

SOUTH AFRICA / JUDGMENT

H.E.K v J.R.K (111/2021) [2021] ZAFSHC 20 (11 February 2021) [2021] ZAFSHC 20

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane

CASE / FILE NUMBER

111/2021

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Case

No: 111/2021

In

the matter between:-

H[....]

E[....] K[....]

APPLICANT

and

J[....]

R[....] K[....]

RESPONDENT

JUDGMENT

BY: MOLITSOANE, J

HEARD ON: 4 FEBRUARY 2021

DELIVERED ON: 11 FEBRUARY 2021

- [1] The parties are husband wife. Three minor children were born in this marriage. The children are currently with the applicant as the parties stay apart. The parties are in the midst of a divorce pending in this court.
- [2] The applicant instituted a Rule 43 application against the respondent under case number 3308/2020. On 12 October 2020 the Court which heard the application granted the orders pendent lite in terms of which full parental rights, responsibilities, rights of care and primary residence were awarded to both parties. The court further ordered the Respondent to retain the applicant and children on his medical aid and to pay the costs associated with the children's' cellphone contracts and expenses to an Amarok motor vehicle.
- [3] The claims for spousal maintenance and contribution towards legal costs were dismissed. The court did not make any order towards the maintenance of the children.
- [4] On 27 January 2021, about three months after the order the applicant instituted a Rule 43(6) application, which in essence seeks to vary the previous order as follows:
- a) That applicant be granted sole primary residence and care of the minor children;
 - b) That the respondent pay maintenance in respect of the minor children in the amount of R6 000.00 per month per child to the applicant;
 - c) That the respondent pay maintenance to the applicant in the amount of R5 000.00 per month;
 - d) That the respondent make available for use a Volkswagen Amarok;
 - e) That the respondent make a contribution towards the legal costs of the applicant for R10 000.
- [5] The applicant avers that the following circumstances constituted changed circumstances as envisaged in Rule 43(6), which necessitated her to approach this court to vary the order granted on 12 October 2020;
- a) That the respondent instituted two other actions against her. She defended the said cases and incurred further legal costs. In the first action instituted in this court, the respondent claims an amount of R524 490.00 for unlawful detention. In the second action instituted in the Regional Court, the respondent claims delivery of the Volkswagen Amarok, alternatively payment of the amount of R305 000.00;

- b) When the divorce action was instituted, the applicant resided at the same address with the respondent. The applicant alleges that the relationship between her and the respondent was toxic and the situation was exacerbated by the claims instituted against her. The applicant avers that on 4 December 2020 she left her home to cohabit with another man with whom they are in a love relationship. She and the man entered into a lease agreement and she is liable for payment of a share of the rental in the amount of R11 000.00 per month
- c) Applicant further alleges that she had entered into a lease agreement with another person in respect of her house. The lessee was to pay rental for R17 000 per month which would have entitled her to pay the rental of R11 000 to the person she now stays with and remain with the balance of R6 000 for her personal use. The respondent, however, informed her that he was not

going to evict the house and the contract for the lease of her house became cancelled. She in effect lost an income for R17 000.

According to her, although she is the owner of the house where the respondent currently stays, she is unable return to that house.

- d) That the respondent is currently occupying the main house and is currently not paying the municipal rates and taxes as well as the water account.
- [6] The respondent opposes the application essentially on the basis that the current application largely constitutes a repetition of facts, which served before Court in the previous Rule 43 application.
- [7] Uniform Rule 46(3) provides that “the court may, on the same procedure, vary its decision in the event of a material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate.” It is settled that a Rule 43 order, being interim in nature is not appealable. (See s16 (3) of the Superior Courts Act, 10 of 2013; S v S and Another

[2019] ZACC 22). In order for the applicant to succeed in a Rule 43(6) application, such an applicant must satisfy the court that there are material changes, which occurred in the circumstances of the party or the children. The court, however, in S v S (above) held that there was no reason why Rule 43(6) should not be expansively interpreted. Rule 43(6) is not meant to serve as an appeal or review of the decision of the order made in terms of Rule 43(1).

- [8] Primary residence of the children

At the time when the previous order was made, the parties and their three children were still staying together. It seems that is the consideration the court took into account in awarding primary residence to both parties. During December 2020 the applicant relocated from the communal. She took away the children. The children currently reside with the applicant. In my view, there is refutable evidence that there has been material change in the circumstances of the

children to vary this order. The respondent does not oppose this prayer. According to him had the applicant approached him about the primary residence he would have given his consent.

[9] Maintenance of the Children

As alluded to above, the respondent consented to the award of primary residence of the children to the applicant. When the issue of maintenance in respect of the said children was raised, it was submitted on behalf of the respondent that the applicant failed to establish that there were material changes in respect of the children to warrant an order of maintenance.

[10] I am unable to agree with this contention. The children no longer stay with the father. The respondent concedes that much. That in itself is a material change in the circumstances of the children. The father, as a parent owe a duty of support to his children. The court in the previous application did not order the respondent to maintain his children notwithstanding that he tendered to pay maintenance for them in the amount of R1000 per month per child. It seems the previous Rule 43 was dismissed, inter alia, on the basis that the applicant failed to disclose material facts necessary for the adjudication of that application. That notwithstanding, I am of the view that in matters involving children the court is constitutionally duty bound to look at the best interests of the children. For the court not to order the respondent to maintain his children would be prejudicial to those children.

[11] It would seem that the costs necessary to maintain each child amounts to about R6 673. The difficulty I have with this blanket figure is that it ignores the fact that the children are not of the same age. They are not on the same level of schooling. That they need maintenance cannot be disputed. I doubt that the respondent disclosed fully his income. He is the sole shareholder in [...] (Pty) Ltd. In the previous application, Annexure 'OA12', the financial statements indicate that the Respondent advanced an amount of R1 021 383 to his company. This begs the question where a person who only earns R13 397.78 gets such huge sum of money to advance to a company. The tax return for the period ending on 28 February 2019 shows that his income was R68 970. The bookkeeper in the previous application sets his income at R90 000 in a year

for a period ending on 28 February 2020. Mere calculation of the figures (R68 9770 and R90 000) will reveal that the monthly

income will be far less than the R13 3977.78 the respondent disclosed as his income in his bank statements. This makes it difficult for one to conclude that the Respondent earns the amount he alleges. The problem could have been easily resolved had the respondent made available the bank statements of his company. I unfortunately have to work with the evidence before me.

[12] Maintenance for the Applicant

What is submitted for this claim is largely what was rehashed in the previous application. The only material change, if any, is that the applicant now stays with another man. In the previous application, it was disclosed that the applicant was in a love relationship with someone else outside her marriage. The fact that the applicant now cohabits with someone else cannot, in

itself, be a bar from being maintained by her husband. While the parties are still married, there exists a reciprocal duty of support, which “creates a physical, moral and spiritual community of life, consortium omnis vitae.” (See Sinclair on The Law of Marriage Vol. 1 Juta & Co 1996@ 422. My decision that the applicant is not entitled to maintenance is not because she is now staying with another man as

husband and wife. For this reason, I will not deal with this issue further.

[13] In the previous application, the respondent demonstrated that the applicant was not entitled to maintenance because of the inheritance from the estate of her father. In this application, the same arguments are repeated. It is so, that the respondent in the previous application averred that the estate would have been finalised within two months but that was not to be. In this application the respondent went so far as to attach the liquidation and distribution account in the late estate of the applicant’s father, which depicts her as the sole heiress to illustrate that the estate is almost about to be finalised. Amounts of advances and her income were repeated. In my view, no material change in the circumstances of the applicant was established. It is difficult to discern how instituting actions against the applicant would constitute material change in the circumstances of the applicant.

[14] The applicant avers that because of the toxic relationship she has with the respondent she cannot return to her house. It appears to me that she left her common home voluntarily to go and stay with another man. She has a protection order against the respondent. She is free to use it should the respondent contravene its terms. That she cannot return to her home seems because of the alleged toxic relationship appears not to be a plausible explanation. The applicant appears to be happy staying with another man in her life. The applicant has not made up a proper case for this court to find that there are changed circumstances to vary the previous order.

[15] Use of Volkswagen Amarok and its maintenance.

This issue was also before the previous court and the court did not grant the applicant the order she then sought. The court ordered the respondent to be liable for the maintenance and service of the vehicle. As indicated earlier, an application in terms of Rule 43(6) is not an appeal against the order of the previous court. The applicant has not led any evidence of material change in her circumstances for this court to vary the decision of the previous court.

[16] Over and above, it is common cause that there is a pending case in the Regional Court under case number FS/BFN/RC 1182/2020 in which the respondent is suing the applicant for the delivery of this Amarok or payment of its value. It is in my view not appropriate to deal with this issue while there is a pending case on the same issue in another court.

[17] Contribution towards costs.

The court in the previous application refused to order the respondent to contribute towards the applicant's costs. The reason given by the applicant to seek a contribution towards her costs is captured in paragraph 6.3 of her founding affidavit as follows:

“Die Respondent met sy aanhoudende aksies wat hy instel en die gedrag van die Respondent soos hierbo uiteengesit, veroorsaak dat ek regskostes moet aangaan wat ek nie kan bekostig nie. Ek versoek bygevolg(my emphasis) die Agbare Hof eerbiediglik om te gelas dat die Respondent 'n bydrae moet maak tot my regskostes in die bedrag van R10 000.Ek

kan huidiglik geen bydrae maak tot my eie regskostes nie deurdat ek en die kinders tans skaars kan oorleef.

[18] An application for a contribution towards costs is for the costs of the main application pending in respect of the divorce and not for legal costs in other different proceedings. It seems that the applicant wants this court to order the respondent to pay costs because of the other cases instituted by the respondent against her. That cannot be correct. In my view, the respondent has failed to establish changed circumstances to warrant the variation of the previous court. Save for the orders relating to the children this application must fail. I accordingly make this order:

ORDER

It is ordered that pendent lite:

1. Both parties have full parental rights and responsibilities and rights of care and contact in respect of the minor children, as contemplated I s18 of the Children's Act;
2. The primary residence of the minor children is awarded to the Applicant, as contemplated s18(2)(a) of the Children's Act, 38 of 2005;
3. The specific parental responsibilities and rights in respect of the Respondent's contact with the minor child, as contemplated in terms of s18(2)(b) of the Children's Act 38 of 2005, are awarded to the Respondent in respect of the child, Keenan, at all reasonable times, which contact shall commence on the first weekend after this order and shall be exercised in a reasonable manner as follows:

3.1 The right to take the minor child on alternate weekends. A weekend shall be deemed to commence on Friday at 17h00 and terminate on Sunday at 17h00.

3.2 The right to take the child on alternate public holidays;

3.3 The right to exercise reasonable contact with the minor child during the week on days and times to be mutually agreed between the parties;

3.4 The right to take the minor child on alternate school holidays, the long and short school holidays to alternate between the parties;

3.5 Christmas and Easter to be alternated between the parties.

4. The Respondent is ordered to pay maintenance in the amount of R3 500 per month per child. The first payment shall be effected on or before 1 March 2021 and subsequent payments to be effected before the seventh of each succeeding month.
5. The respondent shall be responsible for all the minor children's school fees;
6. The Respondent shall retain the Applicant and the minor children as dependants on his medical aid and will be liable for the minor children's reasonable and necessary medical, ophthalmological, dental, and pharmaceutical costs as far as they are not covered by the medical aid.
7. The Respondent shall pay the costs associated with the children's phones' contract;
8. The Respondent shall be liable for the following expenses:
 - 8.1 The premiums in regard to Discovery and Stratum;
 - 8.2 The alarm system of the house;
 - 8.3 The House insurance;
 - 8.4 Data payment at Iclix.
 - 8.5 The maintenance and service of the Amarok vehicle.
9. The applications for the maintenance of the applicant and a contribution towards her costs are dismissed.
10. The costs of this application shall be the costs in the cause.

P.E. MOLITSOANE, J

On behalf of the Applicant:

Adv Coetzer

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of the Respondent: Adv Van der Merwe

Instructed by:

Rossouws attorneys

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