

SOUTH AFRICA / JUDGMENT

N v N (1373/2016) [2018] ZAECPHC 84 (22 November 2018) [2018] ZAECPHC 84

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

T Malusi

CASE / FILE NUMBER

1373/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION – PORT ELIZABETH)

Case

No: 1373/2016

In

the matter between:

J[...] M[...]

N[...]

Applicant

and

A[...]

N[...] (born W[...])

Respondent

JUDGMENT

MALUSI J:

[1] This an application for a variation of an order for payment of maintenance pendete lite as envisaged in Rule 43(6). The application is vigorously opposed by the respondent. For the sake of clarity the applicant will be referred to as the husband and the respondent as the wife.

[2] On 1 June 2017 an order in favour of the wife was issued by Beard AJ (the initial order) in the following terms:

“1. The respondent is ordered to pay maintenance to the applicant in the amount of R25 000.00 per month, the first payment to be made on 30 June 2017 and thereafter on or before the 1st day of each subsequent month.

2. The respondent is ordered to pay the monthly instalment on the BMW X1 motor vehicle together with the short term insurance premium and tracking device fees.
3. The respondent is ordered to retain the applicant as a member of his medical aid.
4. The respondent is ordered to make a contribution towards the applicant’s legal costs in the amount of R7 500.00 payable in monthly instalments of R1 500.00 per month, the first of which is to be paid on or before 30 June 2017.
5. The costs of this Rule 43 application are to be costs in the cause of the main action.”

In the notice of motion the husband sought to set aside the orders encapsulated in paragraphs 1 and 2 of the initial order.

- [3] Both parties applied for admission of supplementary affidavits. I granted the application as both affidavits dealt with relevant developments subsequent to the filing of their normal affidavits. The parties extensively referred to the affidavits filed in the initial application which proved cumbersome.
- [4] The wife applied that various portions of the husband’s affidavit be struck out as scandalous, vexatious and irrelevant. These related mostly to her previous relationships with other partners.
- [5] I find merit in the request. Despite his disavowal, it is clear that the averments have been made out of spite and serve no useful purpose. They have been made to embarrass the wife and are prejudicial to her. The contents of paragraphs 45, 46, 47, 48 and 52 are struck-out as irrelevant.
- [6] The wife took the preliminary point that the husband should not be heard by the court as he was in arrears with his maintenance payments in the sum of R275 000.00 as he has defaulted with his payments since January

2018. It was submitted that the right of the husband to be heard must be restricted until such time that he has purged his contempt of the initial order.[1]
- [7] In turn the husband contended that he is in dire financial circumstances which rendered him unable to comply with the initial order. He further averred that the wife had issued a writ of execution on 9 March 2018 which the Sheriff had executed on 17 May
2018. Due to the averment of an inability to pay which, if proven, would render the husband's conduct not to be wilful and the fact that the wife had resorted to equally effective means of securing compliance by the husband, I decided to hear the matter.
- [8] The purpose of Rule 43(6) has been stated in the following terms:
- "Rule 43(6) provides that the court may on the same procedure vary its decision in the event of a material change taking place in the circumstances of either party or a child or the contribution towards costs proving inadequate. The relevant words, in my view, are 'on the same procedure'. In other words, if there is a change in circumstances, a simple application in terms of Rule 43 can be made. If there is any other good cause for a variation of a maintenance order the maintenance debtor is not precluded from approaching the court for relief by way of ordinary motion proceedings. "* [2]
- [9] The husband contended that there had been a material change in the circumstances of both parties since the initial order was granted. The husband earns his income as a practising attorney with a single major client. He asserted that his once thriving practice had effectively collapsed due to the dominant client withholding instructions. He closed his office and released all his staff which left him practising from his home on his own without any professional assistance. He averred that his income in the form of fees and disbursements received after deduction of tax plummeted to an average of R134 000.00 per month for the financial year ending February 2018. He asserted that his monthly expenses for the same period amounted to approximately R284 000.00 per month. He owed the South African Revenue Services an amount of approximately R2 500 000.00. He averred that he was unable to service a R300 000.00 facility on his business bank account which caused it to lapse.
- [10] The husband asserted that he had been unable to pay for his daughter's accommodation and tuition fees at Stellenbosch University which caused her academic results not to be released at the end of the academic year in
2017. He further had not been able to pay the required fees at the start of the 2018 academic year and her daughter was on the verge of losing her accommodation as a result. The husband contended that to all intents and purposes, he is insolvent as his liabilities grossly exceeded his assets.
- [11] The husband asserted that the wife is involved in an intimate relationship and co-habits with her current partner in a luxurious triple level apartment situated in an eco-estate. The partner is a wealthy businessman who affords the wife a luxurious lifestyle of holiday safaris to the neighbouring states, 'week-end breakaways' to various deluxe holiday destinations in

the Republic, beauty products and cosmetic procedures, satisfying an expensive cycling hobby with pricey accoutrements and flights to various destinations for sporting events involving her partner. The extent of the respondent's newfound luxurious lifestyle was detailed in emotive terms in the founding affidavit which are not necessary to repeat.

- [12] It was common cause that the wife had not used the BMW X1 motor vehicle since 8 February 2018. It had remained parked at her sister's house in Pretoria. She contended that the reason she had not used the motor vehicle was that the licence had not been renewed. The husband averred that the motor vehicle had been licenced since May
2018. In any event, he alleged that the applicant had previously used the motor vehicle unlicensed. It was also common cause that the wife owned a Toyota bakkie which was kept by a mutual friend in Port Elizabeth while she resided in Pretoria. She contended that the Toyota bakkie was 23 years old, decrepit and had not been roadworthy for the previous 10 years.
- [13] The parties' son was involved in a motor vehicle collision on 11 July 2018 and fractured his L-2 vertebra in 3 places. He suffered an epidural haematoma of the spine which caused severe nerve damage. He was treated in hospital and a rehabilitation centre for about 8 weeks. He is presently recuperating at the matrimonial home. The husband indicated that the son's injury has placed a severe financial strain on him. Due to ongoing mechanical problems with his vehicle he contended that he finds himself without any vehicle as his son's vehicle was written off in the collision. This was a further reason for the BMW X1 to be returned to him, so it was asserted.
- [14] The wife disputed that their son's injury has placed any significant additional expenses on her husband. She indicated that her son has recovered remarkably well and is functioning totally independent. The wife indicated that she needs to use the BMW X1 as her partner only has one vehicle practically and economically suitable for daily use. Her partner's other vehicle has been modified for overland trips.
- [15] The wife vigorously disputed the alleged dire financial position of the husband. She challenged the veracity of the documents used to support the husband's averments. She denied the assertion of insolvency by the husband. She alleged that he is currently enjoying a lavish lifestyle without providing details.
- [16] The wife asserted that there has been a slight but not material change in her circumstances. She bemoaned that the initial order awarded her an amount substantially less than she claimed. She stated that the orders should not be varied.
- [17] It appears to me that the husband has overstated the extent of his financial difficulties. At the initial application he stated that he had a R100 000.00 monthly shortfall on his income. He now states it has increased to R150 000.00. This is despite his financial commitments being sharply reduced as his office closed down with all the professional and support staff having been released from employment. He is now conducting 'one-man home practice'

which presumably has sharply reduced his overhead costs. Be that as it may, it is clear that his income has drastically been reduced although it may not be to the extent alleged by him. His financial situation has been worsened by ill-considered expenses like a holiday trip to Europe and purchasing the Audi A1 motor vehicle for his son. On the facts of this matter it is not necessary for me to decide the extent of the husband's changed circumstances.

- [18] The wife took the erroneous view that her circumstances were irrelevant to the application for variation. It is trite that a party to a pending matrimonial matter is entitled to reasonable maintenance pendente lite depending upon the marital standard of living of the parties, the applicant's actual and reasonable requirements and the capacity of the respondent to meet such requirements.[3] The same procedure as in the initial application must be followed in assessing the parties' circumstances.
- [19] In my view there has been a material change in the circumstances of the wife. She has not seriously disputed that she is living a luxurious life with her current partner. The facts of this matter are quite unusual in respect of her improved circumstances. It appears to me that her current partner affords her a better standard of living than she had at the time she was living in the matrimonial home. Although her current partner has no legal obligation to maintain her the court cannot ignore the fact that he has afforded her a very comfortable lifestyle.
- [20] It is necessary to state that it has been held that public policy demands that a person who co-habits with another should not for that reason alone be barred from claiming maintenance from his or her spouse.[4] The orders I intend to issue in this matter are not based on the fact that the wife co-habits with her current partner which is perfectly acceptable in a Constitutional democracy. The court's decision is pivoted solely on the material and financial support she is currently receiving from her partner which constitutes a material change in her circumstances.
- [21] I agree with the submission by the husband's counsel that the maintenance order should not be set aside entirely but reduced. Counsel has submitted an amount of R15 000.00 as being fair and reasonable in the wife's circumstances. I find merit in the submission. I do not deem it necessary to provide a detailed breakdown of the wife's reasonable expenses. Suffice to say on the facts the aforesaid amount is sufficient for her maintenance in her current circumstances. I am satisfied the husband can afford to pay the aforesaid amount.
- [22] I am further satisfied that the husband has placed evidence before court that the wife does not need the BMW X1 motor vehicle. On the other hand it appears that the husband and the parties' son need to utilize the BMW X1 motor vehicle.
- [23] In the result and for the above reasons the following order will issue:

23.1 The order dated 1 June 2017 is hereby varied by deletion of paragraphs 1 and 2 thereof;

23.2 The applicant is ordered to pay maintenance to the respondent in the amount of R15 000.00 per month with effect from 30 November 2018 and thereafter on or before the first day of each subsequent month;

23.3 The applicant is permitted to take possession from the respondent of the BMW X1 motor vehicle with registration numbers and letters HLZ 723 EC five days from the date of this order;

23.4 The costs of this rule 43 application are to be costs in the cause of the main action.

T MALUSI

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv Gagliano instructed by

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Mount Pleasant

PORT ELIZABETH

For the Respondent: Adv Veldsman instructed by

Heine Ungerer Attorney

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Central

Heard on: 6

November 2018

Judgment

delivered: 22

November 2018

[1] Beyliefeltd v Redpath 1982 (1) SA 702 (AD).

[2] Jeans v Jeans 1977 (2) SA 703 (W) at 706G.

[3] Taute v Taute 1974 (2) SA 675 (E) at 676A.

[4] EH v SH 2012 (4) SA 164 SCA.

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