

SOUTH AFRICA / JUDGMENT

R.C v M.C (5655/2024) [2024] ZANWHC 302 (28 November 2024)

[2024] ZANWHC 302

COURT

North West High Court, Mafikeng

BEFORE

WESSELS

CASE / FILE NUMBER

5655/2024

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IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER:5655/2024

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to Regional Magistrates: YES / NO

In the matter between:

C[...]:

R[...]

L[...]

APPLICANT

and

C[...]: M[...]

A[...]

RESPONDENT

Coram: WESSELS AJ

Date: 28 November 2024

ORDER

i.

The application in terms of rule 43(6) is dismissed.

ii.

Applicant is ordered to pay the party and party costs of the application on Scale

B.

JUDGMENT

Background

[1] The applicant and respondent are married to each other. From this union, three minor children were born being a boy (6 years of age), and two girls (aged 2 years and 1 year and 5 months

respectively).

[2] Following a breakdown of the marriage relationship, the respondent deserted the matrimonial residence situated on a farm in the district of Sannieshof in the Northwest Province and moved to Richards Bay in KwaZulu-Natal, where the respondent's family resides. The respondent took the minor children with her.

The Rule 43 application

[3] Following the respondent's removal of the children from the matrimonial residence, the applicant brought an urgent Rule 43 application ("the rule 43 application") requesting relief that can be summarised as follows:

3.1. The restoration of the status quo in respect of the applicant's parental rights and to remain the primary caregiver of the minor children.

3.2. That the SAPS be authorised to ensure the return of the minor children to the applicant in the event of the respondent's refusal to return the children.

3.3. The Office of the Family Advocate to lodge an investigation to determine, inter alia, the best interests of the minor children in relation to their primary residence.

3.4. The applicant to exercise contact with the minor children under the supervision of a social worker, on Mondays, Wednesdays and Fridays from 14:00 to 17:00 and Saturdays from 09:00 to 12:00.

3.5. Until determined otherwise, the respondent be prohibited from removing the children from the jurisdiction of this Court.

[4] The respondent opposed the rule 43 application and brought a counter-application. On 13 November 2024 the rule 43 application served before Morei AJ who dismissed the rule 43 application and granted relief broadly similar to that requested in the respondent's counter-application ("the rule 43 order"). The rule 43 order was granted in the following terms:

"1. The application is dismissed.

2. The Respondent retain primary care and residence of these children subject to the right of reasonable access by the Applicant, pending reports by the Family Advocate about the suitability of each of the parties and pending the finalization of the divorce action.
3. The office of the Family Advocate is ordered to investigate the minor children's interest, with specific reference to the shared parental responsibilities and rights of the minor children, including primary care and residence, care and contact, and the scope and ambit in terms of which the Applicant and Respondent should exercise their parental responsibilities and rights.
4. Upon finalisation of the report by the Family Advocate, to serve the Report on the parties and file same with the Court.
5. The Applicant is ordered to pay maintenance pendente lite in the amount of R33 203.13 per month to the Respondent.
6. The Applicant is ordered to pay the instalment of the Ford Eco-Sport vehicle and the renewal of the license disc over the vehicle in the possession of the Respondent.
7. The Applicant is ordered to pay the amount of R80 000.00 as contribution to the legal fees of the Respondent which amount is payable within 7 days from date of this order.
8. Costs be costs in the cause."

[5] Dissatisfied with the rule 43 order, the applicant brought a second urgent application, this time in terms of the provisions of rule 43(6). In the rule 43(6) application, the applicant stated that his dissatisfaction with the rule 43 order lies in the fact that the reasoning and findings in the rule 43 judgment favour him but the rule 43 order is "in direct conflict with the reasons and finding of the judgment".

Urgency

- [6] The rule 43(6) application intimately concerns the interests of minor children. Such applications are invariably urgent in nature and should be heard on a preferrent basis. There is no doubt that this application should be heard in terms of the provisions of Rule 6(12) and treated as one of urgency.

Rule 43(6) application

- [7] In the rule 43(6) application, the applicant sought the exact relief he sought in the rule 43 application, save for requesting an additional order to the effect that the rule 43 order be deleted and replaced with the relief sought in the rule 43(6) application.
- [8] The relief sought by the applicant [in terms of rule 43(6)] seems to be a novel issue. Counsel for either of the parties did not bring any authority on the point under the attention of this Court and neither did this Court's own research uncover any such authority.
- [9] As a point of departure, it is apposite to address the nature of the relief that the applicant pursues. Considering that the applicant claims the deletion of an existing order and that it be replaced with another, the form of the relief sought is akin to either that of an appeal or a review. Such relief can not be granted without a reconsideration of the Rule 43 application .
- [10] In addition to addressing this application to the Registrar and the respondent, the applicant took the very unconventional step of also addressing the rule 43(6) application directly to Morei AJ, who granted the rule 43 order. This step is reminiscent of review proceedings of a Magistrate's Court order. The inclusion of Morei AJ in the application as a "party" to be notified, suggests that the applicant regards this application to be a review (of sorts). In the matter of Tikly and Others v Johannes NO and Others[1], the court provided a concise definition of appeal and review processes. The court defined an appeal process as follows:[2]

"an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong"

- [11] A review process was defined as follows:[3]

"a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly"

- [12] The relief that a court may grant in the variation of an order granted in terms of rule 43, finds its basis in the provisions of rule 43(6). Rule 43(6) determines that a court may vary its decision in the event of a material change occurring in the circumstances of either parent or child. Subrule 6 reads as follows:

"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."

[13] The relief the applicant requests in this application is dissimilar from the relief provided for in rule 43(6), as the applicant does not request a variation of the rule 43 order but a complete substitution

thereof.

[14] Moreover, the applicant did not bring this application in terms of a material change in circumstances, but rather in terms of an expansive interpretation of rule 43(6), to remedy a patently unjust and erroneous order where no changed circumstances exist. This approach has its origins in the Constitutional Court decision of *S v S and Another*[4]. Resultantly, there is no new evidence before this Court to set this application apart from the rule 43 application.

[15] The issue of appealability of a rule 43 order served before the Constitutional Court in *S v S*[5]. To this extent, the constitutionality of Section 16(3) of the Superior Courts Act[6] had to be decided and at paragraph 43 of the judgment, the Constitutional Court found as follows:

“Bearing this in mind, the question is whether section 16(3), by denying disgruntled rule 43 litigants the right to appeal, bears a rational connection to a legitimate statutory purpose. The purpose of rule 43 is to provide a speedy and inexpensive remedy, primarily for the benefit of women and children. The rationale for the non-appealability is to prevent delays and curtail costs. To allow an appeal process would contradict the objective of rule 43 orders. The statutory differentiation between those litigants who can appeal and those who are precluded from doing so by section 16(3) clearly bears a rational connection to a legitimate government purpose. Moreover, there is no differentiation between the individual litigants in a rule 43 dispute. They both bear the same section 16(3) encumbrance.”

[16] The judgment in *S v S*[7] is clear to the extent that it definitively ruled that a rule 43 order is not appealable. Although the Constitutional Court stated in paragraph 53[8] of the judgment that rule 43(6) was not before it for consideration, it nonetheless in conclusion referred to an expansive interpretation

of rule 43(6) to remedy a patently unjust and erroneous order. In paragraph 58 of this judgment[9] the following was stated:

“There may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence to the rules is at variance with the interests of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice.”

[17] This judgment confers a discretion on this Court to remedy a patently

unjust and erroneous order. The scope and execution of this discretion should however be carefully considered and applied.

[18] To delete and replace an existing rule 43 order, without new evidence, supposes a discretion in the widest sense. A wide discretion to interfere with the rule 43 order has the propensity to result in a re-hearing on the same grounds akin to an appeal (or a review). To allow a High Court consisting of one judge to hear

its own orders on appeal or review, militates against firmly established procedural principles. Not only are both the aforementioned avenues of course not available to this Court, but the exercise of this wide discretion in this sense would lead to absurd results.

[19] Even if the reasoning in the judgment of Morei AJ might be susceptible to some scrutiny, it does not automatically follow that the order granted is patently unjust or erroneous.

[20] Resultantly, there exists no basis for interfering with the rule 43 order as it currently stands.

[21] This Court's unwillingness to interfere with the rule 43 order at this stage does not mean that the applicant is left without a remedy. The rule 43 order makes provision for an investigation by the Family Advocate of inter alia the primary care and residence of the minor children.

[22] Upon the conclusion of the investigation by the family advocate (or any subsequent relevant facts that might come to the fore), the applicant retains the right to approach this Court in terms of the provisions of rule 43(6) for a variation of the rule 43 order should it be in the best interest of the minor children.

Order

[23] Resultantly, the following order is made:

- i. The application in terms of rule 43(6) is dismissed.
- ii. Applicant is ordered to pay the party and party costs of the application on scale B.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Date of hearing : 22 November 2024

Date of judgment : 28 November 2024

APPEARANCES

Counsel for Applicant : Adv L van der Westhuizen

Instructed by

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Mahikeng

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[1] Tikly and Others v Johannes NO and Others 1963

[2] SA 588 (T)

[2] Tikly supra footnote 1 at 590H-591A.

[3] Tikly and Others v Johannes NO and Others, supra footnote 1 at 590H-591A

[4] S v S and Another [2019] ZACC 22

[5] Supra, footnote 1

[6] Superior Courts Act 10 of 2013

[7] Supra, footnote 1

[8] 'Rule 43 may be wanting in certain respects and there may well be grounds for a review of rule 43(6) in the future to include not only changed circumstances but also "exceptional circumstances". However, this is not a decision this Court is called upon to make.'

[9] Supra, footnote 1

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