REPUBLIC OF SOUTH AFRICA

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

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

_____ _____
DATE SIGNATURE

CASE NO: **2015/43663**

In the matter between:

[Y…….]: [S…….] [B……..] Applicant

And

[Y……]: [P…….] [J…….] Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] The applicant, in terms of Rule 43 of the rules of this court, prays for an order in terms of which the respondent is to pay him the sum of R 13 000 per month towards the maintenance of [N……] [K……] [Y…..] ('[N…….]') retrospectively from 1 May 2015 and a contribution of R 5000 towards his legal costs.

[2] During argument the claim in respect of the R 5 000 contribution towards applicant's legal fees, was abandoned.

BACKGROUND

[3] The applicant and the respondent were married to each other on 5 December 1998 out of community of property and subject to the accrual system as provided for in chapter 1 of the Matrimonial Property Act 88 of 1984, as amended.

[4] Three minor children were born of this marriage, [N……..], born on [2… S….. 2……] (14 years of age), a boy named [C……...] [D……] [Y…….] ('[C……..]'), born on [1…… S……. 2…….] (12 years of age) and [N…….] [A……..] [Y……] ('N…….'), born on [1……. F…….. 2…….] (8 years of age).

[5] On the 10th April 2015 Victor J granted an order pursuant to an urgent application brought by Mrs [Y……] in terms of which, amongst other things, the primary residence of all three minor children vested with Mrs [Y…….], who is the respondent in this application, subject to the applicant's reasonable rights of contact as determined by an expert pending the outcome of an investigation by the offices of the Family Advocate and certain other requirements ('the April order'). It contained no provisions relating to maintenance.

[6] Paragraph 1.6 of such order reads:

> "The issue pertaining to the interdict and the maintenance of the minor children is postponed *sine die* for a date to be determined by the Registrar."

[7] During May of 2015, [N……] returned to live with her father, the applicant. For the period May 2015 to August 2015 the applicant had paid no maintenance to the respondent in respect of any of the minor children. For the months of September, October, November and December 2015, the applicant had paid R 5 000 per month to the respondent for the minor sons (R 2 500. 00 per child).

[8] On the 4th December 2015, Modiba J issued an order that, pending resolution of the divorce action, the applicant was directed to make payment to the respondent of the cash component of the maintenance in respect of the minor sons in the amount of R 10 000 per month per child (thus R 20 000). Modiba J's order also deals with Mr [Y……'s.] obligations to retain the mother of his children and their minor sons on a fully comprehensive medical aid scheme, pay school fees and pay for extramural activities and school uniforms. Modiba J's order concluded with a provision that Rules 43(7) & (8) were not applicable and the applicant was ordered to pay the costs of the application as between attorney and client.

[9] The order granted by Modiba J was issued on the 4th December 2015 ('the December order'). Six calendar days later and on the 10th December 2015, the applicant issued his Rule 43 application which now serves before me.

NATURE OF THE CURRENT APPLICATION AND THE APPLICATION HEARD ON 4 DECEMBER 2015

[10] It is clear that, although the issue of maintenance for the minor children was a feature of the April application before Victor J, the Court had postponed this aspect *sine die*, to a date to be determined by the registrar. This was what gave rise to the December application and the order made by Modiba J. In the December order, maintenance for the minor sons is dealt with. That order is operative pending

finalisation of the divorce proceedings. In substance, the application and the relief fell within the four corners of rule 43. That Modiba J considered it to be such is clear from the fact that, but for her order, the respondent's attorney and counsel were bound by the fee tariffs in rule 43 (7) and (8). There would have been no need to make the costs order in the form made by Modiba J unless that Court was dealing with rule 43. To have expressly excluded, as Modiba J did, certain sub-rules of rule 43 would have been entirely pointless unless the application before her was one brought in terms of rule 43.

[11] Accepting as I do, that the December order is a rule 43 one, and bearing in mind that any order granted in terms of Rule 43 may only be varied in the event of a material change of the circumstances of either party, or of a child, Mr Yoko's present application's seems to be doomed, for no allegation of any change of circumstances is made out in his papers. In *Grauman vs Grauman* 1984 (3) SA 477 (WLD) at 480A - 480C Van Der Walt J held:

> "The question to be posed is what does a party have to do if the other party has obtained relief from a Court based on false information. There are ordinary motion proceedings. Mr Weavind, for the applicant, in his reply to the preliminary point, said that the only way open was to utilize Rule 43 (6).
> I am not certain that it is so. If that is the case, the Court will be faced in any number of Rule 43 applications 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 utilize 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 is engendered and further issues are brought forward, which only complicate the divorce instead of simplifying it, Rule 43 misses its point.
> In my view, 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. That has not shown to be the case in this particular application, and I am satisfied that this is not the proper method to deal with the information now brought forward."

[12] A rehearing of the application based on new evidence is not permitted. The new application must be based on a material change in circumstances subsequent to the first application. See too *Micklem vs Micklem*, 1988 (3) SA 259 (CPD) at 262(E)

[13] The position in the current application is the following: Applicant contends that his evidence in relation to his earnings was not before Modiba J at the time of the hearing on 4 December 2015. The matter was argued from the premise that applicant's gross earnings was in the region of R 100 000 per month, which is what his wife contends Mr [Y…..'s] earnings to be (all of this was submitted from the bar). Assuming these facts to be properly before court and assuming these facts to be correct it is clear that Mr [Y……] had had an opportunity to disclose his "correct earnings" to the court but he had either elected not to take the court into his confidence or had omitted to do so. In the papers before the court the applicant does not explain why he omitted to place his true financial position before Modiba J. What is, however, crystal clear is that evidence in respect of his actual earnings (assuming for the moment such figure differs from the R 100 000 per month contended for by the respondent), cannot be considered "new evidence". This is not a fact which only became known subsequent to the December order. He would have known what he earned then, he would not have found out about his earnings after that hearing.

[14] Further, the applicant is unable to refer to a single change to his circumstances, let alone a material change, subsequent to the granting of the December order. This is hardly surprising having regard to the fact that he launched the 'fresh' rule 43 application within 6 days of the granting of the December order. That smacks of spite, the reaction of a stung ego rather than any genuine need for financial support. He is obliged to show that the circumstances which existed at the

time of the granting of the order as at 4 December 2015, changed materially. His argument, advanced by Mr Dawood representing him, was that the material change occurred at the moment that the December order was granted. This is not the type of change that merits a variation of the rule 43 order. If it did, each and every rule 43 order would be capable of variation in terms of rule 43(6) and the argument, if accepted, would defeat the purpose of the rule.

[15] Advocate Wilcock on behalf of Mrs [Y……..] argued that the order granted by Modiba J precludes the applicant from launching further proceedings as the issue of the maintenance of the children has become *res judicata.* Although this principle might have been one which informed the introduction of Rule 43(6), I do not believe that the *res judicata* principle has application. Rule 43 relief is, in its very nature, interim and is granted (and was indeed granted by Modiba J) pending finalisation of the divorce action. Being interim, it can be changed where a material change in circumstances arises. Res judicata applies only where the order is a final one. It does not find application to interim orders.

[16] In my view, this matter falls to be considered according to the provisions of Rule 43(6). Having regard to the factors mentioned herein above, I conclude that the applicant has failed to place facts before this court which would enable it to conclude that a material change in the circumstances of the applicant occurred subsequent to the granting of the December order which would entitle this court to vary the order granted by Modiba J.

MAIN APPLICATION

[17] Assuming I were wrong in my findings set out above, I would nonetheless conclude that the applicant's application is fatally flawed in that he has failed to, *inter*

alia, set out what his wife's earnings are and that she has the means to pay the maintenance claimed. The respondent in the answering papers has stated that she earns between R 16 000 and R 20 000 per month. The application must thus be adjudicated on the basis that this factual allegation is correct. That being so, a payment to the applicant would leave the respondent with between R 3000 and R 7000 after the R 13 000 was paid to the Applicant. The applicant has lumped his expenses and the expenses of [N…….], the daughter who lives with him, together. The court is unable to establish what [N…….'s] needs are from the facts contained in the founding affidavit. The applicant has failed to set out what assets he has and what investments he has. It would appear that the applicant resides in a property worth around R 5 million which is unbonded, that he drives two expensive (luxury) motor vehicles, that he made a cash payment to the respondent in the amount of R 2 150 000 for the respondent's half share of the matrimonial property without having to take out a bond on the property. Access to cash of this quantum is a strong indication, as is the knee-jerk timing of his application, of a man motivated more by a desire for revenge than for genuine financial assistance of the sort that the Courts are allowed to order in appropriate circumstances. These are not those.

[18] The applicant, Mr [Y…….], supported the entire family throughout the subsistence of the marriage which commenced in 1998. The respondent's contributions were nominal and the applicant did not rely on Mrs [Y…….'s]. The current position does no more than preserve the *status quo* as it existed during the marriage and the parties' period of cohabitation. This entire situation will be re-assessed at trial.

COSTS

[19] The issue of costs remains. The ineluctable conclusion is that this application was ill-motivated when launched. I have found that the application in this case under both Rule 43 and Rule 43(6) are ill founded. The applicant has failed to take this court into his confidence in respect of his assets and his income. In respect of his income, he has not provided any financial details, something which he could have done. The applicant is the sole member of Techniche CC and employs at least four IT consultants. None of the management accounts or financial statements of the Close Corporation were made available to the court but applicant simply relied, to verify his income, on a document purportedly generated by Techniche CC.

[20] The parties still have a long way to walk together as co-parents of three children. He would be well advised to put this acrimony behind him during what is undoubtedly a difficult and painful time and to attempt to resolve the differences in a more constructive way.

[21] The application is dismissed with costs on the scale as between attorney and client. The tariff in terms of the Rule 43(7) & (8) is once again waived.

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I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 3 February 2016
Judgment delivered: 4 February 2016
Appearances:
For Applicant: Adv A Wilcock
Instructed by: Martin's Brown Inc

For Respondent: Mr Dawood
Instructed by:Dawood Attorneys