

SOUTH AFRICA / JUDGMENT

Kivetts v Brugmans (04853/2020) [2021] ZAGPJHC 721 (21 May 2021)

[2021] ZAGPJHC 721**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Majavu

CASE / FILE NUMBER

04853/2020

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****CASE****NO: 04853/2020****NOT REPORTABLE****NOT OF INTEREST TO OTHER****JUDGES****REVISED****21 MAY 2021****This****matter was heard virtually on the Microsoft teams platform**

In the matter between:

MAJEDA

KIVETTS APPLICANT

and

WERNER ALFRED JOHAN

BRUGMANS RESPONDENT

Coram: Majavu

AJ

Heard: 20

May 2021

Delivered: 21

May 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14h30 on 21 May 2021

Summary:

This is an application in terms of rule 43 of the Uniform rules of Court for certain relief pendent lite, for inter alia, interim maintenance, payment of certain loans, litigation costs unrelated to the pending divorce, declarators, issue whether some costs prayed for are competent in rule 43, applicant contends the law has developed to accommodate all costs as a species of maintenance, respondent contends otherwise- relief granted only in respect interim maintenance and related expenses, costs to be determined in the main action

ORDER

(a) The

respondent is ordered to pay, pendente lite, an amount of R65,000.00 per month with effect from 28 May 2021, and thereafter by no later than the last working day of each succeeding month, such payment to be made into the applicant's nominated

banking account. This amount shall increase annually on the anniversary of this order and in accordance with the percentage increase in the headline inflation of the consumer price index, as published by statistics South Africa during the preceding year, the

first such increase to be effected on 21 May 2022;

(b) The

respondent will continue to retain the applicant on the Discovery Classic Plan ("the Plan"), as well as pay any necessary and reasonable excess, not covered by the plan, including the cost of hospitalisation, treatment and/or medical expenses and medication as a result of the applicant's prevailing health and related conditions;

(c) The

respondent shall hand over to the applicant's attorneys the current licence disc in respect of the posh Panamera within 48 hours of this order.

(d) Over

and above (c) above, the respondent shall continue to pay the monthly instalments, as well as the requisite insurance premium in respect of the Porsche Panamera.

(e) The

respondent is ordered to pay an amount of R250,000 as part of the contribution towards the applicant's costs within 7 (seven) days of this order.

(f) The

costs shall stand over for determination in the main divorce trial.

Majavu AJ

Introduction

Let me start off by expressing my gratitude to counsels for the detailed heads of argument, which I found very helpful. I also noted that the papers filed by both parties were unnecessarily prolix and voluminous, mindful of the specific ambit of rule 43 applications. In fact, more than three quarters of the founding affidavit and similarly that of the answering affidavit, concerned matters which, self-evidently, do not fall for determination in the rule 43 proceedings. I will deal with that later. In the interest of fairness, and to the extent that condonation might be required, I accordingly grant same in respect of both sets of affidavit. This, should by no means be misconstrued as the court's preparedness to entertain unnecessarily prolix papers, while at the same time, one recognises the need to afford parties an opportunity to fully ventilate their case. There is a delicate balance to be struck, otherwise, the very purpose for which an expedient procedure such as rule 43 applications was intended, might be rendered impractical and inexpedient.

[1] In the application before me, the applicant seeks the following relief, which I elect to restate. This is so because, after my prompting, the parties sought an opportunity to re-engage, with a view to "narrow down issues" resulting in some of the relief not persisted with, correctly so in my view, even though the ambit of those not persisted with, could have been further extended. Be that as it may, I am grateful to counsels for their attempt, mindful that they are creatures of their respective clients' instructions.

Initial relief

[2] The

applicant sought an order
in the following terms:

- “1. Condonation
insofar as the strictures of Rule 43 might not be compliant in
respect of the length
of the founding affidavit and the late bringing
of the application.
2. That
the respondent retains alternatively places the applicant on the
Discovery Classic Care
Plan.
3. That
the respondent be ordered to pay any reasonable and necessary access
medical expenses
incurred in connection with the applicant and not
paid by the medical aid scheme, including the cost of
hospitalisation, treatment
and/or medication as a result of the
applicants prevailing health and related complications.
4. Directing,
that pending the determination of the divorce action between the
parties, the respondent
shall maintain the applicant as follows:-
5. An
amount of R 337, 000.00 in respect of loans which the applicant had
to obtain and to which
the applicant shall utilise in reduction of
the debt owing in respect of the said loans being due within 5 days
of the granting
of the order which payments are to be made into the
applicant’s designated banking account.
6. An
amount of R 35, 000.00 per month, which the applicant shall utilise
in the reduction of
the debt owing to those creditors referred to in
annexures “FDF1 and FDF 4” in the financial disclosure
form, the payment
being due within 5 days of the granting of the
order or before the first day of each succeeding month, which
payments are to be
made into the applicant’s designated bank
account.
7. Directing
the respondent to pay a contribution towards the applicant’s
current legal
costs in the amount of R 540 972.18 which payment is to
be made into the applicant’s designated bank account.
8. Payment
of arrears rental in the sum of R 39 000.00.
9. Payment
of Uber costs in the amount of R7 200.00
10. Payment
of the amount of R930, 000.00 with reference to annexure “FA11”

attached to the founding affidavit.

11. The return of 2 bull mastiff dogs.

12. The immediate return of those assets described in paragraph “FDF 3.1” of the financial disclosure form alternatively the monetary value thereof.

13. By payment to the applicant of an amount of R 129, 292.00 per month, in respect of the applicant’s expenses, effective as of 1 January 2020, without deduction or set off on the first day of every month by way of electronic funds transfer or debit order, into such bank account as the applicant may nominate from time to time.

14. The amounts payable as referred to in paragraph 13 above shall be in respect of the following expenses as set out in the financial disclosure form:-

14.1 accommodation;

14.2 food and groceries;

14.3 toiletries and cosmetics;

14.4 water and electricity;

14.5 rates and/or levies;

14.6 cell phone;

14.7 domestic worker and gardener;

14.8 clothing;

14.9 life-insurance;

14.10 the costs of the applicants flights, accommodation, vehicle rental, public transport, food, entertainment, travel insurance and visa

costs in respect of the holiday locally or abroad;

14.11 dog food;

14.12 house maintenance;

14.13 household appliances and maintenance;

14.14

M-Net/DStv

14.15

In respect of the Porsche Panamera motor vehicle currently in possession of the applicant that the respondent be directed

to:

14.15.1 transfer

the Porsche Panamera into the name of the applicant within 21 days of the granting

of this order and that the eNatis documents be immediately delivered to the applicant's attorney;

14.15.2 pay

the insurance premiums and access on the Panamera;

14.15.3 pay

the cost of repairs, service, tire replacement and maintenance of the Panamera;

14.15.4 pay

the vehicle license fees of the Panamera;

14.15.5 pay

e-toll fees of the Panamera;

14.15.6 immediate

delivery of the relevant licence disc.

15. Directing

that the amounts referred to in player 6, 13 and 14 above shall increase annually in April

of each year in accordance with the

percentage increase in the headline inflation of the consumer price index is published by statistics

South Africa during the preceding

year, the first of such increased to be effected as at 1 April 2021;

16. Directing

that the respondent shall bear the costs of this application.

Amended relief after

re engagement

[3] The

parties subsequently informed me that relief sought in paragraphs

2,3,9,10,11,12 and 14.15.7 were no longer

persisted with, as parties

found each other. With specific reference to 10 and 12, the

parties recognise that there exists material dispute of fact in relation

thereto and thus agreed that the matters will be resolved in trial.

[4] From

my distillation of the issues left for determination, which was confirmed by counsels, it would appear

that broadly speaking, there

are two (2) categories of amounts persisted with. For ease of reference, the first category, and about

which there is no

dispute regarding the jurisdiction of the rule 43 court in respect

thereof, namely cash maintenance, which currently the applicant pegs at R 129, 292.00 and the respondent on the other hand concedes an amount of R 34 045.00 (but not tendered). I hasten to add that the respondent acknowledges in his papers that to date he has spent an amount of R 534 588.00 in respect of legal fees to date.

These amounts are in respect all litigation to date, not necessarily the pending divorce matter. His monthly expenses are approximately R 149 000.00, not far apart from what is alleged by the applicant. The 2nd category relates to amounts mentioned in 5 (loan for R337, 000.00), 6 (R 35 000.00) 7 (R540 972.18), and 8 (arrear rental R 39 000,00).

[5] It is quite clear that parties are alive to the fact that a significant portion of the relief sought in truth, does not belong to rule 43 proceedings, hence the agreement to refer such to trial. What I am called upon to determine is whether or not the 2nd category is competent, within the ambit of rule 43 proceedings. Depending on what my determination on that aspect would be, parties have accepted the correctness of the figures related thereto.

[6] With regard to the cash component, the parties accept the need for some form of financial assistance for the applicant. It is for that reason that I propose to dispose of that category first. Having carefully considered the list of expenses and FDF forms, as debated and in some instances, agreed upon by the parties' counsels, I determine that an all-inclusive cash component in lieu of monthly maintenance to be awarded to the applicant is R65,000.00

[7] Over and above that the respondent will continue to pay the monthly instalment, as well as insurance premium in respect of the Porsche Panamera.

[8] The respondent will continue to retain the applicant on the Discovery Classic Plan ("the plan"), as well as any necessary and reasonable access medical expenses, not covered by the plan, including the cost of hospitalisation, treatment and or medication as a result of the applicants prevailing health and related complications.

[9] The

respondent shall hand over to the applicant's attorneys the current licence disc in respect of the Porsche Panamera within 48 hours of this order. I was informed that the said disc is readily available and could easily be handed over.

[10] The amount referred to above shall increase annually on the anniversary of this order and in accordance with the percentage increase in the headline inflation of the consumer price index, as published by statistics South Africa during the preceding year, the first such increased to be effected on 21 May 2022.

[11] I now turn to the 2nd category, which is hotly contested. A useful starting point would be, what rule 43 prescribes.

[12] "Rule 43(1) this rule shall apply whenever a spouse seeks relief from the

court in respect of one or more of the following matters:

(emphasis)
(a) maintenance pendente lite,
(b) a contribution towards the costs of a pending matrimonial action, (emphasis)
(c) interim custody of any child,
(d) interim access to any child.

[13] The rule is very specific as to the kind of relief that may be sought by way of such an application. For present purposes, I need only concern myself with the first two.

[14] The applicant contends that the law has evolved to include what his counsel referred to as "a species of maintenance" with a view to bringing other types of expenses and litigation costs within the ambit of rule 43, presumably subsections (a) and (b). This is a tacit acknowledgement by the applicant's counsel that, but for such evolution or jurisprudential development of the law, as he puts it, such claims are not justiciable in the rule 43 proceedings.

[15] The applicant's counsel places reliance on the judgement of my brother Davis J in the Western Cape Local Division, in the matter of AFv MF[1]. This case does not

provide authority for the proposition as contended by the applicant's counsel. In this case, the applicant (wife) sought a contribution of R750,000 towards her costs in the divorce action, inter alia.

This was not a claim for general litigation costs, including for litigious matters unconnected to the pending divorce. This is clearly

distinguishable from the current case. I am further fortified in my view with reference to what is contained in paragraph 31 of that

judgement, where, my brother quite aptly restates the correct legal approach (and I am in full alignment there with)

“in

answering the question whether a court may order a contribution to legal costs which have already been incurred, it is helpful,

as a

starting point, to consider the position regarding retrospective orders for the payment of spousal maintenance, for legal costs in a

matrimonial

action

are a species of support and the same rules should logically apply”.

Once again, that judgement places emphasis on the costs related to the matrimonial

action

and not any other litigious disputes. He confirms that in paragraph 4 of the order he ultimately makes.

[16] Of

course, recognition of the fact that spousal maintenance should include contribution towards legal costs

is generally accepted. What

was in issue before Davis J was the retrospectivity of such an order of contribution. In any event,

the respondent in casu does not

contend that spousal maintenance of proper should include

contribution towards costs. In this case, the respondent clearly

recognises that fact and to that extent tenders an amount of R10,000.

Barring the fact that the parties are poles apart with regard to the

quantum, there seems to be no challenge to the acceptance of that

“species of maintenance”. I therefore find that there

can be no challenge to eligibility of the claim for contribution towards costs, especially where it

can be demonstrated that an

impecunious spouse incurred debts to enable it to fund the pending divorce litigation. The reasonableness

or otherwise of the amount so

client is a different matter. In this case, the respondent has

himself spent significant amount of

money on the divorce litigation
thus far, far in excess of what he tenders (R10,000). Having
considered the nature of the litigation,
in the absence of actual or
estimated pro forma invoices, in the exercise of my discretion
I find that an amount of R 250,000.00 would be fair and reasonable
under the circumstances.
This amount to be paid as a lump sum within
7 days of this order.

[17] Now
turning to other loans and debts, these are clearly on a different
footing to cost contributions. They
cannot in all seriousness, be
contended to come anywhere close to being a species of maintenance,
even if one were to accept the
correctness of the Davies judgement.
In fact, some of his brothers in the same division have adopted a
different approach. As I
have already indicated, I align myself fully
with his reasoning. I believe that brings about the equality of arms.
Such an approach
is also in line with the constitutional imperatives
which have, at the heart, equality and the right to dignity. Most
importantly
in my view, such an approach is aimed at levelling in the
playing fields to a significant extent and to ensure that an
impecunious
spouse (male-female) is empowered to adequately present
its case before the courts, as opposed to being left at the mercy of
the
one with the wherewithal.

[18] Even
if one were to be inclined to approach this matter benevolently in
favour of the impecunious spouse,
it would be far-fetched to include,
within the ambit of rule 43, matters about which there are obvious
dispute of facts, as well
as those that fall for determination in
other courts and/or tribunals. In this case, it is clear that some of
the disputes are
pending before the courts. It may well be that
significant amount of monies have been expended or accounts have been
accumulated
in respect thereof, however, the fact that those disputes
are between spouses and/or other juristic entities, does not
necessarily
bring them within the ambit of a specific purpose vehicle
("the rule 43 procedure"). If that were to be the case,
the
very noble objective of what was supposed to be a prompt,
efficient and relatively uncomplicated process could be laden with

never
ending ancillary litigation. This is precisely why, in my view,
orders flowing from rule 43 applications are not appealable. It
does
not take rocket science to appreciate why not. Similarly, if other
unrelated disputes to what is contemplated in the wording
of the
rule, were to be accommodated, this would result in an obvious
absurdity, in that people would seek to achieve in the rule
43
proceedings, what strictly speaking, belongs to a trial court. This
may also further disincentivize litigants in divorce proceedings
to
use their best endeavours to finalise the divorce, attain
certainty and a clean break, so to speak. It could also encourage a
situation where spouses are content with
what ought to have been an
interim and stopgap measure, and prolong what ought to have been a
divorce, that should be finalised with the necessary
promptness.

[19] Even
if I am wrong in my view, the acceptance of the parties to refer
significant portion of the relief sought
to trial and abandoning some
portions, seems to be an unambiguous acknowledgement that most of
these issues do not belong to the
rule 43 proceedings. The court
should not hesitate to stay within the strict confines of what is
contemplated in the rule, whose
clarity and intentions are
self-evident. Failure to do so, will open the floodgates of
unnecessary detours of litigation and obviate
taking matters to trial
courts for finality.

[20] In
this case, and in fairness to the respondent, one cannot, in good
conscience describe him as a spouse who
is unduly parsimonious or who
seeks to avoid taking responsibility in respect of his spouse,
flowing from the reciprocal duty of
support which rests on both of
them. He has and continues to take care of quite a significant
portion of the applicant's
expenses. It is unfortunate that
they sought to conflate what is self-evidently, a very acrimonious
past and to some extent the
present, with what ought to have been a
simple application for interim maintenance and assistance pending
the finalisation of the divorce. The fact that they continue to
litigate against each other, even on matters that they ought to
resolve amicably and reasonably between the two of them, cannot and

should not find application in the rule 43 proceedings. In any event, even without their belated recognition of the error of their ways, I was not inclined to consider the ambit of the rule 43 expansively, as implored by the applicant. Similarly, where objectively, it is clear that the respondent has the means and ability to pay for the reasonable expenses of the applicant, as well as the reasonable contribution towards the applicant's costs related to the pending divorce action, I was not going to hesitate to make an order that seeks to attain fairness and justice.

[21] In the light of the foregoing, it remains my considered view and I accordingly find as such, that the expenses contained in the 2nd category cannot be competently claimed in the rule 43 proceedings. I have not been provided with, nor have I found any authority for that proposition.

[22] In

the result the following order is made:

- (a) The respondent is ordered to pay, pendente lite, an amount of R65,000.00 per month with effect from 28 May 2021, and thereafter by no later than the last working day of each succeeding month, such payment to be made into the applicant's nominated banking account. This amount shall increase annually on the anniversary of this order and in accordance with the percentage increase in the headline inflation of the consumer price index, as published by statistics South Africa during the preceding year, the first such increase to be effected on 21 May 2022;
- (b) The respondent will continue to retain the applicant on the Discovery Classic Plan ("the Plan"), as well as pay any necessary and reasonable excess, not covered by the plan, including the cost of hospitalisation, treatment and/or medical expenses and medication as a result of the applicant's prevailing health and related conditions;
- (c) The respondent shall hand over to the applicant's attorneys the current licence disc in respect of the posh Panamera within 48 hours of this order.
- (d) Over and above (c), the respondent shall continue to pay the monthly instalments, as well as the requisite insurance premium in respect of

the Porsche Panamera.
(f) The
costs shall stand over for determination in the main divorce trial.
Z M
P MAJAVU
Acting Judge of the
High Court
Gauteng Local
Division, Johannesburg
HEARD
ON: 20
May 2021

JUDGMENT

DATE: 21

May 2021

FOR THE APPLICANT: Adv CJC Nel

INSTRUCTED BY: AF

Coetzee Attorneys

FOR THE RESPONDENT: Adv H J Basson

INSTRUCTED BY: Van

Andel- Brink Attorneys

[1] case number 6664/19, judgement delivered on 28 August 2019

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