

**REPUBLIC OF SOUTH AFRICA  
IN THE SOUTH GAUTENG HIGH COURT  
JOHANNESBURG**

**CASE NO: 20212/2014**

**15/12/2016**

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

**L S D**

Applicant

and

**C A D**

Respondent

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**JUDGMENT**

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**VILAKAZI, AJ**

[1] This is a Rule 43(6) application. The Respondent had obtained an interim Rule 43 order in this court on 22 October 2014. In order to avoid confusion between the applicant and the respondent, I shall refer to the applicant as "the husband" and the respondent as "the wife". The husband is seeking an order to vary some order on the basis that there is material change in his circumstances and the circumstances of the wife.

[2] For the sake of brevity, the background facts is that the parties got married out of community of property with the inclusion of accrual system. On 10 March 2014, the wife instituted divorce proceedings. The husband defends the divorce action. The trial date was on 19 May 2016, however this was beset by the wife' notice of intention to amend her particulars of claim. The husband noted an exception on 9 June 2016. There are 3 children born of this marriage. L, a major child, is a student at Potchefstroom and lives in an apartment. L and C, the minor children are in the interim custody of the wife and live in the matrimonial home, a farm property situated at [...] D. Avenue, Glen Austin, in Midrand. (Hereinafter referred to as the "Midrand property")

[3] On 22 October 2014, Botes AJ ordered *pendete lite*:

- a. Primary residence of L, was awarded to the husband subject to reasonable contact to the wife;
- b. Primary residence of L and C, was awarded to the wife subject to reasonable contact to the husband;
- c. The husband to pay maintenance of R5 000 00 per month per child in respect of L and C with effect from 1 November 2014;
- d. The husband to pay for the tuition fees and extra-mural activities expenses or costs of the minor children;
- e. The husband to pay for the cell phones of the minor children;
- f. The husband to retain and keep the wife and the minor children as dependants in his medical aid plan and pay for all expenses not covered by the medical aid;
- g. The husband to pay maintenance for the wife in the amount of R 6 000 00 per month with effect from 1 November 2014;
- h. The husband to pay for the insurance premiums of the wife' motor vehicle, a Mercedes Benz, with registration numbers and letter B[...] GP;
- i. The husband to pay for the salaries of a domestic worker and a gardener and security services of the wife;
- j. The husband to pay for the Telkom landline of the wife;
- k. The husband to pay monthly water, electricity rates and taxes and monthly in respect of the Midrand property;
- l. The husband to pay the mortgage bond registered over the Midrand property;

- m. The husband to contribute an amount of R 1 200 per month towards the wife's property;
- n. The husband to pay can amount of R 9000 towards contribution of legal costs in instalments of R 1 000 per month with effect from 1 November 2014;
- o. The costs of this Rule 43 application were ordered to be costs in the cause of action.

[4] A variation is sought against the following orders:

- i. The husband is ordered to pay an amount of R 6000 per month towards maintenance of the wife.
- ii. Payment of the maintenance by the husband towards the minor children in the amount of R 5000 per month per child.
- iii. Payment by the husband of the mortgage bond registered over the Midrand property, water, electricity and rates and taxes thereon.
- iv. The husband was ordered to retain the wife on his medical aid scheme and to pay the medical costs and expenses not covered by the medical aid plan,
- v. The husband, to pay the salaries of a gardener and a domestic worker,
- vi. The husband to pay for Telkom landline and the security services costs.
- vii. The husband to pay for the cell phones of the minor children.
- viii. The husband to contribute an amount of R1200 per month towards payment of the immovable property of the wife

[5] On 29 September 2016, the husband instituted an application in terms of Rule 43(6), seeking a variation of the order of Bates AJ to an extent that his maintenance obligations be reduced from R 47 952.15 per month to R27 812.40 per month. This amount is made out of the following expenses:

- a. Cash maintenance to the wife - R 6000 00
- b. Cash maintenance to L- R5000 00
- c. Cash maintenance to C - R 5000 00
- d. Mortgage loan obligations of the Midrand property - R 7000 00
- e. Water and electricity of the Midrand property - R 3 898.47
- f. Rates and taxes of the Midrand property - R392.18

- g. Medical aid - R 5500
- h. Mercedes Benz A-class payments- R 5254 .29
- i. Insurance on this motor vehicle- R 1 365 .96
- j. Tuition fees for the 2 minor children - R 3291. 25
- k. Domestic worker and gardener - R 2 400
- l. Cell phones- for the minor children - R 1000
- m. Security - R150
- n. Telkom landline - R 500
- o. The amount of R1200, contribution towards the immovable property of the wife.

[6] In ***Andrade v Andrade* 1982 (4) SA 854 (0) AT 855F**- H Erasmus J discussed the procedure to be followed in Rule 43(6) applications:

"Rule 43 regulates the procedure to be followed in applications for ancillary relief of an interim nature in matrimonial matters. The object of the Rule generally accepted by the courts is that applications of this kind should be dealt with inexpensively and expeditiously as possible. See ***Colman v Colman* 1967 (1) SA 291 (C); *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) *Mather v Mather* 1970 (4) SA 582 (E) and *Maree v Maree* 1972 (1) SA 261(0)**. The cases cited above dealt with Rule 43 but in my view they are equally applicable to Rule 43(6) and Rule 43(6) must be read subject to the provisions of Rule 43(1), Rule 43(6) explicitly says that the court may, on the same procedure vary its decision in the event of a material change taking place in the circumstances of either party or a child or the contribution towards costs proving inadequate"

[7] Despite these clear dicta, the Rule 43 (6) application before me has not been dealt inexpensively or expeditiously. The husband and the wife papers inclusive of Annexures runs into 217 pages. It consists of irrelevant annexures such as letters of authority of the parties' family trust, a protection order, and schedule of benefits of a travel Insurance.

[8] In order for the husband to succeed, he must show on a balance of probabilities that there has been a material change in his circumstances since the hearing of a Rule 43 application before Bates AJ.

[9] The husband submits that the material change contemplated in Rule 43(6) is found in his wife's personal circumstances since the Rule order of Bates AJ.

[10] In the Rule 43(6) application the husband states that the Rule 43 did not order maintenance payments towards L, a major daughter who is studying towards a Teaching Degree at Potchefstroom University. He has expended an amount of R 82 213, 83 during 2016. This amount consists of tuition fees and accommodation costs. He provides L with a subsistence allowance of R3 000 per month.

[11] The husband further states that he is a trustee of L & C D Family Trust. According to him the trust generates income through cattle farming, and is trading from the Midrand property and due to the wife restricting him to have access to the farm, the trust began to experience severe cash flow problems. The husband did not indicate when the said trust started experiencing financial problems. He further alleges that he is the sole member of D Dental Ceramics close corporation, a dental technician who used to trade from the Midrand property, but due to the acrimonious divorce proceedings and the domestic interdict against him, this has placed the finances of his dental business in a precarious position. He states that the financial year ending 28 February 2016, the close corporation profit for the year was R 30 669. He received a net cash flow during the 2014 financial year of R 423 343. His cash flow for the 2016 calendar year was reduced to R 14 104.00 In support hereof he annexed financial statements of D Close corporation and the family trust. F A J Pienaar, the accountant, signed the said financial statements for the year-end February 2016.

[12] The husband states that his wife, who lives in the Midrand property is leasing out 2 garden flats and collecting rental every month and utilises that money to his exclusion. He is not certain of the exact amount and indicated an amount of R 8000, 00 per month.

[13]. His wife has been living with a boyfriend, namely Dries Lategan since 2014 in the communal home. The said Mr Lategan and his wife are operating a business selling and hiring construction tools and equipment from the erstwhile matrimonial home.

[14] It was submitted on behalf of the husband that it is unfair and unreasonable to

expect the husband to provide free accommodation to Mr Lategan and continue to pay electricity water that he consumes. It was further argued that Mr Lategan is a chemical engineer and therefore given his professional status he has disposable income and therefore he should be ordered to make a significant contribution towards the expenses of the matrimonial home.

[15] It is common cause that the wife is living with Mr Lategan, her live-in- partner at the Midrand property, which the husband services the mortgage loan, pays for its utilities, rates and taxes to the Local Authority and security costs.

[16] In ***EH v SH 2012(4) SA 164 SCA*** Leach JA expressed the view that he does not think that in the liberal age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse. Each case must be determined by its own facts. Counsel for the husband argued that the wife ought to have made a full disclosure regarding Mr Lategan's financial position.

[17] It is trite that a person claiming maintenance must establish a need to be supported. Under common law the reciprocal duty of support existing between spouses, of whom provision of maintenance is an integral part, terminates upon divorce.

[18] The wife has disclosed that an income of R4500 that she receives every month from Mr Lategan. In my view the husband cannot be exonerated of his duty to support his wife, simply because his wife is cohabiting with another man. In a marriage relationship, the income-earning spouse owes a duty of support to his or her spouse until conclusion of divorce proceedings. It would be untenable to expect Lategan, a stranger to fulfil this obligation of the husband.

[19] His wife owns a sectional title property in Witbank, which property is occupied by a tenant. He did not indicate the amount of occupational rental collected by his wife.

[20] The wife in her opposing papers disputes that there has been a material change in the husband's financial circumstances. Her principal contention is that her husband has not disclosed the true financial position of the close corporation and the family trust. She

contends that her husband is pleading poverty and this is irreconcilable with his management of the financial affairs of the dental practice and the family trust in that in the financial year of 2015 he granted the close corporation a loan of R 76 803 and in 2016, a further loan of R 166 358 and loan of R 60 978. She further denies that her husband is in financial distress and pointed to the financial statements which indicated that in 2014, her husband granted loans by the Family Trust in the amount of R 327 949, R546 333 in 2015, however these respective loan amounts are not repayable in the next 12 months.

[21] I hold the view that the bare contention by the wife does not shed light in the absence of proof to the contrary by an accountant.

[22] The wife concedes that she is renting out the garden flats situated in the Midrand property, which she collects rental every month of R 9100. In respect of the Witbank sectional title property she collects monthly rental of R 7 300. She avers that due to the husband's failure, to comply with a R 43 order obligations she was compelled to look for alternative means to sustain herself and the children. She launched contempt of court proceedings against her husband, but the husband has since complied.

[23] She denies that she is trading with Lategan from the Midrand property however; she is exploring ways to earn an income. In her income statements she discloses an amount of R4 500 per month that she receives from Mr Lategan. The total income per month that is generated from the letting of the flats in Midrand and the rental income of the Witbank property is R 16 400. The rental income generated from these properties and cash contribution by her boyfriend comes to a total amount of R 20 900 per month.

[24] The wife gives an account of her monthly expenses as follows:

- a. Groceries - R3 600
- b. Meat, fish and poultry - R 2 200
- c. Bread milk and vegetables - R 1700
- d. Diesel - R2 000
- e. Mortgage loan with Standard Bank (Witbank sectional title property) - R4 800
- f. Rates and taxes on Witbank property - R1 000

- g. Levies on the Witbank property - R1 900
- h. L (major child) pocket money - R300
- i. Virgin Active - R350
- j. Discovery policy - R560
- k. Stationery for minor children - R600
- l. School clothes and necessities - R600
- m. Clothing for minor children - R600
- n. Clothing for applicant - R600
- o. Household appliance- R500
- p. DSTV - R900
- q. Cell phones for the minor children - R1 000
- r. Data and Internet bundles - R400
- s. Pharmacy medical – R800
- t. Amway - R200
- u. Personal care, hair cuts and toiletries for minor children - R600
- v. Vodacom - R1 200
- w. Vet and Pet food - R 200
- x. Pocket money for the minor children - R500
- y. Bank charges - R350
- z. Personal care and haircut and toiletries for the wife - R300
- aa. Maintenance on the property - R2 000
- bb. Maintenance on vehicle -R450

**TOTAL        R29 610.00**

[25] She admits that the Rule 43 did not grant an order to deal with the maintenance of a major child. She states that finances permitting, she sends L R300 per month.

[26] Regarding the request by the husband to retain her on his medical aid plan until 30 December 2016, she avers that she is on prescribed chronic medication and to secure her own medical aid will be unaffordable.

[27] As much as the husband continues with his responsibility to pay for the insurance of the Mercedes Benz and the insurance premiums thereon, the vehicle requires maintenance repairs, which cost R 5 907.20 for which she request the husband to take

responsibility thereof.

[28] In consideration of the facts, I am satisfied that there has been a material change in the wife's financial circumstances and further took into account that the husband is providing adequately for the maintenance needs of L. The husband has expended approximately R86 000 during 2016 and gives the said major child a subsistence allowance of R3 000 per month. The wife did not deny this averment.

[29] I am satisfied that the circumstances of the wife have changed for the better.

[30] The husband has made a tender in respect of a variation order of the Rule 43 as follows:

1. Payment of maintenance in the amount of R2 000 per month per child directly into his wife's bank account;
2. The payment of maintenance in the amount of R6 000 per month towards his wife be revoked
3. Payment of the mortgage loan instalments of the Midrand property, the utilities thereon and the levies to be revoked;
4. Payment of the Telkom landline and security services costs for the matrimonial be revoked,
5. Payment of the wages of a gardener and a domestic worker in the total amount of R2 400 be revoked
6. Payment of the cell phone of the 2 minor children be revoked
7. Contribution towards the Witbank property in the amount of R1 200 be revoked,
8. He will retain the wife on his medical aid plan until 31 December 2016.
9. He takes responsibility of school uniform textbooks and stationery extra mural activities, sports apparels, school and sport equipment, tours and participation fees in respect of 2 minor children.

[31] In the result, it is ordered:

1. That the husband pays maintenance of R2 500 per month per child towards the two minor children with effect from 30 December 2016;

2. That the husband is relieved from his obligation of payment of R6 000 per month as maintenance for the wife with effect from 30 December 2016;
3. That the husband complies with his Rule 43 order and retains the wife on his medical aid scheme and pays for medical costs and expenses reasonably incurred for and not covered by the medical aid, *pendete lite* with effect from 1 November 2014;
4. That the husband in so far that he seeks to revoke payment of the mortgage bond, the rates and taxes, security services costs in respect of the Midrand property is dismissed.
5. The husband is relieved from paying the salaries of the gardener and a domestic worker, water and electricity consumed in the Midrand property with effect from 30 December 2016;
6. The husband in so far as he seeks to revoke payment of the Telkom landline costs of the Midrand property is dismissed.
7. That the husband's request to revoke payment of the cellphones of the minor children is dismissed;
8. The husband is relieved from contributing R1 200 per month towards the property owned by the wife with effect from 30 December 2016;
9. It is apparent from the papers that this divorce proceeding is acrimonious this matter dates back to March 2014. I am of the view that it is fair and equitable that each party pays its own costs in respect of this application;
10. The parties are ordered to prepare a draft order in accordance with my judgment.

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**T. D. VILAKAZI**  
**ACTING JUDGE OF THE GAUTENG DIVISION HIGH COURT**  
**ACTING JUDGE OF THE SOUTH GAUTENG**  
**HIGH COURT, JOHANNESBURG**

<b>DATES OF HEARING</b>	<b>:</b>	<b>14 NOVEMBER 2016</b>
<b>COUNSEL FOR PLAINTFF</b>	<b>:</b>	<b>N VAN NIEKERK</b>
<b>INSTRUCTED BY</b>	<b>:</b>	<b>SANET DE LANGE INGELYF</b>
<b>COUNSEL FOR DEFENDANT</b>	<b>:</b>	<b>M COETZEE</b>

**INSTRUCTED BY : SC VERCUEIL ATTORNEYS**