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

Case Number: 2024-116399

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

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

(3) REVISED: ~~YES~~/NO

DATE 04 April 2025

SIGNATURE

In the matter between:

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

Applicant

and

B[...] R[...] K[...]

Respondent

JUDGMENT

Mazibuko AJ

INTRODUCTION

[1] This is an opposed Rule 43 application seeking interim maintenance for the applicant ('Mrs K'), Mrs K and the respondent ('Mr K') 's two minor children, and the initial contribution towards Mrs K's legal costs. Mr K and Mrs K agree on their children's primary residence, care and contact issues.

BACKGROUND

[2] Mr and Mrs K were married out of community of property with the inclusion of the accrual system in May 2004. Mr K vacated the matrimonial home in 2020, and the parties have largely moved on with their respective lives. Their two

minor children reside with Mrs K in their matrimonial home. Divorce proceedings were instituted in October 2024.

CONDONATION

Late filing of the respondent's answering affidavit

- [3] Mrs K filed the Rule 43 application on 3 February 2025 and the completed Financial Disclosure Form ('FDF') on 11 March. Mr K's answering affidavit was due on 17 February. However, he only filed same on 26 February. He seeks leave for condonation of the late filing of his opposing affidavit. He attributed the lateness to the late filing of Mrs K's FDF following his unsuccessful request for same in preparation for his answering affidavit. He stated that he could not properly answer her founding affidavit without the FDF. Further, in February, he received an offer of employment and had to include that information in his affidavit. Mrs K does not oppose the condonation application.
- [4] A party in a Rule 43 application must act with the utmost good faith and fully disclose all material information regarding their financial affairs. I accept that the illustrated circumstances contributed to the late filing of the answering affidavit. Further, Mrs K will suffer no prejudice due to the late filing of Mr K's answering affidavit. I accept the explanation as reasonable and find that the court is justified in granting condonation for the late filing of Mr K's answering affidavit.

POINT IN LIMINE

- [5] Mr K raised a point *in limine* that the application was *mala fide*. In support of his submission, the following was raised. Mrs K had no basis for launching the application, as she was already in July 2024, during a roundtable meeting, informed of Mr K's retrenchment with effect from the end of September 2024. He had always met his financial obligations, even when unemployed, between October 2024 and February 2025, earning only a monthly rental income of R8 000. Despite his request for water usage reduction in the matrimonial home due to unaffordability, instead of cutting expenditures, Mrs K elected to install a new watering system, even after learning of his retrenchment, which caused the escalation of the water account.

- [6] It was argued on behalf of Mrs K that Mr K can afford the increase in maintenance as he has a net asset value of R13 764 852.04 plus savings amount of R568 840.22, whilst Mrs K's net asset value is R743 016.71.
- [7] It is beyond dispute that both parents have a legal duty to maintain their children. This obligation is allocated based on each parent's respective financial resources, the children's needs, and other relevant factors. A parent who is unemployed or facing financial difficulties is not exonerated from their legal obligation to pay child maintenance. The emphasis is on the need to provide for the children.¹ Where the parent is unemployed or has financial difficulties, the court will consider the reasons thereof, the parent's earning potential, and their efforts to find employment.
- [8] In *casu*, Mr K was retrenched and informed Mrs K more than 8 weeks before his last day of employment. I accept that Mr K's loss of employment was not of his own doing and recognise that his unemployment may affect his ability to contribute to maintenance.
- [9] Notwithstanding that Mr K was not employed at the time of the application and was making contributions to almost all household and children's expenses, nothing prevented Mrs K from approaching this court for an increase in maintenance, considering the parties' financial resources. The application for an increase cannot be viewed as *mala fide*. Therefore, the point *in limine* cannot be upheld.

ISSUE

- [10] The issue for determination is whether Mrs K has made out a case for an increase in maintenance and whether Mr K is to contribute to Mrs K's legal cost.

MAINTENANCE PENDENTE LITE

¹ L.N v N.N ZAGPJHC 772

[11] It is common cause between parties that Mr K makes monthly payments towards children's school fees and related costs, R3 500 for the *au pair*, R1 400 for the gardener, household insurance, Mrs K and the children's medical aid and extra costs not covered by the medical aid, R7 000 for groceries, R3 000 for the domestic worker, Municipal account, including rates, levies, water and electricity, children's clothing, dance and hockey classes' fees, bicycle extramural expenses, other miscellaneous and *ad hoc* expenses, including data and children's pocket money.

[12] The application seeks additional payment. Mrs K averred that she has a monthly shortfall of R35 320.92, has depleted all her savings, had to withdraw from the children's investments and has been unable to make provision for payment of her provisional tax. She had to drastically lower her standard of living, as well as that of the children, which standard they had become accustomed to during their marriage with Mr K. Mr K's R10 000 monthly contribution towards their maintenance is insufficient. Mr K can afford to pay the maintenance as claimed.

[13] What is in dispute between the parties for the purposes of this Rule 43 application is the claim for children's maintenance of R13 500 per month per child, spousal maintenance of R8 320,93 per month, the capping of Municipal rates, taxes, water and electricity to R6000 per month, and the initial contribution of R70 000 towards Mrs K's legal costs.

[14] An argument was advanced on behalf of Mr K that the financial benefit Mrs K and the children receive, directly and indirectly, from him amounts to around R92 000 per month, as the beneficial enjoyment of the matrimonial home by them is worth R35 000 per month. In addition, Mrs K earns R50 000, which then amounts to an income and benefits of at least R142 000 per month. Further, the spousal maintenance of R8 320.93 per month was unreasonable, as she does not require a contribution other than what she already receives to meet her own personal needs.

- [15] They had been separated for 5 years; she had by now managed to completely rehabilitate herself financially. She is a registered Professional Accountant in a position to increase her own income. She has an *au pair* for the children, paid for by him, so that she spends time on her business to increase her income.
- [16] Further, there is no justification for the contribution of R70 000 towards Mrs K's legal costs. He has made several attempts to settle the matter with no success, as Mrs K would derail the negotiations in an effort to gain from him unduly.
- [17] Rule 43 applications ensure that no party is substantially prejudiced and lacks resources to maintain a reasonable standard of living enjoyed by the parties during the marriage and to supplement expenses the applicant cannot meet in pursuing their cases in the main divorce action. They relate to the applicant's reasonable needs and the respondent's ability to meet them.
- [18] The reasonableness of the claim to maintenance *pendente lite* is determined by the parties' standard of living during the marriage, the ability and affordability of the respondent to pay, assessing their needs, and the responsibilities they have carried, including the ones they are to assume. The applicant's resourcefulness and the period of marriage should be considered.
- [19] The parties have been married for over 20 years and separated for 4 years. During the marriage and when the parties lived together, they earned an income and enjoyed a comfortable standard of living. Mr K has been unemployed since October 2024 and resumed employment in March 2025. On his own accord, since he vacated the matrimonial home, Mr K has been contributing considerably to the household and maintenance of the children and Mrs K, including *ad hoc* necessities.
- [20] No contingent facts or evidence had been presented before the court that contributed to Mrs K and the children to drastically lowering their accustomed lifestyle. Mr K has been making the contributions since he left the matrimonial home in 2020. Considering Mr K's contribution towards the children, it was unclear from Mrs K's financial disclosure what informed the sudden claim for

cash maintenance of R13 500 per month per child. For about six to eight days a month, the children are with Mr K, and during that period, he also takes care of their needs.

[21] Concerning spousal maintenance, Mrs K's financial disclosure failed to show why her claim of R8 320,93 would be reasonable when regard is had to her monthly income. I am of the view that her monthly income is adequate for her personal expenses and requires no supplement contribution from Mr K.

[22] Regarding the Municipal rates, taxes, water and electricity, the evidence is that Mr K has been paying and wants to continue paying. There is no evidence that the account is in arrears. It is unclear why Mrs K elected to bring an application seeking an order for Mr K to continue to pay this account. Further, she stated that sometimes the account goes up with just less than R1 500 above R6 000 per month. In my view, such a difference can be covered by herself; there is no need for a court order.

[23] In the context of the standard of living enjoyed by the parties when they shared a home, the parties' obvious means and current responsibilities, and the current contribution Mr K makes towards the household and the children, including Mrs K, it does seem to me that the claim is wholly unreasonable and exorbitant. I conclude that Mrs K earns adequately to cater for her financial needs, and Mr K's contribution is also sufficient to cater for the household, the children and Mrs K, and does not require an order for the interim maintenance for herself and their children.

CONTRIBUTION TO LEGAL COSTS

[24] Regarding the contribution towards legal costs, Mrs K claims R70 000 from Mr K for counsel, attorneys' fees and related legal costs. The law is settled that the contribution towards legal costs ensures that a party litigates on the same scale as the other and is not disadvantaged in the divorce action. The applicant is not entitled to the entire legal costs but a contribution. In determining the contribution, the court must consider the circumstances of the case, the financial position of the parties, and the issues involved in the pending litigation.

- [25] Mr K contends that there is no need for him to pay a contribution towards Mrs K's legal costs since she can and has been affording same since June 2024. Further, she has contributed to the delay in finalising the divorce action by making unreasonable demands.
- [26] Having regard to the circumstances of the pending divorce action, the parties' financial position and the issues involved in the pending litigation, I agree that both parties need funds for their legal costs. With respect to the pleadings in the divorce action, Mrs K delivered her plea and counterclaim in January.
- [27] Though there is a significant disparity between the parties' incomes, Mrs K must show that she has insufficient means of her own. She is only entitled to a contribution to adequately put her case before the court. No cogent evidence is placed before the court showing that Mrs K is unable to present her case against the respondent should the court not grant an order for a contribution towards costs.

COSTS

- [28] It was argued on behalf of Mr K that the application should be dismissed with costs. I share the views expressed by counsel on behalf of Mrs K that costs be costs in the main action.
- [29] Consequently, I make the following order.
- Order:
- a) The respondent's point *in limine* is not upheld.
 - b) The Rule 43 application is dismissed.
 - c) Costs shall be costs in the main divorce action.

N G M MAZIBUKO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Heard on: 26 March 2025

Judgment delivered on: 04 April 2025

For the applicant: Adv K Fitzroy

Instructed by: Weavind & Weavind Attorneys

For the respondent: Adv R Ferreira

Instructed by: Riette Oosthuizen Attorneys