

SOUTH AFRICA / JUDGMENT

C.E v N.E (EL 1710 / 2022) [2024] ZAECELLC 36 (9 July 2024)

[2024] ZAECELLC 36**COURT**

Eastern Cape High Court, East London Local Court

BEFORE

A M Bodlani

CASE / FILE NUMBER

EL 1710 / 2022

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FLYNOTES:**FAMILY**

– Maintenance – Variation – Interpretation

of order – Applicant's position is that amount was for accommodation only – Respondent contends that amount is for

maintenance and accommodation – Background to order considered – Respondent was meant to seek and obtain

accommodation for herself and children – Cash maintenance order – Not meant to cover accommodation costs only –

Order varied – Maintenance ordered in sum of R4,000 per month – Uniform Rule 43(6).

IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Case

No: EL 1710 / 2022

In

the matter between: C[...]
E[...]
Applicant
and
N[...]
M[...]
E[...]
Respondent

JUDGMENT

BODLANI AJ

- [1] The applicant applies, in terms of uniform rule 43(6), for the variation of an order granted by Norman J in an application in terms of uniform rule 43 on 11 April 2023 (“the order”). The variation sought is for the deletion of paragraph 9 of the order. In full, the order provides:
1. The residence of the minor children, namely, MJ E, a boy born on [...], CL E, a boy born on [...] SC E, a girl born on [...] and RJ E, a boy born on. [...] (“the minor children”) be shared between the Applicant and the Respondent, with change-over to take place on a Friday.
 2. Alternate short school holidays, being March/April and September/October with the two holidays to alternate annually.
 3. The June/July holidays shall be alternated annually as follows:
 - 3.1 2023 the Applicant shall have the minor children for the first two weeks (14 uninterrupted days) and the Respondent shall have the minor children for the remaining week of the three-week holiday;
 - 3.2 2024 the Respondent shall have the minor children for the first two weeks (14 uninterrupted days) and the Applicant shall have the minor children for the remaining week of the three-week holiday.
 4. The December/January holidays shall be alternated annually as follows:
 - 4.1 2023 the Applicant shall have the minor children for the first two weeks (14 uninterrupted days);
 - 4.2 The Respondent shall have the minor children for the next three weeks (21 uninterrupted days);
 - 4.3 The Applicant shall have the minor children for the final week until the minor children return to school/tertiary facility;
 - 4.4 2024 the Respondent shall have the minor children for the first two weeks (14 uninterrupted days);

- 4.5 The Applicant shall have the minor children for the next three weeks (21 uninterrupted days);
- 4.6 The Respondent shall have the minor children for the final week until the minor children return to school/tertiary facility.
5. Additional contact in relation to Public Holidays, father's Day, Mother's Day, Applicant's birthday and respondent's birthday shall be discussed, planned and agreed to, by the parties together with the minor children, and shall be implemented in accordance with such plans and/or agreements.
6. The minor children shall have the right to have telephonic contact with the Applicant and Respondent at any time they wish.
7. For half of the available time on the minor children's birthday.
8. The Respondent is directed pendente lite to:
- 8.1 retain the Applicant and minor children on his current medical aid and benefit scheme and pay the monthly premiums in respect thereof.
- 8.2 pay 100% of any and all reasonable and necessary medical costs for the minor children and the Applicant which are not covered by the said medical aid benefit scheme, such costs to include, but not limited to all medical, dental, ophthalmic, and allied expenses, including all costs of hospitalisation, surgical treatment, spectacles and prescribed medication;
- 8.3 pay 100% of the educational costs and expenses of the minor children, such to include but not limited to school fees, school excursions and cultural and sporting tours, school uniforms and clothing, books, stationery and electronic equipment and the costs and expenses incurred in relation to any and all extra mural and sporting activities, including the clothing and equipment relating thereto;
- 8.4 pay all other fixed living expenses as are currently paid by him, including but not limited to:
- 8.4.1 bond instalments;
- 8.4.2 rates and utilities at the matrimonial home;
- 8.4.3 insurances for the matrimonial home, contents and vehicles;
- 8.4.5 the monthly premiums for C Fit and Virgin Active;
- 8.4.6 the monthly premiums for the Telkom and Multi Choice for the matrimonial home;
- 8.4.7 the Applicant's monthly cell phone contract.
9. The Respondent is directed to pay maintenance to the Applicant for herself and the minor children in the amount of R15 000.00

(Fifteen Thousand Rand) per month to enable the Applicant to secure suitable accommodation.

10. The Respondent is directed to make payment of the monthly mortgage bond instalment, insurance premiums, rates and utilities on the jointly owned immovable property situate at 5[...] M[...] Road, London, United Kingdom.
11. The costs of this application are reserved for determination by the trial court in the divorce proceedings.
- [2] I need not dwell much on the history of this matter. The facts are common cause. Only where it is necessary and for context shall I venture into the background facts. In *EH v SH*[1] the Supreme Court of Appeal held that it will only be just for a maintenance order to be issued by a court where a party applying for the relief can establish a need to be supported by the other spouse.
- [3] This being an application for the variation of a maintenance order, I approach the matter on the basis that the need for maintenance and by extension, for the payment to the respondent of R15 000.00 (fifteen thousand rand) per month, was established before Norman J. Otherwise, the applicant would not have been ordered to pay it.
- [4] There are 4 (four) children born of the marriage between the parties. They are MJ E and CL E, twin boys born in 2005; SC E, a girl born in 2007; and RJ E, a boy born in 2011. Unless when specifically dealing with matter that relates to a specific child, I refer collectively to the parties' children simply as "the children".
- [5] At the time of the institution of the divorce proceedings, in October 2022, the children resided with the parties in the matrimonial home. The older boy children were studying at Selborne College. The last born child was enrolled at Selborne Primary whilst the girl child, SC E, was studying at Clarendon. Among others, in the application that led to the order of Norman J, the respondent pleaded thus:

"it is no longer an option for me the respondent and I to share the matrimonial home" and "I have to seek alternative

suitable accommodation for them and me in due course, depending on the decision of this Court".

- [6] In view of the respondent's then impending move out of the matrimonial home, she went about in search of available suitable

accommodation for her and the children. She found suitable accommodation in the amount of R15 000.00 (fifteen thousand rand). Out of the R15 000.00 (fifteen thousand rand), she allocated R5 000.00 (five thousand rand) for herself and R2 500.00 (two thousand five hundred rand) for each child. This appeared in the schedule of necessities that she attached to her application for relief in terms of uniform rule 43.

- [7] The applicant contends that since the grant of the order, circumstances have changed. This too is common cause. Even though MJ E and CL E no longer reside in the matrimonial home, they do not reside in accommodation that has been sought and secured by the respondent. They are students at the University of Pretoria. In keeping with paragraph 8.3 of the order of Norman J, the applicant is responsible for their tuition and boarding fees. The position in regard to SC E and RJ E has not changed. They still reside in the matrimonial home.
- [8] The position of the respondent has also changed. She left the matrimonial home in June 2022. She has not found accommodation of her own and currently lives with her partner. Even though she left the matrimonial home, the respondent still gets to see the children. According to her, she works until 13h00 one week and until 16h00 each alternate week. When she works until 13h00, she collects SC E and RJ E from school, takes them to their extra murals and provides for them. She also earns about R4 000.00 (four thousand rand) more than she did at the time of the grant of the order.
- [9] Ms. Watt, for the applicant, contended that paragraph 9 of the order was for the applicant to pay towards the accommodation needs of the respondent pendente lite. Now that the respondent has left the matrimonial home, alone, to live with her partner, in her partner's accommodation, and does not pay for it, paragraph 9 of the order serves no other purpose but to unduly enrich the respondent at the expense of the applicant.
- [10] For her part, Ms. Beard for the respondent argued that there is more to paragraph 9 of the order than just accommodation. The order envisages that the applicant would pay towards the maintenance of the respondent and the children. It also makes provision for its use towards accommodation for the respondent and the children, contended Ms. Beard.
- [11] In an application such as this, the responsibility to prove the change in circumstances lies with the applicant. Where the extent of the change contended for by the applicant is in dispute, the respondent has an evidentiary burden, to place before court material which militates against the variation sought by the applicant. It is unavailing to the respondent simply to disagree with the applicant. Unfortunately, the respondent's affidavit does not state how much is the average and/or exact expense does she incur in regard to the collection of SC E and RJ E from school, taking them to their extra murals and providing for them in this regard.
- [12] To decide the extent of the variation each party contends for, it is important first to understand the meaning of the order sought to be varied. This is because the applicant's position is that the amount R15 000.00 (fifteen thousand rand) implicated in paragraph 9 was for accommodation only. The respondent comes from a different position altogether, it being her contention that the said amount is for her maintenance, that of the children and for their accommodation as well. On this basis, the respondent accepts the need for variation and contends for the reduction of the amount of R15 000.00 (fifteen thousand rand) to R11 000.00 (eleven thousand rand) per month.

[13] The law on the interpretation of court orders has evolved with the law on the interpretation of contracts, statutes, documents, or other instruments. In *Firestone South Africa (Pty) Ltd v Genticuro AG*,^[2] the Appellate Division (as it then was) set out the approach to interpretation, the effect of which was that a court first looked to the plain meaning of the order (and if there was a reasoned judgment, the reasons for such order) to ascertain the meaning of the order. If there was ambiguity in the meaning then the court was entitled first to consider extrinsic evidence “surrounding or leading to the order” and, if there was still ambiguity, a court was entitled to consider “other relevant extrinsic” evidence.

[14] Because of the difficulties in distinguishing between –

“extrinsic evidence “surrounding or leading to the order” and “other relevant extrinsic” evidence; and background circumstances” and “surrounding circumstances”, issues which had also arisen in the interpretation of contracts, the Supreme Court of Appeal developed and simplified this approach in the following way:

“First, the integration (or parol evidence) rule remains part of our law. ... If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning. ...

Second, interpretation is a matter of law and not of fact, and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question ...)

Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent ...

Fourth, to the extent that evidence may be admissible to contextualise the document (since ‘context is everything’) to establish its factual matrix or purpose or for purposes of identification, ‘one must use it as conservatively as possible’ ... The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances’. The distinction is artificial and, in addition, both terms are vague and confusing.

Consequently, everything tends to be admitted. The terms ‘context’ or ‘factual matrix’ ought to suffice. ...”^[3]

[15] The decision of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*^[4] followed the decision referred to above. The dictum in *Endumeni* was applied by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others*^[5] when it was interpreting a settlement agreement which had been made an order of court.

[16] Thus, it is permissible for a court to consider relevant evidence indicating the factual matrix or context in which such order was sought. It is no longer necessary or helpful to distinguish between extrinsic evidence “surrounding or leading to the order” (surrounding circumstances) and “other relevant extrinsic” evidence (background circumstances). A court

is required to consider the relevant factual matrix to determine the context and purpose. This approach has been affirmed more generally in several other cases, for example by the Constitutional Court.[6] These principles were recently endorsed by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*.^[7]

- [17] Now that I have stated what the law is, I turn to the interpretative exercise, regard being had to the law and the facts of the matter. To get to the proper meaning of the order, the inevitable starting point is the language of the order itself. I have considered the entire order, the circumstances attendant upon its coming into existence and the background to it being the divorce proceedings between the parties, the material that served before Norman J, the parties' respective means as presented before Norman J, their needs and those of their children at the time.
- [18] When regard is had to the circumstances attendant upon the coming into existence of, the background to the order being the divorce proceedings between the parties, and the material that served before Norman J – it is clear that at the time the respondent intended to move out of the matrimonial home with the children. She was meant to seek and obtain accommodation for herself and the children because, as she stated before Norman J “....., since it is no longer an option for the respondent and I to share the matrimonial, I now seek an order that the respondent pay a cash portion of the maintenance to me whilst continuing to cover the agreed expenses set out in paragraph 28 above.”^[8]
- [19] Further, in her sworn statement filed in support of the application in terms of uniform rule 43, the respondent listed what the envisaged expenses would be, should she and the children move out of the matrimonial home. The expenses were for accommodation, groceries, general household assistance, transport, entertainment, general maintenance and upkeep for her and the children. It is common cause that the children remain in the matrimonial home, only the applicant has moved out.
- [20] Given the content of paragraphs 8 and 10 of the order of Norman J, I am persuaded that the amount of R15 000.00 (fifteen thousand) provided for in paragraph 9 of the order is what is colloquially referred to as “cash maintenance”. It was granted for used towards the future accommodation costs of the respondent and the children. It was also intended for it to cover food and grocery expenses at the home in which the respondent intended to move with the children. It was also intended to cater for general household expenses.^[9] Thus, contrary to the applicant's contentions, it was not meant to cover accommodation costs only.
- [21] The absence, anywhere else in the order other than in paragraph 9, of a provision for payment to be made for food, grocery expenses and other general household expenses; or, for maintenance; and reference therein to “maintenance” supports the conclusion I have arrived at regarding the meaning of paragraph 9 thereof. This is more so because in her application in terms of uniform rule 43, the respondent had made a claim for food, grocery expenses and other general household expenses.

[22] This then brings me to the extent of the variation that I should grant, so far apart as the parties are in this regard. This task is not made easy by the fact that the respondent did not provide any specifics as to what goes into the amount of R11 000.00 (eleven thousand) she contended for. In contrast, the basis for the applicant's contention for a complete deletion of paragraph 9 of the order is his interpretation thereof. To him, paragraph 9 of the order was for the respondent to seek and pay for accommodation

for her and the children. She has not done that. Therefore, the payment is not due.

[23] Even though in her opposing affidavit the respondent did not provide any specifics as to what goes into the amount of R11 000.00

(eleven thousand) she contended for, I am mindful that given the change in circumstances, whatever maintenance she now requires, it is mainly for herself. She does not pay for her accommodation, at least since the grant of the order to date. I am fully cognisant of the fact that when she works until 13h00, she collects SC E and RJ E from school, takes them to their extra murals and provides for them. This occurs, on the respondent's version, in alternate weeks. I have also considered that the respondent earns about R4 000.00 (four thousand rand) more than she did at the time of the grant of the order.

[24] In the circumstances I vary paragraph 9 of the order by reducing the amount of R15 000.00 (fifteen thousand) by R11 000.00 (eleven thousand) per month. Thus, with effect from 01 August 2024, the applicant shall pay a sum of R4 000.00 (four thousand rand) per month to the respondent. Accordingly, the following order shall issue:

1. Paragraph 9 of the order of Norman J, issued on 11 April 2022, is varied and shall read as follows:
9. The Respondent is directed to pay maintenance to the Applicant for herself and the minor children in the amount of R4 000.00 (Four Thousand Rand) per month.
2. The costs of this application shall be costs in the divorce.

A M BODLANI

ACTING JUDGE OF THE HIGH COURT,

EASTERN CAPE DIVISION.

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Heard : 11 June 2024 Delivered : 09 July 2024

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- [1] 2012
- (4) SA 164 (SCA).
- [2] 1977 (4) SA 298 (A). Firestone has subsequently been confirmed in part by the Constitutional Court in Minister for Justice and Constitutional Development v Chonco and others [2010] ZACC 9; 2010 (7) BCLR 629 (CC) (8 April 2010), at para 6.
- [3] KPMG Chartered Accountants (SA) v Securefin Limited and Another [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA), at para 39. Case references omitted and paragraphing inserted.
- [4] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA).
- [5] 2019 (5) SA 1 (CC) at para 29.
- [6] Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society & Others 2020
- (2) SA 325 (CC), at para 41.
- [7] (CCT 70/20) [2021] ZACC 13; 2021 (8) BCLR 807 (CC) ; 2021 (6) SA 1 (CC) (11 June 2021), para [63] to [69] and [80] to [81].
- [8] Paragraph 31 of the respondent's sworn statement in support of the rule 43 application.
- [9] Compare the decision in Butcher v Butcher 2009
- (2) SA 421 (C), para 17.
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