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

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Case no: **1228/2024**

In the matter between:

S[...] **K[...]**

Applicant

And

E[...] **B[...]** **K[...]**

Respondent

CORAM:

JP DAFFUE J

HEARD ON:

16 MAY 2024

DELIVERED ON:

24 MAY 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 09h00 on 24 May 2024.

Introduction

[1] On 16 May 2024 I heard oral argument in rule 43(6) proceedings launched by Ms S[...]

hereinafter as the applicant and respondent respectively. Adv S Grobler SC appeared for the applicant and Adv PJJ Zietsman SC for the respondent. Mr Zietsman filed heads of argument, but Mr Grobler decided not to do so. Instead, he presented me from the bar with applicant's bundle of authorities consisting of 271 pages. Yet, he never referred to anyone of the authorities during his oral argument. In all fairness to him, I came across the well-written and persuasive judgment of Victor J to which I shall refer later herein.

[2] On 12 October 2023 Baloyi-Mere AJ granted orders in terms of rule 43 (the rule 43 order). I do not intend to quote the orders, but shall deal with alleged material changes since then.

Relief sought in terms of rule 43(6)

The applicant seeks the following relief in the present application:

- a. she and her daughter, R[...], be afforded alternative accommodation in Bloemfontein on the basis that the respondent shall pay an amount of R 28 000 per month;
- b. she be entitled to remove certain household items from the farm and that respondent be ordered to pay relocation costs in the amount of R70 200;
- c. the respondent be ordered to provide her with a BMW X5 or similar motor vehicle;
- d. the respondent be ordered to increase R[...]'s maintenance to R 20 000 per month and ordered to pay several other expenses relating to R[...];
- e. Adv Rudie Cronje be appointed as parenting coordinator;
- f. the respondent be ordered to make a further contribution towards the legal costs in the amount of RS00 000;
- g. the respondent be ordered to pay the costs of the application.

Rule 43(6) and relevant authorities

[3] The purpose of rule 43(1) is to obtain maintenance *pendente lite*, a contribution towards the costs of the divorce action, interim care of any child and interim contact with any child. It is trite that these kind of applications should be dealt with as inexpensively and expeditiously as possible. Therefore, prolixity and unnecessary proliferation of papers and affidavits should be avoided.¹ The rule 43(1) application consisted of 180 pages and the present application of 125 pages.

[4] Rule 43(6) reads as follows:

'The court may, on the same procedure, 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.' (emphasis added)

[5] I emphasise that 'material change' relates to the circumstances of either party, or a child. It does not apply to a possible further contribution towards costs as it may turn out at a later stage during divorce proceedings that the contribution granted earlier proved to be inadequate. Mr Zietsman relied on *Grauman v Grauman*,² in submitting that the applicant had failed to prove a material change in circumstances, but this judgment does not support his case. The learned judge merely pointed out that rule 43(6) should be strictly interpreted in respect of whether or not a material change has taken place in the circumstances of either party, or child. Having said this, this court does not sit as a court of appeal or review, giving it authority to interfere with the rule 43 order granted herein on 12 October 2023.

The appointment of a parenting coordinator

[6] This relief sought by the applicant is not the result of a material change in circumstances. The parties have been fighting like cat and dog before the rule 43

¹ *Henning v Henning* 1975 (2) SA 787 (O) at 789 E, *Andrade v Andrade* 1982 (4) SA 854 (O) at 855 F and *Grauman v Grauman* 1984 (3) SA 477 (W) at 478 I to 479 A and several other authorities.

² *Loe cit* at 479 H to 480 D

proceedings in 2023. The applicant pointed out that a plethora of correspondence has been sent by her attorneys to the respondent's attorneys pertaining to practical arrangements and issues concerning the rule 43 order.³ In order to prevent further unnecessary costs as a result of the parties' inability to communicate properly with each other, and bearing in mind the consequent financial liabilities, she requested that Adv Cronje, an accredited mediator and parenting coordinator (PC), be appointed as PC in the interim. Adv Cronje is willing to accept the appointment. The matters to which Adv Cronje must attend, if appointed, have been set out in paragraph 1.5 of the notice of motion and cover five typed pages.

[7] I accept that section 6(4)(a) of the Children's Act 38 of 2005 stipulates that .in any matter concerning a child an approach conducive to conciliation and problem-solving should be followed and a confrontational approach be avoided. Section 28(2) of the Constitution stipulates that a child's best interests are of paramount importance in every matter concerning the child. In *P.S.D v C.G.V and Others*⁴ I considered the practice that had evolved in the Western Cape in terms whereof parenting coordinators are appointed as part of parenting plans incorporated in deeds of settlement entered into between divorcing parents. I agreed in principle with the dicta in *TC v SC*.⁵ Parenting coordination by making use of a PC to assist 'high-conflict parents' in implementing their parental plans is a worthwhile exercise. The most important limitation on the appointment of a PC is that the parties must already have reached an agreement on a parenting plan and the PC's role should be limited to the implementation of an existing court order. I agree with the learned judge in *TC v SC*⁶ that the appointment of a PC should be done with the consent of both parents. Parenting coordination is still a new alternative dispute resolution process and courts should recognise that the process cannot be forced upon a non-consenting parent.

[8] There is no approved parental plan adopted by the parties *in casu*. The respondent is vehemently against the appointment of a PC at this stage of the proceedings.⁷ I also pointed out during argument that it would be premature to appoint

³ Founding affidavit, para 12, p 31 & 32.

⁴ (4120/2020) [2021] ZAFSHC 175 (19 August 2021) paras 12 & 13.

⁵ 2018 (4) SA 530 (WCC) paras 50, 66, 67, 69 & 71.

⁶ *Ibid* para 71.

⁷ Answering affidavit, paras 31 & 32, pp 91 & 92.

a PC at this stage without a report from the Family Advocate. I indicated that Hefer AJ had already directed in October 2023 that such a report shall be obtained and notwithstanding a period of seven months, it had not been forthcoming. I accept that Adv Cronje is an experienced mediator and PC, but in the absence of an approved parental plan he will face exactly the same problems than the parties' attorneys. There will not be a decrease in costs and Adv Cronje will be confronted with numerous aspects on a regular basis by either the one, or the other, or both parties. The parties are involved in an acrimonious divorce action which not only involve the children, but financial issues. Consequently, I made it clear to the parties that I was not prepared to appoint a PC in the present circumstances. The report of the Family Advocate should be awaited. It is in any event high time that the parties sit back and consider what they are doing to themselves and their children. A bleak future awaits the children if the acrimony cannot be terminated soon.

[9] It would be open to anyone of the parties to apply afresh in terms of rule 43(6) for any variation if it appears from the Family Advocate's report to be justified. It may just be possible for the Family Advocate to convince the parties to work together and adopt a parental plan which would be in the best interests of the children.

Material change in circumstances

[10] During the rule 43 proceedings the applicant made it clear that she wanted to stay on the farm. The respondent insisted that she relocates and even offered to pay relocation costs in the amount of R 75 000. The court did not accept the respondent's offer and orders were made on the assumption that the applicant and R[...] would stay on the farm *pendente lite*. Obviously, their stay would include all amenities incidental and associated with their stay as was the case earlier, including free access to water and electricity.

[11] I am satisfied that there was a material change in circumstances since the rule 43 order. The most important change is the respondent's attitude pertaining to electricity supply. He decided unilaterally to disconnect the electricity supply to the farm house and to install a prepaid electricity meter. As a result, the applicant, who had the use of electricity all the time without paying therefore, had to start paying for

electricity.

[12] This attitude of the respondent is regrettable. I have had occasion to deal with the restoration of electricity supply in *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*.⁸ I concluded in that judgment with reference to *Eskom Holdings SOC Ltd v Masinda (Masinda)*,⁹ *Impala Water Users Association v Lourens NO and Others (Impala)*¹⁰ and *Makeshift 1190 (Pty) Ltd v Cilliers*¹¹ that the consumers' rights to the supply of electricity in that case were incidental and so closely connected to their rights to occupation of the particular business premises that these could be considered as the subjects of *quasi-possessio*.¹² Therefore, spoliation of such *quasi-possessio* were acts of spoliation in relation to the respective premises. The same principle applies *in casu*. Obviously, the respondent cannot be equated to a municipality, but he unlawfully dispossessed the applicant and R[...] from their peaceful *quasi-possessio* of electricity. He resorted to self-help and the applicant could have approached the court in relying on the mandament van spolie.

[13] The parties also had access to a generator to provide power in the case of electricity cuts during lockdown or otherwise. The mere fact that the respondent refuses to repair the generator and allow undisturbed electricity supply at his costs is no doubt a material change in the circumstances. During argument Adv Zietsman obtained instructions whereupon he informed me from the bar that the respondent would be willing to pay for the supply for electricity notwithstanding the installation of the prepaid meter. In my view he should also repair the generator and such order will be made.

[14] I am prepared to accept that R[...]’s medical condition deteriorated after the rule 43 proceedings. Insofar as the respondent does not want to admit this, he is entitled to obtain a second opinion from a psychiatrist, or like expert. It is not for him as lay person to make the call. In order to provide for excess payments, bearing in

⁸ (567/2022) [2022] ZAFSHC 151 (14 June 2022).

⁹ 2019 (5) SA 386 (SCA).

¹⁰ 2008 (2) SA 495 (SCA).

¹¹ 2020 (5) SA 538 (WCC).

¹² *Masinda loc cit* para 16; *Impala loc cit* paras 18 - 21; and see also *Firststrand Ltd t/a Rand Merchant Bank v Scholtz NO and others* 2008 (2) SA 503 (SCA) paras 12 & 13.

mind that medical experts often charge fees in excess of the rates allowed by medical funds, the applicant has made out a case for an increase in respect of R[...]’s maintenance. The respondent pays maintenance in respect of R[...] in the amount of R7 000 per month in terms of the existing order. I noted that R[...] does not take dance classes anymore which brought about a saving, but that she wants to take up horse riding and compete in competitions. Extra costs will be incurred in this regard. The respondent is liable for payment of the fair and reasonable extramural costs of the children. The payment for the extra activities should be left to the respondent to consider what is fair and reasonable in this circumstances. The expenses claimed in annexure F to the founding affidavit in the amount of R 29 951 per month is exorbitant. R[...] has also changed schools which causes the applicant to travel a further distance per day. Bearing in mind the material change in R[...]’s circumstances, I am satisfied that her maintenance should be increased to R 10 000 per month.

[15] The applicant advanced reasons why she wants to relocate from the farm to Bloemfontein. These are not sufficient to be regarded as a material change in circumstances. She elected to stay on the farm a few months ago and her change of heart should not be adhered to. She has not convinced me. This is in any event temporary and *pendente lite*. There is no reason why the divorce proceedings cannot be set down for hearing during the fourth term of 2024, or the first term of 2025. I have considered the pleadings in the divorce matter, case no 4699/2023, and also put my views forward to counsel during oral argument. Both parties are apparently kicking for touch all the time, keeping themselves busy with skirmishes relating to the well-being of the children, instead of considering to finalise the divorce. The pleadings closed in November 2023. Contrary to the provisions of rule 36(9), both parties failed to file notices of expert evidence to be led, as well as the summaries of their experts. In this regard, I do not necessarily consider expert reports pertaining to the well-being of the children as the Family Advocate’s report will probably deal with this aspect. I have in mind the asset value of both estates.

Further contribution towards costs

[16] The right to access in terms of section 34 of the Constitution is one of the

central issues to be considered in rule 43 applications. Victor J dealt with contribution to legal costs in *H v H*.¹³ I agree whole-heartedly with her sentiments insofar as it is still evident that gender-based inequalities characterise rule 43 applications. It is the more financially vulnerable spouses, usually the wives, who are unable to meet the costs of litigation and to effectively place their cases before a court of law. There should be 'equality of arms' in order to ensure that the right to equality in section 9 of the Constitution is achieved. Constitutional imperatives apply nowadays, but the principle has been established decades ago in *Van Rippen v Van Rippen*¹⁴ where the court stated that, having regard to the circumstances of the case and the financial position of the parties, 'the wife must be enabled to present her case adequately before the court.'¹⁵ Nowadays the roles have changed in some cases insofar as some wives are wealthy and professional people, whilst their husbands are relatively poor, but the principle remains the same: there must be 'equality of arms'.

[17] It is evident that the respondent is a wealthy man. The applicant *inter alia* claims an order in terms of section 7(3) of the Divorce Act 70 of 1979 in terms whereof 50% of the respondent's nett assets be transferred to her, either in cash, or in equivalent value by means of transfer of movable and/or immovable assets. Although the parties were married out of community of property with the exclusion of the accrual system long after the promulgation of the Matrimonial Property Act 88 of 1984, the Constitutional Court has recently held¹⁶ that persons in the position of the applicant have a right to claim in accordance with the aforesaid sub-section as if they were married out of community of property before the promulgation of the Matrimonial Property Act.

[18] Both counsel indicated that there was just no possibility of a settlement between the parties and that mediation was not even considered. When the initial rule 43 proceedings were conducted, the respondent filed financial records of his close corporation for the financial year as at the end of February 2023. Obviously, a

¹³ (44450/22) [2022] ZAGPJHC 904; [2023] 1 All SA 413 (GJ); 2023 (6) SA 279 (GJ) (30 September 2022) para 70 and further.

¹⁴ 1949 (4) SA 634 (C).

¹⁵ *Ibid* 639.

¹⁶ *EB v ER NO and others* and a similar matter 2024 (2) SA 1 (CC).

new financial year has now come and gone, the effect being that the financial statements presented to the court previously are now outdated. The applicant would be fully entitled to appoint an auditor or forensic analyst to do a proper investigation to establish the respondent's net worth. Further costs will be incurred as her counsel and attorney would obviously have to be involved in the investigation as well.

[19] A contribution towards the applicant's costs was awarded in the amount of R 100 000 in the rule 43 order. Although the applicant indicated that this contribution has been used to a large extent to settle the acrimonious correspondence and communication between the parties, I am satisfied that the applicant is entitled to a further contribution. The respondent has now made it clear in no uncertain terms in his answering affidavit that the applicant is not lawfully entitled to claim anything from his estate due to the marriage out of community of property with the exclusion of the accrual system.¹⁷ Consequently, much more litigation will probably follow. The respondent is also of the view that he has made a full and frank disclosure of the close corporation's financial position and that there is no basis for any investigation into its affairs.¹⁸ I do not agree. I indicated earlier that the financial statements are outdated. No financial statements have been presented to the court in the present proceedings. It is not my intention to deal with any of the financial statements attached to the answering affidavit in the previous rule 43 proceedings and this should be left for a forensic analyst. Fact of the matter is that it is apparent that much has changed from February 2023 to date hereof pertaining to the housing complex development in Bloemfontein. Also, a forensic analyst will be able to establish whether or not the immovable and movable properties referred to in the financial statements are valued at fair value.

[20] According to the close corporation's draft financial statements, it sustained a loss of about R1.5 million for the financial year ending 28 February 2023. It is evident that the close corporation has already sold several housing units built in Woodlands and that the remaining few would probably be sold and transferred to purchasers in due course. These are all aspects to be properly considered by the applicant's experts.

¹⁷ Answering affidavit para 158, p 83.

¹⁸ Answering affidavit para 159, p 83.

[21] Both parties make use of senior counsel and there is no reason why the applicant should not be allowed to participate in the litigation on the same footing as the respondent.

Costs of this application

[22] It is customary to order the costs of a rule 43 application to be costs in the main action. Adv Zietsman submitted that the applicant's application was an abuse of court process and should be dismissed with costs on the scale as between attorney and client. I do not agree. I indicated herein that the respondent must also be blamed for the conflict that has arisen after the rule 43 order. He not only disconnected the electricity and inserted a prepaid meter, but without obtaining a second opinion from a medical expert, decided on his own that his daughter did not require the prescribed treatment. In the exercise of my discretion I shall order that the costs of the application be costs in the main action.

Order

[23] The following orders are made:

1. The rule 43 order of 13 October 2023 issued under case no 4228/2023 is amended in accordance with the provisions of rule 43(6) to substitute the amount of R 7 000 in paragraph 8 with the amount of R 10 000. In addition:
2. The respondent shall forthwith repair the generator on the farm in order to be used by the applicant as and when required.
3. The respondent shall forthwith ensure that the prepaid electricity meter installed by him on the farm be provided with sufficient credits to enable the applicant and R[...] to enjoy constant electricity supply when required, save in such cases when electricity is not available as a result of official load-shedding.
4. The respondent shall make a further contribution of R 100 000 towards

the applicant's legal costs, such costs to be paid in four instalments of R 25 000 each, the first instalment to be made on/or before 7 June 2024 and further instalments before the 7th of each and every successive month.

5. The costs of this application shall be costs in the divorce action.

JP DAFFUE J

On behalf of the Applicant: Adv S Grobler SC
Instructed by: Phatshoane Henney Attorneys
BLOEMFONTEIN

On behalf of the Respondent: Adv PJJ Zietsman SC
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