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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2024 -052216

1. REPORTABLE: NO

2. OF INTEREST TO OTHER JUDGES: NO

3. REVISED: NO

DATE: 6 August 2025

SIGNATURE OF JUDGE :

In the matter between:

A[...] W[...] F[...]

APPLICANT

and

K[...] S[...] R[...]

RESPONDENT

*This Judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines system and by release to SAFLII. The date for hand down is deemed to be **6 August 2025**.*

JUDGMENT

BADENHORST, AJ

INTRODUCTION:

- [1] This is an opposed application in terms of Rule 43(6) of the Uniform Rules of Court in terms of which the Applicant seeks an order that the Respondent be ordered to allow the Applicant to collect his personal belongings, household effects and furniture as listed in Annexure “A” attached to the Founding Affidavit.
- [2] The Respondent opposes the application on the basis that no material change in the Applicant’s circumstances exists.
- [3] Rule 43(6) provides litigants with an avenue to approach the Court for a variation of a previous decision, on the same procedure, where there is a “material change occurring in the circumstances of either party and/or the contribution towards cost proving inadequate”.

THE FACTS:

- [4] The Applicant and the Respondent got married to each other on 28 October 2022, out of community of property, without the application of the accrual system and the marriage still subsists.
- [5] From the marriage relationship between the Applicant and the Respondent one minor child was born. The Respondent has a minor daughter born from a previous relationship and the Applicant has two minor sons, born from a previous marriage.

- [6] The Applicant has two teenage sons from a previous marriage.
- [7] The Applicant launched a Rule 43 application for relief pertaining to contact and care in respect of two minor children, i.e. the biological daughter of the parties and the Respondent's daughter from a previous marriage.
- [8] The Respondent opposed the Rule 43 application and applied for counter relief in the form of interim maintenance, a contribution towards her costs, undisturbed/uninterrupted stay at the common home and *pendente lite* care and contact relating to the parties' biological daughter.
- [9] The Rule 43 application was heard on 21 January 2025 and the Honourable Mr Justice Nyathi J reserved the judgment.
- [10] The order and judgment were handed down on 16 May 2025.
- [11] At the time when the Rule 43(6) application was brought, the Rule 43 judgment was still pending.
- [12] The Applicant served his Rule 43(6) application on the Respondent's attorneys of record on 1 April 2025 for the following relief:
- [9.1] That the Respondent be ordered to allow the Applicant to collect his personal belongings, household effects and furniture as listed in Annexure "A" attached to the Rule 43(6) application, within seven days from the date of the order;
- [9.2] Cost of this application in the event of the Respondent opposing same on Scale B.
- [13] The Final Notice of Set Down was served on the Respondent on 26 June 2025.

- [14] The Respondent served and filed a Notice in terms of Rule 6(5)(d)(iii) on 16 July 2025 without filing an answering affidavit.
- [15] The Respondent's answering affidavit should have been filed on or before 15 April 2025.
- [16] The Respondent prays that the points of law in terms of Rule 6(5)(d)(iii) be upheld and that the Rule 43(6) application be dismissed with costs on Scale B.
- [17] The Applicant's Rule 43(6) application is based on circumstances which were not present at the hearing of the Rule 43 application.
- [18] At the time the Applicant launched his Rule 43 application, he was entitled to reside at the previous common home when he exercised his contact rights with the minor children. This was in accordance with an *inter partes* agreement reached between the Respondent and the Applicant.
- [19] It is the Applicant's case that he would have had unfettered access to the previous common home whilst exercising contact with the minor children. This would include that he had access and use of his personal belongings, furniture and household effects when he was at the previous common home.
- [20] As a result of the aforementioned agreement between the Applicant and the Respondent, the Applicant obtained alternative accommodation for himself for the times, he was not exercising contact with the minor children.
- [21] The Applicant informs the court that three days prior to the date upon which the Rule 43 application was to be heard, the Respondent refused the Applicant access to the previous common home to exercise his contact with the children at the previous common home. The Applicant states that the Respondent changed the *status quo*, even though the Rule 43 order was still pending, causing the situation where the Applicant had to request that his personal belongings, furniture and household effects to be given to him to

enable him to set up home where all four the minor children can comfortably exercise contact with the Applicant.

- [22] The Applicant further avers that the Rule 43 application did not address any reference to personal belongings, furniture or household effects because the Applicant was still of the view that the shared residency agreement, where the Respondent and the Applicant would live in the previous common home on a rotational basis, could be granted.
- [23] The Applicant avers that he is now compelled to live on a permanent basis in a 3-bedroom furnished apartment which does not cater for the needs of the minor daughters and the minor sons. The Applicant further avers that he does not have furniture to set up a proper and bigger home for him and the minor children.
- [24] The Applicant has regular contact with both his sons and when he exercises his contact with the minor children, he wants to provide them with a suitable place to live but he requires some furniture, household effects and personal items to be able to do so.
- [25] The Applicant stated that he cannot accommodate both teenage sons and two minor daughters in this confined space as it is totally inadequate and the circumstances are not what the children are used to. The Applicant stated that there is no space and desks for the children to do homework, study or do school projects.
- [26] It is the Applicant's case that he needs the listed items, set out in Annexure "A" to the application for purposes of properly maintaining himself, the two minor daughters as well as his two minor sons on a standard of living they were used to.
- [27] It is further the Applicant's case that the application is not brought to vary the Rule 43 application but it is brought on the basis of changed circumstances which did not exist at the time of the Rule 43 application and/or order.

[28] The Respondent did not file an answering affidavit in reply to the Applicant's Rule 43(6) application dealing with the merits of the application and only filed the a notice raising points of law.

[29] The undisputed facts before me are that:

[29.1] When the Rule 43 application was launched, the Applicant was also living at the common home when he exercised contact with the minor children. During the times when the Applicant did not exercise contact with the minor children, he was living at Unit 1[...], Block 8[...], P[...] F[...] L[...] Estate, Waterfall, Midrand in a 3-bedroom furnished apartment.

[29.2] The Applicant had unfettered access to the previous common home on the days and nights when he exercised contact to the minor daughters which included the Applicant's access and use of all his personal belongings, furniture and household effects.

[29.3] That this living arrangement was in accordance with an agreement reached between the Respondent and the Applicant and that this arrangement was also part of the initial Rule 43 application when the Applicant requested that the minor children remain at the common home during the week whilst the Respondent would be entitled to remain there with them.

[29.4] As a result of the aforementioned agreement the Applicant obtain temporary alternative accommodation for purposes of providing accommodation only for himself when he did not exercise his contact with the minor children.

[30] From the Founding Affidavit it is evident that several emails were sent to the Respondent's attorneys of record and that the parties came to an agreement that the Applicant may collect his belongings out of the common home.

- [31] The Applicant's attorneys of record wrote an email dated 19 February 2025 addressed to the Respondent's attorneys of record and stated that the Applicant used to have access and use of his personal assets and belonging in the joint common home and the Respondent is spoliating him of these assets.
- [32] The Applicant avers that the Respondent's refusal to deliver his assets and personal belongings, is depriving him and the minor children of the standard of living they are used to. The Applicant's two teenage sons cannot sleep in their own beds and do not have access to their furniture and personal belongings which remained in the common home.
- [33] On 3 March 2025 the Applicant's attorney wrote a further letter, attached as Annexure "B" to the application, in a last attempt to avoid approaching the Court and suggested that a mediator be appointed by the South African Bar Association to assist the parties with the division of the items currently in the matrimonial home to prevent further conflict regarding the division of personal belongings as well as assisting the parties navigating the shared parental responsibilities.
- [34] On 17 March 2025 the Respondent's attorneys of record sent a letter to the Applicant's attorneys of record indicating that all disputes will be litigated in the appropriate forum "through Court".
- [35] It is unfortunate that the Respondent refused to mediate the dispute given the Mediation Protocol issued in this division.

POINT OF LAW TAKEN IN TERMS OF RULE 6(5)(d)(iii) :

- [36] The Respondent is opposing the order sought by the Applicant by merely filing a Notice in terms of Rule 6(5)((d)(iii), without filing an answering affidavit.

- [37] It is the Respondent's case in terms of its Notice in terms of Rule(6)(5)(d)(iii) that the Court may 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.
- [38] It is further the Respondent's case that the Rule 43(6) is premature as there was no Rule 43 order in place to vary and the relief sought is not competent and there is no material change in the circumstances.
- [39] It is further the Respondent's case that Rule 43 does not make provision for the relief sought by the Applicant *i.e.* for delivery of furniture, household effects and personal items.
- [40] The Respondent prays that the point of law should be upheld and that the Applicant's Rule 43(6) application be dismissed with cost on scale B.
- [41] It was argued in reply that the Respondent chose not to file an answering affidavit to the Rule 43(6) application and that the Respondent must stand and fall with her point in law and if not successful, then the Applicant should succeed in the application.
- [42] Counsel for the Applicant argued that the application is unopposed due to the lack of any answering affidavit filed. Counsel for the Respondent argued that even if the matter is unopposed, the Court had to ensure that the application meet the requirements as envisaged in Rule 43(6).
- [43] Counsel for the Applicant argued that the facts before Court are not changed circumstances but new circumstances, which were not addressed during the first Rule 43 application.
- [44] On the eve of the application the Respondent's attorneys of record uploaded an affidavit, without asking condonation from the Court to do so, as this affidavit is well outside the time periods as stipulated in Rule 43 and not in compliance with the Judge's Directive issued the previous week.

LEGAL PRINCIPLES AND DISCUSSION:

[45] Rule 43(3) of the Uniform Rules of Court determines as follows:

- “(a) The Respondent shall, within 10 days after receiving the application delivery a sworn reply in the nature of a plea.*
- (b) The reply shall be signed by the Respondent or the Respondent's attorney shall give an address for service within 15 km of the office of the registrar, as referred to in rule 6(5)(b).*
- (c) In default of delivery of the reply referred to in paragraph (a) the Respondent shall automatically be barred.”*

[46] Rules 43(6) determines:

“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.”

[47] *“Rule 43 is a sui generis type of application. The rule itself makes provision for the filing of affidavits and the time periods within which a party must do so. It also makes provision for the manner in which a matter is to be set down for the hearing. This being so, and the Rule being specific and self-contained, Rule 6 of the Uniform Rules of Court does not apply to a Rule 43 application, and a party does not have a choice as to which Rule of Court to follow when launching Rule 43 proceedings.”¹*

¹ **Leppan v Leppan** 1988 (4) SA 455 W at 57E-G; Also referred to by Neukircher J in the matter of **M.N v A.L.N** (094387/23) [2024] ZAGPPHC 402 (22 April 2024)

[48] Rule 43 provides for the affidavits to be filed in the nature of a declaration and only two sets of affidavits may be filed unless the Court permits further evidence under Rule 43(5). In terms of Rule 6(5)(d)(iii) a Respondent should generally file his or her affidavits on the merits at the same time as he or she takes a preliminary objection under a point of law.

[49] *If a Respondent in opposing the relief sought by an Applicant have not filed an answering affidavit but in a notice in terms of Uniform Rule 6(5)(d)(iii) have raised questions of law, it follows that the averments in the founding affidavit must be taken as established facts.*²

[50] In this Rule 43(6) application the Respondent relies exclusively on the notice in terms of Uniform Rule 6(5)(d)(iii).

[51] *“The procedure in Rule 43 is straightforward as:*

“An Applicant seeking interim relief is required in terms of Rule 43(2)(a) to do so on notice with a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefore

....

*A Respondent wishing to oppose the application is required by Rule 43(3)(a) to deliver (sworn reply in the nature of a plea). The parties are expected to file concise affidavits and to avoid prolixity.”*³

[52] A Respondent who files an affidavit on the merits is entitled to make any legal contention open to him or her on the facts as they appear on the affidavits and notice of such legal contention need not be given in terms of this subrule, but the Respondent elected to file only a Notice in terms of Rule 6(5)(d)(iii). The Rule provides:

² **Boxer Superstores Mtatha v Mbenya** 2007 (5) SA 450 (SCA)

³ TS v TS 2018 (3) SA 572 (GJ) at 585A

“If such person intends to raise any question of law only such person shall deliver notice of intention to do so, within the time stated in the preceding subparagraph-, setting forth such question.”

[53] In terms of Rule 6(5)(d)(iii) a party who intends to oppose an application that that party should file *“within 15 days of notifying the Applicant of intention to oppose the application, deliver such person’s answering affidavit, if any, together with any relevant documentation”*.

[54] In terms of a Rule 43 application the Respondent’s Notice should have been filed within the prescribed 10 days. In terms of Rule 43(3)(c) a party in default of delivery of a reply referred to the Respondent shall automatically be barred from doing so.

[55] *In casu* the Respondent failed to file an answering affidavit within the time period stipulated by the Rule 43. The Respondent is therefore barred from filing same and the matter is unopposed.

[56] Rule 43(6) determines:

“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 proving inadequate.”

[57] In ***Nicklem v Nicklem***⁴ it was held as follows:

“Rule 43 does not provide for a rehearing of a formal application, based on new evidence.”

[58] In a matter of ***Van der Spuy v Van der Spuy***⁵ the Court determined that a Rule 43 application order can be made that furniture, household effects and personal belongings be handed to an Applicant to place an Applicant in a

⁴ 1988 (3) SA 259 (C) at 262 E-G

⁵ 1981 All SA 227 (C)

position to maintain himself or herself and/or the minor children pending the finalisation of the divorce action.

- [59] Considering the case law referred to above, there is a lack in merit in the Respondent's legal point that a Court cannot order for the delivery of furniture and household effects in a Rule 43 application.
- [60] The undisputed facts before Court is that the furniture listed in Annexure "A" is not needed by the Respondent to maintain herself and the minor children in the interim, but the furniture and household effects listed are limited household effects needed for the Applicant to set up home where he can comfortably exercise care and contact to all four of the minor children.
- [61] It bears mentioning that amongst the furniture and household effects are the Applicant's sons' beds, desks, chairs and linen.
- [62] The Court's focus should always be on the children's best interest when making interim orders in divorce proceedings. I deem it necessary for the well-being of minor children to order the interim use of the household items and furniture.
- [63] In considering whether to grant the relief sought this Court must consider the reasonableness of such relief and ensure that the level of lifestyle of the minor children, must not be worse off than that which they are used to. I am also considering the fact that the Respondent initially agreed to the arrangement that the Applicant may collect items from the common home and refused to try and mediate the issue.
- [64] It was held in **Van der Spuy** *supra* that where a Court makes an order affecting the interest of children, in *ignorance of a material fact which existed but was not brought to its attention, the Court may vary the order.*
- [65] I am therefore of the view that this Court has the power to vary the initial order and to consider the undisputed circumstances which caused a material

change as to the place where the Applicant can exercise contact with the minor children.

- [66] Rule 43(6) provides litigants with an avenue to approach the Court for a variation of a previous decision, on the same procedure, where there is a *“material change occurring in the circumstances of either party or children.”* The changed circumstances in *casu* cannot be seen as a re-hearing of the facts.
- [67] The Respondent relies exclusively on the points of law raised in her Notice in terms of Rule 6(5)(d)(iii) without addressing the merits of the application. This caused the Applicant’s Counsel having to object to the Respondent’s Counsel giving evidence from the bar, which evidence were not substantiated in an affidavit before Court.
- [68] Counsel for the Respondent asked for the matter to be postponed to enable the Respondent to file her answering affidavit on the merits.
- [69] Counsel for the Applicant objected to the request for a postponement considering that the Respondent is automatically barred from filing a reply in terms of Rule 43(3) and the Respondent has already uploaded an affidavit without asking condonation to do so. Counsel for the Applicant reiterated that the Respondent elected to only raise points in law without addressing the merits at her own peril.
- [70] I am of the view that the Respondent had ample time to file an affidavit dealing with the merits of the application, but she elected not to do so. The Respondent is barred from filing a further answering affidavit.
- [71] I am satisfied that facts before Court are not changed circumstances but new circumstances and meets the requirements as envisaged in Rule 43(6).
- [72] This Court is not in a position to make an order as to the ownership of the movable items sought by the Applicant. Therefore, the question of ownership

of the listed items in **Annexure “A”** will be left for the trial court to adjudicate, should the parties not be able to come to an agreement on the division thereof.

[73] I am however satisfied that the Applicant has made out a proper case for the ***interim*** use of the furniture and household effects listed in **Annexure “A”** to the application.

COST:

[74] The Applicant requested mediation to amicably resolve some issues *inter alia* division of movables, as is evident from the correspondence referred to in the founding affidavit.

[75] The Respondent declined the avenue of mediation and challenged the Applicant to approach the Court for relief.

[76] The Respondent further failed to file an answering affidavit addressing the merits and then opportunistically uploaded an affidavit without leave of Court and no condonation application.

[77] I intend to grant the cost order as prayed for by the Applicant.

ORDER:

[78] In the result the following order is made:

[78.1] The Respondent's points in law in terms of her Rule 6(5)(d)(iii) Notice are dismissed due to a lack of merit.

[78.2] The Respondent is ordered to allow the Applicant to collect the items listed in **Annexure “A”** (attached hereto) for the Applicant's *pendente lite* use thereof, within 7 days from date of this order.

[78.3] The Respondent is ordered to pay the costs of the Rule 43(6) application on Scale B.

L BADENHORST AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Matter heard on 22 July 2025

Judgment handed down on 6 August 2025