

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

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 67591/2013

PRETORIA 26 JANUARY 2024

BEFORE THE HONOURABLE MISTER JUSTICE SWART

| | |
|-------|------------------------------|
| (1) | REPORTABLE: |
| (2) | OF INTEREST TO OTHER JUDGES: |
| (3) | REVISED. |
| _____ | _____ |
| DATE | SIGNATURE |

In the matter between:

O A J[...]

PLAINTIFF

and

K J[...]

DEFENDANT

JUDGMENT

B H SWART

- [1] The applicant and the respondent were married out of community of property with the inclusion of the accrual system on 4 November 2004. On 10 October 2013 the applicant issued summons for divorce. On 15 May 2015 Kollapen J granted an order in terms of Rule 43.¹ In the current application the applicant applies in terms of Rule 43(6) for the rescission of the 2015 order, alternatively for a variation thereof. The respondent counter applies for an increase in the maintenance granted in terms of the 2015 order and for a contribution towards her future legal costs, coupled with an order for outstanding legal disbursements.
- [2] Rule 43 contemplates an inexpensive and expeditious application to deal with matters falling within its ambit *pendente lite*. It is trite that lengthy affidavits may frustrate this object and may amount to an abuse of the process of the Court.² This notwithstanding, the parties filed voluminous affidavits. The respondent filed a supplementary affidavit which she seeks to be admitted in terms of Rule 43(5), to which the applicant responded. The applicant, under the guise of an answering affidavit to the respondent's counter-application, in effect, filed a replying affidavit thereto. Notwithstanding these indications of an abuse of the process of the Court, I have decided to accept all the affidavits and to entertain the application, as striking it from the roll will further delay the finalisation of the trial of the outstanding issues between the parties.

¹ The '2015 order'.

² See the authorities referred to in fn 10 of Erasmus – Superior Court Practice (2nd ed) at D1-583.

[3] It is necessary, for context, to refer to the 2015 order, and certain facts that transpired thereafter.

[4] The 2015 order provided as follows:

- “1. *Pendente lite* the Respondent is ordered to pay an amount of R20 000-00 (Twenty Thousand Rand) per month commencing on 28 May 2015 and thereafter on or before the 28th Day of each following month directly into a Bank Account nominated by the Applicant.
2. *Pendente lite* the Respondent is ordered to pay the medical aid monthly subscriptions and Gap cover Directly to the service provider and all excess medical expenses not paid by the medical aid.
3. *Pendente lite* the Respondent shall be liable to pay that portion of asset retainer’s CC’s over draft facility which relates to the common home presently occupied by the applicant.
4. *Pendente lite* the Respondent shall pay directly R9 500-00 (Nine and a Half Thousand Rand) to the municipality of Tshwane per month with regard to rates and taxes, water and electricity.
5. *Pendente lite* payment shall made by the Respondent to the Applicant in the amount of R2 500-00 (Two and a Half Thousand Rand) as a petrol allowance per month payable simultaneously with the amount in paragraph 1 above.
6. *Pendente lite* the Respondent is ordered to pay the monthly instalments for the applicant’s BMW motor vehicle in the amount of R9 258-07 (nine Thousand Two Hundred and Fifty Eight Rand and Seven Cents).
7. *Pendente lite* the Respondent is ordered to pay the monthly premiums to insure the BMW motor vehicle referred to above and on a comprehensive basis.
8. *Pendente lite* the Respondent is to pay the following expenses directly to the service provider:
 - 8.1 MWEB
 - 8.2 ADT
 - 8.3 ADSL AND TELKOM
9. *Pendente lite* the restrictions stated in Rule 43(7) and Rule 43(8) are waived.

10. *Pendente lite* respondent is ordered to ensure that suitable arrangement are made or a payment plan is put into place to pay the arrears that have built up in respect of the utilizes [sic] bill with the Tshwane Municipality so that no interruption under any circumstances occurs in respect of the continual supply of electricity to the matrimonial home.”

[5] Pursuant to an application for the separation of issues, Ranchod J granted a final decree of divorce on 17 March 2016, resulting in the calculation of the respondent’s accrual and the her claim for maintenance for remaining as the only issues. The trial for these issues were set down on 16 October 2017 and 22 May 2018 but was each time postponed. On 9 March 2018, Mavundla J dismissed a second Rule 43 application. 2018 – 2020 was spent on litigation caused by the applicant having ceased to comply with the provisions of 2015 order, according to him, on the advice of his former legal attorney. 2021 and 2022 were devoted to proceedings launched by the respondent for further and better discovery. The current application was launched on 7 June 2022. It was argued before me on 26 January 2014 and clearly resulted in the parties, since the launching of the application, not taking any serious steps to advance the issues remaining to trial.

[6] The legal bases underpinning the applicant’s application are recorded in his founding affidavit as Rule 43(6), as well as the inherent jurisdiction of the Court in terms of section 173 of the Constitution.

[7] The applicant’s reliance on section 173 of the Constitution is based on the judgment of Rogers J in *CT v MT*.³

³ 2020 (3) SA 409.

[8] To understand why the applicant's reliance on section 173 of the Constitution is misguided, regard must be had to paragraph 34 of the judgment of Rogers J which records the following:

“[34] Nevertheless, where an order [in terms of Rule 43] is *from the outset manifestly unjust and erroneous*, a court may exercise its inherent power in terms of s 173 of the Constitution to remedy the wrong.... Moreover, where an *injustice* is compounded by an undue protraction of the divorce proceedings, the delay may itself constitute a material change of circumstance as contemplated in Rule 43(6).”⁴

[9] It appears from the judgment that the section 173 powers vested in a Court will be activated where an order in terms of Rule 43 is from the outset manifestly unjust and erroneous. The applicant does not suggest in its application that the 2015 order was from the outset manifestly unjust and/or erroneous. His reliance on section 173 of the Constitution accordingly has no factual basis.

[10] It follows that the only legal basis for the applicant's application is Rule 43(6) which provides for a variation of an existing order in terms of Rule 43 *in the event of a material change occurring in the circumstances of either party....., or the contribution towards costs proving inadequate.*

[11] Counsel for the applicant submitted that an inordinate delay, in itself, constitutes a material change in circumstances as contemplated in Rule 43(6). The judgment in *CT v MT* provides support for this proposition. Rogers

⁴ Own italics.

J held the following in respect of an order in terms of Rule 43 not specifying a terminal date:

“[36] Be that as it may, if specifying a terminal date in the order were thought desirable, there is nothing at common law or in Rule 43 which prevents its imposition. And even in the absence of such a term, the fact that the main case had been delayed significantly longer than could reasonably have been expected when the interim order was made would probably be a basis to ask for a fresh assessment in terms of Rule 43(6).”

[12] Counsel for the respondent correctly pointed out that the aforesaid remarks of Rogers J appears to have been made obiter. This notwithstanding, to me, they make perfect sense. Implicit in any Rule 43 order is an assumption that the trial to which it pertains would be adjudicated expeditiously. It makes sense to assess the matter afresh, should this assumption fail. This does not mean that an inordinate delay will automatically result in amended relief. Whether this will happen will depend on the evidence adduced in the papers. Furthermore, in assessing the evidence, a Court will guard against sitting as a Court of Appeal in respect of the original order.

[13] The facts relied on by the applicant for the relief sought in his notice in terms of Rule 43(6) are summarised as follows in his founding affidavit:

[13.1] The respondent has made no real attempt to secure employment for herself or to vacate the common home, despite acknowledging her obligation to do so in her first Rule 43 application.

[13.2] The common home has been sold and registration of transfer is expected imminently, which would render substantial portions of the 2015 order moot and/or inappropriate.

[13.3] Having received spousal maintenance for seven years, the respondent has no further entitlement to maintenance.

[13.4] The respondent utilises her maintenance for purposes other than spousal maintenance.

[14] During argument I was informed by the applicant's counsel that the transaction for the sale of the common home has fell through and that the property will not be sold before the outstanding issues in the divorce action had been finalised.

[15] As a fact, the respondent is still unemployed. I am not on the evidence before me in a position to conclude that the respondent has deliberately elected not to secure employment. The granting of the relief sought in the notice in terms of Rule 43(6) will terminate her income stream under circumstances where there exist material factual disputes in respect of the reasons/s for her unemployment.

[16] The applicant went to great lengths to demonstrate that the respondent will not succeed with a claim for maintenance at the trial. In my view, I am not called upon to pre-empt the outcome of her maintenance claim. It is trite that

maintenance *pendente lite* is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced. Kollapen J has already found in 2015 that the respondent is entitled to maintenance *pendente lite*. The inordinate delay in the finalisation of the matter does not detract from this.

[17] With reference to an analysis of the respondent's bank statements, as well as those of her mother, the applicant concludes that, between the period October 2020 to October 2021, 57% of the maintenance paid by him to the respondent was paid to her mother, and 13% to Avis Car Rental.

[18] This evidence is dealt with tersely, and possibly unconvincingly, as follows in the respondent's answering affidavit:

"24.4 Every month I pay a substantial amount of my maintenance into my mother's account since she manages my limited funds on my behalf. She assists me with budgeting and the purchasing of day-to-day expenses.

24.5 The amounts spent relates to my normal living expenses as I am entitled to in terms of the R43 application which ranges from groceries, personal items, appliances needed at home, things and transport. The fact that my mom purchases some items for me and on my behalf does not take the matter further.

24.6 I have to resort to car rental as my car has been repossessed."

and:

"25.2 All the amounts I or my mother have spent in respect of normal maintenance needs. She assists me in managing the budget. The trauma of the protracted litigation has had such a negative impact on my health that I am unable to do simple things. My mother, as such, assists me with these simply [*sic*] tasks."

- [19] The applicant's assertions in this regard, coupled with the respondent's unsatisfactory response thereto, do not provide a basis for a rescission of the 2015 order sought in prayer 1 of the notice in terms of Rule 43(6), or the alternative prayer 2 for a terminal date of three months.
- [20] For the reasons aforesaid I am not inclined to grant the applicant the relief sought in prayers 1 or 2 of his notice in terms of Rule 43(6).
- [21] A large portion of the respondent's allegations in her affidavit in support of her claim for increased maintenance is devoted to the sale of the property where she is currently residing, and the applicant's erratic payment of his maintenance obligations. The undertaking furnished by the applicant in respect of the property results in the sale of the property no longer constituting a basis for increased maintenance. Erratic payment of the applicant's maintenance obligations does not constitute a reason for the increase of the maintenance.
- [22] As already pointed out, the respondent has not properly dealt with the assertions in the applicant's affidavit to the effect that she partially utilises the maintenance payments for reasons other than her own maintenance.
- [23] For this reason I am not inclined to grant an increase in the respondent's maintenance *pendente lite*.

[24] Having regard to the facts that transpired since the granting of the 2015 order, I have no doubt that the respondent requires a further contribution towards her legal costs in respect of the pending action. In her counter-application the respondent claims the amount of R1 million in respect of outstanding legal disbursements for accounts already rendered, and a further contribution towards her future legal costs in the amount of R1,500,000.00.

[25] In her affidavit, the respondent seeks to substantiate this claim, with reference to a pro forma bill of costs attached as annexure 'A16' thereto. This evidence is in several respects problematic:

[25.1] The calculation appears to commence from the first consultation between the respondent and her attorneys at the inception of the matter and spans to the conclusion of an eight day trial, contrary to the established principle that a contribution to costs can only be claimed up to the first day of the trial, whereafter the matter can be revisited.

[25.2] The calculation appears not to take cost orders already granted in favour of the respondent in respect of interlocutory applications into consideration.

[26] Non-suiting the respondent in respect of her cost contribution claim will aggravate the inordinate delay in finalising the matter. For this reason I am inclined to order a contribution, which is to a certain extent arbitrary, but which in my view constitute less than the amount to which the respondent would be

entitled, should she substantiate her claim properly. This will enable the parties to move forward in respect of the pending trial, and will allow the respondent to apply for a further contribution, if required.

[27] It appears from the evidence that there has been no serious effort to advance this matter to finality and that the acrimonious divorce proceedings have led to irrational decision making. Having regard to the applicant's conduct in respect of the 2015 order, the submission that he is attempting to litigate the respondent into submission appears to have merit. There is furthermore much to be said for the applicant's submission that the respondent, being in possession of a Rule 43 order that favours her, has no serious intention of advancing the matter to trial. It appears from the papers that she blames lack of funds for her inability to file a replying affidavit in respect of a pending Rule 35(7) application, which prevents the parties from obtaining a trial date. Yet she has managed to file a voluminous answer to the applicant's Rule 43(6) application, and to obtain the services of senior and junior counsel to argue the matter on her behalf. In my view the conduct of both parties have contributed to the inordinate delay in getting the outstanding issues to trial. To assist with the finalisation of the matter I intend ordering the parties to approach the Deputy Judge President for case management of the matter.

[28] In *CT v MT*, Rogers J held the following:

“[35] The potential abuse of indeterminate interim orders could be avoided by including in the order a provision to the effect that it will lapse after a specific period of time, whereupon the spouse in whose favour it was

made would need to review his or her application. In many cases it ought to be possible to assess how long the divorce should take to come to trial if diligently conducted. Specifying a fixed period might encourage the benefitted spouse to pursue the main case diligently. On the other hand, proceedings can be delayed for many unforeseen circumstances having nothing to do with abuse by the benefitted spouse. Whether it is desirable to insist on the expense and inconvenience of a further application is debatable. Furthermore, if the interim order were regarded as unduly parsimonious rather than unduly generous, there may be an incentive on the part of the obligated spouse, rather than the benefitted spouse, to drag out the main case.”

[29] Having regard to the facts that transpired since the granting of the 2015 order and adopting the approach suggested in paragraph 36 of *CT v MT*, I am of the view that the specification of a terminal date in this matter is called for. In my view this, coupled with an order for a further contribution of legal costs will assist in getting the matter to trial, which should have happened years ago.

[30] The order that I intend granting in effect nonsuits the applicant in respect of his application. He must bear the costs thereof. The respondent’s counter-application is partially successful in respect of a further contribution for costs. She is therefore entitled to the costs of her counter-application.

[31] I make the following order:

[1] The application is dismissed with costs.

[2] The respondent is ordered to contribute to the respondent’s legal costs in the amount of R600,000.00, payable in three equal monthly instalments with effect 31 March 2024.

- [3] The applicant is ordered to pay the costs pertaining to the respondent's counter-application.
- [4] The parties are directed to approach the Deputy Judge President for the appointment of a Case Manager.
- [5] The Rule 43 order granted by Kollapen J in 2015, as varied and/or supplemented by this order, shall lapse within eighteen (18) months of the date of the granting of this order, should the matter not have proceeded to trial by then. In this event, any of the parties are entitled to approach the Court for relief in terms of Rule 43, if so advised.

B H SWART
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

| | |
|------------------------|------------------------------------------------------------------------------|
| Counsel for Applicant | Adv H. Loots SC |
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| Counsel for Respondent | L C Haupt SC |

With Adv S M Stadler

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THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES ON
6 MARCH 2024.