

SOUTH AFRICA / JUDGMENT

N v N (223/2017) [2019] ZAFSHC 101 (28 June 2019) [2019] ZAFSHC 101

COURT

Free State High Court, Bloemfontein

BEFORE

S.G.Meintjes

CASE / FILE NUMBER

223/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 223/2017

In

the matter between:

M[...]

N[...]

Plaintiff

and

C[...], G[...]

N[...]

Defendant

CORAM:

MEINTJES, AJ

HEARD

ON:

20 JUNE 2019

JUDGMENT

BY: MEINTJES, AJ

DELIVERED ON: 28 JUNE 2019

[1] This is an application by applicant as originally applied for, an order that:

- 1) the respondent be ordered to pay, within 3 days of this order, the amount of R5000.00 into the trust account of applicant's attorneys, as stated, and
- 2) the applicant is given leave, in the event that the respondent fails to comply with this order as prayed, to approach the Court on the same papers, supplemented if necessary, for an order declaring the respondent in contempt of a Court Order, dated 28 June 2018, and that the respondent be imprisoned for such period as this Court considers appropriate, and
- 3) costs, on attorney and client scale.

[2] The respondent opposes the application.

[3] It seems that the following are common cause facts in this matter:

3.1 That the marriage between the parties was dissolved by this Court on 28 June 2018, by way of a Decree of Divorce and that the Deed of Settlement between the parties was made an Order of Court.

3.2 This Court Order, amongst other stipulations, stipulating that the respondent must pay certain amounts (as stipulated) to the applicant, for some periods as stipulated.

3.3 The respondent was in default of a payment owing in respect of February 2019, which payment included the payment of R5000.00, which is the object of the relief claimed in prayer 1 of the Notice of Motion.

3.4 Payment of R5000.00 was subsequently made by the respondent on 25 March 2019, after service of this application. On 11 April 2019 applicant's attorney, via correspondence (attached) with respondent's attorney, indicated that in spite of the payment, applicant is not prepared to withdraw the application, unless the respondent pays the costs of applicant for the application on an attorney and client scale. The respondent, not prepared to fulfil this, then filed a Notice of Intention to Oppose on 12 April 2019.

[4] Notwithstanding this payment, and the fact that applicant did not amend the Notice of Motion to also cover apparently new non-compliance in respect of obligations in terms of the Court Order, which is not part of this application, applicant still seeks an order for contempt of court.

- [5] Instead, she has only filed a supplementary affidavit on 12 June 2019, stating therein the respondent's apparent subsequent non-compliance again of the said Court Order in respect of obligations which became due at the beginning of June 2019 and which are not part of this application.

Very illuminative is the fact that applicant failed to disclose in this supplementary affidavit that the said amount of R5000.00 was indeed already been paid. A fact only disclosed by the papers and Counsel's arguments.

- [6] An applicant must in his /her Notice of Motion set out the relief claimed (See Erasmus-Superior Court Practice, B1-42 A).

Applicant chose certain relief in the Notice of Motion and is accordingly bound thereto.

A Notice of Motion may be amended, but only in compliance with the rules relating to amendment. In *Devonia Shipping Limited v MV Luis (Yeoman Shipping Co Ltd)* 1994(2) SA 363(C) at 369 F-I it was said:

"...As in the case of the summons or a pleading in an action, (it) will always be allowed unless the application to amend is mala fide or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the Notice of Motion which it sought to amend was filed".

Here was no amendment. The relief sought by applicant, set out in prayers 1 and 2 of the Notice of Motion. Prayer 2, dependent upon respondent's non-compliance with the order which the Court might make in terms of prayer 1.

Prayer 1, indeed as contended by Counsel for respondent, unambiguous. Applicant claims an order compelling respondent to pay an amount of R5000.00 into a certain account within 3 days of the date of an order being granted. Prayer 2 stating that in the event that the respondent fails to comply with the order in terms of prayer 1, only then the applicant would be entitled to approach the Court on the same papers, or to be supplemented if necessary, for an order that the respondent be found in contempt of the Court Order, dated 28 June 2018.

- [7] Respondent effected payment of the amount of R5000.00 prior to the hearing of this application. For the purposes of this application, there seems to be no disobedience of the Court Order dated 28 June 2018 and the applicant therefor not entitled to the relief sought in prayer 2, merely based on a supplementary affidavit, mentioning non-compliance of the Court Order dated 28 June 2018, and which non-compliance only occurred as recently as June 2019, postdating the application.

- [8] The only outstanding issue then remains costs.

Applicant's attorney submitted that applicant is entitled to costs of this application on a scale as between attorney and client. The applicant was unsuccessful in this application, the manner in which the application was proceeded and dealt with, highly undesirable and not according to the rules. Applicant accordingly not entitled to such costs. She was however entitled to her costs on a party and party basis when the amount of R5000.00 was paid before the application was heard.

[9] The following order is hereby made:

9.1 The applicant's application is dismissed.

9.2 The respondent is to pay the costs of the application on an unopposed basis until 11 April 2019.

9.3 The applicant is to pay the costs of the opposition of the application beyond 11 April 2019.

S.G.MEINTJES, AJ

On behalf of plaintiff : Mr R.G.Green

Instructed by : Green Attorneys

BLOEMFONTEIN

On behalf of defendant : Adv.M.C.Louw

Instructed by : Azar Attorneys

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