

SOUTH AFRICA / JUDGMENT

D.F.J.V.R v A.M.V.D.H (40377/2020) [2024] ZAGPJHC 1257 (27 November 2024)

[2024] ZAGPJHC 1257**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Wilson

CASE / FILE NUMBER

40377/2020

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Policy**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG LOCAL DIVISION,****JOHANNESBURG****CASE****NO: 40377/2020****DATE:**

27-11-2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO.

(3)

REVISED.

27

November 2024

In

the matter between

D[...]

F[...] J[...] V[...] R[...]

Applicant

and

A[...] - M[...]

V[...] D[...] H[...]

Respondent

JUDGMENT

WILSON, J: The applicant, Mr J[...] V[...] R[...]g, is in the midst of contested divorce proceedings against the first respondent, Ms V[...] D[...] H[...]. On 9 November 2021 Segal AJ, sitting in this court, made an order regulating the payment of maintenance between the parties pending the divorce action.

That order required Mr J[...] V[...] R[...] to make certain maintenance payments to Ms V[...] D[...] H[...]; to fund payments in respect of a bond held over immovable property at 2[...] R[...] Street, G[...] H[...]; to pay school fees in respect of the parties' minor child; and to pay medical aid expenses in respect of the parties' minor child which are not covered by Ms V[...] D[...] H[...]'s medical aid scheme.

It is common cause before me that these amounts were not paid. It was accepted that Mr J[...] V[...] R[...] fell R144 222 behind with his maintenance fees. It is, though, disputed whether and when his obligations to pay additional amounts relating to medical aid, school fees and the bond fell due.

In light of Mr. J[...] V[...] R[...]’s default, on 13 December 2023 Ms Van Den Heever caused the sheriff to execute the rule 43 order against Mr J[...] V[...] R[...]’s Sanlam pension fund.

The amount recovered was in the sum of R170 898.47, being the maintenance payments in arrears and the additional sums Ms. v[...] d[...] H[...] claimed for outstanding medical aid, bond and school fee payments.

The sheriff executed the rule 43 order on a writ of attachment. But that writ was not served on Mr J[...] V[...] R[...], and it was defective in several other technical respects.

Mr J[...] V[...] R[...] now seeks repayment of the amount attached by the sheriff under the defective writ. It was, however, accepted by both parties that, the defectiveness of the writ notwithstanding, it was open to me to decline to order repayment of the amounts attached if I am satisfied that the amounts were in fact due in terms of the rule 43 order.

There is no dispute that the R144 222 in outstanding maintenance payment was due. I therefore decline to order that amount to be repaid.

That leaves three further amounts that are in dispute between the parties. The first is a bond payment representing two instalments of R8126.53 each.

Mr J[...] V[...] R[...]’s counsel, Ms Carstens, was unable to convince me that this amount was not due in terms of paragraph 6 of Segal AJ's order, which states that Mr J[...] V[...] R[...] shall make payment of all the bond instalments due to ABSA Bank in respect of the immoveable property, “for such amount and on such date” as may be claimed by ABSA.

It appears that Ms V[...] D[...] H[...] made those payments herself and then claimed them as part of the attachment amount stated in the writ issued against Mr J[...] V[...] R[...]. The question was whether in those circumstances she was entitled to recover them in the manner that she did by claiming them through the execution of the writ.

I am satisfied that, since the amounts were plainly due under the rule 43 order, Ms V[...] D[...] H[...] was in fact entitled to recover them as part of the execution amount, and I decline to order repayment notwithstanding the technical difficulties with the writ of execution.

Another matter raised between the parties was whether or not school fees of R5000 were due and claimable as part of the execution amount.

It was suggested that, even though Mr J[...] V[...] R[...] was required to pay the minor child's school fees, because he had not done so and Ms V[...] D[...] H[...] had then stepped in and made the payment, Ms V[...] D[...] H[...]’s payment constituted a donation to Mr J[...] V[...] R[...].

That submission is contrived, and I reject it. The court order of Segal AJ made it quite clear that the school fees amount was due to be paid by Mr J[...] V[...] R[...]. The mere fact Ms V[...] D[...] H[...] paid it herself – no doubt precisely because of Mr. J[...] V[...] R[...]’s failure to do so - and then chose to reclaim it as part of the execution amount makes no difference to her entitlement to obtain the amount due under the rule 43 order.

The final issue between the parties concerns some R10 049.69 claimed under paragraph 5.1 of Segal AJ’s order which reads that:

“Mr J[...] V[...] R[...] shall make payment of the medical excess expenses of the minor child not covered by the respondent’s

medical aid scheme.”

The order required that Mr. J[...] V[...] R[...] to reimburse Ms V[...] D[...] H[...] for such payments on submission to him of an invoice or a statement related to the particular expense.

There was a great deal of crossfire between the parties about whether Ms V[...] D[...] H[...] submitted legible invoices evidencing these expenses to Mr J[...] V[...] R[...], and whether the invoices she did submit really were evidence of a cost incurred on behalf of the minor child rather than for her own benefit.

From the receipts attached to the writ of execution itself it seems to me that, if any expense not due under the rule 43 order was claimed as part of the R10 000 included in the execution amount, it was such a tiny sum as to be de minimis.

In the circumstances, I can see no reason to order any repayment of the medical aid amount included in the execution amount. The order of Segal AJ was in substance complied with. The fact is that the order requires Mr J[...] V[...] R[...] to make payments in respect of the minor child’s medical expenses not covered by the medical aid. That is what the writ of execution achieved.

Accordingly, even assuming that the writ of execution was defective in any way, the underlying purpose of the court order which it sought to execute was served. The amounts attached in terms of the writ were due and payable under the court order, and there is no basis for ordering their repayment now.

Nevertheless, the process of execution was technically defective. Mr J[...] V[...] R[...] was clearly entitled to be served with a writ of execution, and I am satisfied on the papers that he was not served with the writ. If in future it becomes necessary to execute Segal AJ's order, the parties should be under no illusions that proper service of the writ on Mr J[...] V[...] R[...] is required, and that any future failure to observe the applicable rules may be penalised with an appropriate costs order.

Be that as it may, for the reasons I have given, I see no reason to undo the consequences of the flawed execution in these circumstances.

It follows that the application must fail. On the question of costs, even though Mr J[...] V[...] R[...] has not been successful in claiming the repayment of the amount attached, it seems to me that this application was launched reasonably and was based on bona fide complaints about the non-service of the writ and the way that it was executed.

For all those reasons I do not think that it is appropriate that Mr J[...] V[...] R[...] be mulcted in costs. Each party will pay their own costs.

The application is accordingly dismissed, and each party will pay their own costs.

WILSON, J

JUDGE OF THE HIGH COURT

27 November 2024

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