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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 038855/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

DATE 06/01/25

SIGNATURE

In the matter between:

T, M. C.

Applicant

and

K, M. P.

Respondent

JUDGMENT

Joyini J

INTRODUCTION

[1] The applicant and the respondent (“parties”) were cited in court papers by their full names. It is now standard practice in our courts that in order to give effect to the paramountcy principle entrenched in section 28 of the Constitution, the interests of minor children must be protected in legal proceedings, including, divorce proceedings. In this case, the parties have a minor child. I accordingly deem it appropriate to refer to the parties and their child by their initials only.

- [2] The applicant approached this court in terms of Rule 43 of the Uniform Rules of Court ("Rule 43"). She seeks maintenance for herself and the parties' minor child, pending the finalisation of her action for divorce from the respondent.
- [3] The purpose of Rule 43 applications is to ensure that no party is substantially prejudiced and lacks resources to maintain a reasonable standard of living enjoyed by the parties during the marriage when pursuing their cases in the main divorce action. Courts are required to consider the applicant's reasonable needs and the respondent's ability to meet them.¹
- [4] In all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied. Collis J said, in an unreported decision LD v PH 150/19, *"In South Africa, in addition to section 28 (2) of the Constitution, the common law principle that the High Court is the upper guardian of children obliges courts to act in the best interest of the child in all matters involving the child. As upper guardian to all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children. Notably, in Mpofu this Court endorsed the approach in Kotze v Kotze: 'The High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interest are. It is not bound by procedural strictures or by the limitation of evidence presented, or contentions advanced or not advanced, by respective parties'".*²

BACKGROUND FACTS

- [5] The applicant and the respondent got married to each other on 10 November 2007. The applicant says that she is customarily married to the respondent and the divorce is pending before this court. In the divorce proceedings, the respondent is challenging the validity of the customary marriage.

¹ M G M v M J M [2023] ZAGPJHC 405 para 9.

² 150/2019, 9/5/19

[6] Two children were born from this marriage between the parties. One of them is still a minor who was born on 15 August 2017³ and is residing with the applicant in the marital home. His name is K, L. M. The parties separated and have not been living together as husband and wife since August 2019.

[7] In assessing this matter, I shall first consider the points *in limine* raised by the respondent.

POINTS IN LIMINE RAISED IN RESPECT OF THE IRREGULARITIES/NON-COMPLIANCE ISSUES ALLEGED IN TERMS OF RULE 30

[8] The respondent opposes this matter arguing that there is no marriage relationship between himself and the applicant. He raised a point *in limine* arguing that the divorce action will therefore be dismissed and thus the applicant's Rule 43 application premised thereon must also be dismissed. He also raised quite a number of technical issues of non-compliance arguing that the applicant's Rule 43 application is defective without showing evidence of prejudice caused by such non-compliance.

[9] On behalf of the respondent, counsel submitted that this court cannot hear the application since the marriage is in dispute. However, counsel for the applicant referred the court to various decided cases and submitted that the court can entertain the applicant's Rule 43 application even where marriage is in dispute.

[10] In *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) Trollip J said at page 345 E-H: “*There is, therefore, a good authority that in common law, even though the validity of the marriage was being disputed, nevertheless the court had jurisdiction in preliminary application proceedings to award maintenance and a contribution towards costs pending an action to determine that fundamental dispute. And I have no doubt that that applies equally, if not a fortiori where, although the validity of the marriage is admitted, its continued subsistence is disputed, as in the present case. Rule 43 was merely designed to provide a*

³ Caselines 008-4 para 5.3.

streamlined and inexpensive procedure for procuring the same interim relief in matrimonial actions as was previously available under the common law in regard to maintenance and costs, and I think, therefore, that Rule 43 must be construed accordingly; in other words, that 'spouse' in sub-rule (1) must be interpreted as including not only a person admitted to be a spouse but also one who alleges that he or she is a spouse, and that that allegation is denied. In other words, the Rule also applies where the validity of the marriage or its subsistence is disputed. The application under Rule 43 in the present case can, therefore, be entertained by this Court."

- [11] This decision is quoted with approval in *MRL v KMG* case number 15078/12 dated 08/04/2013. I am therefore persuaded by the argument of the counsel for the applicant that this court, on the basis and in line with caselaw referred to above, can hear and decide the applicant's Rule 43 application. It is not for this court to decide on the validity or otherwise of the marriage. I will accordingly ignore all issues about the validity of the marriage going forward. I am also persuaded by the argument of the counsel for the applicant that the counsel for the respondent should not be allowed to continue detaining the court proceedings on a number of technical issues of non-compliance arguing that the applicant's Rule 43 application is defective without showing evidence of prejudice caused by such non-compliance. Prejudice is a prerequisite to success in an application in terms of Rule 30. As entertaining these issues is not in the interest of justice and the minor child involved in this Rule 43 application, I conclude that in the absence of prejudice caused by such non-compliance, the issues raised stand to be dismissed.

ISSUES FOR DETERMINATION AND RELIEF SOUGHT

- [12] The applicant seeks an order under Rule 43 of the Uniform Rules of Court that compels the respondent to pay R57 765 per month as maintenance *pendente lite* for herself (applicant) and the parties' minor child plus payment for schooling and extra-mural costs, medical expenses, and winter and summer clothes for the minor child.

[13] Maintenance relief under Rule 43 application arises from the parties' duty of support. Rule 43 proceedings provide an important mechanism for giving effect to parties' reciprocal duty of support. One of the invariable consequences of marriage is the reciprocal duty of support.⁴ In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC) at par 52 O' Regan J notes: "*The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage....*"

APPLICANT'S EVIDENCE AND ARGUMENT

[14] The applicant approaches this court on the basis that the respondent has ceased fulfilling his responsibilities in the household since the applicant started the divorce process in February 2023. The applicant in this case describes herself as unemployed and as family, they have been relying on the respondent financially since they got married. The applicant says the respondent has been the sole provider of the family for all these years that the parties have lived together as husband and wife, which is more than 12 years. According to the applicant, the respondent has the capacity to provide for the minor child's financial needs. However, he allegedly decided to punish the child because of the pending divorce. The applicant alleges this because the respondent has stopped paying for the child's maintenance since the commencement of the divorce action.

[15] The applicant states that the respondent works in retail industry and he was promoted into the position of Manager at P[...] [...] P[...] in Durban in 2009. The parties, after a lengthy discussion, agreed then that the applicant should resign from her employment and relocate together to Durban as family. The company

⁴ Bwanya v The Master of the High Court 2022 (3) SA 250 (CC) at par 36.

paid for their relocation expenses, house rental, and the applicant's allowances for a year. Two years later, the parties moved back to their marital house in Pretoria East.

[16] The applicant has supplied the respondent with her financial disclosure form (FDF) which shows her financial standing in terms of Rule 35 and the respondent has failed to provide the applicant with his FDF. It is evident that the respondent is not prepared to take responsibility for his obligations towards the minor child and the applicant by not disclosing his financial position.

[17] The breakdown of the maintenance requirements of the applicant in her FDF⁵ is as follows: Food, groceries & cleaning materials – R8 000; toiletries – R1 000; lunches for children – R500; domestic worker – R1 000; personal care R600; fuel – R4 000; other policies – R724.87; and pocket money – R5000. The applicant's total expenditure is R20 824.87.

RESPONDENT'S EVIDENCE AND ARGUMENT

[18] The respondent argues that one of the material components of an application for maintenance *pendente lite* is to set out how the amount claimed is arrived at. He argues that the claim for the spouse and the child must be separated.

[19] He further argues that for any spousal maintenance claim to exist, applicant must explain her employment circumstances and her means. She must show the court that the basic ground for her claim exists namely that she has a "need" for maintenance. Here, the applicant simply contends that she is unemployed but gives the court no information about her qualifications, her employment history, her attempts to find employment or her general financial means.

[20] According to the respondent, the applicant has lied to the court and this can be seen from her own FDF. In that form, she states that she has three businesses, namely, M[...], C[...] D[...], A[...] A[...] Y[...] S[...] and M[...] S[...]

⁵ Caselines 014-78, para 3.

and R[...]. She has a cheque account with R69 393 in it and a savings account with R1 706.30. The respondent is asking why the applicant is not using it for maintenance. She has two credit cards and the respondent is asking how did she get credit if she is unemployed.

- [21] The respondent also argues that the applicant discloses her expenses in her FDF as being R20 824.87 per month and yet she claims R57 765 plus payment of other direct costs. In her FDF, she states that she earned R18 000 from her curtain business last year.

LEGAL PRINCIPLES

- [22] In determining this application, I am bound by the following well-established legal principles:

- [22.1] Orders for maintenance that are issued pursuant to Rule 43 are intended to be interim and temporary and cannot be determined with the degree of precision and closer exactitude which is afforded by detailed evidence.⁶
- [22.2] The purpose of Rule 43 is to provide a speedy and inexpensive remedy, primarily for the benefit of women and children.⁷ It allows for interim arrangements to be imposed on the parties in matrimonial disputes, and *pendente lite* until the Divorce Court can make a properly informed decision and after hearing *viva voce* evidence.⁸
- [22.3] The applicant spouse (who is normally the wife) is entitled to reasonable maintenance *pendente lite* dependent on the marital standard of living of the parties, her actual and reasonable requirements and the capacity of her husband to meet such requirements which are normally met from income although in some circumstances inroads on capital may be justified.⁹
- [22.4] A claim supported by reasonable and moderate details carries more weight than one which includes extravagant or extortionate demands – similarly more weight will be attached to the affidavit of a respondent who evinces a

⁶ Taute v Taute 1974(2) 675 (EC) at 676B.

⁷ S v S 2019 (6) SA 1 (CC) ([2019] ZACC 22) at par 43.

⁸ JG v CG 2012 (3) SA 103 (GSJ).

⁹ Taute v Taute 1974(2) 675 (EC) at 676D-E.

willingness to implement his lawful obligations than one who is obviously, *albeit* on paper, seeking to evade them.¹⁰

[22.5] One of the fundamental principles for an award of maintenance is an ability to pay on the part of the spouse from whom maintenance is claimed.¹¹

EVALUATION AND ANALYSIS

[23] When determining this matter, I must be guided by the well-established principles governing Rule 43 applications. I must however, also be guided by: (a) the gendered realities in claims for maintenance while divorce proceedings are pending; and (b) the vital constitutional principle of the best interests of the child as required by section 28(2) of the Constitution. These factors do not allow for an easy departure from an otherwise reasonable claim for maintenance founded on the well-established principles governing Rule 43 applications.

[24] The applicant, in *casu*, seeks interim spousal and child maintenance. The applicant does not agree with respondent's version. The respondent opposes the application. Despite the regrettable efforts to unnecessarily complicate issues that this court should determine, the issues that must be decided are relatively simple. (i) Is the parties' child and the applicant in need of maintenance pending the finalisation of the divorce proceedings? (ii) What are the applicant's actual and reasonable needs and/or requirements? (iii) If these questions are answered in the affirmative, then it should be determined whether the respondent has the financial means to provide interim maintenance to the applicant and their child pending the finalisation of the divorce proceedings. (iv) If he does, to determine the reasonable amounts of maintenance that the respondent should be ordered to pay.

[25] To adequately determine the need for maintenance and ability to pay, respective assets and incomes of both parties must be assessed. The applicant's FDF was disclosed to this court and the respondent did not submit

¹⁰ Taute v Taute 1974(2) 675 (EC) at 676H.

¹¹ Buttner v Buttner 2006 (3) SA 23 (SCA) ([2006] 1 All SA 429) at par 36. See also: Reynecke v Reynecke 1990 (3) SA 927 (E) at 932J - 933F.

his FDF to this court. This obviously complicates the court's assessment process.

[26] In this application before the court, the respondent needs to ensure that the issue of whether he can afford maintenance as claimed by the applicant is feasible or not and whether he can afford and or cannot afford such demands. The respondent has failed to satisfy the court on those issues in opposition to what the applicant seeks before this court.

[27] The applicant details that the respondent, who has been the family's sole provider for over 12 years, is employed as Manager at P[...] P[...] with a monthly income. This income has historically been sufficient to support the applicant and their family.

[28] The respondent also did not attach his salary slips and/or his current banking accounts to prove to the court that he is unable to maintain the applicant and the minor child. The respondent failed to adduce evidence to support his opposition. Without such evidence, it is assumed that the respondent can be able to meet the demands of the applicant but has just chosen to ignore them.

[29] In reviewing this case, the respondent has not presented sufficient evidence to effectively counter the Rule 43 Application. The set of facts before this court is for maintenance, and to answer and oppose the maintenance case, the respondent is supposed to be taking this court into confidence by indicating that he cannot afford and attach proof to support same. The respondent has failed to deal with and address his opposition to the Rule 43 Application.

[30] In the circumstances, I am of the view that the respondent has not made out a case to seriously suggest that the expenses claimed by the applicant are unreasonable. In the same vein, I am also satisfied on a holistic evaluation of the evidence presented, that the applicant has made out a case for the interim relief that she seeks pending the finalization of the divorce between the parties. As such, the applicant's Rule 43 application should be granted.

CONCLUSION

[31] To decide whether the applicant and the child should receive interim maintenance from the respondent pending the finalisation of the divorce proceedings, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective affidavits, heads of arguments and oral arguments by their counsel. The conclusions that I reach are not binding on the court that will conduct the divorce trial which, after hearing all the evidence, may provide clarity on the actual financial position of the parties.¹²

[32] In conclusion, given the temporary nature of Rule 43 proceedings, I am convinced that the applicant has been placed in a situation that she and their minor child are deprived of their necessary maintenance which warrants the intervention of this court by way of Rule 43 remedy. I am convinced on the strength of the evidence submitted to this court, that the respondent can afford to pay interim maintenance. I am convinced that the applicant and the children should receive interim maintenance from the respondent based on the evidence before the court.

[33] Each application for spousal maintenance must be decided on its own facts. It is not disputed there is a significant disparity in their respective incomes and that the respondent has through the years paid for most expenses. He has always paid for his family's living expenses and they are entitled to live a similar high standard of living which they were used to.

[34] In *CC v NC*¹³ the court stated that an applicant is entitled to reasonable maintenance dependent on the marital standard of living of the parties, albeit that a balanced and realistic assessment is needed, based on the evidence concerning the prevailing factual situation.

¹² *Levin v Levin and Another* [1962 \(3\) SA 330](#) (W) 331D.

¹³ 16742/21) [\[2021\] ZAWCHC 227](#) (9 November 2021).

[35] In *Glazer v Glazer*,¹⁴ the court stated: “*I think that a wife is entitled to a reasonable amount according to her husband’s means, not necessarily according to what he thought was reasonable.*”

[36] I have considered the breakdown of the maintenance requirements of the applicant in her FDF¹⁵ which is as follows: Food, groceries & cleaning materials – R8 000; toiletries – R1 000; lunches for children – R500; domestic worker – R1 000; personal care R600; fuel – R4 000; other policies – R724.87; and pocket money – R5000. The applicant’s total expenditure is therefore R20 824.87. In my view, they appear reasonable. It is clear that the respondent would not be seriously prejudiced if he must keep his family financially comfortable. I am therefore inclined to grant the applicant and their minor child maintenance in the amount of R20 824.87 per month.

COSTS

[37] I have considered both parties’ argument relating to the costs of this application. I am accordingly not inclined to grant costs in either party’s favour. Therefore, I leave this to the trial court to decide. The costs of this application will therefore be costs in the cause, meaning that they would be determined as part of the overall case.

ORDER

[38] The points *in limine* raised by the respondent are accordingly dismissed.

[39] **In respect of the applicant’s Rule 43 application, I make the following order, *pendente lite*:**

[39.1] The respondent shall maintain the applicant and the parties’ minor child *pendente lite* by paying a monthly cash amount of R20 824.87. The first payment shall be made within 10 days following the granting of this order. Subsequent payments shall be made on or before the first day of the month until the date this court grants a divorce decree. These payments shall be made directly into the applicant’s chosen bank account;

¹⁴ 1959 (3) SA 930 D_E.

¹⁵ Caselines 014-78, para 3.

- [39.2] The amount set out in paragraph 39.1 above shall be increased annually on the 1st day of the month succeeding the anniversary date of this order and every 12 months thereafter in accordance with the average increase as recorded in the Consumer Price Index for the Republic of South Africa as notified from time-to-time by the Director of Statistics or his equivalent, for the preceding year;
- [39.3] The respondent shall pay for the parties minor child's winter and summer clothes, school-fees at a school, inclusive of school levies, school-books, school uniforms, all school outings and tours, extra-mural activities, sporting activities, any equipment and clothing required for the aforesaid extra-mural activities, extra tuition and sporting activities;
- [39.4] The respondent shall put the parties' minor child on medical aid and pay all the minor child's medical and related expenses not covered by the medical aid scheme, inclusive of hospital, dental, orthodontic, prescribed pharmaceuticals, therapeutic and related expenses; and
- [39.5] The costs of this application will be costs in the cause.

T E JOYINI
JUDGE OF THE HIGH COURT, PRETORIA

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Date of Hearing: 27 November 2024

Date of Judgment: 6 January 2025

Delivery or handing down of the Judgment

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 6 January 2025 at 10h00.

