

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**(1) REPORTABLE: NO**

**(2) OF INTEREST OF OTHER JUDGES: NO**

**(3) REVISED: YES/NO**

**30/12/2024**

Case Number: 24232/2020

**In the matter between:**

**C[...] W[...] L[...]**

**Applicant**

**and**

**N[...] D[...] L[...]**

**Respondent**

**JUDGMENT**

**Joyini J**

***INTRODUCTION***

[1] This is an opposed application in terms of Rule 43(6). Rule 43(6) provides litigants with an avenue to approach a court for a variation of its decision, on the same procedure, when there is "material change occurring in the circumstances of either party and/or the contribution towards costs proving inadequate".

[2] Courts are required to consider the applicant's reasonable needs and the

respondent's ability to meet them.<sup>1</sup> The Court will look at the financial circumstances of both 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.

[3] Affordability on the part of the respondent is an issue as he claimed to be unemployed. The applicant is also unemployed.

[4] Both parties submitted written heads of argument in addition to their oral submissions. Where appropriate, I have relied on the written heads in crafting this judgment.

### ***BACKGROUND FACTS***

[5] The following facts underlie this application: The applicant and the respondent ("the parties") got married to each other on 29 July 1995. The marriage relationship still subsists. The marriage is out of community of property, with the exclusion of the accrual system. The parties, in their marriage relationship, are blessed with two children who have already reached majority/adult age. The applicant moved out of the marital home around June 2020 and instituted divorce proceedings on or about 25 June 2020. The evidence is that both parties have moved on with their lives since they separated in June 2020.

[6] It is also common cause that the respondent has always maintained the applicant at a somewhat opulent living standard.

### ***ISSUES FOR DETERMINATION AND RELIEF SOUGHT***

[7] The applicant seeks a further contribution towards her legal costs and an increase in the amount of maintenance payable by the respondent to the applicant. The initial Rule 43 order granted on 13 November 2020 allowed for R22 500 monthly maintenance payable by the respondent to the applicant and a contribution of R20 000 by the respondent to the applicant for her legal costs.<sup>2</sup> It is common cause that the

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<sup>1</sup> *MGM v M J M* [2023] ZAGPJHC 405 para 9.

<sup>2</sup> Caselines 043 to 044.

applicant seeks a variation of a maintenance order previously issued under Rule 43 of the Uniform Rules.

[8] The applicant seeks an order under Rule 43 of the Uniform Rules of Court, in the following terms: That the respondent be directed to pay maintenance for the applicant in the amount of R35 000 per month plus R660 000 as further contribution towards her legal costs; that the respondent be ordered to continue making payment to the applicant of the monthly subscription required by Discovery Health for the applicant's Hospital plan; and that the respondent be directed to pay costs for the application.

### ***POINT IN LIMINE AND DISCRETION TO ALLOW FURTHER AFFIDAVITS***

[9] 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 supplementary and further 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 supplementary and further supplementary affidavits.

[10] A *point in limine* of this nature, like the one raised in paragraph 9 above was dealt with properly in the following paragraphs of *S N v S*<sup>3</sup>:

*"[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.<sup>4</sup>*

*[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.<sup>5</sup>

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<sup>3</sup> (2023/036122) [2023] ZAGPJHC 1335 (14 November 2023)

<sup>4</sup> *Ev E; R v R; M v M* 2019 (5) SA 566 (GJ) at para 25.

<sup>5</sup> *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 5310; *Du Preez v Du Preez* 2009 {6} SA 28 (T) at 33B; *TS v TS*

*[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).<sup>6</sup>*

*[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*,<sup>7</sup> 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."*

[11] Accordingly, it is in the interest of justice 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 AND ARGUMENT**

[12] The applicant contended that there had been material change in circumstances

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2018 (3) SA572 (GJ)at585A.

<sup>6</sup> 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 *Ev E, R v R, M v M* above n 2 at paras 33, 43, 48, and 52.

<sup>7</sup> *E v E; R v R; M v M* at paras 58-9.

since the original Rule 43 proceedings. In support of her claim, the applicant relies on a purported change in circumstances as contemplated in Rule 43(6). The emphasis is more on her health issues that need an urgent surgical operation and the need for an increase in the amount of maintenance. She is also unemployed and she cannot find employment.

[13] The applicant, in her financial disclosure form<sup>8</sup>, revealed the following: *"The Defendant/Respondent and I enjoyed a very lavish lifestyle. During the subsistence of our marriage, we travelled to approximately 22 (twenty-two) cities in different countries around the world such as Australia, France, Netherlands, USA, Thailand, Italy, Jordan, Croatia, Greece, and the UAE but to name a few. We often went for dinners, between 1 and 2 times a week. The Defendant/Respondent and I resided in Dubai, UAE (United Arab Emirates) from 2009 to 2017. During this period the Defendant/Respondent, on at least 9 (nine) occasions, flew my mother and other family members over from South Africa to enjoy a holiday with us in the UAE. On one birthday occasion during this period in the UAE the Defendant/Respondent purchased me Ford Mustang 5L. VB motor vehicle in cash."*

[14] The applicant, in her founding affidavit,<sup>9</sup> also revealed the following: *"The Respondent is utilising the services of a very senior counsel and I trust he will inform this Honourable Court as to what he has spent on his legal fees as well as the hourly and daily rate of his senior counsel and attorney."*

[15] With regard to the applicant's prayer for further contribution towards her legal costs, the following is stated in her further supplementary affidavit: *"I am currently indebted to my attorneys of R152 018,62 (one hundred and fifty-two thousand eighteen rand and sixty two cents). I have also since deposing to my previous affidavits loaned funds from Mr Jacques Hans Botha ("Botha") in the sum of R56 752,50 (fifty-six thousand seven hundred and fifty-two rand and fifty cents) in order to place my attorney in funds, more specifically for counsel."*

## **RESPONDENT'S VERSION AND ARGUMENT**

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<sup>8</sup> Caselines M77 to M81.

<sup>9</sup> Caselines Q8, para 14.

[16] The respondent opposed this application, arguing that the applicant has failed to demonstrate any material change in circumstances that could justify a variation of the previous Rule 43 order. The respondent contends that there has been no material changes since the original Rule 43 proceedings, *"and if there were, there were to her benefit. None of the children now stays with her."*<sup>10</sup> The respondent argues that a variation of a Rule 43 order, previously agreed upon, is not simply for the asking, the material change in circumstances must be shown. He further argues that the applicant, on her own version, as set out in her further supplementary affidavit, earned R18 050.00 from her CV crafting business for a period between 1 December 2023 to 28 February 2024 and R21 935.00 from her soap business for a period between 20 April 2023 to February 2024. With regard to the monthly subscription required by Discovery Health for the applicant's medical aid plan, the respondent is already paying the instalment since February 2023 and he has undertaken to pay the recent increase of R174.00 per month from July 2024 onwards. With regard to the applicant's need for urgent surgical operation, the respondent is prepared to assist with payment if the applicant proves that there is no doctor or hospital which falls inside her medical aid's network that can perform the procedure. This is subject to him being allowed to speak to the doctors and personnel relating to such financial requirements.

[17] The respondent, in his heads of argument,<sup>11</sup> revealed the following: *"The Respondent's net estate is worth R11 000 000.00, inclusive of all the moneys in bank accounts, investments, immovable and movable property. The Respondent's position has since changed to the negative, as he is presently also unemployed, without a salary, having to draw from his savings to make ends meet."*

[18] According to the respondent, this application constitutes an abuse of the court process. As such, there is no need for a further contribution towards her legal costs. The respondent argues that *"The Applicant must show a material change in circumstances in terms of Rule 43(6), to vary the previous order for maintenance."*

[19] The respondent argues that it is the applicant who enjoys a comfortable lifestyle considering her expenses on restaurants, pubs and entertainment.

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<sup>10</sup> Caselines Q430, para 71.2.

<sup>11</sup> Caselines Q406 to Q432.

## EVALUATION AND ANALYSIS

[20] Rule 43(6) allows for a variation of an earlier Rule 43 order. An order made in terms of Rule 43 is not appealable in terms of section 16(3) of the Superior Courts Act 10 of 2013. Section 16(3) had been found to be constitutional in *S v Sand another 2019 (6) SA 1* (CC).

[21] Rule 43(6) allows for a variation of an earlier Rule 43 order in two instances: (i) if a material change has occurred since the granting of the earlier order in the circumstances of the applicant; and (ii) if an earlier contribution towards the applicant's legal costs proves to be inadequate. These are two separate instances. The qualifier "material change in circumstances" does not apply to a subsequent application for a further contribution to the applicant's legal costs; for a subsequent contribution to legal costs the applicant must show that the earlier contribution was inadequate. See *E.W v S. W*(26912/2019) [2024] ZAGPJHC 465 as a recent example where this approach was followed. I disagree with the approach taken in *Z.G v J.G.C.G* (77979/2018) [2024] ZAGPPHC 18 that the qualifier "material change in circumstances" also applies to an application for a further contribution to legal costs.

[22] The post-constitutional purpose of Rule 43(6) must be kept in mind. The Constitutional Court in *S v Sand another 2019 (6) SA 1* (CC) para 3 provides the context against which Rule 43(6) should now be interpreted and applied. Rule 43 applications are for the most part brought by women who are usually in a more disadvantageous financial position than their husbands. Gender inequality persists in South African society. Courts should therefore apply Rule 43 in such a way that gender inequality is alleviated.

[23] *AF v MF* make the following salient points. It is for the most part still so that women have to utilise Rule 43 to obtain a contribution from their husbands to fund their litigation, seeing that wives are not remunerated for their household and childcare responsibilities and that their husbands are usually in a better financial position (para 30). Courts should aim to establish an equality of arms in divorce litigation (para 41). Courts must alleviate a marked imbalance of financial resources between the parties (para 41). *SH v MH* paras 73-79 and 83-105 make similar points. Both judgments hold that a lumpsum contribution to costs may be ordered. Both judgments hold that a Rule

43(6) order must be granted through an equality of arms prism.

[24] Section 7(2) of the Divorce Act 70 of 1979 sets out certain factors that a court would consider before making an order for spousal maintenance. These factors were considered by Collett AJ in her judgment. For the sake of completeness, they are: The existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, their standard of living prior to their divorce, the conduct in so far as it may be relevant to the break-down of the marriage, and any other factor which the court deems appropriate.

[25] In *Micklem v Micklem*,<sup>12</sup> the court held as follows: "*A wife seeking a contribution towards costs is not entitled to payment in full of the costs that she avers will be incurred in presenting her case to the court nor all costs incurred to date.*"

[26] Each application for increase in spousal maintenance must be decided on its own facts. In *casu*, the applicant has not shown that a material change in circumstances has occurred since the granting of the earlier order in the circumstances of the applicant.

[27] That said, the applicant's failure to show a material change in her circumstances is not a bar to her application for a further contribution to her legal costs. The applicant is reliant on the respondent's maintenance payments. She has no independent means to fund her own legal costs.

[28] It has been held that a wife is not expected to realise her own assets to fund her litigation costs where her husband is able to contribute to her costs - *De Villiers v De Villiers* **1965 (2) SA 884** (C) 888O-F and *Glazer v Glazer* **1959 (3) SA 928** (W) 931.

[29] The amount to be awarded as a contribution to costs is within the court's discretion - *AF v MF* para 28. In exercising this discretion, *Van Rippen v Van Rippen* **1949 (4) SA 634** (C) 639-640 is still to some extent good law, taking in mind that a constitutional gloss must now be put on Rule 43(6): The court must consider the

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<sup>12</sup> 1988 (3) SA 259 (C) at 262.



circumstances of the case, the respective financial positions of the parties, and the likely issues that will be in dispute at trial, and then award such costs to enable the applicant (wife) to adequately present her case. *S v S*, *AF v MF* and *SH v MH* now require equality of arms, and not mere "adequate" representation.

## **CONCLUSION**

[30] The conclusion that I reach is 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.<sup>13</sup> In conclusion, given the temporary nature of Rule 43 proceedings, I am convinced that the respondent can afford to pay a further contribution towards the applicant's legal costs.

[31] Each application for increase in spousal maintenance must be decided on its own facts. The applicant has not shown that a material change in circumstances has occurred since the granting of the earlier order in the circumstances of the applicant.

## **COSTS**

[32] I have considered both parties' argument relating to the costs of this application. The facts in this regard were not extraordinary in this context and I am not persuaded that the respondent's opposition was frivolous or in bad faith. I am accordingly not inclined to grant costs in either party's favour and leave this to the trial court to decide. The costs of this application will therefore be costs in the cause, meaning that they would be determined as part of the overall case.

## **ORDER**

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

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

[33.2] The respondent is ordered to pay a further contribution to the applicant's legal costs in the amount of R660 000.00 to the trust account of the applicant's

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<sup>13</sup> *Levin v Levin and Another* **1962 (3) SA 330** (W) 331D.

attorneys.

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

**T E JOYINI**  
**JUDGE OF THE HIGH COURT, PRETORIA**

**APPEARANCES:**

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Date of Hearing: 20 November 2024

Date of Judgment: 30 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 30 December 2024 at 10h00.