

SOUTH AFRICA / JUDGMENT

J.D.K v J.K (584/2022) [2024]

ZAECQBHC 58 (10 October 2024)

[2024] ZAECQBHC 58

COURT

Eastern Cape High Court, Gqeberha

BEFORE

NJ Mullins

CASE / FILE NUMBER

584/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GQEBERHA)

Case

No: 584/2022

Date

Heard: 12 September 2024

Date

Delivered: 10 October 2024

In

the matter between:

J[...]

D[...]

K[...]

APPLICANT

and

J[...]

K[...]

RESPONDENT

JUDGMENT

MULLINS AJ:

- [1] The Applicant and the Respondent are engaged in an opposed divorce action. Pursuant thereto the Respondent brought a Rule 43 application, which was opposed. On 30 August 2023 Potgieter J gave an order, the relevant portions of which (for the purposes of this application) read as follows (the “Rule 43 Order”):

“1. The Respondent shall maintain the major dependent child, A[...], until she has completed her tertiary education by payment of her monthly rental, groceries, fuel, vehicle insurance, cellular phone expenses, cell phone data expenses and other ancillary expenses as agreed, the total cost of which equates to R15,500.00 per month, payable on the first day of each month, free of exchange, and without any deduction.

2. The Respondent shall cover A[...] at his cost, on his current medical air scheme, or any scheme with similar benefits and the Respondent shall pay the monthly premium (and escalations) timeously together with payment of the costs of all reasonable and necessary expenses in respect of the medical; dental; surgical; hospital; orthodontic and ophthalmological treatment required by A[...], including any sums payable to a physiotherapist; occupational therapist; speech

therapist; dermatologist; psychiatrist / psychologist and chiropractor, the costs of medications and the provision where necessary of spectacles and/or contact lenses if not covered by the Respondent’s medical aid scheme.

3. Respondent shall bear the costs in respect of A[...]’s tertiary expenses including the costs of fees, textbooks and stationary requirements, which cost shall be paid by the Respondent for as long as A[...] applies herself to her studies with due diligence and makes satisfactory progress.”

- [2] For reasons which will be dealt with below the Applicant failed to comply with the terms of the court order quoted above, as a result of which the Respondent launched an application on an urgent basis to have him committed for contempt of court. The application was unopposed and on 4 April 2023 Potgieter J made the following order (the “Contempt Order”):

“2. The Respondent be found to be in contempt of the Order of the Honourable Mr Justice Potgieter dated 30 August 2022 (“the Order”) and that Respondent be sentenced to a consecutive period of three months’ imprisonment, which period of imprisonment is to be suspended for the duration of the order provided that:

2.1. The Respondent complies fully with the terms of the Order by payment of R15,000.00 per month as and for maintenance of the major dependent child, A[...] K[...], payable on the first day of each month, free of exchange and without set off or deduction.

3. In the event that the Respondent fails and/or refuses and/or neglects to purge his contempt set out in paragraph 2 above within 5 (five) court days from the date on which a Court Order is granted herein, the Applicant may set the matter down upon notice as a matter of urgency, with or without further amplification of the papers, calling

upon the Respondent to show cause why:

- a) a further order should not issue in terms of which the Respondent should not immediately be imprisoned for a period of three consecutive months;
- b) he should not pay the costs of any further proceedings on an attorney and client scale; and
- c) further sanctions to ensure purging of the contempt should not be imposed against him.

4. The Respondent pay the costs of this Application on an attorney and client scale.”

[3] On 18 June 2024 the Applicant launched this application for the variation of the Rule 43 Order by the deletion of paragraphs 1, 2 and 3 thereof (the “Variation Application”). Although not specifically stated, the application was obviously premised on Rule 43(6), which provides that in the event of changed circumstances a party may approach the court for a variation.

[4] The Respondent opposed the Variation Application.

[5] The Applicant’s case can be summarized as follows: Due to her poor academic performance A[...] is no longer pursuing her studies at North West University in Potchefstroom (“NWU”), has moved back to Gqeberha and is working as a waitress at a restaurant. Therefore, the argument goes, the purpose of paragraphs 1, 2 and 3 of the Rule 43 Order are no longer applicable. He also alleges, without providing any proof thereof, that he is financially distressed.

[6] In the result he states that with effect from May 2023 he unilaterally reduced the monthly payment to R7,000.00.

[7] In her opposition to the application the Respondent admits that A[...] has given up her studies at NWU but this is because of the sustained emotional abuse and manipulation which the Applicant subjected her to, which appears to have been motivated by the fact that A[...] has a boyfriend who belongs to another ethnic group.

[8] In support of this allegation the Respondent attached to her affidavit a string of WhatsApp messages from the Applicant to A [...], which I do not intend to deal with in detail. Suffice it to state that the Applicant’s racist and bigoted views are unacceptable by any measure and are disgraceful. The fact that they are directed at his own daughter compounds the issue.

[9] The upshot of the Respondent’s opposition is that due to his behaviour the Applicant caused A[...] to give up her studies and he should not be allowed to benefit from his reprehensible behaviour.

- [10] That the Applicant's behaviour towards his daughter was (and remains in this application) reprehensible and that she is suffering from anxiety as a result thereof, for which she is on medication, is quite clear. But on the papers before me I cannot conclude that this is the reason she is no longer pursuing her studies at NWU.
- [11] However, the bottom line is that A[...] is no longer at university and although she intends to enrol at Unisa (or may have already done so) there have been changed circumstances. They are:
- (a) She is no longer studying at NWU;
 - (b) She is employed and earning an income.
- [12] With regard to A[...]’s income, the Applicant attaches her bank statement for the months April to the middle of July 2024. They indicates that she is earning an average of R2,304.00 per month from waitressing.
- [13] Paragraph 1 of the Rule 43 Order compels the Applicant to pay to A[...] R15,500.00 per month towards her living expenses “until she has completed her tertiary studies...”. That is no longer applicable, but that does not mean that she no longer has living expenses. Thus, while the Applicant is entitled to a reduction in the monetary amount payable, he is not entitled to the deletion thereof.
- [14] Paragraph 2 deals with medical and related expenses. There is no reason to interfere with this part of the maintenance order.
- [15] Paragraph 3 deals with the cost of fees, textbooks, stationery, and the like. This form of maintenance is no longer relevant.
- [16] Which brings me to costs. Although the Applicant has been partially successful, he has also been partially unsuccessful. I have already dealt with his unacceptable behaviour, which is deserving of censure. In addition, he comes to court with dirty hands. Despite being found guilty of being in contempt of court (on 4 April 2023) he states in his affidavit that from May 2023 he unilaterally reduced the maintenance payable to A[...] to R7,000.00. The costs order I intend to make is, hopefully, an indication of the Court’s displeasure of his behaviour towards his daughter.
- [17] Why the Respondent has not pursued the contempt application is baffling, but that issue was not before me.
- [18] In the circumstances I make the following order:
1. Paragraph 1 of the Rule 43 Order, dated 30 August 2022, is hereby varied by the deletion of the figure “R15,000.00” and the replacement thereof with the figure “R11,000.00”;
 2. The Applicant (the respondent in the Rule 43 application) is to pay the sum of R11,000.00 per month back-dated to 1 July 2024.

3. Paragraph 3 of the Rule 43 Order, dated 30 August 2022, is hereby deleted.
4. The Applicant is ordered to pay the costs of this application on an attorney and client scale.

NJ MULLINS

(ACTING JUDGE OF THE HIGH COURT)

REPRESENTATION:

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