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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

CASE NO: **5571/2017**

31/5/2019

In the matter between:

R[....] D[....]

APPLICANT

and

F[....] D[....]

RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] On 27 June 2018 Wanless AJ, having read the documents filed of record, heard Counsel and considered the matter, gave an order in the following terms;

"The respondent is to pay the applicant maintenance pendent (sic) lite in the sum of R8000-00 (Eight Thousand Rand) per month commencing on the first July 2018 and on or before the first day of each subsequent month."

[2] Before him was a Rule 43 application between the same parties as in this

court. The applicant *in casu*, who was also the applicant in the initial Rule 43 application sought the following relief pending finalisation of the divorce;

1. Payment of maintenance by the respondent to the applicant in the sum of R28 931-00 per month;
2. That the respondent pay the reasonable medical, dental, ophthalmic, pharmaceutical and related expenses for and in respect of the applicant not covered by the medical aid scheme on demand;
3. Contribution towards costs in the sum of R10 000-00.

[3] The applicant approaches this court in terms of Rule 43(6). She argues that there has been a material change in her circumstances, and consequently she seeks the following relief;

1. That the Rule 43 order dated 27 June 2018 be set aside and replaced with the following *pendente lite*;
 - a. The respondent be ordered to pay to the applicant the sum of R21 200-00 per month;
 - b. The respondent supply the applicant with a vehicle for her sole and exclusive use within 7 days, and that the vehicle not be more than 3 years old, be reliable, and have less than 50 000km on its odometer. The respondent is to remain responsible for its financing, insurance maintenance and service.
 - c. The respondent make a costs contribution in the sum of R50 000-00 within 30 days of the order.

[4] The application is opposed by the respondent who contends that this application is simply an attempt to again re-hear the Rule 43 application one more time under the guise of materially changed circumstances, which is impermissible.

[5] When the matter was to be argued counsel for the respondent indicated that she wanted to raise a point *in limine* which if upheld would be dispositive of the whole application. She submitted that the applicant has failed to show that

there has been a material change in her circumstances and that the court should uphold the preliminary point and dismiss the application. I advised the parties that I was inclined to entertain the point *in limine* first and if necessary then the merits of the main application at a later stage.

The law briefly

[5] Rule 43(6) states as follows:

"The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate."

[6] In the matter of **Grauman v Grauman 1984 (3) 477 WLD at 480 (C)**, the court stated the following about what amounts to material change:

"Rule 43(6) should be strictly interpreted to deal with matters which it says has to be dealt with, that is, a material change taking place in the circumstances of either party or child. That relates to a change subsequent to the hearing of the original Rule 43 application."

[7] In **Micklem v Micklem 1988 (3) SA 259 (C)** Van den Heever J summarised the principles applicable to Rule 43 applications which I suggest are equally applicable to applications brought in terms of rule 43(6). He stated the following at **262A-263A**:

"1. Wealth is an undoubted advantage in litigating, in that a litigant with means can obtain the services of experts which may not be available to someone with a more modest purse. No authority was quoted, and I would be astonished to discover that any existed, that a man of means is entitled to rewrite the rules to suit his own convenience and still less that he should be obliged to permit his opposition to do so, even if she is his wife.

2. Rule 43(2) sets out the type of affidavits that should be put before the Court. The cases are clear that unduly lengthy affidavits and annexures, that would not in the normal course be annexed to be a pleading, may amount to an abuse of the process of the Court. The aim of

Rule 43 is to conserve the parties' energies for the trial itself and provide speedy and inexpensive interim relief - even for millionaire spouses.

3. ...

4. ...

5. *The fact that a husband has unlimited means does not in our law entitle his wife to unlimited spending. There is a difference between her wants and her needs (**Grasso v Grasso 1987 (1) SA 48** (CJ at 59G - H). What she is entitled to, is to maintain the standard of living to which she was accustomed, not to increase that.*

6. *A wife seeking a contribution towards costs is not entitled to payment in full of the costs she avers will be incurred in presenting her case to the Court nor all costs incurred to date. In a matter such as the present, this may clash with the 'paramount consideration' that she should be enabled 'adequately to place her case before the Court' (**Van Rippen v Van Rippen 1949 (4) SA 634 (C)** at 638 - 9) in which the question of essential disbursements is a material factor. And what are essential disbursements is adjudged against the background of (a) the depth of his purse and (b) his own scale of litigation. (**Glazer v Glazer 1959 (3) SA 928 (W).**)"*

The point *in limine*

[8] In support of the point *in limine* the respondent prepared a schedule juxtaposing the applicant's expenses in the previous rule 43 application with those in this case. The schedule is reproduced below;

ITEM	RULE 43(6)	RULE 43(2)
1. Rental	R7 500-00	R7 500-00
2. Water, and lights	R1 100-00	R1 050-00
3. Medical Aid contribution	R3 500-00	R3 012-00
4. Medical expenses not covered by Medical Aid	R1 000-00	R1 050-00
5. Food, meat, bread, milk	R3 000-00	R1 400-00

6. Cleaning goods, personal care, pets	R1 500-00	R4 500-00
7. DSTV, books newspaper	R1 500-00	R1 870-00
8. Cellphone	R1 100-00	R1 000-00
9. Clothing	R1 000-00	R1 000-00
10. Vehicle monthly instalments	R3 000-00	R2 999-00
11. Insurance on motor vehicle	R 900-00	R 850-00
12. Fuel	R2 000-00	R1 800-00
13. Domestic Helper		R 900-00
14. Medical Aid Gap	R 300-00	
Total	R27 100-00	R28 931-00

[9] Counsel for the respondent asked the court to look thoroughly at the schedule from which, it was argued, the court can only deduct that there has not been a material change in the circumstances of the applicant. The difference in monetary terms between what was claimed then and what is claimed now is the sum of R1 831-00. The amount, counsel for the respondent argued, shows that there has not been a material change in the circumstances of the applicant. She was also of the view that the applicant was raising issues which were fully ventilated and argued before Wanless AJ.

[10] Issues which were fully ventilated include the applicant's need for transport, the applicant's health issues both physical and mental to which closely connected are issues of the applicant's medical aid as well as contribution towards legal costs. On the latter aspect although the court did not make a specific order of contribution, it also did not give an order of dismissal. The applicant approaches this court on the basis that no order was made whereas the respondent contends that the relief sought was effectively refused and that this is implied in the court's order.

[11] Counsel for the respondent asked this court to take a dim view to the fact that the applicant failed to take the court into its confidence when the initial Rule 43 application was heard, in that although the applicant was already on a medical

aid scheme of a third party since 1 January 2018, she failed to disclose such a fact. Another omission which the respondent contends should attract the courts dim **view**, is the fact that the applicant had pre-existing medical conditions for which she had been receiving treatment since 2015 and that such a fact was not disclosed .

Applicant's case

[12] The point *in limine* is opposed by the applicant. As I follow the argument in opposition, and this is also captured in the applicant's heads of argument, when the application was heard and the order granted, the applicant had made out a case that she required R28 931-00 per month as maintenance *pendente lite*, that she required medical aid and that she was entitled to a contribution towards legal costs. She states that when the order was granted that RS 000-00 be paid as maintenance, she accepted that she could not appeal. The award, according to the applicant, "immediately proved to be inadequate" and she turned to other persons such as friends for support.

[13] It is also argued that the fact that the applicant's mental and physical health took a turn for the worst, brought about a material change in her circumstances. The cost of living, its is argued, increased dramatically since the previous order this therefore is accentuated as a material change in circumstances particularly because the previous order did not make provision for an increase in maintenance.

[14] The issue for determination therefore, at this stage, is whether the point *in limine* is meritorious, in which event it should be upheld or whether there is in fact a material change in the circumstances of the applicant and that the merits of the relief she seeks should be entertained.

Evaluation

[15] It is in my view clear that the applicant is now and was at the time of its award, aggrieved at the order of Wanless AJ. I say this because on the applicant's own version she made a case that she was unemployed, that she deserved to be awarded a contribution towards legal costs and that an order

should have been granted that the respondent pay for her medical aid. She now argues before me, that despite making such a case, the court inexplicably gave the order it did. By implication therefore, the order of the court that heard the initial Rule 43 application is wrong. That the applicant accepted that the order was not appealable is in my **view** pure lip service. The fact that the court made an award of R8 000-00 shows, in my view, that the applicant in fact failed to make out a case for maintenance of R28 931-00, medical aid, and cost contribution. If a case had been made, the award would have followed.

[16] The applicant argues that soon after the court granted the order, it proved insufficient. Her financial position deteriorated and her health took a turn for the worst. I interrupt myself to point out that a realisation, soon after a matter is argued and an order is granted, that the award is inadequate, can not at a later stage be said to be a weighty consideration in an application where it is contended there has been a material change in the circumstances of the applicant. The reason is manifest. A material change must occur after the initial order.

[17] After the first order was granted the applicant underwent a laparoscopy procedure on both her breasts. Subsequent thereto, on her version, she injured herself and as a consequence had to undergo an operation to correct/repair a burst breast implant. The damage was seemingly repaired in February 2019. The applicant submits that the deterioration in her health negatively impacted her life and lifestyle as well as her needs and responsibilities. As a consequence she developed blood pressure issues and has since been emotionally and psychologically affected. In addition, she has to undergo a back operation in due course.

The applicant's health

[18] A major contention that the applicant makes is that her deteriorating health does amount to a material circumstance warranting the court's intervention. The respondent is quick to point out that when the first Rule 43 application was heard, the applicant failed to disclose that she was already a beneficiary in the medical aid scheme of one Mr Claassen. I have gone back to the founding affidavit of the

applicant in the initial Rule 43, for verification and can confirm that she never disclosed that she was in need of financial assistance to cover specifically medical costs or that she had a specific medical condition at all. There is no mention in the affidavit that the applicant was of ill health. It is my view that faced with such paucity, and without reviewing or revisiting the first court order, the court was correct not to accede to the prayer seeking payment in respect of medical expenses.

[19] What is significant however is that the applicant according to annexure "RDT2" from the founding affidavit which is a letter from a family special physician of the applicant, Dr. HJ Sommerville, the applicant was receiving treatment for hypothyroidism, hypertension and dyslipidaemia as at the date of the launching of the Rule 43 application. What this suggests, and the respondent is correct to point it out, is that the medical predicament the applicant finds herself in at this stage, is not "subsequent" to the Rule 43 order. It is a pre-existing medical condition therefore it can not be characterised as amounting to materially changed circumstances which took root after the Rule 43 order..

[20] Divorce is a stressful phenomenon. Parties to a divorce could very well end up having medical conditions. The sequelae could be emotional or psychological. I am of the **view** that to elevate these sequelae to circumstances that would warrant the courts intervention in Rule 43 applications would be to lower the bar in these applications and result in a huge proliferation of of Rule 43 and Rule 43(6) applications. I take the view that stress from divorce is not material enough a factor as to warrant the intervention of a court as envisaged in Rule 43(6) applications.

The applicant's transport and vehicular needs

[21] In the initial Rule 43 application the applicant listed in her schedule of expenses that she needed the sum of R1 800-00 for fuel, R2999-00 for a motor vehicle and R850-00 for insurance in respect thereof. In these proceedings she suggests that respondent should purchase a car for her with a monthly instalment of R3 000-00, and pay insurance thereof in the amount of R900-00 as well as fuel expenses of R2 000-00 per month. The applicant in support of this need makes

the point that the respondent drives 2017 Ford Ranger but all she needs is a smaller and much more basic car. The car sought, would, according to the applicant, solve all her transportation problems or challenges.

[22] The applicant compares her situation to that of the respondent. For example she states that she has sold her car and all that she wants is an entry level vehicle. She then states that the respondent owns or drives a Ford Ranger which is an expensive vehicle. Unfortunately for her that is not the test. The test is whether there has been a material change in circumstances.

[23] In the initial Rule 43 application the applicant stated that circumstances forced her to sell her motor vehicle, a Renault Sandero on 11 October 2017. The proceeds from the sale, she stated, were utilised for her maintenance and to settle expenses and liabilities. The applicant did not give details of the sale price and the liabilities or expenses she had to settle.

[24] The applicant in these proceedings has failed to show in what respect the circumstances in relation to the motor vehicle have changed. She states that she always had a car and that she sold it to cover her legal costs. No further details are disclosed. She then "suggests" that the respondent should buy her a car and that it would be up to him whether he buys it in cash or whether he finances it.

[25] While the applicant has sold her car, she has failed to show, to the satisfaction of this court, that there has been a change in her circumstances in so far as the need for a motor vehicle is concerned. The applicant sold her motor vehicle but had now approached this court for an order that the respondent buy her a motor vehicle. The argument therefore lacks merit.

Applicant's living conditions

[26] In paragraph 15 of the applicant's founding affidavit in the initial Rule 43 application she states the following;

"I cannot continue to reside under circumstances such as I presently do. My temporary accommodation with my son and his fiance is not fair either of them and constitutes an invasion of their privacy. It is also not fait upon

myself and I have no privacy and am in the humiliating position of having to be maintained by my children."

[27] in paragraph 23 of the Rule 43(6) application the applicant states the following;

"I am currently living with my son and daughter in law as I cannot afford to obtain accommodation of my own. My son got married in August 2018 and I do not believe it would be fair for me to be intruding on him and his wife (as newlyweds) in the manner that I currently am, all due to me not being able to afford my own place to live."

[28] It is clear from the above that the applicant regurgitated, in the Rule 43(6), the reasoning employed in the initial Rule 43 application to bolster her claim that her circumstances have changed. There is nothing in the content of the submission which suggests that her circumstances have changed materially.

Contribution towards legal costs

[29] In these proceedings, as was the case in the Rule 43 application the applicant seeks a contribution towards legal costs. She asks for a contribution of R50 000-00 and attached to her application are two invoices and quotations all of which total R156 129-50. In the previous application she applied for a contribution of R10 000-00. What is also discernible from her affidavit is that she sold a motor vehicle and received R95 000-00 from the sale. She then says she *'used the entire amount to pay for my legal costs at my erstwhile attorney and or to live off'*. There is serious ambiguity about how this amount was utilised. There is in addition lack of detail about the previous attorney costs. This counts against the applicant.

[30] The respondent in the heads of argument draws the courts attention to the line items in the invoices as well as the quotation from the legal representatives. To the extent that certain moneys are attributed in the invoice to the Rule 43

application, she argues that in addition to the fees being exorbitant, the applicant is not entitled to a contribution towards costs of the Rule 43 application. I agree with her. (See **Service v Service 1968 (3) SA 526 (DJ)**). The other aspect relates to discovery proceedings. As I follow the respondent's contention, the applicant failed to discover within the time period stipulated in the Uniform Rules. The respondent then approached court to compel discovery. It is after service of the application to compel that the applicant discovered. The applicant lists the costs that arose in that process, as part of those towards which a contribution is sought. This is simply impermissible.

[31] As I understand Rule 43(6) in relation to costs contribution, a party can approach court if the contribution towards costs proves to be inadequate. If the order of Wanless AJ is anything to go by, no case was made for a contribution towards costs when it was granted. The question of a contribution becoming inadequate therefore does not arise in this case. Besides, a contribution in terms of the rule can be sought towards costs of a pending matrimonial action. The applicant does not in her affidavit list which circumstances have changed materially, in relation to costs, which call for this court's intervention.

The rise in the costs of living

[32] In support of the contention that there has been material change in her circumstances, the applicant argues that one of the reasons why she is approaching this court is that there has been a rise in the costs of living. In **Louis v Louis 1973 (2) SA 597 (T)**, the court held that inflation or the rise in the costs of living is not by itself a sufficient ground in an application for variation. I agree with that approach. To hold otherwise would result in a proliferation of Rule 43(6) applications as and when there is an increase in the costs of living.

[33] In **Mick/lem v Mick/lem 1988 (3) SA 259 (C)** Van Den Heever J set out some of the guidelines in Rule 43(6) applications one of which is that a Rule 43(6) hearing should not be a rehearing of a former application. He cited a dicta from **Grauman v Grauman 1984 (3) SA 477 (W)** at 4791-480C, in making the point that were the court to allow a rehearing of the former application, it would be faced;

"..... with virtually a review of a previous decision, based on the existing facts but now having to deal with the matter in more detail, having been able to utilise more information, another slant being given to those very same facts, or one or two additional facts might be discovered, which puts a different complexion on matters."

[34] The court can not turn a blind eye to conduct of a party in the process of litigation. In considering a costs contribution, the issues that are placed in dispute at the trial. My understanding is that the parties as at the time of the first Rule 43 application, divided their assets in addition to the respondent consenting to the order of divorce. The only dispute, it would appear, is the maintenance of the applicant. I am informed that the trial is only some 90 days away. In light of the imminency of the trial, at which the maintenance of the applicant will be fully ventilated, while accepting that in these proceedings interim relief is sought, I take the view that the balance of forces will be disturbed at the trial, were this court to grant an order against the respondent.

[35] I am of the view that the application is ill conceived and that the point *in limine* must be upheld. I therefore make the following order;

1. The application is dismissed with costs.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date Heard: 27 May 2019

Date of Judgment: 31 May 2019

Counsel for the Applicant: Adv. E van der Merwe

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