

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



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 2022-053646

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: **20 February 2024** Signature: _____

In the matter between:

N H K[...]

Applicant

and

A J K[...]

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an opposed application in terms of Rule 43 of the Uniform Rules of Court. The applicant seeks an order *pendente lite* in the following terms:

- 1.1 That the respondent be ordered to pay maintenance to the applicant in the amount of R31 350.00 per month, the first payment to be made immediately and thereafter on/or before the first day of each subsequent month;
- 1.2 That the respondent be ordered to retain the applicant on the medical aid at his costs and pay for any shortfall not covered by the medical aid;
- 1.3 That the respondent be ordered to pay the deposit of R12 000 in respect of the applicant's rental accommodation immediately to the applicant and to pay the deposit in respect of the electricity connection for the applicant's rental accommodation immediately to the applicant;
- 1.4 That the respondent be ordered to make a contribution of R100 000.00 towards the applicant's legal costs in instalments of R10 000.00 per month, the first payment to be made immediately and thereafter on/or before the first of each month until the full amount has been paid;
- 1.5 That costs of the application be costs in the cause;

[2] Over and above opposing the application, the respondent has filed a counterclaim the details of which will be apparent below.

[3] At the time of hearing this application, the applicant was 68 years old, sickly and past retirement age and unemployable. The parties have been married for 45 years.

[4] The applicant is the plaintiff in the divorce action, which is opposed by the respondent who has also filed a counterclaim therein. The parties are still exchanging documents in the pending divorce.

B. APPLICANT'S CASE

[5] The applicant alleges that the respondent does not want to settle the divorce amicably, yet he holds the financial keys to do so.¹ The parties are still living in the same house but have not shared the same bed since 2017.

[6] Throughout the marriage the applicant was dependent on the respondent, more particularly since 2007 when the applicant ceased working at the behest of the respondent.

[7] In days gone by, the respondent used to provide the applicant with a credit card which she used to buy the weekly household cleaning materials and other necessities. He recalled the credit card during February 2023 and removed the applicant as a signatory from the joint account as had been the case since about 1980.

¹ Founding affidavit para 5.3.

- [8] The respondent currently gives the respondent an allowance of R1500 per week which amounts to R6000 per month for her food, cleaning materials and other personal needs.
- [9] The applicant is not earning any income save for an annuity policy that pays once a year the amount of approximately R1 900.00.
- [10] The applicant is in possession of a Mercedes Benz motor vehicle that the respondent bought and paid for that she uses for transportation.
- [11] Additionally, the respondent also pays the following expenses:

11.1	Medical aid	– R 4 937.00 (Applicant's portion)
11.2	Cell Phone	– R 400.00
11.3	DSTV	– R 850.00
11.4	Insurance	- R 2 500.00
11.5	Policies	- R 12 500
11.6	Domestic worker	- R 1 440.00
11.7	Netflix	– R 1 049.00
11.8	Insurance	– R 2 500.00
11.9	Water & Electricity	– R 4 500.00
11.10	Groceries	– R 2 500.00
11.11	Applicant's guitar lessons	– R 1 200.00

Total: R 34 376.00

[12] The applicant desires to move out of the marital home she shares with the respondent. She has already started a search for potential alternative accommodation. She alleges that the cohabitation has become intolerable due to aggressive behaviour, emotional and verbal abuse by the respondent towards her.

[13] She states in her founding affidavit that ever since the divorce summons was served upon him, the respondent has become very vindictive, making life intolerable for her. It is for these reasons that she needs to have the respondent contribute an amount of R 12 000.00 for a deposit on the rent.

[14] The applicant and the respondent do not speak to each other, she needs to write out handwritten notes to request for money or to have certain repairs attended to.

[15] The applicant's health is not good. She had a foot operation back in 2015, a back operation in 2017 and a hip replacement operation in 2018. She is under the care of a psychiatrist and uses prescribed medication for depression. She takes anti-seizure tablets, blood pressure tablets, tablets for backpain as well as sleeping tablets.

[16] According to the applicant the respondent's financial position can be summed up as follows:

- 16.1 The respondent is an experienced Land Surveyor who has been in the business for at least 30 to 40 years.
- 16.2 He has trained one of their adult sons, Ruan, to do the work of a Land Surveyor and they have been working together from the common home.
- 16.3 The Respondent and Ruan always operated from the same premises, and they serve the same clients but under different entities and names. The Respondent and Ruan moved both businesses in March 2023.
- 16.4 Despite preaching poverty, the Respondent is an experienced businessman.

[17] The respondent owns a Land Cruiser bakkie and he upgraded the suspension of the vehicle during November 2022 for approximately R50 000.00.

[18] The applicant claims that she knows that the respondent has a contract with one of the big road agencies which pays him a retainer of approximately R200 000.00 per month. She however, suspects that they moved the contract to Ruan's business Beluga Deer Surveyors.

[19] The applicant attached a bank statement of the respondent indicating a balance of R 619 516.36 available.

[20] The applicant disputes the financial disclosure form submitted by the respondent; she submits that it is “tailored” to suit circumstances. She insists that he has the means to maintain her in the interim.

[21] According to the applicant, the parties were the owners of two immovable properties. One of the properties is a townhouse which was sold. She has not received anything from the proceeds of the sale of the townhouse.

C. RESPONDENT’S CASE

[22] Ms. Ellerbeck appeared on behalf of the respondent. She submitted that the respondent makes a very reasonable offer to the applicant, which is being unreasonably refused. Furthermore, it is respondent’s view that the applicant chooses not to work. He therefore offers a cash contribution of R 7 500.00, medical aid cover and shortfall as well as R 20 000.00 contribution to legal costs. He then asks the court to dismiss the application.

[23] The respondent’s case is premised on two grounds.

23.1 Firstly, he alleges that the application is not brought *bona fide* but is an abuse of the Rule 43 process in that the applicant has failed to show that she is destitute and that there is a need for an interim order pending the divorce.

23.2 Secondly, on the merits of the application the respondent is arguing that he simply cannot afford to pay what the applicant is asking.

[24] The respondent confirms that he pays all the living expenses listed by the applicant above.² The respondent states that pending the finalization of the divorce proceedings, where the applicant's claim for spousal maintenance will be properly and fully adjudicated, or a change in their circumstances occurs, he will continue to do so as has have done and as far as he is able to afford it. He submits that he has not threatened to stop paying these expenses or the R 6 000.00, which he is currently contributing.³

[25] The respondent also confirms that he took back the credit card that he had entrusted with the applicant, but that was because the latter had made unexplained withdrawals of R 6 000.00 at the time. He states however, that with hindsight he assumes that the applicant could have paid some of her legal fees from these funds.⁴

² Respondent's Answering Affidavit para 30 and 31.

³ Respondent's answering affidavit, supra para 33.

⁴ Answering Affidavit supra at para 35.

[26] The respondent admits, alternatively, does not deny and/or dispute the following:

- 26.1 That during the subsistence of their marriage the applicant was a housewife, and the respondent took responsibility of paying for their day-to-day living expenses.
- 26.2 The respondent furthermore does not deny that since January 2023 he has unilaterally reduced the applicant access to finances by revoking her use of a credit card that was available for her use to cover certain expenses.
- 26.3 Does not dispute that he has a duty to pay maintenance towards the applicant, but claims he is unable to afford to do so.
- 26.4 The respondent denies that he is financially able to pay said maintenance to the applicant and/or to make any contributions towards the applicant's legal costs and/or to pay a rental and utilities deposit.
- 26.5 The respondent contends that the proceed of the sale of 2 co-owned properties, being the marital home and a second property that was leased for rental income, would be sufficient for the Applicant to sustain herself for the future.
- 26.6 The respondent admits that he is self-employed and is currently earning a gross salary in the amount of R37 178.75 Net Salary = R 30 000.00 [See paragraph 28 of the answering affidavit, read with respondent's Financial Disclosure Form]

26.7 In exposition of his alleged "inability to pay" the respondent has attached what he purports to be a financial disclosure form to his answering affidavit, but same remains unsupported by any source documents either for his personal finances or that of the business he is the sole member of. Although the respondent admits to paying the expenses as listed by the respondent, it remains unclear whether the respondent still intends to pay for these expenses or not.

[27] In reaction to the applicant's allegations that the parties have not lived together as husband and wife since 2015, the respondent highlights that it is 8 years later now that the applicant alleges that it is intolerable to live in the same house with the respondents. He denies any form of abuse on his part.⁵

D. ANALYSIS

[28] It was held in *Taute v Taute* 1974 (2) SA 675 (E) that "relief under rule 43 is intended to be interim and temporary and cannot be determined with the degree of precision and exactitude afforded by detailed evidence."⁶

[29] In determining interim maintenance in a rule 43 application the court is guided by 3 considerations,⁷ namely:

- (a) The standard of living of the parties during the subsistence of the marriage;
- (b) The Applicant's actual and reasonable requirements, and

⁵ Answering affidavit para 38

⁶ *Taute v Taute* 1974 (2) SA 675 (E) at 676B-C; Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed 2009 Chapter 47-p1535.

⁷ *DD v FD* 2021 JDR 0048G (Case No. 72897/2019) at p4 para 8.

(c) the income of the Respondent

[30] The respondent in this application does not shirk his responsibility to maintain the applicant and is willing to continue to meet the requirements as listed in the applicant's application. What seems to get in the way is the applicant's desire to move out of the common house even before it is put up for sale in the open market.

[31] The difficulty facing the court is the paucity of relevant information. Both parties' Financial Disclosure Forms provide very scant information.

[32] *Taute v Taute*⁸ is also authority for the proposition that a claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands. Furthermore, greater weight will be attached to the affidavit of a respondent who evinces a willingness to implement his lawful obligations than to that of one who is seeking to evade them.

[33] The applicant states it as a fact that the respondent and/or his company has a retainer agreement with one of the big road agencies which pays him R 200 000.00 per month. This is not supported by any proof; this deprives the assertion of the requisite weight.

[34] What is beyond dispute is the fact that the applicant is financially destitute and wholly dependent on the respondent. It follows that she cannot litigate on an

⁸ *Taute v Taute supra* at 676H.

equal footing with the respondent. Her attorneys' bill remains unpaid while the litigation remains pending.

[35] In *Dodo v Dodo 1990 (2) SA 77 (WLD) at 96 F* it was held that: "The husband's duty of support includes the duty to provide the wife with costs for her litigation with her husband." This is compatible with the provisions of section 9(1) of the Constitution which states that: "*Everyone is equal before the law and has the right to equal protection and benefit of the law*".

E. CONCLUSION

[36] Taking the above into account, it is this court's finding that on the facts before it, the respondent has no difficulty with the applicant continuing to stay in the common home as has been the case so far. He continues to be responsible for all household and related expenses including medical aid contributions.

[37] The issue of the need for the proposed relocation and the attendant costs seems unsupported by evidence on the current facts submitted by the applicant.

[38] The applicant is however, still entitled to spousal maintenance given her history and personal circumstances. This applies to her need for a contribution towards legal costs.

[39] In the circumstances the following order, applicable *pendente lite*, is made:

- 39.1 The respondent is ordered to pay spousal maintenance in the amount of R 15 000.00 per month with effect from 29 February 2024, and thereafter on or before the 7th day of each subsequent month until this order is discharged or the divorce is finalized.
- 39.2 The respondent is hereby ordered to continue retaining the applicant in his medical aid and covering any shortfalls that may arise.
- 39.3 The respondent further is hereby ordered to make a contribution towards the applicant's legal costs in the amount of R 100 000.00 in monthly instalments of R 10 000.00 with effect from 29 February 2024 and thereafter on or before the 7th day of each subsequent month.
- 39.4 The costs of this application to be costs in the divorce.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 16 October 2023

Date of Judgment: 20 February 2024

On behalf of the Applicant: Adv. J. Swanepoel

Attorneys for the Applicant: Krynauw Attorneys

Tel: (012) 667 4155 E-mail: pierre@krynauwlaw.co.za

On behalf of the Respondent: Adv. T. Ellerbeck

Attorneys for the Respondent: De Lange & Van Kaam Incorporated

Tel: (012) 362 3970 E-mail: natasha@dlvklaw.co.za ; Admin1@dlvklaw.co.za

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 20 February 2024.