

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



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NUMBER: 14189/2022

In the matter between:

BA R

APPLICANT

And

DG R

RESPONDENT

RULE 43 JUDGMENT 17 MARCH 2023

KUSEVITSKY, J:

[1] This is an opposed Rule 43 application. The Applicant in these proceedings is the Defendant in the divorce action. I will for sake of convenience, refer to the parties as cited in the pending divorce action.

[2] The Defendant seeks interim maintenance relief from the Plaintiff in the amount of R 21,000.00. He also seeks an initial contribution to his legal costs in the amount of R 200 000.00.

A general observation

[3] It is common cause the Rule 43 proceedings are interim in nature pending the resolution of the main divorce action. It is also common cause that the genesis of the rule emanated from the position that a claimant, usually the woman, found themselves him – sometimes destitute - when litigating against their spouse, who were often in a stronger, financial position than themselves in divorce proceedings. In recent times, and if the court roll is anything to go by, applications for interim maintenance have morphed into unrealistic, super-inflated claims by applicants, using the rule as a measure or yardstick to gain advantage in the main action. In certain instances, substantial interim maintenance has been awarded to applicants which has had, in some instances, the un-intended consequence of claimant's not being inclined to finalise the main divorce action. In my view, the basic tenets of the rule have been forgotten and is more often than not, abused.

[4] In *Taute v Taute* 1974 (2) SA 675 (E), the court stated that there is no general principle upon which an application under Rule 43 can or must be based. Each case

must depend on its own particular facts. *Taute* also reiterated that a claimant for maintenance *pendente lite* was not entitled, as of right, and without more, to maintenance sufficient to keep him or her in the same lifestyle as that enjoyed during the marriage. Hart AJ stated thus¹: *'The applicant spouse (who is normally the wife) is entitled to reasonable maintenance pendente lite dependent upon the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified'*.

[5] *Taute* also referred to LUDORF, J. in the case of *Levin v Levin and Another* 1962 (3) SA 330 (W) at p 331D, who said the following:

*"To decide the issues I am compelled to draw inferences and to look to the probabilities as they emerge from the papers. Obviously my findings are in no way binding on the trial Court and indeed after hearing the evidence it may emerge that some or all of the inferences I have drawn are wrong. On this basis I now turn to the issues as they emerge from the papers."*²

[6] In my view, this case is one of the matters where I am compelled to draw inferences based on the papers: The parties were married to each other on 3 August 2018. No children were born of the marriage. The Plaintiff filed for divorce during April 2021. During the hearing of the matter, it was submitted by counsel for the Defendant that this court does not have to take into account the averments made in Plaintiff's summons regarding the reasons for the breakdown of the marriage. Counsel for Plaintiff however argued that regard ought to be had thereto since the Plaintiff is claiming a forfeiture order based on the conduct of the Defendant.

¹ *Taute* at 676D-E; *C v N*, Case No. 16742/2021 (WCC) 9 November 2021 at para 14

² at 676C-D

[7] Bearing in mind that these are merely interim proceedings and that these allegations would ultimately be ventilated in the normal course during the trial, I am mindful of the *dicta* in *Levin supra* and am of the view that the allegations raised by the Plaintiff cannot simply be ignored in these proceedings. I am also of the view that a potential forfeiture claim by a party against whom interim maintenance is being sought is a factor that could militate against, or at the very least mitigate, the granting of an interim maintenance order.

[8] In *casu*, in the application, the Defendant states that he is an adult handyman and lives in a 'wendy house' on a farm in Onrus, Rooi Els, Western Cape. He states that he is unable to support himself. The Plaintiff however is able to support him since she is the owner of a guesthouse and can support him from the income that she receives by virtue of the income that she generates from the guesthouse. He says that Plaintiff resides in a four-bedroom double-story guest house which is fully paid for. He lived there too until he was ejected from the matrimonial home. He says that he has not generated a fixed income and has earned R 6 983.37 per month over the last 14 months. According to his affidavit, the couple enjoyed holidays and week-ends away together, all of which was paid for by Plaintiff. Other expenses paid for by the Plaintiff was dining at restaurants, day-spas and upgrades to the former common home. The Defendant states that he has always been employed in the informal sector as a handyman and has no assets of value.

[9] The Plaintiff in opposition to this application states that the use of the word 'wendy house' is misleading. The dwelling in which Defendant currently occupies is a

fully equipped and furnished wooden eco-cabin outside of Betty Bay, known as the Hangklip Cottage. They both lived there from November 2021 until 6 March 2022, when she fled the common home in fear of her life. She states that the Defendant is not 'only' a handyman. When she met him, he operated a business which provided *inter alia* various services such as garden maintenance, pool cleaning, painting, general renovation and motor repairs. She also states that before their separation, he was employed to work as an estate agent. She argues that nothing prevents him from continuing to earn an income and providing for his own maintenance and payment of his own legal fees from these various sources.

[10] She further states that she is 52 years old with no means to support herself other than the rental income which she receives from the two-bedroom self-catering unit on the top floor of her home. She also lives off an investment she inherited from her late husband. Other than that, she has no other funds or assets with which to liquidate to support herself, let alone the Defendant.

[11] In her opposing affidavit, she further states that the Defendant was not unlawfully ejected from the common home. She explains that less than three months after the couple married, the Defendant assaulted her for the first time, dislocating her right-hand middle finger by bending it over backwards. Two months later, he violently smashed his fist through a window after she locked herself in the home after he had allegedly returned home drunk and abusive. Four months later he violently threw her against a door and held her in a chokehold as a result for which she obtained a protection order against him. His last assault occurred on 6 March 2022 when he head-butted her in the face which forced her to flee their home in the

middle of the night. According to the particulars of claim, in reliance of the forfeiture order, the Defendant damaged the property by breaking objects, throwing bricks through glass doors, and cutting the security gate with a grinder to gain access to her. She says that she has used the money that she inherited to fund the legal costs in the divorce action, the domestic violence proceedings and now these rule 43 proceedings. She is of the view that by the time these proceedings are finalised, all of that money would have been depleted. She is of the view that the Defendant has a substantial customer base in the area; he is a strong and healthy 32 year-old man able to generate his own income; his parents are wealthy individuals and they too can assist him with his legal fees.

[12] In the Plaintiff's particulars of claim, she claims further that the Defendant stopped working and refused to commence his career as a full-time handyman. When she met him, he conducted his business with a Bantum *bakkie* worth R 30 000.00. Now, he contends that she has to maintain the Ford Ranger *bakkie* that she bought him.

[13] The main tenor of the Defendant's application is that the Plaintiff has more assets than him; she has the capacity to earn more income than him; she paid for everything and still enjoys a lifestyle such as massages and dining out. He says that she owes him a contribution in line with the expenses which they incurred as a family. In *Strauss v Strauss* 1974 (3) AD, the court held that it was not enough to merely state that a claimant is entitled to more maintenance just because their spouse is able to afford same.³ A claimant is also not entitled, as of right, to enjoy in the same standard of living and lifestyle as their spouse. (*at 83D*). In *casu*,

³ *Strauss* at 83C

the Defendant has failed to say how he managed to maintain himself for ten months since the parties' separation. The Defendant has also failed to take this court into his confidence and volunteer information as to what steps he has taken to supplement his own income. On Plaintiff's version, he intentionally omitted to state that he was working at an estate agency. As in *Strauss* (at 83D-E), the Defendant has failed to provide a cogent explanation as to why his maintenance cannot be supplemented by his own income. On a conspectus of this application, I can find no grounds which would entitle the Defendant to maintenance *pendente lite*. Furthermore, there is nothing before me on the papers which would persuade me that the Defendant is utterly incapable of supporting himself.

[14] With regard to the Defendant's claim of R 200 000 for a contribution to costs, the Defendant submits that the paramount consideration is that a claimant must be placed in a financial position adequately to place his case before the court, taking into account the circumstances of the case, the financial position of the parties and the particular issues involved in the pending litigation.⁴ The Defendant submits that the court in rule 43 proceedings may direct payment of legal costs that a party has already incurred. In my view, such an approach would be manifestly unjust, given the particular allegations raised on the papers of serious domestic violence abuse, and where it is the Plaintiff that has had to incur legal expenses in order to protect her life and her rights. The Defendant also claims that he has a fair and reasonable prospect of success with his claim, and that this justifies his entitlement to interim maintenance and costs. I am not persuaded by this argument. In my view, a fair and reasonable prospect of success as a general contention and as factor entitling a party, as of right, to interim maintenance is misguided. In my view, the probabilities

⁴ Van Rippen v Van Rippen 1949 (4) SA 634 (C) at 639-640.

lay more in favour of the Defendant having a reasonable prospect of success in her forfeiture claim, which is a factor that I am taking into consideration to refuse a contribution of costs in this instance. Even if my approach is strong on this score, for the reasons advanced above, I am of the view that the Defendant has not persuaded me that a contribution to costs is justified in this instance. As stated in *Nilsson v Nilsson* 1984 (2) SA 294 (C) at 295F, a rule 43 order is not meant to provide an interim meal ticket to a person who quite clearly at the trial will not be able to establish a right to maintenance. It would also be manifestly unfair to expect the Plaintiff to fund the Defendant's legal fees from the investment that she receives from her late husband's inheritance.

[15] For all of the reasons, I make the following order:

ORDER

1. The application is dismissed with costs.

**D.S. KUSEVITSKY
JUDGE OF THE WESTERN CAPE HIGH COURT**

APPEARANCE FOR APPLICANT

ADV. HERNA BEVISS-CHALINOR

APPEARANCE FOR RESPONDENT

ADV. THELMA-ANN PRATT