

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D9175/2020

In the matter between:

V[...] G[...]

APPLICANT

and

D[...] G[...]

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 20 September 2022 (Tuesday) at 16:00.

JUDGMENT

Mlaba AJ

Introduction

[1] This is an application in terms of Uniform rule 43. The applicant seeks an order in the following terms:

1. Payment of the sum of R25 000 by the respondent / defendant, on or before the first day of the month following the granting of this order, and thereafter, on or before the first day of each and every month, directly into the Applicant/Plaintiff's FNB cheque account, account number [...], branch code [...] ("the Applicant's FNB account").

2. Payment of the following expenses by the respondent/defendant directly to the suppliers for Bentley Estate on a monthly basis, timeously and in accordance with the terms and conditions of the suppliers concerned:
 - 2.1 the property rates and refuse charges, to the KwaDukuza Municipality;
 - 2.2 all the levies (including but not limited to the CSOS levies, reserve Fund, as well as any special levies from time to time), payable to the Bentley Estate (previously Fairfields) Body Corporate, which is currently managed by ATTLEE AGENCY (Pty) LTs Property Management Specialists ("BEBC);
 - 2.3 the electricity consumption, payable to the BEBC;
 - 2.4 the water consumption, payable to the BEBC;
 - 2.5 the basic water and sewage charges, payable to the BEBC.
3. That the respondent/defendant is directed to retain the applicant/plaintiff as the respondent/defendant's spousal dependant on his Discovery Coastal Saver Medical Aid Plan;
4. That the respondent/defendant is directed to make purchase of a new Suzuki Brezza motor vehicle, from Suzuki Northcliff, to be registered in the applicant/plaintiff's name, the total costs of which being R336 655.89 (including all the road charges, smash and grab and service extension plans) which payment is to be made directly to Suzuki Northcliff (whose banking details are Nedbank, account styled Trust Absolut Auto (Pty) Ltd, current account number 1201351723, branch code 198765) within 5 (five) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
5. That the respondent/defendant is directed to make payment of the quoted amount for the damp-proofing, re-plastering and re-painting, in the quoted amount of R115 136,24, directly to Riverside Construction (annexure G7), whose banking details are FNB, branch code 220 127, account no 62174937402, account name Riverside Park Trading 9 (Pty) Ltd, to be paid within 5 (five) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;

6. That the respondent/defendant is directed to make payment directly into the applicant/plaintiff's FNB account in the amount of R18 396.00, being the costs of a new Defy Slimline Solid Control Panel Hob, new Defy 600 Cooker Hood (being an extractor), new Defy DBO 486 Slimline Oven Fan Assist-SS Imitate-Eye Level (being an oven) and a new Hisense 12 kg Front Loader Washing Machine with Inverter, within 5 (five) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
7. That the respondent/defendant is directed to make payment directly into the applicant/plaintiff's FNB account in the amount of R4 599.00, being the costs of a new entry level laptop, being Lenovo Notebook IdeaPad 14" FHD Intel Celeron 4GB 128GB SSD Windows 10 Home Device (annexure G28), within 5 (five) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
8. That the respondent/defendant is directed to make payment of a contribution towards the applicant/plaintiff's legal costs in the sum of R50 000.00, to be paid directly into Chimes Law's Trust banking account, the details of which are Nedbank, Hyde Park Branch, account number 1972 069 527 ("Chimes' Trust banking account") within 5 (five) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
9. That the respondent/defendant is directed to make payment of the costs of this application, as taxed, on a party-and-party scale, payable forthwith on taxation, alternatively by agreement reached prior thereto, and to be paid directly into Chimes Law's Trust banking account, on presentation of the taxed (or agreed to), and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za.

[2] The respondent has no objection to an order in terms of paragraphs 2 and 3 of the order prayed. The remaining paragraphs being 1, 4, 5, 6, 7 and 8 of the order prayed are in dispute.

[3] Rule 43(1) provides as follows:

'43 Interim relief in matrimonial matters

- (a) Maintenance *pendente lite*;

- (b) A contribution towards the costs of a matrimonial action, pending or about to be instituted;
- (c) Interim care of any child;
- (d) Interim contact with any child.'

[4] The applicant and respondent married each other on 30 December 1980 and their marriage is in community of property. All their children are majors. Their marriage broke down irretrievably in 2009 and they separated. The applicant instituted divorce action against the respondent out of the South Gauteng High Court, Johannesburg however the parties agreed that the action be withdrawn and that this court entertain the matter.

Applicant's submissions

[5] A rule 43 order was granted by the South Gauteng High Court, 12 September 2012 wherein the respondent was ordered to pay an amount of R5 300 to the applicant per month for maintenance as well as a R10 000 contribution towards the applicant's legal costs.

[6] The applicant submits that the cash component of the monthly living expenses is currently wholly insufficient to cover what she requires as her monthly maintenance. Since June 2019 she has been without transport and the unit she occupies at Bentley Estates, Ballito needs substantial maintenance and repair. The existing order is ten years old and notwithstanding several requests for the respondent to increase the maintenance he has never tendered an increase.

[7] Divorce proceedings were instituted by the applicant in this Court in December 2020 and the respondent filed a plea and counter-claim. The issue of the division of the joint estate remains in dispute. The applicant anticipates that the divorce action will not be finalised expeditiously due to the respondent's attitude and therefore needs sufficient maintenance pending the finalisation of the divorce action.

[8] The applicant submits further that besides the unit she occupies in Ballito she has no access to resources or assets and is entirely dependent upon the respondent for the small amount of maintenance that he pays to her each month and the

expenses that he pays on her behalf. The respondent on the other hand has access to and controls all of the financial resources and assets in the joint estate.

[9] The applicant submits that in light of their marriage regime she too ought to be in an equal position as the respondent, yet the respondent controls the resources of the joint estate at her exclusion.

[10] The respondent has failed or refused to make a full and frank disclosure of his financial circumstances. There are immovable properties in the joint estate as well as monies, being proceeds of properties that were sold, that the respondent fails to disclose and account for including the following:

- (a) Sheffield Manor: The respondent contended that it is a rental property but in his plea dated 26 May 2022 it is listed as an asset in the joint estate. In this rule 43 application the respondent submits that it is a rented property and that he had made a mistake in his plea. He however failed to produce a lease agreement to substantiate his claim.
- (b) Verulam Family Farm: In the previous rule 43 in 2012 the respondent admitted that he had an interest in this seven acre farm and that the farm was bequeathed to him and his two siblings but that it was transferred to his elder brother and the farm was in the process of being divided. In this application the respondent did not comment and / or give any information about this property. Upon being questioned in a letter about the farm his attorney responded to state that the respondent had no interest in the family farm.
- (c) Sea View: This is the previous matrimonial home of the parties and it was sold in 2009 for R675 000. The respondent alleged that the applicant is aware that the proceeds were invested in a brewery in Zambia and the investment was a failure but produced no documentation to support his contention. The applicant submitted that she is not aware of such an investment. In a letter dated 9 May 2022 the respondent states that the proceeds of the sale were used to pay off loans, settle varsity fees and purchase a Kia motor vehicle.

(d) Ferndale Property, Stanlib Swaziland bank account, Standard Bank Swaziland bank account, SwaziBank fixed account, Barclays Wealth (London) bank account, Eswatini bank account, Tongaat Hulett pension benefits, Illovo Sugar pension benefits, Capitec account and Mending Ways (Pty) Ltd: The applicant submits that the respondent has failed to disclose any documentation relating to his full financial position in respect of these accounts, interests and properties.

[11] The applicant submits in conclusion that her maintenance needs have increased since 2012 and that her request is reasonable taking into account the amount of time that has lapsed since 2012 and the current cost of living. She submits that the respondent is able to afford what she is requesting but does not want to assist her. The respondent tendered in his plea to purchase a new vehicle for her but he only did so in order to avoid having a liquidator appointed because he does not want to have his financial position exposed. In respect of the contribution to legal costs the respondent offers nothing however he is able to pay for his legal fees out of the joint estate.

[12] The applicant submits that she is entitled to the order as prayed.

Respondent's submissions

[13] The respondent submits that the court has to look at the reasonableness of the relief being sought by the applicant and his ability to provide same. He further submits that the amount sought is five times of what he is currently paying in terms of the 2012 court order and he submitted that according to his calculations the reasonable increased monthly maintenance is an amount of R7 238. He submitted that his monthly income is approximately R45 000 per month.

[14] The respondent stated that he could not recall with precision as to what he used the proceeds of the sale of the Seaview property for as well as the pension fund benefits pay-outs as these took place a long time ago. According to the respondent the applicant signed for the Zambia investment and was aware of it. He submitted that he could not secure bank statements for his overseas accounts and neither did he want to burden the court with voluminous documents.

[15] The respondent submitted that even though the applicant is entitled to 50 percent of the joint estate that it was not in the interest of both of them to deplete the assets and monies belonging to the joint estate and that the applicant's requests would do exactly that.

[16] The respondent submitted that he has been honest in the disclosure of his financial circumstances and even disclosed his other bank accounts that the applicant had not disclosed. He stated that he cannot be expected to recall the exact transactions that he undertook 20 years ago.

[17] In conclusion the respondent submitted that it was not the domain of this court to deal with issues of maintenance. He further submitted that the costs of his application must be reserved for determination by the court that will finalise the divorce action.

Evaluation

[18] Our courts have always emphasised the need for utmost good faith by both parties in rule 43 proceedings and the need to disclose fully all material information regarding their financial affairs.¹

[19] In *B v B*² the Supreme Court of Appeal stated the following regarding the non-disclosure of the respondent:

'[39] The attitude of many divorced parties, particularly in relation to money claims where they control the money, can be characterised as "catch me if you can". These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly, fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be "caught" and have to disgorge what is in law due to the other party.'

[20] The applicant and respondent are married to each other in community of property and there is no reason for the applicant to endure a lifestyle that is inferior to that of the respondent. She is entitled to enjoy the lifestyle that the respondent is

¹ *Du Preez v Du Preez* 2009 (6) SA 28 (T) para 16.

² *B v B* (700/2013) [2014] ZASCA 137 (25 September 2014).

currently enjoying and is also entitled to live out of the assets of the joint estate that the respondent controls.

[21] The applicant requires new household appliances, a reliable motor vehicle for her transportation needs and maintenance work on her home. She further requests for an increase of monthly maintenance from R5 300 to R25 000.

[22] The maintenance order for R5 300 was based on the financial circumstances of the respondent and the applicant's reasonable financial expenses at the time. In fact the submission by the applicant is that she was living with her children in a flat owned by the family trust. It is reasonably expected that the applicant's current monthly expenses are far greater than they were in 2012 and the same applies for the respondent. The applicant's expenses include groceries, toiletries, a Vodacom mobile contract, clothing and shoes, personal care, insurance, fuel, tracker, travelling to visit her children, gym membership, TV licence, entertainment etc. These appear to be reasonable and necessary expenses that the respondent is probably also incurring.

[23] The applicant submits that the reason that she proposes the vehicle model that she does is due its reasonable cost as well as 4 year service plan and 5 year warranty. The vehicle that the respondent proposes is not suitable as it is not automatic and the model, Datsun Go, is apparently being discontinued in South Africa. This court is of the view that there is nothing unreasonable with the applicant's request in this regard especially in light of the fact that the respondent has use of more than one vehicle including a Ford Ranger double cab and a Kia Optima. At one stage he also had a VW Polo.

[24] The respondent cannot, with certainty, dispute that the requests by the applicant are unnecessary. The respondent has not also stated that he cannot afford to provide these to the applicant. He contends that what the applicant seeks does not fall within the ambit of rule 43 because interim maintenance does not embrace the acquisition of capital assets such as motor vehicles, a laptop computer and household appliances.

[25] I do not agree with the respondent. The court usually orders periodic payments of money but may order that other assets be made available for use by the applicant³. The applicant is entitled to reasonable maintenance *pendente lite* according to the marital standard of the parties. Accordingly, she is entitled to the use of safe and reliable transportation, and to live a lifestyle, just like the respondent, that the assets of joint estate are able to provide. The respondent does not dispute that the appliances that the applicant currently utilises are over 30 years old and it cannot be reasonably expected that 30 year-old appliances are still in good condition. The respondent controls all the finances of the joint estate and the applicant is not in a position to acquire these appliances as she depends solely on the amount that she receives from the respondent.

[26] The respondent relied on the case of *Greenspan v Greenspan*⁴ wherein the court stated that in terms of rule 43(1) the court has no power to award lump sum payments. While this may be the case it is also true that the purpose of this rule is to provide the applicant with maintenance *pendente lite*. The applicant currently needs these appliances to continue with her normal day-to-day life. In my view rule 43(1) (b), which deals with contribution towards legal costs, permits lump sum payments and indeed that is the way contribution towards legal costs are usually ordered to be paid. Accordingly, the same may apply in respect of acquisition of necessary household appliances as well as delivery of a motor vehicle.

[27] In considering whether to grant the relief sought the court must consider the reasonableness of such relief and ensure that the level of lifestyle of the applicant must not be worse off than that which she is used to and also compare it to the respondent's lifestyle. The applicant seeks purchase of household items which the court is of the view that they are not luxurious items but only necessary in the day-to-day life of the applicant considering that the items that the applicant wishes to replace are more than 30 years old.

[28] The applicant is entitled to a contribution to her legal costs. The respondent is able to secure the services of an attorney as well as counsel, and the applicant

³ Van der Spuy v Van der Spuy 1981 (3) SA 638(C).

⁴ *Greenspan v Greenspan* 2000 (2) SA 283 (C).

ought to be able to do the same. In *Senior v Senior*⁵ the court stated that the scale on which the respondent is litigating must be commensurate with the scale upon which the applicant wishes to litigate.

[29] The respondent has failed to fully disclose his financial circumstances to the court. This court is of the view that the relief being sought by the applicant is reasonable.

Order

[30] Accordingly, I make the following orders:

1. Payment of the sum of R25 000 by the respondent, on or before the first day of the month following the granting of this order, and thereafter, on or before the first day of each and every month, directly into the applicant's FNB cheque account, account number 62295190294, branch code 250655 ("the applicant's FNB account").
2. Payment of the following expenses by the respondent directly to the suppliers for Bentley Estate on a monthly basis, timeously and in accordance with the terms and conditions of the suppliers concerned:
 - 2.1 the property rates and refuse charges, to the KwaDukuza Municipality;
 - 2.2 all the levies (including but not limited to the CSOS levies, reserve Fund, as well as any special levies from time to time), payable to the Bentley Estate (previously Fairfields) Body Corporate, which is currently managed by ATTLEE AGENCY (Pty) LTs Property Management Specialists ("BEBC);
 - 2.3 the electricity consumption, payable to the BEBC;
 - 2.4 the water consumption, payable to the BEBC;
 - 2.5 the basic water and sewage charges, payable to the BEBC.

⁵ *Senior v Senior* 1999 (4) SA 955 (W).

3. That the respondent is directed to retain the applicant as the respondent's spousal dependant on his Discovery Coastal Saver Medical Aid Plan;
4. That the respondent is directed to make purchase of a new Suzuki Brezza motor vehicle, from Suzuki Northcliff, to be registered in the applicant's name, the total costs of which being R336 655.89 (including all the road charges, smash and grab and service extension plans) which payment is to be made directly to Suzuki Northcliff (whose banking details are Nedbank, account styled Trust Absolut Auto (Pty) Ltd, current account number 1201351723, branch code 198765) within 30 (thirty) days of the granting of this order, and to deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
5. That the respondent is directed to make payment of the quoted amount for the damp-proofing, re-plastering and re-painting, in the quoted amount of R115 136,24, directly to Riverside Construction (annexure G7), whose banking details are FNB, branch code 220 127, account no 62174937402, account name Riverside Park Trading 9 (Pty) Ltd, to be paid within 30 (thirty) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
6. That the respondent is directed to make payment directly into the applicant's FNB account in the amount of R18 396.00, being the costs of a new Defy Slimline Solid Control Panel Hob, new Defy 600 Cooker Hood (being an extractor), new Defy DBO 486 Slimline Oven Fan Assist-SS Imitate-Eye Level (being an oven) and a new Hisense 12 kg Front Loader Washing Machine with Inverter, within 30 (thirty) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
7. That the respondent is directed to make payment directly into the applicant's FNB account in the amount of R4 599.00, being the costs of a new entry level laptop, being Lenovo Notebook IdeaPad 14" FHD Intel Celeron 4GB 128GB SSD Windows 10 Home Device (annexure G28), within 30 (thirty) days of the

granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;

8. That the respondent is directed to make payment of a contribution towards the applicant's legal costs in the sum of R50 000.00, to be paid directly into Chimes Law's Trust banking account, the details of which are Nedbank, Hyde Park Branch, account number 1972 069 527 ("Chimes' Trust banking account") within 15 (fifteen) days of the granting of this order, and to simultaneously deliver proof of payment in respect thereof to Chimes via email to larry@chimeslaw.co.za;
9. The costs of this application shall be costs in the cause.



Mlaba AJ

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