

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14148/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

22 NOVEMBER 2024
DATE

In the matter between:

G[...] **C[...]**-**I[...]** **L[...]**

Applicant

and

T[...] **P[...]** **L[...]**

Respondent

JUDGMENT

MODIBA, J

Introduction

[1] This is an application for spousal maintenance *pendente lite* in terms of uniform rule 43. In an amended notice of motion, the applicant seeks a suit of relief against the respondent consisting of cash payments as well as specific payments in respect of the former matrimonial home and her motor vehicle and medical expenses. She also seeks an order in terms of which the

respondent is held liable for contributing to her legal costs as well as the costs of the rule 43 application.

- [2] The respondent is vigorously opposing the application. He wants an order in terms of which an application for similar relief the applicant brought against him in 2022 is dismissed with punitive costs. He contends that the present application does not supplement it as the applicant contends but constitutes a new application. He also seeks a dismissal of the present application with costs. Further, he wants the applicant's claim for contribution to legal costs dismissed with punitive costs.
- [3] The parties were married to each other on 4 December 1994, in community of property. Their marriage still subsists. Their marital relationship has broken down irretrievably. The respondent vacated the former matrimonial home in August 2018. The applicant still resides in the former matrimonial home. There are two major children born from the marriage. No relief is sought in respect of them in this application.
- [4] The respondent instituted divorce proceedings against the applicant in July 2020 seeking a decree of divorce, forfeiture of the benefits of the marriage and legal costs. The applicant is defending the divorce action and has filed a counterclaim in which she concedes the divorce relief. However, she seeks an order for the division of the joint marital estate and costs of suit. The respondent is defending the counterclaim and seeks its dismissal with costs.
- [5] The applicant instituted a rule 43 application in March 2022. The Respondent opposed the application. Despite pleadings closing, the applicant did not set down the application for hearing. She also did not withdraw it. The respondent's version is that he started making contributions towards the applicant's maintenance needs as sought by the applicant in the notice of motion. It is for that reason that the applicant did not persist with the application.
- [6] The applicant has filed an amended notice of motion in June 2024. She seeks leave to file a supplementary founding affidavit. In it, she sets out grounds on

which she contends that the respondent's contributions towards her maintenance are insufficient. It is for that reason that she is proceeding with the rule 43 application on supplemented papers. She also particularises the contribution towards legal costs she now seeks.

[7] The respondent contends that the applicant's supplemented papers do not constitute a continuation of the rule 43 application instituted in March 2022. He contends that the March 2022 application should have been withdrawn and the applicant ought to have tendered the costs thereof. Whether the applicant ought to have withdrawn the 2021 application is a red herring. Hence, I deal with the issue upfront and summarily.

[8] The respondent had the right to enrol the 2021 application. By failing to do so, just as the applicant did, he too allowed that application to remain pending. He did not oppose the amendment to the notice of motion. The amendment to the applicant's notice of motion has since been effected. He is also not opposing the filing of the applicant's supplementary affidavit. He has replied to it. Therefore, he is effectively opposing the rule 43 application as supplemented.

[9] There is no abandoned rule 43 application as the respondent contends. There is only one pending rule 43 application. It is the supplemented application, which the respondent is opposing. Therefore, the respondent fails in his quest to have the original application regarded as an abandoned application that ought to have been withdrawn by the applicant.

[10] The basis for the relief the applicant seeks is that she is unemployed. The relief she seeks is elaborative. I set it out below:

- (a) Payment of a cash amount of R 101,847.63 per month.
- (b) The respondent, at his cost, to retain the applicant as a dependent on the current medical aid scheme. Further, the respondent is liable for medical expenses not covered by the medical aid scheme.
- (c) The respondent pays certain direct expenses in respect of the former matrimonial homey.
- (d) The respondent pays certain expenses in respect of the applicant's

Mercedes Benz GLE 500 motor vehicle.

- (e) The respondent pays R20,000.00 per month in respect of services, cost of maintenance, upkeep and repairs of the property known as M[...]farm from which the applicant conducts the business of the boutique hotel and spa.
- (f) The cash amounts in (a) and (e) to increase annually in accordance with the CPI published by Statistics South Africa.
- (g) The respondent pays to the applicant's attorney, in respect of a contribution towards the applicant's legal costs, the following:
 - i. R352,700.21 in respect of past legal fees, to be paid in four equal instalments of R88,175.05 each.
 - ii. R1 724, 469.00 in respect of future legal costs, to be paid in ten equal instalments of R172,446.90 each.
 - iii. R740,000.00 in respect of the cost of a forensic accountant, to be paid in four equal instalments of R185,000.00.
 - iv. R62,500.00 in respect of the cost of an actuary.
 - v. R75,900.00 in respect of an industrial psychologist.
- (h) That condonation be granted, as far as the founding affidavit may exceed the recommended pages as prescribed in terms of the Practice Directive of this Court.
- (i) That the limitations of rule 43(7) and (8) do not apply.
- (j) That the respondent pays the applicant's costs of the application.

[11] The respondent opposes the above relief on the following grounds:

- (a) The application constitutes an abuse of the process of this court. He has at all material times complied with his obligations to pay interim maintenance to the applicant. It was therefore not necessary for the applicant to bring either of the two rule 43 applications. He tenders to continue to do so.
- (b) The applicant has not approached the court with clean hands. She has failed to make a full and frank disclosure of her financial position, especially in the first rule 43 application but significantly so also in the second rule 43 application.

- (c) The applicant's claims are exorbitant, unreasonable in the extreme, do not constitute her reasonable or necessary interim maintenance requirements or her actual spend.
- (d) The applicant's claims for legal costs are severely inflated and do not constitute the costs reasonably required by her to enable her to proceed to trial and place her claims properly before the court.
- (e) The rule 43 applications are both exceedingly prolix, contain irrelevant and immaterial matter, inadmissible evidence and is repetitive. The respondent seeks an order that that the irrelevant and inadmissible material be struck with a punitive costs order.

[12] I determine the issues that arise under the following subheadings:

- (a) The parties' respective means and the applicant's maintenance needs.
- (b) The applicant's claim for contribution towards legal costs.
- (c) The respondent's application to strike out.
- (d) Legal costs of the rule 43 application.

The parties' respective means and the applicant's maintenance needs

[13] The applicant contends that she is unemployed, continues to be and is entirely financially dependent on the respondent. The respondent alleges that the applicant can generate an income as an independent interior designer and landscaper. He also accuses her of being dishonest regarding her income for the 2022-2023 tax year. He relies on her tax return to sustain this claim. In response to these allegations, the applicant refers to her employment history and alleged lack of ability and/or means to generate an income. Notably, she has not dealt with the allegation regarding her income as reflected in her tax return.

[14] It is common cause that after the applicant instituted the rule 43 application in March 2022, the respondent started contributing towards her maintenance needs. He continues to do so.

[15] It is common cause that there has not been an inflationary increase to the respondent's cash contribution of R39,600.00 since the respondent started making that payment in March 2022. He contends that considering the other

payments he makes towards the applicant's living expenses; she does not need such an increase.

[16] The applicant complains that from November 2020 to May 2021, the respondent reduced his cash contribution to R34,600.00 and from August 2021 to March 2022, he further reduced it to R22,160.00 and only increased it back to R39,600.00 after she served him with the rule 43 application, resulting in a shortfall of R217,557.50 during this period. She used her overdraft facility to cover the shortfall in her living expenses.

[17] As contended by the respondent, I find that the respondent was entitled to reduce the applicant's maintenance as alleged to defray the legal costs relating to an interdict. The respondent restored the payments once the legal costs were defrayed. That event coincided with the launching of the rule 43 application. Therefore, there is no basis for the contention that this event induced the respondent to revert to the R39,600.00 cash contribution.

[18] In the supplemented rule 43 application, the applicant refers to the respondent's luxurious lifestyle with his girlfriend which she alleges he maintains from the joint estate. She relies on the respondent's reply to her rule 35(3) notice (which she had to compel) and subpoena issued. She specifically complains about:

- (a) The R52,500.00 rental home the respondent occupies with his girlfriend.
- (b) R620,982.53 spent on furnishing the home and a further R93,1100.00 paid to his girlfriend's account from August 2022 to June 2023.
- (c) R209,679.60 on dining out at restaurants with an amount of R31,386.00 at the Saxon Hotel.
- (d) Wine purchases in the amount of R53,462.94 from January to June 2023 and a total spend of R96,941.34 between 2020 and 2023.
- (e) R121,677.28 for a flight to Italy with his girlfriend in 2023, R56,497.43 for hotel expenses, and R316,434.50 for international travel from 2021 to 2022.
- (f) R733,066.40 paid to his girlfriend from March 2017 to August 2023.

- (g) R234,484.95 spent on designer brand purchases.
- (h) R338,454.59 on IVF treatment for his girlfriend from January 2022 to June 2023.
- (i) R323,207.75 spent on hosting his 60th birthday party in February 2023.

[19] She also places reliance on the respondent's financial declaration form dated 7 August 2024. She points out that supporting bank statements reflect an amount of R385,461.96 spent on dining out, travel and luxury brand purchases, income in the amount of R7 475,198.25 for January to May 2024 and monthly expenses in the amount of R368,000. She contends that considering his income and expenses during this period, he would have a surplus of R5 634,000.00.

[20] She complains that, notwithstanding his substantial surplus income, the respondent has continued to cut her off from the benefits of the joint estate. Although he has been making certain contributions to her maintenance needs, he fails to do so adequately, while the respondent and his girlfriend unduly benefit from the joint estate.

[21] She further complains that she finds herself in a position where she is unable to make payment of her day-to-day expenses and to start making repayments of her debts, which have increased due to her not being maintained adequately by the respondent. The only means at her disposal, the applicant's contentions further go, is the current cash contribution the respondent pays in the amount of R39,600.00. This amount is not sufficient. Although she is currently being maintained as a member of the respondent's medical aid and the respondent makes payments in respect of expenses not paid by the medical aid, the payments are a bone of contention and often delayed leaving her embarrassed at the doctor's rooms having to wait for payment by the respondent. It is for that reason that she seeks an order that in addition to being maintained on the respondent's medical aid, that he pays the expenses not paid by the medical aid.

[22] She expresses a similar complaint in respect of expenses related to the matrimonial home and the motor vehicle the respondent has provided her

with. Hence, she seeks an order that the respondent makes payment of the specific expenses related to the former matrimonial home and the motor vehicle.

[23] She has itemized her current monthly expenses and provided an explanation for each expense. The amounts are substantially higher than the amounts set out in her 2022 papers. She submits that the increased amounts are justified by a change in circumstances. She further submits that some expenses are necessary while others are projected. She contends that the respondent is comfortably able to afford the increased contribution that she seeks.

[24] Several difficulties arise in respect of the basis for applicant's claim. She has badly alleged a change in her personal circumstances without providing any particularity. It is striking that having launched the rule 43 application in March 2022, she did not persist with it until June 2024. This sustains the respondent's contention that the contributions he currently makes to the applicant's living expenses is adequate.

[25] The applicant refers to gleaning from the respondent's answer to her request in terms of rule 35(3) and financial declaration form filed in August 2024 that together with his partner, they live a lavish lifestyle while she struggles to make her ends meet yet he can afford to meet her increased maintenance needs. She does not complain that the respondent is failing to maintain her according to the lifestyle he was accustomed to during their marriage. The respondent is maintaining her according to what she had demanded in her March 2022 notice of motion. The parties have been separated since 2018. The respondent has clearly moved on. The lifestyle he is living with his girlfriend is not a measure by which the applicant's right to maintenance pendente lite ought to be determined.

[26] From the papers filed, the applicant's case is also predicated on:

(a) Debt she incurred when the respondent had reduced the cash contribution to defray legal costs in terms of a costs order granted against the applicant.

- (b) Expenses for maintaining a property on which she runs a boutique hotel.
- (c) The high costs of maintaining the former matrimonial home.

- [27] She only has herself to blame for incurring increased liabilities. She is not entitled to circumvent her liability for the costs order by demanding an increase in maintenance to settle debts she incurred because of the costs order.
- [28] She is operating what appears to be a business that is unable to covers its expenses. These factors would ordinarily lead to any party being insolvent. She has not established a legal right to demand that the respondent covers these losses.
- [29] Her separation from the respondent has no doubt had a drastic effect on the size of her household. Her children are now adults and no longer live with her. The respondent is maintaining them with no reference to the applicant. Her attempt to obtain an increase for some expense items such as groceries and the cost of a domestic worker is not justified. It is unclear why she has not moved to a smaller property to reduce her living costs. Her claim for expenses for a big household is not justified under these circumstances, particularly because the party's divorce action is, for unexplained reasons protracted.
- [30] It disturbs me that she did not disclose her income, even if, on her version, it is a mere R300,000. It accounts for two thirds of the respondent's current cash contribution and would go a long way in meeting her alleged shortfall, defraying her claims for an inflationary increase to the respondent's current cash contribution, settling her debts and/or meeting her business expenses for which she unjustifiably seeks to hold the respondent liable. I take a very dim view of her failure to disclose this material information.
- [31] For these reasons, she has not justified an increase in the cash contribution from R39,600 to R101,000. Her claim for higher amounts falls to be dismissed.

- [32] The respondent has agreed to pay for specific expenses related to the matrimonial home and applicant's motor vehicle costs towards which he has been contributing as well as medical expenses not covered by the medical aid. An order for these expenses stands to be made based on the respondent's consent. It relates to the applicant's reasonable expenses. It is unlikely to diffuse disagreements between the parties regarding whether expenses claimed are reasonable and whether the applicant is entitled to demand prompt payment by the respondent. Bringing finality to the divorce action is what will probably reduce such disagreements.
- [33] Granting an order in respect of payment of expenses towards the matrimonial home and applicant's medical and motor vehicle expenses does not imply that the applicant is substantially successful in these proceedings because the respondent has been making these contributions.

The applicant's claim for contribution towards legal costs

- [34] The applicant's claim for contribution towards legal costs comprises:
- (a) Past legal costs made up of:
 - i. payments to her attorney for the rule 43 application and an unopposed application to compel a reply to her rule 35(3) notice. She alleges that she loaned R250,000.00 from a friend to pay these costs;
 - ii. as of 30 April 2024, she was indebted to her attorneys of record in the amount of R352,700.21
 - (b) Future legal costs in the amount of R1 724,469.00
 - (c) R740,000.00 being the cost of a forensic accountant to determine the exact value of the joint estate.
 - (d) R62,500.00 being the actuarial costs to determine her post-divorce spousal maintenance.
 - (e) R75,900.00 being the fees of an industrial psychologist to determine her ability to earn an income, which is in dispute between the parties.
- [35] The respondent resists these claims on the basis that the applicant's claim for past legal costs is exaggerated, she is litigating on a reckless and extravagant

scale and that there is no parity of scale in the parties' litigation. He has only spent approximately R160,000 on legal fees from 2018 to date.

[36] The legal principles for determining whether an applicant for contribution towards legal costs has made out a proper case for the relief sought are trite. The respondent has set them out in his heads of argument. I derive guidance from the relevant principles and authorities when determining whether the applicant has made out a proper case for this relief. The applicant has not set out contradictory principles and/ or authorities.

[37] It is common cause that the respondent's means are substantially larger than the applicant's. It goes without saying, that an order for contribution towards legal costs would enable the applicant who has substantially less financial means than the respondent, to adequately place her case before the Court.¹ The following factors are relevant when determining whether the applicant has made out a proper case for the relief sought:

- (a) The applicant's reasonable needs.
- (b) The issues to be determined in the action.
- (c) The scale at which the parties are or intend litigating.²

[38] As contended on behalf of the respondent, considering that in the original notice of motion, the applicant's claim for legal costs was R520,000.00 her present claim for R2 956,000.00 is exorbitant. She has provided no justification for the almost five-fold increase in her claim.

[39] She has changed attorneys on four occasions. She changed her first attorney of record, that she was not satisfied with the quality of services received from her but provided no particularity in that regard. She alleges that her two subsequent attorneys withdrew because she could not afford their fees. I disagree with the applicant's contention that this court need not concern itself with legal fees the applicant paid to her previous attorneys of record. That information is relevant to determine the applicant's request for legal costs with reference to the factors listed in paragraph 32 above. The applicant ought to

¹ *AG v LG* [2020] ZAWCHC 83 at para 17.

² *AF v MF* 2019 (6) SA 422 (WCC).

justify expenses she has paid even out of her own resources for this court to determine her means, reasonable needs and scale at which she is litigating.

[40] She has not stated how much was paid to these attorneys and the purpose for which the relevant fees were incurred to enable the court to determine the amount of wasted costs that resulted from these changes. She has therefore not placed this court in a position to determine whether the legal costs for the services rendered by her previous attorneys were necessary and reasonable whether the costs associated with the appointment of new attorneys justify her claim for contribution towards legal costs.

[41] She prematurely enrolled the application on the unopposed roll of 7 April 2022, thereby incurring wasted legal costs. Some of the items are duplicated and/ or unnecessary. Some of the items relate to services rendered by her business entity.

[42] I have already expressed concern about how long the divorce action is taking to finalize. This court is left in the dark regarding reasons why the divorce action is taking so long to finalize.

[43] Most of the expense items relate to the quantification of the applicant's claim and may not be incurred at all. For example, the value of the marital estate will only be relevant if the applicant succeeds in her claim for a division of the joint estate. Therefore, at this stage, those costs are speculative. The costs of determining the applicant's claim for a division of the joint estate and the respondent's claim for forfeiture cannot be that exorbitant.

[44] She has not taken this court into her confidence regarding how much she has spent on legal fees in the pending matrimonial proceedings since inception to date. On the papers filed, I must find that she is litigating on a substantially excessive scale than the respondent.

[45] She has failed to fully disclose her income. She has also meagrely accounted for an amount of R11,000,000 received from the respondent in between

March 2015 and October 2018. During this period, the respondent was largely responsible for the household expenses, the children's maintenance as well as meeting the applicant's maintenance needs. She has badly stated that she used it to maintain the M[...]property from which she runs her boutique hotel business. To hold the respondent liable for contribution towards her legal costs will indirectly and inappropriately hold the respondent liable to contribute to the applicant's business expenses. The applicant is not entitled to deplete her reserves covering business expenses, claim to be impecunious and seek an order holding the respondent liable for a contribution towards legal costs where she has not established the reasonableness of her legal expenses and is clearly litigating at a far extravagant scale. Such a claim is incompetent in terms of rule 43.

[46] For all the reasons set out above, coupled with the applicant's failure to fully disclose her income as found earlier, I find that the applicant has not made out a proper case for an order for contribution towards legal costs.

The respondent's application to strike out

[47] The respondent's quest to have materials in the applicant's papers struck out on the basis that her affidavits are unnecessarily prolix and some of the annexures unnecessary is made belatedly. By not opposing the applicant's request for leave to supplement her papers and by answering thereto, the respondent has accepted her right to properly place her case before the court as contemplated in *E v E*.³ This warrants the exercise of the court's discretion in favour of the applicant in terms of uniform rule 43(5)

[48] Therefore, the respondent's application to strike out falls to fail.

Legal costs of the rule 43 application

[49] Effectively the applicant has substantially failed to make out a proper case for the relief sought. The only orders that stand to be granted are those the respondent have acquiesced. They relate to expenses he has been paying. The application was wholly unnecessary. The respondent has not only been

³ [2019] 3 ALL SA 519 (GJ) at paras 33 and 35.

sufficiently contributing to the applicant's reasonable maintenance needs, pendente lite, he has done so consistently and without being coerced. His contribution towards the applicant's traveling, accommodation and other expenses for her trip to New York to attend her son's graduation, as well as a holiday in Cancun is not only generous, but also demonstrates good faith on his part. The allegation by the applicant that the respondent is failing to contribute towards her living expenses to enable her to maintain the lifestyle she lived during their marriage is wholly unfounded. She is only entitled to reasonable living expenses. Her claims both for maintenance and contribution towards legal costs are exorbitant, speculative and unjustified. The supplemented rule 43 application constitutes an abuse of the court process. It is only out of profound leniency that I do not order her to bear the costs of this application on a punitive scale.

[50] In the premises, the following order is made:

Order

1. Leave for the filling of the applicant's supplementary founding affidavit is granted.
2. It is declared that the limitations of rule 43(7) and (8) do not apply.
3. The application is dismissed with costs, inclusive of the costs of counsel on scale C.

L. T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicant:

G Olwagen-Meyer instructed by Tugendhaft
Wapnick Banchetti Attorneys

For Respondent:

A De Wet SC instructed by Deanne Kahn
Attorneys

Date of hearing:

11 September 2024

Date of judgment:

22 November 2024

MODE OF DELIVERY: This judgment is handed down electronically by emailing it to the parties' legal representative, uploading on CaseLines and release to SAFLLI. The date and time for delivery is deemed to be 10:00am.