

SOUTH AFRICA / JUDGMENT

Yazbeek and Another v du Plessis and Others (2170/2020) [2020] ZAECHGC 147 (1 December 2020) [2020] ZAECHGC 147

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

2170/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

EASTERN CAPE DIVISION,

GRAHAMSTOWN

CASE

NO: 2170/2020

Date

heard: 19

November 2020

Date

delivered: 01

December 2020

In the matter between: LUKE
ANTHONY YAZBEK
First
Applicant
LUKE
ANTHONY YAZBEK NOMINE OFFICIO
ON
BEHALF OF B[...] L[...] Y[...]
Second
Applicant
and
LOUISE
ANN DU PLESSIS
First
Respondent
JULIANA
MARY YAZBEK
Second
Respondent
ROSEMARY
ANNE SHUTZER-WEISSMANN
Third
Respondent
MATTHEW
ANTHONY YAZBEK
Fourth
Respondent

JUDGMENT

LOWE, J

INTRODUCTION

- [1] This matter was launched on 30 October 2020, as one of urgency, First Applicant claiming for himself and also bringing the application for his minor daughter, Second Applicant, as father and co-holder of parental rights.
- [2] Applicants sought maintenance orders pending the “final determination” of the action proceedings in Case No.: 1572/2020 in which First Applicant challenges the latest Will of his deceased father, Mark Yazbek seeking that an earlier Will be declared operative.
- [3] The maintenance sought is respectively R15,000 per month (which includes a maintenance obligation of First Applicant to Second Applicant of R3,800 per month) and R6,600 per month, payable from 1 December 2020 onwards.

- [4] Extraordinarily the papers run to 394 pages, inclusive of Respondents' Application to strike out much of the founding affidavit and many annexures.
- [5] Whilst there are four Respondents, relief is only sought against Second Respondent, who is First Applicant's mother and Second Applicant's grandmother.
- [6] First Applicant is the main deponent to the founding papers whilst First, Third and Fourth Respondents are his siblings.
- [7] Second Respondent was married to the late Mark Yazbek at the time of his death being First Applicant's father, and Second Applicant's grandfather.
- [8] As will be appreciated then this matter pitches sibling against sibling and son and granddaughter against mother and grandmother. A family feud, if ever there was one. First Applicant against the Respondents with Second Applicant sadly thrown into the mix for reasons that are impossible to fathom.
- [9] First Applicant's mother, Second Respondent, is the main replying deponent supported by confirmatory affidavits from Fourth Respondent and one Gary Stirk, both Attorneys and partners in the firm Stirk Yazbek Attorneys, with First Respondent similarly in support.
- [10] In fact notwithstanding the extreme length of the papers and their prolixity, the issues can be reduced to the following:
 - (a) The relationship between Applicants and Second Respondent.
 - (b) Applicants' factual need to be supported and their respective degrees of relationships.
 - (c) Adequate resources on the part of the person called upon to support, being Second Respondent.
 - (d) The issue of a closer relative if applicable.
 - (e) The quantum of Applicants' claims and the basis thereof, necessities for Second Applicant and necessities for First Applicant.
- [11] The above crisp issues seem to have entirely escaped First Applicant, who set off on an absurdly lengthy and irrelevant, prolix founding affidavit, 58 pages in length (182 paragraphs) and 222 pages of annexures (52 documents in all).
- [12] There were two supporting affidavits.
- [13] The answering affidavit is 33 pages in length with 12 annexures and 4 supporting affidavits.
- [14] The reply went to 24 pages and 4 more annexures.
- [15] To say the least and from the get go this matter was entirely out of hand and traversed considerable irrelevant material for reasons which entirely escape me.

APPLICATION TO STRIKE OUT

[16] All Respondents oppose the main application though relief was sought only against Second Respondent.

[17] An application was launched to strike out much of the founding affidavit and many annexures, on the basis that the offending material was irrelevant, the disclosure (in instances) of settlement negotiations, hearsay, irrelevant and vexatious.

[18] The application seeks to strike out as follows:

“The Respondents pray that the following paragraphs be struck from Applicants’ founding affidavit:

1. paragraph 9 thereof in and it constitutes disclosure of Rule 41A mediation proceeding outcomes, which is impermissible;
2. paragraphs 21, 22 and 23 thereof, as the contents thereof does not contribute in any way to the decision of the issues before Court;
3. paragraphs 25, 26, 27, 28 and 29 thereof as the contents of these paragraphs similarly does not contribute in any way to the resolution of the issue before Court;
4. paragraph 31 of the founding affidavit as the identity of the Executor is entirely irrelevant and does not contribute in any way to the issues before Court;
5. paragraphs 33 to 56 inclusive – as the enumeration of details relevant to the late Mr Yazbek’s negotiations with the Cape Law Society, discussions involving attorneys Moolman, meetings held with parties at the Cape Law Society, copies of the late Mr Yazbek’s will, correspondence addressed to the Law Society, and all other issues raised in these paragraphs are irrelevant and do not contribute in any way to the resolution of the issues before Court;
6. paragraphs 57, 58, 59, 60 and 61 thereof are irrelevant and do not contribute in any way to the resolution of the issues before Court;
7. paragraphs 65 to 70 inclusive in that the contents of these paragraphs are similarly irrelevant and do not contribute in any way to the resolution of the issues before Court;
8. paragraphs 74 to 81 inclusive in that the contents of these paragraphs are vexatious in suggesting correspondence by the Fourth Respondent was part of a “Stalingrad strategy” (whatever that may be) and allegations regarding lack of water on the farm are irrelevant, and do not contribute in any way to the resolution of the issues before Court;
9. paragraphs 88 to 96 inclusive in that the allegations regarding the identity of the attorney handling the file, the postponement of the CCMA proceedings and speculation of Applicants’ prospects of success in those proceeding are irrelevant and do not contribute in any way to the resolution of any issues before Court;

10. paragraphs 97 to 102 inclusive in that the allegations regarding the debt owned by the Applicant, which indebtedness he denies, is accordingly irrelevant and does not contribute in any way to the issues before Court;
11. paragraphs 111, 112 and 113 of the founding affidavit relevant to farm staff are irrelevant and do not contribute in any way to the resolution of the issues before Court;
12. paragraphs 121 to 125 of the founding affidavit, in that the paragraphs are irrelevant and do not contribute in any way to the resolution of the issues before this Court;
13. paragraphs 150, 151, 152 and 153 of the founding affidavit in that the paragraphs relevant to the farming loss and the allegations regarding poultry are irrelevant and do not contribute in any way to the issues before this Court;
14. the striking out of Annexures “LA2”, “LA3”, “LA4”, “LA5”, “LA6”, “LA7”, “LA8”, “LA9”, “LA10”, “LA11”, “LA12”, “LA13”, “LA14”,
“LA15”, “LA16”, “LA17”, “LA20”, “LA21”, “LA22”, “LA23”, “LA24”, “LA25”, “LA33”, “LA34”,
“LA37” and “LA38, as being annexures to the aforementioned irrelevant paragraphs and allegations which do not contribute in any way to the resolution of any issues before Court.”

[19] Such striking out is in terms of Rule 6(15) referring to scandalous, vexatious, irrelevant matter. This extends to inadmissible matter, argument and attacks on credibility.

[20] To be struck the matter must fall into one or other category referred to above and the Court must be satisfied that if not struck the party seeking such relief would be prejudiced[1].

[21] The last sentence of Rule 6(15) puts substance over form as to prejudice. This promotes the orderly ventilation of the issues and focus on the real issues, avoiding prolixity and irrelevancies that unduly burden the record.

[22] This is just such a case and there can be no doubt that the necessary elements of striking out are well demonstrated in respect of the paragraphs referred to in the order hereafter as being well within one or other of the objectionable grounds referred to.

[23] In the circumstances, the paragraphs and annexures referred to in the order are struck out.

THE RELEVANT FACTS

[24] Applicants are the son and granddaughter of Second Respondent, by blood relationship.

[25] The Application is premised upon a maintenance claim by both for maintenance from Second Respondent.

[26] First Applicant is locked in battle in an action disputing the Will of Mark Yazbek, late husband and father as set out above, against mother and siblings and 5 other Defendants. This is hotly defended.

- [27] The real issue is that First Applicant maintains he would have inherited the farming properties of Queens Court Farming operation in terms of an earlier Will but in the final Will was disinherited, his mother (Second Respondent) being the sole beneficiary. He alleges the incapacity of the late Mark Yazbek, in respect of the final will.
- [28] In 2001 First Applicant took over management of Queens Court Farms, a family business, as employee and has since been so employed until discharge on 31 November 2020.
- [29] He previously had a good relationship with First and Second Respondents.
- [30] Following threats of litigation in respect of the Will and during July 2020 the following was addressed to First Appellant by Attorney Stirk on behalf of the “Landowner of Queens Court Farms”:

“She also demands that your client immediately deliver the stock books to her as they have been prepared for at least the three-year period prior thereto. She reserves her right to inspect her premises as well as her livestock which she fears are under threat bearing in mind that she no longer trusts your client to take care of her assets. The threat of litigation and the demands made from our client have severely diminished any trust relationship in regard to your client’s occupation of our client’s property as well as your client’s duties as her employee.”

Your client is forthwith advised that he no longer has any authority on her behalf to transact with regard to the care and management of livestock, equipment or implements. He is not to transact with any creditors and he is not to make any decisions regarding any of our client’s assets. Anything to do with the management of our client’s property and assets must be communicated to our offices.”

- [31] On 28 July 2020 Fourth Respondent, for Stirk Yazbek, asserted that First Applicant was Second Respondent’s employer and threatened him as potentially committing a dismissible offence.
- [32] A firm of attorneys, Sharp Attorneys, then acting for Second and First Respondents, terminated First Applicant’s employment, in writing, on 3 August 2020.
- [33] This issue was referred to the CCMA on 5 August 2020.
- [34] This labour dispute has been referred to arbitration with no date as yet.
- [35] On 4 August 2020 Attorneys Stirk Yazbek demanded payment of R371,995.41 from First Applicant to Second Respondent within 10 days. This is now the subject matter of a further litigation claim as of 11 August 2020.
- [36] On 18 August 2020 the return of the Queens Court Landcruiser in First Applicant’s possession was demanded, but resisted.
- [37] The livestock on the farms was to be sold at Second Respondent’s instance. Sale of the farms was threatened and two were apparently sold.

- [38] First Applicant's Wi-fi was cancelled limiting his usual internet access relevant to much of his communications.
- [39] On 10 September 2020 First Applicant's Attorneys drew attention to First Applicant's inability to pay maintenance for Second Applicant.
- [40] First Applicant was informed that he could not farm the farm chickens and the electricity was terminated, then later reconnected, the account being paid.
- [41] On 23 September 2020 First Applicant, through his attorneys, demanded "interim maintenance" from Second Respondent of R15,000.00 for himself and R6,600.00 for Second Applicant, pointing out that his salary would end on the last day of November 2020 and that he could not supplement his income from hunting, wood cutting or other farm activities due to the instructions he had received prohibiting same.
- [42] Stirk Yazbek for Second Respondent sought a schedule of income and expenditure and the contribution made by First Applicant's ex-wife to Second Applicant and by her maternal grandfather.
- [43] The schedule sought was provided on 30 September 2020.
- [44] First Applicant set out in his affidavit his previous earnings from wood, aloes, hunting and chickens, none of which were now available to him, being all farm related and now prohibited.
- [45] First Applicant and his daughter's expenses are detailed as follows:

"FIRST APPLICANT'S LIST OF EXPENSES"

1. Groceries / food / personal care (including hair care / cosmetics etc) R2 000.00 2. Household Expenditure Telephone R700.00 Domestic Worker R2 500.00 3. Clothing Clothes and shoes R500.00 4. Transport Fuel R2 500.00 5. Medical Expenditure Medication R400.00 Other medical expenditure (hospital plan) R2 900.00 6. Insurance Annuity R1 080.00 7. Pets Food R600.00 8. Other Maintenance for daughter in terms of court order R3 800.00 TOTAL R16 980.00

SECOND APPLICANT'S LIST OF EXPENSES

Bridget's monthly needs, catered for by me, are:

1. Household Expenditure Telephone R500.00 2. Clothing Clothes and shoes R500.00 School uniforms R500.00 Sports Clothes R200.00 3. Educational Expenditure School Fees R3 000.00 Books / Stationery R200.00 4. Medical Expenditure Doctor / dentist / etc. R570.00 5. Pocket money / allowance R600.00 TOTAL R6 070.00"
- [46] Second Respondent's financial position is luxurious, it being sufficient to state that the deceased's estate M Yazbek is in the sum of R26,060,642.59 and it was conceded in argument that her ability to pay is not contested.

[47] Whilst First Applicant still lives on the farm and uses the Landcruiser vehicle though he has been informed that he must pay rental for the farm residence of R2,000.00 per month and that the Landcruiser insurance has been cancelled.

[48] He says he will be without funds at the end of November 2020.

THE RESPONSE

[49] Much of the above is in fact common cause save for the following where this contradicts the above.

[50] First Applicant's locus standi in respect of Second Applicant is contested, this being, so it is said, her mother's claim. There is no merit in this whatsoever the parties being co-holder of parental rights including guardianship in terms of the settlement agreement part of the Court order and Section 18 of the Children's Act.

[51] First Applicant is 45 and divorced.

[52] Second Respondent, the maternal grandparent, is able to contribute to Second Applicant's maintenance.

[53] The "Trust Relationship" between First Applicant and Second Respondent has broken down, subsequent to the Will litigation, and he has been dismissed from his longstanding employment.

[54] He resides at the farm despite being asked to leave, but Respondents contend "he has no business on [my] property following his dismissal".

[55] It had to be conceded in argument for Respondents that as an effective trespasser on the property he certainly could earn no income from wood sales, aloe sales, hunting, bees or chicken thereon.

[56] His remaining income earning prospects are suggested speculatively as, insurance sales (as he is a qualified salesman of insurance) a music teacher (he having a music diploma), the sale of water pumps, and from chickens.

[57] In reply it is clear that there are presently good and bona fide reasons as to why First Applicant does not currently earn from these sources, mostly highly specialised, and with no immediate prospect of success in obtaining work in the areas suggested for reasons clearly set out in the papers which cannot presently be gainsaid. There can be no doubt on a proper construction of the papers as per the Plascon approach that First Applicant's financial position is, at least in the short term, precarious.

[58] He does however receive a monthly sum of R1,720.00 from Griffin Mews.

[59] His salary from the farm employment was R10,018.94 which falls away at the end of November 2020 as also the benefit of residence and vehicle.

- [60] That he owns a Toyota Hilux vehicle valued at R30,000.00 is effectively irrelevant.
- [61] Respondents deal with the list of his monthly needs. I accept certain of these criticisms as his claim is limited to necessities and the result is set out below. I have deleted the housekeeper payment, annuities and pet food. The remaining total is R12,800.00, inclusive of maintenance he pays for his daughter in terms of the divorce order, of R3,800 per month.
- [62] The criticism that he smokes and drinks beer said to be “important expenses” are to be disregarded as the claims above are more than reasonable and this exercise is simply an intelligent assessment of his needs as to necessities.
- [63] The expenses for B[...] are criticized as excessive and pocket money said to be a “luxury”. I do not agree herewith at all. Against her entitlement to support as to necessities, to be seen against Second Respondent’s access to Millions of Rand, the criticisms are unfortunate and fall to be rejected.
- [64] If she has a claim therefore in principal, these total R6,070.00.
- [65] It is not seriously denied that B[...]’s mother cannot contribute to her support. Reference is made however to her maternal grandfather.

THE LEGAL POSITION

- [66] Firstly it is clear that First Applicant indeed has locus standi to sue for B[...] as set out above
- [67] B[...]’s best interests are of paramount consideration constitutionally (Constitution Section 28 (2)). This extends to the duty of support.
- [68] The duty falls on the nearer relative before the more remote one[2].
- [69] The duty is always reciprocal.
- [70] Maintenance is a wide concept which embraces many things, food, housing, clothing, medical care amongst others, and for children, education – this being a matter of “intelligent assessment” not meticulous calculation[3]. The measure of support varies in the circumstances depending on the means available.
- [71] The parental duty of support ends when the child becomes self-supporting. This revives however if the child again ceases to be self-supporting for good reason[4].
- [72] A major is not usually supported on as lavish a scale as that of a minor[5]. There is a reciprocal duty of support between grandchildren and grandparents[6].
- [73] Whilst B[...] clearly has a claim against maternal and paternal grandparents – I accept on the papers and for the purposes of this application, that the maternal grandparents have insufficient funds to be called upon. In any event Respondents in their Heads of Argument suggested no authority providing that this was a bar to a claim against a grandparent who will be able to afford same and argued no more than that is was prejudicial for Second Respondent to be “singled out”, a submission which rings hollow in the light of her vast

access to funds.

THE RESULT:

- [74] It follows from the above that each Applicant is properly before me and it is only the question of the quantum of the claim and the need therefor that is in issue. The argument that Applicants' claims are premature is such as to be rejected. It was clear, when this application was launched, that it would take some time to reach a resolution of the dispute, First Applicant's income was to cease on the probabilities at the end of November 2020 and to proceed thus was reasonable.
- [75] First Applicant, it was argued, is an experienced stockman and qualified musician and has not shown that he cannot earn or work as such. It was further argued that he has taken no steps to find paying employment.
- [76] This falls to be rejected as thing stand presently. The suggested alternative employment in the current economic climate and Covid 19 is most unlikely to be achieved in the near future. Whilst First Applicant is not by any means relieved from a duty to make every effort to find work and earn an income, there is no doubt on the probabilities that he is not immediately able to do so.
- [77] Indeed in this regard Respondents have been hoist on their own petard having ensured First Applicant's immediate inability to be employed on the farm and earn an income from salary or farm related projects. It is further even suggested that he is untrustworthy personally, and as an employee, which will do his employment prospects no good at all, this all being a matter now of public knowledge through this litigation.
- [78] In the result I find that First Applicant has demonstrated the necessary claim for the sum of R12,800.00 per month which must be reduced by the R1,726.00 per month received from Griffin Mews, being a total of R11,080.00 per month of which R3,800.00 must go to B[...]’s maintenance payment.
- [79] In respect of B[...], her claim is easily established at R6, 070.00 per month and goes well beyond the tender reluctantly made during argument[7]. The tender was a step forward and is noted, being given after I stood the matter down for the parties to reconsider their attitude to her claim.
- [80] Having regard to the deep mistrust between the litigants, I order this sum of R6,070.00 to be paid monthly to B[...]’s mother for B[...]’s maintenance.
- [81] The sums referred to are to be paid monthly on the 1st day of each month commencing on 1 December 2020 and monthly on the 1st day thereafter.

- [82] As to the striking out application, this is successful as to paragraphs 21, 22, 23, 25-29, 31, 33-44, 46-60, 69-70, 76-81, 88-89, 91-92, 111-113, 121-125 and related annexures referred to therein. All these allegations and facts fall to be struck on the basis already enumerated above.
- [83] As to the costs of the striking out, I order each party to pay their own costs. I do so as part of the exercise of my discretion in this regard. To order Applicants to pay these costs relevant to Second Respondent would be such as to effectively deprive them of any maintenance herefrom and would not be just and equitable. This kind of litigation is unfortunate but sadly Applicant had no alternative, in the circumstances and whilst his affidavit was vastly prolix I do not consider this alone in these circumstances to justify a costs order against him.
- [84] The parties have entered upon unfortunate litigation flowing from recently established bad blood. This will do no one any good and probably much harm. Family money will be wasted on legal costs when cool heads and responsible conduct could avoid same. This I also take into account in the costs order above.
- [85] Finally in respect of the costs of the main application, Applicants have been successful and costs must follow the result.

ORDER

[86] Accordingly, it is ordered that:

1. Second Respondent is to make payment to:
 - 1.1 First Applicant in the sum of R11,080.00 per month.
 - 1.2 Second Applicant in the sum of R6,070.00 per month, payable to her mother on her behalf.
2. The payments above are to commence on 1 December 2020, and monthly thereafter on the first day of the month, and endure until the final determination of Case No.: 1572/2020 in the Eastern Cape Division of the High Court and the finalization of such appeals as may eventuate therefrom.
3. Paragraphs 21, 22, 23, 25-29, 31, 33-44, 46-60, 69-70, 76-81, 88-89, 91-92, 111-113, 121-125 and relevant annexures referred to therein, of the founding affidavit are struck out, each party to pay their own costs in respect of the striking out application. The remaining paragraphs, annexures and reply remain unaffected, including the supporting affidavits.
4. Second Respondent with First, Third and Fourth Respondent are to pay Applicants' costs in the main application, jointly and severally the one paying the other to be absolved.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances:

Obo Applicants:

Adv T Miller

Instructed by:

Wheeldon Rushmere & Cole Inc., Grahamstown

Obo Respondents:

Adv S H Cole

Stirk Yazbek Attorneys, East London

c/o Whitesides Attorneys, Grahamstown

[1] Beinash v Wixley [1997] ZASCA 32; 1997

(3) SA 721 (SCA) 733B; University of the OFS v Afriforum 2017

(4) SA 283 (SCA) 296 E; Goldfields v Motley Rice CCC 2015

(4) SA 299 GJ 325/6

[2] Ex Parte Pienaar 1964

(1) SA 600 (T) 606.

[3] Cullen v Haupt 1988

(4) SA 39 (C) 41

[4] Hofman v Herden 1982

(2) SA 274 (T); Gliksman v Talekiacsky 1955

(4) SA 468 (W) 470; Ex Parte Jacobs 1982

(2) SA 276 (O) 272.

[5] Gliksman 470; Hoffman 275.

[6] Barnard v Miller 1963

(4) SA 426 (C) 427.

[7] “The Second Respondent undertakes, with effect from 1 January 2021, to pay the reasonable maintenance requirements of the Second Applicant including her school fees, medical costs and invoices of service providers pertaining to her care as supplied by her mother Kerry-Lee Rudolph, such payments to be made directly to the service providers concerned, subject to a maximum of R5 000.00 (FIVE THOUSAND RAND) per month, with such undertaking to remain in place pending the First Applicant attaining employment.”

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