



**IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION,  
JOHANNESBURG**

**CASE NO: 2017/31153**

- (1) REPORTABLE NO  
(2) OF INTEREST TO OTHER JUDGES

8/6/2022  
DATE

SIGNATURE

In the matter between:

**LUBIE, DARRYN**

Applicant

and

**LUBIE, LEANNE ROBYN (born ARENSON)**

Respondent

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**JUDGMENT**

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**MOORCROFT AJ:**

Summary

*This is an application in terms of Rule 43(6) for a variation of an existing order made under Rule 43 of the Uniform Rules. The Rule is strictly interpreted and the applicant*

*for a variation order is required to show a material change in circumstances. This the applicant fails to do even though lengthy papers including evidence in reply were admitted into evidence.*

*A punitive cost order is justified.*

### Order

[1] In this application I made the following order:

1. *The application is dismissed.*
2. *The applicant is ordered to pay the costs of the application on the scale as between attorney and client.*

[2] The reasons for the order follow below.

### Introduction

[3] This is an application for interim relief in a matrimonial matter in terms of Rule 43<sup>1</sup> of the Uniform Rules, and specifically for the variation of an existing order as provided for in Rule 43(6).

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1 See in general Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* RS15, 2020, D1-577, and *E v E* 2019 (5) SA 566 (GJ).

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[4] The parties were married in 2011 out of community of property with the exclusion of the accrual system and two children were born of the marriage. They were born in 2014 and 2015 and are currently eight and seven years old.

[5] The parties separated in 2016, and in 2017 the respondent instituted divorce proceedings. The children reside primarily with the respondent.

[6] The applicant is the shareholder and director of a business incorporated as a private company and the respondent is a teacher.

[7] Six years after the parties separated and five years after divorce proceedings were instituted, the issues in dispute on the pleadings are -

7.1 the *quantum* of maintenance for the children, and

7.2 whether the applicant (defendant) has a claim to the proceeds of a sale of property registered in the name of the respondent.

Rule 43(2), (3), (5) and (6)

[8] Rule 43(2) requires a party seeking interim relief in a matrimonial matter to do so on notice<sup>2</sup> with a “*sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor.*” A respondent wishing to oppose the application is required by Rule 43(3) to deliver “*a sworn reply in the nature of a plea.*”

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<sup>2</sup> Form 17 of the First Schedule.

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[9] While concise affidavits are foreseen and prolixity should be avoided,<sup>3</sup> there is no prescribed length: Relevance remains the criterion.<sup>4</sup> The filing of financial disclosure forms filed prior to the hearing should shorten proceedings.<sup>5</sup>

[10] The Court does not have a discretion to permit departure from the strict provisions of Rule 43(2) and (3) unless it decided to call for further evidence in terms of Rule 43(5).<sup>6</sup> Rule 43 therefore does not provide for the filing of replying affidavits as of right.

[11] Rule 43(5) states that 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.*” A court may therefore in the interest of a just and expeditious decision allow a party to file further affidavits.

[12] The discretion that is provided by Rule 43(5) ought to be exercised where the respondent’s affidavit raises a dispute of fact in order to allow the applicant to file a further affidavit. Usually the applicant would apply for leave to do so.

[13] Rule 43(6) provides for a change in circumstances. The court may, “*on the same procedure,<sup>7</sup> 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.*”

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3 *Maree v Maree* 1972 (1) SA 261 (O) 263H; *Zoudendijk v Zoudendijk* 1975 (3) SA 490 (T) 492C; *Visser v Visser* 1992 (4) SA 530 (SE) 531D; *Du Preez v Du Preez* 2009 (6) SA 28 (T) 33B; *T S v T S* 2018 (3) SA 572 (GJ) 585A.

4 *E v E* 2019 (5) SA 566 (GJ) paras 33, 43, 48, and 52.

5 *E v E* paras 63 to 64.

6 *E v E* paras 24 and 58 to 59.

7 In other words, the procedure in Rule 43(2) and (3).

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[14] Rule 43(6) is strictly interpreted.<sup>8</sup> There must be a *material* change in circumstances and it is not permissible to seek a re-hearing or a review of an existing order under the guise of a Rule 43(6) application, or to appeal the existing order.

[15] There often are disputes of fact in Rule 43 applications, perhaps unavoidably so. The relief is interim in nature and intended primarily to put food on the table and a roof over the heads of litigants and their children while a matter is being prepared for trial. In this matter it is important to note that a lengthy period has elapsed since divorce proceedings were instituted and there appears to be no reason given the disputes and the complexity of the matter why the matter cannot proceed to trial so that the factual disputes can be dealt with properly.

[16] The respondent has intimated that she would prefer the issue of maintenance to be dealt with in the maintenance of court which would effect a cost saving.

### The first Rule 43 application

[17] In November 2019 the applicant launched a Rule 43 application seeking relief mainly in respect of the children, and the respondent counter-applied for maintenance.

[18] The application took 14 months to finalise and boasted more than nine hundred pages. The application was argued in January 2021 and judgment was handed down in May 2021.<sup>9</sup>

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<sup>8</sup> *Jeanes v Jeanes* 1977 (2) SA 703 (W) 706F; *Grauman v Grauman* 1984 (3) SA 477 (W) 480C; *Micklem v Micklem* 1988 (3) SA 259 (C) 262E–G; *Maas v Maas* 1993 (3) SA 885 (O) 888C; *Greenspan v Greenspan* 2001 (4) SA 330 (C) 335E–F

This application in terms of Rule 43(6)

[19] The applicant now applies in terms of Rule 43(6) for a variation of the order. He seeks an order that the monthly maintenance payable by him be reduced from R14 000 to R5 000 and that he pay 50% of the children's medical expenses not paid by the medical scheme, and 50% of their educational expenses whereas he was responsible for all these expenses in terms of the existing order. He states that he has been experiencing financial difficulties since July 2020.

[20] The Rule 43(6) application is 734 pages long. Surprisingly the applicant's papers include the *Code of Conduct of the South African Institute of Chartered Accountants (Revised 2018)*, a document completely irrelevant to the application.

[21] The parties filed reports by chartered accountants. These are of little use for comparison purposes as the applicant's experts focused on assets and liabilities while the respondent's expert focused on income and expenditure which she regarded as more appropriate for Rule 43 proceedings.

[22] In his expert report<sup>10</sup> attached to the Rule 43(6) application, the applicant's expert states that he was requested to review the two expert reports<sup>11</sup> that featured in the first Rule 43 application and to express an opinion on the

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9 Judgment was delayed by unforeseen illness on the part of the presiding Judge.

10 The report is referred to as an "interim expert report" by the applicant's expert.

11 These two reports are (1) a report by his predecessor as the applicant's accounting expert, and (2) a report by the respondent's expert who provided reports in both the first Rule 43 application and this application under Rule 43(6).

applicant's financial affairs and his ability to meet his obligations as required in terms of the first Rule 43

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order. His report is largely an analysis of the evidence that was before Court in the first Rule 43 application.

[23] Unfortunately the expert then takes to making insulting remarks about the respondent's expert which of course raises serious doubts about his impartiality and his ability to assist the Court.

[24] He deals cursorily in one and one-third of a page of his 13-page report with the "*applicant's current financial position.*" He reviewed management reports of the applicant's business for the period July 2020 to December 2021, as well as the applicant's bank statements and his schedule of assets.

[25] The Rule 43(6) application as filed was therefore an attempt at a re-hearing of the first Rule 43 application.

[26] The respondent filed an opposing affidavit and a six-page report by her expert dealing with the allegations made against her personally in the report by the applicant's expert, and with aspects raised by him.

[27] In response the applicant filed a replying affidavit by his expert together with an addendum to his first report. In this addendum that is twenty-five pages long with annexures, he deals with criticism of his first report and deals briefly with events since the first Rule 43 application was argued. The addendum was admitted during a case management meeting and is properly before the Court.

[28] Much of the addendum report is a critique of the report by the respondent's expert.<sup>12</sup>

#### The allegations of changed circumstances

[29] In his financial disclosure forms of October 2021<sup>13</sup> the applicant stated that his liabilities exceeded his assets by more than R645 000. The only assets he had, were personal assets of R2 755 and a pension valued at R98 654. His interest in business assets was a negative amount of -R40 394 leaving him with total assets of R61 015.

[30] In February 2020 his total interest in business assets was R23 670.00.

[31] He did not have any personal debtors.

[32] The applicant's total liabilities amounted to almost R707 000, the bulk of which consisted of legal costs of almost R650 000. He estimated his net income from employment at R528 757 but had no other sources of income.

[33] The respondent disclosed<sup>13</sup> a net asset value of R250 000 and income from employment of R141 161, equal to 26% of the applicant's income. The disparity in income is obvious.

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12 The applicant's expert *inter alia* criticises the respondent's expert for admitting in her report that she was the author of a document that she later denied being the author of. The accusation is unfounded as the applicant or his expert confused one document with another. The applicant's counsel correctly conceded this error in argument. <sup>13</sup> The applicant's first financial disclosure form was filed in February 2020.

13 The respondent's financial disclosure forms were dated in November 2021.



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[34] Nothing in the affidavits now before Court justify a finding of changed circumstances that merit a revised order as sought by the applicant. The revised order sought would entail a 64% reduction in direct maintenance payable, and a 50% reduction in respect of his contribution to educational expenses and certain medical expenses.

[35] In February 2020 the applicant's net income for the last financial year was R34 258. In October 2021 this had increased to R416 843. In February 2020 he estimated his net income over the coming twelve months as R216 000. In October 2021 his estimate was R528 757.

[36] Since the first Rule 43 application was argued the applicant increased his salary drawings from his business. He explains that in the past the company paid more of his expenses but those are now paid out of his salary, so that the increase in his salary does not reflect a concomitant increase in real income. This of course makes comparison difficult.

[37] He also moved into a more luxurious home so as to have enough rooms for his household that includes him and his girlfriend, their child, his girlfriend's child from a previous relationship, and the two minor children born of the marriage when they

visit.

[38] Over the course of the marriage the applicant paid the majority of the expenses through his business, and drew a nominal salary. Certain expenses were paid through a company that is now said to be dormant. Given the fact that many of the common household expenses were always paid through the business and

not directly by the applicant, proper discovery and *viva voce* evidence is essential to arrive at the true expenditure of the common household during the subsistence of the marriage, the real income of the applicant then and now, and the needs of the children.

[39] Central to the applicant's case are the propositions that his business was no longer profitable and was in fact trading under insolvent circumstances, that it was impacted severely by the Covid-19 pandemic, and that he was no longer able to pay private school fees. These issues featured in the first Rule 43 application and were taken into account by Mdalana-Mayisela J.

[40] It is also abundantly clear that the applicant is supported by his company over and above his salary and the fact that his salary was increased substantially because he was now expected to make more payments himself instead of having it done through the company conclusively shows that at least to some extent and for at least some of the time his expenses were paid by the company and one cannot and never could simply look at his salary to determine his income.

[41] Despite the fact that the economy was facing a headwind, a new employee was appointed, at least one staff member received a 5.3% salary increase, and the company pays a tax free payment towards another staff member's education.

[42] There are a number of anomalies in the accounting practices of the applicant's business that also require oral evidence and cross examination in a trial. For instance, the applicant's business paid invoices issued by a third party firm to Levitt

Kirson, the business of the applicant's girlfriend's father. When these invoices were queried, amended invoices were issued with the applicant as the debtor instead of Levitt Kirson. Again, oral evidence and discovery is required to deal with these issues.

### Conclusion

[43] The application is unnecessarily prolix and the evidence inconclusive. No case is made out for a variation in terms of Rule 43(6) on the basis of a material change in circumstances.

[44] Under these circumstances the appropriate order is that the application be dismissed and the applicant be ordered to pay the costs on an attorney and client scale. I make such an order in paragraph 1 above.

**J MOORCROFT**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

*Electronically submitted*

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **8 JUNE 2022**.

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DATE OF THE HEARING:

26-27 May 2022

DATE OF JUDGMENT:

8 June 2022