

SOUTH AFRICA / JUDGMENT

L.M v R.D.M (EL789/2022) [2023] ZAECELLC 32 (31 October 2023)

[2023] ZAECELLC 32**COURT**

Eastern Cape High Court, East London Local Court

BEFORE

T.V. Norman

CASE / FILE NUMBER

EL789/2022

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT]

CASE NO.: EL789/2022

In the matter between: - LM APPLICANT and RDM RESPONDENT

JUDGMENT

NORMAN J:

- [1] The applicant, an ophthalmologist, instituted this application seeking, amongst others, variation of an Order granted by Stretch J on 25 May 2023, in terms of Rule 43(6) of the Uniform Rules of Court. The relief sought is couched as follows:

“5.1 That the maintenance Order made by this Court on 02 March 2023 and varied on 25 May 2023 is set aside with effect from 06 April 2023, it being the date upon which the Respondent ceased to require maintenance;

5.2 The costs order awarded to the Respondent on 25 May 2023 varied to the extent that –

5.2.1 the Respondent, in casu, is to pay costs of the application, or, in the alternative;

5.2.2 each party is to pay its own costs.

6. I also humbly seek an order that in respect of the reserved costs of 01 August 2023, each party be ordered to pay its own costs.”

- [2] The parties were cited by their full names. It is now standard practice in our courts that in order to give effect to the paramountcy principle entrenched in section 28 of the Constitution, the interests of minor children must be protected in legal proceedings, including, divorce proceedings. In this case the parties have minor children. I accordingly deem it appropriate to refer to the parties and their children by their initials only.

Relevant

facts

- [3] The relevant history of this matter is dealt with in detail in the judgments of Stretch J and Collett AJ. I do not intend to repeat

it herein except where necessary and for context. The facts are mostly common cause. The applicant is married to the respondent, a housewife, who instituted divorce proceedings against him. He is defending the divorce action. It is common cause that on 02 March 2023 the respondent sought and was granted by Collett AJ, by way of Rule 43 proceedings, maintenance for herself, contribution towards legal costs, together with various orders relating to the needs of their minor children in the following terms:

1. “The respondent shall pay to the applicant the sum of R10 000.00 per month as and for maintenance payable on the first day of each month;
2. The respondent shall make payment of the costs of retaining the applicant and the minor children (Q& M) as dependent members on his medical aid scheme and make payment of all reasonable and necessary private medical expenses not covered by the medical aid scheme;
3. The respondent shall pay all the reasonable costs of education of the minor children, including the minor children’s school fees as well as extra-mural, extra-curricular, sporting activities, school uniforms, equipment and attire relating to the minor children’s education, sporting and/or extra-mural and extra-curricular activities, cultural activities, including the costs of all and any school extra-curricular sporting trips, camps, tours, excursions and the costs of extra lessons for the minor children’s educational purposes.
4. The respondent shall pay all reasonable costs for the minor children’s clothing, toiletries, recreation and pocket money as may be reasonably required.
5. The respondent shall continue to make payments of the bond instalments on the matrimonial home and the home in Port Alfred and all associated costs including rates, lights and water, excluding the prepaid electricity for the Port Alfred property where the applicant resides.
6. The respondent shall make contribution to the legal costs of the applicant in the sum of R50 000.00 to be paid within 30 days of the date of this order.
7. Costs are to be costs in the cause.”

- [4] It is common cause that the applicant is the sole financial provider for the family. It is also common cause that for many years he was paying the respondent an amount of R15 748.24 as a stipend/ salary on a monthly basis. After the order of Collett AJ was made it appears that the applicant paid R10 000.00 to the respondent and ceased to pay the monthly stipend/ salary. That gave rise to the respondent instituting urgent variation proceedings seeking, amongst others, an order that the applicant be directed to pay the stipend in addition to the R10 000.00 and that Collett AJ's order be

varied accordingly. The applicant opposed the application. The applicant's stance was that in terms of Collett AJ's order he was ordered to pay R10 000,00 as maintenance and nothing more.

- [5] The variation application served before Stretch J on 25 May 2023. The applicant opposed it. Stretch J varied Collett AJ's order and issued the following Order:

"PENDENTE LITE ORDER

1. The respondent is ordered to pay the applicant R41 496,48 on or before Thursday, 1 June 2023.
 2. The respondent is ordered to pay to the applicant R25 748,24 on or before the first working day of each and every consecutive
- month thereafter.
3. To this end, paragraph 1 of the rule 43 order made by this court on 2 March 2023 under case number EL789/2022 is varied to read as

follows:

"The respondent shall pay to the applicant the sum of R25 748,24 per month as and for maintenance payable on the first day of each month."

4. The respondent is ordered to pay the costs of this application on the scale as between attorney and client, which costs shall exclude

the costs of the certificate of urgency."

- [6] The variation sought by the applicant in this application is allegedly based on the fact that during June 2023, he got to know that the respondent had received a sum of R1 715 802.92. She failed to disclose this information before Stretch J. Upon receiving this information he requested his attorneys of record to direct a letter to the respondent's attorneys requesting them to abandon the Order of 25 May 2023. He contended that the respondent no longer required maintenance after receipt of that large sum. He further submitted that the non-disclosure of that material fact before Stretch J meant that the respondent had received judgment in her favour, on falsified facts.

- [7] In response to that letter the respondent's attorneys confirmed that indeed the respondent had received the sum mentioned on 6 April

2023. They also indicated that their instructions were that their client had not falsified any information and she had no intention of abandoning the judgment of 25 May 2023. The applicant fell behind with the payments and as a result thereof the respondent obtained a warrant of execution for the arrears.
- [8] On 13 July 2023 the Sheriff executed a warrant and attached the applicant's property. Thereafter an urgent application seeking to set aside the warrant and to seek leave to apply to set aside and vary the order of 25 May 2023 was brought. The parties settled the matter. The costs of the urgent application were reserved for later

determination.

- [9] In dealing with the changed circumstances of the respondent, the applicant stated: The respondent is unemployed. She resides at a home owned by the JR Family Trust for which the applicant pays for monthly. She lives alone and she drives a vehicle which the applicant pays for. He pays maintenance in respect of the respondent out of the overdraft facility that his medical practice has. It is difficult to maintain the respondent and the needs of the children. Since the applicant admitted receipt of the large sum, she is no longer in need of maintenance, as she is now wealthy. If she were to continue receiving money, he stated, she would be unjustly enriched whilst he would be impoverished since he operates an overdraft facility.
- [10] He asked the court to set aside the maintenance orders as they are no longer necessary for the upkeep of the respondent. He further sought an order that would operate retrospectively to the 6 April 2023 on the basis that had the court been advised of the R1 715 802.92, the court would not have made the orders that it made. He contends that the applicant misled the court. In this regard he relied on an affidavit deposed to by the respondent on 24 April 2023 where she stated:
- "20. It is necessary to urgently approach this Honourable Court for relief as I am in financial distress and I am unable to afford my day to day living..."*
- [11] He contends that the respondent knew that these allegations were false and were made with the intention of misleading the court into believing that she had financial difficulties when in fact she had none. He further stated that even on 09 May 2023, when the matter was heard, the respondent did not disclose this payment to the court. In respect of the costs of this application he submitted that the court must show its displeasure based on the conduct of the respondent and must order her to pay costs on a punitive scale.
- [12] He stated that in the event that this court finds that the respondent is entitled to maintenance, he would have his attorneys release the amount that is owed to her. He submitted that good cause exists for this court to vary that order which ordered him to pay costs. He asked that in respect of those proceedings and those that were settled on 1 August 2023 each party must bear its own costs.

- [13] The respondent, on the other hand, stated: The applicant is an eye surgeon who has considerable wealth. She has not been employed for approximately 11 years as she was focusing on raising the minor children born of their marriage. The fact that the applicant had failed to honour the initial rule 43 order has caused legal costs to escalate between the parties. She denied that the applicant is unable to pay her monthly maintenance amount because apart from the successful medical practice that he runs, the applicant is a director and shareholder in the East London Eye Hospital. He also has numerous Trusts under his control and multiple properties owned by those Trusts which, according to her, will be a subject matter in an application to join the Trusts as she intends to amend her particulars of claim in due course.
- [14] In response to the allegations about the sum of money she received, she admitted that she received R1 715 802.92 as inheritance from her late mother's land claim which was instituted against the Land Claims Commission. She contends that she did not disclose the amount because it is irrelevant to the orders for maintenance pendente lite. She confirmed that she refused to abandon the previous court order. She disputed that the applicant is entitled to the variation of the order on the basis that the interim maintenance orders are legally binding and are intended to provide her with financial support during the divorce proceedings.
- [15] She submitted that she cannot be required to use her inheritance to maintain herself whilst the applicant has legal obligations towards her. The inheritance is her only valuable asset. To use it as maintenance would go against the legal principle of preserving inherited wealth. She contends that the inheritance is excluded from the joint estate as a matter of law.
- [16] She opposed the variation of the order on the basis that it would perpetuate the financial imbalance between the applicant and herself. She stated that the applicant made bald allegations that he was not able to pay maintenance to her but gave no details about his finances. It is for that reason that he is not entitled to any variation of the order, she stated. She denied that she was dishonest in any manner. She contends that she is entitled to maintenance as ordered by the court. She persisted in seeking a punitive costs order against the applicant but resisted a punitive costs order sought against her.

Applicant's

submissions

- [17] Mr Quinn SC appeared for the applicant and Mr Miller for the respondent. Mr Quinn SC submitted that if the payment of R1 715 802.92 had been brought to the attention of the Stretch J she would have made a different order to the one that she made. In this regard he relied on *Occupiers, Berea v De Wet NO[1]*, for the contention that it follows that if material facts are not disclosed or if fraud is committed (i.e. the facts are misrepresented to the Court) the order will be erroneously granted. He compared what occurred herein to instances where a court would act in terms of Rule 42 to rescind or vary an order that was

erroneously granted, especially, if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment. He also relied on *Southgate Corporation v Engineering Management Services*[2] for the contention that interlocutory orders can always be reconsidered.

[18] He further submitted that it is not up to the respondent to conceal the amount on the basis that it was irrelevant, that was a decision that the court had to make. He submitted that the applicant is not able to comply with the order of the court. He urged the court to vary the order of Stretch J in respect of the contribution towards costs and the maintenance amount.

[19] In conclusion, Mr Quinn submitted that the respondent is not entitled to cash maintenance except for the

R15 748.00 for March 2023. He submitted that by reason of receipt of the R1 715 802.00 there is no need for a contribution

towards costs. He further submitted that the remainder of Collett AJ's order is not affected including the cost order

made therein. He submitted that by reason of the respondent's reprehensible conduct, she should bear the costs of the application before Stretch J on a punitive scale.

Respondent's

submissions

[20] Mr Miller, on the other hand, submitted that: When the rule 43 application was heard by Collett AJ the inheritance money had not been received. Rule 43 prescribes the ambit of this application. This application is *sui generis* and must follow the prescribed form of rule 43(6). The applicant is not entitled to bring the application under rule 42 because it is a rule 43(6) application. The applicant is bound by Collett AJ's judgment. Even if the court were to interfere with Stretch J's order the court must keep Collett AJ's judgment as is. The respondent is no longer receiving the monthly R15 800 that she was accustomed to over the years. The court must have regard to the income of the parties, the inheritance received by the respondent and the income that she no longer receives from the applicant. On the applicant's version, he earns R375 000 per month. He relied on the decision in *Micklem v Micklem*[3] for the contention that there would be no merit in setting aside Collett AJ's order.

Discussion

[21] Rule 43 (6) of the Uniform Rules of Court provides:

“43

- (6) 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.”

[22] In *GB v DS*[4], Keightley stated:

“.. the Rule is designed to provide interim cover to the spouse who has been financially dependent on the other spouse, because of their particular marital circumstances, and who thus has a genuine need for such support to continue until the matter is finally dealt with on divorce. This being the case, a claim for interim maintenance would normally be accompanied by a claim for maintenance on divorce. In the absence of such a claim, the implication is that the critical requirement of financial dependency on the other spouse, which underpins the application for interim maintenance is missing...”

The maintenance order

- [23] It seems to me that both parties, in argument, were not averse to the reinstatement of Collett AJ’s order. That seems to be a sensible approach because that order was made prior to the existence of the inheritance amount. There is of course one difficulty with that approach and that is the fact that paragraph 1 of Collett AJ’s order was varied by the order that Stretch J issued. Therefore, any reinstatement of Collett AJ’s order would mean reinstatement of her order in its varied form. In varying paragraph 1 of Collett AJ’s order, Stretch J gave effect to what was intended by Collett AJ as evinced in her judgment. She simply added the two amounts of R10 000.00 for maintenance and the stipend/ salary of

R15 748.24, totalling R25 748,24 and directed that that amount was payable on the first day of each month.

- [24] That is what Collett AJ intended and the order of Stretch J simply clarified and varied the order to avoid any ambiguity. This means that from 2 March 2023 to 02 October 2023 (eight months) maintenance of R10 000.00 would amount to R80 000.00. In addition, thereto an amount of R15 748.24 as a stipend/ salary for the same period would amount to R125 985.92. A total of R205 985.92 is what would have been paid to the respondent by the applicant for that period if there was compliance with Collett AJ’s order.

- [25] This court will have no basis in law to interfere with that order because the payment of a stipend/ salary accords with the position prior to the institution of divorce proceedings. The order simply preserved the status quo ante the divorce proceedings. Collett AJ decided that in addition to the stipend the respondent required maintenance in the amount of

R10 000,00. Collett AJ was also alive to the fact that all other financial obligations of the family were paid for by the applicant. There are no factors which support the contention that the respondent does not require spousal maintenance. The interpretation that the applicant accorded to the order is not supported by the judgment of Collett AJ. It also transpired that even applicant’s erstwhile counsel understood the order to mean that the R10 000.00 was in addition to the stipend.

- [26] There is no doubt that the respondent requires maintenance. That need for maintenance was identified by the applicant himself years ago when he provided her with a stipend on a monthly basis. That is the status quo that the Rule 43 proceedings intended to maintain pending divorce. That obligation arose purely from the husband and wife relationship. It should not be conflated with inheritance that still requires a determination by the trial court on whether or not it forms part of the joint estate. That enquiry relates to the division of the joint estate, a totally different enquiry from the one that applies to issues of maintenance. The contention by the applicant that the respondent is now wealthy and does not require maintenance means in simple terms that, the applicant must now be completely relieved of an obligation that he undertook many years ago (that of maintaining his wife by giving her a monthly stipend/ salary); and the respondent should deplete her inheritance towards maintenance in fulfilling an obligation that her husband is obliged to fulfil in terms of their marriage regime. That reasoning is, with respect, flawed.
- [27] Other than the receipt of the inheritance amount there is nothing else that the applicant has placed before this court to warrant an order releasing him from his obligation to continue maintaining the respondent pending finalisation of the divorce proceedings.
- [28] In *Estate Sayle v Commissioner for Inland Revenue* [5] the court held that a marriage in community of property means that the spouses become joint owners in undivided half shares of the assets they possess at the time of their marriage as well as of all assets acquired by them during the subsistence of their marriage. The merging of the properties takes place automatically by virtue of the parties being married in community of property.
- [29] Section 7(2) of the Divorce Act 70 of 1979 sets out certain factors that a court would consider before making an order for spousal maintenance. These factors were considered by Collett AJ in her judgment. For the sake of completeness they are : The existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, their standard of living prior to their divorce, the conduct in so far as it may be relevant to the break-down of the marriage, and any other factor which the court
- deems appropriate.
- [30] In *EH v SH*[6] the Supreme Court of Appeal held that it will only be just for a maintenance order to be issued by a court where a party applying for the relief can establish a need to be supported by the other spouse. The obligation for the payment of R15 748.24 emanates from the spousal obligation. It has nothing to do with the inheritance that the respondent received. This court is concerned with the means and the financial support that the respondent was accustomed to for the past eleven years.

[31] The applicant has indicated that he has deposited these payments into his attorneys Trust account and that upon being ordered to pay them he would do so. This undertaking is in stark contrast to the applicant's contention that he is unable to pay spousal maintenance. All that the applicant needs to do is to instruct his attorneys to release the money and pay it over to the applicant.

Contribution towards costs

[32] The applicant sought to set aside both the orders of Collett AJ and Stretch J on the basis that the respondent, does not require any contribution towards costs. When that order for contribution towards costs was made by Collett AJ, the respondent had not received the inheritance amount. Stretch J did not interfere with that order at all. The receipt of the inheritance sum cannot be applied retrospectively as it would seriously prejudice the respondent. It would also have the effect of condoning the applicant's non-compliance with the court's order where he has failed to make payment to the respondent.

[33] In Micklem[7], the court held as follows :

"A wife seeking a contribution towards costs is not entitled to payment in full of the costs that she avers will be incurred in presenting

her case to the court nor all costs incurred to date."

[34] It is common cause that the applicant sought contribution towards costs in the amount of R100 000.00 but Collett AJ granted her half of that amount and Stretch J did not interfere therewith. The applicant was ordered to pay R50 000.00 as contribution towards legal costs of the respondent which sum was to be paid within 30 days from the date of the order, being 2 March 2023. There are no factors which justify a variation or setting aside of that amount as suggested by the applicant. It follows that the order of Collett AJ must stand.

Punitive costs order

[35] In so far as the punitive costs order is concerned, Stretch J gave detailed reasons why she ordered the applicant to pay costs of the application before her on a punitive scale. She gave those reasons at paragraph 59 of her judgment as follows:

"[59] The applicant seeks punitive costs. I intend making such an order, not because the applicant seeks it, but to express this court's displeasure at the respondent not having opposed this matter with clean hands. The respondent has been disingenuous

on oath on at least five occasions: firstly, by stating that a third party had been paying the R15 748.24 to the applicant;

secondly, by withdrawing his tender in the rule 43 application to continue to pay this money; thirdly, by denying in this application that he had previously said on oath that he was paying the R15 748.24 to the applicant; fourthly, by stating in this application that the applicant received monthly payments from an incorporated company with its own legal personality, when it is clear

from the rule 43 papers that he was paying the money himself from his own business account of which he is a sole proprietor; and fifthly, by describing the money which he paid the applicant as a salary, when his own bank statement does not reflect this.” (footnotes omitted).

[36] These reasons were based by Stretch J on the applicant’s conduct only. That conduct had no bearing whatsoever on the inheritance money or its non- disclosure. In any event, the applicant has not adduced any evidence to persuade this court to vary the costs order made against him. That costs order must accordingly stand.

Non – disclosure of the receipt of the inheritance amount

[37] The respondent was obliged to mention the sum of inheritance especially where she deposed to an affidavit pleading poverty. As correctly submitted by Mr Quinn, it was within the power of the court to decide whether the inheritance was relevant or not for the determination of her need for maintenance. The non- disclosure of the inheritance amount is material especially in circumstances where the respondent had moved court for relief on an urgent basis.

[38] The respondent had clearly failed to take the court into her confidence on 25 May 2023. In these proceedings, she did not state that she was not aware that she ought to have disclosed it, instead, she decided to invoke the defence that it was irrelevant to the issues at hand and that inheritance did not form part of the joint estate.

[39] The inheritance sum received is substantial and had it been disclosed there is a great possibility that Stretch J would not have granted the Order for the payment of the R41 496.48 on an urgent basis.

[40] By failing to disclose the inheritance payment the respondent’s conduct is deserving of censure. This court will order that the respondent should forfeit 50% of the costs granted on the scale as between attorney and client, in her favour, by Stretch J on 25 May 2023.

Payment of R41 496.48

[41] There is merit in the argument by Mr Quinn that paragraph 1 of the Order made by Stretch J (for the payment of R 41 496. 48) should be set aside because the inheritance amount was not made known to the court at that time. I did not gain an impression in the argument advanced by Mr Miller that the respondent was averse to the reinstatement of the Order of Collett AJ.

[42] Stretch J ordered the applicant to pay the amount of R41 496.48 on or before Thursday , 1 June 2023. It appears that this payment was sought urgently on the basis that the respondent was in financial distress hence it had to be paid within a few days after the order was made. The evidence proves that she was not in financial distress at that point as she was already in possession of the inheritance sum. Furthermore, that amount appears to be a duplication of what is already ordered in the varied paragraph 1 of Collett AJ’s order which was effective from 2 March 2023. It would be fair in the circumstances to set aside that order as it will not

cause prejudice to any of the parties.

Costs

- [43] In relation to this application I am of the view that each party will bear its own costs. I trust that such an order may discourage both parties from rushing to court prior to them making an effort to mediate their disputes.
- [44] Mr Miller submitted that the joinder application be removed from the roll and costs thereof to be reserved for later determination by the trial court. Mr Quinn did not object to the proposed order.
- [45] Each party shall bear its own costs in relation to the costs ensuant to the application for the stay of the execution warrant which were reserved on 01 August 2023.

PENDENTE LITE ORDER

[46] I accordingly make the following Order:

A. The Order issued by Collett AJ on 02 March 2023 and varied by Stretch J on 25 May 2023 is hereby reinstated in the following terms:

“1. The respondent shall pay to the applicant the sum of R25 748.24 per month as and for maintenance payable on the first day of each month.

2. The respondent shall make payment of the costs of retaining the applicant and the minor children ('Q' and 'M') as dependent members on his medical aid scheme and make payment of all reasonable and necessary private medical expenses not covered by the medical aid scheme;
3. The respondent shall pay all the reasonable costs for education of the minor children, including the minor children's school fees as well as extra-mural, extra-curricular, sporting activities, school uniforms, equipment and attire relating to the minor children's education, sporting and/or extra-mural and extra-curricular activities, cultural activities, including the costs of all and any school extra-curricular sporting trips, camps, tours, excursions and the costs of extra lessons for the minor children's educational purposes.
4. The respondent shall pay all reasonable costs for the minor children's clothing, toiletries, recreation and pocket money as may be reasonably required.
5. The respondent shall continue to make payments of the bond instalments on the matrimonial home and the home in Port Alfred and all associated costs including rates, lights and water, excluding the prepaid electricity for the Port Alfred property where the applicant resides.
6. The respondent shall make a contribution to the legal costs of the applicant in the sum of R50 000.00 to be paid within 30 days of the date of this order.

7. Costs are to be costs in the cause.”

B. The Order issued by Stretch J on 25 May 2023 is varied as follows:

1. Paragraph 1 of the Order issued on 25 May 2023 for the payment of R41 496.48 is hereby set aside.
2. The respondent shall forfeit 50 % of the costs granted in her favour on an attorney and client scale on 25 May 2023.
3. Each party is to bear its own costs in relation to the costs reserved on 1 August 2023 in respect of the urgent application.
4. The joinder application is removed from the roll and costs thereof are reserved for later determination by the trial court.
5. In relation to this application, each party shall bear its own costs.

T.V. NORMAN

JUDGE OF THE HIGH COURT

Matter heard on 10 October 2023

Judgement

Delivered on 31 October 2023 APPEARANCES: For the APPLICANT ADV QUINN SC Instructed by Majali Gwabeni Attorneys Inc. Respondent's Attorneys 36 Darlington Road, Berea East London (Ref: Mr Gwabeni/NN/Civ) Email: alexgwabeni@outlook.com/ Majali.East@outlook.com For the RESPONDENT ADV MILLER Instructed by Wheeldon Rushmere & Cole Inc. (Ref: B Brody / Dianne/ S25822) Email: bbb@Wheeldon.co.za c/o IC CLARK INCORPORATED 25 St. Luke's Road, Belgravia EAST LONDON (Ref: P de Azevedo/ P/A06

- [1] Occupiers Berea v De Wet NO 2017 (5) SA 346 CC at 366 E – 367 A; Naidoo v Matlala NO 2012 (1) SA 143 GNP at 153 C-E.
- [2] Southgate Corporation v Engineering Management Services 1977 (3) SA 534 A at 550 H.
- [3] 1988
- (3) SA 259 (C) at 262.
- [4] GB v DS (16/08/2018) under case number 16158/16, Gauteng Local Division, unreported.
- [5] 1945 AD 388.
- [6] 2012
- (4) SA 164 (SCA).
- [7] Micklem at para 262 I.

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