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

CASE NO: 2020/31273

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

31/10/2022

In the matter between:

S [...], W [...], J [...], E [...]

Applicant

And

S [...], A [...], L [...]

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Rule 43 application – application and counter-application in terms of Rule 43(6) for a variation of order – material change of circumstances as result of changes in the residence of child and employment of parent

Order

[1] In this matter I make the following order:

1. *The following paragraph is substituted for paragraph 3 of the Rule 43 Order between the parties under case number 2020/31273 dated 15 December 2020:*

(3)

The applicant is ordered to make payment of a sum of R29 000.00 (twenty-nine thousand rand) per month in respect of maintenance for the respondent and the minor child pendente lite, as from 1 December 2022, and to continue making payment of R35 000 (thirty-five thousand rand) per month as per the existing order in respect of payments due before 1 December 2022;

2. *The order as amended on 25 July 2022 is varied by the addition of the following paragraph after paragraph 2.3.2:*

(2.4)

The costs of the parenting co-ordinator appointed in terms of paragraph 2.3 of the order as amended on 25 July 2022 shall be shared between the parties on the basis that the applicant will pay 75% of the costs and the Respondent will pay 25% of the costs;

(2.5)

The parenting co-ordinator shall monitor the impact of any material change of circumstances that may affect the minor child (including the respondent vacating the home of her parents) and provide recommendations pertaining thereto;

3. *Paragraphs 4, 5, and 6 of the order granted on 15 December 2020 are not affected by this order;*

4. *The respondent is ordered to pay the costs reserved when the matter was set down for argument on the opposed roll on 25 July 2022;*

5. *Save as aforesaid each party shall pay his or her own costs.*

[2] The reasons for the order follow below.

Introduction

[3] This is an application and counter-application in terms of Rule 43(6) of the Uniform Rules.

[4] Rule 43 governs relief *pendente lite* in matrimonial matters and an order obtained in terms of the Rule is not subject to appeal. When a material change occurs in circumstances any party may approach the court for a variation of an order in terms of Rule 43(6). The court may, “*on the same procedure,¹ vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.*” Rule 43(6) is strictly interpreted.²

[5] While concise affidavits are foreseen and prolixity should be avoided in Rule 43 applications,³ there is no prescribed length: Relevance remains the criterion.⁴

[6] The Court does not have a discretion to permit departure from the strict provisions of Rule 43(2) and (3) unless it decided to call for further evidence in terms of Rule 43(5).⁵

¹ In other words, the procedure in Rule 43(2) and (3).

² *Jeanes v Jeanes* 1977 (2) SA 703 (W) 706F; *Grauman v Grauman* 1984 (3) SA 477 (W) 480C; *Micklem v Micklem* 1988 (3) SA 259 (C) 262E–G; *Maas v Maas* 1993 (3) SA 885 (O) 888C; *Greenspan v Greenspan* 2001 (4) SA 330 (C) 335E–F.

³ *Maree v Maree* 1972 (1) SA 261 (O) 263H; *Zoudendijk v Zoudendijk* 1975 (3) SA 490 (T) 492C; *Visser v Visser* 1992 (4) SA 530 (SE) 531D; *Du Preez v Du Preez* 2009 (6) SA 28 (T) 33B; *T S v T S* 2018 (3) SA 572 (GJ) 585A.

⁴ *E v E* 2019 (5) SA 566 (GJ) paras 33, 43, 48, and 52. The filing of financial disclosure forms should shorten the proceedings. See paras 63 to 64.

⁵ *E v E* paras 24 and 58 to 59.

The Rule 43 order of 2020

[7] The parties were married out of community of property and subject to the accrual system in 2012, and a boy was born of the marriage in 2017. Divorce proceedings were instituted by the applicant in 2020.

[8] On 15 December 2020 Mdalana-Majisela J granted an order in terms of which, inter alia-

8.1 The parties were ordered to co-operate with Dr R Duchen so as to allow Dr Duchen to report on the best interests of the minor child born of the marriage;

8.2 Primary care of the child shall be with the respondent, subject to access by the applicant;

8.3 The applicant shall maintain the respondent and the child on a medical scheme;

8.4 The applicant shall also pay amounts due to various services providers and others in respect of the respondent's motor vehicle and cellular phone expenses as well as for the minor child's education;

8.5 The applicant shall pay maintenance for the respondent and the minor child in the amount of R35 000 per month.

[9] The respondent's claims for a contribution to costs, a once-off payment of R44 000 for accommodation, and R22 000 per month for accommodation were dismissed.

[10] Dr Duchen reported in September 2021. She made various recommendations including a shared residence arrangement. The respondent took issue with certain of the recommendations and indicated that she would appoint her own expert. She appointed Dr Strous who is referred to below.

This application

[11] In April 2022 the applicant brought this Rule 43(6) application seeking the substitution of paragraphs 2 and 3 of the existing Rule 43 order. The applicant sought an order for shared residence and a reduction in monthly maintenance from R35 000 to R20 000 on two basis, namely the shared residence that would mean that the child would spend less time with the respondent, and his new employment circumstances in terms of which his gross salary had been reduced by 30%. He added that a property rented out by him had been vacated and new tenants had not been signed up yet.

[12] He therefore sought an order for shared residence reflecting the expert's report, and a reduction of maintenance for the respondent and the child.

[13] The respondent filed an answering affidavit and counter-application in May 2022. She stated that the report by Dr Strous, the expert appointed by her, would only be available in June 2022, that she wishes the existing order regarding access to the child to remain substantially unchanged, and that did not find shared residence proposals of Dr Duchon to be acceptable. She sought an order postponing the application *sine die* to await the report by Dr Strous, alternatively an order that the application be dismissed, alternatively an order confirming primary residence with her, and other relief relating to the child.

[14] The applicant filed an answering affidavit to the counter-application also in May 2022. Both parties filed financial disclosure forms. The matter was on the court roll in June but was removed, and re-enrolled for 25 July 2022.

[15] On 20 July 2022 the respondent filed a supplementary answering and supplementary founding affidavit in the counter-application. The respondent sought to introduce a report by Dr Strous and now also sought an increase in the amount of cash maintenance monthly from R35 000 to R45 000, plus R45 000 per month to enable the respondent to rent suitable accommodation. The respondent had in mind a townhouse in Bryanston available at R45 000 per month. She therefore claimed a total payment of R90 000 per month.

[16] The respondent states that the recommendations by Dr Strous '*largely align with those of Dr Duchon*' and that the parties had come to an agreement relating to care *pendente lite* save for one aspect, relating to the costs of a parenting co-ordinator / psychologist. The agreement now provided for shared residence.

[17] On 25 July 2022 the Rule 43(6) application was removed from the roll and the costs were reserved. The supplementary affidavit of Ms S [...] was admitted into evidence and an agreement on the care of the child was made an order of court by Karachi AJ. The agreement provided for shared primary residence as recommended and (in terms of the agreement between the parties) paragraphs 2 and 3⁶ of the existing order of December 2020 were varied.

[18] The agreement reached meant that the only issues of dispute that remained after 25 July 2022 were –

18.1 The maintenance payable by the applicant;

18.2 The costs of a parenting co-ordinator;

18.3 The powers of parenting the co-ordinator;

18.4 The costs of the Rule 43(6) application, including the reserved costs of 25 July 2022.

[19] The applicant filed a supplementary answering affidavit to the counter-application dated 5 August 2022. The matter was set down for the motion court week of 17 October 2022. This prompted yet a further supplementary answering affidavit and supplementary founding affidavit in the counter-application from the respondent on 29 September 2022.

[20] I deal with the remaining issues below.

⁶ The reference to paragraph 3 appears to be misnomer as paragraph 3 was in fact not varied. Nothing turns on this.

Maintenance

[21] The existing order provides for monthly maintenance for the respondent and the child of R35 000 per month; the applicant now tenders R29 000 (R15 000 labelled as maintenance and R14 000 in respect of accommodation when the respondent actually moves out of her parents' home where she currently stays) while the respondent seeks R90 000 (R45 000 as maintenance and R45 000 for accommodation).

[22] The respondent is not in full time employment and earns nominal amounts as a part-time ballet dancer. She indicated that she has done nothing to seek employment since the parties separated two years ago, even though she is professionally qualified and of employable age.

[23] The applicant is employed. His payslip for 25 February 2022 reflect gross monthly earnings "*for SA purposes*" of R172 903.50 and net earnings of R101 834.55. These amounts translate, respectively, to R2 074 842 and R 1 218 414.60 per year. However, his payslip for June 2022 includes a substantial bonus that increased his net income for the month to R491 135.08.

[24] He states that he "*moved to a flexibility programme at*" his employer which means that he earns less than he did when the Rule 43 order was made, but the founding affidavit is silent on when this happened. In the financial disclosure document he states that it happened in January 2022; his employer refers to the date of February 2022 and states that he is on a "*70% part time program.*"

[25] He alleges that his income was thus reduced by 30%. The applicant's salary fluctuates however with the Rand/\$ exchange rate.

[26] He has also lost rental income of R18 500 per month albeit it on a temporary basis. His earnings (including 'perks') for the year to date in February 2022 are R6 265 354.66, i.e. R522 112.89 per month.

[27] The applicant failed to disclose but has to concede that he receives bonuses

that are in the discretion of his employer, but these can not be ignored as he does receive the bonuses typically every year. His employer confirmed that he received a bonus of US \$44 618 in June 2022 and another such bonus is expected in September 2022.

[28] He is the owner of property worth R3,4 million financed by way of a home loan on which R2,8 million is outstanding. He owns personal assets worth R1,5 million and has liabilities of R646 000. He is a “partner” in the business he works for.⁷ His interest in the business is worth R172 000 plus US \$11 000.

[29] The respondent disputes the applicant’s analysis of his earnings but it is not possible to analyse his income on affidavit. No doubt the machinery of discovery and of cross-examination will in due course provide the trial court with more and better information but for now the matter has to be decided on the existing affidavits and with reference to the financial disclosure forms.

[30] I am of the view that an amount of R29 000 in maintenance for the child and the respondent is appropriate. Whether the respondent rents from her parents or from a third party landlord is irrelevant to the question of living expenses as any agreement with her parents for accommodation is a matter between her and her parents. The order I make will therefore not be conditional on her finding alternative accommodation – it is not for the court to tell her where to live.

[31] The respondent’s claim for monthly maintenance of R90 000 is not supported by the evidence she presents.

⁷ Documents received subject to a subpoena *duces tecum* indicated that he became a partner in January 2020.

Cost of parenting co-ordinator

[32] The applicant tenders to pay 75% of the costs. His view is that if the respondent paid nothing, the services might be abused even if unintentionally. There is logic in this argument.

Powers of parenting co-ordinator

[33] The applicant seeks an order that the parenting co-ordinator shall have the power to monitor the impact of any material change of circumstances that may affect the minor child and provide recommendations. One such possible change of circumstances is the respondent's intention to move into her own dwelling.

[34] The child is four years old. He is undergoing the trauma of a divorce. These are difficult times for him and he needs all the assistance the legal process can give him. A child's best interests are of paramount importance in every matter concerning the child.⁸ It is in his best interests that the impact of material changes in his environment be monitored so that responses can be implemented pro-actively by the parents.

Costs:

The wasted costs of 25 July 2022

[35] The applicant's application was premised on the contents of the report of Dr Duchon that recommended shared residence. The applicant was entitled to invoke Rule 43(6) because the recommendations by the expert differed substantially from the existing order that did not provide for shared residence.

[36] Dr Duchon was a court-appointed expert and the respondent initially rejected the findings, persisted with her opposition to shared residence, and appointed her own expert, Dr Strous.

[37] When Dr Strous published a report that also favoured shared residence, the

⁸ S 28(2) of the Constitution.

respondent filed a further affidavit two days before the date set down for the hearing. The respondent had to accept that the two experts were largely *ad idem* and agreement was reached on the basis of the expert reports.

[38] What then remained was the respondent's newly introduced claim for maintenance in the amount of R90 000 per month, and the dispute about the payments due to and the powers of the family co-ordinator. The matter was postponed to enable the parties to deal with the new allegations, and the postponement was necessitated by the late filing of the respondent's affidavit a few days prior to the hearing. The respondent must be held liable for the costs of the day.

The remaining costs

[39] A fundamental change in the pending dispute was introduced on 20 July 2022 when the respondent claimed monthly maintenance of R90 000 per month, an increase of 257% despite the new agreement on shared residence which meant that the child would only be in her care for half of every month, and without a material positive change in the applicant's financial position.

[40] In a further supplementary affidavit that I allow in terms of Rule 43(5), the respondent places compelling evidence before the Court indicating the applicant received bonuses that were not disclosed by him.

[41] I am therefore of the view that each party should pay his or her own costs

Conclusion

[42] For these reasons I made the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **31 October 2022**

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DATE OF THE HEARING: 19 October 2022

DATE OF ORDER: 31 October 2022

DATE OF JUDGMENT: 31 October 2022