

SOUTH AFRICA / JUDGMENT

Benson v Benson (1549/2012)

[2013] ZANWHC 7 (21 January 2013)

[2013] ZANWHC 7**COURT**

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

1549/2012

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Source record**IN THE NORTH WEST****HIGH COURT****MAFIKENG****Case no:**

1549/2012

In the matter

between:

GERHARDUS JACOBUS

BENSONAPPLICANT

and

MAGDALENA SUSARA

JUDITH BENSONRESPONDENT

JUDGMENT**LANDMAN J:**

[1] This is an application in terms of Rule 43(6) to vary an order made by this court on 1 June 2012.

[2] It is necessary to address a preliminary matter. The applicant brought an application to strike two affidavits annexed to the respondent's answering affidavit as well as certain parts of the answering affidavit referring to these affidavits. The applicant contention is that Rule 43(5) disallows the filing of supporting affidavits. This is correct. But the affidavit of Rousseau is not a supporting affidavit. It was made in the course of inter pleader proceedings and not specifically for the matter at hand. It is not a supporting affidavit as envisaged in the sub rule. The second affidavit by R S Matane is a supporting affidavit but I

have a discretion to admit it. For the reasons outlined below I am of the view that it should be admitted. The application for a variation and the application to strike out the affidavits were made at the same time. The only question is whether the applicant should be allowed an opportunity, which is seldom done, to file a replying affidavit which may deal with the affidavit of Matane. I am of the view that the applicant should be given such an opportunity and such a replying affidavit has been filed.

- [3] It is the applicant's case that he seeks a variation of the order to reduce the maintenance payable to the respondent and their minor child from R30 000 to R1500 for the child alone. The grounds for variation of the order are that the applicant has lost the main stay of his income namely his income from the business known as Scramblers which buys and sells motor vehicles and accessories.
- [4] The applicant says that:
- (a) his brother-in-law, Rousseau, withdrew his capital from the business on 3 June 2012 ie shortly after the maintenance order to was granted (a letter by Rousseau of that date is attached in which he claims MAZDA Bakkie BDF 027 NW) and that he cannot purchase stock;
 - (b) his stock was sold in execution and therefore he cannot proceed with the business; and
 - (c) he moved to different premises and lost business because of that relocation.
- [5] The respondent says that in paragraphs 18.7 and 92 of the applicant's answering affidavit in the previous application, the applicant stated that Rousseau had withdrawn from the business in 2007 and that this was why the applicant utilise the respondent's loan.
- [6] The respondent also says that the Sheriff, at her request attached a Mazda Bakkie with registration no BDF 027 NW found on the applicant's business premises. In inter pleading proceedings Rousseau on 10 August 2012 filed an affidavit in which he claimed ownership of two vehicles one being a Mazda Bakkie with registration no BDF 027 NW. A copy of the handwritten affidavit is annexed to the answering affidavit. This is one of the affidavits in dispute.
- [7] I turn to the second affidavit. Matane says he is the son of Isaiah Loeto Matane who was the owner of a Mazda Bakkie with registration no BDF 027 NW. He was mandated by his father to sell the Bakkie. He sold it on 21 June 2012 to Gerhardus Jacobus Benson (the respondent) and the

notification of change of ownership of the motor vehicle was signed over by his father. He acknowledged receipt of the amount of R10 000 paid on that date when this deal was concluded.

- [8] He affirms that this motor vehicle was sold to Benson and not to M J Rousseau. He says the vehicle is still registered in the name of my father as would appear from the copy of the Certificate of Registration. Copies of the various documents have been annexed to his affidavit.
- [9] The applicant, in his replying affidavit, accepts the truth of the contents of Rousseau's affidavit.
- [10] The applicant says that a Ranger Bakkie belonging to Rousseau was on the business premises. He sold it to Matane (snr) on 20 June 2012 on behalf of Rousseau subject to the trade in of Matane Mazda Bakkie. This bakkie was brought to the business premises on 21 June and R10 000 (the trade in price) was paid to Matane. The applicant did not personally buy the Mazda Bakkie (BDF 027 NW).
- [11] The applicant's explanation does not explain how Rousseau could have been the owner of Mazda Bakkie BDF 027 NW on 3 June 2012 weeks, when he recorded it and its registration number in his letter of that date. He had not yet bought it and, on the applicant's version, had not had sight of the Mazda. Thus there is support for the respondent's allegation that the letter of that date is a fabrication and so is the allegation that Rousseau withdrew his capital investment from the business. Prima facie all this would be known to the applicant. I am of the view that the affidavit by Matane should be admitted. This affidavit together with the affidavit of Rousseau constitutes prima facie evidence of fraud. The applicant has been unable to offer an innocent explanation.
- [12] In the circumstances it cannot be expected of a court to entertain an application for relief where prima facie fraudulent conduct is present and unexplained. I decline to vary the order.

Costs

- [13] Costs in Rule 43 applications are limited for good reason but I have a discretion to award a different order for costs. The circumstances of the application call for a punitive order.

Order

- [14] In the result I make the following order:

The application to strike out is dismissed with costs.

The affidavit of R S Matane is admitted.

The applicant's replying affidavit is admitted.

The application for a variation of the order dated 1 June 2012 is dismissed.

The applicant is ordered to pay the respondent's costs on an attorney and client scale as if this was an application in the ordinary course.

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

date of hearing : 17 January 2013

date of judgment : 21 January 2013

for the applicant : mr m wessels

for the respondent : adv g maree

attorneys for applicant : van rooyen tlhapi & wessels

attorneys for respondent : smit & stanton inc.

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Prepared on 9 October 2026 · Esheria