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**HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No.: 27077/2021

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~

(3) REVISED YES

DATE: 24/05/24

SIGNATUR

In the application between:

J[...] A[...] N[...]

APPLICANT

And

L[...] K[...]

N[...]

(NEE B[...])

FIRST RESPONDENT

SHERIFF OF THE COURT

PRETORIA SOUTH EAST

SECOND RESPONDENT

JUDGMENT

BAQWA J:

Introduction

[1] This is an application in terms of Rule 43(6) of the Uniform Rule of Court in terms of which the applicant seeks an order in terms of which paragraph 1 of the order of Madam Justice Janse Van Nieuwenhuizen dated 10 May 2022 under case number 27077/2021 varying paragraph 3 of the order of Acting Justice Holland-Muter dated 15 November 2021 under case number 27077/2021 is varied in terms of Rule 43(6) to read:

“3. The Respondent to make the following contributions;

3.1 Payment of school fees per month for two minor children at R6500.00 per child;

3.2 Food and groceries of R6000.00 per month

3.3 Mobile airtime for the children R2000.00 per month

3.4 No contribution for accommodation towards the 1st Respondent

3.5 Contribution for accommodation for the children at R4000.00 per month

3.6 Clothes R2000.00 per month per child

3.7 Entertainment for the children at R2000.00 per month

3.8 Medical Aid for the children R2600.00 per month

3.9 School textbooks, stationary, data and others R6000.00 per month.”

[2] The applicant sought that the above be complied with from the first day of the month following the date of the pronouncement of the order and therefore on the first day of each subsequent month until finalization of the divorce;

[3] He further sought an order that the execution of the warrant of execution issued by the first respondent pursuant to the variation order granted on 10 May 2022,

if any, be stayed pending the hearing of this application; alternatively, that the first and second respondent be interdicted from executing the warrant of execution, if any, on the strength of the variation order of 10 May 2002 pending the hearing of this application with costs.

- [4] The first Respondent opposes the application on the basis that no material change in the applicant's circumstances exists.
- [5] This application constitutes the third iteration of an application in terms of Rule 43 between the parties herein. For that reason, I have deemed it necessary to set out the two previous orders of this court in full in order to properly contextualise the matter.

The Holland-Muter Order (dated 2021-11-16)

- [6] *"Having heard the parties it is ordered that;*

- 1. The applicant and Respondent shall retain parental responsibility and rights in respect of the two minor children born of the marriage between the parties as provide (sic) for in terms of section 18, 19 and 20 of the Children's Act 38 of 2005.*
- 2. Care and primary residence of the two minor children born of the marriage between the parties is awarded to the applicant.*
- 3. The Respondent to make following contributions;*
 - 3.1 Payment of the school fees per month for children R10 000.00 per child.*
 - 3.2 Payment of transportation for the two minor children R800.00 per month*
 - 3.3 Food and groceries at R 15 000.00*

3.4 Mobile airtime for the kid's R 2000.00

3.5 Bond for the house R14 000.00

3.6 Electricity and water bill R 5000.00

3.7 Rates and levies at R3000.00

3.8 Clothes R2000.00 per month per child

3.9 Entertainment for the children at R2000.00 per month

3.10 Medical aid for the children and the respondent R14 000.00

3.11 School textbooks, stationery, data and others R 10 000.00

3.12 A total of R 85 500.00 (Eighty-five thousand five hundred)."

4. The Respondent to make a R40 000.00 (Forty Thousand rands) contribution of the legal fees of Applicant in the main proceeding, in four instalments of R10 000.00 rand each.

5. Costs of this application to be costs in the course (sic).

[7] The Janse Van Niewenhuizen order (Dated 2022-05-10)

"ORDER

After reading the papers filed of record, having heard counsel and considered the matter, the following order is made;

Paragraph 3 of the order of Acting Justice Holland-Muter dated 15 November 2021 under case number 27077/21 is varied in terms of Rule 43 (6) to read as follows;

“3 The Respondent to make the following contributions;

3.1 Payment of school fees per month for two minor children at R10 500.00 per child.

3.2 Payment for transportation for the two minor children at R 8 000.00 per month

3.3 Food and groceries at R 15 000.00 per month

3.4 Mobile airtime for the kid R2000.00 per month

3.5 Contribution for accommodation at R 20 000.00 per month

3.6 Clothes R2000.00 per month per child

3.7 Entertainment for children of R 2000.00 per month

3.8 Medical aid for the children and the Respondent R14 000.00 per month

3.9 School textbooks, stationery, data and others at R 10 000.00 per month “

2. “The above to be complied with from 30 May 2023 and on the first day of each subsequent month until finalisation of the divorce.

3. Costs are costs in the cause. “

The facts

[8] The divorce action between the parties was instituted in May 2021 by the first respondent against the applicant.

[9] During August 2021 the first respondent launched the Rule 43 application which resulted in the order quoted in paragraph 6 above.

[10] The applicant admits in the founding affidavit that the Holland-Muter order was consented to and agreed to having regard to the financial standing of the first respondent. He also admits to the variation order by Madam Justice Janse Van Nieuwenhuizen having been made by agreement between the parties.

[11] The current application was triggered by the failure of the applicant to comply with the Holland-Muter order in terms of which he had failed to pay the sum of R20 000.00 per month as a contribution to first respondent's accommodation for a period of about 15 months during which the debt had accumulated to a sum of R300 000.00.

[12] The first respondent instructed her attorneys to issue a writ of execution against the applicant for failure to comply with the said order.

[13] The applicant has sought to utilise this application as basis to seek an order interdicting the second respondent from executing the warrant of execution against him and simultaneously a further order varying the Janse Van Nieuwenhuizen order on the basis that circumstances between him, and the first respondent have changed.

Counter – Application

[14] The first respondent has not only opposed this application but has simultaneously filed a counter-application in which she seeks an order in the following terms "That the initial Rule 43 and the amended order dated 10 May 2022 as handed down by the Honourable Madam Justice Janse Van Nieuwenhuizen be varied as follows;

1.1 Prayer 3 to read;

"3 The Respondent to make to make the following contribution to applicant;

- 3.1 Payment of school fees per month for the two minor children at R 10 500.00 per month per child, payable directly to the school.*
- 3.2 Food and groceries and toiletries at R20 000.00 per month payable to the applicant.*
- 3.3 Mobile airtime for the children in the amount of R2000.00 per month payable to the applicant.*
- 3.4 Contribution for accommodation and electricity at R35 000.00 per month*
- 3.5 Clothes for the children in the amount of R2000.00 per month per child which amount must be paid to the applicant.*
- 3.6 Entertainment for the children in the amount of R2000.00 per month per child directly payable to the applicant.*
- 3.7 An amount of R 10 000.00 per month to the applicant in respect of her medical aid fund.*
- 3.8 The Respondent is ordered to retain the minor children and the applicant as beneficiaries on his comprehensive medical aid and is liable to pay the monthly premium thereof. The Respondent shall upon request from the applicant, furnish the applicant with a medical aid card for the minor children and herself.*
- 3.9 The respondent is ordered to pay all medical and dental expenses incurred and reasonably necessary for and connection with the minor children which are not paid by the medical aid fund referred to above, provided that the party who incurred these costs did so subject to the prior consent of the other party, reduced in writing, which consent shall not unreasonably be withheld or delayed. Without limiting the generality of the foregoing, such expenses shall include prescribed*

pharmaceutical, ophthalmic, orthodontic, surgical, hospitalisation, medical dental and related expenses.

3.10 School textbooks, stationary, school, clothes and other expenses in the amount of R15 000.00 per month.

3.11 Spousal maintenance in the amount of R43 000.00. (A total amount of R133 000.00 is payable to the applicant each month).

- 2. The applicant is ordered to provide the respondent with a five door, automatic transmission motor vehicle valued in the amount of no less than R600 000.00 which vehicle shall be roadworthy, in good condition fall under a motor plan and be fully insured by the applicant.*
- 3. That the applicant be ordered to make the children's bedroom furniture available to the respondent within 7 days from demand being made by the respondent. The applicant must cause the furniture to be delivered to the respondent.*
- 4. That the applicant be ordered to make a further contribution to the respondent's legal costs in the amount of R1 000 000.00 which amount should be paid into the trust account of the attorneys within 40 days of this order.*
- 5. That the above order be complied with from the first day of the month after date of granting of the Rule 43(6) order and on or before the first day of each subsequent month.*
- 6. Costs in the cause.*
- 7. Further and/or alternative relief."*

[15] In *Micklem v Micklem*¹ it was held as follows;

“Rule 43 does not provide for a rehearing of a former application, based on new evidence.”² The court is not to be faced with virtually a review of a previous decision, based on the existing facts, but now having been given time to deal with the matter in more detail, having being able to utilise more information, another slant being given to these very same facts, or one or two additional facts might be discovered which puts a different complexion on matters. After all, this is merely to assist parties in resolving their differences and if one makes of Rule 43 procedure, a procedure whereby acrimony is engendered and further issues are brought forward, which only complicates the divorce instead of simplifying it, Rule 43 misses its point. In my view 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.”

[16] In this application the applicant tries to avoid his maintenance obligation as ordered by this court in the orders referred to above. After an application for contempt of court filed by the first respondent, the latter issued a warrant of execution against the applicant.

[17] In prayer 3 and 4 of this application the applicant seeks a stay of execution and an interdict against the warrant. Not only does Rule 43(6) not make provisions for the relief sought, this amounts to an abuse of the Rule 43 process.

[18] To confirm the frivolousness of the applicant's action, he agreed to pay the amount he was owing and that was confirmed in a court order dated 30 November 2023. The remarks by the court in *AP v TP*³ are particularly fitting to the circumstances of this case where it was said;

¹ 1988(3) SA 259(c) at 262E-G.

² *Grauman v Grauman* 1984(3) SA 477 (w) at 4791 – 480c.

³ 2018 JDR 0349 (GP).

“[18] Therefore, I find that the applicant has failed to establish that there has been material change in circumstances warranting interference with the Rule 43 order. In my view, the application was clearly ill-conceived and constitutes abuse of the process of this court, is manifested by the timing thereof, as well as material contained in the application. As stated above, the applicant deposed to founding affidavit on the 28th September 2017, about a month and a half after the Rule 43 order was granted. This type of conduct is not what is contemplated by the court. It is prejudicial to the respondent.....

It unnecessarily clogs the court rolls and dispensing of justice. Therefore, for the reasons stated above the applicant will be ordered to pay the respondents costs of application on a scale of attorney and client.”

[19] The first respondent requests that the application be dismissed with costs on an attorney and client scale and in the same breath launches as alluded to above, a counter-application regarding her entitlement to maintenance.

[20] What the first respondent does is merely to compound issues and to ride on the back of an irregular application in the hope that another judge on the same facts will have a different view whilst already in possession of order by two judges in terms of Rule 43. What she seeks to do is reminiscent of a review or an appeal where neither is allowed.

[21] A perusal of both the founding affidavit in this application and the counter-application shows that the parties traverse the same issues dealt with by this court in the two orders referred above, namely, school fees, school text-books, stationary, transport for children, mobile airtime, electricity and water, rates and levies, clothes, entertainment for children, medical aid, maintenance and contribution towards costs.

[22] The acrimony is noticeably rising with the applicant declaring in his answering affidavit to the counter-application that “I simply cannot afford the lavish lifestyle of the respondent.”

[23] Equally, the demands, compared to the claims in the previous applications are rising.

[24] In the Holland-Muter order, the applicant was ordered to make a R40 000.00 (Forty Thousand) contribution to the legal fees of the first respondent in the divorce proceedings.

[25] In the counter-application the first respondent, even before the divorce proceedings commence, seeks an order for a further contribution to her legal costs in the amount of R1000 000.00 (one million rands) coupled with, inter alia, the provision by the applicant to the first respondent of a five-door automatic transmission motor vehicle valued in the amount of no less than R600 000.00 (six hundred thousand rands) which vehicle shall be roadworthy, in good condition, fall under a motor plan and be fully insured by the applicant.

[26] Instead of contesting and litigating about the assets in the estate in the divorce proceedings the parties are seemingly wanting to make the Rule 43 procedure the arena in which the divorce court issues are contested. This cannot be allowed. This constitutes an unacceptable abuse of court process.

[27] As stated in *AP v TP* quoted in paragraph 18 above this type of conduct is not what is contemplated by the rule and will not be countenanced by the court. It is prejudicial to the parties, and it unnecessarily clogs the court rolls and the dispensing of justice.

[28] What is needed is for the parties to get on with the divorce matter and resolve their issues once and for all. The circumlocutious behaviour involving unnecessary and repetitively expensive court procedures must be put to an end.

Costs

[29] In my view, none of the parties are deserving a costs order. The applicant brought the application for the wrong reasons and the first respondent,

opportunistically sought to exploit the situation by riding on the process mischievously set forth by the applicant.

Order

[30] For reasons set out above, I make the following order

30.1 The application by the applicant is dismissed.

30.2 The counter-application by the first respondents is dismissed.

28.3 Each party is ordered to pay its own costs.

SELBY BAQWA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing: 29 February 2024

Judgment delivered:

APPEARANCES:

Counsel for the Applicant

Adv M Snyman SC

Attorneys for Applicant

Couzyn Hertzog Horak
Attorneys

Counsel for Respondent

Adv K Fitzroy

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