

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

CASE NO:48742/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 27 November 2023

E van der Schyff

In the matter between:

K[...] E[...]

APPLICANT

and

K[...] H[...] J[...]

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant instituted a Rule 43(6) application based on extreme urgency in the Family court. The Notice of Motion is dated 14 November 2023. The application was served on the respondent by email at 18h42 on 14 November 2023. The respondent was instructed to file a notice of intention to oppose 'on or before 15 November 2023' and an opposing affidavit by 16 November 2023.

Background

- [2] The parties to this application are married in community of property. Divorce proceedings commenced in September 2021. The divorce action is enrolled for trial on 29 January 2024. No minor children are involved, and spousal maintenance is the only contentious issue preventing the divorce from being settled. A Rule 43 order was granted, ostensibly by agreement, in June 2022. The applicant was represented at the time.
- [3] It is common cause that the applicant was medically boarded due to psychological challenges. This fact was stated in the papers filed in the original rule 43 application and frequently reiterated by the applicant's counsel during argument. She currently receives a disability payment of R20200.00 per month.
- [4] The applicant now approaches the court, two months before the divorce action is set down to proceed on trial, for a variation of the rule 43 order. She avers that a material change in circumstances necessitates the relief sought. This material change of circumstances relates to the fact that the parties' common home, in which the applicant resided, has been sold in terms of an agreed *actio communi dividundo* order. The applicant is to vacate the common home by the end of November 2023. The parties agreed that she would reside in the common home until it was sold. The respondent is responsible for paying the utility bills, household insurance, homeowner's insurance, gardener, and the costs of security of the matrimonial home directly to the service providers until the common home is sold.
- [5] An offer to purchase was signed on 15 September 2023. Transfer documents were signed on 26 and 27 October 2023. The applicant avers that she was caught off guard by the speed with which the registration of the transfer of the property proceeded. While she expected the process to take at least three months from the date the transfer documents were signed, she was informed on 6 November 2023 that the transfer would take place by the end of November 2023. The applicant states that she now requires a further contribution to enable her to move to,

resettle, and establish a new home. The unforeseen need to vacate the home by the end of November 2023 requires the applicant to obtain rental accommodation.

[6] In this application, the applicant also seeks, amongst others, maintenance *pendente lite* in the amount of R25 000 per month and a further contribution towards costs. She avers that the respondent is able to litigate on a significantly greater scale than she is and is currently solely in control of the joint estate. She has to borrow money from her brother to pay her legal costs.

[7] It is common cause that the applicant stands to receive an amount of about R1 000 000.00 before the end of December 2023, a fact brought to the court's attention in the answering affidavit. This is her half share of the sale of the parties' two immovable properties.

Discussion

[8] It is trite that before a court pronounces on the merits of an application brought in the urgent court, it first needs to consider whether the application is indeed so urgent that it must be dealt with on the urgent court roll. Where the facts indicate that the urgency is self-created, a court will be slow to entertain the matter. Where the interest of justice requires a matter to be dealt with speedily despite self-created urgency, the court will not hesitate to deal with a matter. The facts of each specific matter always dictate the court's approach. The establishment of a dedicated Family Court in this Division did not change this position.

[9] In considering whether the applicant was justified in approaching the court based on extreme urgency due to her changed circumstances, I had regard to the terms of the order granted by Thlapi J in October 2022 in the proceedings relating to the *actio communi dividundo*. The order provides for the appointment of estate agents within two weeks after the granting of the order and the subsequent marketing of the property for six months from the date of their appointment. If the property was not sold within the six-month period, the property had to be sold at a public auction. By October 2022, when the order was granted, the applicant should have

reasonably foreseen the need to vacate the common home during 2023. However, the property was renovated and only listed on 1 August 2023.

- [10] At first glance, it is difficult to understand why the applicant plunged into an urgent court application before taking the issue of, particularly, alternative accommodation up with the respondent and then approached the court on less truncated timelines if she did not receive a satisfactory reaction. More clarity is gained when the annexures to the answering affidavit are read together with the answering affidavit. Based on the respondent's calculation, the applicant's monthly income is insufficient to cover the immediate costs needed to rent a home. This, assumedly, is the basis on which the respondent proposes to loan the applicant the amount of R15 000.00 towards the deposit required on her rental as well as one month's rental in the amount of R7 500.00, provided that she agrees in writing that the amount of R22 500.00 will be deducted from her share of the proceeds from the sale of one of the properties.
- [11] If one considers that the parties are still married in community of property and that the applicant was staying in the communal home without having to contribute to any accommodation-related expenses, the sale of the communal home does bring about a material change in her circumstances. She needs to vacate the home when the property is transferred into the name of the purchaser. She could arguably have instituted this application at an earlier stage and provided the respondent with more time to oppose the application, but the reality is that the end of November is imminent, and she needs a place to stay. The respondent's answer is clear, 'I will assist but only with a loan.'
- [12] Parties embroiled in divorce proceedings often tend to forget the reality of a marriage in community of property. The fact that parties are separated does not nullify the consequences of a marriage in community of property. The notion of one party borrowing money from the other before the joint estate is divided is untenable. To date, the applicant has benefitted from residing in the matrimonial home, and until the marriage is dissolved, she is entitled to be housed at the expense of the joint estate, provided that the expenses incurred are reasonable.

The joint estate is to pay for the monthly rental until the marriage is dissolved. The respondent is, however, to be reimbursed for half of the rental deposit when the applicant receives the proceeds of any of the sales of the immovable property. The applicant will be responsible for costs associated with living in the rental property.

[13] It is the need for accommodation before the divorce is finalised that renders it just to deal with this application, although it was instituted on the basis of extreme urgency. It would be illogical to deal with the relief sought piecemeal in these circumstances. After considering the papers and the financial disclosure of both parties, no case is made out for the remainder of the relief sought. It is for the trial court to decide whether spousal maintenance is to be paid in light of, amongst other things, the applicant's current monthly income coming to an end in the near future. The evidence before this court is that the applicant will receive a substantial amount of money in the near future. She will have sufficient funds for legal costs, and the trial court will pronounce on the issue of the costs of the divorce action.

[14] This leaves the issue of the costs of this application. The parties are married in community of property, and any costs will effectively be paid from the joint estate. As a result, a costs order will not serve the purpose that a costs order generally serves and is appropriate for the costs to be costs in the divorce action.

ORDER

In the result, the following order is granted:

- 1. The application is dealt with as an urgent application, and condonation is granted for non-compliance with the time periods prescribed in the uniform rules of court;**
- 2. The order granted on 14 June 2022 by Du Plessis AJ is varied by incorporating the following to the existing order:**

2.1. In the event that the applicant is obliged to vacate the communal home before the parties' marriage is dissolved, the respondent is to pay an amount of R15 000 or the required rental deposit, whichever is the lesser

amount, and the monthly rental or an amount of R7 500.00 per month, whichever is the lesser amount, either to the applicant or the lessor of the property;

2.2. When the applicant receives any proceeds of the sale of the immovable property, she is to pay an amount equal to 50% of the rental deposit paid by the respondent to the respondent;

3. Costs are costs in the divorce action.

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. C. I. D. Bennett
Instructed by:	Stegmanns Incorporated
For the respondent:	Adv. M. Feinstein
Instructed by:	Di Sienna Attorneys
Date of the hearing:	21 November 2023
Date of judgment:	27 November 2023