Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38752/2016

DATE: 2022-09-16

10

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE: 27 September 2022
SIGNATURE

In the matter between

R B Applicant

and

N B Respondent

J U D G M E N T

20

WANLESS AJ

Introduction

[1] In this matter the applicant, one R B, an adult male and the respondent, one N B, an adult female, remain married to

one another. Arising from the various applications and counter-applications before this Court, it will be convenient for this Court (as was the case during the argument before the Court) to simply refer to the applicant as Mr. B and to the respondent as Mrs B throughout this judgment.

[2] Regrettably the present basket of applications and counter-applications which were heard by the Court on 12 September 2022 are not the first entered into between the parties now before this Court. In order to properly
10 understand the nature of the present litigation and the relief sought by both parties, it is accordingly necessary to briefly set out the history of this matter, thereby placing both the previous and present litigation in proper context.

History

[3] Mrs B instituted a Rule 43 application in this Court under case number 38752/16, which was heard by Strydom
20 J on 27 March 2018. On the same day the learned Judge made an order which is annexure “RB01” to Mr B’s Notice of Motion in the present application (“the Rule 43 order”). In terms thereof Mr. B was ordered, *inter alia*, to pay to Mrs B maintenance and 50 percent of medical costs not covered by a medical aid *pendente lite* and a contribution towards her

costs.

[4] Thereafter and during or about August/September 2018, Mrs B instituted an urgent application in this Court, also under case number 38572/16. The purpose of this urgent application was to protect Mrs B's half share of the nett proceeds of the immovable property, registered jointly in the names of both the parties, since Mr B had apparently procured a purchaser for same.

[5] This urgent application was heard by Adams J, who
10 granted an order on 11 September 2018 ("the Adams order"). In essence, Mrs B was successful in the relief that she sought in terms of this application, including an order that Mr. B pay the costs. Ultimately (and this is common cause) the sale did not proceed and the immovable property remains registered in the names of both parties.

[6] Thereafter (and this is also common cause on the application papers presently before the court) Mr. B fell into arrears in respect of his payments to Mrs B and as he had been ordered to pay in terms of the Rule 43 order. As a
20 result thereof, Mrs B instituted an application in this Court (again under case number 38752/16) for, *inter alia*, an order that Mr. B be found to be in contempt of the Rule 43 order and an order that he pay to her the then arrear maintenance in the sum of R93 003.35. This application was instituted by way of a Notice of Motion dated 17 September 2019.

Service of this application was never effected upon Mr. B and for that reason the application was never proceeded with.

The present litigation

[7] Mr. B, who appears in person, has instituted an application for the variation of the Rule 43 order, together with an order for costs. Mrs B has instituted a counter-
10 application by amending her previous Notice of Motion and supplementing her papers to claim arrear maintenance which has increased considerably since September 2019 and to revive the contempt of court proceedings now that Mr. B is capable of being served with the application. In addition thereto, Mrs B now seeks an order that the immovable property be sold; any arear maintenance paid to her, if not already paid by Mr. B and the nett proceeds retained in trust pending the finalisation of the divorce action after they had been distributed in accordance with
20 the Adams order. In other words, an order giving effect to a sale of the immovable property and, at the same time, the Adams order.

The application for the variation of the Rule 43 order

[8] Upon a reading of Mr. B's notice of motion and his founding affidavit, it is far from clear as to the basis, in law, upon which he seeks a variation of the Rule 43 order. Indeed, there is nothing either in the notice of motion or the application papers before this court that would enable this court, if it found for Mr. B, to formulate an order varying the existing Rule 43 order of Strydom J.

[9] Those material difficulties apart, Mr. B, both in his heads of argument and during the course of argument

10 before this Court, premised the relief he sought primarily on the provisions of Rule 42 of the Uniform Rules of Court.

[10] Rule 42 deals with variation and rescission of orders. In terms of Rule 42(1):-

> "The court may, in addition to any other powers it may have, *mero motu*, or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> 20 (b) An order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) An order or judgment granted as a result of a mistake common to the parties."

[11] It is common cause and was correctly conceded by Mr B before this court that both parties were present at court on 27 March 2018 when the matter was argued before Strydom J. In the premises, subrule 42(1)(a) is not applicable since the order was not sought or granted in the absence of either of the parties, with particular reference to Mr. B. In addition thereto, it is clear that having regard to the facts of this matter, neither subrule 42(1)(b) nor 42(1)(c) assist Mr. B in his quest to have the Rule 43 order varied or
10 rescinded.

[12] During the course of argument Mr. B referred this court to paragraph 30 of his founding affidavit wherein it is stated: "…but the Honourable Judge omitted the Applicant's testimony and thus erred in his judgment." Insofar as it appeared to this Court that Mr. B may also be relying on the common law to rescind or vary the Rule 43 order (to which reference in passing may have also been made in his heads of argument and various affidavits placed before this court) and in light of the fact that Mr. B had elected to represent
20 himself in these proceedings, the Court attempted to elicit from Mr. B an explanation which could possibly shed some light on this issue and potentially assist Mr. B in the matter.

[13] Following thereon, it became clear that what Mr B wished to convey to this Court was that the error Mr B had based his entire application upon, was his opinion that the

learned Judge had failed to consider the evidence that Mr B had placed before the court by way of affidavit. In that regard Mr. B believed that the learned Judge had not even read his affidavit before handing down the order that he did. In this regard it is clear that Mr. B has placed no evidence in support of this belief before this Court. Furthermore, as correctly pointed out by Mr Jacobs, who appears for Mrs B, paragraphs 9 and 10 of Mr. B's founding affidavit clearly contradict such a belief.

10 [14] It further appeared that Mr B may also rely on fraud on the part of Mrs B to set aside the Rule 43 order. In this regard he complains that Mrs B surrendered an insurance policy to the value of R84 941.40 and failed to disclose this fact, together with dividends received from a share portfolio, all prior to the hearing of the Rule 43 application, in her Rule 43 statement placed before Strydom J. There was also an allegation in respect of obtaining a loan from FNB Home Loans. It is Mr B's case that Strydom J did not take these actions of Mrs B into consideration when he

20 granted the Rule 43 order. As the learned authors in Erasmus, Superior Court Practice (Second Edition) at D1-564 note:-

> "In order to succeed on a claim that a judgment be set aside on the ground of fraud, it is necessary for the applicant to allege and prove the following:

(i) That the successful litigant was a party to the fraud [1]

(ii) That the evidence was in fact incorrect;

(iii) That it was made fraudulently and with intent to mislead [2]

(iv) That it diverge to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the
10 incorrect evidence to give.[3]"

[16] Mrs B has dealt with the allegations made by Mr. B in her Opposing (more correctly answering) affidavit. Whilst the averments made by Mr. B in his founding affidavit may be described, at best, to be broad and lacking in any factual foundation whatsoever, the contents of that answering affidavit dealing with those averments are not only fairly detailed and supported by documentary evidence but are, viewed objectively, not improbable. At the very least, they raise a genuine and *bona fide* dispute of fact which cannot
20 be decided on the application papers before this court. In the premises, Mr. B has failed to discharge the onus incumbent upon him to prove, on a balance of probabilities, that the Rule 43 order should be set aside (or somehow

[1] *Rowe v Rowe 1997 (4) SA 160 (SCA) at 166 G - J*
[2] *Mabuza v Nedbank Ltd 2015 (3) SA 369 (GP) at 374 D – 375 A*
[3] *Rowe v Rowe (supra) at 166 I*

varied) on the ground of fraud. [4]

[17] In the premises, it is clear from the aforegoing that the application for the variation of the Rule 43 order by Mr B must fail. Not only does it fail to satisfy the provisions of Rule 42 but it clearly falls well outside the ambits of the common law whereby a judgment may be set aside on the grounds of fraud. Of course, in addition thereto, it is trite that if an applicant relies upon either Rule 42 or the common law, he should bring his application to vary or set
10 aside an order within a reasonable time. In this case the Rule 43 order was granted on 27 March 2018. Mr B has taken three years and six months to institute the present application. On this ground alone the application should be dismissed.

[18] Upon a proper reading of the application papers before this Court it is clear that the real reason for the application to set aside or vary the Rule 43 order is the failure of Mr. B to comply therewith. Once again, adopting the most benevolent attitude possible towards the
20 application, it is one which should possibly have been instituted in terms of Rule 43(6). This subrule reads as follows:

> "The court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or

[4] *Plascon-Evons Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at 634I*

the contribution towards costs proving inadequate".

So, had Mr. B taken this Court into his confidence and clearly set out his past and present financial position, it may have been possible for this Court to come to his assistance and vary the Rule 43 order in terms of subrule 43(6). However, as correctly pointed out by Mr Jacobs, Mr. B's application papers presently before this court are largely devoid of any such information. At best, he deals only with four months' expenses, from October 2021 to January 2022,
10 whilst tendering to continue paying R250.00 per month in terms of the Rule 43 order. This, when he has failed to comply with the same order since 31 March 2018, to date.

[19] The application by Mr. B is accordingly dismissed with costs. As to the scale of those costs, this will be dealt with later in this judgment.

The counter-application

[20] The counter-application instituted by Mrs B seeks
20 relief in three (3) respects:-

(a) Payment of arrear maintenance;

(b) An order that if Mr. B fails to pay that arear maintenance he will be deemed to be in contempt of the Rule 43 order; and

(c) Sale of the immovable property registered in

the names of both parties, with the distribution of funds as per the Adams order.

Mrs. B also seeks a costs order on a punitive scale.

Payment of arrear maintenance

[21] The Rule 43 order has been in effect since 27 March 2018. In light of the decision of this Court whereby the application by Mr. B for the variation or
10 rescission of that order is dismissed the Rule 43 order remains intact. It is trite law that until an order of court is set aside, it is enforceable and must be followed. This is not disputed in the application papers before this court.

[22] In the Amended Notice of Motion Mrs B claimed arrear maintenance in the total amount of R247 216.18. At the hearing of this matter Counsel for Mrs B introduced into evidence an affidavit deposed to by Mrs B, entitled "Supplementary Affidavit to Applicant's Contempt of Court Application (Counter-application)". There was no objection
20 thereto by Mr B. One of the purposes of this affidavit was to update the amount of arrear maintenance payable by Mr. B in terms of the Rule 43 order. In that regard the said amount has increased from the sum originally claimed (R247 216.18) to R285 966.18. Mrs B asks for judgment in respect of this latter amount.

[23] Whilst Mr. B has raised vague complaints in the affidavits before this Court pertaining to what he describes as the failure of Mrs B to keep proper records, this Court is satisfied that Mrs B has proven, on a balance of probabilities, that the arrear maintenance payable to her is presently the sum as set out in the schedule to her affidavit bearing the title "Maintenance Calculations". This Court can confidently arrive at this conclusion based on, *inter alia*, the fact that the amounts claimed fall squarely within the
10 provisions of the order itself; appear more than reasonable and reflect all payments made by Mr. B. As already stated, these amounts have never been seriously disputed by Mr. B. Lastly, it is noted that Mrs B has not claimed any interest in respect of her claim, which has been outstanding for a considerable period of time. Nor does she claim interest in respect of the claim for the arrear maintenance should it not be paid timeously in terms of any order which this Court may make in respect thereof. *Prima facie* it would appear to this Court that Mrs B would have been entitled to claim
20 same. In that regard Mr. B can indeed count himself to be a fortunate man.

[24] In the premises, an order should be made whereby Mr B pay to Mrs B arear maintenance in terms of the Rule 43 order, in the sum of R285 966.18.

Contempt of court

[25] The history of this aspect of the counter-application has already been dealt with earlier in this judgment. Relying on the decision of *Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)*, Mr. Jacobs has urged this Court to grant an order as set out in the Amended Notice of Motion. Arising therefrom, a lively debate ensued between this Court and Mr. Jacobs pertaining to the wording of that
10 proposed order with particular reference to the word "deemed" and the concerns of this Court that, whilst it is accepted in law that once certain essentials of contempt are proven by an applicant the onus falls upon a respondent to show that he is not guilty of contempt, any order at this stage (if even necessary) should not "deem" Mr. B to be guilty of contempt before these essentialia have been proven.

[26] In the premises, despite the fact that, as submitted by Mr. Jacobs, orders have apparently been granted in this
20 Division following the wording as set out in the Amended Notice of Motion pertaining to the counter-application, this Court has declined to grant an order in those terms. However, in light of the history of this matter, the Court will grant an order in relation to any potential contempt by Mr. B, should he fail to pay the amount of arrear maintenance

payable to Mrs B as dealt with above. Of course, there also remains the question of the proceeds of the sale of the former matrimonial residence, dealt with hereunder.

<u>The sale of the immovable property</u>

[27] With regard to this aspect of the counter-application, it is common cause on the application papers before this court that:-

10 (a) The immovable property situated at [...] Street, [...], Midrand, Gauteng ("the property") is jointly owned by Mrs B and Mr. B;

(b) At one stage (as dealt with earlier in this judgment) Mr B entered into an agreement to sell the property but, for reasons no longer relevant to the present matter before this Court, the sale was never finalised;

(c) At that stage Mrs B instituted an urgent application to deal with the protection of the
20 proceeds of the sale. This gave rise to the Adams order, which also (to a certain degree) dealt with payment of some of the arrear maintenance from those proceeds;

(d) The parties are married to one another in community of property. In the premises, upon

divorce there will be a division of the joint estate and the property will be sold;

(e) Considerable expenses are being incurred in respect of the property, which has given rise to disputes between the parties. In addition, disputes have arisen in respect of rental income derived from the property;

(f) The property is the only real asset of the joint estate and potentially the only real issue remaining in the divorce action;

(g) Mrs B no longer wants to be a co-owner of the property and wishes to sell the property.

[28] It is trite that every co-owner is entitled to have the co-ownership terminated with the *actio communio dividendo*[5]. A party claiming termination of co-ownership has to allege and prove:-

(a) The existence of joint ownership;

(b) A refusal by the other to agree to a termination of the joint ownership, an inability to agree in respect to the method of termination, or an agreement to terminate, but a refusal to comply with the terms of the agreement.[6] ; and

(c) Facts upon which a court can exercise its discretion as to how to terminate the joint

[5] *Robson v Theron 1978 (1) SA 841 (AD)*
[6] *Ntuli v Ntuli 1946 TOD 181*

ownership. The general rule is that the court will follow the method that is fair and equitable to both parties.

[29] As correctly submitted by Mr. Jacobs no co-owner of a property should be forced to remain a co-owner unless the law otherwise directs. As the parties are in the process of getting divorced, there is no reason why they should remain co-owners *(LAWSA: First Re-issue: Volume 27: Paragraphs 413 -414).*

10 [30] Mrs B has not only satisfied all the requirements of the *actio* as set out above but the method of selling the property and distributing the proceeds thereof as set out in the Amended Notice of Motion is fair to both parties. Indeed, Mr. B has not proposed any other method on the application papers before this Court.

[31] It must follow that a suitable order should be granted which will allow the property to be sold and the proceeds dealt with incorporating the order of this court, which is already in place in that regard (the Adams order).

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Costs

[32] Mrs B has asked this court to order Mr B to pay both the costs of the application and the counter-application on the scale of attorney and client. In this regard Mr.

Jacobs has drawn the attention of this court to the matter of *SA Druggists Ltd v Beecham Group PLC 1987 (4) SA 876 (TPD)* as authority for the proposition that a litigant should not be out of pocket and has submitted that this matter was a perfect example of just that. In addition, Mrs B, on 5 September 2022, made a with prejudice offer to settle this matter. This offer of settlement is contained in a letter from her attorneys dated 5 September 2022 and which is annexure "ABC07" to her supplementary affidavit. This offer
10 was not accepted by Mr. B.

[33] It is trite that the awarding of costs generally falls within the discretion of the court. That said, costs normally follow the results, unless there is some other factor worthy of consideration. Clearly, in this matter, the costs of both the application and the counter-application should be borne by Mr. B.

[34] That leaves only the question of the scale of those costs. Costs on an attorney and client scale are, once again at the discretion of the court, awarded when, *inter*
20 *alia,* a party has either conducted frivolous, vexatious or baseless litigation, which has not only mulcted the other party in wasted costs, but has taken up unnecessary court time. This is simply a broad and very general categorisation of instances when a court may order a party to pay costs on a punitive scale. Put another way, it is a way in which a

court may mark its displeasure at the manner in which a party has conducted his or her case before it.

[35] In addition to the findings of this Court that there were no grounds whatsoever upon which to base a cause of action in respect of Mr. B's application, however much a benevolent attitude was adopted by this Court, it was also submitted by Mr. Jacobs that not only did Mr. B take a considerable amount of time to contest the Rule 43 order, all the while failing to comply therewith but when he did 10 finally elect to take action, he did so in the High Court, rather than follow a less expensive route in the Maintenance Court where, it is submitted, he could have applied for a variation in the amount of maintenance he had been ordered to pay by this court, *pendente lite*. In this regard, it is not clear to this Court as to whether the Maintenance Court has the jurisdiction to vary an order made by this Court in terms of Rule 43. For the purposes of deciding the issue of the scale of costs to be awarded in the present matter, it is not necessary for this Court to reach a decision in that regard. 20 This is because the issue of arrear maintenance was not the only issue this Court was asked to decide. Whilst the sale of the property is also linked to the issue of maintenance, it remained a separate issue for this Court to decide. Arising therefrom Mrs B had the benefit of that litigation, which could only have taken place before this Court. So the costs

were not entirely wasted.

[36] At the end of the day and taking all of the relevant factors into account, it is this Court's considered opinion that the costs payable should be paid on a scale of party and party. As misguided as the conduct of Mr. B is, it falls just short, in this particular matter, of attracting a costs award on a punitive scale.

[37] The court makes the following order, which I have, for the purposes of identification marked X, signed and
10 dated today's date. This order will be uploaded onto caselines. The order reads as follows:-

See the order at pages 00-3;00-4 and 00-5 of caselines.

I hand down that order which, as I say, I have signed and dated and which will be uploaded onto caselines.

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WANLESS AJ

ACTING JUDGE OF THE HIGH COURT

20 **DATE: 27 September 2022**