

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 10025/21

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| (1) | REPORTABLE: Yes <input checked="" type="checkbox"/> / No <input checked="" type="checkbox"/>          |
| (2) | OF INTEREST TO OTHER JUDGES:<br>Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/> |
| (3) | REVISED: Yes <input type="checkbox"/> / No <input checked="" type="checkbox"/>                        |

Date:	27 June 2022	WJ
du Plessis		

In the matter between:

**C D** Applicant

and

**J D** Respondent

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**JUDGMENT**

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**DU PLESSIS AJ**

**[1] Background**

- [1] This is an opposed rule 43(6) application requesting this court to, based on the same procedure, vary its decision because of a material change in the applicant's circumstances.
- [2] The applicant and respondent got married on 10 February 1996, out of community of property with the exclusion of the accrual system. The respondent left the marital home in 2019 for a few months, and in September 2020, after the applicant became aware of his affair. He has not returned to the marital home. The applicant still lives in the house with the two children (the minor 18 in a few days, and a major dependent child).

- [3] The applicant instituted a divorce action against the respondent in February 2021. The respondent is defending the action and has delivered his plea and counterclaim. The action is still pending.
- [4] One of the core disputes in this action is whether, as the applicant claims, she is entitled to share in the respondent's estate. She alleges that she and the respondent build up various legal entities as a partnership throughout the marriage and that she should share in his gains. The respondent denies this and states that the companies employed the applicant as an employee for the entire duration of the marriage.
- [5] This court granted a rule 43 order on 16 November 2021. The court ordered the following:
1. Until the minor child N[...] turns 18 years of age on [...] July 2022, the status quo regarding her primary residence with the applicant and contact with the respondent shall remain subject to the views and wishes of the minor child.
  2. The order is granted without any of the parties conceding the disputes relating to the alleged universal partnership in the divorce action and on the basis that the applicant returns to her employment as Credit Controller on the same salary scale and employment conditions at Hubner Investments (Pty) Ltd and that she is to report for duty to the Financial Manager of Hubner Investments (Pty) Ltd.
  3. The respondent is to continue, *pendente lite* to pay for the following expenses directly to the relevant institution and/or individual:
    - 3.1. The bond of the matrimonial home which is presently in the market to be sold, until the property is sold;
    - 3.2. The municipal account in respect of the matrimonial home until the property is sold;
    - 3.3. The reasonable and necessary maintenance of the matrimonial home as agreed upon between the parties and until the property is sold;
    - 3.4. The monthly instalment and the applicant's VW Tiguan motor vehicle, the vehicle licencing renewal fees and insurance;
    - 3.5. WiFi connection;
    - 3.6. The applicant's cell phone contract;
    - 3.7. Groenkloof Community Security;
    - 3.8. The fuel card presently used by the applicant;
    - 3.9. Registration of the applicant and the minor and major child as beneficiaries on the respondent's medical aid and the reasonable and necessary medical shortfalls in relation to the minor children;
    - 3.10. The school fees of the minor child, N[...] and the reasonable and necessary educational related expenses as discussed and agreed upon between N[...] and the respondent;

- 3.11. The University fees of the major child, F[...] and the reasonable and necessary educational related expenses as discussed and agreed upon between F[...] and the respondent;
  - 3.12. The reasonable and necessary extramural and/or sport related expenses and sport equipment of the minor and major child after consultation between the children and the respondent;
  - 3.13. The reasonable and necessary personal expenses of N[...] and F[...] as discussed and agreed upon between the children and the respondent;
  - 3.14. A contribution towards the applicant and children's electricity expense in the amount of R5 000. The first payment to be made on or before 1 December 2021 and on or before the 1<sup>st</sup> day of every subsequent month.
4. The respondent is to make a contribution towards the legal costs of the applicant in the amount of R55 000,00 payable on or before the end of January 2022.
  5. Costs are reserved for determination by the trial court.

## **[2] The current rule 43(6) application**

- [6] The current application is an application to vary that order to order the respondent to pay maintenance for the two minor children and the applicant to the amount of R36 748,40 and to pay the cost of this application on an attorney-client scale since she is now unemployed. How she became unemployed will be fully canvassed later.
- [7] The affidavit filed by the applicant is longer than what is prescribed by rule 43, and she asks for condonation. The reason she cites for the longer than usual affidavit is that she needed the opportunity to illustrate the respondent's "contempt of the Rule 43 Court order and his vindictiveness". Thus, she must provide all background facts included in the rule 43 application.
- [8] It should from the outset be noted that the respondent argues that this rule 43(6) application is nothing but an abuse of process and an apparent attempt to reargue the facts already part of the rule 43 application. The respondent argues that there is no change in the circumstances as contemplated in the rule. For this reason, the respondent asks the application to be dismissed.
- [9] Rule 43(6) only allows the court to vary its decision if there was a material change in the circumstances of either party.<sup>1</sup> For this reason, it seems pertinent to start with whether there was a material change before considering a variation to the decision.
- [10] To determine whether there is such a material change, I deem it necessary to set out the background facts. For this reason, I will condone the longer-than-usual affidavit of the applicant. I also had regard to all the rule 43 papers filed on Caselines in considering the application, in so far as the issues overlap, as requested by the respondent.

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<sup>1</sup> *Andare v Andare* 1982 (4) SA 854 (O).

### **[3] Background: the rule 43 application**

- [11] The applicant is currently unemployed and living in the family home with their two children. After the respondent left the family home, he always paid the monthly expenses on demand.
- [12] In the main divorce action, the applicant argues that she and the respondent started conducting business together early in their marriage. They conducted the business in various legal entities where the respondent holds shares, member's interest and directorship. This never concerned her, as they worked together for the benefit of the business and the family. However, now that there is no love lost, the applicant asserts that the respondent is hiding behind the "corporate veil" to avoid certain responsibilities.
- [13] The applicant sketches the picture of a couple who worked together and benefited from the income and profits derived from the businesses. This income and profit covered their monthly household needs and obligations. They also made use of company assets and vehicles for their benefit.
- [14] She states that she managed the business's financial affairs and provided information to the auditor. She also conducted the personal banking affairs of the respondent until July 2019. She was an administrator on the banking app and facilities of the business. She was responsible for monitoring bank balances and payments, making payments for the business on the bank accounts, and fulfilling various personal and physical tasks. She then states, "[t]hrough the years my functions in the different businesses changed depending on where my assistance was required and on the age and stage of development of our children".<sup>2</sup>
- [15] The applicant states that this enabled her and the respondent to draw a salary from the partnership. The applicant received about R36 000 per month from the partnership entities until June 2021 as a "salary". She used this to pay for the remainder of the joint household expenses and some of her personal expenses. Some of the personal household expenses (such as meat) were paid from the business accounts. The respondent denies this, stating that it is set off against his loan account.
- [16] She claims that this "salary" is not an ordinary "salary" and, although paid from one legal entity, is rather for all the work done at the entities used to run the various businesses. She claims that she was never requested, nor required, to maintain a presence at their companies' offices. She has always worked from home and "took sole and full responsibility for our children and our household".<sup>3</sup> The respondent claims that the company made this concession while the children were young.
- [17] Up until the day that the respondent left the marital home, the applicant had access to all business finances and access to all their bank accounts, and she continued to receive SMS notifications for some time after. She noticed that some of the transactions were concluded in Namibia and concluded that these were for the respondent's girlfriend's benefit (who resided there). The respondent denies this. The applicant also avers that the girlfriend was paid R20 000 a month from the one business without rendering services. The respondent denies this, stating that his girlfriend was employed and received a salary.

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<sup>2</sup> Par 6.14 of the founding affidavit.

<sup>3</sup> Par 6.25 of the founding affidavit.

- [18] Even after the applicant lost access to the banking app and her work email, she continued to receive the R36 000 payment until 1 June 2021. On 29 June 2021, the applicant received a *Whatsapp* to inform her that she is expected to report for duty on 5 July 2021 at the company premises. The same demands were delivered by courier on 8 and 17 July 2021. The applicant views this as a tactical approach by the respondent to support the case that the applicant is only an "employee". The applicant writes that "the Respondent's intention is to manipulate me, to override my autonomy and destroy my sense of self to humiliate me and to force me into concluding a settlement agreement".<sup>4</sup> She claims that she was always regarded as a co-owner of the business and not an employee in the conventional sense.
- [19] After that, the respondent received a payment of only R4293 on 28 July 2021. She received no payment in August. The respondent insinuated that the company should be held accountable, not him. This, she states, is the respondent hiding behind the corporate veil. They have never purchased assets or traded in their personal capacity during the marriage, and they have always used various legal entities to invest their proceeds, income and assets. The suggestion seems that the line between the business and the household was not always clear.
- [20] All this led to the rule 43 application.

#### **[4] Rule 43 order**

- [21] A rule 43 order was granted as set out above. The court did not order that the respondent pay maintenance to the applicant. This was because the respondent submitted that the applicant was employed by one of his companies as a credit controller, where she received a salary of about R36 000. This employment, he submitted, was never terminated. The financial manager confirmed that her position was still vacant and that she had the option to return to her old position to earn her salary. If this happens, the status quo as it was during the marriage will be restored. Receiving a salary meant that the applicant could pay for her own luxuries and contribute to the household expenses as she had done throughout the marriage and up until July 2021.
- [22] The applicant viewed the submission that she was gainfully employed as a move by the respondent to evade his maintenance obligation. Nevertheless, she was ordered to return to her employment as a credit controller at the respondent's company and was asked to report for duty to the financial manager.
- [23] The applicant wrote an email to the financial manager on the same day as the order. She was informed that she could work from home Mondays to Thursdays as a credit controller but that she had to report to work on Fridays for financial meetings and training. She was instructed to report at the office on 19 November 2021 at 8:00 for training before starting her employment.
- [24] On 19 November 2021, she informed the financial manager that she took the wrong offramp and that there was an accident on the road, and that, as a result, she would be late. She arrived at work six minutes late and attended the training. After the training, she asked for a job description and equipment to enable her to do the work. The financial manager undertook to get back to her.
- [25] However, on 23 November 2021, the financial manager informed her that they were investigating the disclosure of financial information to a third party between 1 March 2021 and 30 September

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<sup>4</sup> Par 6.33 of the founding affidavit.

2021. This financial information refers to the information the applicant received via SMS notification from the bank, referring to the respondent's transactions for personal use, which the applicant alleges proved his affair. She shared this information with the girlfriend's husband.

- [26] The respondent was made aware of the sharing of this information during March / April 2021, and thus, after a "management decision", restricted her access to the financial information and her work email "as it was clear that she could not distinguish between private and employment related matters".<sup>5</sup> The respondent also states that "[t]he applicant's loathing of me and Ms K[...] regrettably blinded her to the extent that all rational thought and conduct went out of the window",<sup>6</sup> and that his attorney had to write a letter to her after she has written a Whatsapp in foul and derogatory language to one of the company's employees. The respondent views the "vague manner in which the applicant tries to interweave the businesses into our personal affair [as amounting to] nothing more than an attempt to obtain a tactical advantage in the divorce proceedings".<sup>7</sup>
- [27] When she again asked about her job description on 25 November 2021, she was informed that she could only get that after the investigation. She arrived at work on 26 November 2021 and was required to do data capturing. She did so, even though she did not regard this as the work of a credit controller (and therefore, again, not in line with the court order granted). On the same day, she received a written warning from the financial manager for arriving 6 minutes late on 19 November 2021. She was not required to be in the office on 2 December 2021 due to Covid-19 prevention measures. However, on 3 December 2021 she received a notice that she must attend a disciplinary hearing on 6 December 2021. She represented herself, as she did not want to involve other employees in the conflict.
- [28] On 10 December 2021 (her birthday), she was notified of her dismissal with immediate effect. She received a part of her salary on 6 December 2021 in the amount of R10224, and her last salary on 25 December 2021 in the amount of R34 819. The dismissal was referred to the CCMA, but due to various complications was postponed and had not taken place on the date of the hearing. At the date of the hearing of this application, she was still unemployed.

#### **[5] Is there a material change in circumstances?**

- [29] The respondent rightly noted that in the rule 43 application, the applicant was not awarded maintenance but then adds: "despite the allegation that she was not employed at that stage, as is the case now".<sup>8</sup> He then states that "[c]urrently the position is no different than in the previous application [and] [i]n that regard there is no material change in the circumstances of the Applicant in that regard".<sup>9</sup>
- [30] With this argument, it seems like the respondent painted himself into a corner: the reason why the applicant failed with a claim of maintenance *pendente lite* previously was because the respondent convinced the court that the applicant was still employed at one of his companies. That income

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<sup>5</sup> Par 5.9.1 of the rule 43 answering affidavit.

<sup>6</sup> Par 5.9.2 of the rule 43 answering affidavit.

<sup>7</sup> Par 6.2 of the rule 43 answering affidavit.

<sup>8</sup> Par 2.8 of the answering affidavit.

<sup>9</sup> Par 2.11 of the answering affidavit.

enabled her to maintain herself if she returned to work. She reported for work on the same day as the order, only to be fired about four weeks later.

[31] On my reading of the facts, the circumstances at the time of the rule 43 ruling were that the applicant was employed and earning a salary (or at the very least had a realisable option to do so), and that, therefore, the applicant did not establish a need for maintenance. However, at the time of this rule 43(6) hearing, the applicant is unemployed as she was fired from her employment at one of the respondent's companies. There is now a need for maintenance, which I regard as a material change in the circumstances.

**[6] The financial position of the applicant**

[32] The applicant lists as her only source of income the R36000 she received from the business. Since being dismissed from her employment, she had to sell her bicycle (for R40 000) to be able to pay her expenses and her and the children's groceries. Her son furthermore gave her R2000, and a friend donated R10 000. She earned R5 000 after caring for a friend's pets over the holidays.

[33] She states that she is unemployed with limited computer skills. She needs to attend a course to improve her computer skills that will enable her to apply for administrative positions. She does not have any qualifications. She worked in the business for 25 years. She could not find any other employment thus far. She attempted to start a jewellery business but has not made any money from it.

[34] She has R8 200 available in her FNB overdraft facility and R5 469 on her FNB credit card. She previously had no debt. In her supporting affidavit, she states that this money will take her until March 2022. After this date, she cannot foresee being able to purchase groceries for herself and the children and to pay for the remainder of their expenses.

[35] She states that she has the following assets: ½ share in the immovable property she stays in and ½ a stake in the partnership as set out in her particulars of claim (this is disputed and part of the divorce action).

[36] She has liabilities of clothing accounts (R1 500); overdraft (R56 900), credit card (R18 043) and legal fees (R173 000).

[37] She sets out her need for maintenance as:

<b>Expense</b>	<b>Previous</b>	<b>Currently</b>
<b>Policy</b>	R809,40	Place on hold for Dec / Jan
<b>DSTV</b>	R1069	Cancelled, will reinstate when possible
<b>Gym</b>	R1120	R1120

<b>Chronic medication</b>	R750	R750
<b>Pharmacy and medical shortfalls</b>	R1000	R250
<b>Gardener</b>	R2000	R2000 (house and garden maintenance)
<b>Groceries and cleaning products for her and two children</b>	R14 300	R10 000
<b>Personal treatments and skin products</b>	R2 100	R2 096
<b>Toiletries</b>	R2 000	R1 000
<b>Fochini and Woolworths accounts</b>	R450	R280
<b>Hair care</b>	R1 000	R250
<b>Clothes</b>	R1 500	R0 (cannot afford)
<b>Dog food</b>	R600	R600
<b>Stationary also for school projects</b>	R750	R750
<b>Recreation and family gifts</b>	R2 000	R 500
<b>Children gifts and entertainment</b>	R1 000	R 0 (cannot afford)
<b>Total:</b>	<b>Need R36 748,40</b>	<b>Currently R21 346</b>

[38] She thus asks for R36 784,40 over and above the expenses granted in rule 43.



- [39] She speaks of a high living standard while married, able to purchase whatever they wanted or needed. She and the children are thus accustomed to a high standard of living, and the respondent could always provide that. The respondent avers that both he and the applicant received salaries from the businesses and that their combined income maintained their standard of living. He states that a divided household requires an adjustment in living standards.
- [40] She speaks of the respondent as a sportsman – shooting and cycling on the weekends during their marriage – and frequent hunting excursions, holidays and weekends away with his girlfriend in Namibia.
- [41] She paints the respondent as a very wealthy businessman, using his businesses to finance his expenses and living costs. This is not reflected on his financial disclosure form, according to the applicant. The respondent denies that he uses the business to finance his expenses. He states that, from time to time, he made loans to the company (by taking a second bond over property owned in Upington), and thus, any monies received from the company later were debited from his loan accounts.
- [42] She lists his assets that she is aware of as
- i. ½ the share in the immovable property that the applicant resides in, shareholding and member's interests in various companies and close corporations;
  - ii. a Cirrus SR22 aircraft with an approximate value of R4 000 000 (purchased in March 2021);
  - iii. VW Amarok V6 R 600 000;
  - iv. Double Cab Toyota Land Cruiser hunting vehicle used for personal use, alleged to belong to one of the companies;
  - v. a camping trailer worth R250 000;
  - vi. a rifle collection of about R500 000;
  - vii. and household contents of R300 000.
- [43] In his rule 46 answering affidavit, the respondent denies owning a Cirrus aircraft. He states that it was purchased by one of his companies and is financed through Wesbank (with a market value of about R2 500 000). He denies ownership of the Toyota Land Cruiser. He states that the camping trailer is worth R150 000, and his rifle collection is about R300 000. He denies the rest.
- [44] The applicant questions the respondent's claim of not being able to afford to pay the maintenance. She lists his expenses (travelling and leisure) between January and July 2021 as about R115 000. This includes frequent travels to Namibia to enable his girlfriend to visit her children. The respondent denies this, stating that some of the payments he made on behalf of his father online (who reimbursed him), as his father is not good with online payments.
- [45] The applicant states that the respondent has exclusive access and control of the partnership assets that they build over the past 25 years. She claims he evades his obligation towards her by restructuring his assets and interests in the various legal entities to make it seem as if his finances

are less favourable than it is. All this, the applicant states, is to ensure that she walks "out of this marriage with the clothes on my back".<sup>10</sup>

- [46] She further claims that the respondent only paid for electricity after the demand for payment and was also late in paying in January 2022. The respondent acknowledges that he was late on two occasions and provided reasons for it (such as not having an internet signal).
- [47] The respondent avers that the applicant seeks relief not only for her but also for the children, noting that the oldest is already 20, and a daughter will reach the majority age by 1 July 2022. The respondent avers that the applicant makes no case that he has neglected his obligation in respect of his children and still complies with it.
- [48] From the rule 43 application, it is evident that the respondent draws a salary of R69 300. He has (capital) assets worth R656 527,84.<sup>11</sup> He lists his expenses as R129 942,00.<sup>12</sup> He argues that the applicant is the author of her own change and cannot require from the respondent to stand in for changes "which was planned by the Applicant to gain a tactical advantage in the divorce and these proceedings".<sup>13</sup>

## **[7] The law**

- [49] A civil marriage establishes a legal relationship between, for now, a man and a woman.<sup>14</sup> The termination of this legal relationship through a divorce is done in line with the prescriptions of the Divorce Act.<sup>15</sup> A final court order, either in an unopposed court or after a trial, signals the end of the legal relationship. In a contested divorce like this, the contrast between family obligations and market obligations that is part and parcel of the family unit gets put under a magnifying glass. It is stated that the court is only faced with two questions with a rule 43 application: does the applicant have a need for maintenance, and can the respondent provide it?
- [50] Reading through the affidavits, I pick up a sense of loss of an imagined future crashing with the realisation of an impending lifestyle adjustment. The respondent attests to an unhappy marriage for years, if not decades. The applicant indicates a marriage with a domineering, prescriptive and controlling husband. The latter was overly critical of her, which led to a marriage where she felt unseen, undermined and lonely. Judging from the children's age and the dispute's intensity, the parties probably stayed in this unhappy situation much longer than they should have. They possibly did so in "the interest of the children". The respondent's extramarital relationship was a catalyst for the divorce action. Through all this hurt, fear, anger and sense of betrayal, I must ascertain what facts to consider to determine whether the previous order granted must be varied and, if so, how.
- [51] This is an arduous task if one considers the purpose and form of an interim (and thus only temporary) maintenance order and how it differs from a final maintenance order upon the decree

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<sup>10</sup> Par 11.5 of the founding affidavit.

<sup>11</sup> CaseLines 009-17.

<sup>12</sup> CaseLines 009-18.

<sup>13</sup> Answering affidavit paragraph 26.2.

<sup>14</sup> *G v Minister of Home Affairs* [2022] ZAGPPHC 311 par 38.

<sup>15</sup> 70 of 1979.

of divorce. The rule 43 application is often the first highly contested court appearance (sometimes the last) in a divorce action that frames the rest of the dispute. The Constitutional Court in *S v S*<sup>16</sup> stated that rule 43 must be interpreted expansively. The respondents placed the court's attention on *Grauman v Grauman*,<sup>17</sup> asking for the court to interpret subrule 6 strictly.

- [52] Rule 43 provides the expeditious adjudication of matters that cannot wait for the final divorce proceedings. Relying mainly on the brief statements filed by the parties (in the form of affidavits), a court must adjudicate the matter robustly.<sup>18</sup> The utmost good faith (*uberrimae fidei*) is required with a full material disclosure from both parties to enable the court to grant relief.
- [53] *Nilsson v Nilsson*<sup>19</sup> stated that rule 43 was envisaged to provide temporary assistance to women<sup>20</sup> who have given up careers or potential careers for the sake of the marriage. This interim assistance is only temporary until the final maintenance claims can be properly ventilated in a trial court. Since rule 43 maintenance is an interim and expeditious remedy, it need not be established with the same degree of precision as maintenance at divorce - there is no trial where detailed evidence is adduced.<sup>21</sup>
- [54] A claim supported by reasonable and moderate details will carry more weight than one with extravagant claims. Likewise, the affidavit of a respondent willing to implement his lawful obligations will be more favourably considered than one seeking to evade his obligations.<sup>22</sup>
- [55] The applicant is only entitled to reasonable maintenance *pendente lite*. The factors that must be considered making an order for reasonable maintenance are:<sup>23</sup>
- i. The standard of living of the parties during the marriage;
  - ii. The applicant's actual and reasonable requirements;
  - iii. The respondent's income (although the use of assets can also sometimes be considered).<sup>24</sup>
- [56] This must all be considered in light of the dicta of the Constitutional Court in *S v S*,<sup>25</sup> where it was stated that

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<sup>16</sup> *S v S* [2019] ZACC 22 par 56.

<sup>17</sup> 1984 (3) SA 477.

<sup>18</sup> Heaton, J. (2014). *The law of divorce and dissolution of life partnerships in South Africa* Juta p 541.

<sup>19</sup> 1984 (2) 294 (C) at 295F.

<sup>20</sup> This rule is, of course, not exclusively for women. Men can also claim maintenance, if they can prove a need and that the other spouse can provide it.

<sup>21</sup> Erasmus, H. J., & Van, L. D. E. (1994). *Superior court practice* Juta. at p 1-314

<sup>22</sup> *Taute v Taute* 1974 (2) SA 675 (ECD) at 676 D-H.

<sup>23</sup> *Taute v Taute* 1974 (2) SA 675 (ECD) at 676 D-H.

<sup>24</sup> *Taute v Taute* 1974(2) SA 675E; *Du Preez v Du Preez* 2009 (6) SA 28 (T) par 15 – 16.

<sup>25</sup> [2019] ZACC 22.

"[a]pplicants in rule 43 applications are almost invariably women who [...] are generally in a less favourable financial position than their husbands. [...] The gender imbalance in homes and society in general remains a challenge both for society at large and our courts."

[57] Substantive equality, the equality recognised by our courts<sup>26</sup> as the content of section 9 of our Constitution, would require that we interpret the inquiry into maintenance *pendente lite* with this inequality in mind. Neither the imbalance nor the challenge dissipates when the parties are wealthy. People with means often manage their wealth through complex structures – either to limit exposure or for tax purposes – making a rule 43 application rather complicated and the inequality perhaps less obvious.

[58] As for the claim for maintenance for adult dependent children: the court in *Butcher v Butcher*<sup>27</sup> clarified that where an adult dependent child lives at home, the residence parent that requires a contribution should not look towards the adult child to pay over a contribution from the amount that is paid to them from the other parent. This would place the adult dependent child in a difficult position. The court, however, limited the claim for contribution to items such as food and general household expenses in the family home.

[59] Maintenance orders are normally not made in arrears. The common law maxim *non quisquam in praeteritum vivitur aut alendus est*<sup>28</sup> is based on the assumption that the person claiming maintenance has somehow survived without the maintenance until the court order. This might be different for someone who incurs debts to maintain themselves (if the debts are still unpaid).<sup>29</sup> An applicant seeking a variation of an order is required to do so expeditiously to avoid an accumulation of arrears,<sup>30</sup> as this can place an undue burden on the respondent.

[60] While a rule 46 application ordinarily requires brevity, exceptional circumstances allow a deviation from the norm where the complexities in rule 43 applications are unusual.<sup>31</sup>

[61] Having set out the law, I now turn to apply it to the facts at hand.

## **[8] On the facts**

[62] I have already indicated that I am satisfied that there was a material change that warrants a rule 43(6) application and that I condone the longer than usual affidavits. In this instance, the background was important to indicate the change in circumstances. Rule 43 application also sets the

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<sup>26</sup> *Brink v Kitshoff* 1996 (4) SA 197 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC).

<sup>27</sup> 2009 (2) SA 421 (C).

<sup>28</sup> A person does not live, nor has to be maintained, in arrear.

<sup>29</sup> *Dodo v Dodo* 1990 (2) SA 77 at 95.

<sup>30</sup> *Dodo v Dodo* 1990 (2) SA 77 at 95.

<sup>31</sup> *Dodo v Dodo* 1990 (2) SA 77 at 79 E.

tone for the divorce. In a divorce that is more complex than usual, the court must brawl through the complex financial structures and the muffled boundary between business and family to determine questions of affordability. For reasons explained below, this matter is not simply a matter of two salaried litigants.

- [63] From all the affidavits, the parties enjoyed a high standard of living. This is evident in the property they bought and renovated together, the cars they drive, and their general household income during the subsistence of the marriage. I am also satisfied that the high living standard was not only sustained by the parties' salaries.
- [64] The respondent is correct when he states that a divided household requires an adjustment in living standards. However, this argument is more suitable during a divorce action than during an application in terms of rule 46. The respondent did not argue that any of the expenses listed are unreasonable or exorbitant (other than the request for maintenance itself). Furthermore, expenses such as the garden fall under maintenance of the house. Groceries for the household include the children, all of which fall within the ambit of the responsibility of the respondent unless and until the court orders otherwise in the final divorce proceedings.
- [65] I am satisfied that the respondent is not neglecting his obligations in respect of his children. If the respondent pays grocery money to the adult dependent child, this should have been stated (together with an amount) to enable the court to make an adjustment. I will thus accept that the grocery money includes money for food and cleaning products for the children. I am also satisfied that insofar as the applicant requests maintenance for the children, it is restricted to these items.
- [66] Of course, it is possible to state that he will thus only pay the applicant's portion of those expenses to her and the rest to the children, who must then contribute to the household, but this seems unnecessarily complicated, especially for an interim maintenance order. When the final divorce order is granted, both children will be majors, and the situation might be different. But in line with caselaw: as long as the children reside with, and are dependent on, the applicant to some extent, she is entitled to claim that expense.
- [67] As for her ability to enter formal employment for the same remuneration as before: I am not convinced that was the applicant not married to the respondent and employed on the same terms as the applicant, that she would make a salary of R36 000 per month working for the company. This is not the salary band of an administrative person or a (senior) credit controller. My inference from this is one of three options: either she was not an employee in the conventional sense; she was not just a credit controller or an administrative person, or; she was well remunerated because she was married to the respondent.
- [68] For instance, the respondent's girlfriend who was employed in the same category but at a different company, on his own version, earned R20 000, which seems more realistic. Thus, even if the applicant finds employment in line with her experience and training (also considering that she did not build her career since she took care of the minor children), she will still need maintenance.
- [69] Furthermore, the fact that the applicant took the wrong offramp on her first day in the office is evidence that she was probably seldom at the premises. This does seem to suggest that she was not an employee in the ordinary sense. It also indicates a change in her terms of employment conditions contrary to the court order (i.e. that she had to report at an office she did not usually report to).

Whether this means that she was a co-owner of the business, is not for this court to decide. It does, however, have a bearing on this application insofar as it addresses the question if there is a maintenance need.

[70] I am satisfied that once the court ordered the applicant to return to work to earn her salary, she did everything she needed to comply with the court order, despite the unclarity surrounding her job description. I am also satisfied that she was dismissed from her employment, which led to her being unemployed since 10 December 2021 and, therefore, in need of maintenance.

[71] Her bank statements show that she relies on her friends (who have no duty to support the applicant) for financial support and that she has incurred debts to keep the household going. And while she has years of work experience, she only has her husband, with whom she is involved in a bitter divorce, and his companies to put up as a reference. She is trying to start a business, but it has not brought in any income. Her bank statements also show that she had to incur debts to cover her expenses.

[72] I am thus satisfied that the applicant made a case for a need for maintenance of R36 748,40 per month.

[73] The question now turns to whether the respondent can afford it. It is not this court's place to make an order regarding the alleged universal partnership, or the allegation that the respondent is hiding behind the corporate veil. I will only remark that there seems to be an obscured line between the (private) family affairs and the respondent's businesses. I am also not convinced that the respondent relies on his salary alone to cover his everyday expenses.

[74] I don't get the impression that the respondent necessarily seeks to evade all his obligations – he is making a substantial contribution to the household, to the house, to the car and the petrol and his children. It is only insofar as his wife is concerned that he seems to refuse – perhaps because of an intense history or as a way to note the unhappiness with his marriage. Perhaps because he no longer derives a benefit from the marital home and must now pay for his own home too.

[75] However, I am not convinced that the respondent will be unable to meet the maintenance request. Insofar as I am allowed to take into account the use of assets and not only the respondent's salary, it seems clear (also from the various loans that the respondent can afford to make to other parties and entities) that the respondent can meet the maintenance need of the applicant.

[76] I take note that maintenance orders are usually not made in arrears but that this might be different for someone who incurs debts to maintain themselves. The applicant launched this rule 43(6) application on 16 March 2022 and, at that time, did not see how she would survive after that date since she was on the last of her overdraft facilities. I am therefore inclined to order retrospective maintenance from 16 March 2022.

[77] Lastly, as to costs, I see no reason why I must deviate from the usual cost order in rule 43 applications, that cost of this application is cost in the trial.

## **[9] Order**

[78] I, therefore, make the following order:

1. In addition to the maintenance payable by the respondent as in terms of the rule 43 order granted under the aforesaid case number on 11 November 2021, the respondent is ordered to pay maintenance in respect of the two dependent children and the Applicant *pendente lite* in the amount of R 36 748,40, the first payment to be made on or before the 1<sup>st</sup> day of the month preceding this order.
2. The aforesaid amount of R36 748,40 is payable by the respondent retrospectively from 16 March 2022. The respondent is ordered to pay the arrear maintenance from 16 March 2022 until the date of this order in an amount of R5 000 per month to the applicant until the arrear amount has been settled.
3. Costs are reserved for determination by the trial court.

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**WJ DU PLESSIS**

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Ms K Fitzory
Instructed by:	Couzyn Hertzog & Horak Attorneys
For the for respondent:	Mr SM Stadler
Instructed by:	Van Heerden Krugel Attorneys
Date of the hearing:	14 June 2022
Date of judgment:	27 June 2022