

SOUTH AFRICA / JUDGMENT

J.P.N v N.A.N (51791/2020) [2024] ZAGPPHC 1337 (17 December 2024)

[2024] ZAGPPHC 1337

COURT

North Gauteng High Court, Pretoria

BEFORE

Joyini

CASE / FILE NUMBER

51791/2020

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 51791/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES/NO

DATE:

17/12/24

SIGNATURE

In

the matter between: N,
 J. P.
 Applicant
 and
 N,
 N. A.
 Respondent

JUDGMENT

Joyini AJ

INTRODUCTION

- [1] The parties were cited in court papers by their full names. It is now standard practice in our courts that in order to give effect to the paramountcy principle entrenched in section 28 of the Constitution, the interests of minor children must be protected in legal proceedings, including, divorce proceedings. In this case the parties have minor children. I accordingly deem it appropriate to refer to the parties and their children by their initials only.
- [2] This is an application in terms of Rule 43 of the Uniform Rules of Court (“Rule 43”) brought by the applicant for interim maintenance in respect of herself and children, pending divorce. A Rule 43 Application in the High Court provides for urgent interim relief. In many instances, the party who is not the main breadwinner is left without any income and is then in a predicament in meeting his/her needs, and in some instances, their minor children’s financial needs. In this regard, he/she may apply for an interim order in terms of Rule 43. The purpose of Uniform Rule 43 applications is to ensure that no party is substantially prejudiced and lacks resources to maintain a reasonable standard of living enjoyed by the parties during the marriage when pursuing their cases in the main divorce action.
- [3] Courts are required to consider the applicant's reasonable needs and the respondent's ability to meet them.[1] The Court will look at the financial circumstances of both the parties and will make an order accordingly thereto. The Court will not make an order where luxuries are asked for in the Rule 43 application, and will only make an order for what is essential.

BACKGROUND

FACTS

- [4] The following facts underlie this application: The applicant and the respondent (“the parties”) got married to each other on 20 July 2002. The marriage is in community of property. The marriage relationship still subsists. Three children were born from this marriage between the parties, whose ages range between and around twenty-one, sixteen and three. All three children are residing with the applicant in the marital home. The applicant instituted divorce proceedings on or about February 2020. The respondent moved

out of the marital home on or about March 2020. He has since neglected his financial obligations towards the applicant and the children. His payment of the children's school fees is also not consistent. The children are with the applicant full time. They rely solely on the applicant for both emotional and financial support. The respondent does not take children to be with him bi-weekly, on school holidays and/or on Father's Day as per the agreement with the Family Advocate. This leaves the children in the full-time care of only one parent.
[2]

ISSUES FOR DETERMINATION: RELIEF SOUGHT

- [5] The applicant sought an order under Rule 43 of the Uniform Rules of Court, aiming to secure maintenance pendente lite for the children and herself as follows: That the respondent be directed to pay maintenance for the applicant in the amount of R140 000 per month plus R20 000 per child per month; that the respondent be ordered to consistently effect payment of the children's school fees; that the respondent be ordered to retain the two minor children on his medical aid and to include the major child to his medical aid immediately after the granting of this order; and that the applicant be directed to pay costs for the application.[3]

POINT IN LIMINE: DISCRETION TO ALLOW FURTHER AFFIDAVITS

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

- [7] A point in limine of this nature, like the one raised in paragraph 6 above was dealt with properly in the following paragraphs of S N v S R[4]:

"[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.[5]

- [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.[6]
- [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).[7]

- [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*, [8] 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."
- [8] Accordingly, it is in the interest of justice and in the best interest of minor children 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 affidavits 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 further affidavits.

APPLICANT'S VERSION

- [9] The applicant, in her replying affidavit[9], filed her financial disclosure form[10] and she also revealed the following: "I have become unemployed due to mental issues – major depression, that coincided with company retrenchments. I have been unemployed

since end of May 2024. I am seeking employment & undergoing treatment with Psychiatrist for mental issues. We both owned a

company T[...] P[...] L[...], that had and still have contracts. On average, the company made +-R20 Million per annum. Currently it made R32 Million per annum. From the proceed, my estranged husband gave me R150 000 allowance monthly, and paid all household expenses from the company. He stopped & blocked access to company when I filed for divorce. My estranged husband pays R60 000 maintenance to his one child with his mistress to her company This is monthly payment. He has abandoned our need (myself and 3 kids (one is only 2 years old). My earning capacity is impacted by mental issues since my husband's cheating, financial exclusion & abandonment. I was retrenched fully by the company I worked for. I stay with the 3 kids fulltime, 2 of them have mental issues as well. I do not have plans to be married or stay with a partner. I am heavily in debts."

- [10] The applicant, in her supplementary affidavit[11], brought to the Court's attention the letter from school of the second child, N, O. N., demanding payment of R37 000 for her outstanding school fees for the 2024 academic year and also that the applicant has been diagnosed with cervical cancer. She is due for further surgeries during December 2024.

RESPONDENT'S VERSION

- [11] The respondent, in his answering affidavit,[12] is of the view that applicant's version is misleading the Court because he has and he is still maintaining their children and indirectly the applicant. He told the Court through his Counsel that before he left the marital/common home, they agreed to lease out their second joint immovable property in order to use the rental income to pay for rates and taxes, levies and other household requirements. The property was leased at a monthly rental of R12 000 and the lease agreement still subsists. He said the Court cannot be called upon to order what he is already doing. He submitted that he pays for the children's school fees and the children are on his medical aid.
- [12] His Counsel submitted that the applicant is gainfully employed as an engineer and she is a director in several companies from whom she derives an income. According to him, she basically receives multi streams of income from her companies. Apart from the rental income she is collecting from the Centurion property as pleaded above, she receives income from a Guest House jointly owned by them.
- [13] He argued that the applicant has failed to prove that she is in a financial state wherein she cannot afford herself as he does everything for their children. He submitted that their children are well taken care of financially as he has opened banking accounts for them where he deposits money every month to cover their personal needs. According to the respondent, this application constitutes an abuse of the court process.

TEST FOR ENTITLEMENT TO MAINTENANCE PENDENTE LITE

- [14] The applicant is only entitled to a reasonable maintenance pendente lite. In deciding whether a case for a reasonable maintenance has been made, the court looks at: (i) the standard of living of the parties

during the marriage; (ii) the applicant's actual and reasonable needs/requirements; and (iii) the respondent's income (although the use of assets can also sometimes be considered).[13]

PURPOSE OF RULE 43

- [15] The applicant approached this Court in terms of Rule 43 of the Uniform Rules of Court. This rule is aimed at providing prompt and temporary relief to a financially weaker spouse who needs maintenance from a financially stronger spouse pending the finalisation of the parties' divorce proceedings.

- [16] This rule created an important procedure that enables financially weaker spouses to approach the court to order financially stronger spouses to pay maintenance pending the finalisation of divorce disputes. It also allows financially weaker spouses, often women, who do not have their hands on the keys of their joint estates' financial resources to be allowed to tap into those resources to finance their needs including litigations.[14]
- [17] It is evident that the procedure laid out in Rule 43 is not only intended for the parties to approach the court and argue their matters in a short possible period of time, but also to enable the court to promptly hear evidence, decide the matter and expeditiously render its judgment.

APPROACH OF THE COURTS TO DATE

- [18] In all the current applications, one or two respondents apply for the dismissal of the application or for a punitive costs order on the basis of prolixity and failure to comply with the strict provisions of Rule 43(2) and (3). The desirability of keeping the costs of Rule 43 applications as low as possible has been emphasised in many decided cases. In *Willies vs Willies* 1973 (3) SA at 259 C-D Fannin J said: In considering the question before us it must not be ignored, I think, that the Rule 43 procedure was a novel procedure, a sort of hybrid procedure, largely of the nature of a motion or application (being commenced with a notice supported by an affidavit) but partly of the nature of an action, in which a document "in the nature of a declaration" has to be filed and in which evidence can be led."
- [19] In *Varkel vs Varkel* 1967
- (4) SA 129 © at 131 G-H, Van Winten J said: "rule 43 was devised and promulgated with the object of providing an expeditious and inexpensive procedure for obtaining interim relief in matters relating to matrimonial disputes pending or about to be instituted."
- [20] The nub of the question to be answered is what interpretation of rule 43 will ensure a speedy and efficient resolution of the application while at the same time protecting the rights of women and children who are prevalently vulnerable in Rule 43 applications.
- [21] The Children's Act, directs that the best interests of the child is of paramount importance in every matter concerning children. Similarly Section 28 of the Constitution requires that a fair hearing is observed and that the child's best interests are protected in all proceedings concerning the child.

EVALUATION AND ANALYSIS

- [22] The applicant seeks interim spousal and child maintenance. The applicant does not agree with respondent's version. The respondent opposes the application. Despite the regrettable efforts to unnecessarily complicate issues that this court should determine, the issues that must be decided are relatively simple. (i) Are the parties' children and the applicant in need of maintenance pending the finalisation of the divorce proceedings? (ii) What are the applicant's actual and reasonable needs and/or requirements? (iii) If these questions are

answered in the affirmative, then it should be determined whether the respondent has the financial means to provide interim maintenance to the applicant and their children pending the finalisation of the divorce proceedings. (iv) If he does, to determine the reasonable amounts of maintenance that the respondent should be ordered to pay.

[23] To adequately determine the need for maintenance and ability to pay, respective assets and incomes of both parties must be assessed. The applicant, in her replying affidavit[15], revealed the following: “I have become unemployed due to mental issues – major depression, that coincided with company retrenchments. I have been unemployed

since end of May 2024. I am seeking employment & undergoing treatment with Psychiatrist for mental issues. We both owned a

company T[...] P[...] L[...], that had and still have contracts. On average, the company made +-R20 Million per annum. Currently it made R32 Million per annum. From the proceeds, my estranged husband gave me R150 000 allowance monthly, and paid all household expenses from the company. He stopped & blocked access to company when I filed for divorce. My estranged husband pays R60 000 maintenance to his one child with his mistress to her company This is monthly payment. He has abandoned our need (myself and 3 kids (one is only 2 years old). My earning capacity is impacted by mental issues since my husband's cheating, financial exclusion & abandonment. I was retrenched fully by the company I worked for. I stay with the 3 kids fulltime, 2 of them have mental issues as well. I do not have plans to be married or stay with a partner. I am heavily in debts.”

CONCLUSION

[24] To decide whether the applicant and the children should receive interim maintenance from the respondent pending the finalisation of the divorce proceedings, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective

affidavits, heads of arguments and oral arguments by their counsel. The conclusions that I reach are not binding on the court that will conduct the divorce trial which, after hearing all the evidence, may provide clarity on the actual financial position of the parties.[16]

[25] The respondent's submission illustrates that the applicant may have been able to maintain herself at some point. Unfortunately, this submission does not counter the applicant's argument that the applicant is no longer able to financially maintain herself and the children due to inter alia her mental issues and cancer. From the evidence submitted in all her affidavits and arguments made in court, it is clear that her income has indeed been drastically affected by the new developments in her life, especially her health issues. I am satisfied that the applicant no longer receives the salary and income that she used to receive.

[26] In conclusion, given the temporary nature of Rule 43 proceedings, I am convinced that the applicant has been placed in a situation that she and their children are deprived of their necessary maintenance which warrants the intervention of this court by way of Rule 43

remedy. I am convinced on the strength of the evidence submitted to the Court, that the respondent can afford to pay interim maintenance. I am convinced that the applicant and the children should receive interim maintenance from the respondent based on the evidence before the court.

- [27] Each application for spousal maintenance must be decided on its own facts. The respondent is a man of means. It is not disputed there is a significant disparity in their respective incomes and that the respondent has through the years paid for most expenses. He has always paid for his family's living expenses and they are entitled to live a similar high standard of living which they were used to. The applicant contended that the respondent has continued to live on the same high standard.
- [28] In CC v NC[17] the court stated that an applicant is entitled to reasonable maintenance dependent on the marital standard of living of the parties, albeit that a balanced and realistic assessment is needed, based on the evidence concerning the prevailing factual situation.
- [29] I have considered the list of expenses the applicant annexed to her papers, they appear reasonable. It is clear that the respondent would not be seriously prejudiced if he must keep his family financially comfortable. I am inclined to grant the applicant maintenance in the amount of R140 000 per month and a further R20 000 per child per month.
- [30] The applicant's constitutional rights to dignity[18] should not be compromised. She should not have to go cap in hand to the respondent each time, he has refused to pay for very critical

necessities. The facts demonstrate a recent trend of "tight fisted and spiteful behaviour", and it is likely to continue

until the matter is finalised. In Glazer v Glazer,[19] the court stated:

"I think that a wife is entitled to a reasonable amount according to her husband's means, not necessarily according to what he thought was reasonable."

COSTS

- [31] The costs of this application will be costs in the cause. I have ruled that costs would be costs in the cause, meaning they would be determined as part of the overall case.

ORDER

- [32] In the circumstances, I make the following order, pendente lite:

[32.1] Leave is granted for the filing of the applicant's replying and supplementary affidavits.

[32.2] The respondent shall pay maintenance for the children as follows:

[32.2.1] R20 000.00 per month per child, on or before the 1st day of each month from the grant of the order, directly to the Applicant's

bank account: J[...] N[...], FNB Current Account Number: 6[...], Branch Code: 2[...].

[32.2.2] The amount set out in paragraph 32.2.1 above shall be increased annually on the 1st day of the month succeeding the anniversary date of this order and every 12 months thereafter in accordance with the

average increase as recorded in the Consumer Price Index for the Republic of South Africa as notified from time-to-time by the

Director of Statistics or his equivalent, for the preceding year;

[32.2.3] All the children's school-fees at a private school, inclusive of school levies, school-books, school uniforms, all school outings and tours, extra-mural activities, sporting activities, any equipment

and clothing required for the aforesaid extra-mural activities, extra tuition and sporting activities;

[32.2.4] The respondent shall pay all the children's medical and related expenses not covered by the medical aid scheme, inclusive of hospital, dental, orthodontic, prescribed pharmaceuticals, therapeutic and related expenses.

[32.3] The respondent shall pay maintenance for the applicant as follows:

[32.3.1] R140 000.00 per month, on or before the first day of each month from the grant of the order, directly to the applicant's bank account: J[...] N[...], FNB Current Account Number: 6[...], Branch Code: 2[...].

[32.3.2] That the amount set out in paragraph 32.3.1 above shall be increased annually on the 1st day of the month succeeding the anniversary date of this order and every 12 months thereafter in accordance with such

rise as has occurred in the Consumer Price Index for the Republic of South Africa as notified from time-to-time by the Director of Statistics or his equivalent, for the preceding year; and

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

T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the applicants: Adv Fumisa Ngqele Instructed by: Seanego Inc. Attorneys For the respondents: Adv Yasmin Omar Instructed by: Brian Maphanga Attorneys Date of Hearing: 27 November 2024 Date of Judgment: 17 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 17 December 2024 at 10h00.

[1] M G M v M J M [2023] ZAGPJHC 405 para 9.

[2] Caselines 026-413: Brief factual background on parties' current family situation.

[3] Caselines 026-410 to 026-411: Relief sought.

[4] (2023/036122)

[2023] ZAGPJHC 1335 (14 November 2023).

[5] E v E; R v R; M v M 2019

(5) SA 566 (GJ) at para 25.

[6] 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.

[7] 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.

[8] E v E; R v R; M v M id at paras 58-9.

[9] Caselines 026-325 to 026-326.

[10] Caselines 026-308 to 026-324.

[11] Caselines 026-487 to 026-493.

[12] Caselines 037-1 to 037-14.

[13] See Taute v Taute 1974

(2) SA 675 (E) at 676D-H; CD v JHD [2022] ZAGPPHC 456 at paras 55-6.

[14] See S v S and Another 2019

- (8) BCLR 989 (CC); 2019
- (6) SA 1 (CC) para 3, where the Constitutional Court observed that '[a]pplicants in rule 43 applications are almost invariably women who, as in most countries, occupy the lowest economic rung and are generally in a less favourable financial position than their husbands. ... The inferior economic position of women is a stark reality. The gender imbalance in homes and society in general remains a challenge both for society at large and our courts'.
- [15] Caselines 026-325 to 026-326.
- [16] Levin v Levin and Another 1962
- (3) SA 330 (W) 331D.
- [17] 16742/21) [2021] ZAWCHC 227 (9 November 2021).
- [18] Section 10 Act 108 1996.
- [19] 1959
- (3) SA 930 D_E.

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