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

CASE NO: 3198/23

In the matter between

S[...] K[...] (BORN S[...]) APPLICANT

AND

J[...] L[...] K[...] RESPONDENT

Date of Hearing: 13 March 2023

Date of Judgment: 24 March 2023 (to be delivered via email to the respective Counsel)

JUDGMENT

THULARE J

[1] This was an opposed rule 43 application in which the applicant sought maintenance pending the divorce action for herself and her two minor children, including monthly payment for her vehicle, maintenance costs to a home, being allowed to retain movable items in the house for her and the children and payment of an amount of R439 940-00 without any deduction or set-off in respect of a contribution to legal costs. There was an interim order in place in terms of which the children resided with each of the parties 50%

of the time and the respondent met the daily maintenance expenses when the children were with him. He paid for the children's pre-school fees. The respondent also paid 50% of all additional and excess medical expenditure not covered by the children's medical aid, provided that the costs were reasonable and incurred by prior agreement between the parties except in case of emergencies, costs associated with one of the children's extracurricular activities up to a maximum of two activities per term (ie one activity per child) and the cost of equipment, attire and club fees if any; and 50% of any additional educational expenses which included the cost of schoolbooks, stationary, uniforms and equipment that the children may require. In his response, the respondent made a tender to continue to make these payments in respect of the maintenance of the children. In relation to the matrimonial property, which the parties jointly owned, the respondent's case was that the parties were unable to afford to retain the property and tendered that the property be sold and that both parties share the net proceeds of the sale of the property in equal shares. The respondent's case was that the applicant could afford her own maintenance and legal costs.

[2] The issue is whether the order sought was a just and expeditious decision to be made.

[3] I dealt with this matter in the urgent court primarily because of my understanding of the terms of an order by Cloete J on 16 February 2023. The applicable term read:

> "5 The applicant shall co-operate with any child-care expert appointed by the respondent, in the event that the respondent elects to appoint her own expert, which expert shall be appointed within 3 weeks of this order, if any."

The applicant elected to appoint her own expert and needed funds urgently in order to mandate an expert to represent her interests and that of the children in the care and contact dispute within the time set out by that court order. The expert identified require a deposit, which the applicant alleged was unable to raise.

[4] The parties were married in April 2016 out of community of property by ante-nuptial contract with the exclusion of accrual. Two children, twins, were born of the marriage in 2019. The respondent served the applicant with divorce summons on 23 January 2023 and launched an urgent application for care and contact with the children. In his particulars of claim the respondent sought that the parties contribute to the children's maintenance in proportion to their respective means. The applicant actively prevented the respondent from exercising regular contact with the children and caring for them in the same manner as he had done and insisted that he exercise only limited contact with the children. The applicant went so far as to inform the principal of the pre-school that she would do anything in her power to exclude the respondent from the children's lives. The conduct of the applicant led to the respondent approaching the High Court for a care and contact order. The applicant also filed a domestic violence application, which is pending.

[5] During the marriage the respondent paid for her car insurance and short-term insurance, and in January 2023 the respondent cancelled the policies and these two items were moved to her own policy. The respondent used to be the main member of the family's medical aid scheme and the applicant paid the premiums. The applicant removed herself and the children as beneficiaries of the respondent and did not pay the premiums. The applicant enrolled herself in a medical scheme with the children. The respondent paid for levy, rates and taxes. The applicant requested the managing agents to send the levy, rates and taxes accounts to her. The interim domestic violence order directed the respondent to leave the common home. He moved in with his parents and was in the process of acquiring accommodation where he had to pay rental.

[6] The parties' earning capacity has historically been equal and both have always contributed to the household expenses in equal shares. The applicant earned around R58 000-00 before changing jobs to become an independent broker in January 2023. In January her fee income was R26 784-58. The applicant moved positions because the new work had significant earning potential of reaching R100 000-00 per month, which would result in an increase in her income as she established herself in her new position.

The respondent's gross income was R73 170-29. He on occasion bought goods on auction and resold them for a profit and occasionally made between R10 000-00 and R15 000-00. He has a pension fund with a value of R873 538-08 and a retirement annuity with a value of R442 493-85. His savings have been adversely affected by the ongoing litigation and relocation and were depleted. The respondent's vehicle valued at R400 000-00 was fully paid. The applicant has a retirement annuity with a value of R200 000-00, a provident fund with a value of R173 190-04 and refinanced her vehicle to the value of R450 000-00.

[7] The common home of the parties was worth about R4 000 000-00 with about R254 833-00 still owing to the bank on a bond. During the marriage, the parties divided responsibilities for their monthly household expenses. The applicant paid for groceries and toiletries, internet, clothing for the entire family, medical aid premiums for the entire family, monthly bond repayments and extra-mural activities for one child. The respondent paid for bulk meat, which the parties deemed not to form part of the grocery, the children's school fees, levies, rates and taxes, vehicle insurance and short term insurance premiums, gardener and house help's salaries, extra-mural activities for one child and one child's lift club.

[8] The true liabilities of each of the parties was about R300 000-00. I am saying true because amongst others, the applicant indicated a loan from a friend of R80 000-00 when the bank statements indicated that that amount had been paid back to the borrower. The applicant also included attorneys' fees at R100 000-00 in her liabilities. The bank statements indicated that the amount had been paid and was not owing. There were also amounts on both the overdraft and revolving credit plans which had been repaid, resulting in lesser amounts than those in applicant's founding affidavit. What was of concern was that the bank statements revealed a worrying gambling pattern, with the use of the credit card, by the applicant. In September 2022 she spent R23 613-51, in October R48 136-69, in November R69 592-52 and in December 2022 R45 182-02. These were online gambling purchases. This means that in four months the applicant spent around R186 524, 92 gambling online. She pleaded being indigent

and expected to be found lacking. In her application to refinance her vehicle on 15 February 2023 the applicant indicated a disposable income of R24 145-93.

[9] The applicant needs accommodation, but not that which may be beyond her means. Just like every average South African on finances, she must cut her cloth to the size of her dress. Where the parties have equal, although not similar earnings, and they share care and contact equally, without more, in my view it was not established that the applicant deserved to be paid anything by the respondent for the period that the children are with her. The respondent paid for water, electricity, rates and taxes for the property. I fail to see the wisdom of redirecting that expense from the respondent to her through the managing agents, and then claiming that amount in a rule 43 application. This kind of conduct, where on the eve of divorce or immediately after service of divorce summons the role of a party in the maintenance of the spouse or the children was sought to be erased or the effect thereof scraped out, whilst the liabilities and expenses are inflated or amassed ostensibly to make up a case for a rule 43 application, need not be encouraged. The applicant cannot claim for the transport of the son, for which the respondent was paying.

[10] The inclusion of these kids of expenses, including medical expenditure at R1000 per month per child, when the respondent is paying and has tendered to continue paying such expenses, suggests that the items were included simply to inflate and increase the expenditure on the children. It is not for this court to tell the applicant how to run her life and what to do with her earnings. As a result, it is generally none of the court's business that she elected to pay R6000 for life cover and R10 000-00 per month for an annuity. However when she uses that to advance a case that she cannot afford her lifestyle and wants the court's intervention for the respondent to pay for it, it becomes my business. These amounts are excessive when regard is had to the parties' earnings. This is moreso if one considers that the life cover was taken out over the life of the applicant's father. This is an expense which is not only excessive but unnecessary.

[11] As regards legal costs, although the applicant in her notice of motion used the word contribution, in her papers, including on a paper which was prepared and handed during the hearing titled “REVISED LEGAL COSTS”, the applicant claimed the totally of the legal costs and not a contribution thereof. The total in her founding affidavit was R439 940 and in the revised costs the total was R357 440-00. In setting out the breakdown, the original amount claimed will be set out and where revised the revision amount will be in brackets. The amounts set out were indicated as trial preparation including costs of counsel and attorney, up to and including the first day of trial. To drafting plea and counterclaim, discovery, rule 37 and pre-trials for 20 hours at R1700 per hour excluding vat and disb R34 000 and 10 hours at R1150 per hour excluding vat and disb R20 000 (R11 500).

[12] On consultation with counsel and attorney in respect of preparation for trial -2 days the amounts were set out as follows: Counsel at R20 000 (R11 500-00) per day excluding vat and disb R40 000 (R23 000-00). Attorney at R17 000-00 per day excluding vat and disb R34 000-00. Consultations with instructing attorney per hour 10 hours at R1 700 per hour excluding vat and disb R17 000. Attorney’s fees in respect of preparation of bundles and costs of subpoenas of witnesses R42 500-00. Expert qualifying fees for first day of trial R30 000-00. Counsel’s first day excluding vat and disb R20 000 (R11 500). The applicant alleged to have already spent approximately R92 000-00 on the care and contact matter. In terms of Cloete J’s order the parties must *inter alia* file supplementary affidavits, joint minutes and heads of arguments in preparation for the hearing on 4 October 2023. The applicant’s estimated costs are: to receive and perusal of expert reports, joint minute, consulting with attorney and a counsel, and to drafting and filing supplementary affidavit R60 000 (R40 000), to draft heads of argument R30 000-00 (R10 000-00), counsel’s day fee R20 000-00 (R11 5000), attorney’s day fee R17 000-00 and to attorney’s various attendances in respect of the matter R17 000. Settlement is clearly not an option.

[13] Rule 43(5) of the Uniform Rules of Courts read as follows:

> “43 Interim relief in matrimonial matters
>
> (5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision.

[14] During the marriage the expenses of the children have been proportionally shared between the parties and in my view there was no reason to interfere with that arrangement until the divorce was finalized, including the contact and care dispute between the parties. The expeditious nature of a rule 43 application, in my view, in itself was sufficient reason to not allow for a complex enquiry of the nature of an involved maintenance order. In my view, complex enquiries should preferably be pursued in the maintenance courts, which now have the power to make an interim order as envisaged in section 10(6)(b) of the Maintenance Act, 1998 (Act No. 99 of 1998) (the MA). The power of a maintenance court to make an interim order before the maintenance enquiry was heard is a new development, which was introduced by section 4 of the Maintenance Amendment Act, 2015 (Act No. 9 of 2015) which came into operation on 9 September 2015. Section 10(6)(a) of the MA provided the legislative voice to the urgency of maintenance enquiries. Where the issue is simply the determination of a reasonably appropriate amount to be paid for the support of the spouse or the children, the proper machinery is the maintenance recovery regime of the MA. It provides for a proper investigation and an enquiry. In that machinery, a maintenance investigator is available to run the errands to help determine the difference in value between two bob and twenty cents, whilst the maintenance officer and the parties have the time to use a calculator to add, subtract, divide and multiply the figures where necessary, to help the parties and the magistrate to determine reasonable amounts to be admitted as expenses.

[15] The requirement in Rule 43(5) for a just order, in my view, placed a duty not only on the courts but also on applicants to base their applications and their conduct according to what is morally right and fair. It requires a dispassionate approach to the application, which is guided by truth and reason. In as much as family law matters are in their very

nature emotionally charged, it is expected of an applicant to strive not to be influenced by strong emotions and affected by personal bias. This will allow some measure of calm, so that they can be rational and be able to think clearly and to make good decisions. A Rule 43 application remains a process of balancing the scales for a just divorce process and provides temporary assistance for the support of the spouse and the children and to enable a party in an unfair position to present its case adequately before the court.

[16] Rule 43 was not created to give an interim meal ticket [*Nilsson v Nillson* [1984] 1 All SA 520 (C) at p. 520. The rule was enacted to ensure justice in that the parties are treated fairly *vis-à-vis* one another. I have to add that the rule was also not intended to result in an order which will for all intents and purposes be a certificate of exemption of legal practitioners to some risk, to wit, that their fees were covered in advance. The totality of what is covered by the rule has its basis in the duty of support that the spouses owe each other [*Carry v Carry* 1999 (3) SA 615 (C) at 619H-I and parents owe to their children.

[17] The applicant exaggerated her expenses and understated the support that the respondent was providing to her and the children. This is dishonourable conduct which has no place in judicial proceedings [*Du Preez v Du Preez* 2009 (6) SA 28 (TPD) at 32D-E]. The parties in rule 43 proceedings have a duty to act in utmost good faith and to disclose fully all material information regarding their financial affairs and failure to carry out this duty would justify refusal of the relief sought [*Du Preez,* at 32G-H]. The needs of the parties and their respective available means did not persuade me that the order as prayed for would be fair *vis-à-vis* the parties under the circumstances.

[18] In my view, the rule was not envisaged for the parties to have similar means. If that was the case experience taught that some divorce actions would run for the lifetime of the parties therein engaged and for as long as the legal practitioners' fees were covered in advance. The rule was intended for the parties to have equal means so that they can on an equal footing adequately engage with the issues between them. Equality includes

the paradox of similarities and differences in one whole. It is necessary to indicate that equality is sometimes a logically self-contradictory concept which has the propensity to run contrary to other people's expectations. Equality may involve contradictory yet interrelated elements. I understand equality, in the context of a rule 43 application, to accept the difference between available means between the parties, for as long as that difference does not amount to an unfair advantage for one party at the expense of the other and lead to unjust divorce proceedings.

[19] For these reasons, a just decision is to dismiss the application with costs, such costs to include costs of counsel.

DM THULARE

JUDGE OF THE HIGH COURT