenance expenses and car maintenance expenses, he has only paid certain limited expenses on a selective basis.

[14] The applicant refuted the respondent's initial defence, which claimed that the additional sums were not covered by the Court's order and that the expenses were

capital-related. If paragraph 18.14 of that order is taken into consideration, the respondent is responsible for the repairs made to the applicant's car.

[15] With regard to the second defence, the respondent alleged that he has not received or been made aware of most of the bills. According to the applicant, respondent does not inform the court what he received and what he had not. It was then stated that his defences have no merit.

[16] The applicant denied that the respondent is unable to pay. She stated that his investments are valued at approximately R1.6 million. Although these allegations were denied by the respondent, the applicant criticised him for failing to provide evidence to refute the allegations, or disclose the value of his investments. In her opinion, the allegations of the respondent in his Rule 43(6) application reflected that the respondent has the resources to pay, but wilfully chooses not to do so. The Rule 43 application was granted after considering the respondent's assets and not just his salary. If the respondent is unable to pay based on his salary, then he cannot preserve his capital assets at the expense of his children's maintenance needs.

[17] In her contempt proceedings the applicant contended, that the applicant need to prove, as stated by Herbstein and Van Winsen : *"Once the Applicant proves the three requirements (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established."*¹

¹ Volume 2 page 1104

[18] On admission by the respondent that he has failed to comply with the order, the applicant is not required to follow alternative means to seek compliance. By proceeding with the contempt application, it was stated that the applicant seeks to enforce compliance with the maintenance order. The respondent has failed to take this Court into confidence by providing bank statements and investment schedules to prove that he is factually unable to purge his contempt. Nevertheless, at the hearing of this matter, the applicant indicated that, if the Court is amenable to granting the contempt order, she is not seeking for the committal to prison or incarceration of the respondent, the Court should consider alternative sentences such as correctional supervision instead.

Discussion

[19] The purpose of Uniform Rule 43 application, is to provide interim relief to the applicant who finds herself or himself in a desperate financial or living position without the assistance of his or her spouse in the short terms. In my opinion, the interim order should ensure that the applicant continues with the lifestyle he/she enjoyed before the marriage disintegrated. The process is designed to be inexpensive and expeditious as possible. A Rule 43 application, for this purpose should be clear, short and precisely to the point, hence it requires hearing on an urgent basis.

[20] This practice is no longer adhered to, as the applicants would now file applications running into hundreds of pages and thereby utilise these proceedings for another party to prematurely discover their assets in preparation for trial.

Inadvertently, the Courts find themselves having to adjudicate Rule 43 applications based on assets that never formed part of the parties daily living plan during the subsistence of a marriage. This manner of litigation is prevalent in substantial estates and where another spouse is accused of concealing assets which were enjoyed by both parties during marriage. In most of these applications, it becomes clear that the applicant is aiming for an order that will keep her or him comfortable for a considerable number of years, meanwhile, one or both parties are bent over backwards to frustrate the ultimate finalisation of divorce. In dealing with these applications, the Courts should be careful and prudent not to be strung along in this process by the litigants who are unwilling to reach finality to their actions. In the same vain, the parties' legal representatives should guard against becoming involved in the party's marital battles and thus neglecting their role as advocates, attorneys and or legal practitioners. Our Courts are there to dispense r justice and fairness and legal processes are not to be abused.

[21] Rule 43 orders should not be used by the parties as "waiting rooms" for the joint assets or another litigant's assets to dissipate before divorce proceedings are finalised. In most circumstances, the parties are in and out of court raising unnecessary, or inconsequential legal issues against each other, which ultimately amount to nothing. It has become a trend for parties to drag divorce proceedings unnecessarily (even in simple and uncomplicated estates) to ensure that none of the parties ultimately benefit from the estate, and/or when the matter is ripe for trial none of the parties are able to afford legal representation due to the amount of legal fees that has already been expended unnecessarily. This is normally borne out by the Settlement Agreements that are reached by the parties, after it has taken years for

the divorce process to be concluded. Courts have to discourage this way of litigation.

[22] In this matter, the applicant and the respondent are married to each other out of community of property, without accrual. In April 2019, the respondent divorced the applicant in terms of Islamic law (*'talaaq'*). On 6 August 2020, a Rule 43 order was granted *pendete lite*. To the extent that no reasons were given by the Court for the respondent to pay an amount of R20 000.00 for maintenance, this Court will undertake its own assessment in coming to a conclusion as to whether the respondent is able to pay as ordered.

[23] It appears that when the applicant instituted her Rule 43 application, she stated that she had about R55 000.00 worth of savings and that she did not have immediate access to those funds. Since the respondent left the matrimonial home, she experienced financial difficulties, and needed him to contribute to some of the living expenses.

[24] The applicant pointed out that the respondent transferred an amount of R20 000.00 from his bank account to unknown recipients. When they lived together as husband and wife, the respondent used to give her an amount close to R20 000.00 to utilize to cover all general household expenses. In fact, sometimes he used to pay an amount of R18 500.00 to the applicant's bank account to cover these expenses. Perhaps, it is assumed that it was for those reasons that Salie-Hlophe J granted an order for the respondent to pay an amount of R20 000.00 as maintenance.

[25] The respondent pointed out in his Rule 43(6) application that this Court should vary and amend the monthly maintenance payable from R20 000.00 to R10 000.00 since there is a material change in the respondent's financial position since the order was granted. When the order was granted his monthly salary was about R63 680.00 per month. This amount included an annual performance bonus over the seven (7) month period. However, due to some adjustments at his workplace, his monthly income has been reduced to R53 817 .00 per month on an annualised basis.

[26] From the table presented by the respondent, it is evident that before the Rule 43 was granted, the respondent's expenses in maintaining the two (2) households was approximately R51 230.00 while he was earning an amount of R63 680.00. The respondent was left with R12 450.00 to utilize towards his legal representation.

[27] After the Rule 43 order was granted on 6 August 2020, the respondent's expenditure in the two (2) households was R61 872.00, while there was a reduction in his salary and he earned about R53 817.00 per month. That left him with a deficit of R8055.00. To augment for this deficit, he had to make use of his credit card and also borrow money from his father. He had to withdraw some funds from his Glacier Investment Fund. It was stated that the ongoing withdrawals and rising cost of living would deplete his funds at any time.

[28] In her denial of the respondent's financial situation and her assertion that the respondent is able to pay, she has not presented any documentary proof to rebut the applicant's claims. The applicant merely stated that the respondent received a

higher payment in the month of December 2022 and was able to pay his arrear maintenance. The respondent paid R15 000.00 in legal fees to his attorneys per month, he contributes about R10 881.00 per month to his retirement annuity and he has an investment to the value of about R6.5 million.

[29] The respondent denied that he paid R15 000.00 per month to his attorneys. However, he elected not to respond to the other allegations despite the Court directing him to respond at the hearing of this application.

[30] After the applicant was advised to file for a protection order against the respondent and whereafter the respondent moved out of the common matrimonial home, it became apparent that the respondent was unable to meet his maintenance obligations as he used to when there was one family unit. After the respondent moved to a rented flat, it then became clear that his salary had to be split in order to cater for the two (2) households. It seems that the expenses for the second household were not factored in when the initial Rule 43 order was granted.

[31] The fact that the applicant indirectly alluded to other sources of funds, indicated to her that the respondent's salary could not cover all their needs. Reference to the respondent's contribution to the retirement annuity does not necessarily mean that the retirement annuity is not a necessity for the latter years. She has failed to apply the same reasoning when she mentioned in her Rule 43 application that her savings are not readily available to be utilized. As stated above, the Rule 43 order should not be used to financially exhaust another litigant or as a weapon to settle the divorce scores. It should be used as an interim contribution

towards the living expenses pending the finalisation of divorce. In any event, the respondent stated that she is not upfront to this Court about her income and investments that are currently in existence.

[32] Unfortunately, this Court cannot be tasked with an obligation of considering unverified investment accounts in its decision. The applicant knew more than two years ago that there is a pending Rule 43 (6) application by the respondent. Surely, the respondent's affordability of the maintenance order is central to both proceedings. She did nothing to investigate the veracity of her allegations, or of his further sources of funds. Perhaps the applicant was hoping that the respondent would respond to these allegations, but elected not to do so. It is common cause therefore that one who alleges must prove.

[33] In the absence of any proof to the contrary, I am satisfied that the respondent cannot afford to carry on contributing financially to the two (2) households with the present income. However, the respondent's salary per month was not said to have changed at the hearing of this application. In *Grauman v Grauman*,² the Court stated as follows:

"Rule 43(6) should be strictly interpreted to deal with matters which it says has to be dealt with, that is, a material change taking place in the circumstances of either party or child. That relates to a change subsequent to the hearing of the original Rule 43 application."

² 1984(3) SA 477 WLD at 480 (C)

[34] In the circumstances, I am of the view that the maintenance contribution should be varied.

[35] With regard to the contempt application, it is common cause that contempt of court is defined as “*the deliberate, intentional disobedience of an order granted by a court of competent jurisdiction.*”³ In *Fakie NO v CCII System (Pty) Ltd*⁴ where it was stated that the applicant bears the onus to prove, beyond reasonable doubt, the requisites of contempt, i.e. the existence of an order, its service or notice, non-compliance, and wilfulness and *mala fides*. Once the applicant has proved these requisites the respondent bears an evidential burden in relation to wilfulness and *mala fides*. In other words, the respondent must provide evidence that raises a reasonable doubt as to whether his non-compliance with the court order is wilful and *mala fide*.

[36] Prior to the contempt being filed, the respondent filed his Rule 43(6) to demonstrate that his financial circumstances have changed. Despite the applicant suggesting that there are other financial resources, unfortunately those allegations remained unsubstantiated and/or unverified. As stated above, this Court has to determine the respondent’s ability to pay the applicant’s maintenance based on the level of affordability as stated by the respondent. Having said that, the court found that the respondent’s default was not voluntary, it then follows that non-compliance with the Court order is not wilful and *mala fide*.

[37] As a consequence thereof, this application should fail.

³ See Consolidated Fish Distributors (Pty) Ltd v Zive 1968 (2) SA 517 (C) at 522C

⁴ 2006(4) SA 326 (SCA) para 9-10

[38] It has to be noted that the respondent in his application initially requested her rights to contact with the minor children to be restored. Due to the number of years this matter has been dragging, the minor children have both since become majors. In addition, based on the Family Advocate's recommendations, the respondent elected not to pursue the relief sought.

Costs

[39] It is common cause that a cost order is discretionary. However, it appears that costs have become a challenge to Rule 43 proceedings, as currently Rule 43 (8) of the Uniform Rules has a capped amount of R350 that an instructing attorney could charge unless the court in an exceptional case otherwise directs. I would imagine such challenge becomes real when the costs are taxed. In the event that the court order is not specific on costs, the R350 for costs becomes real. Even if the Rule 43 proceedings were designed to be simplistic, in my view, it does not mean that legal practitioners should be short changed or work for a mere pittance. This rule in my view needs to be revisited as not every case in these proceedings is exceptional. In conclusion, the Court's reasons not to award any costs in these proceedings is not motivated by Rule 43 (8), but by the conduct of the parties against each other and lack of interest in finalising the divorce proceedings.

[40] In the result, this order shall issue:

40.1 The respondent's contribution towards maintenance of R20 000.00 is varied and set aside. The respondent is ordered to contribute R15 000.00 to the applicant towards maintenance per month.

40.2 The contempt of court application is dismissed.

40.3 Each party is ordered to pay its own costs.

MANTAME J
WESTERN CAPE HIGH COURT

Coram: B P MANTAME, J

Judgment by: B P MANTAME, J

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