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REPORTABLE

NORTH GAUTENG HIGH COURT PRETORIA (REPUBLIC OF SOUTH AFRICA)

Case number: 43989/10

DATE:16/08/2013

In the matter between:

P L

APPLICANT

AND

B L

RESPONDENT

JUDGMENT

BAQWA J

[1] This is a Rule 43(6) application, the origin of which is an application which was issued out of this court by the current respondent on 28 July 2010. The parties are Mr P L who is the applicant and the respondent is Mrs B L who are husband and wife

Background

[2] The parties were previously married to each other on 31 May 1994 which marriage ended in divorce proceedings during the year 2000. On 9 November 2001 they became

remarried out of community of property wherein the accrual sharing system, as provided for in Chapter 1 of the Matrimonial Property Act 84 of 1984 was made applicable.

[3] On 28 June 2010 the respondent caused divorce summons to be issued under case number 3730/10 . The divorce action was defended by the applicant and the pleadings have closed. The trial date was set for 28 November 2012 but the matter was postponed on that date.

[4] In the interim and on 28 July 2010 respondent caused a Rule 43 application to be issued wherein she asked for pendent lite maintenance for herself. At that time K, a son born of their first marriage on 22 January 1995 was residing with the applicant on his farm. He moved to the respondent during the 2011 March/April school holidays and still resides with the respondent.

[5] Applicant filed an answering affidavit in the Rule 43 application and made a tender to maintain respondent pendente lite, which tender was accepted and in terms of which the Rule 43 application became settled.

[6] Thereafter applicant caused an application to be brought against the respondent under the case number 75207/10 wherein he asked for the following relief:

"1. That the 2010 model Toyota RAV 4 motor vehicle with registration number MABEAR GP be returned to the applicant within 48 hours of service of this order.

2. That the respondent shall pay the outstanding levies payable in respect of Unit 54 situated at Les Chenils, Summer way Street, Lakefield, Benoni, within 48 hours of service of this order and that the respondent shall continue to make further payment of future levies on due date.

3. That the respondent pays the costs of this application.

4. Further and/or alternative relief. ”

[7] This application served before my brother Mr Justice Bertelsmann on 14 June 2011.

Pursuant thereto he issued two orders, the first of which reads as follows:

I,2. That the applicant complies with the settlement agreement reached in terms of the Rule 43 application and that he makes payments in terms of this agreement which contains the following terms:

2.1. That the applicant pays the respondent the amount of R1500.00 per month pendente lite from 1 September 2010;

2.2. That the applicant pays the bond payments in respect of the immovable property where the respondent resides.

2.3. That the applicant pays the instalments in respect of the 2010 model Toyota RAV 4 motor vehicle with registration number MABEAR GP which the respondent has in her possession as well as the insurance premiums in respect thereof

2.4. That the applicant keeps the respondent as a dependent on his medical aid funds (sic) the Discovery Classic Comprehensive "Plan".

2.5. That the applicant pays the respondent's insurance premiums. ”

[8] The order referred to above is the order which the applicant seeks to amend. During or about May 2013 he established that the respondent has since March 2011 not resided at the erstwhile common home namely Les Chenils 54, Summer Way Street, Lakefield, Benoni and that she had moved in with a certain Scott Pringle at 2nd Road, 45 Sanford Gleen Complex, Boksburg, as husband and wife.

[9] Respondent had not informed the applicant of her changed circumstances and had

unilaterally installed her mother as the occupier of the former common home.

[10] Applicant submits that the material change referred to in Rule 43(6) finds application in the respondent's personal circumstances since the Rule 43 application was settled and the settlement incorporated as an order of court on 14 June 2011.

[11] Relying upon judgments such as *Carstens v Carstens* 1985(2) SA 351SE at 353F Mr Smith SC argued both in court and in his heads of argument that it would be against public policy for a woman to be supported by two men at the same time. The *Carstens* decision states the following:

" It is in my view against public policy that a woman should be entitled to claim maintenance pendente lite from her husband when she is flagrantly and deliberately living as man and wife with another man. Not only is applicant in the present case living in adultery, but she and her lover are maintaining a joint household complete with the addition of an adulterine child. She has by her conduct accepted the support of Clarkson in lieu of that of her husband. The fact that Clarkson is unable to support her to the extent that she may have been accustomed in her matrimonial home with respondent does not appear to me to affect the position. "

[1] Mr Smith further finds support for his argument in the case of *SP v HP* 2009(5) SA 223 (OPD) which was a Rule 43 application brought by a wife cohabiting with another man pendente lite. In elaborating on the *Carstens* case Musi JP states the following:

"[10] With respect, I do not see what is the difference between a woman who has given birth to a child by her extramarital lover with whom she lives, and one who has simply moved in with her lover and is living with him. They are both cohabiting with their lovers and it matters not whether or not a child has been born out of the illicit love affair. It has

been laid down that it is contrary to justice and equity that a person in the applicants position should at the same time collect support from her husband as well as from her 'putative' second husband (Carstens at 3531 citing Hahlo). The objection is not so much about the moral turpitude attaching to the illicit cohabitation but more about the notion of a woman being supported by two men at the same time. I hold therefore that the dictum in Carstens is applicable in the instant case. "

[2] On the contrary applicant's counsel Ms Vermaak Hay, submits that the respondent's submissions are bad in law in that both the Carstens and SP v HP decisions were overruled in the Supreme Court of Appeal matter of EH v SH 2012(4) SA 164 (SCA). On page 167 E-G the following was said:

"Relying upon judgments such as Dodo v Dodo 1990(2) SA 77(W) at 89G; Carstens v Carstens 1985(2) SA 351 SE at 353F; and SP v HP 2009(5) SA 223(0) paragraph 10, it was argued, both in the High Court and in the appellant's heads of argument that it would be against public policy, for a woman to be supported by two men at the same time. While there are no doubt members of society who would endorse that view, it rather speaks of values from times past and I do not think in the modern, more liberal (some may say more 'enlightened') age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse...."

Also at p 167 it is stated:

"Under the common law, the reciprocal duty of support existing between spouses, of which the provision of maintenance is an integral part, terminates upon divorce. "

[14] Respondent's counsel further submits that applicant does not aver that the man with whom the respondent lives maintains her. She only alleges that he provides her with

accommodation and pays for her food. In paragraph 46 of the Respondent's opposing affidavit she alleges the following:

"Mr Pringle only gives me free accommodation and does not maintain me or K. I have to pay for all our expenses as set out hereinabove. I am still married to the applicant and he still has an obligation to maintain me. There exists no reason why he should be exempted from this obligation. He is financially more than capable of maintaining us. "

It is further submitted and I accept that applicant has not denied these allegations in the papers before me.

[15] Having considered facts and the law applicable, I have come to the conclusion that applicant has failed to make out a case for the relief sought in his application.

Respondent's counterclaim

[16] Respondent has filed a counterclaim for a substantial contribution towards her legal costs as well as an increase of maintenance for herself and Kuene.

[17] Before dealing with the substance of the counterclaim, applicant's counsel seeks to challenge the counterclaim as an abuse of the process of court in that the documents filed are excessively lengthy and not in compliance with Rule 43(3).

[18] The respondent's affidavit is neither in the form of a plea and/or declaration and it comprises 54 pages.

In *Du Preez v Du Preez* 2009(6) SA 28(T) at 30 E-J Murphy J stated the following:

*74] The applicant's papers are anything but brief and the respondent's reply is less than succinct. The tendency by parties, aided by their legal representatives, to engage in prolixity in Rule 43 proceedings has been criticised more than once by courts across the

country. Yet the criticism has been insufficiently heeded. I align myself with the remarks made by Kroon J in *Visser v Visser* 1992(4) SA 530 (SE) at 531 D, where he observed: "It is my experience and I understand that my brothers to be the same, that there is a tendency for the provisions of Rule 43 to be disregarded and for the applications and reply thereto to assume voluminous proportions. That practice must be firmly discouraged and the present is an appropriate cause where the discouragement will commence. "

[5] Prolixity in a Rule 43 proceeding is an abuse of process because it defeats the purpose or object of the rule- *Smit v Smit* 1978(2) SA 720(W) at 722G.

[6] In *Patmore v Patmore* 1997(4) SA 785 W at 788D, Epstein AJ elaborated on the undesirable nature of prolixity in Rule 43 applications as follows:

'In this division, where there are so many Rule 43 applications on the roll each week, the abuse of the process of this court (by frustrating and/or defeating the purpose or object of Rule 43) places an unnecessary burden on the Judges who have to read prolix affidavits containing matter irrelevant to the Rule 43 proceedings. "

[7] In *Patmore* (supra) the application was struck from the roll because the applicant's papers ran to 47 pages. In *Smit* (Supra) the application suffered the same fate because the complete set of papers ran to 69 pages. In the present matter the papers total 192 pages."

[19] I align myself with the comments of my brother Murphy in the *Du Preez* decision. I do so because the present application consists of 145 pages which is certainly not in the spirit of a Rule 43. In my view an order uplifting the provisions of Rule 43(7) and (8) should only be made after properly considering whether or not the parties have properly complied with

the provisions of Rule 43.

[20] In considering respondent's counterclaim, the onus is upon her to demonstrate a material change in her circumstances with regard to her personal claim for maintenance and the amendment of the maintenance order with regard thereto.

[21] In the application under case number 75207/2010 the respondent filed an affidavit and in paragraph 1 thereof she stated the following: "1.1. I am a major female currently unemployed and residing at 54 Les Chenils, Summer Way Street, Lakefield, Benoni. I am the respondent in this application. "

This affidavit was deposed to and signed before a Commissioner of Oaths on 11 August 2011.

[22] In the present application respondent deposing to her affidavit states regarding Scott Pringle's invitation to cohabit with him.

"...we accepted the invitation with open arms and during March 2011 we moved in with him. "

Applicant submits in this regard that respondent perjured herself thus demonstrating a tendency to be mendacious. Applicant's counsel refers to the dicta of Murphy J in the Du Preez case (supra) at 32B where the following is stated:

"Parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury and, in certain circumstances, may be the crime of defeating the course of justice. Should such conduct occur in Rule 43 proceedings at the instance of the applicant, then relief should be denied. "

[23] I was referred further to p32 of the Du Preez judgment in which the following is stated:
‘A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be done. Consequently, I would assume there is a duty on applicants on Rule 43 applications seeking equitable redress to act with the utmost good faith (uberrimae fidei) and to disclose fully and all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with ‘clean hands’ and, on that ground alone, the court will be justified in refusing relief. ”

[24] In the present case it has become clear that the respondent has not always disclosed all material facts to this court. On her own evidence, when she declared under oath that she was still resident at the previous matrimonial home, she was not telling the truth. She had already moved in with Mr Scott Pringle.

[25] She would have this court believe that her circumstances have altered in such a manner that she deserves an increase in her personal and her son’s maintenance in the sum of R30 270.00.

[26] It is pertinent to consider the amounts currently expended by the applicant in support of the respondent.

Maintenance.....	R15,000.00
Bond payments.....	R7,159.93 Monthly instalment for
Toyota RAV 4 motor vehicle.....	R8,933.97 Short terms insurance for
Toyota RAV 4 motor vehicle.....	R2,274.04
Medical Aid scheme payments.....	R3,086.00
Long term insurance.....	R3.025.52

TOTAL.....R39.479.46

[27] The above amounts represent a package contribution made by applicant in support of the respondent. Not all the amounts are included in the order of my brother Bertelsmann referred to above but it is common cause that respondent is paying these amounts.

[28] I have considered the submissions on behalf of the respondent and I accept that her circumstances have changed. In my view however her condition has changed for the better. Whereas she had lived by herself in the erstwhile common home, she was later joined by her son K. She formed a relationship with another man with passage of time the relationship became more intimate and in March 2011 they moved into Mr Pringle's home and bedroom and they cohabit as man and wife.

[29] It is trite that the reciprocal duty of support existing between spouses, of which the provision of maintenance is an integral part, which terminates upon divorce. Taking into account the financial support that applicant is currently contributing for the support of the respondent and their son, I do not consider that respondent has demonstrated a need for a further maintenance order.

Contribution towards costs

[30] Respondent has also filed a substantial application for a contribution towards her legal costs.

In the matter of Cary v Cary 199(3) SA 615(C) it was held that:

'The claim for contribution towards costs in a matrimonial suit was sui generis. The basis of such claim was the duty of support which the spouses owed to each other In assessing the quantum of the contribution to enable the party seeking the contribution to present her case adequately before the court, the court had to have regard to the circumstances of the

case, the financial position of the parties and the particular issues involved in the pending litigation. The question of essential disbursements was a material factor to be considered, as was the scale on which the party from whom the contribution was required was litigating. In exercising its discretion in the determination of the quantum towards costs to be awarded, the court was bound by Section 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 to guarantee both parties the right to equality before the law and equal protection of law. This has to be interpreted in context to mean that the applicant was entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against the respondent. The applicant would not be able to present her case fairly unless she was empowered to investigate the respondent's financial affairs through forensic accountant appointed by her. "

[31] What is clear from the facts of this case thus far is that the main disputes will revolve around the issue of accrual and the nature and value of the applicant's assets and whether or not he has made a proper disclosure thereof. It is quite clear that considering the value of applicant's farm and his shares in Motrade 252(Pty) Ltd to mention just a few, the applicant is the owner of substantial assets.

The applicant is litigating on a considerably higher scale which can be judged from his employment of senior counsel who was briefed in this Rule 43(6) application.

[32] Upon weighing these facts it becomes clear that the respondent is entitled to a contribution towards her costs which would ensure equality of arms in the divorce action against the applicant.

[33] Counsel for the applicant has handed two draft orders marked "A" and "B". In draft "A" applicant would support respondent as ordered by Justice Bertelsmann without paying for

her personal maintenance. In draft "B" he would similarly contribute to her support but also contribute the sum of R7840.07 to respondent's personal maintenance.

This tender is made by applicant despite his initial stance of seeking to wholly withdraw his personal maintenance for her because of her involvement with another man.

Further, applicant offers (in the draft) to continue paying maintenance for the child K as he had been doing without a court order for him to do so.

[34] The responsible attitude conveyed through the medium of these draft orders by applicant is commendable in that he recognises that they need not to bring in the emotional issues between himself and respondent to cloud his responsibilities towards his spouse and their child K.

[35] Consequently in formulating the order in the current application I am going to factor in all these considerations.

[36] There are two matters which have been raised by the applicant which I need no comment on. The first one is the fact that that the son, K, has reached the age of majority which puts a question mark on the respondent's locus standi in applying for maintenance on his behalf. As matters stand, I do not have to address the matter as applicant offers through his draft order to continue paying maintenance for him.

The second matter is the issue of respondent's mother occupying the matrimonial home without paying rent and without his consent as joint owner of the property. I am not called upon to resolve such matters in a Rule 43 application. It is open to both parties to resolve the matter by either getting her to pay rent or vacate the premises. An arrangement can be made inter partes or through the courts. I say no more about the matter.

[37] In the result, it is ordered :

37.1. That the applicant in so far as he seeks to revoke payment of maintenance in terms of Rule 43(6) is dismissed.

37.2. That the applicant complies with the settlement agreement reached in terms of the Rule 43 application and that he makes payments in terms of this agreement which contains the following terms:

37.3. That the applicant pays the respondent the amount of R15,000.00 per month pendente lite, 7 September 2010.

37.4. That the applicant pays the bond payments in respect of the immovable property described as Les Chenils, no 54, Summer Way Street, Lakefield, Benoni.

37.5. That the applicant pays the instalment in respect of the 2010 model Toyota RAV 4 motor vehicle with registration number: MABEAR GP which the respondent has in her possession as well as the insurance premiums in respect thereof.

37.6. That the applicant pays the respondent's insurance on a monthly basis.

37.7. That the applicant continues paying the respondent's medical aid premiums on a monthly basis.

37.8. That the applicant contributes to the maintenance of the major child K as follows:

37.8.1. By the payment of R3,000.00 per month payable on or before the 7th day of each month;

37.8.2. By paying one half of the school fees pertaining to K's school attendance;

37.8.3. By retaining K on the applicant's medical aid scheme and paying all medical expenses reasonably incurred for and on behalf of K;

37.9. That the respondent's counter application in so far as it relates to an increase of her maintenance and that of the parties's son K is dismissed.

37.10. That the applicant is ordered to make a contribution towards the respondent's legal

costs in the amount of R100,000.00 which should be paid in monthly instalments of R20,000.00 per month, the first payment to be made on/before the first day of the month succeeding the order, and on/before the first day of every month thereafter until the amount is fully paid;

37.11. That the costs of this application and counterclaim be costs in the cause.

It is so ordered.

BAQWA ,

(JUDGE OF THE HIGH COURT)

Counsel for the applicant: Adv D.A Smith SC

Instructed by: Venn & Muller Attorneys

Counsel for the respondent: Adv I Vermaak-Hay

Instructed by: Arthur Channon Attorneys