

SOUTH AFRICA / JUDGMENT

P v P (21615/2015) [2016] ZAGPJHC 312 (7 November 2016) [2016] ZAGPJHC 312

COURT

South Gauteng High Court, Johannesburg

BEFORE

A A Crutchfield

CASE / FILE NUMBER

21615/2015

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REPUBLIC

OF SOUTH AFRICA

IN

**THE HIGH COURT OF SOUTH AFRICA,
GAUTENG**

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2016/12912 and

21615/2015

Reportable:

YES

Of

interest to other judges: YES

In

the matter between:-

P,

G

R Applicant

and

P,

A

M Respondent

JUDGMENT

CRUTCHFIELD AJ:

- [1] For the sake of convenience, I refer to Mrs G R P. as the applicant and Mr A M P. as the respondent throughout.
- [2] The applicant, Mrs G R P., brought an application in terms of Rule 43(6) claiming an increase in the cash maintenance payable by the respondent, her estranged husband, in respect of herself and their two (2) children.
- [3] The application was opposed by the respondent who simultaneously launched a counter-application, also in terms of Rule 43(6), for a change in the school that the children currently attend. The respondent's counter-application in turn, was opposed by the applicant.
- [4] In addition, the applicant launched a separate application under case number 21615/2015 for a further contribution towards her trial costs in the pending divorce action. This application was also opposed by the respondent.
- [5] In the interests of convenience, all three applications were heard at one hearing and I shall deal with all will three hereunder.
- [6] I read the plethora of affidavits and supplementary affidavits together with the heads of argument made available to me. In so far as I received correspondence from the respective attorneys subsequent to the hearing referring to certain additional heads of argument, I am satisfied that no prejudice was caused to the respondent pursuant thereto.
- [7] It is not customary for reasoned judgments to be furnished in Rule 43 applications, save in exceptional circumstances. This matter is not exceptional other than in terms of the prolixity of the papers, and I do not intend to furnish a fully reasoned judgment. In addition, I am acutely aware of the necessity not to make credibility findings at this stage of the litigation.
- [8] Having read the affidavits, however, I would caution both parties together with their respective legal representatives, to pay attention to *Du Preez v Du Preez*,^[1] in particular, at [15] – [17] thereof.

The applicant's application under case number 2016/12912.

- [9] The applicant claimed an increase in the cash portion of the monthly maintenance of R60 000.00 payable by the respondent, to R105 000.00. This was largely pursuant to the children now living with her on a full time basis, as opposed to the shared

residence regime that operated whilst the respondent resided within South Africa. The respondent conceded the aforementioned change of circumstances and tendered an increase of R15 000.00, to R75 000.00 per month payable in respect of the applicant and children.

- [10] Little purpose is served in traversing the applicant's monthly expenditure and the commentary provided thereto by the respondent, or dealing in any detail with the respondent's monthly expenditure and the parties' respective incomes, for the purposes of this order. Suffice it to state that both parties raised significant questions in respect of the other's expenditure, income and financial circumstances. The factual disputes between the parties are many and irreconcilable without oral evidence.
- [11] In my view, an increase in the cash portion of the monthly maintenance to R85 000.00 per month payable with effect from 1 December 2016, is sufficient to meet the applicant's reasonable maintenance needs for herself and the children.

The respondent's counter-application under case number 2016/12912.

- [12] As regards the respondent's counter-application under case number 2016/12912, paragraph 1.2.1 of the extant Rule 43 order

granted by Wepener J on 23 September 2015 provides that:

'1.2.1 the costs of the minor children's education at the American International School of Johannesburg or such other school as agreed between the parties including, but not limited to, private school fees, uniforms, books, stationery, outings, tours and extra lessons; ...'

- [13] The respondent sought the substitution of the reference to the American International School of Johannesburg ('AISJ'),

with 'Dainfern College', such that the provision reads:

'1.2.1 the costs of the minor children's education at Dainfern College or such other private school as agreed to between the parties including but not limited to, private school fees, uniform, books, stationery, outings, tours and extra lessons'.

- [14] Whilst I am cognisant of the fact that I am called upon to amend the existing Rule 43 order, in terms of Rule 43(6), pursuant to a change in the respondent's circumstances resulting in an alleged financial inability to afford payment of the costs of AIJS, the order sought by the respondent in this regard is, in my view, framed as an application to change the school currently attended by the children.

- [15] Rule 43 provides that a court may make an order in respect of one or more of the following matters:

15.1 Maintenance pendente lite;

15.2 A contribution towards the costs of a pending matrimonial action;

15.3 Interim custody of any child;

15.4 Interim access to any child.

- [16] A court may, in terms of Rule 43(6), vary its decision in respect of the abovementioned matters in the event of a material change to the circumstances of either party or a child, or the contribution towards costs proving inadequate.
- [17] A claim for the payment of a specified monetary amount or for payment of an expense to be incurred in respect of educational costs is, self-evidently, a claim for maintenance and falls within the ambit of Rules 43. A claim for the variation of either will perforce fall for determination in terms of Rule 43(6).
- [18] However, I am not asked by the respondent to vary the monetary amount payable by him, or reduce the expenses per se incurred by him, in respect of the children's educational costs. I am called upon to cause a reduction in the cost to the respondent of the children's education, by varying the school at which the children currently attend. This, in my view, is not competent in terms of Rule 43.
- [19] A court is permitted in terms of Rules 43 and 43(6), to deal only with the matters stipulated above. It speaks for itself that an application to change the school attended by the children, (notwithstanding that the application is brought in order to reduce the interim maintenance costs of the respondent pursuant to an alleged change in his financial circumstances), falls outside of the parameters of Rule 43.
- [20] In the circumstances, I am of the view that the relief sought by the respondent is excluded from consideration in terms of Rules 43 and 43(6).
- [21] However, the respondent's claim can, potentially, be dealt with by a court sitting in terms of Rule 6 of the Uniform Rules of Court.
- [22] In the light of the fact that the papers in the respondent's counter-application may well be supplemented and utilised at a future hearing in terms of Rule 6, together with the fact that the applicant did not raise the issue that the respondent's claim, as presently framed, falls outside of the provisions of Rules 43 and 43(6), I decline to make any order in respect of prayer 1 of the respondent's counter-application under case number 2016/12912.
- [23] It is not necessary for me to deal with prayer 2 of the counter-application given the outcome of prayer 1 thereof.

The costs of the application and counter-application under case number 2016/12912.

- [24] In respect of the costs of the application and counter-application under case number 2016/12912, the respondent made a with prejudice offer to the applicant on 26 April 2016, to increase the cash component of the maintenance pendente lite from an amount of R60 000.00 to R75 000.00 per month.

- [25] This according to the respondent was a reasonable tender that the applicant rejected. Hence, the respondent contended that in so far as the court made an award for an amount substantially reflecting that tendered, the costs of the application ought to be awarded against the applicant.
- [26] However, in the light of the order which I intend making in respect of case number 2016/12912, the respondent has achieved some success in respect of the applicant's application, and the applicant, (albeit that the point relied upon by me was not raised by the applicant), might be considered to have achieved success as regards the respondent's counter-application.
- [27] Accordingly, I do not intend ordering costs against either party.
- [28] The parties were ad idem that the provisions of Rules 43(7) and (8) should be waived. To the extent that Rules 43(7) and (8) find application, I do not see reason to interfere with that agreement.

The applicant's claim for a further contribution towards her trial costs under case number 21615/2015.

- [29] The applicant claimed a further contribution towards her trial costs in the amount of R1 108 447.35. This amount was computed as to 80% of the outstanding account of her attorney as at 30 June 2016, (being an amount of R686 478.47), together with 80% of her estimated costs to be expended from 1 July 2016 up to and including the first day of trial, an amount of R699 080.72.
- [30] It was common cause that the applicant had claimed and been granted a contribution of R80 000.00 in terms of the Rule 43 order of Wepener J. That was on 23 September 2015, at which stage a trial date in the divorce was pending. Subsequently, the trial was postponed and a future date has not yet been allocated.
- [31] The respondent opposed the application on a number of grounds, including that he had already made various substantial payments, both directly and indirectly, towards the applicant's legal costs.
- [32] The applicant's calculation of her claim as at 30 June 2016 was allegedly vague, and the applicant's reasonable costs to be incurred from 1 July 2016 up to and including the first day of the trial, were estimated by the respondent's expert at R204 244.20.
- [33] Whilst the respondent alleged that he is currently unemployed, he has amassed a significant estate albeit that the estate may not contain liquid assets as contended on his behalf.
- [34] I was not furnished by the applicant with details of the claim made in the initial rule 43 application, for a contribution of R80 000.00.

In so far as the applicant's claim before me included items covered by the initial application for R80 000.00, the

applicant ignored the fact that in respect of the costs claimed at the previous hearing, an award has already been made to her. To that extent *res judicata* applies.[2]

[35] Accordingly, the applicant is entitled only to claim a contribution in respect of the costs incurred or projected since the previous claim.

[36] I was not informed by the applicant as to what portion of her costs as at 30 June 2016, was covered in terms of the previous application for a contribution. Hence, I deal only with the applicant's estimated costs to be expended from 1 July 2016 up to and including the first day of trial, 80% of which amounted to R699 080.72.

[37] The general principles in terms of which these applications are governed, are adequately set out in the standard reference texts,[3] and I do not intend restating them fully herein.

[38] Suffice it to state that the contribution is towards the applicant's anticipated costs of the action and not to interim applications.

It is trite that the applicant is entitled not to all of her attorney and client costs but to a substantial contribution towards them. The issue of essential disbursements is a material factor in calculating the amount to which the applicant is entitled.[4]

[39] The respondent alleged that he had amended his pleadings and the applicant would require to amend her own pleadings consequentially.

Thereafter a further pre-trial conference would be required. Furthermore, it was apparent from the respondent's opposing affidavit that the parties' respective experts had not met nor produced a joint minute. Hence, the possibility that

issues might yet be narrowed between the parties.

[40] The respondent relied upon an expert estimation of the applicant's future fees and disbursements, from 1 July 2016 up to and including the first day of trial, of R204 244.20.

[41] Regard being had to the principles aforementioned and the differences between the applicant's draft bill and that of the respondent's expert, I am of the view that the applicant's reasonable needs will be adequately met, by an award of R350 000.00, to be paid in three instalments commencing with an amount of R150 000.00 on 5 January 2017, and thereafter two equal instalments of R100 000 on the first day of the two succeeding months.

[42] In the circumstances, I grant the following orders:

42.1 In respect of the applicant's application under case number 2016/12912:

42.1.1 Paragraph 1.1 of the rule 43 order granted by the Honourable Mr Justice Wepener under case number 2015/21615 on 23 September 2015, is varied by the deletion of the amount of R60 000.00 and the substitution thereof with the amount of R85 000.00;

42.1.2 The provisions of Rules 43(7) and (8) are waived;

42.1.3 The costs of the application are costs in the cause of the divorce action.

42.2 In respect of the respondent's counter-application under case number 2016/12912, no order is made.

42.3 In respect of the applicant's claim for a further contribution towards her trial costs under case number 21615/2015:

42.3.1 The respondent is ordered to pay a further contribution towards the applicant's trial costs in the sum of R350 000.00 in three instalments; commencing with R150 000.00 on or before 5 January 2017, and thereafter two equal instalments of R100 000.00 each on the 1st day of February 2017 and the 1st day March 2017;

42.4 The provisions of rules 43(7) and 43(8) are waived;

42.5 The costs of the application under case number 2016/12912, are costs in the cause of the divorce action.

A A CRUTCHFIELD

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

COUNSEL FOR APPELLANT Ms A de Wet

INSTRUCTED BY

Steve Merchak Attorney.

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INSTRUCTED BY

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DATE OF HEARING

22 September 2016.

DATE OF JUDGMENT

7 November 2016.

[1] 2009 (6) SA 28 (T).

[2] Greenspan v Greenspan 2001 (4) SA 330 (C) at 333E-G.

[3] Superior Court Practice, Erasmus, Vol 2, commencing at D1-580.

[4] Cary v Cary 1999 (3) SA 615 (C).

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