

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH**

CASE NO: 790/2011

Date Heard: 24/04/12
Date Delivered: 26/04/12

In the matter between:

JOY PAPADOLAMBIS

Applicant

And

EMMANUEL STAVROS PAPADOLAMBIS

Respondent

JUDGMENT ON RULE 43 APPLICATION

DAMBUZA J:

[1] This is an opposed application for variation of an *interim* maintenance order. Two *interim* maintenance orders were previously granted in favour of the applicant. In terms of the last of those orders, which was granted on 23 August 2011, the respondent was ordered to pay *interim* maintenance of R10 000,00 to the applicant. In this application the applicant seeks an increase of R6 000,00 to her *interim* maintenance; she further seeks an order of contribution towards her legal cost. This is further to an order of contribution towards the applicant's costs in the amount of R15 000,00 having been made against the respondent in the order granted on 23 August 2011.

[2] The basis for this application is that the applicant has had to vacate the common home which has since been sold. She has secured a lease for residential premises in respect of which she has to pay rental of R7 150,00

per month. It is not in dispute that the applicant's circumstances have changed; the respondent only contends that he is not able to pay the increased maintenance. The respondent does take issue with the reasonableness of the contribution towards costs claimed by the applicant. He has also brought an application in terms of Rule 6(15) of the High Court Rules in terms of which he seeks to have certain portions of the applicant's affidavit struck out. At the hearing it was submitted on behalf of the respondent that in fact the application should be struck off the roll.

[3] It was submitted on behalf of the applicant that the portions of the founding papers which the respondents objects to are evidence necessary to adequately place before court all the factors relevant for proper determination of the application. I deem it appropriate to first consider the application to strike out.

[4] The application is brought in terms of Rule 43(6). This sub-rule provides for variation, on the same procedure as Rule 43(1), in the event of a material change in the circumstances of a party or child who is already subject to an order in terms of Rule 43(1). The procedure referred to is set out in Rule 43(2) and requires an applicant to "*deliver a sworn statement in the nature of a declaration setting out the relief claimed and grounds therefore.*" It is trite that Rule 43 of the High Court Rules is intended to provide a comparatively inexpensive and speedy remedy in matrimonial proceedings where orders of maintenance *pendente lite* and contribution towards costs are sought.

[5] In terms of Rule 43(2), the applicant is required to set out the facts on which she relies succinctly. Consequently lengthy affidavits may amount to an abuse of court process and may result in no order being made on the application, except in special circumstances.¹

[6] During the hearing I was referred to various decisions on this principle. In *Patmore v Patmore* 1997 (4) SA 785 WLD the applicant's affidavit ran to 47 pages; in *Visser v Visser* 1992 (4) SA 530 E referred to *Nienaber v Nienaber* 1980 (2) 803 (O) wherein the applicant's affidavit was 23 pages long. The applicant's affidavit in *Visser* was longer than *Nienaber*. In *Du Preez v Du Preez* 2009 (6) T the application consisted of 139 pages.

[7] In the three decisions referred to above, the court cited with approval the interpretation in *Zoutendijk v Zoutendijk* 1975(3) SA 490 T of the word "*declaration*" in Rule 43. The court in *Zoutendijk* held that:

*"When Rule 43(2) refers to a sworn statement in the nature of a declaration, the rule-maker presumably had in contemplation the requirements of a declaration as set out in Rule 20(2); and when Rule 43(3) refers to a sworn reply in the nature of a plea, the rule-maker presumably had in contemplation the requirements of a plea as set out in Rule 22(2). In both cases the rule-maker also presumably had in contemplation the general rule applicable to pleading..."*²

¹ Erasmus; Superior Court Practice; at B1-316A.

² See, for example *Patmore*, at 787C

[8] The applications in all three matters were struck off the roll. The court further ordered that the parties would not be charged any fees by their attorneys in respect of the application. In *Patmore (supra)* Epstein AJ referred, with approval, to *Colman v Colman* 1967(1) SA 291 (C) AT 292A wherein the court held that that:

“ The whole spirit of Rule 43 seems to me to demand that there should only be a brief statement by the applicant of the reasons why he or she is asking for the relief claimed and an equally succinct reply by the respondent and that the court is then to do its best to arrive expeditiously at a decision as to what the order should be pendente lite”.

[9] In this application the applicant's affidavit alone is 29 pages long. Additional to that is 34 pages of annexures. This excludes the two page Notice in terms of Rule 43(6) prefixed to the affidavit. The facts which constitute the basis of this application were common cause prior to the launching of this application. In particular, it was not in dispute that the applicant had agreed to vacate the common home which had been sold and that she had to procure alternative accommodation. There could not have been a *bona fide* dispute on whether there has been a material change in the applicant's circumstances since the last order was granted. The only issues that would be in dispute would be the respondent's to pay for the additional

expenses. The issue in this application is narrower than in the Rule 43(1) proceedings that were under consideration in the cases referred to above. Ordinarily that much should be reflected in the contents of the sworn statement.

[10] It was not necessary, in my view, for the applicant to attach the seven page lease agreement in respect of the new premises. It was equally unnecessary for her to attach Rule 35 notices that had been served on the respondent. She could have referred to correspondence that preceded this application without attaching the correspondence itself all that the correspondence is a disputed allegation that the respondent had agreed to pay additional maintenance of R6000. The ten page reply by the applicant, in this application, to the respondent's answering affidavits in the two previous Rule 43 applications is in total conflict with the letter and spirit of Rule 43. In essence this means that I have to consider the papers filed in the previous applications as well.

[12] Regarding costs, I am of the view that although my finding regarding prolixity only relates to the applicant's papers, it would be unjust to order the applicant to pay the respondent's costs for the application.

The order I issue therefore is that:

- 1 The application is struck off the roll.
- 2 There is no order as to costs and it is ordered further that the applicant will not be charged any fees by her attorneys in respect of the application.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv. S Potgieter Instructed by Anthony INC. Central, Port Elizabeth.

For the Respondent: Adv. Ronaasen Instructed by Roelofse Meyer INC. Central Port Elizabeth.