



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **21 May 2021** Signature: *Z Majavu*

CASE NO: 04853/2020

This matter was heard virtually on the Microsoft teams platform

In the matter between:

MAJEDA KIVETTS

APPLICANT

and

WERNER ALFRED JOHAN BRUGMANS

RESPONDENT

Coram: **Majavu AJ**

Heard: 20 May 2021

Delivered: **21 May 2021** – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14h30 on 21 May 2021

Summary: This is an application in terms of rule 43 of the Uniform rules of Court for certain relief *pendent lite*, *for inter alia*, interim maintenance, payment of certain loans, litigation costs unrelated to the pending divorce, *declarators*, issue whether some costs prayed for are competent in rule 43, applicant contends the law has developed to accommodate all costs as a species of maintenance, respondent contends otherwise- relief granted *only* in respect interim maintenance and related expenses, costs to be determined in the main action

ORDER

(a) The respondent is ordered to pay, *pendente lite*, an amount of R65,000.00 per month with effect from **28 May 2021**, and thereafter by no later than the last working day of each succeeding month, such payment to be made into the applicant's nominated banking account. This amount shall increase annually on the anniversary of this order and in accordance with the percentage increase in the headline inflation of the consumer price index, as published by statistics South Africa during the preceding year, the first such increase to be effected on 21 May 2022;

(b) The respondent will continue to retain the applicant on the Discovery Classic Plan ("the Plan"), as well as pay any necessary and reasonable excess, not covered by the plan, including the cost of hospitalisation, treatment and/or medical expenses and medication as a result of the applicant's prevailing health and related conditions;

(c) The respondent shall hand over to the applicant's attorneys the current licence disc in respect of the posh Panamera within 48 hours of this order.

(d) Over and above (c) above, the respondent shall continue to pay the monthly instalments, as well as the requisite insurance premium in respect of the Porsche Panamera.

(e) The respondent is ordered to pay an amount of R250,000 as part of the contribution towards the applicant's costs within 7 (seven) days of this order.

(f) The costs shall stand over for determination in the main divorce trial.

Majavu AJ

Introduction

Let me start off by expressing my gratitude to counsels for the detailed heads of argument, which I found very helpful. I also noted that the papers filed by both parties were unnecessarily prolix and voluminous, mindful of the specific ambit of rule 43 applications. In fact, more than three quarters of the founding affidavit and similarly that of the answering affidavit, concerned matters which, self-evidently, do not fall for determination in the rule 43 proceedings. I will deal with that later. In the interest of fairness, and to the extent that condonation might be required, I accordingly grant same in respect of both sets of affidavit. *This*, should by no

means be misconstrued as the court's preparedness to entertain unnecessarily prolix papers, while at the same time, one recognises the need to afford parties an opportunity to fully ventilate their case. There is a delicate balance to be struck, otherwise, the very purpose for which an expedient procedure such as rule 43 applications was intended, might be rendered impractical and inexpedient.

[1] In the application before me, the applicant seeks the following relief, which I elect to restate. This is so because, after my prompting, the parties sought an opportunity to re-engage, with a view to "narrow down issues" resulting in some of the relief not persisted with, correctly so in my view, even though the ambit of those not persisted with, could have been further extended. Be that as it may, I am grateful to counsels for their attempt, mindful that they are creatures of their respective clients' instructions.

Initial relief

[2] The applicant sought an order in the following terms:

- "1. Condonation insofar as the strictures of Rule 43 might not be compliant in respect of the length of the founding affidavit and the late bringing of the application.*
- 2. That the respondent retains alternatively places the applicant on the Discovery Classic Care Plan.*

3. *That the respondent be ordered to pay any reasonable and necessary access medical expenses incurred in connection with the applicant and not paid by the medical aid scheme, including the cost of hospitalisation, treatment and/or medication as a result of the applicants prevailing health and related complications.*
4. *Directing, that pending the determination of the divorce action between the parties, the respondent shall maintain the applicant as follows:-*
5. *An amount of R 337, 000.00 in respect of loans which the applicant had to obtain and to which the applicant shall utilise in reduction of the debt owing in respect of the said loans being due within 5 days of the granting of the order which payments are to be made into the applicant's designated banking account.*
6. *An amount of R 35, 000.00 per month, which the applicant shall utilise in the reduction of the debt owing to those creditors referred to in annexures "FDF1 and FDF 4" in the financial disclosure form, the payment being due within 5 days of the granting of the order or before the first day of each succeeding month, which payments are to be made into the applicant's designated bank account.*
7. *Directing the respondent to pay a contribution towards the applicant's current legal costs in the amount of R 540 972.18 which*

payment is to be made into the applicant's designated bank account.

8. *Payment of arrears rental in the sum of R 39 000.00.*
9. *Payment of Uber costs in the amount of R7 200.00*
10. *Payment of the amount of R930, 000.00 with reference to annexure "FA11" attached to the founding affidavit.*
11. *The return of 2 bull mastiff dogs.*
12. *The immediate return of those assets described in paragraph "FDF 3.1" of the financial disclosure form alternatively the monetary value thereof.*
13. *By payment to the applicant of an amount of R 129, 292.00 per month, in respect of the applicant's expenses, effective as of 1 January 2020, without deduction or set off on the first day of every month by way of electronic funds transfer or debit order, into such bank account as the applicant may nominate from time to time.*
14. *The amounts payable as referred to in paragraph 13 above shall be in respect of the following expenses as set out in the financial disclosure form:-*

14.1 accommodation;

14.2 food and groceries;

14.3 toiletries and cosmetics;

14.4 water and electricity;

14.5 rates and/or levies;

14.6 cell phone;

14.7 domestic worker and gardener;

14.8 clothing;

14.9 life-insurance;

14.10 the costs of the applicants flights, accommodation, vehicle rental, public transport, food, entertainment, travel insurance and visa costs in respect of the holiday locally or abroad;

14.11 dog food;

14.12 house maintenance;

14.13 household appliances and maintenance;

14.14 M-Net/DStv

14.15 In respect of the Porsche Panamera motor vehicle currently in possession of the applicant that the respondent be directed to:

14.15.1 transfer the Porsche Panamera into the name of the applicant within 21 days of the granting of this order and that the eNatis documents be immediately delivered to the applicant's attorney;

14.15.2 pay the insurance premiums and access on the Panamera;

14.15.3 pay the cost of repairs, service, tire replacement and maintenance of the Panamera;

14.15.4 pay the vehicle license fees of the Panamera;

14.15.5 pay e-toll fees of the Panamera;

14.15.6 immediate delivery of the relevant licence disc.

15. Directing that the amounts referred to in player 6, 13 and 14 above shall increase annually in April of each year in accordance with the percentage increase in the headline inflation of the consumer price index is published by statistics South Africa during the preceding year, the first of such increased to be effected as at 1 April 2021;

16. *Directing that the respondent shall bear the costs of this application.*

Amended relief after re engagement

[3] The parties subsequently informed me that relief sought in paragraphs 2,3,9,10,11,12 and 14.15.7 were no longer persisted with, as parties *found* each other. With specific reference to 10 and 12, the parties recognise that there exists material dispute of fact in relation thereto and thus agreed that the matters will be resolved in trial.

[4] From my distillation of the issues left for determination, which was confirmed by counsels, it would appear that broadly speaking, there are two (2) categories of amounts persisted with. For ease of reference, the first category, and about which there *is no* dispute regarding the jurisdiction of the rule 43 court in respect thereof, namely cash maintenance, which currently the applicant pegs at R 129, 292.00 and the respondent on the other hand concedes an amount of R 34 045.00 (but not tendered). I hasten to add that the respondent acknowledges in his papers that to date he has spent an amount of R 534 588.00 in respect of legal fees to date. These amounts are in respect all litigation to date, not necessarily the pending divorce matter. His monthly expenses are approximately R 149 000.00, not far apart from what is alleged by the applicant. The 2nd category relates to amounts mentioned in 5 (loan for R337, 000.00), 6 (R 35 000.00) 7 (R540 972.18), and 8 (arrear rental R 39 000,00).

[5] It is quite clear that parties are alive to the fact that a significant portion of the relief sought in truth, does not belong to rule 43 proceedings, hence the agreement to refer such to trial. What I am called upon to determine is whether or not the 2nd category is competent, within the ambit of rule 43 proceedings. Depending on what my determination on that aspect would be, parties have accepted the correctness of the figures related thereto.

[6] With regard to the *cash* component, the parties accept the need for some form of financial assistance for the applicant. It is for that reason that I propose to dispose of that category first. Having carefully considered the list of expenses and FDF forms, as debated and in some instances, agreed upon by the parties' counsels, I determine that an all-inclusive cash component *in lieu* of monthly maintenance to be awarded to the applicant is R65,000.00

[7] Over and above that the respondent will continue to pay the monthly instalment, as well as insurance premium in respect of the Porsche Panamera.

[8] The respondent will continue to retain the applicant on the Discovery Classic Plan ("the plan"), as well as any necessary and reasonable access medical expenses, not covered by the plan, including the cost of hospitalisation, treatment and or medication as a result of the applicants prevailing health and related complications.

[9] The respondent shall hand over to the applicant's attorneys the current licence disc in respect of the Porsche Panamera within 48 hours of this order. I

was informed that the said disc is readily available and could easily be handed over.

[10] The amount referred to above shall increase annually on the anniversary of this order and in accordance with the percentage increase in the headline inflation of the consumer price index, as published by statistics South Africa during the preceding year, the first such increased to be effected on 21 May 2022.

[11] I now turn to the 2nd category, which is hotly contested. A useful starting point would be, what rule 43 prescribes.

[12] “Rule 43(1) this rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters: (emphasis)

- (a) maintenance *pendente lite*,
- (b) a contribution towards the costs of a pending matrimonial action,
(emphasis)
- (c) interim custody of any child,
- (d) interim access to any child.

[13] The rule is very specific as to the kind of relief that may be sought by way of such an application. For present purposes, I need only concern myself with the first two.

[14] The applicant contends that the law has evolved to include what his counsel referred to as “a species of maintenance” with a view to bringing other types of expenses and litigation costs within the ambit of rule 43, presumably subsections (a) and (b). This is a tacit acknowledgement by the applicant’s counsel that, but for such evolution or jurisprudential development of the law, as he puts it, such claims are not justiciable in the rule 43 proceedings.

[15] The applicant’s counsel places reliance on the judgement of my brother Davis J in the Western Cape Local Division, in the matter of AFv MF¹. This case does not provide authority for the proposition as contended by the applicant’s counsel. In this case, the applicant (wife) sought a contribution of R750,000 towards her costs in the divorce action, *inter alia*. This was not a claim for general litigation costs, including for litigious matters unconnected to the pending divorce. This is clearly distinguishable from the current case. I am further fortified in my view with reference to what is contained in paragraph 31 of that judgement, where, my brother quite aptly restates the correct legal approach (and I am in full alignment there with) *“in answering the question whether a court may order a contribution to legal costs which have already been incurred, it is helpful, as a starting point, to consider the position regarding retrospective orders for the payment of spousal maintenance, for legal costs in a matrimonial action are a species of support and the same rules should logically apply”*. Once again, that judgement places emphasis on the costs related to the matrimonial action and

¹ case number 6664/19, judgement delivered on 28 August 2019

not any other litigious disputes. He confirms that in paragraph 4 of the order he ultimately makes.

[16] Of course, recognition of the fact that spousal maintenance should include contribution towards legal costs is generally accepted. What was in issue before Davis J was the retrospectivity of such an order of contribution. In any event, the respondent in *casu* does not contend that spousal maintenance of proper should include contribution towards costs. In this case, the respondent clearly recognises that fact and to that extent tenders an amount of R10,000. Barring the fact that the parties are poles apart with regard to the *quantum*, *there seems to be no challenge to the acceptance of that "species of maintenance"*. I therefore find that there can be no challenge to eligibility of the claim for contribution towards costs, especially where it can be demonstrated that an impecunious spouse incurred debts to enable it to fund the pending divorce litigation. The reasonableness or otherwise of the amount so claimed is a different matter. In this case, the respondent has himself spent significant amount of money on the divorce litigation thus far, far in excess of what he tenders (R10,000). Having considered the nature of the litigation, in the absence of actual or estimated *pro forma* invoices, in the exercise of my discretion I find that an amount of R 250,000.00 would be fair and reasonable under the circumstances. This amount to be paid as a lump sum within 7 days of this order.

[17] Now turning to other loans and debts, these are clearly on a different footing to cost contributions. They cannot in all seriousness, be contended to come anywhere close to being a species of maintenance, even if one were to

accept the correctness of the Davies judgement. In fact, some of his brothers in the same division have adopted a different approach. As I have already indicated, I align myself fully with his reasoning. I believe that brings about the equality of arms. Such an approach is also in line with the constitutional imperatives which have, at the heart, equality and the right to dignity. Most importantly in my view, such an approach is aimed at levelling in the playing fields to a significant extent and to ensure that an impecunious spouse (male-female) is empowered to adequately present its case before the courts, as opposed to being left at the mercy of the one with the wherewithal.

[18] Even if one were to be inclined to approach this matter benevolently in favour of the impecunious spouse, it would be far-fetched to include, within the ambit of rule 43, matters about which there are obvious dispute of facts, as well as those that fall for determination in other courts and/or tribunals. In this case, it is clear that some of the disputes are pending before the courts. It may well be that significant amount of monies have been expended or accounts have been accumulated in respect thereof, however, the fact that those disputes are between spouses and/or other juristic entities, does not necessarily bring them within the ambit of a specific purpose vehicle ("the rule 43 procedure"). If that were to be the case, the very noble objective of what was supposed to be a prompt, efficient and relatively uncomplicated process could be laden with never ending ancillary litigation. This is precisely why, in my view, orders flowing from rule 43 applications are not appealable. It does not take rocket science to appreciate why not. Similarly, if other unrelated disputes to what is contemplated in the wording of the rule, were to be accommodated, this would result in an

obvious absurdity, in that people would seek to achieve in the rule 43 proceedings, what strictly speaking, belongs to a trial court. This may also further disincentivize litigants in divorce proceedings to use their best endeavours to *finalise* the divorce, attain certainty and a clean break, so to speak. It could also encourage a situation where spouses are content with what ought to have been an interim and stopgap measure, and prolong what ought to have been a divorce, that *should* be finalised with the necessary promptness.

[19] Even if I am wrong in my view, the acceptance of the parties to refer significant portion of the relief sought to trial and abandoning some portions, seems to be an unambiguous acknowledgement that most of these issues do not belong to the rule 43 proceedings. The court should not hesitate to stay within the strict confines of what is contemplated in the rule, whose clarity and intentions are self-evident. Failure to do so, will open the floodgates of unnecessary detours of litigation and obviate taking matters to trial courts for *finality*.

[20] In this case, and in fairness to the respondent, one cannot, in good conscience describe him as a spouse who is unduly parsimonious or who seeks to avoid taking responsibility in respect of his spouse, flowing from the reciprocal duty of support which rests on both of them. He has and continues to take care of quite a significant portion of the applicant's expenses. It is unfortunate that they sought to conflate what is self-evidently, a very acrimonious past and to some extent the present, with what ought to have been a simple application for interim maintenance and assistance *pending* the finalisation of the divorce. The fact that they continue to litigate against each other, even on matters that they ought to

resolve amicably and reasonably between the two of them, cannot and should not find application in the rule 43 proceedings. In any event, even without their belated recognition of the error of their ways, I was *not* inclined to consider the ambit of the rule 43 expansively, as implored by the applicant. Similarly, where objectively, it is clear that the respondent has the *means and ability* to pay for the *reasonable expenses* of the applicant, as well as the *reasonable contribution towards* the applicant's costs related to the *pending* divorce action, I was not going to hesitate to make an order that seeks to attain fairness and justice.

[21] In the light of the foregoing, it remains my considered view and I accordingly find as such, that the expenses contained in the 2nd category *cannot be competently claimed in the rule 43 proceedings*. I have not been provided with, nor have I found any authority for that proposition.

[22] In the result the following order is made:

(a) The respondent is ordered to pay, *pendente lite*, an amount of R65,000.00 per month with effect from **28 May 2021**, and thereafter by no later than the last working day of each succeeding month, such payment to be made into the applicant's nominated banking account. This amount shall increase annually on the anniversary of this order and in accordance with the percentage increase in the headline inflation of the consumer price index, as published by statistics South Africa during the preceding year, the first such increase to be effected on 21 May 2022;

(b) The respondent will continue to retain the applicant on the Discovery Classic Plan ("the Plan"), as well as pay any necessary and reasonable excess, not covered by the plan, including the cost of hospitalisation, treatment and/or medical expenses and medication as a result of the applicant's prevailing health and related conditions;

(c) The respondent shall hand over to the applicant's attorneys the current licence disc in respect of the posh Panamera within 48 hours of this order.

(d) Over and above (c), the respondent shall continue to pay the monthly instalments, as well as the requisite insurance premium in respect of the Porsche Panamera.

(e) The respondent is ordered to pay an amount of R250,000 as part of the contribution towards the applicant's costs within 7 (seven) days of this order.

(f) The costs shall stand over for determination in the main divorce trial.



Z M P MAJAVU

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	20 May 2021
JUDGMENT DATE:	21 May 2021
FOR THE APPLICANT:	Adv CJC Nel
INSTRUCTED BY:	AF Coetzee Attorneys
FOR THE RESPONDENT :	Adv H J Basson
INSTRUCTED BY:	Van Andel- Brink Attorneys