

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 18688/2022

In the matter between:

CVS **Applicant**

And

SV **Respondent**

Heard: 11 October 2024

Delivered: Electronically on 25 October 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application in terms of Rule 43(6) of the Uniform Rules for the variation of an interim maintenance order granted by this court on 15 June 2023. In terms of that order, the applicant was ordered, to enter into a lease agreement for alternative accommodation chosen by the respondent and to pay the required monthly rental directly to the landlord in terms of the lease agreement and thereafter to pay R42 000 into the respondents nominated bank account on the first day of each succeeding month commencing on 01 July 2023.

[2] The applicant now seeks an order varying that order to the effect that he should now contribute maintenance for the respondent and the minor children *pendente lite* by paying R24,000 directly to the landlord in respect of monthly rental for the lease of the respondent's premises until the expiration of the lease agreement on 30 November 2024. The applicant further seeks an order that after the expiration of the lease agreement and as of 01 December 2024, he should pay the respondent an amount of R20,000 per month into the respondent's bank account on or before the first day of every successive month.

[3] Simply put, the applicant seeks an order that his maintenance obligation towards the respondent and the minor children be reduced from R42,000 per month to R20,000 per month as from 01 December 2024. In addition, the applicant seeks an order for the parties to exercise shared residency concerning their two minor children.

Background Facts

[4] The applicant and the respondent were married to each other on 3 January 2009 at Stellenbosch out of community of property without the application of the accrual system. They have two minor children, who are 10 and 12 years old, respectively. The applicant works as an entrepreneur and the respondent is currently unemployed. The divorce proceedings between the parties are pending in this court. In early November 2022, the respondent applied for urgent relief in terms of Rule 43(1). The Rule 43 application was heard before the parties' common home was sold and while they still lived together with their two minor children.

[5] Having considered the matter, Erasmus J made an order that pending the sale and registration of transfer of the applicant's immovable property situated at Val de Vie Estate, Paarl, into the name of the purchaser, the applicant must pay interim maintenance for the respondent and their two minor children in the sum of R18 000 per month as well as an initial contribution towards the respondent's legal costs in the sum of R40 000. In terms of that order, the parties were granted leave to set the matter down on an urgent basis one week prior to the registration of transfer of the

property on duly supplemented papers for the determination of the applicant's *pendente lite* contribution to the applicant and the children in anticipation of the parties moving to their own accommodation.

[6] In response to the sale of the property, the applicant launched a Rule 43(6) application in April 2023, setting out *inter alia* the extent to which the sale of his property would affect him and his family financially. The most obvious change that the applicant alluded to was that his income would have to support two households. According to the applicant, the sale of his Val die Vie property meant that his income would thenceforth support two households, whereas before the sale, the parties shared a home with their children, and he, as the sole breadwinner, supported one household.

[7] In his affidavit in the current application, the applicant stated that he carefully calculated his ability to meet a cash tender for the maintenance of the respondent and the minor children and his ability to pay all their ancillary expenses, such as medical and educational expenses. The applicant also asserted that he calculated his tender after payment of the amounts owed to family members and legal costs. According to the applicant, his investment of the remaining proceeds of the sale would conservatively yield R30,000 per month, which, together with his employment income of R58,000 per month, would provide him with an amount of 88,000 per month, which would enable him to pay the expenses of two households. As a result, the applicant made a cash tender of R42,000 per month plus payment of the ancillary expenses of the respondent and the minor children, such as medical and educational expenses.

[8] The applicant also asserted that he was aware when he made the relevant tender during April 2023 that the business in which he was employed, B[...] M[...] (Pty) Ltd, was being sold and that he would soon be unemployed. On 15 June 2023, Pangarker AJ granted an order in terms of Rule 43(6) in line with the applicant's tender and ordered the applicant to pay interim maintenance in the sum of R42,000 for the respondent and the minor children.

[9] In August 2024, the applicant launched the present application in terms of Rule 43(6), in which he sought the variation of the orders granted by Erasmus J and Pangarker AJ. In terms of the current application, the applicant seeks an order that the cash amount payable by the applicant in respect of the respondent and the children's maintenance and rental shall be reduced from R42,000 per month to R24,000 per month until 13 November 2024 and thereafter as from 1 December 2024, the amount should be further reduced from R24 000 to R20,000 per month.

[10] In terms of the proposed variation, the applicant seeks an order that he shall no longer retain the respondent and the minor children as dependents on his medical aid scheme and gap cover and further that he shall no longer be liable for any medical and related expenses of the applicant and the minor children. The applicant contends that due to a change in his financial circumstances, he can no longer afford to pay interim maintenance of R42 000 to the respondent as ordered by Pangarker AJ during June 2023, which order was following his tender.

[11] The reasons that underpin the applicant's application are that the business that employed him, B[...] M[...] (Pty) Ltd, was sold in December 2023 and that he has not been earning an income since December 2023. In addition, the applicant contends that the remaining proceeds of the sale of his Val de Vie property were only R418 058, 63 as of 12 August 2024 and that those proceeds will be depleted by December 2024. The applicant seeks a variation of the existing maintenance order to safeguard his capital investment from depletion. He aims to allocate the remaining proceeds from the sale to establish a new business venture.

[12] The respondent opposed the application and contended that the applicant's application is nothing more than a veiled appeal or review of the Rule 43 orders dated 26 January 2023 and 15 June 2023. The respondent also asserted that the respondent's version of his financial position is distorted and arises from a set of circumstances that the applicant himself has engineered. According to the respondent, the applicant can afford the increase in maintenance that she requires from him. The respondent also asserted that the applicant did not play open cards with the court in not disclosing to the court what happened to the proceeds of the sale of B[...] M[...] (Pty) Ltd and the proceeds of the sale of the Val de Vie property.

To this end, the respondent prayed this court to dismiss the applicant's application with costs.

Principal submissions by the parties

[13] At the hearing of this application, Ms Bartman, the applicant's Counsel, submitted that the applicant's financial circumstances have changed, and that the applicant received his last salary in November 2023 when B[...] M[...] (Pty) Ltd was sold. Ms Bartman argued that the applicant does not have enough resources to pay the R42 000 maintenance to the respondent. Ms Bartman conceded that the applicant deposited 1.8 million into the children's investment account. However, Counsel argued that the applicant has effectively maintained his family from the proceeds of this amount. Ms Bartman further contended that the proceeds in respect of the sale of the Val de Vie property have been depleted and that the only amount available is only R418 058.63.

[14] Ms Bartman further submitted that from the proceeds of the sale of the immovable property, the applicant paid R2 million into a bond account of V[...] P[...] (Pty) Ltd, a property holding company of which the applicant is a director. According to Ms Bartman, the applicant will withdraw this amount to invest in a business. Counsel submitted that if the applicant's funds are depleted, the applicant will not be able to pay maintenance, which will not be in the children's best interest. According to Counsel, the applicant must be allowed to invest in a business so that he can be able to pay maintenance for his children and the respondent. To this end, Ms Bartman implored the court to grant the variation relief that the applicant sought in the notice of motion.

[15] On the other, Mr Cloete SC, the respondent's Counsel, submitted that the sale of B[...] M[...] (Pty) Ltd during December 2023, which allegedly had the effect of the applicant not earning an income from employment since then, hardly qualifies as a material change in the applicant's circumstances which was not foreseen and anticipated by him at the time when he made the maintenance tender during the Rule 43 application in April 2023. Counsel submitted that at the time of making this tender, the applicant knew that the business would be sold, which would leave him

without an income from employment, but nevertheless made a tender which he carefully calculated based on his ability to meet the tender, which was eventually made an order of court.

[16] Mr Cloete submitted that the applicant had failed to provide any information about what steps he had taken since December 2023, when B[...] M[...] (Pty) Ltd was sold to find an alternative source of income. It was Counsel's further submission that the applicant has dishonestly engineered the usage of the proceeds of the sale of the Val de Vie property to portray a significant reduction of the remaining proceeds. According to Mr Cloete, the applicant has R 2 million that he invested in a bond account, which he can use to support his family. Mr Cloete applied that the applicant's application be dismissed with costs as it amounts to an abuse of process.

The Applicable Legal Principles

[17] Rule 43 regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. The object of the Rule generally accepted by the courts is that applications of this kind should be dealt with as inexpensively and expeditiously as possible.¹ Rule 43(6) explicitly states that 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. Rule 43 (6) must be read subject to the provisions of Rule 43(1) dealing with the original Rule 43 application.²

[18] It is trite law that Rule 43(6) provides for variation of a prior Rule 43 order in the event of a "material change" in the circumstances of the parties or a child, and it should strictly be interpreted.³ In other words, Rule 43(6) must be employed only in circumstances set out therein, where there has been a material change in the circumstance of either party or child or where a contribution towards costs proves inadequate.⁴ It cannot be invoked merely because, after the order, fresh facts came

¹ *Colman v Colman* 1967 (1) SA 291 (C); *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W).

² *Andrade v Andrade* 1982 (4) SA 854 (O) at 855E.

³ *Grauman v Grauman* 1984 (3) SA 477 (W) at para 478.

⁴ *Micklem v Micklem* 1988 (3) SA 259 (C) at 262E-G.

to light which cast doubt upon the accuracy or completeness of the information then before the Court.⁵

[19] In an application in terms of Rule 43(6) for a reduction of interim maintenance payable based on a decline in the financial situation of the applicant, a full and frank disclosure regarding all the numerous and varied elements which make up the broad overview of the applicant's financial situation should be made.⁶ To succeed in that endeavour, an applicant must demonstrate not only that a change or even a significant change in circumstances occurred but must place sufficient facts before the court to enable it to determine the materiality of that change in the context of the applicant's broader financial circumstances.

Discussion

[20] In the present matter, the applicant brought this application arguing that there has been a material change in his financial circumstances. As correctly summed up by Mr Cloete, the applicant raised two main reasons for his variation application. *Firstly*, the applicant asserts that the business which employed him at the time he made the R42 000 tender was sold during December 2023 and that accordingly he has not been earning an income from employment since December 2023. *Secondly*, the applicant avers that the remaining proceeds of the Val de Vie property were only R418 058.63 as of 12 August 2024 and that those proceeds will be depleted by December 2024.

[21] I have carefully considered the applicant's stated reasons, and I am of the view that the applicant's reasons for this application do not meet the threshold set out in Rule 43(6). When Pangarker AJ granted the first variation order in June 2023, the applicant carefully calculated his ability to meet the cash tender of R42 000 per month and the ancillary expenses he was paying for the respondent and the minor children. When he made this tender, the applicant knew that the business that employed him would be sold, which would leave him without an income from employment. Nevertheless, he made a well-considered tender based on his ability to

⁵ *Grauman v Grauman* 1984 (3) SA 477 (W) at para 478.

⁶ *CLJ v CLE* (unreported) GJ case number 34267/19 dated 26 April 2023) at para 22.

meet the tender. In other words, the applicant's calculations, which eventually resulted in the tender, considered the impending sale of B[...] M[...] (Pty) Ltd.

[22] The tender was subsequently made an order of court. I must stress the fact that when the applicant made the tender to pay R42 000 per month, the applicant knew and included in his calculations what would happen after the business was sold. In other words, the sale of the business was well considered at the time when the order was granted in June 2023. In my view, Rule 43(6) must never be used as a mechanism to unscramble what was already considered and dealt with during the Rule 43(1) application.

[23] As far as the finances of the applicants are concerned, I must say that the applicant has not been frank, candid, and open with the court. The applicant alleges that after the payment of the capital gain tax, he received R6 984752 from the sale of the Val die Vie immovable property. From this amount, the applicant asserted that he paid various creditors and invested 1.8 million to his children's respective investment accounts held with Absa. The applicant failed to inform the respondent (the mother of his children) about this. Furthermore, this court was informed at the hearing of this matter that only R418 058, 63 is remaining from the said investment. The court was referred to a statement from Absa in support of the applicant's submission.

[24] It is worth noting that the applicant did not provide this court with sufficient evidence as to how the 1.8 million was expended to leave a balance of R418 058. The court was referred to the balance of R418 058 but there were no source documents to indicate how the difference of 1.4 million was spent. The applicant had a duty, in my view, to make a full and candid disclosure of his financial affairs and has lamentably failed to do so.

[25] In this regard, in *Du Preez v Du Preez*,⁷ the court stated that there is a duty on applicants in Rule 43 applications seeking equitable redress to act with utmost good faith (*uberrimae fidei*) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure will mean that he or

⁷ 2009 (5) SA 28 (TPD) at para 16.

she is not before the court with clean hands and, on that ground alone, the court will be justified in refusing relief.

[26] The applicant did not disclose how he spent the 1.8 million that he deposited in his children's investment Account. Ms Bartman contended that the applicant used these funds to maintain his family. There is nothing attached to his affidavit which support this contention. To this end, I agree with the views expressed by Mr Cloete that the applicant has dishonestly engineered the proceeds of the sale of the immovable property to portray a significant reduction of the remaining proceeds. The applicant paid the 1.8 million into the investment account of the children to portray a significant reduction of the remaining proceeds.

[27] What I find highly concerning and too worrying is that the applicant seeks a drastic reduction of the cash portion of maintenance that he currently pays to the respondent and the minor children, notwithstanding that he has the necessary capital to support and meet his financial obligations. In terms of the proposed variation, the applicant is asking this court to make an order that he shall no longer retain the respondent and the children as dependents on his medical aid scheme and gap cover and that he shall no longer be liable for any medical and related expenses of the respondent and the minor children. Except for the school fees, the applicant seeks an order that he shall no longer be liable for the costs of the children's education including sporting, cultural and other extra mural activities, additional tuition fees, schoolbooks, attire and school outings.

[28] In my view, the order sought by the applicant is extremely drastic and would have far-reaching consequences for the minor children. Undoubtedly, if such an order is granted, it will impact on the wellbeing of the minor children and their performance at school. The centrality of the child's best interest in a case such as this must guide this court. The court notes with great concern that the applicant is pleading poverty notwithstanding the fact that he has deposited 2 million from the proceeds of the sale of his house into the bond account of V[...] P[...] (Pty) Ltd, a property holding company of which he is a director. According to the applicant, he will be withdrawing this money to invest in a business. The court notes that the applicant deposited 1.8 million into the children's account and has not fully accounted for it.

[29] I must emphasise that children are the primary obligation of parents. Their maintenance, in my view, must prevail over all other expenses. Children have a right to family care or proper parental care. They have a right to basic nutrition, shelter, basic health care services and social services. Children are regarded as wards of society, and it is the inherent responsibility of society to ensure their protection and wellbeing. Importantly, the Bill of Rights in the South African Constitution is renowned for its extensive commitment to the protection of the rights of children in section 28(2), which emphatically underscores the paramountcy of the child's best interests.⁸ Section 6(2)(a) of the Children's Act 38 of 2005 provides that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote, and fulfil the child's rights set out in the Bill of Rights and must respect the child's inherent dignity.⁹

[30] In my view, it is in the interest of the minor children that the applicant continues to maintain them and the respondent in accordance with the existing Rule 43 orders. The applicant has 1.8 million invested in the Depositor Plus Absa Investment accounts. The applicant must utilise the remaining capital of this amount to comply with his current maintenance obligations. The applicant has also not provided any evidence that he has since December 2023, when Brighton (Pty) Ltd Motors was sold attempted to find any employment.

[31] At the hearing of this application, Ms Bartman argued that the applicant intends to use the 2 million deposited in the bond account to start a new business. In Counsel's view, it is not in the children's best interest that this amount be depleted by the payment of maintenance. Counsel submitted that the applicant should be allowed to use these funds to start a new business so that he can support his family. I appreciate that the applicant intends to start a new business; however, he must pay maintenance for his children. The maintenance of his children and the respondent cannot be deferred. The children need maintenance now.

⁸ See Heaton J and Kruger H *South African Family Law* 4 ed (2017) at 171.

⁹ Section 9 of the Children's Act requires that the paramountcy of the child's best interests must apply in all matters concerning a child's care, protection and wellbeing.

[32] In my view, it is not in the children's best interest that instead of paying for their reasonable maintenance requirements, the applicant should invest the 2 million from the proceeds of the sale of the business. The children and the respondent need maintenance now. Those funds are readily available to be used for the maintenance *pendente lite* of the children. I am further of the opinion that nothing material has changed in this case regarding the financial status of the applicant that would warrant the variation sought by the applicant.

[33] I am not satisfied that the 2 million and the 1.8 million are the only remaining capital for the applicant. The applicant stated that his brother conducts Bergzicht's business. The monthly medical aid premiums of the applicants' medical aid of which the respondent and their children are beneficiaries are paid from Bergzicht. The applicant has failed to explain why Bergzicht would be paying for his medical aid. In addition, the applicant asserted in his affidavit that he has moved in with his brother to save on rental because the applicant cannot afford his own accommodation. However, he has failed to mention that they own the immovable property occupied by him and his brother in equal shares.

[34] Significantly, the legal position in our law is that whilst maintenance obligations would normally be met from income, in some circumstances, inroads on capital may be justified.¹⁰ In other words, if the applicant has no income to support his children and the respondent, he must then liquidate assets.¹¹ In this case, we know that he has liquidated some of his assets and he deposited some funds in various bank accounts. Evidently, this is a quintessential matter where the applicant should utilise the remaining capital including the sum of 1.8 million and 2 million to comply with his current maintenance obligations. Clearly, enough capital is available to maintain the applicant and the minor children pending the finalisation of the divorce.

[35] As previously stated, in an application of this nature, an applicant should make a full and frank disclosure regarding all the numerous and varied elements that make up the broad overview of the applicant's financial situation. The applicant must

¹⁰ *Dodo v Dodo* 1990 (2) SA 77 (W) at 93H-I.

¹¹ *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 298.

place sufficient facts before the court to enable it to determine the materiality of the change in the context of the applicant's broader financial circumstances. In this case, the applicant failed to discharge the onus, which rested on him in that he has not met the basic requirement of a schedule of his assets and liabilities or dealt with his assets and liabilities in any way. The applicant has failed to provide a full and honest explanation of how the proceeds of the sales of his immovable properties have been utilised.

[36] In my view, this application is an abuse of process and is devoid of merit, so it falls to be dismissed. As far as the exercise of parental rights and responsibilities in respect of the minor children is concerned, the court was informed during the hearing of this matter that the parties are in *ad idem* that they will share care of the minor children as suggested by the applicant in prayer 1 of the notice of motion.

ORDER

[37] Given all these considerations, the following order is granted:

37.1 The applicant's application in terms of Rule 43(6) is hereby dismissed.

37.2 The parties will, by agreement, enjoy shared residency of the minor children as detailed in paragraph 1 of the Notice of Motion. To this end, the minor children will reside with the respondent on Monday and Tuesday during the first week of the month. In the second week, the children will reside with the respondent on Monday, Tuesday, and Friday to Saturday. The parties will be entitled to telephone contact with the children while they are in the care of the other party.

37.3 The family advocate is hereby directed to investigate the matter to determine whether this current arrangement is in the best interest of the minor children.

37.4 The applicant is ordered to pay the costs of this application, including the costs of Counsel on Scale B.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the Appelcant: Adv Bartman
Instructed by: Cluver Makoter Inc

For the Respondent: Adv Cloete SC
Instructed by: Nabal Attorneys