

SOUTH AFRICA / JUDGMENT

A.O v C.O (2020/41165) [2024] ZAGPJHC 597 (20 June 2024) [2024] ZAGPJHC 597

COURT

South Gauteng High Court, Johannesburg

BEFORE

C Von Ludwig

CASE / FILE NUMBER

2020/41165

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020-41165

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

20 June 2024

In the matter between

A[...] O[...]

Applicant / Defendant

And

C[.] O[...]

Respondent / Plaintiff

JUDGMENT

VON LUDWIG AJ

-
- [1] This is an Opposed Rule 43 Application for spousal maintenance and a contribution to legal costs.
- [2] The Applicant requires the Respondent to be liable for:
- a. House Payment
 - b. City of Johannesburg
 - c. Estate Levies
 - d. House maintenance
 - e. Household basic groceries and cleaning materials
 - f. Insurance household
 - g. ADSL
 - h. Domestic worker
 - i. Garden service
 - j. Medical aid
 - k. Car instalment
 - l. Car insurance
 - m. Car maintenance
 - n. Repair and replacement of household appliances
 - o. Repair and replacement of kitchenware, linen and towels and other household items
 - p. Maintenance pendente lite of R4 266
 - q. A contribution to legal costs of R301 659
- [3] Respondent (contending that Applicant spends little time at the house in question) tenders:
- a. To retain Applicant on his medical aid at his cost
 - b. To pay her motor vehicle insurance
 - c. To make a contribution to her legal costs of R62 584 in monthly instalments of R10 000.
- [4] Today the Applicant asks:
- a. That the matter be removed from the roll
 - b. That the Respondent pays the Applicant's wasted costs on an attorney client scale
 - c. That the Respondent must file an FDF "for the purposes of the Rule 43 application" within 10 days

- d. That the Respondent's Supplementary Affidavit be admitted and the Applicant be given ten days to file a supplementary affidavit within 10 days of the Respondent filing his updated FDF\
- [5] The Respondent contends :
- a. The Respondent's Supplementary Affidavit of 06 May should be allowed in terms of Rule 43(5)
- b. His tender contained in paragraphs 150.1 to 150.3 of his Sworn Reply must be made an Order of Court.
- c. Any application for removal should be refused.
- [6] A Financial Disclosure Form ("FDF") is required in terms of paragraph 3.5 of the Judge President's Practice Directive 2 of 2020 issued on 14 January 2020 to be exchanged between the parties "in an opposed divorce action in which maintenance or proprietary relief is in dispute and/or in every opposed Rule 43 application in which maintenance is in dispute." (3.5.1)
- [7] 3.5.2 provides that in an opposed divorce action both parties must exchange their FDFs "no later than ten court days after the defendant delivers his/her plea."
- [8] 3.5.3.1 provides that in an opposed Rule 43 application the FDFs must be exchanged "no later than 5 days after the respondent has delivered his/her sworn reply;"
- [9] Applicant contends that even though Respondent filed an FDF after the Plea he is also required to file one after his R43 Sworn Statement. The Respondent contends that once an FDF is filed another is not required.
- [10] 3.5 uses the words "and/or". Applicant contends that "and" requires two FDFs to be "filed" (although the Directive requires a reciprocal "exchange")
- [11] A first point to note is that the Directive speaks of "A" financial disclosure "form" (in the singular) as opposed to "financial disclosure forms".
- [12] Putting these sections together to read as one sentence helps to derive the ordinary meaning. The first uses only the word "and" of the "and/or"
- "A Financial Disclosure Form must be completed.....to be exchanged between the parties....in an opposed divorce action in which maintenance or proprietary relief is sought and in every opposed Rule 43 application in which maintenance is sought. In any opposed divorce action... both parties must exchange...*
- their respective FDFs no later than 10 court days after the defendant delivers (the plea) plea and in any opposed Rule 43 application

.....the applicant and respondent must exchange... their respective FDFs no later than 5 days after the Respondent's

sworn reply is delivered"

[13] "And" seems to qualify the 2 processes in which "A Financial Disclosure Form" must be completed, and not to qualify the Financial Disclosure Form itself.

[14] Likewise if we do the same and use only the word "or" of the "and/or".

[15] "A Financial Disclosure Form must be completed.....to be exchanged between the parties....in an opposed divorce action in which maintenance or proprietary relief is sought or in every opposed Rule 43 application in which maintenance is sought. In any opposed divorce action... both parties must exchange...

their respective FDFs no later than 10 court days after the defendant delivers (the plea) plea or in any opposed Rule 43 applicationthe applicant and respondent must exchange... their respective FDFs no later than 5 days after the Respondent's sworn reply is delivered"

[16] Neither sentence infers any sense of more than one FDF per party.

[17] The fact that there is only one standard Financial Disclosure Form advances the argument that only one document was intended to be completed only once. The Form used is not a different one if it is filed after the Plea or of it is filed after the Rule 43 papers. What then would be the purpose of exchanging the same form twice in what will almost always be close proximity?

[18] Examining how a divorce action generally proceeds is instructive

[19] After service of Summons the Defendant generally (distance excepted) has 5 days to deliver Notice of Intention to Defend and 20 to deliver a Plea. The "trigger" for the FDF is the Plea. The FDFs would be exchanged no later than 10 days after the Plea. The outside parameter is thus 35 days after service of Summons.

[20] If a Rule 43 application were served simultaneously with the Summons, the Opposing Sworn Statement would be due within 10 days, and the FDFs exchanged no later than 5 days thereafter. The R43 Respondent's Sworn Statement would be the FDF trigger and the FDF's outside parameter would be 15 days.

[21] This would generally be the shortest time between the two processes.

[22] The "first" FDF would thus be due at latest on day 15. If the interpretation for two FDFs is correct a second would be due at latest on day 35, only 20 days later. There can be no rationale or justification for a repeat of the same document only 20 days later, especially since the FDF is at minimum 26 pages long, requires significant annexures and is a document which needs care, time and attention to prepare and must be properly deposed before a Commissioner of Oaths. It is not an insignificant or "quick" document. When the exchange is in close proximity the content will be the same and there can be no justification

whatsoever for an argument that the Directive intended two.

- [23] In practice, pleadings are not always delivered within the time periods prescribed by the Rules. Not all Rule 43 applications are served simultaneously with or even close to Summons. Can this be used in support of an argument that a second FDF is what the Directive intended?
- [24] The Directive makes no reference to lengths of time between main action pleadings and Rule 43 Sworn Statements, which it would do if it intended to cater for different requirements in different time parameters.
- [25] Having regard to the much-shortened time periods in which Family Law matters can be brought to adjudication in the new Family Courts there are unlikely to be many matters in which the details disclosed in the FDFs exchanged pursuant to the first “trigger” are out of date by the time the second trigger occurs.
- [26] Even if this does occasionally occur, there are other ways in which a Court and parties can access documents and details, and there would still not be any motivation to suggest that an entire second (even if new or partially new) FDF is mandatory.
- [27] It is important also to understand that the trigger events for the exchange of the FDFs occur not at the hearing stage of matters, but at the preparation stage just after the cases of both parties have been put to paper. Between the FDF exchange and adjudication of the main divorce action there are numerous other methods to address absence of current or relevant information and documents. Even in a Rule 43 application, depending on where in the process it is brought, many of these processes may have taken place, but even if not, the Court may obtain the information pursuant to R43(5).
- [28] The FDF is one of the many tools of litigation. Early disclosure by FDF can assist Family Law litigants to achieve correct results sooner and more cost effectively than they would without it, but the FDF is not the only, or even the most important, tool in every financially oriented divorce. Hence one FDF is sufficient to achieve its purpose.
- [29] The FDF does not replace or oust *inter alia*, the power of the Court in a Rule 43 application to call for further information in terms of R43(5) and *mero motu* if same is needed to properly adjudicate the application.
- [30] Discovery, subpoenas, expert evidence and notices, the pre-trial conference process, a Request for Further Particulars for the Purposes of Trial and the exchange of Rule 33(4) Agendas and replies are all still available to the litigants in divorce actions.
- [31] There thus seems to be no purpose or rationale for two FDFs being required.

- [32] If a second FDF was required, its sole reasonable purpose would be to update some information contained in an outdated first FDF. It is highly unlikely that the entire FDF content would change during the course of a divorce, save in the most exceptional circumstances and those could properly, with no prejudice to either litigant, be dealt with as contemplated above. To require a further exchange of comprehensive FDF documents to cater for those eventualities cannot be what the Directive intends.
- [33] I therefore find that the Directive does not require more than one exchange of FDFs, at whichever of the trigger points occurs the soonest, and that the Applicant's contention that it is mandatory for the Respondent to file a second FDF "for the purposes of the Rule 43 Application" is without foundation.
- [34] In light of the finding that there is no mandatory requirement for a second FDF (which, I add, is not to be "filed" but is to be "exchanged" and which would thus require the Applicant to do likewise), and that there follows no distinction between an "FDF for the purposes of the main divorce action" and a "R43 FDF" the Applicant's prayer for costs must fail.
- [35] It is worth noting that none of the three FDFs was filed in accordance with the Directive. Each was unilaterally submitted, seemingly at times of each litigant's own choosing. There was no "exchange" and the first trigger for the exchange (namely 10 days after the Plea) was ignored. Neither chose to avail themselves of the provision of 3.5.6 of the Directive to compel the other's FDF. The Applicant then went on, totally unrelated to either of the trigger dates, and thus contrary to the argument advanced on her own behalf herein, to file an "amended" FDF a few days after launching this Rule 43 Application.
- [36] It is clear from the times during the litigation at which the FDFs were filed that neither party has paid heed to the actual purpose of an FDF and what use a litigant is to make of it. It seems unwise for the submissions made on the Applicant's behalf herein to have been so made in the context of her disregard of the Directive to date.
- [37] What of the Respondent's submission that the application was ready to be heard and must proceed, the more so because it was Applicant who set it down (again) and because the application is based almost entirely on the Respondent's FDF?
- [38] The very reservation of judgment to adjudicate on the basis for the Applicant's argument to remove the application from the roll resulted in the application not proceeding on the merits. Does the Respondent thus have a costs remedy against the Applicant?

- [39] Respondent made much of “finality” in this Rule 43 Application. He is however not prejudiced by the delay. The Applicant seeks payments from him. The longer the Application is delayed the longer Applicant does not secure such payments. A self-evident benefit (and a self-inflicted prejudice to Applicant it seems).
- [40] A R43 Application is an Interim Application and does not delay the prosecution of the Main Divorce Action. He is not bound to await the outcome hereof before he proceeds with the main action. His right to overall “finality” is not affected by the pursuit of or delay in this Rule 43 application.
- [41] He too came to Court not entirely ready to proceed, asking for his Supplementary Affidavit of 06 May 2024 to be admitted, but this was a simple and quick issue with the main focus being on the “2nd FDF” issue.
- [42] It was only in a 04 June 2024 letter, scant days before the hearing on 10 June 2024, that the Applicant raised, for the very first time, the alleged mandatory need for Respondent to “file” a “financial disclosure form within 5 days of the filing of his formal reply in the application” and contended that, his FDF having been filed “in the context of the principle matrimonial proceedings...some two years ago”, that FDF “cannot, on any construction, constitute compliance with this provision of the relevant Practice Directive”
- [43] As the chronology of process shows, neither litigant complied with the Directive’s requirement that “both parties must exchange...their respective FDFs no later than ten court days after the defendant delivers his/her plea”.
- [44] Given my finding that there is no distinction between an FDF filed after the plea and an FDF filed after the R43 Opposing Affidavit, the allegation that the Respondent’s FDF was non-compliant because it was filed “in the context of the principle matrimonial proceedings” was not correct.
- [45] There is no Directive as to “expiry” of an FDF; hence its filing “some two years ago” likewise did not render it non-compliant.
- [46] The only sense in which that FDF might be said to be non-compliant was that it was not “exchanged” no later than 10 days after the Defendant’s Plea was filed. However the Applicant did not bring an Application to Compel it on time, did not adhere to the requirement for an exchange, and filed hers out of compliance with the Directive too. It is nowhere suggested that FDFs submitted or exchanged at times not compliant with the Directive are somehow disqualified from use or in some way “pro non scripto” (and if it were suggested my view is that suggestion would be incorrect).
- [47] In a second letter of 09 June 2024 the Applicant’s attorney persisted that the then-relevant Directive required Respondent to file another FDF, this one 5 days after his R43 Affidavit, on 25 January 2024.

- [48] These letters, presumably advanced to support Applicant's claim for punitive costs against the Respondent, do the converse. They set out submissions which have been found to have no basis, which the Respondent was accordingly correct to reject.
- [49] Respondent cannot reasonably have been expected to accept the proposal that the filing of the "required" FDF from the Respondent would be unilateral, as the Directive clearly provides for "exchange".
- [50] The proposal that the Applicant be permitted to file a supplementary affidavit in the application within 2 weeks of receiving the Respondent's second FDF does not flow from any reading of the Directive. It is trite that a Rule 43 Application is limited to 2 Affidavits unless the Court permits more. Respondent could not be expected to agree. (It cannot on any reading of this correspondence

be suggested that all the Applicant sought was an opportunity to address the short Supplementary Affidavit of 06 May).

- [51] Respondent was not offered the same, namely to receive an exchange of FDFs and also to file an Affidavit with 2 weeks thereof. Even had he been so offered, there is no basis for the in R43 or in the Directive and his rejection would have been justified.
- [52] Respondent cannot be blamed for rejecting this entire unfounded proposal and thus cannot be blamed for not agreeing to the application being removed from the roll.
- [53] That Applicant sought removal from the roll on these unsubstantiated (and Directive and Rule 43 non-complaint) conditions seems even more egregious when she had earlier refused the Respondent's request to remove the matter due to counsel's unavailability.
- [54] Who in fact then wasted the costs of 11 June 2024?
- [55] Clearly the Applicant did so by requiring Respondent's compliance with something that the relevant Directive does not require (the 2nd FDF), and by further imposing unsubstantiated and unreasonable conditions for the matter's removal from the roll which the Respondent could not have been expected to accept.
- [56] For such reason the Respondent's wasted costs of 11 June are to be paid by the Applicant, on the party and party scale.
- [57] All that remains is to admit the Respondent's Supplementary Affidavit of 06 May 2023, which is short and which directly addresses current information on a business of the Applicant which may not have been available to the Respondent when he submitted his Sworn Affidavit. It appears relevant to the issues to be adjudicated and for the Court to arrive at a just and expeditious decision and as such may be admitted in terms of R43(5) subject to the Applicant's right to file an Affidavit dealing only with its content as I order below. The application to admit same cannot be contended to be the reason for the matter not proceeding on 11 June, especially in light of Respondent's counsel's tender to withdraw same if it were the reason for the matter not to proceed. Hence this does not affect the costs order

I make above.

Order

- a. The Applicant's prayer that the Respondent must file an FDF "for the purposes of the Rule 43 application" within 10 days is dismissed.
- b. The Applicant's prayer that she be given ten days to file a supplementary affidavit within 10 days of the Respondent filing his updated FDF is consequently also dismissed.
- c. The Applicant shall pay the costs of the Respondent of 11 June 2024
- d. The Respondent's Supplementary Affidavit of 06 May 2024 is admitted and the Applicant is given ten days from date of emailing of this Order to the parties to serve and upload to Caselines an Affidavit dealing only with the content thereof.
- e. The costs pertaining to the Respondent's Supplementary Affidavit and the Applicant's Affidavit dealing with the content thereof are reserved for the Court hearing the Rule 43 Application.
- f. The Rule 43 Application is postponed sine die.

C VON LUDWIG AJ

ACTING JUDGE OF THE HIGH COURT,

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 20 June 2024.

Heard:

11 June 2024

Delivered:

20 June 2024

APPEARANCES:

Applicant's counsel:

Adv. D Hodge

Applicant's Attorneys:

Steve Merchak Attorneys

Respondent's Counsel:

Adv. L. Bedeker

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