

SOUTH AFRICA / JUDGMENT

J.B and Another v J.L.S and Another (22199/2022) [2024] ZAGPPHC 1367 (31 December 2024) [2024] ZAGPPHC 1367

COURT

North Gauteng High Court, Pretoria

BEFORE

T E Joyini

CASE / FILE NUMBER

22199/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 22199/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES/NO

DATE

31/12/2024

SIGNATURE

In

the matter between:

J[...]
B[...]
First Applicant
JULIUS
SWART PROMOTIONS CC
Second Applicant
and
J[...]
L[...]
S[...]
First Respondent
THE
SHERIFF, SANDTON SOUTH
Second Respondent

JUDGMENT

Joyini J

INTRODUCTION

- [1] This is an opposed application in terms of Rule 43(6). Rule 43(6) provides litigants with an avenue to approach a court for a variation of its decision, on the same procedure, when there is “material change occurring in the circumstances of either party and/or the contribution towards costs proving inadequate”.
- [2] Both parties submitted written heads of argument in addition to their affidavits and oral submissions. Where appropriate, I have relied on the written heads and affidavits in crafting this judgment.

BACKGROUND FACTS

- [3] By way of summary, the first applicant and the first respondent (“the parties”) got married to each other on 25 October 2018. The marriage relationship still subsists. The parties, in their marriage relationship, have no minor children. They separated in February 2022 and subsequently instituted divorce proceedings in May 2022.

ISSUES FOR DETERMINATION AND RELIEF SOUGHT

- [4] It is common cause that the first applicant seeks a variation of the order that was issued by this Court on 28 August 2024 under Rule 43 of the Uniform Rules of Court on the following grounds: That the first applicant be ordered to continue to pay maintenance towards the first respondent pendente lite in the amount of R20 000.00 per month; that the remainder of the orders in the Rule 43 application be set aside; that the property

already executed upon, with the exclusion of the TV Cabinet remains the property of the first respondent; and cost of this application be on an attorney-client scale including costs of senior junior counsel, only in the event of opposition.

POINT IN LIMINE AND DISCRETION TO ALLOW FURTHER AFFIDAVITS

[5] The first respondent is opposing the order and relief sought by the first applicant. He also raised a point in limine, taking issue with the filing of the first applicant's supplementary affidavit. This became an issue when the first applicant was seeking the Court to exercise its discretion in terms of Rule 43(5) and grant him leave to file his supplementary affidavit.

[6] A point in limine of this nature, like the one raised in paragraph 5 above was dealt with properly in the following paragraphs of S N v S R[1]:

"[5] It is well accepted that Rule 43 proceedings are interim in nature pending the resolution of the main divorce action. The premise is expeditious intervention by the courts to alleviate the adverse realities faced by claimants, usually women, who find themselves impoverished when litigating against their spouses who have, historically, always had and still do have stronger financial positions in divorce proceedings.[2]

[6] The procedure is straightforward as the 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 therefor, ..." A respondent wishing to oppose the application is required by Rule 43(3)(a) to deliver "a sworn reply in the nature of a plea." The parties are expected to file concise affidavits and to avoid prolixity.[3]

[7] Instructively, Rule 43 does not provide for the filing of replying affidavits as of right. Moreover, the Court does not have a discretion to permit departure from the strict provisions of Rule 43(2) and (3) unless it decided to call for further evidence in terms of Rule 43(5).[4]

[8] In this case, that applicant, without leave of the court, filed a supplementary affidavit in response to the allegations in the respondent's answering affidavit. This step is impugned by the respondent as irregular. In response, the applicant contends that she is seeking the Court to exercise its discretion in terms of Rule 43(5) and grant her leave to file a supplementary affidavit.

[9] The parties accept that there is no provision to file further affidavits in terms of Rule 43. Whilst that is the case, in E v E; R v R; M v M,[5] the full bench of this Court, which both parties referred to, observed that: "In terms of Rule 43(5), the court does have a discretion to call for further evidence despite the limitations imposed by Rule 43(2) and (3). The problem with the present Rule 43(2) and (3) is that invariably, in most instances, the Respondent will raise issues that the Applicant is unable to respond to due to the restriction, unless the court allows the Applicant to utilise Rule 43(5). This process will result in conflicting practices as it has already happened in a number of cases and as highlighted by Spilg J in TS. Applicant should have an automatic right to file a replying affidavit, otherwise she has no way of

responding to allegations that are set out in the Respondent's answering affidavit."

- [7] The first respondent has, in turn, submitted his further answering affidavit responding to the first applicant's supplementary affidavit. Accordingly, it is in the interest of justice to allow the parties to file substantive but relevant affidavits setting out the basis upon which their relief is sought. It is clear that the averments in the affidavit and information provided are pertinent to the determination of issues in dispute. I therefore exercise my discretion in terms of Rule 43(5) to allow the filing of the first applicant's supplementary affidavit and of course, the first respondent's further answering affidavit.

APPLICANTS' VERSION AND ARGUMENT

- [8] The first applicant contended that there had been material change in circumstances since the original Rule 43 proceedings. In support of his claim, the applicant relies on a purported change in circumstances as contemplated in Rule 43(6). The first applicant argues that it is impossible to comply with the Rule 43 order granted on 28 August 2024 for lack of funds.
- [9] The second applicant's business flourished when all the members were involved and up and until the first applicant was forced to resign after causing massive losses for the closed corporation. As such, the applicants' financial position took a dive from there and has still not recovered. The financials of the closed corporation clearly show a loss of close to a million rands, which is indicative of the financial position of both applicants.
- [10] It is additionally impossible for the applicant to rectify his alleged contempt as there are no funds available to rectify any breach of the order.

FIRST RESPONDENT'S VERSION AND ARGUMENT

- [11] The first respondent opposed this application, arguing that the first applicant has failed to demonstrate any material change in circumstances that could justify a variation of the previous Rule 43 order. The first respondent contends that the first applicant only annexed his FNB cheque account until 3 August
2024. The date of the Rule 43 order is 28 August 2024. He signed his sworn affidavit on 6 November 2024. There are no bank statements from date of the Rule 43 order up to the date of signature of his affidavit. The first applicant also only annexed financial statements of the second applicant for the year ended 28 February 2023. He failed to annex financial statements from date of the Rule 43 order up to the date of signature of his affidavit. To prove a material change in circumstances, he should have annexed the financial statements of 2024.
- [12] In support of this argument and a call for the dismissal of this application, the first respondent referred the Court to *Du Preez v Du Preez*[6] where it was held: "[16] 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.”

- [13] It was submitted that if the first applicant alleges a material change in circumstances, then he must prove it, which he failed to do. It was further submitted that the first applicant has not made out a proper case for material change in circumstances pertaining to his relief sought in terms of Rule 4(6).
- [14] According to the first respondent, this application constitutes an abuse of the court process. The first respondent argues that the first applicant must show a material change in circumstances in terms of Rule 43(6), to vary the previous Rule 43 order. The first respondent further argues that the application before this Court is fatally defective on the grounds that there are several material non-disclosures, meaning that the first applicant is not before Court with clean hands.
- [15] Since the Rule 43 order was granted on 28 August 2024, the first applicant has failed completely to comply with it. Instead, he filed an urgent interdict application to stop the Sheriff from enforcing the Rule 43 order and now he has filed this Rule 4(6) application.
- [16] The first applicant has not remedied his default before requesting the Court for assistance in terms of Rule 4(6). The Court may refuse to hear a party until it has purged itself of the contempt.
- [17] In an unanimous Constitutional Court decision, *S S v V V S*[7] penned by Justice Kollapen, a punitive costs order was granted against the applicant for failure to pay maintenance as per court

order; and the fact that the applicant had not remedied his default before requesting the Court for assistance.

LEGAL FRAMEWORK AND ANALYSIS

- [18] Rule 43(6) allows for a variation of an earlier Rule 43 order. An order made in terms of Rule 43 is not appealable in terms of section 16(3) of the Superior Courts Act 10 of 2013. Section 16(3) had been found to be constitutional in *S v S* and another 2019
- (6) SA 1 (CC).

[19] It is important to note that there is a test that must be satisfied. The Cape Division of the High Court correctly held in *Greenspan v Greenspan* that when the court is considering an application in terms of Rule 43(6), ‘... to succeed the applicant must show a material change in circumstances since the date when the last order was made’.[8]

[20] The Orange Free State Division (as it then was) in *Andrade v Andrade* also convincingly held that ‘Rule 43(6) requires a brief statement indicating the material change that is alleged to have taken place and not a long-winded account as to

the circumstances under which the change has come about’.[9]

[21] In *P.E.O.I v W.A.H.*, this court correctly held that: ‘... to succeed in that endeavour, an applicant must demonstrate, not only that a change or even a significant change in circumstances has occurred but must place sufficient facts before the court to enable it to determine the materiality of that change in the context of the applicant’s broader financial circumstances. This would, at the very least, entail a detailed exposition of all available sources of income and would not merely be limited to the income earned from his (now reduced) salary.[10] Further that ‘[a] considered reading of Rule 43(6) suggests to me that, in order to succeed in demonstrating a material change in circumstances, one must make a full and frank disclosure in regard to all of the numerous and varied elements which make up the broad overview of the applicant’s financial situation’.[11]

CONCLUSION

[22] Calling for the dismissal of this application, the first respondent argues that this application constitutes an abuse of the court process. The first respondent argues that the first applicant must show a material change in circumstances in terms of Rule 43(6), to vary the previous Rule 43 order. The first respondent further argues that the application before this Court is fatally defective on the grounds that there are several material non-disclosures, meaning that the first applicant is not before Court with clean hands. In support of this argument, the first respondent referred the Court to *Du Preez v Du Preez*[12] where it was held: “[16] 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.”

[23] Having considered the evidence before this Court and caselaw cited/referred to above, I am of the view that the first applicant has to be reminded of this duty on applicants in Rule 43 applications seeking equitable redress to act with the utmost good faith and to disclose fully all material information regarding their financial affairs (referred to in Du Preez case above). I am also of the view that the first applicant's material non-disclosure means that he is not before this Court with clean hands. Therefore, on that ground alone, I think this Court is justified in refusing the relief sought by the first applicant and this means dismissing the application.

COSTS

[24] I have considered both parties' argument relating to the costs of this application. The facts in this regard were not extraordinary in this context and I am not persuaded that the first respondent's opposition was frivolous or in bad faith. I am accordingly not inclined to grant costs in either party's favour. Therefore, I leave this to the trial court to decide. The costs of this application will therefore be costs in the cause, meaning that they would be determined as part of the overall case.

ORDER

[25] In the circumstances, I make the following order:

[25.1] Leave is granted for the filing of the first applicant's supplementary affidavit and the first respondent's further answering affidavit.

[25.2] The application of the first and second applicants is dismissed.

[25.3] The costs of this application will be costs in the cause, meaning that costs would be determined as part of the overall case.

T E JOYINI

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the applicants: Adv A Korf Instructed by: Susan Van Rooyen Attorneys Email: susann@lawvr.co.za For the respondents: Adv D Theodorellis Instructed by: Mundt Inc. Attorneys Email: wm@mundt.co.za Date of Hearing: 22 November 2024 Date of Judgment: 31 December 2024

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 31 December 2024 at 10h00.

[1] (2023/036122)

[2023] ZAGPJHC 1335 (14 November 2023).

- [2] E v E; R v R; M v M 2019
- (5) SA 566 (GJ) at para 25.
- [3] Maree v Maree 1972
- (1) SA 261 (O) at 263H; Zoutendijk v Zoutendijk 1975
- (3) SA 490 (T) at 492C; Visser v Visser 1992
- (4) SA 530 (SE) at 531D; Du Preez v Du Preez 2009
- (6) SA 28 (T) at 33B; TS v TS 2018
- (3) SA 572 (GJ) at 585A.
- [4] Rule 43(5) provides: “The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision.” See E v E, R v R, M v M above n 2 at paras 33, 43, 48, and 52.
- [5] E v E; R v R; M v M id at paras 58-9.
- [6] (16043/2008)
- [2008] ZAGPHC 334 (24 October 2008).
- [7] (CCT247/16)
- [2018] ZACC 5; 2018 (6) BCLR 671 (CC) (1 March 2018).
- [8] [1999] JOL 5300 (C) para 6.
- [9] [1982] 4 All SA 639 (O) 639.
- [10] (97132/16) [2021] ZAGPPHC 60 (3 February 2021) para 16.
- [11] P.E.O.I v W.A.H para 14.
- [12] (16043/2008)
- [2008] ZAGPHC 334 (24 October 2008).

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