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

CASE NO.: 2022/016326

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

In the matter between:

M, G M

Applicant

and

M, J M

Respondent

Neutral citation: ***M G M v M J M*** (Case No.016326/2022) [2023] ZAGPJHC 405 (02 May 2023)

JUDGMENT

MAZIBUKO AJ

Introduction

1. The applicant approached the court in terms of Rule 43, seeking monthly interim maintenance of R26 000, parental rights and responsibilities for a

minor child, and the R20 000 contribution towards her legal costs pending the finalisation of her action for divorce from the respondent.

2. The application was opposed. However, the parties agreed regarding issues of the minor child's primary residence, contact and school fees.
3. On 14 March 2023, the court granted an order in favour of the applicant where the respondent was to pay R18 000 towards maintenance. The applicant was awarded primary residence and contact to the respondent.
4. The respondent requested reasons for the order granted by the court. The court now proceeds to give reasons.
5. In September 2022, the Rule 43 application was served on the respondent together with the divorce summons. The respondent filed the notice of his intention to oppose the application and the notice of his intention to defend the divorce action.
6. Rule 43 of the Uniform Rules of Court provides:
“(1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following 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.”
7. It is self-evident from the provision itself what the purpose of a Rule 43 application is.
8. In *Taute v Taute* 1974(2) SA 676(E), the court held that *“The applicant is entitled to reasonable maintenance pendente lite dependent upon ... the*

applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements...."

9. Rule 43 applications ensure that no party is substantially prejudiced and lacks resources to maintain a reasonable standard of living enjoyed by the parties during the marriage and in pursuing their cases in the main divorce action. They relate to the applicant's reasonable needs and the respondent's ability to meet them.
10. They allow any of the spouses to approach the court to seek the care, residency and contact of the minor children born of their marriage pending the finalisation of the divorce proceedings.

Issue

11. The court is to determine the following;
 - 11.1. What expenses and amount must the respondent pay for the maintenance? and
 - 11.2. Whether the respondent will contribute to the applicant's legal costs.

Maintenance pendente lite

12. The applicant seeks an order directing the respondent to pay maintenance of R26 000 per month towards the mortgage bond, household expenses, and other aspects of the minor child's maintenance, including contribution to medical aid and medication not paid by the medical aid. It was submitted that the monthly household expenses are in the amount of R42 475.
13. The parties have been married in community of property since 20 September 2015. In 2016, one child was born of the marriage. It is common cause that the marriage relationship between the parties is acrimonious. There are allegations of abuse in different forms. The respondent had to move out of the matrimonial home in January 2022.
14. The applicant is employed and earns a monthly net salary of R34 458.96. She also has a gifting business, sometimes making a minimum of R500 monthly.

She is on medical aid together with their minor child. The contributions thereof are deducted from her gross salary.

15. The respondent is also employed, earning a net salary of R48 198.05 per month. He is on his own medical aid, deducted from his gross salary.
16. It is not in dispute that the respondent's contribution before he left the matrimonial home was R14 300 per month. He used to make monthly loan repayments of about R10 100. He stopped making loan repayments. His last monetary contribution towards the homestead was an amount of R7000 in 2022.
17. It was argued on behalf of the respondent that the R14 300 is no more possible as he now has to pay for his accommodation at R6 500 per month, groceries and other expenses. He pays an amount of R3000 towards the monthly maintenance of his other child. Further, the minor child's monthly expenses of R11 550 must be equally divided between the parties, and each contributes towards his costs. The respondent is willing to contribute R2 025 towards the home loan repayments.
18. He stated that the applicant has not made out a case for maintenance in the interim because both parents are responsible for maintaining the minor child. The applicant's estimated expenses are exorbitant and irrational. Both parties should pay their expenses as they incur them. It was argued on his behalf that the applicant must make the loan repayments towards the house as she resides in it whilst the respondent continues to pay for his rented accommodation.

Contribution to legal costs

19. Regarding the contribution towards legal costs, the applicant claimed R20 000 from the respondent and attached no pro forma invoice.
20. The respondent, through his counsel, raised a preliminary point regarding the application and the costs thereof. It was argued that the application was

brought to the high court to inflate legal costs as the applicant had an option of the Regional court. The contribution towards legal costs does not appear in the applicant's notice of motion though the applicant makes averments concerning it in her founding affidavit. No affidavit or document was attached confirming the legal fees incurred and those still outstanding.

21. It was submitted on behalf of the respondent that the applicant failed to comply with the provisions of Rule 41A.

Discussion

22. Regarding the interim maintenance. The parties have been married since 2015. They are both employed. It is not in dispute that the respondent would contribute about R14 300 per month before he left the matrimonial home. Initially, he made loan repayments before he stopped. He has his own expenses now, ranging from his monthly rental of R6 500 to fuel costs as he left the matrimonial home. It was argued on behalf of the respondent that the parties were living beyond their means and the court should instead ensure to protect the minor child's interest.
23. The reasonableness of the claim to maintenance *pendente lite* is determined by; the standard of living of the parties during the marriage, the ability and affordability of the respondent to pay, assessing his needs, and the responsibilities that he has carried, including the ones the other party is to assume or has assumed. Also, by considering the applicant's resourcefulness and the period of marriage.
24. In *Nilsson v Nilsson* 1984 (2) SA 294 (C) at 295F, it was stated: "*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.*"
25. Both were employed during the marriage and when the parties lived together. The family enjoyed an average standard of living. The court is mindful that the monthly bond repayments of about R10 100 need to be made consistently. Same is for the benefit of both parties, including the minor child. Though it

might seem like only the applicant benefits from the matrimonial house in the interim as she stays there with their son, the parties are married in community of property. They both need to contribute towards this joint marital asset, from which they stand to benefit at the finalisation of the divorce action. Even though he now has his monthly expenses as he is renting the accommodation. The respondent also has an ongoing duty of support towards his homestead.

26. In the context of their standard of living, apparent means, and current responsibilities, there are no grounds that these maintenance requirements are unreasonable and exorbitant. The applicant must also contribute from her income, which is her salary and the gifting business. In my view, the respondent's contribution of R18 000 is reasonable.
27. Regarding the contribution towards legal costs. In determining the contribution to legal costs, the court must have regard for the circumstances of the case, the financial position of the parties and the issues involved in the pending litigation.
28. The respondent raised preliminary points complaining about the applicant's election to bring the matter to the high court instead of the Regional court, where it would have been more reasonable in terms of the legal costs. As correctly conceded by the respondent, the applicant has a right to bring her matter to the high court for adjudication.
29. Regarding the applicant's noncompliance with Rule 41A. The applicant did not serve and file the Rule 41A notice.
30. Rule 41A provides:
"(2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation."

“(3) (a) Notwithstanding the provisions of subrule (2), the parties may, at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced, the parties shall obtain the leave of the court.”

31. It is not clear how the applicant's failure to serve the Rule 41A notice prevented the respondent from using Rule 41A(3)(a) to engage in mediation with the respondent. No fault could be found where the respondent also takes the initiative to resolve the issues at hand with the applicant. Besides, these are issues affecting them individually and as a family where not only their interest is important and stands to be affected, but also that of a minor child.
32. The contribution towards legal costs is not included in the notice of motion. On behalf of the applicant, it was stated that that was an omission by the drafters. The court was referred to paragraphs 46 to 47 of the applicant's founding affidavit, where averments were made relating to the contribution towards the legal costs and how the applicant borrowed money to commence the proceedings.
33. Until the day of the hearing and during the hearing, the applicant did not bring an application to amend her notice of motion. The court accepts that the drafters of her papers could have omitted to include same. However, when she became aware of the omission, she could have elected to amend same, but she did not. Consequently, her persistence with the claim of the contribution to the legal costs is unjustifiable. The respondent's point in limine regarding the non-inclusion of the contribution towards legal costs in the notice of motion is upheld.
34. As a result, the applicant's application partly succeeds. The following order is granted,
Order:
 1. The respondent will pay R18 000-00 per month,....., into the [.....], towards the mortgage bond, household expenses, and other aspects of the minor child's maintenance, including contribution to medical aid and medication not paid by the medical aid.

2. The respondent is to pay the minor child's school fees.
3. The applicant will have the primary residence of the minor child [T.K.M],

subject to the following rights of contact between the respondent and the minor child, considering and subject to the minor child's age, educational, religious, social, extramural, cultural, and sporting activities:

- 3.1. The respondent will collect the minor child after school every alternate weekend. The respondent will collect the minor child on Friday afternoon and bring him back to the applicant on Sunday afternoon.
 - 3.2. Reasonable telephonic contact with the minor child between 18:30 and 19:30.
4. Costs be costs in the divorce action.

N. MAZIBUKO
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

Counsel for the Applicant:
Attorney for the Applicant:

Ms Eichner-Visser
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Counsel for the Respondent:

Attorney for the Respondent:

Mr G. Nchaupa

GN Nchaupa Attorneys

Heard on:

14 March 2023

Judgment delivered on:

02 May 2023