

SOUTH AFRICA / JUDGMENT

Q.N.M v M.M.M (2022/013249) [2024] ZAGPJHC 1317 (12 December 2024)

[2024] ZAGPJHC 1317

COURT

South Gauteng High Court, Johannesburg

BEFORE

A Friedman

CASE / FILE NUMBER

2022/013249

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FLYNOTES:

FAMILY – Rule 43 application – Mediation –
Non-compliance
with court directive – Failed to explore mediation or
provide detailed financial disclosures –
Applicant's
papers inadequately prepared – Respondent's financial
claims were unclear – Parties'
inability to agree on
essential expenses – Inappropriate to grant interim relief
without proper evidence of parties'
financial positions –
Mediation was most sensible way to resolve dispute –
Application stayed pending compliance
with court's
directive.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
Number: 2022-013249
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED: NO
In

the matter between: QNM
Applicant
and
MMM
Respondent

JUDGMENT

FRIEDMAN AJ:

[1] In this matter, the applicant and respondent are parties to a pending, opposed action for divorce. The applicant, in the

proceedings before me, seeks relief in terms of rule 43 and asks for an interim order that the respondent must pay certain expenses listed in her notice of motion. The parties have two minor children, boys born in 2013 and 2019 respectively, and part of the aim of the rule 43 application is to make provision for various expenses relating to their care, including school fees at a private school.

[2] While preparing to hear the applications allocated to me in the Family Court in the week starting 18 November 2024, I emailed the parties in several of the matters to attempt to obtain information about the state of the proceedings. I did this in all cases in which it was unclear from the Court file whether there was proper opposition, whether the matter was ripe to proceed and/or related issues. In this rule 43 application, the respondent had filed a notice of intention to oppose but no answering affidavit. I therefore wanted to find out whether there was any opposition to the application and whether the respondent would be represented at the hearing.

[3] As a result of my email, and subsequent correspondence from the applicant's attorney, the respondent came out of the woodwork. At the hearing on 18 November 2024, he took the position that the matter should be removed from the roll to enable him to file an answering affidavit. The applicant's attorney had anticipated this, and had prepared a draft order facilitating the exchange of affidavits and the taking of steps to enable the rule 43 application to be argued on an opposed basis in due course. Understandably, the applicant's attorney sought, in his draft order, that the relief in the rule 43 application be granted on an interim basis pending the finalisation of the opposed rule 43 application. This was a reasonable request, given that the respondent had filed a notice of intention to oppose on 24 July 2024 but had not, in the intervening four months, filed an answering affidavit.

[4] At the hearing, the respondent's attorney expressed agreement with the applicant's draft order, to the extent that it facilitated the filing of an answering affidavit and further papers. However, he said that his client could not pay the sums of money envisaged by the proposed interim order, and so could not agree to that part of it. The respondent is an attorney. In the circumstances, it struck me as unfortunate that he had failed to file an affidavit for months, only to claim that he could not afford to pay what the applicant seeks without having any

evidentiary basis for saying so. Because the interests of minor children are implicated, I did not want to allow the respondent's irresponsible approach to this litigation to prejudice them. On the other hand, I could not simply treat this matter as an ordinary opposed motion, and give the applicant all of the relief that she sought on the basis that no answering affidavit had been filed. The risk of the respondent being unable to comply with the order sought by the applicant implicates the interests of the children. This is because it would be far better for them for their parents to be required to pay for the most urgent expenses which they can afford, than for an unrealistic order to be made against their father resulting in widespread default and the uncertainty that that would entail. I accordingly gave the respondent the rest of the week to file an answering affidavit, with the intention of holding a virtual hearing on the late afternoon of Friday 22 November 2024.

- [5] The respondent filed an answering affidavit well within the deadline which I imposed. Unfortunately, when the hearing commenced on 22 November, the respondent's attorney was unable to make himself audible despite multiple attempts. I therefore had no choice but to stand the matter down and, since that was the last day on which I was scheduled to act as a judge, indicated to the parties that I would revert to them on the future conduct of the matter after consulting with the Deputy Judge President.
- [6] After the Deputy Judge President gave me the go ahead to schedule a hearing at any point convenient to me and the parties, I considered the papers again to decide how best to handle the matter (at that stage, my thoughts were focused on whether a further oral hearing would be necessary, whether I should ask for the matter to proceed in open court, and related topics of housekeeping).
- [7] During the course of deciding how to proceed, I looked again at correspondence exchanged between the parties, which suggested that attempts had been made to settle the rule 43 dispute through "round table discussions". This is the type of matter where, were sanity to prevail, the parties should be able to find each other. The respondent has made his commitment to his children clear in his answering affidavit, but claims not to be able to afford to honour all of the financial commitments which the applicant says he is obliged to honour. The parties are married in community of property and have a series of joint obligations (house-related expenses such as a mortgage, levies and municipal accounts, school fees and the like). The respondent does not dispute that he is liable, together with the applicant, for the debts of the joint estate. He also does not dispute his duty of care and responsibilities to the minor children. His simple position is that he cannot afford to keep up with all of the expenses which relate to the care of the children, the upkeep of the former marital home (which the respondent has now vacated) and various other obligations (such as vehicle finance).
- [8] The answering affidavit filed by the respondent gives relatively detailed evidence to support his claim of being unable to afford what the applicant seeks in the rule 43 application. Both parties appear to dispute, to some extent, whether expenses claimed by the other have been properly substantiated. However, I am satisfied on the papers that the vast majority of the

expenses listed by the applicant in the notice of motion and founding affidavit are genuine and were incurred by the joint estate by both parties voluntarily during the subsistence of the marriage. By the same token, it seems relatively clear that the respondent does not earn enough to cover all of his financial obligations at the moment. In these circumstances, the only sensible way to resolve the applicant's needs pending the finalisation of the divorce, is for the parties to sit down and try to compromise in order to settle on a list of essential expenses which the respondent should cover.

[9] Because of the previous attempts at settlement in this matter, and because of what I have said above, on 26 November 2024, I issued a directive in terms of paragraph 29.13 of the Revised Consolidated Practice Directive 1 of 2024 of this division ("the Practice Directive"). Paragraph 29.13 of the Practice Directive empowers a judge sitting in the Family Court, if not satisfied that appropriate efforts have been made to mediate a dispute which appears to be susceptible to mediation, to exercise a discretion to stay the proceedings to afford the parties an opportunity to reflect on this issue, and not to permit re-enrolment until the parties have adduced cogent evidence of having properly engaged on the prospects of mediation and to explain why, in their view, it would be fruitless to attempt mediation.

[10] It would be convenient to quote verbatim the main, operative parts of my directive:

2. Having read the papers in this matter, I now make the following directive in terms of paragraph 29.13 of the Revised Consolidated Practice Directive 1 of 2024, as amended on 12 June 2024 ("the Practice Directive"):

2.1. Correspondence uploaded to Caselines shows that certain attempts at settlement of the rule 43 application have been made.

2.2. The respondent's version is that his monthly expenses, taking into account the relief sought by the applicant and the cost implications of that relief being granted, exceed his monthly income. The applicant's version is not sufficiently detailed to enable me to understand precisely what she spends her nett salary on each month. The financial disclosure of the applicant attached to the papers is inadequate because (a) it is out of date and (b) there is a contradiction between the pleaded nett salary of the applicant and the documents demonstrating her earnings.

2.3. In the above-mentioned circumstances, hard choices will have to be made about what the parties can now afford, and what financial commitments should be prioritised. I am not minded to leave the applicant without any remedy, but I also cannot order the respondent to make payments which he cannot afford. Given that attempts were previously made to settle this matter, and given that mediation may well constitute a mechanism to determine what precisely is affordable for the proper maintenance of the applicant and the minor children, I do not wish to make an order without at least staying the proceedings for a short time to allow the possibility of a mediated settlement to be found.

2.4. I am mindful of the fact that the end of year is fast approaching, and would not like to leave the applicant without any remedy at all, until after the December recess.

2.5. The following procedure will therefore apply:

2.5.1. The parties are afforded until 6 December 2024 to take steps either to reach agreement between themselves as to what sensible order may be made in this case, or to take steps to appoint a mediator.

2.5.2. On or before 6 December 2024, each party or, by agreement, one party representing both parties, is to file an affidavit detailing:

- The steps taken to appoint a mediator, or to reach agreement on the minimum expenses which the respondent should be required to commit to pay each month to maintain the applicant and the minor children.
- If a mediator is to be appointed but only in the new year, brief allegations/submissions on an interim order which I should make to provide for the applicant in the meantime.
- If there is no prospect of either a mediated settlement, or any settlement at all, the reasons for this.
- If there is no prospect of settlement, then the applicant must give proper detail about her actual nett salary and a breakdown of all expenses which she is required to cover on a monthly basis with that salary.

2.5.3. Once the affidavit(s) is filed on 6 December 2024, I am comfortable making an appropriate order on the papers, without a need for an oral hearing. However, if one or both of the parties wishes to have an oral hearing, they are to advise me no later than 6 December 2024. The hearing will then have to take place on 9 or 10 December 2024.

2.5.4. If no affidavit is filed by either party, by the deadline, I shall make an order that this application is to be stayed pending compliance with this directive. In that event, the applicant will be required to apply to re-enrol the matter on the family court roll, once there has been compliance with this directive. If only one party complies with this directive, then I may have to make an order without regard to the updated factual circumstances applicable to the defaulting party.

2.5.5. In the event that an oral hearing is requested, it will be my preference to conduct it on MS Teams because it will not be convenient to convene a courtroom just for this hearing. In those circumstances, both parties are requested to make themselves familiar with the rules in the Practice Directive about virtual hearings, and to ensure that they have the necessary equipment and facilities to enable us to conduct a proper hearing. The parties' representatives are also requested to ensure that they sign into the hearing punctually, at the scheduled time of the hearing. A failure to do so will result in me proceeding in the absence of the tardy party, if that party is more than 10 minutes late (unless he or she has communicated with my secretary beforehand to explain any unforeseen difficulties).

- [11] Neither party complied with this order. Instead, both parties engaged in litigation by correspondence, essentially blaming each other for a failure to take steps to investigate the possibility of mediation. The only reason I am aware of this correspondence is that I was copied on the emails exchanged between the parties. The correspondence has not been uploaded to Caselines, let alone forming part of affidavit evidence as envisaged by my directive.
- [12] Instead of complying with the directive, the applicant's attorney caused a document styled as "Applicants [sic] Income and Expenditure" to be uploaded to Caselines. It is not in the form of an affidavit, and instead presents a table showing that the applicant is currently paying R43 943.79 towards monthly living expenses for herself and the minor children in the former marital home, and takes home nett pay of R44 554.88.
- [13] Although the correspondence which was exchanged between the parties is not before court, I have read it. The respondent's attorney sent a letter explaining the steps which he took to try to arrange a meeting to discuss my directive. On the version reflected in that letter, the applicant's attorney did not make an efficient effort to meet or facilitate mediation. The applicant's

attorney replied to the letter, but did not meaningfully dispute what the respondent's attorney said on that topic. Overall, the conduct of the applicant creates an impression that she wishes this Court to make an order, with possible mediation or settlement to be held on the backburner. For his part, the respondent has explained his expenses and income in rands and cents, but it is not clear to me which expenses relate to wherever he is living now, and which to the formal marital home, and which relate to the minor children of the applicant and which to a child, or children, of the respondent from his previous marriage or relationship to whom fleeting reference is made in the papers. The applicant filed a replying affidavit which casts doubt on some of the expenses which the respondent claims to be obliged to pay each month and his explanation (or lack thereof) for them, but it is impossible for me to determine these disputes. The application of Plascon-Evans is inappropriate where the best interests of minor children are involved.

- [14] In these circumstances, it remains appropriate for me to follow through on what I said would happen if neither party complied with my directive. I have given serious consideration to granting interim relief to the applicant, as part of staying these proceedings as contemplated in my directive. The reason why I have grappled with this is because it is common cause that the respondent takes home R138 526.37 per month and there are a range of financial obligations which the relief sought in the notice of motion is designed to address which could comfortably be covered by this sum. This, coupled with the fact that it is not possible for me to assess many of the additional expenses listed by the respondent in an annexure to his answering affidavit (for the reasons given above relating to it being unclear to which household they relate), made me interested in being able to make some sort of interim order pending compliance with my directive, to ensure that the minor children and the applicant at least have a roof over their head and that the minor children are not excluded from school.

- [15] However, I have reluctantly come to the conclusion that it would not be appropriate for me to depart, even to a limited extent, from what I warned would happen (ie, in my directive).
- [16] The reason why this matter cries out for mediation is that the applicant is being ill-served by her attorney in following a classically adversarial approach to litigation. Her papers are not clearly drawn, and what is said in the main affidavits is often contradicted by the documentary evidence offered as proof. The applicant is the other debtor in the joint estate, but has given no evidence whatsoever of any steps taken by her to protect her interests in the joint estate (such as making her own enquiries with the bank about arrangements which could be made to settle the arrears).
- [17] Even if I were to order the respondent immediately to pay the monthly mortgage relating to the former marital home, and the school fees for the minor children, it is not clear to me what ultimate difference it would make to them. This is because the respondent says in his answering affidavit that he has already made arrangements with some of the creditors (including the school) and so I have no meaningful sense of what sums of money would actually be involved to ensure that the applicant and the minor children are adequately maintained pending the divorce. A large component of the blame for this must be assigned to the applicant, and the inadequacy of the affidavits filed on her behalf.
- [18] What is clear to me is that the parties appear to have enjoyed a relatively affluent lifestyle at some stage, but seem no longer to be able to afford everything which that lifestyle entails. The nature of the lifestyle which the parties enjoyed before the breakdown of the marriage is obviously a relevant consideration in determining rule 43 relief. In principle the applicant and the minor children are entitled to expect to maintain the lifestyle to which they were accustomed, at least until the proprietary implications of the divorce can be determined on a final basis and subject to the no-luxuries principle. But, on the other hand, people who fall on hard times cannot expect not to experience the unwelcome and unpleasant consequences, and so there needs to be a sensible assessment of what is affordable so that steps can be taken (for example, moving homes, choosing more affordable schools, giving up some non-essential expenses etc) to ensure that both parties and the minor children can live as comfortably as the means of the joint estate can accommodate.
- [19] Had one of the parties complied with my directive and I had a proper evidentiary basis to come to the aid of that party, I would have had no hesitation in doing so. An interim order against the respondent would have incentivised him to try to speed up the mediation process. However, if anything, it appears to be the applicant who is not entirely enthusiastic in taking that route. I cannot, in these circumstances, and given the multiple difficulties in the papers, conclude that any form of interim order is appropriate at this stage.
- [20] I wish to make very clear that, subject to compliance with my order, there would be nothing stopping either of the parties supplementing their papers to make out a proper case for appropriate relief. There are multiple potential ways in which the applicant could make out a case for a quantifiable rule 43 remedy, and in doing so to assist the Court to understand

precisely what is required and what would be reasonable in the circumstances. This judgment should not be understood as precluding that being done in the future (even the near future). To take one example: I have no idea, at this stage, whether there is any proper arrangement in place to prevent irredeemable default in respect of the home loan. This is something which could, in principle, be rectified by the making of enquiries by either or both of the joint debtors, followed by a clear explanation given in an affidavit. In the meantime, though, the parties are obliged to pursue mediation or explain why mediation would be fruitless.

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

Order

- (1) The rule 43 application with the above-mentioned case number is stayed pending compliance with the remainder of this order.
- (2) The rule 43 application may not be re-enrolled by either of the parties until the party seeking re-enrolment has adduced evidence, in affidavit form and supported by appropriate documentary evidence, if any, of:
 - attempts made by that party to facilitate proper engagement between the parties on the possibility of mediation; and
 - why, if attempts to facilitate mediation have failed, the reasons why that party considers mediation to be fruitless.
- (3) The costs incurred in the rule 43 application up to the date of this order are reserved.

ADRIAN FRIEDMAN

Acting Judge of the High Court

Gauteng Division, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter. The date for hand down is deemed to be 12 December 2024. Date of hearing: 18 NOVEMBER 2024

For the Applicant: Mr T Faku

Attorney with right of appearance

(T Faku Attorneys Inc)

For the Respondent: Mr R Mashego

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