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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG**

CASE NO: DIV 31/2020

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between:

A[....] L[....]

APPLICANT

And

C[....] A[....] L[....]

RESPONDENT

REASONS FOR JUDGEMENT

NONCEMBU AJ

Introduction

[1] On the 22 October 2020, after perusing the papers filed on record and hearing argument for both counsel for the Applicant and the Respondent, I granted the following orders in a Rule 43 application for maintenance and contribution towards costs *pendente lite*:

- a) The point *in limine* is upheld.

b) The application is dismissed with costs.

[2] Subsequent to that the Applicant requested reasons for the said order. These are the reasons.

Background

[3] The Applicant and the Respondent were married out of community of property without the accrual system on the 13 March 2010 at Lichtenburg, which marriage is still in subsistence. Two minor children were born of the said marriage. The Applicant has filed for divorce, which action was initially instituted at Lichtenberg Regional Court, and was later transferred to this Division. The divorce action is still pending. The Applicant lodged an application before this court in terms of Rule 43 wherein she claimed *inter alia*, interim maintenance for herself, an increase in the maintenance for her two (2) minor children as well as a contribution towards the costs of the divorce action from the Respondent pending the final divorce action

[4] The Respondent opposed the application and to that end raised two *points in limine* on the grounds, *inter alia*, that the order sought was effectively to vary an order which was granted *pendent lite* by Honourable Judge Djadge on the 6 of February 2020, further that the Applicant had failed to comply with the provisions of Rule 43(6) in this regard. In the alternative, the Respondent contended that the Applicant failed to show that she was entitled to any further relief in addition to what had been provided in the afore-mentioned order.

[5] Rule 43(1) of the Uniform Rules, which is equivalent to Rule 58 in the Magistrates Courts provides as follows:

“This Rule shall apply whenever a spouse seeks relief from the Court in respect of one or more of the following matters;

- a) *Maintenance pendent lite;*
- b) *Contribution towards costs of a pending matrimonial action;*
- c) *Interim custody of any child;*

d) *Interim access to any child.*”

[6] Rule 43(6) provides:

“The court may on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.”

The Application

[7] The Applicant issued a Notice of Motion dated the 13 August 2020 against the Respondent wherein she sought the following orders:

(a) That the Respondent be ordered to contribute to maintenance towards the Applicant in the amount of **R23 212.22** per month *pendent lite*.

(b) That the Toyota Fortuner (registration number [...]) remains in the Applicant’s possession pending the finalisation of the divorce action, and that the Respondent be ordered to properly maintain the vehicle, and to keep same properly insured.

(c) That the Respondent be ordered in addition to the Court Order made dated 6 February 2020:

- Pay all medical expenses which are not paid for by the aforementioned funds in respect of the minor children.
- Payment of school clothing as well as clothing related to extra-mural activities in respect of the minor children.
- That the maintenance in respect of the minor children be increased to R5 500.00 per child per month.

(d) R300 000.00 contribution towards the Applicant’s legal expenses, which is payable in three monthly instalments of R100 000.00 each.

[8] Supporting the notice of motion is an affidavit deposed to by the Applicant wherein the purpose of this application is set out. In the founding affidavit the Applicant contends that the divorce proceedings were initially instituted in the Lichtenburg Regional Court which falls under the Regional Division of North West. Pursuant to an urgent application which was brought before the honourable Judge Djadge of the North West Division of the High Court on the 6 of February 2020, the

divorce proceedings were transferred to the North West High Court sitting in Mahikeng.

[9] In terms of the order referred to above the primary residence of the minor children was awarded to the Applicant and the Respondent was awarded a right of access and contact with the minor children as expatiated in the said order.¹ Of material relevance to this application are paragraphs 5; 5.8 and 7 of the said order which provide as follows:

- **5:** Pending the final determination of the divorce in this court.
- **5.8:** The Applicant shall make payment of maintenance to the First Respondent in favour of the minor children as follows:
 - **5.8.1:** The Applicant shall make payment of the amount of R3500.00 (Three Thousand Five hundred Rand) per month per child, the first payment, calculated proportionately for the remainder of the month of February 2020, to be made on or before the 10th of February 2020, and thereafter on or before the first day of each succeeding month; paid to the First Respondent's account as nominated by her.
 - **5.8.2:** The Applicant shall retain the minor children on his medical aid scheme and shall make payment of the monthly premiums in respect thereof;
 - **5.8.3:** The Applicant shall make payment of the monthly school fees of the minor children in Vryburg directly to the relevant service provider and shall make payment of the minor children's extra-mural activities.
- **7:** The balance of the relief sought in the main and counter application is postponed sine die, insofar as such relief has not been dealt with in this order.

The Points in Limine

[10] In opposing this application the Respondent raised two points *in limine*. The first one pertained to the Applicant's failure to give notice to the Family Advocate who had been appointed to investigate the best interests of the minor children earlier

¹ AL 3 to the founding affidavit.

on in this matter. The contention was that part of the relief sought by the Applicant concerned aspects relating to the minor children, and therefore the Family Advocate has a direct and substantial interest. The Respondent contended that the said failure by the Applicant rendered the application immature and as such it ought to be dismissed with costs.

[11] Whilst I acknowledge the requirement for the Family Advocate to be notified in all matters involving minor children in divorce proceedings including related applications, I could not find the failure by the Applicant to give such a notice to be fatal in these proceedings. The only issue concerning the minor children in this matter related to their maintenance, an aspect which can best be established on information known to both the Applicant and the Respondent. If anything, I am of the view that dismissing the application on that basis alone would certainly not be in the best interests of the minor children. This point *in limine* was therefore dismissed.

[12] The second point *in limine* related to the failure by the Applicant to comply with the provisions of Rule 43(6) which deals with variation of orders *pendent lite*. Before the divorce action was transferred to the High Court the Applicant had instituted Rule 58 proceedings in the Regional Court. The Applicant instituted a further application in this Court (UM 126/2019) for relief pending the determination of the Rule 58 application by the Regional Court. The application (UM126/2019) was settled by also having regard to the Rule 58 application in the Regional Court per court order dated 6 February 2020 (annexure 'AA1' to the Replying affidavit and annexure 'AL3' to the founding affidavit). In terms of 'AA1' interim relief was granted to the Applicant pending finalisation of the divorce action.²

[13] The contention by the Respondent was that part of this application is effectively to vary the relief granted *pendent lite* under case no. UM 126/2019 and as such its true nature is premised on Rule 43(6). The submission was that the Applicant failed to state any facts in support of her application for the variation of the relief granted *pendent lite* as no material change in circumstances is alleged or put

² Paragraph 3 of the replying affidavit.

before this Court in her papers. It was therefore contended that the application should be dismissed with costs on a punitive scale.³

The Issue

[14] This Court was therefore enjoined to make a determination as to whether the Applicant made out a case for the orders prayed for in the Notice of Motion. Alternatively, to decide whether or not the true nature of this application was to vary the order made *pendent lite* on the 6 February 2020, which if found to be the case, warranted compliance with Rule 43(6) failing which to uphold the point *in limine*.

The Legal Principles and their application

[15] Paragraph 5 of the Court order dated 6 February 2020 which provides for, *inter alia*, the interim access and custody as well as the maintenance of the minor children starts with the statement: '**Pending the final determination of the divorce in this court**'. Rule 43 (1) specifically provides that the Rule shall apply whenever a spouse seeks relief from the Court in respect of one or more of the following matters;

- (a) Maintenance *pendent lite*;
- (b) Contribution towards costs of a pending matrimonial action;
- (c) Interim custody of any child;
- (d) Interim access to any child.

[16] The order referred to above relates specifically to maintenance *pendent lite* and interim custody and access to the minor children by the Respondent pending the final determination of the divorce action. Notwithstanding the fact that no specific Rule is mentioned in the aforementioned order, I find myself inclined to accept the exposition that it is in effect an order as envisaged in Rule 43(1). That being the case it follows therefore that for the said order to be varied the provisions of Rule 43(6) must be complied with.

[17] I am not convinced that the Applicant was not alive to this factor given the following aspects of her application which I will deal with individually below. Prayer 3

³ *Ibid.*

of her application, reads ‘The Respondent be ordered **in addition to the Court Order made dated 6 February 2020**’ (My emphasis). I can only understand this to mean that the order in question was no longer adequate and hence it needed to be varied/added on. Furthermore, in her founding affidavit, the Applicant contended that the Honourable Djaje J did not have insight into the financial affairs of the Respondent, and could thus not arrive at a just amount towards the maintenance of the minor children.⁴ She further contended that she was financially depleted, in distress and in urgent need of maintenance for herself to make ends meet.⁵

[18] The following was stated in paragraph 10.3 of the founding affidavit:

“Circumstances have changed to such an extent that the previous Rule 58 does not cover the current monetary needs of the minor children and myself, and I was therefore advised to rather withdraw the Rule 58 application and to institute a fresh Rule 43 application.”

[19] Two distinct issues arise from the above paragraph. Firstly, it does not seem to account for the fact that some of the considerations in the Rule 58 application were incorporated in the Court order dated 6 February 2020, hence the order included interim maintenance, custody and access to the minor children pending finalisation of the divorce action. Secondly, it is only a bald statement which states that the circumstances have changed, but nothing more is said throughout the affidavit to indicate the material change in the circumstances since the previous order which, evidently, also incorporated the previous Rule 58 application.

[20] I found various other problems with the application before me in this matter, particularly pertaining to the changed circumstances warranting a new order *pendent lite*. The order dated 6 February 2020 did not follow upon an inquiry into the financial affairs of the parties by the Court as it emanated from a settlement agreement entered into between the Applicant and the Respondent. It therefore cannot be said that the Court could not arrive at a just amount when the amount awarded was in fact agreed upon between the parties in terms of their settlement agreement.

⁴ Paragraph 8.4.

⁵Paragraph 9.1.

[21] It seemed to me that the Applicant merely placed factors which in her view were never placed before the Court for it to reach an appropriate amount. This seems to me to be a mere rehearing of the matter with more information now being placed before the court to put a different complexion on the matter. Rule 43(6) requires that there must be a material change in the circumstances for an order *pendent lite* to be varied, which must occur after the initial order.⁶

[22] In the matter of *Grauman v Grauman*⁷ the following was stated regarding what amounts to a material change:

“Rule 43(6) should be strictly interpreted to deal with matters which it says has to be dealt with, that is, a material change taking place in the circumstances of either party or child. That relates to a change subsequent to the hearing of the original Rule 43 application.”

[23] One of the guidelines in a Rule 43(6) application is that it should not be a rehearing of a former application based on new evidence.⁸ In making this point the Court in *Grauman v Grauman* supra pointed that in allowing a rehearing of a formal application a Court would be faced ;

“...with virtually a review of a previous decision, based on the existing facts but now having been given time to deal with the matter in more detail, having been able to utilise more information, another slant being given to those very same facts, or one or two additional facts might be discovered which puts a different complexion on matters.

After all, this is merely to assist parties in resolving their differences, and if one makes of Rule 43 procedure a procedure whereby acrimony in engendered and further issues are brought forward, which only complicate the divorce instead of simplifying it, Rule 43 misses the point”⁹

⁶ *D v D* (5571/2017) [2019] ZAGPPHC 197 (31 May 2019).

⁷ 1984 (3) 477 WLD at 480 (C).

⁸ *Micklem v Micklem* 1988 (3) SA 259 (C).

⁹ *Grauman v Grauman* 1984 (3) 477 WLD at 479I-480C.

[24] Other than listing out her current living expenses and those of the minor children, there is nothing in the founding affidavit by the Applicant which expatiates on any material change in circumstances since the granting of the previous order which renders that order to now be said to be inadequate. It seems to me that the Applicant seeks a rehearing of the matter which in law is impermissible.

[25] Having found no material change in the circumstances of either the Applicant or the minor children placed before me in the founding affidavit, I upheld the point *in limine* as I had no basis to interfere with the initial order which was made *pendent lite* on the 6 February 2020.

V Noncembu, AJ

APPEARANCES

DATE OF HEARING :22 OCTOBER 2020

DATE OF JUDGMENT :22 OCTOBER 2020

REASONS FOR JUDGMENT :15 APRIL 2021

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