

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

Case No: 62908/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

SIGNATURE:

DATE: 10/5/2023

In the matter between:

C[...] **C[...]** **R[...]**

Applicant

and

A[...] **R[...]**

First Respondent

THE SHERIFF, CENTURION EAST

Second Respondent

JUDGMENT

- [1] The Applicant (husband) and the First Respondent (wife) are married in community of property. There is a pending divorce action that commenced in 2020. The First Respondent brought a Rule 43 application and on 13 October 2021 an order was made by Justice Manyathi AJ, directing the Applicant to pay maintenance to his wife in the amount of R9 500.00 per month as spousal maintenance.

- [2] The bondholder of the property where they lived threatened to foreclose and the applicant negotiated and settled with the bank in 2022. In terms of the settlement he has to repay the bank an agreed amount monthly. This payment has placed financial strain on the applicant in keeping up with his maintenance payments to his wife.
- [3] It bears noting that, in paying back the bank, the applicant is paying an amount half of which is the liability of the first respondent. The first respondent has not made a contribution in this regard.
- [4] In an attempt to vary the amount of maintenance, the applicant launched Rule 43(6) proceedings on 23 November 2022. The First Respondent has not yet filed her answering affidavit in that application, which has now been set down for hearing on 19 June 2023.
- [5] In the meantime, the Applicant went into arrears in respect of his maintenance payments and the First Respondent proceeded to issue a writ for arrears on 11 April 2023. The arrears are in the region of R25 500.00. She refused a request to hold over the writ until after the rule 43(6) application and the sheriff holds instructions to execute the writ.
- [6] The Applicant launched an urgent application to suspend the writ, pending finalisation of the Rule 43(6) application. It is this application that I need to decide.
- [7] The Applicant contends that the First Respondent is gainfully employed as a professional assistant while he is a pensioner, who is also caring for their daughter. The daughter is no longer a minor but is still dependent. The applicant is carrying this burden alone. The First Respondent is not contributing to their daughter's maintenance.
- [8] This application was brought in order to grant the Applicant breathing space until the Rule 43(6) application is heard. In that application he seeks a discharge of the maintenance order.

[9] The First Respondent failed to file an answering affidavit in this urgent application, as she has in the Rule 43(6) application. She filed a notice in terms of Rule 6(5)(d)(iii) in order to raise a question of law. The question of law is formulated as follows:

1. *“In its (sic) urgent application the applicant is seeking that the warrant of execution be stayed pending the outcome of the instituted Rule 43(6) application.*
2. *However, and in the Rule 43(6) application, the applicant is not seeking that the warrant of execution be set aside but is merely seeking an order discharging his maintenance obligations. Thus, and even if the interim relief is granted, the warrant of execution will become enforceable, after the hearing of the Rule 43(6) application, irrespective of the outcome thereof.*
3. *There is accordingly no factual or legal basis to grant the interim relief, as sought in the urgent application.*
4. *The first respondent therefore requests that the urgent application be dismissed with costs.”*

[10] The First Respondent has chosen not to place evidence before the Court of hardship, due to non-payment of the maintenance. While the amount is due in terms of a Court Order, and will remain due regardless of the outcome of the Rule 43(6) application (unless the writ is set aside in separate proceedings), I am mindful of the First Respondent’s delay in finalising the Rule 43(6) proceedings. Her failure to file answering papers timeously, has delayed the finalisation of those proceedings. The delay has no doubt played a role in establishing the amount outstanding by April 2023. By then, the Rule 43(6) application had been pending more than four months. In those four months the maintenance payable by the Applicant would amount to R38 000.00. Had the First Respondent acted with more promptness in

complying with the Rules of Court in filing her answering affidavit, the rule 43(6) proceedings may have been finalised by now.

[11] The suspension of a writ is governed by Rule 45A. This rule empowers the Court, on application, to suspend the operation and execution of any order for such period as it may deem fit.

[12] The Court's inherent discretion to suspend the execution of an order must be exercised judiciously (see **Whitfield v Van Aarde** 1993(1) SA 332 E at 337 F). The suspension of a writ of execution is decided on the principles governing an interim interdict for suspension of a Court Order. These requirements are trite. The Applicant must show:

- (a) That he has a *prima facie* right, though open to some doubt;
- (b) That there is well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he/she ultimately succeeds in establishing his right;
- (c) That the balance of convenience favours the granting of interim relief; and
- (d) That the Applicant has no other satisfactory remedy.

[13] The First Respondent has been aware since November 2022 that the Applicant is approaching the Court for a variation of the maintenance order in terms of Rule 43(6). Since the Applicant has no right of appeal in respect of a Rule 43 Court Order, the only remedy that he has to ameliorate the effects of a Rule 43 order, due to changed circumstances, is to approach the Court in terms of rule 43(6)-(see **S v S** 2019(6) SA 1 (CC) at para [49]).

[14] The Applicant advises that he is unable to afford the maintenance of R9 500.00 due to the First Respondent in terms of the Rule 43 order. He is able to pay R1 000.00. This is an issue for the Rule 43(6) Court to decide.

However, if the writ were not suspended, the Applicant would face an increasing amount of arrears with the risk of the current writ being enforced, together with future writs.

[15] As the writ will first be executed against movables, such movables will be those in the home of the parties, where the Applicant cares for their daughter.

[16] These movables are assets in the joint estate. The first respondent already owns half those assets by virtue of the marital regime. This means that attaching and selling sufficient assets that render proceeds of R25500, will extinguish only half the amount due in terms of the writ. The amount will only be extinguished if a further R25500 is realised from a sale in execution.

[17] If the movables are insufficient to satisfy the writ, the jointly owned property will be attached. Even then, half the proceeds would belong to the first respondent by virtue of the marriage in community of property.

[18] If the First Respondent's failure to file answering affidavits in the Rule 43(6) application, and in this application, is taken as a guide, there is a risk of further delays in the Rule 46(9) proceedings. If the First Respondent were to belatedly file her answering affidavit in those proceedings, which have been enrolled on an unopposed basis, that would result in a further postponement of those proceedings with an ever-increasing indebtedness for arrears which the Applicant contends that he cannot pay. There is therefore a risk of irreparable harm if the Rule 43 Court Order were not suspended until after finalisation of the Rule 43(6) application.

[19] In assessing the balance of convenience, I am at a disadvantage in that the First Respondent has not placed facts before the Court that could demonstrate hardship on her part, or reasons why the balance of convenience would favour the First Respondent. I take into account under this rubric that the period of suspension, assuming the hearing proceeds on 19 June 2023, is a mere six weeks.

- [20] I take into account that the hardship flowing from execution of the writ would not only strike the Applicant, but the daughter of the First Respondent as well. If the movables in the Applicant's home were to be attached for the debt, the execution would adversely affect their dependent daughter. The fact that she is a major does not remove her need for maintenance from her parents, if she is dependent.
- [21] The point that the First Respondent raises, i.e. that the accrued liability of the Applicant will remain, regardless of the outcome of the Rule 43(6) proceedings, is correct. It is not in my view a point of law, as contended, but a factual issue that needs to be taken into account.
- [22] The liability for arrear maintenance has been due to the Applicant shouldering the burden of saving their communal immovable property and maintaining their daughter alone.
- [23] The applicant may decide to set aside the writ. If not, the fact that his liability to satisfy the writ will remain, is not a bar to granting the First Applicant a breather for a short period. This is particularly so where he contends that he is unable to pay the monthly maintenance, and that this has been the position for many months. I have further taken into account that the amount of arrear maintenance is the equivalent of approximately 2½ months maintenance. This indicates that the First Applicant had not merely stopped paying maintenance since he launched the Rule 43(6) application, but has continued paying maintenance for at least two months thereafter. Part of the reasons why he fell into arrears was that he was paying the first respondent's share of two communal debts, namely repaying the bank and maintaining their daughter.
- [24] In the premises, I find that the applicant has established a prima facie case for the suspension of the writ. If it were to be executed before 19 June 2023, it would cause irreparable harm to an innocent third party. The balance of convenience favours the granting of the suspension. It is for a relatively short

period. Even if the full amount remains payable, the need for an accounting and reassessment of the maintenance liability is apparent.

[25] Taking all the above considerations into account, find that the First Respondent has established a basis for the suspension of the writ in terms of Rule 45A.

[26] In the premises the following order is made:

1. The writ of execution for arrear maintenance in the amount of R25 500.00 dated 11 April 2023 is suspended pending finalisation of the Rule 43(6) proceedings;
2. The costs of this application will be costs in the divorce action.

EC LABUSCHAGNE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for handing down is deemed to be 10 May 2023.

APPEARANCES

FOR THE APPLICANT: ADV. S BARREIRO

FOR THE RESPONDENTS: ADV. DU TOIT

HEARD ON: **10 MAY 2023**

DATE OF JUDGMENT: 10 MAY 2023