

SOUTH AFRICA / JUDGMENT

K.S v N.S (D1137/2021) [2023] ZAKZDHC 94 (1 December 2023)

[2023] ZAKZDHC 94**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

R Singh

CASE / FILE NUMBER

D1137/2021

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****KWA-ZULU****NATAL LOCAL DIVISION, DURBAN****CASE****NO:D1137/2021****In**

the matter between:

[K.....]

[S.....]

APPLICANT

And

[N.....]

[S.....]

RESPONDENT

ORDER

1.

In respect of the main application: -

1.1

The respondent is declared to be in contempt of the order of court which was

granted on 17 May 2021 under case number D1137/2021.

1.2

The respondent is committed to imprisonment for a period of 30 days which is wholly suspended for a period of three years on condition that the respondent pays:-

1.2.1

all outstanding rental in respect of the immovable property situate at [.....]
up to and including 30 November 2023 within 30 days of the granting of this order;

1.2.2

all arrear school fees due to [.....]
in respect of the minor
children on or before 4 December 2023.

1.3

the respondent is directed to pay the costs of the main application on a scale as between attorney and client.

2.

In respect of the counter-application, the order granted on 17 May 2021 under case number D1137/2021 is varied as follows: -

2.1

Paragraphs 1.3.1, 1.3.2, 1.3.3, 1.3.5 and 1.3.7 are deleted.

2.2

The respondent is directed to pay the following expenses pendente

lite:

2.2.1

Maintenance in respect of the minor children at the rate of R10 500-00 per month;

2.2.2

two thirds of the monthly rental in respect of the immovable property situated at 4[...] M[...] R[...],
1[...] B[...] Drive, Durban,
KwaZulu-Natal;

2.2.3

fifty percent of the rates, electricity, water and utilities in respect of the said immovable property;

2.2.4

the monthly instalments in respect of the Mercedes Benz C180 motor vehicle;

2.2.5

the costs of all reasonable educational expenses incurred in respect of the minor children, including private school fees, stationery, extra mural activities, sports equipment, uniforms and allied expenses;

2.3

The applicant is directed to pendente lite:-

2.3.1 retain

the minor children as beneficiaries on her medical aid scheme and pay all premiums relating to them, including

any excess medical expenses
not covered by the said medical aid scheme;
2.3.2
pay one third of the monthly rental in respect of the immovable
property.
2.4
The costs of the Rule 43(6) counter-application are reserved for the
trial court hearing the divorce
action.

JUDGMENT

DELIVERED :01 DECEMBER 2023

R SINGH AJ:

INTRODUCTION

[1] A divorce action is pending between the parties. The applicant launched an application in terms of the provisions of Rule 43 and the parties obtained an order by consent where, inter alia, the respondent was directed to pay pendente lite:-

1.1 maintenance in the sum of R15 750.00 per month in respect of the applicant and the minor children;

1.2 the rental in respect of the immovable property occupied by the applicant and minor children;

1.3 the minor children's educational expenses;

1.4 the applicant and minor children's medical aid premiums, including any excess medical expenses which may be reasonable and necessary; and

1.5 the respondent was also directed to sign a lease agreement with the landlord in respect of the immovable property occupied by the applicant and minor children for a fixed period of no less than 12 months.

("the Rule 43 Order")

THE FACTS WHICH ARE COMMON CAUSE

[2] The following facts are common cause: -

2.1 the respondent was present at court and legally represented at the time the Rule 43 order was granted;

2.2 the respondent failed to sign a lease agreement with the landlord in compliance with the Rule 43 order.

2.3 the respondent defaulted in payment of the monthly rental, the medical aid premiums and has been in arrears with the payment of the minor children's educational expenses;

2.4 the landlord has instituted ejectment proceedings against the respondent and all those occupying the immovable property by through or under him who would the applicant and minor children.

2.5 the school which the minor children attend sent a letter asking for immediate payment of the outstanding school fees failing which, the minor children face exclusion from the school.

2.6 the applicant has removed the children from the respondent's medical aid and placed them on her own medical aid. She has been paying the monthly premiums relating thereto.

THE CONTEMPT APPLICATION

[3] It was against the aforesaid background that the applicant launched the main application seeking an order that the respondent be declared to be in contempt of the Rule 43 order.

[4] On 15th June 2023, a Rule Nisi was granted calling upon the respondent to show cause why he should not be declared to be in contempt of the Rule 43 order and sentenced to a period of imprisonment to be determined by the court, with or without the option of a fine, which sentence was to be suspended for a period of 3 years on condition that the respondent complies with the Rule 43 order within 7 days. The applicant also sought that the respondent pays costs of the application on a scale between attorney and client.

[5] Very briefly, the respondent's opposition to the application is as follow: -

5.1 he admits that he is in arrears with the rental but contends that he can no longer afford to pay the rental;

5.2 he was only obliged to pay rental for a period of 12 months from the date of the order because of the Rule 43 order obliged him to enter into a lease agreement for a period of 12 months;

5.3 he further alleges that he was not obliged to pay maintenance for the applicant after a period of 18 months. He was advised that the divorce action would be settled before then;

5.4 in respect of the medical aid premiums, he alleges that he could not afford to pay same and therefore the medical aid was cancelled in 2021. The applicant has joined a more expensive medical aid scheme and he should not have to pay more than R2 700 per month which was the monthly premium for the previous medical aid scheme.

5.5 in relation to the school fees, the respondent contended that since 2018 he paid lump sums towards school fees as and when the monies from his business came in. He has "every intention" of paying the school fees on or before 6 December 2023.

THE RULE 43(6) COUNTER- APPLICATION

[6] The respondent together with his opposition to the contempt application also launched a counter-application in terms of the provisions of the Uniform Rules 43(6) for a variation of the Rule 43 order.

[7] In support of the Rule 43(6) counter application, the respondent relies on the following: -

7.1 that the Rule 43 order is exorbitant and at the time he agreed to pay the said amount, he was under the impression that the divorce action would not take more than a year to finalise and it was for that reason that he agreed to enter into the lease agreement for a period of 12 months;

7.2 that due to Covid and a downturn in his business, he fell into arrears with the rental payments and at the time the Rule 43 order was made, he was already in arrears with the rental payment;

7.3 as he was in arrears with the rental payment, the landlord was not willing to conclude a written lease agreement with him;

7.4 he was the main member of the Momentum Basic Hospital Plan together with the applicant and the two minor children as beneficiaries and paid the sum of R2 700.00 per month at the time of the interim order;

7.5 he fell into arrears in February 2021 and the medical aid was cancelled. During May 2021, he joined Affinity Health but the applicant was not happy with that medical aid scheme and advised that she would obtain her own medical aid. She joined Discovery Medical Aid which is more expensive. She paid the sum of R4 500.00 per month in respect of the minor children and herself. The respondent reiterated that he was happy with the instalments of Affinity Health as it was the same as his Momentum medical aid scheme;

7.6 since May 2022, the applicant has not asked for contributions towards her medical aid scheme and he understands that she pays same;

7.7 in relation to the payment of school fees, the respondent alleges that he has a long-standing arrangement with the school whereby he makes a lump sum payment and that the next payment due is 6 December

2023. The interim order does not specify a date by which the school fees needs to be paid nor does the school have an issue with same.

[8] The respondent alleges that his income varies from R30 000.00 to R150 000.00 per month. His expenses include material, labour and other expenses in respect of his business. The respondent put up his business bank statement from First National Bank for the period January 2023 to October 2023 as proof of his expenses. He alleges that his expenses are R57 400-00 per month. When his business sites are running, he also pays salaries in the sum of R30 000.00 per month. He alleges that he does not have a personal bank account.

- [9] The allegation in relation to his monthly income is bald. No schedule of monthly income or annual financial statements have been put up by the respondent in support of the income he alleges he receives. One would have expected him to do this bearing in mind that as the applicant in the Rule 43(6) application, he bears the onus of establishing a material change in circumstances.
- [10] The further change in circumstances which the respondent relies on is that the applicant has been employed for the last 19 months and that she has failed to disclose same to this honourable court in her contempt application. He further submits that the applicant also has a duty of support towards the minor children and that the cash sum of maintenance which he has been paying included maintenance for the applicant which she surreptitiously accepted.
- [11] The respondent seeks that the Rule 43 order be varied to delete payment of the monthly rental payment, household insurance premiums and medical expenses. He tenders a cash amount of R15 750.00 per month in respect of maintenance for the minor children, fifty percent of rates, electricity, water and utility charges, he agrees to continue to pay the instalments in respect of a Mercedes Benz C180 and two thirds of the costs of the minor children's educational expenses.

[12] The applicant in reply, states as follows: -

12.1 she denies that she has the resources to find other accommodation and therefore requires the respondent to pay all the arrear rentals;

12.2 she changed to the Discovery Hospital Plan as she required surgery and the waiting period was two months whereas if the respondent's medical aid scheme was reinstated, she would have a waiting period of three months;

12.3 the school policy regarding the payment of fees is that fees must be paid on or before the first day of each month.

12.4 the respondent has shown no attempt to reduce his expenditure and has instead embarked on a luxurious lifestyle which included regular liquor, cannabis, expensive branded clothing and jewellery purchases as well as holidays and spa treatments.

12.5 she earns approximately R22 800.00 per month and has annexed her most recent payslip in support thereof. The renovations to the immovable property which the respondent mentioned was a gift from her boyfriend.

THE ISSUES TO BE CONSIDERED

[13] On the papers, the issues to be considered are as follows: -

13.1 whether this application is urgent;

13.2 whether the applicant has made out a case for the respondent to be

declared to be in contempt of the Rule 43 order;

13.3 if the respondent is found to be in contempt of the Rule 43 order, what a suitable sanction to be imposed is;

13.4 whether the respondent in his counter-application has demonstrated that there has been a material change in circumstances to warrant the varying of the Rule 43 order.

URGENCY

[14] The court order of the 15 June 2023 recorded that the respondent did not consider the application to be urgent and reserved his right in this regard. At the hearing of the matter, Ms Ameer who appeared on behalf of the respondent persisted that the application lacked urgency. It is common cause that the respondent has failed to timeously pay the rental amounts for the leased premises and has been in arrears with the educational expenses in respect of the minor children. In an urgent application, the applicant must demonstrate that he will not be afforded substantial redress at the hearing in due course.[1]

[15] Courts have recognised that the payment of the maintenance obligations is not a debtor/creditor type of situation and that maintenance arises out of an ongoing duty of support. In the case of child support, the duty is fortified by a minor child's constitutional right to parental and family care. Ultimately the best interest of a minor child is paramount. Whilst not every contempt application is urgent, it is evident in casu that the application was urgent, firstly because of the very real threat of ejectment of the applicant and minor children from the immovable property as well as the letter received from the minor children's school that the school fees in respect of the minor children must be paid otherwise they face exclusion from the school.

[16] I am therefore satisfied that the main application is urgent.

THE LAW IN RELATION TO CONTEMPT PROCEEDINGS

[17] Civil contempt procedure has been a useful mechanism in securing compliance with orders of court and has survived constitutional scrutiny.[2] It is clear that contempt of court proceedings exist to protect the rule of law and preserve the honour of the judiciary. This lies at the heart of any constitutional democracy.

[18] In respect of issues pertaining to maintenance of minor children, the Constitutional Court in the matter of Bannatyne v Bannatyne & Another[3] declared that failure to comply with a maintenance order is a criminal offence and is contrary to the provisions of Sections 28(2) of the Constitution of the Republic of South Africa, 1996.

- [19] Once it is shown that the order is granted and served or has come to the notice of the respondent and that the respondent has disobeyed or neglected to comply with the order, wilfulness and mala fides will be inferred and the applicant will be prima facie entitled to a committal order[4] [5] The evidentiary burden then rests on the respondent to advance evidence that establishes a reasonable doubt as to whether he is in contempt of the order.
- [20] It is fundamental principle of law that orders must be complied with until they are properly set aside and it is not for a respondent to impute that an order was improperly made or that he cannot meet his obligations in terms of the order to justify non-compliance of the order. [6] [7]

THE LAW IN RESPECT OF APPLICATIONS IN TERMS OF THE PROVISIONS OF RULE 43 (6)

- [21] The provisions of Rule 43 (6) allows the court to vary its decision where there has been a material change in circumstances in one of the parties or a child. That change must be subsequent to the hearing of Rule 43 application which gave rise to the order that the court is being called upon to vary.[8]
- [22] An applicant in Rule 43 (6) proceedings bears the onus of establishing that there has been a material change in circumstances and must place sufficient facts before the court in order for the court to determine the extent and the impact of the change in circumstances.

APPLICATION OF THE LAW TO THE FACTS

- [23] I, first turn to consider the contempt application.
- [24] The starting point is that the respondent was legally represented and the Rule 43 order was taken by consent. He therefore not only consented to the order but, in my view, would have had full knowledge by virtue of being legally represented of his obligations in terms of the order. There is nothing to infer that his previous legal representatives did not advise him of his obligations. Therefore, I am satisfied that the first requirement of a contempt application, namely that the respondent was aware of the existence of the order, has been met.
- [25] The next requirement to be considered is whether the respondent disobeyed or neglected to comply with the order and in so doing, whether wilfulness or mala fides can be inferred from his conduct.
- [26] In relation to the rental, the respondent acknowledges that he is in arrears with the rental but contends that such failure was not wilful. A perusal of rental schedule, however indicates that the respondent as at the time the Rule 43 order was granted, was already in arrears with his rental payments but nonetheless consented to an order that he pay the rental. In my view, he knew full well that he would have been unable to comply with the order. To add insult to injury, he contends that he was only obliged to pay the rental for a period of twelve months from the date of the order and his obligations extended no further because Rule 43 order contained provisions for him to enter into a lease agreement of

twelve months. It is also common cause that since December 2022, the respondent has not made any payment towards the rental.

- [27] Likewise in consenting to an order that he signs a lease agreement, he ought to have realised that given the already outstanding rental, he would be unable to enter into any lease agreement with the landlord and hence comply with his obligations in terms of the order. In my view, it was disingenuous of the respondent to consent to the Rule 43 order requiring him to sign a new lease agreement when he knew that he would not be able to meet his obligations. I therefore find that he wilfully disobeyed the Rule 43 order in this regard.
- [28] In relation to the medical expenses, the respondent contends that he ought not to be held responsible for the costs of the monthly premiums because the applicant chose to change her medical aid scheme. It is clear from the court order that he was responsible for all medical expenses for the applicant and the minor children. He therefore would have been required to comply with the order. His version that he was not asked to contribute to the medical aid by the applicant and he therefore inferred that the applicant would pay the premiums for the medical aid scheme cannot pass muster. Likewise, in my view, he is also in default of his obligation to cover all medical expenses in respect of the minor children in terms of the Rule 43 order.
- [29] His defence that he had an arrangement to pay school fees in lump sums as and when he had money flies in the face of the demand from the school for payment of the school fees as well as the possible exclusion of the minor children. There is nothing on the papers to suggest that the respondent was only obliged to settle school fees by 6 December 2023. The letter states that if the fees are not paid, the children face exclusion on 6 December 2023. It is also evident that school fees are substantially overdue and likewise the respondent has been in default with provision of Rule 43 order.
- [30] In considering the respondent's failure to comply with Rule 43 order and whether he is in contempt thereof, it is necessary to consider whether lack of affordability is a defence available to the respondent.
- [31] The respondent makes the bald allegation that his income varies from R30 000 to R150 000 per month. He does not take this court into his confidence and place a schedule of his monthly income or his annual financial statements given that he is self-employed. Against that, there are sufficient entries on his bank statements which suggests that the respondent has incurred unnecessary and luxurious expenses ranging from regular purchases of liquor and cannabis, branded clothing, frequent restaurant and take away purchases as well as holidays and spa treatments. Ms Ameer who appears for the respondent tried to explain away these extravagant expenses by submitting that some of these expenses were for the minor children and further that the respondent is entitled to enjoy luxuries. Even if these submissions were correct, the expenses in respect of luxuries do not trump the respondent's obligation to obey the letter of the law and comply with his obligation in terms of the Rule 43 order.

- [31] I am not satisfied that the respondent was unable to meet his financial obligations in terms of the order due to lack of affordability. Indeed, if he was unable to meet his financial obligations, he ought to have approached this court to vary the Rule 43 order which was granted two and a half years ago. He simply chose not to do so until faced with the contempt application.
- [32] I am therefore satisfied that the respondent is in contempt of the order of 17 May 2021. Having found same, I must consider what a suitable sanction in respect of his contempt.
- [33] Sitting as upper guardian of minor children, the court will not tolerate failure to meet maintenance obligations in respect of minor children. Mr Skinner SC who appears on behalf of the applicant submits that the respondent ought to be sentenced to a period of imprisonment but that same be suspended on condition that he settles all the arrear school fees within 7 days of the court granting an order. I do not believe that this will resolve his contempt of the court order in totality. The respondent must also settle all outstanding rental otherwise the Rule 43 order would be meaningless. The outstanding rental is substantial and the respondent must be afforded 30 days from the granting of this order to pay same.
- [34] In relation to the Rule 43(6) application, the respondent contends that the order must be varied to the extent that he can no longer afford to pay the amounts which he was ordered to pay. Further since the granting of the Rule 43 order, the applicant has found employment. Indeed, the applicant admits this and she has put up her salary advice slip which reflects her as earning approximately R22 800.00 per month. Mr Skinner SC advised the court that the applicant may be unemployed before the end of the year and that the Rule 43(6) application must therefore be adjourned to be determined when that event occurs. I do not believe that this is necessary. The applicant must cross that bridge when she comes to it.
- [35] The respondent, like in dealing with his opposition to the contempt application has not taken this court into his confidence and stated exactly how much he earns. His bank statements, reflect unnecessary expenses and a luxurious lifestyle which I have already mentioned. The applicant is, however in receipt of an income and has been for the last nineteen months. I am thus satisfied that there has been a material change in circumstance for the Rule 43(6) application to succeed. The applicant does have a duty of support to the minor children and must make some contribution to their financial needs.
- [36] The respondent suggests that the Rule 43 order be varied to delete the monthly rental payment, household insurance and medical expenses. He tenders the cash amount of R15 750.00 per month per child as maintenance towards the minor children; payment of fifty percent of the monthly rates, electricity, water and utilities charges; payment of the instalments in respect of the Mercedes-Benz C180 and two thirds of the educational expenses to the minor children.

[37] I am satisfied that the applicant must be responsible for payment of the medical aid contribution and any excesses not covered by the medical aid scheme in respect of the minor children. In addition, she ought to pay one third of the monthly rental in respect of the leased premises. I am not satisfied that the respondent has demonstrated that the applicant must be ordered to pay one third of the minor children's educational expenses. In respect of the cash maintenance for the minor children, the sum of R10 500.00 (Ten Thousand Five Hundred Rands) per month for both children is adequate.

COSTS

[38] The applicant has been successful in the main application and as a result the costs of the main application must follow the result. The applicant seeks costs on a scale between attorney and client. I am satisfied that she is entitled to costs on a punitive scale as it was evident from the papers that the respondent was always in default of Rule 43 order and until the main application was launched, no steps were taken to vary the order. In the circumstances, the respondent is liable for the costs of the main application on a scale as between attorney and client.

[39] In relation to the counter application being the application to vary the Rule 43 order, the usual order made in applications of this nature is that costs are reserved for the trial court hearing the divorce action and I see no reason to deviate from that tradition.

CONCLUSION

[40] In the circumstances, I make the following order: -

40.1. In respect of the main application: -

40.1.1 the respondent is declared to be in contempt of the order of court of 17 May 2021 under case number D1137/2021;

40.1.2 the respondent is committed to imprisonment for a period of 30 days which is wholly suspended for a period of three years on condition that the respondent pays: -

40.1.2.1 all outstanding rental in respect of the immovable property situated at [.....]

up to and including 30 November 2023 within 30 days of the granting of this order;

40.1.2.2 all arrear school fees due to [.....] in respect of the minor children on or before 4 December 2023.

40.1.3 the respondent is directed to pay the costs of the main application on a scale as between attorney and client.

40.2 In respect of the counter-application, the order granted on 17 May 2021 under case number D1137/2021 is varied as follows: -

40.2.1 paragraphs 1.3.1, 1.3.2, 1.3.3, 1.3.5 and 1.3.7 are deleted;

40.2.2 the respondent is directed to pay the following expenses pendente lite;

40.2.2 maintenance in respect of the minor children at the rate of R10 500-00 per month;

40.2.2.1 two thirds of the rental in respect of the immovable property situated at [.....]

into the applicant's bank account;

40.2.2.2 fifty percent of the monthly rates, electricity, water and utilities charges in respect of the said immovable property;

40.2.2.3 the monthly instalments in respect of the Mercedes Benz C180;

40.2.2.4 the costs of all reasonable education expenses incurred in respect of the minor children, including private school fees, stationery, extra mural activities, sport equipment, uniforms and allied expenses pendente lite.

40.2.3 the applicant is directed pendente lite:-

40.2.3.1 to retain the minor children as beneficiaries on her medical aid scheme and pay all premiums relating to them including any excess medical expenses not covered by the said medical aid scheme;

40.2.3.2 pay one third of the monthly rental in respect of the immovable property

40.3 The costs of the Rule 43(6) application are reserved for the trial court hearing the divorce action.

R SINGH AJ

Date of Hearing

: 30 November 2023

Date of Judgment : 01 December 2023

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[1] Luna Meubels Vervaardigers (EDMS) Bpk v Makin & Ano.(t/a Makin's Furniture
manufactures) 1977 (4) SA 135 (W) at 137F

[2] Faki N.O v CC11 Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 333 A-B

[3]

[2002] ZACC 31; 2003 (2) SA 363 (CC) at 375C TO 376A

[4] Replication Technology Group v Gallo Africa Ltd 2009 (5) SA 531 (GSJ) AT 549

[5] Minister of Water Affairs and Forestry v Stillfontein Gold Mining Company Ltd 2006 (5) SA 333 (W) at 353 H-I

[6]Culverwell v Beira 1992 (4) SA 490(W) AT 494 A to B

[7] Molefe & Ors v Noge & Ors (22894/2) [2021] ZACPJHC 841 (7 June 2021)

[8] Graumann v Graumann 1994 (3) SA 477 (W) at 480 C

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