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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 55124/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

28 February 2023

In the matter between:

J [....] A [....] H [....]

APPLICANT

And

P [....] J [....] 1 H [....]

RESPONDENT

JUDGMENT

Coram NOKO AJ

Introduction

[1] The applicant brought an application in terms of Rule 43(6) of the Uniform Rules of Court for an order in terms of which the previous order granted on 30 June 2020 by Fabricius J be varied. Fabricius J varied the previous order granted in 2019 by Swanepoel J and discharged the respondent from paying interim maintenance. Fabricius J granted a counter-application brought by the respondent in terms of which the parties were to share R2 million paid in respect of the sale of their

business. The parties were also ordered to share their livestock which would be valued and if possible, the respondent would buy the applicant's share of the livestock.

[2] The applicant now seeks that the said order be varied and the respondent be ordered to pay maintenance in the sum of R35 484.00 and further that he contributes the amount of R50 000.00 towards legal costs.

Background

[3] The parties are married to each other out of community of property subject to the accrual system. The applicant commenced divorce proceedings and pleadings were closed in 2017. The parties are shareholders into two companies, *to wit*, Silver Lakes trading 87 (Pty) Ltd and Flora Spark Tuindienste cc. The respondent is the only director in both companies. The applicant has launched proceedings in the Middleburg High Court for the removal of the respondent as a director and the appointment of an independent director to take over the operation of the company and further investigate possible theft of money by the respondent. The proceedings are pending and parties would be exchanging the heads of arguments in due course.

Arguments before this court

[4] The applicant's counsel contended that the applicant's circumstances have changed which warrant the variation of the order issued previously by Fabricius J. The applicant, who now resides with her sister in KwaZulu Natal, wishes to relocate back to Pretoria so that she could stay closer to her children. Her ill-health has deteriorated and therefore also need financial assistance with medical expenses. She is 71 years old and therefore unemployable. The applicant has attached a list reflecting her monthly expenses she paid before she relocated to the KZN. She submits that the list provides a cue from which the amount now being claimed is based. The respondent has a legal duty to assist with the maintenance and contribution for her legal costs and as is set out below he can afford to assist the applicant. She has already paid amount of R121 630.64 in respect of the legal fees and is currently indebted to her attorneys in the amount of R300 973.10.

[5] The applicant further asserted that the respondent's expenses are as contained in annexure FA 50 which expenses were stated in the previous Rule 43 application. He has prepared his financial statement which is attached to his papers. The said statement present perilous financial status and the supporting documents attached thereto are replete with inconsistencies and were made with the absolute intention to lure the court to believe that the respondent would not afford to contribute the requested amounts. By way of example, the respondent claims that he has a short fall on his monthly expenses such that he was obliged to request a loan from his son in an amount of R100 000.00 and R150 000.00 respectively. Strangely there are transfers of funds from the business account into his personal account. He has in fact transferred an amount of R350 000.00 just a day after the alleged R150 000.00 deposited by his son which he explained was his share of the proceeds as was directed by Fabricius J. To this end, the contention that he did not have funds is unsustainable and is intended to mislead the court. In addition, the affidavit of the respondent states that the monthly expenses amount to R51 000.00 whereas on the Financial Disclosure Form the amount indicated is R43 000.00. This appears to be a display of common occurrence where the parties consciously make efforts not be truthful to the courts.

[6] The respondent's counsel on the other hand contended that the application by the applicant is frivolous and should be dismissed. The basis for this argument is that the applicant has resources at her disposal to cater for her own maintenance needs and besides that the respondent has no financial means to make the contribution to her requested funds. In addition, the divorce proceeding has been stagnant since 2017 and as such if there has not been any activity there cannot be any legal fees due and payable. In any event the court has no jurisdiction to entertain arguments on legal costs which are not relevant to the divorce proceeding.

[7] The parties are shareholders in a company and there are funds to the tune of R880 000.00 which can be available to be used by the applicant for her owns needs. The respondent is the only director and a resolution was forwarded to the applicant to authorise payment in her favour and she has not signed same. This offer still stands. The counsel for the applicant submitted that she is not involved in the

litigation matter in Middleburg, but the applicant was advised by the legal representative in that matter that it is not advisable for her to agree to receive the said amount of money.

[8] In addition, so went counsel for the respondent, the applicant has a livestock under his care worth R312 000.00 and the respondent has made an offer to pay for the said livestock and the applicant has also turned down the offer which still stands. The applicant has stated that she has requested valuation thereof and same is not forthcoming. In retort the respondent averred that there has never been such a request to conduct valuation and, in any event, nothing stops the applicant from commissioning the valuation of the livestock and then same may be sold to the respondent or any other interested party.

[9] The respondent further contended that the applicant's daughter is indebted to the applicant in the amount to the tune of R84 000.00 and she must call up for the payment to sustain herself and in retort the applicant stated that the daughter is making periodical payments to settle the said loan.

[10] A further offer was made for the applicant to occupy the respondent's 8-room house ("*property*") in Secunda and the applicant has also outrightly rejected the said offer as it is big and further too far from her children. There were attempts to sell the said property and reasonable offer has not come forth as yet. The respondent ordinarily resides on the farm situated elsewhere but is currently temporarily residing in the said property as it is closer to where he is receiving medical attention.

[11] The respondent further contends that the applicant has failed to detail her current expenses and this would have assisted the court in making an assessment whether the applicant's position has changed such that a contribution for maintenance would be warranted.

Legal analysis

[12] The order which may be granted in terms of Rule 43 applications is predicated on the determination whether there is a need for payment of maintenance¹ and further whether the respondent can afford.

[13] Where a party approaches court in terms rule 43(6) such a party is enjoined to demonstrate material change in her circumstances warranting variation from the order made previously. It is axiomatic from the papers that the applicant is currently not liable for the expenses listed in her papers and would incur such expenses once she relocates to Pretoria. In this regard the order, if made in her favour, would have to take this aspect into account.

[14] In general, having regard to, *inter alia*, the time restrictions to compile comprehensive financial statuses in Rule 43 applications instead of being honest to the court parties fails to paint a correct picture to the court. Spilg J observed in this regard in *Sc, R v Sc, L*, (20976/2017) [2018] ZAGPJHC (28 February 2018) 30 that “[T]he mere fact that a party claims to earn a salary and produces a payslip or even IRP5 form tells a court very little unless it is self-evident that he or she is strictly a wage earner with no personal connection to the employer”. It was further stated in *Du Preez v Du Preez* 2009 (6) SA 28 (T) at para [15] that in Rule 43 applications “... there is a tendency for parties ... acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later ... seek to correct the relevant information”. This then call for a cautious approach by the court to filter the information being presented on the papers before the court, noting that “Maintenance pendente lite is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced”.²

[15] The applicant’s list of expenses includes the amounts which appears to be reasonable more so that those were old figures and due to fluctuating economic circumstances the amounts may have increased and or possibly remained the same.

¹ The court in *Taute v Taute* 1974 (2) SA 675 (E) at 676, has restated that “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”.

² See *Erasmus Superior Court Practice* 2nd edition, Volume 2, Juta and Co, at D1-580

That notwithstanding the amounts identified in the list and payable for the life cover policy and the church's tithe appear to be excessive. The respondent has failed to react properly to the listed expenses as he contended that expenses thereon do not appear in the applicant's bank statement and more particularly that she listed rental expense at the same time having stated that she has terminated lease agreement. The list is said to be a list compiled before relocating to KZN and should not be criticised on the basis that it does not tally with current expenses which must be located in her bank statements. It is noted that there is merit in the respondent's contention that the applicant should prove the need for maintenance by putting forward her financial position and not the future need. There is however no doubt that in addition to her health status she needs to have her own place and also be closer to the children who may assist her. As set out above the expenses appears not to be unreasonable and applicant should then be maintained provided that she factually relocates to Pretoria.

[16] Contrary to what the applicant has stated that there are assets which the applicant may dispose of to cater for the maintenance there is a plethora of authorities where it was held that a party need not liquidate his or her assets and apply same to her maintenance needs. This would include the capital payment the applicant received. The applicant has failed to provide a clear account of what the amount of R1 million she received as per Fabricius J's order was expended on though if her monthly expenses were around R35 000.00 as claimed it follows that the amount of R1 million would have covered the legal expenses paid and her normal monthly expenses between July 2020 and April 2022 when she relocated to KZN. Bearing in mind that the amounts sought will be awarded where it is clear that the other party is able to afford it.

[17] *In casu* the respondent has not given a comprehensive presentation regarding his income and also the performance of the company to which the applicant has no assets. His truncated disclosure of his financial profile leaves the court with an oblique view to determine the extent to which he allegedly finds himself constrained to assist the applicant. He is however able and prepared to purchase the applicant's livestock. He failed to disclose where such funding will be obtained from. It creates an impression that the respondent wishes not to just contribute towards his wife's

woes for maintenance but he is ready, willing and able at least to acquire her assets. This stance is certainly disquieting and appears to be stratagem for the respondent to reap the applicant of her assets and disavowing his obligations to maintain his wife. The reasonable inference is that the respondent has resources and financial means to contribute for the applicant's maintenance and the order as set out below is made.

[18] The respondent's contention that the applicant received R20 000.00 in 2019 as contribution for legal costs fails to address the fact that the applicant has stated that she is unable to prosecute the matter to finality due to paucity of funds. There is also no reason advanced at the instance of the respondent why he is unable to bring the divorce process to finality even though in his capacity as a defendant. The status of the divorce proceeding is not set out in detail and the requested contribution for legal costs in the amount of R50 000.00 may without such information be warranted, this is aggravated by the fact that the applicant cannot provide details of the attorneys' statement as it contains confidential information. The applicant has decided not to exploit available avenues to make the information available to the court confidentially. In the premises no award will be made for legal costs.

Conclusion

In consequence, I make the following order:

1. Pending the determination of the divorce action between the partes, the respondent shall maintain the applicant and the children as follows:
 - 1.1. by payment to the Applicant for herself an amount of R25 000.00 (twenty five thousand rand) per month with effect from the last day of the month during which the applicant would have provided proof of relocation to an accommodation to Pretoria. The payment shall be without deduction or set off on the first day of every month, by way of electronic funds transfer or debit order, into an account as the applicant may nominate from time to time.
 - 1.2. Costs shall be costs in the cause.

Noko AJ,
GAUTENG DIVISION, PRETORIA

APPEARANCES

Applicant's counsel : Adv G Swart, Johannesburg
Applicant's attorney : Vos, Viljoen and Becker Inc.

Respondent's Counsel : Adv A.M. van Niekerk, Pretoria.
Attorneys for the Respondent : EY Stuart Inc.

Date of hearing : 18 January 2023

Date of judgment : 28 February 2023