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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20421/2016

DATE: 2024-03-08

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO. 10

(3) REVISED: YES

DATE 29 NOVEMBER 2024

SIGNATURE

In the matter between

R[...] L[...] M[...] - K[...]

Applicant

and

20

M[...] G[...] K[...]

Respondent

JUDGMENT

HARDY, AJ:

30 I have before me an application, which the applicant claims is urgent, in which the applicant is essentially seeking: the payment of a contribution towards her legal costs; direct access

to bank accounts (held in the name of the respondent); and for payment by the respondent of the applicant's son's university fees in the amount of R120 000.

The application has, to some extent, been framed as an urgent rule 43 although some of the relief sought, particularly that of direct access to bank accounts, would naturally exceed what is possible in terms of rule 43.

10 The first question to be answered is whether the matter is urgent. I have considered the full set of affidavits, in addition to having the benefit of oral argument. It is evident from the papers and argument that the applicant finds herself in a position where she has been in need of financial support for a considerable length of time.

 This is not the kind of situation where she discovered yesterday that her bank card had been cancelled and she could not pay for groceries at the till when she produced her bank card
20 or was trying to get fuel and the garage declined her card. In fact, the newest invoice of any shape, sort, or size that I can see in this matter, is for her son's tuition fees at Varsity College which is dated the 12 January 2024.

 As such I am very hard pressed to find that this matter is urgent and there is no reason for the applicant not to wait out the approximate six weeks it would take for a rule 43 or rule 43 variation served today to be heard. I have concluded that this application is not urgent.

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 However, mindful that my conclusion could be wrong, I will do a very brief navigation of the merits.

 This navigation of the merits is on the assumption that

there is still enough of an issue live on the divorce action for a rule 43 to be possible. In other words, that the divorce action is not absolutely finalised – it appears there is some dispute as to whether the separated issues of accrual have yet been finalised. I am acutely aware that the only rule 43 order still in existence would be that of Millar J, granted on 27 December 2019 for medical expenses.

10 It would appear that the previous rule 43 orders (following the parties' civil marriage on 18 October 2014) have been set aside. The order granted by Moosa AJ (on 05 August 2016) was set aside by that of Keightley J (on 26 June 2017), which was in turn set aside by Magistrate Nkabinde in the maintenance court (on 21 October 2019) – although this is disputed.

20 So, it is quite a task even to assume the parties were in a rule 43 space to claim contributions for legal costs and maintenance. Even if that were the case, the cost contribution sought is: reimbursement for expenses incurred between 2011 and 2018; payment to a former attorney of the applicant in the amount of R155 000; and overdraft and credit card debts.

The ordinary position with a rule 43 or any variation thereof is that the legal costs contribution is strictly for the costs of divorce up to and including the first day of trial. That contribution is calculated by having reference to what issues are in dispute between the parties and an estimate of what the costs are likely to be to deal with those disputed issues.

30 On the papers it is not apparent to me what all the issues of dispute are and there is certainly no estimation of the costs to take these issues to trial.

What I am faced with here is a request for a contribution

to past costs. This poses some difficulty as I am aware that the divorce order granted on 18 August 2018 by Mashile J provides for each party to pay their own costs. So, it does not appear at present that there is any basis to grant any cost before the divorce date. I am aware that the divorce order is being challenged, but no such challenge has yet been completed, and the order still stands.

10 As regards overdraft and credit card debt, again that could only be awarded as a legal cost contribution if it can be shown that those funds, were expended for legal costs. Again, it also gets hit by the problem of past expenditure dealt with by the divorce order. The claim as framed at present simply would not meet the requirements of rule 43 or a rule 43 variation.

20 The next claim is direct access to bank accounts. No basis is set out to access bank accounts which are not in the applicant's name or over which she is not a signatory. It appears that she would be seeking this access to the respondent's bank accounts obtain funds to live. Without a maintenance order in her favour in place that poses a challenge. If there is a maintenance order in place, then she could obtain funds by way of execution but there is simply no basis for a court to grant direct access to a bank account on the information pleaded.

The third aspect is the applicant's son's university fees. This her son, not that of the respondent. It is not clear to me that there is currently any order in force that obliges the respondent to pay such an amount.

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As set out in debate with both the applicant and the respondent's counsel, I am of the view that the order of Tulare AJ granted on 08 April 2013 (dealing the divorce action flowing from the parties' customary marriage concluded on 21 May 2011),

would have probably been made a nullity by the parties' civil marriage concluded on 18 October 2014 and subsequent divorce action.

Even if I am wrong on that, the applicant has not pleaded the terms of that order. I am aware that the child concerned was only 11 years of age at the time of that order, so without any proof of the terms, I cannot accept that educational expenses ordered 11 or 12 years ago for primary or secondary school fees would
10 have covered university fees now.

Having set all that out very briefly, it is clear that as pleaded, the relief sought at the moment is unsustainable. So, even if I have erroneously concluded that the matter is not urgent, there is some difficulty with the merits and I would be unable to assist the applicant on the merits of the matter as pleaded.

I am acutely aware that the applicant, as she has set out, has a great difficulty with resources and funding at the moment.
20 What costs order am I to make? The usual order is that costs follow the result. I accept that in an inability to pay a costs order is not a basis to refuse to grant one. At the same time, I am acutely aware that the applicant is a lay person who would not have the same knowledge as opposing counsel or myself of what the law will or will not allow her to do in these circumstances.

Accordingly, I am not inclined to make a costs order against the applicant unless she should persist in seeking unsustainable relief which the application as it currently stands
30 amounts to, for all practical purposes.

In the circumstances I grant the following order:

1. The application is struck from the roll for lack of urgency.
2. No costs order is made against the applicant, unless the

applicant sets this application (Notice of Motion dated 26 February 2024 and Founding Affidavit deposed on 26 February 2024) in its present form down for further hearing at a future date. In the event that the applicant seeks the identical relief on the same papers at a future date, the applicant will pay the costs of this application on the scale as between party and party.

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HARDY, AJ
JUDGE OF THE HIGH COURT
DATE:

Appearances:

For the applicant

In person

reabetsoe@yahoo.com

For the respondent

Advocate N M Mtsweni

milly@adv-mtsweni.co.za

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Mr T Mathopo - Mathopo Attorneys

info@mathopo.co.za