

SOUTH AFRICA / JUDGMENT

De Wet v Hartmut (30867/07) [2007] ZAGPHC 214 (19 September 2007)

[2007] ZAGPHC 214

COURT

High Courts - Gauteng

BEFORE

N M Mavundla

CASE / FILE NUMBER

30867/07

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REPORTABLE

CASE

NUMBER: 30867/07

DELIVERED:19

SEPTEMBER 2007

In the matter

between:

ESTHER
DE WET
APPLICAN
T
And
HARTMUT
RESPONDENT

JUDGMENT

MAVUNDLA .J.

[1] The applicant approached this Court in terms of Rule 43(6) of the Uniform

Court Rules, seeking an order in terms of which the order that was granted in terms of Rule 43(5) on the 22 November 2006 be varied by including an order which directs the respondent to pay all reasonable medical expenses of the applicant as well as those of the minor children. The matter is opposed by the respondent.

[2] It is common cause that the respondent was in terms of Rule 43(5)

ordered to pay maintenance for the plaintiff in the amount of R2000,00, maintenance for the two elder children in the amount of R2500,00 per child per month as well as R1000,00 per month in respect of the maintenance of the youngest child.

[3] The applicant states that in the previous application, the respondent had stated in his affidavit, inter alia, that he has always been paying the medical expenses in respect of the minor children and that he request the Court to order him to continue to pay such medical costs. The applicant states further that although she and the respondent had asked the Court to make such an order, same was, however, not made notwithstanding the

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

respondent's tender to continued to pay these medical expenses. She says that the defendant's continuing with the payment of the aforesaid medical expenses, was motivated by his intention to deduct such medical expenses from the amounts of maintenance which he was ordered to pay. She further says that from the tender the respondent had made on the previous occasion, it is clear that the respondent can afford to pay such medical expenses.

[4] The applicant states that on 10 December 2006 the respondent only paid an amount of R6,600,00 towards maintenance instead of R8000,00 as per Court order. In this regard, she has attached annexure EDW3 in support of this averment. She says that in January 2007 the respondent summarily deducted an amount of R 1286.00 in respect of medical expenses and R200.00 in respect of motor vehicle insurance. She says that she has not agreed to these deductions. She says that the respondent has since deducted in a period of 7 months an amount of R10,906.00 from the maintenance amount that he was supposed to have paid during that period.

[5] The applicant states that her financial needs have remained the same.

However, because of these deductions which the respondent is making, she is now forced to carry these medical costs herself. This has resulted in her circumstances changing.

[6] The respondent on the other hand, has stated in his answering affidavit that on the 22 November 2006, during the rule 43 application, the Court decided to order cash payment in respect of maintenance of the children, which amount that was ordered was inclusive of the medical expenses.

[7] The respondent further states that the applicant's position has since positively altered since January 2007 because she is now working at

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Poljas CrechÃ© where she is earning an amount of R3,000.00 per month, whereas when the rule 43 order was granted, she had stated that she would be working until November 2006. He further states that the applicant does not disclose to the court that after school hours, she is selling cleaning products on commission. He says that the applicant is also having two outside rooms at her place which she is letting out and she collects rent in respect thereof. He says that her financial position has since changed for the good as the result of the additional finance she is receiving.

[8] The respondent further states that both parties have agreed that the

respondent will keep the applicant and the minor children in the medical scheme. The applicant however insisted that the respondent must continue to retain them in the medical scheme but he must deduct the medical expenses from the monthly maintenance amount. He says that all these verbal agreements were made while they were all together at Port Edward in Kwa-Zulu. He further states that the applicant has not made a case for changes circumstances.

[9] It has been submitted on behalf of the respondent that the applicant has

approached this Court on an incorrect procedure. It is contended that the applicant should have approached the Court by way of rule 42 of the Uniform Court Rules. It submitted that because the applicant seeks to have the previous order amended. This contention is premised on the allegation of the applicant that the addition she seeks, was left out whereas the respondent tendered payment of and had also stated that the Court should order him to make such payment.

[10] Rule 42 (1) caters for the rescission or variation of an order

(a) "erroneously sought or erroneously granted in the absence of any party affected thereby.' In case both parties were duly represented at

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Court and therefore it cannot be said that the order was granted in the absence of either of them.

(b) "an order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission." The respondent says that when Mabuse AJ granted the rule 43 order, he decided to provide for medical expenses in monetary terms which is included within the maintenance amount he granted. Therefore there is no room for any ambiguity, error or omission, according to the respondent.

(c) "an order or judgment granted as the result of a mistake common to the parties." In casu, the parties are not ad idem with regard to why Mabuse AJ did not order the respondent to continue to pay the medical expenses. Therefore, I am of the view that there is no common mistake that existed at the time of the granting of the rule 43 order. I am further of the view that the submission made in this regard is flawed and has no merit.

[11] The applicant contends that there now exists changed circumstances as the result of the respondent's arbitrary deduction of the medical expenses

[12] Rule 43(6) provides that: "The Court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the condition towards costs proving inadequate." In the Superior Court Practice¹ the learned authors state that the phrase "in the event of a material change" must "be strictly interpreted and employed only in circumstances set out therein, Le where there has been material change in the circumstances of either party or a child, or where the contribution towards the costs proves inadequate." They further refer to *Grauntman v Grauntman* 1984 (3) SA 477 (W) at 480C; *Micklem v Micklem* 1988 (3) SA 259 (C) at 262E-G; *Maas v Maas* 1993 (3) SA 885 (O) at 888C.

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[13] It is common cause that the respondent is effecting some deductions from the amount he was ordered to pay. There is a dispute about whether such deductions is by agreement. The respondent has not attached any invoice pertaining to the medical expenses that were incurred by the applicant. It is not clear what informs the respondent how much must he deduct with regard to the medical expenses that are incurred by the applicant. The applicant denies that there was ever such agreement.

[14] The rule 43 order directs the respondent to pay specified amounts. On his own admission, the respondent is not complying with the said order since he is effecting deductions which he says that are in respect of the medical expenses. Firstly, he is in contempt of the Court order because nowhere is it stated in the rule 43 order that he can effect any deduction at all. Secondly, if there was any such arrangement as he contends that there was between himself and the applicant to effect such deductions, there is nothing that forbid him to bring an application to have the rule 43 order granted by Mabuse AJ varied in accordance with the alleged agreement. On probabilities, I must find that there was no such agreement as the respondent wants this Court to believe.

[15] The applicant states that her financial needs have remained the same.

However, as the result of the deductions effected by the respondent, she now has to carry the medical expenses herself. This results in her having a shortfall in meeting her financial needs. In the matter of *Greenspan v Greenspan*² the honourable Hlophe DJP pointed out that in order to succeed the applicant must show that there is a material change in circumstances since the date when the last rule 43 order was made. The Court found in that case that relocation from Cape Town to Israel is a material changed circumstance. The learned Hlophe DJP also accepted

² 2000 (2) SA 283 (CPD) at 286 para [6]

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that depreciation of money since the date of the last rule 43 was a changed circumstance. I am of the view that the deductions effected by the respondent must consequently impact negatively on the financial means of the applicant especially because the applicant must now pay for those expenses. In my view, this results in changed circumstances. The respondent has stated that the applicant is having extra income in the form of the outside rooms that she is letting out as well as from the selling of cleaning products on commission.

[16] When a party does not properly comply with an order of the Court, that

party is coming to Court with dirty hands. Such party cannot expect that the Court should give him or her a sympathetic hearing. The respondent's protestation that the applicant is generating extra income and that therefore she is not entitled to be assisted with the medical expenses, cannot in the circumstances of the case be accepted. The respondent has not favoured this Court with evidence regarding what amount the applicant is generating to augment her salary. For the above stated reasons, I am of the view that the respondent has not persuaded me that indeed the applicant is generating extra income. Where there is doubt, and the other party is also in contempt of a court order, then the Court must learn in favour of the innocent party.

[17] In the premises, I find that the applicant has made a case for changed

circumstances, and that she is entitled to the relief she seeks. With regard to question of costs, it is trite that costs follow the event. It is also so that the Court has a discretion to uplift the restrictions referred in Rule 43(7) and (8). I am of the view that having regard to the circumstances of this case, as well as to the fact that the respondent himself was asking for such an order against the applicant, it can be safely accepted that the circumstances of this case are special and justify such an order. The applicant being the successful party, is therefore entitled to such an order.

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[18] I therefore proceed to grant the following order:

18.1 That the order in terms of Rule 43(5) which was granted on the 22 November 2006 under case number 34631/2006 is varied, by including order 9, which reads as follows:

"That the respondent is ordered to pay all reasonable medical expenses of the applicant, as well as those of the minor children."

18.2 That the restrictions of costs as provided in Rule 43(7) and (8), is uplifted;

18.3 The respondent is ordered to pay the costs of this application.

N M MAVUNDLA

JUDGE OF THE COURT

HEARD ON THE

DATE OF JUDGMENT APPLICANT'S ATT APPLICANT'S ADV RESPONDENTS' ATT RESPONDENTS'
ADV

: 05/09/07

: 12 /09 /2007

: MR. OOSTHUIZEN : MR E BOTHA

: MR. L MARE

MR.DJ BARDENHORST

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