

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 595/2016

In the matter between:

A. C. G.

Applicant

and

G. G.

Respondent

CORAM: PHALATSI, AJ

HEARD ON: 10 MARCH 2016

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 24 MARCH 2016

[1] This is an application in terms of Rule 43(6), following an order in terms of Rule 43 which was granted by this court on 28 March 2013. On the said date, the court granted an order in the following terms, by agreement between the parties:

“1. Die respondent, met ingang van **1 April 2013**, *pendente lite* onderhoud aan die applikante betaal in die bedrag van

R12 000.00 per maand, betaalbaar voor of op die eerste dag van elke en iedere maand.

2. Die respondent om *pendente lite* die uitgawes soos na verwys in pragrafe 8.2.2, 8.2.4, 8.2.5 en 8.2.6 van die opponerende verklaring, uitgesluit die applikante se elektrisiteitsverbruik, te betaal.
3. Die respondent binne 14 dae na verlening van die bevel, die bedrag van **R549.00** aan Klopers, Bloemfontein oor te betaal vir die installasie van 'n DSTV DSD1132 dekodeerder en skottel, en 'n bedrag van **R1 600.00** vir die installasie van 'n elektriese motor tot die motorhuisdeur.
4. Die respondent 'n bydrae tot die applikante se regskostes maak in die bedrag van **R5 000.00**.
5. Die koste van die aansoek, koste in die hoofgeding sal wees."

In the present application the applicant seeks an order in the following terms, among others:

- “(a) Die respondent word beveel om met ingang die eerste dag van die kalendermaand wat volg op die datum van hierdie bevel, *pendente lite* die hoofaksie, onderhoud aan die applikante te betaal in die bedrag van R25 213.31, alternatiewelik R14 000.00 per maand, betaalbaar voor of op die eerste dag van elke opeenvolgende kalendermaand;
- (b) Die respondent word beveel om binne veertien dae na verlening van hierdie bevel aan die applikante te betaal die bedrag van R100 000.00 as 'n bydrae tot die applikante se regskoste in die hoofaksie.”

- [2] In support of prayer (a) above, the applicant attached annexure “B” to her founding affidavit, setting out her monthly financial needs. It is instructive to note that the items listed in Annexure “B” are identical to the items as set out in the previous Rule 43 application, but for the costs of the medical fund. It is only the amounts in respect of these items which have increased and the applicant avers that this is because of inflation.

In respect of the prayer for contribution towards her legal costs, the applicant avers that she has up to date incurred the following legal costs:

“R42 409.99 for the respondent’s wasted costs occasioned by her application for postponement of the main trial; R41 473.00, being her former attorneys’ legal costs and R126 545.00, being legal costs for an application she brought to join the trusts of which her husband is the trustee, as co-defendants in her counter claim. She has up to date incurred legal costs in the amount of R130 765.00 in respect of her present attorneys’ and advocate’s fees. She further avers that the respondent is in a financial position to pay the amounts that she is asking for.”

- [3] The respondent has taken a point in *limine* that the applicant has not shown any changed circumstances as envisaged in Rule 43(6). The second point in *limine* taken by the respondent is that the applicant is not entitled to make an application for a further contribution towards costs, before the first day of the trial.

LEGAL PRINCIPLES

[4] 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.”

The first question is what constitutes “material change”. In the matter of **Grauman v Grauman** 1984 (3) 477 WLD at 480 (C), the court states the following:

“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.”

In casu, the applicant has relied on effluxion of time and inflation as factors constituting material change within the meaning of the sub-rule. In the matter of **Micklem v Micklem** 1988 (3) SA 259 CPD, the applicant had relied on the fact that the time in which the matter had been expected to have been finalised had lengthened substantially; and that inflation in itself constituted a material change. The court found that the delay was triggered by her own choice to delay and she therefore had to pay for the delay. In respect of inflation, the respondent had already made an offer to increase her own maintenance and that of the children

by the percentage in excess of the current inflation rate, which offer had been refused by the applicant. The court did, therefore, not deal with the question whether these two factors, namely, effluxion of time and inflation, constitute material change within the meaning of Rule 43(6), but merely endorsed the tender which had been made by the respondent. In casu, it is common cause that the applicant applied for a postponement of the trial in May 2014, in order to join the trusts of which the respondent is the trustee, as the co-defendants in her counter claim, which application was finally brought in February 2015. There are no facts placed before me as to why was this application not made before the start of the trial, nor why was it only brought in February 2015, some nine months after the trial was postponed. I am, however, prepared to accept that a fair amount of investigations had to be made, seeing that it is in total 22 trusts that had been joined as co-defendants in the applicant's counter claim. The application was not only to join the said trusts, but also to show that the said trusts are nothing more than the alter ego of the respondent.

In my view, it is undesirable to consider only inflation per se, as constituting "material change" within the meaning of the sub-rule. This may lead to a proliferation of applications in terms of Rule 43(6), that such applications are brought on a yearly basis, based on the increase, or decrease, in the inflation rate. I am of the view that where there has been a substantial lapse of time after the initial Rule 43 application, on circumstances that are beyond the control of the parties, such lapse of time can be regarded as

constituting “material change” within the meaning of the sub rule. I therefore find that in casu, where there has been a lapse of nearly 3 years from the initial application, the said period constitutes material change. In respect of the monthly expenses of the applicant, I must agree with the respondent that the applicant does not show why she needs a medical fund whilst she is covered by the respondent’s medical fund. It is also not clear what interest she pays to First National Bank is for. In the premises, I am of the view that the amount of maintenance paid by the respondent to the applicant should be increased from R12 000.00 to R13 000.00 per month, to cater for the increase of expenses because of effluxion of time.

[5] The next question is the one of contribution towards costs.

The point in *limine* taken by the respondent in this regard is that the applicant is not entitled to bring an application for further contribution towards costs before the first day of trial. In the matter of **Maas v Maas** 1993 (3) SA 885 OPD at 888 C, the court held as follows:

“Ek meen dat die korrekte benadering sou wees om die bewoording van die Reël te volg en as uitgangspunt te neem dat ‘n verdere bydrae tot koste nie voor die eerste dag van die verhoor aangevra kan word nie, tensy die aanvanklike bydrae tot koste nie voldoende was nie en dit noodsaaklik is vir ‘n applikant om ‘n verdere bydrae tot koste te verkry voor die eerste dag van die verhoor.”

It is therefore clear that although it might not be desirable to do so, there is no hard and fast rule that an application for a further

contribution towards costs cannot be done before the first day of trial. If it is necessary, depending on the facts of each case, such an application can be made.

It is therefore necessary to determine whether the applicant has shown that it is necessary that she be awarded a further contribution towards costs, and if so, what the amount should be. In the Micklem matter, *supra*, at 262 I, the court held as follows:

“A wife seeking a contribution towards costs is not entitled to payment in full of the costs that 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’ in which the question of essential disbursements is a material factor”.

It was further decided, at 263 B that

“the costs of interim applications are excluded from costs to which respondent is obliged to contribute.”

I share the sentiment that the applicant must be enabled adequately to place her case before the court. The difficulty in this present matter is that the whole application of the applicant is characterised by the paucity of information and or facts upon which the court can properly evaluate her case. The only information that is placed before court is of the legal costs already incurred. In the absence of essential disbursements that are going to be incurred by the applicant to enable her to adequately place her case before the court, it is impossible to quantify the

amount that she needs as contribution towards her costs. The legal costs that she has incurred cannot help the court to determine the amount she needs to prepare for her case. Mr Fischer, on behalf of the applicant, argued that the applicant would need experts to investigate the finances of the trusts, but there is nothing showing how much will be needed to engage such experts, and what the other disbursements would be and how much they would cost. In the premises, I cannot find that the applicant has made out a case for contribution towards her legal costs, in the amount of R100 000.00, or in any amount at all. In the light of this finding, I deem it not necessary to decide whether the applicant has shown that it is necessary to bring an application for a further contribution towards costs, in line with the finding of the court in the Maas matter, *supra*.

- [6] In respect of the costs of this application, both parties are partially successful in their cases and it would be proper that no order as to costs be made.

I therefore make the following order:

1. The respondent is ordered to pay maintenance to the applicant *pendente lite*, in the amount of R13 000.00 per month, from 1 April 2016, payable on or before the first of each month.
2. The application in respect of contribution towards costs is dismissed.

3. No order as to costs is made.

N.W. PHALATSI, AJ

On behalf of applicant: Adv. P.U. Fischer SC
Instructed by:
Hill McHardy & Herbst Inc.
Bloemfontein

On behalf of respondent: Adv. E. Els
Instructed by:
Honey Attorneys
Bloemfontein

/PC