

SOUTH AFRICA / JUDGMENT

B.W.H v S.A.H (22802/2021) [2023] ZAGPJHC 1348 (21 November 2023)

[2023] ZAGPJHC 1348**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

22802/2021

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Policy**REPUBLIC OF SOUTH****AFRICA****IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG DIVISION,****JOHANNESBURG****Case Number:** 22802/2021

In the matter between: H,
B W
Applicant
And
H,
S A
Respondent

JUDGMENT

Nkutha-Nkontwana J

Introduction

- [1] This is an opposed application in terms of Rule 43(6) of the Uniform Rules that is instituted by the applicant, the respondent husband in the Rule 43 application, premised on alleged changes in the circumstances. He accordingly seeks a retrospective variation of the Rule 43 order issued by Adams J on 9 May 2023. Moreover, the applicant relies on the wide interpretation of Rule 43(6) contemplated in *S v S and Another*[1] and section 173 of the Constitution.
- [2] The Respondent, the applicant wife in the Rule 43 application, is opposing the application on the basis that the applicant failed to show any material change in the circumstances that were previously before Adams J. As such, she contends that this application is purportedly a second bite at the cherry; alternatively, an attempt to appeal the order by Adam J.
- [3] Thus, issues for determination are as follows:
- a. whether there has been a material change of circumstances which would warrant a variation of the order by Adams J.
 - b. if so, how the impugned order should be varied insofar as the maintenance is concerned pertaining to the minor children and/or the respondent; and
 - c. whether the impugned order should be varied retrospectively.
- [4] The parties are married out of community of property, with the inclusion of the accrual system as defined in the Matrimonial Property Act[2]. The respondent instituted a divorce action against the applicant on 6 May 2021 which is still pending a final determination. There are two minor children born of the marriage.
- [5] In terms of the order by Adams J, the applicant was ordered, inter alia, to pay a cash sum of R8 851.97 per month per child (totalling R17 703.94) in respect of the minor children's maintenance and R10 000.00 to the applicant per month as spousal maintenance.
- [6] The applicant contends that the circumstances have materially changed as follows:
- a. the respondent's income has materially increased since the Rule 43 proceedings;
 - b. the respondent's lodging has changed since the Rule 43 proceedings and certain of the Respondent's household expenses have thus decreased including, inter alia, rental, water, and electricity; and

- c. the respondent is running her business from home and, accordingly, part of the household expenses (such as rental, electricity and water) should be apportioned to the respondent's business and should not be for the applicant's account.
- [7] As a result, the applicant seeks a variation of that the order by Adams J by replacing paragraph 3 with an order directing him to pay cash sum of R7 262.13 per month per child (totalling R14 524.26) in respect of the minor children's maintenance, alternatively, the amount as determined by the Court; and deleting paragraph 6 in totality and absolve him from paying the spousal maintenance of R10 000.00.

Material Change in Circumstances

- [8] The respondent concedes that her income has increased. In her sworn statement and Financial Disclosure Form (FDF), she asserts that her net income after tax is about R15 000.00, an increase from R10 000.00 she had disclosed during the Rule 43 application. However, she contends that the increase does not constitute a material change.
- [9] The applicant, on the other hand, has been through the respondent's FDF and bank statements with a fine comb. So, he gave a detailed construal of the respondent's financials in his heads of argument and ultimately argues that the respondent earns an average income of R34 742.00 per month based on the transactions in the bank statements in respect of all her bank accounts for the period between January to August 2023.
- [10] The respondent filed the supplementary heads of argument wherein she attempted to elucidate the discrepancies in her disclosed financials as picked up by the applicant in his heads of argument. The anomaly of the respondent's conduct becomes more pronounced when regard is had to the contents of her supplementary heads of argument and the documents attached thereto which I deal with later

in this judgment.

- [11] The applicant submits that the respondent's averment that she has been receiving an amount of R3500 per month from B[...], one of her businesses, is excluded as income because it is a repayment of a R50 000 loan she provided to B[...], is not probable because there are transactions reflecting a payment to the respondent, including R4000.00 and R7000.00 respectively.
- [12] The respondent concedes that she has received more than R3500.00 during the impugned period from B[...]. She submits that from January to August a total of R22 250.00 (R4000.00 on 6 February 2023, R3 750.00 on 1 April 2023,

R7 000.00 on 4 May 2023, R4 000.00 on 6 June 2023, and R3500.00 on 2 August 2023) was paid towards servicing the loan on an average of R2 781,25 over an eight-month period in 2023. However, in annexure A to her FDF she states that:

“B[...] (Pty) Ltd this is a start-up business that my sister-in-law and I established to provide digital marketing services to clients. We both hold 50% of the shares in this company. We both attended a digital marketing course which cost R50 000 each and this was our contribution to the business on loan account. My loan account has been repaid. There are as yet no annual financial statements that have been produced for this company but the bank statement for the period from the company commencing business to date will be disclosed to the Applicant. B[...] has no assets and thus the present value of my interest in the business is Nil.”[3] (Own emphasis)

- [13] The respondent obviously states that her loan account has been repaid and that could only mean that she is not being owed. Even if there was still an outstanding balance owing to the respondent, there is no explanation as to why it is not settled by now because the account has funds.
- [14] Tellingly, the average amount alleged in the respondent's supplementary heads of argument is less than the R3 500.00 declared as a loan repayment in her sworn statement. Moreover, in 2022, the respondent made two withdrawals from B[...]’s bank account totalling to R20 00.00. It is also curious that all these details were not placed before Adams J nor included in the respondent's sworn statement in this application.
- [15] The respondent further concedes that she understated her income pertaining to OCL Rental for the 2024 tax year by R2 778.96, an average of R555.79 per month. She attributed the omission the April and July rental income to bona fide error.
- [16] The respondent disputes that she has other bank accounts that she has not disclosed. Yet, she failed to give a clear account of the income generated from "Colourful Connections" which was advertised on her Facebook page with an access bar course costs R4 350.00 per course, per person. According to the information provided, at least 37 people attended the course between 18 May 2022 and 26 April 2023. Despite being confronted with this information and a request for full disclosure of all her business accounts, the respondent failed to do so.
- [17] Turning to the applicant's financial affairs, he contends that since the granting of the Adams J he had drastically reduced his own personal expenses from approximately R52 408.22 per month to R32 113.43 per month. He currently earns about 44 399.49 per month, while the Adams J order amounts to R27 703.94 per month and that leaves him with a deficit of R15 417.88 per month to sustain himself.
- [18] He contends further that his financial position is dire. He has taken all steps necessary to try and obtain further funds including depleting his tax-free savings account and funds in the Freelance bank account. Despite this, he has continued to service the Adams J order to the best of his ability. The respondent has since launched contempt proceedings because the applicant has failed to pay the full amount per the Adams J order.

- [19] The respondent takes issue with the applicant's disclosed financial affairs. She contends that the applicant has restructured his income in order to avoid serving the Adams J order. The applicant failed to disclose the Freelance business and the income generated therefrom during the Rule 43 application, a fact not disputed. He also failed to honour the respondent's request to disclose all of his bank statements from January 2021. The Freelance business is subcontracting the applicant's brother's company to service its work. Hence, she launched the contempt application, which is pending the outcome of this application.

Evaluation

- [20] It is well accepted that Rule 43(6) is strictly interpreted and as such a party seeking a variation must show that there are material changes in circumstances and is not seeking a re-hearing or a review or an appeal of an existing order under the guise of a Rule 43(6) application.[4] The applicant bears the onus of establishing that a material change has occurred in the circumstances of either party or a child, or a previous contribution towards costs proving inadequate.[5] As such, it is incumbent upon the applicant to show, over and above establishing that there is a change, that the change is material in the context of the parties' broader financial circumstances.
- [21] Admittedly, in Rule 43 proceedings the parties are enjoined to make full and frank disclosure of their financial affairs and do so at the earliest available opportunity. In *Du Preez v Du Preez*[6], Murphy J made the following observations about the duty to disclose fully all material information regarding the financial affairs in Rule 43 application and the trend to deliberately misstate same, a trend that is unfortunately still persisting:

"However, before concluding, there is another matter that gives me cause for concern, deserving of mention and brief consideration. In my experience, and I gather my colleagues on the bench have found the same, there is a tendency for parties in rule 43 applications, acting expediently or strategically, to misstate the true nature of their financial affairs. It is not unusual for parties to exaggerate their expenses and to understate their income, only then later in subsequent affidavits or in argument, having been caught out in the face of unassailable contrary evidence, to seek to correct the relevant information. Counsel habitually, acting no doubt on instruction, unabashedly seek to rectify the false information as if the original misstatement was one of those things courts are expected to live with in rule 43 applications. To my mind the practice is distasteful, unacceptable, and should be censured. Such conduct, whatever the motivation behind it, is dishonourable and should find no place in judicial proceedings. Parties should at all times remain aware that the intentional making of a false statement under oath in the course of judicial proceedings constitutes the offence of perjury and, in certain circumstances, may be the crime of defeating the course of justice. Should such conduct occur in rule 43 proceedings at the instance of the applicant then relief should be denied.

Moreover, the power of the court in rule 43 proceedings, in terms of rule 43(5), is to 'dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision'. The discretion is essentially an equitable one and has accordingly to be exercised judicially with regard to all relevant considerations. A misstatement of one aspect of relevant information invariably will colour other aspects with the possible (or likely) result that fairness will not be

done. Consequently, I would assume there is a duty on applicants in rule 43 applications seeking equitable redress to act with the utmost good faith (*uberrime fidei*) and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with 'clean hands' and, on that ground alone, the court will be justified in refusing relief."

[22] In my view, as correctly contended by the applicant, the respondent has not approached the court with clean hands. The explanation proffered in respect of the income derived from B[...] is obviously inconsistent and untenable. To make matters worse, this explanation was not volunteered at the first available opportunity nor mentioned during the Rule 43 application.

[23] The respondent further concedes to misstating her rental income and seemed insouciant in her explanation for the

omission. Worse still, the respondent failed to tender an explanation for the conspicuous absence of the income generated from Colourful Connection in her disclosed bank statements.

[24] As stated in *Du Preez*, the failure to disclose fully all material information regarding a party's financial affairs is fatal. Thus, in my view, an inference can be drawn that the respondent's income has indeed increased materially and to the extent that she is in a position to maintain herself.

[25] The applicant seeks also a reduction of the amount he has to pay in respect of the minor children's maintenance from R8 851.97 to R7 262.13 per month per child. While I agree with the applicant that the lodging expenses may have decreased, in my view, the amounts at stake are inconsequential. Also, the costs of maintaining the minor children could not have decreased, as contended by the applicant. On the contrary, the respondent gave evidence that shows that the costs have since increased to R39 937,87 per month, as opposed to R35 407,88 that was claimed during the Rule 43 Application.[7] I have no reason to doubt the respondent's evidence as the applicant has not placed any cogent evidence to negate same.

[26] I am not inclined to deal with the applicant's second reason for the reduction of his maintenance contribution in respect of the minor children. The contention that the respondent conducts her business from the residential property and, as such, her business must contribute towards some of the expenses is not new. The same facts were placed before *Adams J* and were rejected.

[27] Besides, I have looked at the applicant's financial position. As much as he pleads poverty, in his own version, he receives a restraint of trade bonus of R 5000.00 per month which becomes payable every 6 months, an overtime allowance of R 5000.00 and a 13th Cheque. Yet, he failed to proffer any explanation for committing his overtime income towards servicing the loans that were extended by his employer.

- [28] It is also inexplicable that his employer, who was at some stage seemingly indulgent and prepared to defer repayment towards the loan (in respect of the expenses for failed relocation to Australia) until the applicant's financial position improves, is now demanding payment. The applicant seems to forget that the premise for this application is his allegedly dire financial position and there is no explanation provided why his employer bailed out on its undertaking.
- [29] Furthermore, there is no explanation as to why the applicant cannot use his restraint of trade bonus and 13th Cheque to service his loans. In essence, the applicant has R 5000.00 per month overtime income that he has committed to servicing the loans over and above the income of about R 8000.00 per month derived from the restraint of trade bonus and 13th Cheque. One can also not turn a blind eye to the fact that the applicant managed to source funds to finance a holiday to Victoria falls with his partner.
- [30] Absent any proof to the contrary, I am satisfied that the applicant can afford to contribute financially towards the maintenance of the minor children per the Adams J order.
- [31] Lastly, I deal with retrospectivity of the variation order. The applicant contends that the variation order must apply retrospectively to July 2023, the date when he discovered that the respondent's income has increased. To fortify this contention, reliance is placed on the decision of *Harwood v Harwood*[8] wherein it was held that retrospective or retroactive orders were possible in matters relating to maintenance in terms of the common law and the court is not divested of its power to order same by the provisions of Rule 43 of the Uniform Rules since there is no explicit injunction.
- [32] I am persuaded that the variation order in respect of the spousal maintenance should be retrospective. However, I am of a view that it should be effective from 1 September 2023 since the applicant launched this application in August 2023.

Conclusion

- [33] In all the circumstances, and in the light of the reasons alluded to above, I am of the view that the order by Adams J should be varied and only in relation to the spousal maintenance.

- [34] Accordingly, it is ordered that:

Order

1. The order by Adams J is varied as follows:
 - ii. Paragraph 6 thereof is set aside.
 - iii. The applicant is absolved from paying the respondent an amount of R10 000.00 per month as spousal maintenance with effect from 1 September 2023.
2. Costs shall be cost in cause.

P NKUTHA-NKONTWANA J
JUDGE OF THE HIGH COURT,
JOHANNESBURG

Heard on: 05 October 2023

Judgment

handed down on: 21 November 2023

Appearances:

For the Applicant: Adv R Adams

Instructed by: Pagel Schulenburg Attorneys

For the Respondent: Adv T Eichner-Visser

Instructed by: Assheton-Smith Ginsbery

[1] 2019 (6) SA 1 (CC).

[2] 88 of 1984.

[3] CaseLines 024-460, Annexure A (28 August 2023) in 024: RULE 43(6) APPLICATION.

[4] *Jeanes v Jeanes* 1977

(2) SA 703 (W) 706G; *Grauman v Grauman* 1984

(3) SA 477 (W) 480C; *Micklem v Micklem* 1988

(3) SA 259 (C) 262D–E; *Maas v Maas* 1993

(3) SA 885 (O) 888C.

[5] *Id.*

[6] 2009 (6) SA 28 (T) at para 15-16.

[7] Annexure SAS3 CaseLines 024: 203.

[8] 1976 (4) SA 586 (C) at 588C-E. see also *Herfst v Herfst* 1964

(4) (W) at pp127-128A-B.

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