

SOUTH AFRICA / JUDGMENT

M.S.H v J.S.H (Reasons) (618/2019)

[2024] ZAWCHC 406 (29 November 2024)

[2024] ZAWCHC 406

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

618/2019

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FLYNOTES: FAMILY – Maintenance – Variation – Applicant was ordered to pay monthly bond instalment of property – Unilaterally sold property occupied by minor children and wife – Failed to make any concrete arrangements for accommodation – In arrears with maintenance obligation – Respondent is unemployed with no source of income – Order sought is at odds with best interest of his children – Court implemented measures intended to ensure children and respondent do not find themselves destitute and homeless – Uniform Rule 43(6).

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 618/2019

In the matter between:

MSH

Applicant

And

JSH

Respondent

REASONS FOR THE ORDER MADE ON 30 OCTOBER 2024

LEKHULENI J

Introduction

- [1] On 11 October 2024, the applicant brought an application on an urgent basis in terms of Rule 43(6) of the Uniform Rules to vary paragraph 4 of the Rule 43 order granted by Le Grange J on 3 April 2019. According to paragraph 4 of the Rule 43 order issued by Le Grange J, the applicant was ordered to pay the costs for the accommodation of both the respondent and her children at the Stonehurst property, which served as their matrimonial home. Those costs included:

Mortgage bond instalment;

The levies;

Water and rates;

Electricity account;

Web Africa, telephone and internet account; and

Netflix

- [2] In the present Rule 43(6) application, the applicant sought an order that paragraph 4 of the order granted by Le Grange J on 3 April 2019, be varied and be replaced with the following:

“The applicant shall pay the following costs relating to the respondent and the minor children’s accommodation:

2.1 R12 000 per month towards rental directly to the respondent,

2.2 The full deposit directly to the landlord of the rented accommodation.

2.3 Internet service provider; and

2.4 Netflix”

- [3] After considering the matter, and the arguments presented by the parties' legal representatives, I granted an order in terms of Rule 43(6) in the following terms:

1. The applicant shall pay the respondent (directly into her bank account as she may nominate from time to time in writing) the sum of R16,000 for maintenance of the respondent and their minor children in respect of rental.
2. The first payment of R16,000 (plus a deposit of R32,000) in respect of new rental premises for the respondent and the minor children shall be paid to the respondent on the following conditions:

2.1. As soon as the applicant has paid all his arear maintenance to the respondent, and

2.2. The respondent and the minor children shall vacate the matrimonial home into new rental premises once the applicant has complied with the orders in paragraphs 2 and 2.1 above.

3. The applicant shall be liable to pay the respondent the costs of monthly Netflix and the costs of monthly stable internet connection, in the sum of R1200 per month for both.
 4. The amount set out in paragraphs 2 (R16000 per month) and R1200 per month (paragraph 3) shall be paid to the respondent on or before the 1st day of every succeeding month commencing when the respondent occupies the rental property.
 5. The applicant shall be liable for the costs of and incidental to this application for variation on a party and party scale as taxed or agreed.
- [4] On 19 November 2024, the applicant requested reasons for the Rule 43(6) order in terms of Rule 49(1)(c) of the Uniform Rules. Unfortunately, the court file related to the Rule 43(6) application was misplaced at the Registrar's office and could not be found. Consequently, the Registrar of this court requested the applicant's legal representative to reconstruct the file and submit a copy to this court, including the pertinent affidavits related to the Rule 43(6) application. The applicant's legal representative promptly complied with this request, for which I extend my sincere appreciation.
- [5] What follows are the reasons for the order granted on 30 October 2024 in respect of the applicant's application in terms of Rule 43(6) set out in paragraphs 1 and 2 above.

Background

Facts

- [6] The applicant and the respondent are involved in protracted and acrimonious divorce proceedings. The parties were married in 2007 out of community of property with the application of the accrual system, and their divorce proceedings are pending before this court with no end in sight. The applicant and the respondent have two minor daughters, aged 16 and 12. On 21 January 2019, the respondent instituted divorce proceedings against the applicant. The issue in the divorce proceedings is the respondent's claim for personal maintenance, the respondent's accrual claim, and the maintenance in respect of the minor children. While the divorce proceedings are still underway and awaiting finalisation, the respective parties have instituted several interlocutory applications against each other. Gassner AJ has succinctly summarised the various interlocutory

applications instituted by the parties in this matter in her judgment for contribution to costs dated 4 September 2024, which forms part of the record in this matter.

- [7] The applicant owned a house at Stonehurst, the parties' erstwhile matrimonial home. The applicant's wife (the respondent) and their two minor children occupied the property. As stated in paragraph 1 above, in terms of the Rule 43 order granted by Le Grange J on 3 April 2019, the applicant was ordered to pay the monthly bond instalment in respect of this property.

- [8] Without a court order varying the Rule 43 order granted by Le Grange J, on 30 July 2024, the applicant unilaterally sold the Stonehurst property occupied by his minor children and his wife. On 9 September 2024, the applicant's attorney addressed a correspondence to the respondent's attorney advising her that the Stonehurst property occupied by her client (the respondent) had been sold and that the transfer of the property was due to take place on 17 October 2024. In

that correspondence, the applicant's legal representative advised the respondent's legal representative that the applicant in this matter, was prepared to pay the respondent R15 000 on registration of transfer towards the respondent's occupation elsewhere for a calendar year. The applicant's legal representative also mentioned that the applicant required access to his property to comply with his obligations in terms of the sale agreement.

- [9] In addition, the applicant's attorney indicated in the correspondence that previously when he canvassed with the respondent's legal representative during pre-trial discussions the need for the respondent to vacate the premises at some time, the respondent's attorney just restated the terms of the Rule 43 order. The applicant's attorney further stated that the current situation required a departure from the Rule 43 order granted by Le Grange J. To this end, the respondent was given five days to consider and agree with the applicant's proposal failing which, the applicant's legal representative indicated that the applicant would approach this court urgently for the required relief.

- [10] Indeed, on 11 October 2024, the applicant brought this Rule 43(6) application on an urgent basis to vary the Rule 43 order granted by Le Grange J. The applicant asserted in the application that the Rule 43 order has existed for about six years. Since 2019, there has been a material change in circumstances, particularly to his financial detriment. In the application, the applicant further asserted that on 30 July 2024, the Stonehurst property was sold and that the prospective buyer paid the deposit and obtained finance. The applicant also stated that the registration of transfer was expected to be on 17 October 2024.

- [11] In terms of the sale agreement, the applicant asserted that he was obliged to give vacant possession and to pay an occupational rental of R45,000 per month if the respondent and the minor children remained on the premises after the registration of the transfer of the sale. The applicant also asserted that he is forced to approach this court for relief as the respondent simply did not engage with him on this aspect. The reasons for the sale of the house that the applicant advanced were that the expenses associated with the Rule 43 order and the expenses associated with ownership of the property in question were ruining him financially. Selling the house meant he would stop the recurring payments associated with the home ownership.

- [12] The applicant conceded in his application that he is behind in his maintenance obligation towards the respondent and the children. The applicant stated that he informed the respondent in the past that he could settle his arrear maintenance with the proceeds of the sale of the house. According to him, the respondent is not interested in receiving arrear

maintenance but would rather have him incarcerated as she attempted on 12 October 2023. The sheriff took the applicant to Pollsmoor prison, and his attorney had to bring an urgent application to stay the warrant. The applicant asserted that he cannot afford the current court order. Despite his efforts to resolve the dispute, the respondent has not attempted to settle.

- [13] In the current application, the applicant was emphatic that it was days before the transfer of the house was to be registered, and the respondent still refused to accept the sale price as the market value of the house. The applicant stated that he struggled financially from the outset and continues to fall further into debt. He intended to settle his debts and pay the maintenance arrears. He also wanted to make provisions for the respondent's claim for future maintenance and accrual. As the respondent has not engaged in discussion regarding alternative accommodation, the applicant considered suitable

alternative accommodation for the respondent and their two daughters.

- [14] The applicant also enclosed a selection of alternative accommodation in a brochure of Property24. The applicant resides with his partner, child, and two daughters, in a two-bedroom apartment in Tokai. According to him, his accommodation costs him R9270 per month. Similar places cost R12 000 per month in the region. The applicant stated that he is prepared to pay for the relocation cost of the respondent from the current accommodation to a new accommodation. The applicant was prepared to pay the respondent directly to pay for her own rental until the current order is discharged or varied. He does not want to be contractually bound to a landlord when he is no longer obliged by a court order to pay the respondent's accommodation. To this end, he prayed for the relief sought in the notice of application, as stated in paragraph 2 above.
- [15] The respondent opposed the application and raised a point in limine of urgency and noncompliance with Rule 41A of the Uniform Rules. The respondent lamented that the applicant gave her five days to file her answering affidavit. The respondent contended that the applicant knew of the sale of the property months ago and that the urgency with which the application was brought was self-created. The respondent prayed the court to dismiss the application on that basis. The respondent further asserted that she became aware of the sale of the house on 12 September 2024 after her legal representative received an email from the applicant's attorneys attaching a sale agreement of the house. The respondent stated that the applicant did not engage with her regarding the sale of the house before the applicant could accept the offer to purchase. According to the respondent, it appeared the applicant never informed the purchaser of the house that the property was subject to the standing Rule 43 order.
- [16] On the merits of the application, the respondent averred that the relief sought by the applicant does not provide sufficient details as to the accommodation for the respondent and the minor children and on how the accommodation costs shall be paid and why certain provisions in clause 4 of the Rule 43 order have been omitted from the relief sought by the

applicant. The respondent further asserted that she is unemployed and has no source of income. She could not obtain a lease in her name nor qualify for bridging finance to pay a rental deposit and related rental costs, which the applicant wants her to pay.

- [17] According to the respondent, there is no material change in the applicant's position for the worse. Instead, the applicant is selling one of his greatest assets, which would put him in a far better position financially. The respondent asserted that the relief sought by the applicant, if granted, would have a detrimental effect upon her and the minor children in that the relief sought took the form of an eviction application under the guise of Rule 43(6) application. Furthermore, the respondent asserted that the relief sought by the applicant provided no certainty as to where the minor children and the respondent are to reside. The relief also did not provide details on how the cost of the alternative accommodation should be paid.
- [18] Essentially, the respondent averred that if the order was granted, this would leave her and the children on the street. The respondent stated that the situation would have been different if the applicant had presented a confirmed suitable accommodation, along with verified funds in a trust account to cover the rental and additional costs while the divorce was being finalized. However, no concrete arrangements have been made. According to the respondent, the applicant has not complied with the court order, especially his maintenance obligations and the order relating to contribution to costs.
- [19] The respondent further stated that the applicant is currently in arrears for R189 900 regarding his maintenance obligations. A writ of committal was issued for contempt of court for non-compliance with his maintenance obligations. However, the writ was stayed as the applicant indicated that he intended to take the judgment of Maher AJ, holding him in contempt of court to the SCA. The respondent applied that the application be dismissed with costs.

Applicable Legal Principles and Discussion

- [20] As discussed above, this matter involves the maintenance of the minor children and that of the respondent. The applicant was directed to pay maintenance in April 2019 in a Rule 43 application in the form of a cash component and for the accommodation of the respondent and the minor children. To this end, the applicant was ordered to pay R6000 per month per child for the two minor children payable from 5 April
2019. The applicant was also ordered to pay interim spousal maintenance to the respondent in the sum of R5000 per month. The applicant is currently in arrears with his maintenance obligation for the sum of over R180,000.
- [21] In addition to the cash component, the applicant was ordered to pay the accommodation costs for the applicant and the minor children by paying the monthly bond instalment for the Stonehurst property, their erstwhile matrimonial home. Concernedly, without making any concrete arrangements for the accommodation of the minor children and the

respondent and despite the Rule 43 court order on the matrimonial property granted on 3 April 2019, the applicant unilaterally sold the property occupied by his children and the respondent. The property was sold notwithstanding that the court order required the respondent

and the minor children to continue residing there. This application for variation was submitted shortly before the registration of the transfer was completed.

[22] The applicant sold the property for R6500 000 (Six million five hundred thousand rand only). At the hearing of this application on 11 October 2024, the court was informed that the registration of the property in the name of the purchaser is scheduled to occur on 17 October 2024. In terms of clause 7 of the sale agreement, the applicant was obliged to pay R45 000 occupational rental if he did not give vacant possession of the property.

[23] From the papers filed of record, it is common cause that the respondent is currently unemployed and has no source of income. It bears emphasis that one of the invariable consequences of marriage is that the duty of support arises between husband and wife.[1] From its beginning until its termination, marriage imposes a reciprocal common law duty of support on the spouses, provided that

the spouse who claims maintenance needs it and the spouse from whom it is claimed is able to provide it.[2] The scope of the duty of support is determined inter alia by the social status of the parties, their means or income and the costs of living.[3] The duty of support terminates upon dissolution of the marriage unless it is extended by a court order in terms of section 7(2) of the Divorce Act 70 of 1979 or upon the death of either of the spouses.

[24] As stated above, the applicant sought to vary the Rule 46 order six days before the Stonehurst property was registered in the purchaser's name. The applicant offered to pay accommodation costs for the respondent and the children but had not made immediate alternative arrangements for their accommodation. The applicant wanted to give the purchaser of the house vacant possession of the property in terms of the sale agreement. In the draft order submitted to the court by the applicant's legal representative during the hearing, the applicant requested that the respondent vacate the matrimonial home and move to a rental property selected by the applicant by no later than 17 October 2024. This suggested that the respondent and the minor children had to vacate the Stonehurst property no later than 17 October 2024 so that the applicant could give vacant possession of the property to the purchaser.

[25] In my view, if the Rule 43(6) order had been granted in the manner prayed for by the applicant, the respondent and the minor children would have been left on the street without a roof over their heads. The applicant did not source an alternative accommodation for the respondent and the minor children. What is very concerning is that the applicant knew as of 30 July 2024 that the house was sold. The applicant knew that the house in question was subject to a Rule 43 order. The offer to purchase the house was signed by the purchaser on 17 July 2024 and accepted by the applicant on 30 July 2024.

- [26] Notwithstanding this knowledge, the applicant sold the house without making the necessary arrangements for the accommodation of his wife and children. Simply put, the applicant did nothing to ensure that he provide alternative accommodation for the respondent and the minor children. In the Notice of Motion and in the draft order that was handed to court on the date of hearing, the applicant implored the court to vary the original order, which provided a secure, homely environment for the respondent and the children.
- [27] The Notice of Motion and the draft order did not specify where the respondent and the minor children would reside after the proposed draft order was granted. The applicant expected the respondent to enter into a lease agreement for a new accommodation within a period of six days before the registration of the house into the name of the purchaser. This request was made with the applicant's full knowledge that the respondent was unemployed.
- [28] In my view, the order sought by the applicant was at odds with the best interest of his children, especially considering that the respondent was unemployed and had no source of income. The respondent and the minor children are vulnerable, and the respondent would not immediately be able to obtain a lease in her name nor qualify for bridging finance to pay a rental deposit and related costs which the applicant wanted her to pay as she was unemployed. The children are vulnerable and incapable of supporting themselves or providing a roof over their heads.
- [29] The respondent sold the house which was subject to a court order without making any alternative accommodation available for the respondent and her children. The applicant brought this application on an urgent basis and sought an order that the respondent and the minor children effectively vacate the common home by no later than 17 October 2024 as he wanted to give vacant possession of the immovable property to the purchaser. The registration of transfer into the name of the purchaser was scheduled to take place on 17 October 2024. This urgent order was sought notwithstanding that there was no concrete arrangement at all for an alternative accommodation for the respondent and the minor children.
- [30] In my opinion, it would have been a different situation if the applicant had concluded a lease agreement and or had made alternative arrangements for the accommodation of his wife and the minor children. I must stress that this court has an inviolable duty over the applicant's minor children. The provisions of the Constitution pertaining to children have been the overriding consideration in court proceedings involving children. Now, even more so with the provisions set out in section 7 of the Children's Act 38 of 2005 which sets out the factors that must be considered when considering the best interest of the child. This court is the upper guardian of minor children.

- [31] Upon consideration of the application and the relief sought by the applicant, the court was of the view that granting an order with the potential to render both the respondent and the minor children homeless would constitute a failure in its obligation as the upper guardian of minor children. As the upper guardian of minor children, the court recognised its responsibility to protect the welfare and stability of the minor children, ensuring they are not subjected to precarious living conditions.
- [32] Importantly, when this matter was heard, it was six days prior to the registration of transfer of the property. The applicant sought an order that the respondent and the minor children vacate the property before 17 October
2024. Save for the prayer that the applicant would pay for the accommodation of the applicant and the minor children in the sum of R12 000; no arrangement had been made for the alternative accommodation of the respondent and the children.
- [33] The court expressed considerable concern regarding the applicant's financial commitments in relation to the maintenance of the respondent and the children. Although the applicant made an offer of R12,000 per month for their accommodation, this gesture was overshadowed by his history of noncompliance with his maintenance obligations. The applicant is currently in default, failing to meet the monthly maintenance payments as ordered by the court. As a result, he has accumulated substantial arrears totalling R189,900, highlighting his failure to fulfill his obligations to support his family adequately.
- [34] Given these circumstances, it became critical to ensure that the order the court makes guaranteed prompt payments from the applicant, so that the minor children and the respondent are not left destituted and adversely affected.
- [35] In his application, the applicant avers that he does not want to be contractually bound to a landlord when he is no longer obliged by a court order to pay for the respondent's accommodation. Ostensibly, the applicant did not make proper arrangements before selling the house, in the form of entering into a lease agreement for the alternative accommodation of his wife and children because he does not want to be contractually bound to a landlord when he is no longer obliged by a court order to pay for the respondent's accommodation.
- [36] The applicant's stance raises significant concerns. He appears to be shirking his responsibilities regarding his children. It is crucial to emphasise that the primary obligation of parents is to ensure the well-being of their children. Their maintenance, including the provision of accommodation, must prevail over all other expenses. As enshrined in sections 28(1)(b) and (c) of the Constitution, children have a right to family care or proper parental care. They have a right to basic nutrition, shelter, basic health care services and social services. The duty of support for minor children extends to accommodation, food, clothes, medical and dental attention, and other necessities of life on a scale that is in line with the social position, lifestyle, and financial resources of the parties.[4]

- [37] Children are regarded as wards of society, and it is an inherent responsibility of society to ensure their protection and well-being.[5] Importantly, the Bill of Rights in the South African Constitution is renowned for its extensive commitment to the protection of the rights of children in section 28(2), which emphatically underscores the paramountcy of the child's best interests.[6] Section 6(2)(a) of the Children's Act 38 of 2005 provides that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote, and fulfil the child's rights set out in the Bill of Rights and must respect the child's inherent dignity.[7]
- [38] In order to uphold and protect the fundamental right of minor children to secure adequate accommodation and shelter, as outlined in the Constitution, the court reached a decisive conclusion. The court ordered that the applicant make a deposit of R32,000, equivalent to two months' rent. This significant financial commitment was intended to enable the respondent, along with the minor children, to successfully locate and secure suitable rental housing that meets their needs for stability and safety.
- [39] I must also indicate that the sum of R16 000 ordered by the court as rental is consistent with the offer the applicant made through his legal representative in his email addressed to the respondent's legal representative. Having considered the rental accommodation of R19000 in Kirstenhof sought by the respondent, the R15000 offered by the applicant, and the various rental prices from Property24 attached to the applicant's founding affidavit, I determined that the sum of R16 000 was fair and reasonable under the circumstances for the accommodation of the respondent and her children.
- [40] It is common cause that the applicant is in arrears with his maintenance obligations. The court file is replete with various applications made by the respondent to enforce her maintenance claim against the applicant. According to the respondent, the applicant is indebted to her in the sum of R189 900 in respect of arrear maintenance. The applicant avers that he owes over R180 000 in maintenance arrears. On 18 July 2023, Maher AJ found the applicant guilty of contempt of court for failing to comply with the provisions of the Rule 43 order, specifically for failing to pay maintenance for his children and the respondent.
- [41] In addition, the court sentenced the applicant to 1000 hours of periodical imprisonment, from 6 pm on Friday until 6 am on Monday, which sentence was suspended for five years on condition that the applicant was not convicted of a similar offence committed during the period of suspension.
- [42] The applicant has repeatedly expressed his intention to pay his overdue maintenance once his house is sold. In paragraph 35 of his founding affidavit, he stated that he is in arrears regarding maintenance payments for his children and his wife. Additionally, the applicant mentioned that he had previously informed the respondent of his plan to use the proceeds from the sale of the house to settle his outstanding maintenance obligations. The house (erstwhile common home) has now been sold. The applicant was expected to receive a gross payment of R6500 000 from the sale of the property.

- [43] As I have stated previously, the maintenance of children, including accommodation, is the primary obligation of parents. Having considered the matter and the fact that the respondent was due to receive a substantial amount of money, I deemed it proper, and in the best interests of the children that before the respondent and the children can vacate the secure common home, the applicant must pay all the maintenance arrears due to the respondent so that the respondent and the children are not left destitute. I am mindful that the applicant made no such request in his application. However, the issue of arrear maintenance was raised in the papers. Furthermore, given that the respondent is currently unemployed, it is axiomatic that a considerable deposit had to be provided for rental purposes to mitigate associated risks.
- [44] Notably, as an upper guardian of minor children, the court had a duty to ensure that the best interests of the applicant's minor children are protected and that the applicant pays maintenance promptly, as ordered by the court on 3 April 2019. To this end, the court ordered that the respondent and the minor children must stay in the matrimonial home until the applicant pays the outstanding maintenance and provides a two-month deposit for new accommodation for the respondent and the children. This measure was intended to ensure that the children and the respondent do not find themselves destitute and without a place to live.
- [45] Lastly, in terms of the original Rule 43 order that the applicant sought to vary, in addition to the accommodation costs, the applicant was ordered to pay levies, water and rates, electricity account, Web Africa, telephone and internet account and Netflix. In the Rule 43(6) application, the applicant sought to pay Netflix and the internet Service provider. Consistent with the original Rule 43 order, the court believed that the applicant must pay monthly costs for Netflix and a stable internet connection for the children and the respondent.
- [46] To this end, the court considered the sum of R1200 fair and reasonable in the circumstances to cover these costs. A direct payment of R1200 would enable the respondent to source the appropriate service provider and personally pay Netflix's costs. I must add that the applicant has offered to pay these amounts in the Notice of Motion and the draft order that was handed to the court at the hearing of this matter. It was for this reason that an order in this respect was granted.

Costs

- [47] As far as the costs of the application are concerned, the court was satisfied that the applicant is a party who was seeking an indulgence of the court and had to pay the costs of the application. Furthermore, it was noted that the applicant brought this application on an urgent basis in instances where it was evident that the applicant was to be blamed for the urgency. The applicant knew of the sale of the property in July 2024 but only brought the Rule 43(6) application five days before the registration of the property. It was for this reason that I directed the applicant to pay the costs of the application.

[48] For all these reasons, the court granted an order as stated in paragraph 3 above.

LEKHULENI JD

JUDGE OF THE HIGH COURT

Appearances

For the Applicant's legal representative: Mr G Van Zyl

For the respondent legal representative: Ms Lawrance

[1] See Van Zyl L Handbook of the South African Law of Maintenance (2000) at 16. Jodaiken v Jodaiken 1978 1 SA 784 (W).

[2] Reneke v Reyneke 1990

(3) SA 927 (E).

[3] Oberholzer v Oberholzer 1947

(3) SA 294 (O); Young v Coleman 1956

(4) SA 213 (D).

[4] Du Toit v Du Toit 1991

(3) SA 856 (O) 860, 861.

[5] CVS v SV (18688/2022)

[2024] ZAWCHC 340 (25 October 2024) at para 29.

[6] See Heaton J and Kruger H South African Family Law 4 ed (2017) at 171.

[7] Section 9 of the Children's Act requires that the paramountcy of the child's best interests must apply in all matters

concerning a child's care, protection and wellbeing.

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