

SOUTH AFRICA / JUDGMENT

Z.E v N.E and Another (10914/2022) [2023] ZAWCHC 21 (24 January 2023)

[2023] ZAWCHC 21

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

10914/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

Case

number: 10914/2022

In

the matter between:

Z[...]
E[...]
Applicant
and
N[...]
E[...]
First respondent
CHAPMANS
SEAFOOD COMPANY (PTY) LTD
Second
respondent

JUDGMENT

DELIVERED ON 24 JANUARY 2023

VAN ZYL AJ:

Introduction

1. This matter served before me on 17 January 2023 on the urgent roll. I indicated to the parties that I would give an order and short reasons in due course after having considered the issues raised.
2. These proceedings essentially entail:
 - 2.1. a Rule 30(1) application for the setting aside as an irregular step the first respondent's notice of application for leave to appeal against a Rule 43 order granted on 17 October 2022,
 - 2.2. an application that I find the first respondent to be in contempt of the Rule 43 order; and
 - 2.3. an application for an order – effectively an emoluments attachment order – that the cash sums payable to the applicant in terms of the Rule 43 order be paid directly from the first respondent's salary by the second respondent, the first respondent's employer.

The Rule 43 order dated 17 October 2022

3. The applicant and the first respondent were married to each other in terms of Muslim rites on 30 December 2007. Two minor children were born of the marriage. The parties separated in April 2020 and divorce proceedings were instituted by the applicant on 25 May 2021. Those proceedings are pending.
4. The Rule 43 order that was granted against the first respondent in favour of the applicant directed the first respondent, inter alia, to pay on the first day of each month, with effect from 1 November 2022, and free of deduction or set-off, the following:
 - 4.1. the sum of R10,000 a month towards the applicant's personal maintenance;
 - 4.2. the sum of R10,000 per month in respect of the first of the parties' minor children's maintenance;
 - 4.3. the sum of R10,000 per month respect of the parties' second minor child's maintenance;
 - 4.4. the sum of R12,000 per month towards the rent of accommodation for the applicant and the children;
 - 4.5. the monthly instalment on the vehicle used by the applicant: this amount is indicated in the founding papers as being R7,349.49; and

4.6. the sum of R5,300 per month, being the amount agreed to as repayment of the applicant's credit card and loan debt as dealt with in the application under rule 43.

5. On 19 October 2022 the first respondent requested written reasons for the Rule 43 order. According to the applicant, the first respondent made certain selective payments in terms of the order from 1 November 2022 onwards, but did not fulfil all of his obligations thereunder.
6. As a result, on 2 November 2022 the applicant's attorney addressed a letter to the first respondent's attorney, seeking proper compliance with the order.
7. The day thereafter, on 4 November 2022, the first respondent delivered notice of an application for leave to appeal against the Rule 43 order. The first respondent contended in the application that the interests of justice demanded that leave to appeal be granted. The specific circumstances that were relied upon for this contention were not set out. The first respondent indicated in the application for leave to appeal that such application would be supplemented once the reasons for the grant of the Rule 43 were available.
8. No further steps have since been taken in relation to the application for leave to appeal.

The irregular step application

9. On 12 December 2022 the applicant delivered a notice in terms of Rule 30(2)(b) in terms of which the first respondent was requested to withdraw the notice of application for leave to appeal.
10. The application now before me, which includes an application in terms of Rule 30(1), was launched the next day, on 13 December 2022, the applicant stating that her financial circumstances were so dire that she could not wait to see if the first respondent would withdraw his application for leave to appeal.
11. The first respondent points out, correctly, that the Rule 30(1) application was brought prematurely, in that the ten-day period prescribed in Rule 30(2)(b) had not elapsed prior to its institution. The Rule 30(2)(b) notice, moreover, was delivered more than ten days after the notice of application for leave to appeal had been delivered on 4 November 2022. Is this Court at liberty to condone these instances of non-compliance with the Rules? I deal with this issue further below.
12. The applicant argues that the delivery of the notice of application for leave to appeal constitutes an irregular step for the following

reasons.

13. It is settled law that a Rule 43 order is not appealable. In terms of section 16(3) of the Superior Courts Act 10 of 2013 an order for interim maintenance cannot be appealed. The applicant referred to the matter of *S v S* 2019 (6) SA 1 (CC), in which the Constitutional Court upheld the constitutional validity of section 16(3).

0cm; background: #ffffff; line-height: 200%"> 14. At para [33] the Court disagreed with the argument that the expeditious and inexpensive relief afforded by Rule 43 could never trump a litigant's right to an appeal in matters involving children. The Court held that "these submissions ignore the detrimental impact that delayed maintenance payments may have on children. This far outweighs the danger of an erroneous interim order."

15. The Court proceeded in paras [34] and [35]:

"[34] In any event, should any rule 43 order be contrary to the best interests of a child, this can be immediately rectified. The High Court regularly hears, on an urgent basis, applications where it is alleged that the best interests of the child are under threat. Such a matter will be treated with the urgency it deserves, irrespective of any previous orders made in terms of rule 43.

[35] An appeal process that is subject to endless delays and protracted litigation will inevitably play into the hands of the litigant who is better resourced. It is therefore inconceivable that it can ever be in the best interest of the most vulnerable members of our society, the children."

16. As to equality before the law under section 9 of the Constitution, the Court held as follows at paras [43] and [44]: "... 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 ...Any challenge in terms of section 9(1) must therefore fail."

17. In relation to access to court under section 34 of the Constitution, the Court concluded (at para [46]) that not all litigants have the right to appeal. The Constitutional Court has on more than one occasion stated that it is generally not in the interests of justice for leave to be granted to appeal an interim order. This would defeat the interim nature of that order. That there is no right to appeal interlocutory orders has been held to be constitutional by the courts on numerous occasions.

18. And at para [47]: "The fact that a rule 43 order may be of longer duration than initially anticipated does not in my view detract from the interim nature of the order. It is only in limited circumstances where the interests of justice dictate otherwise that appeals of interim orders have been countenanced by this Court."

19. Litigants in rule 43 applications are not unequivocally barred from approaching court again: "This avenue is provided for in terms of rule 43(6), albeit with limitations. The applicant complains, with some justification,

that the rule is too restrictive as it only allows for variation of an existing rule 43 order when there is a change in “material

circumstances”. However, it cannot be denied that litigants are afforded the opportunity to vary their court orders

under certain conditions. This rule ameliorates any injustice where changed material circumstances have emerged” (at para [49] of the judgment).

20. The Court remarked in para [53] that Rule 43 may be wanting in certain respects, and there may well be grounds for a review of Rule 43(6) to include not only changed circumstances, but also exceptional circumstances. This was not, however, an issue that the Court was called upon to decide.

21. The Rule 43 order in the present matter does not dispose of the applicant’s claims and is clearly interim in nature. It is, on the authority of section 16(3) of the Superior Courts Act and the decision in *S v S*, not appealable (see also, in relation to interim orders generally, *Jacobs and others v Baumann NO and others* 2009

(5) SA 432 (SCA) at para [9]).

22. The first respondent also relies on *S v S*, and in particular on para [58], which reads that 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.”

23. The first respondent argues that this statement gives him the right to make application for leave to appeal. The quoted extract was, however, an obiter remark to be read in the context of the case as a whole, and does not detract from the finding that an order for interim maintenance under Rule 43 is not appealable.

24. In any event, the first respondent made no attempt at all in his application for leave to appeal to formulate the grounds upon which it would be in the interests of justice to grant leave to appeal. I have alluded to this earlier. Even in the absence of reasons for the order having been given, the first respondent could have set out the grounds upon which he relief for his contention that this is an exceptional matter that calls out for leave to appeal. He did not do so.

25. In argument the first respondent submitted that the fact that a Talaq had been served on the applicant prior to the hearing of the Rule 43 application meant that there was no longer a marriage between the parties, and that such application could or should not have been entertained. This constituted a reason why an application for leave to appeal should be entertained. I do not agree. It has been stated time and again in recent case law that the validity of a marriage, including marriages concluded by way of Muslim rites, is a matter to

be decided by the court hearing the divorce action. Until that issue was resolved there was a matrimonial dispute between the parties that served as a jurisdictional fact for a Rule 43 application to be dealt with (see *SJ v SE* 2021

- (1) SA 563 (GJ) at para [48]; *TM v ZJ* 2016
- (1) SA 71 (KZD) at 77B-C). The fact that the first respondent disputes the existence of the marriage thus does not render his case exceptional.
- 26. I accordingly agree with the applicant's submissions in relation to the irregularity of the application for leave to appeal. The application for leave to appeal falls to be set aside as an irregular step. This means that there is no reason for the first respondent not to perform his obligations under the Rule 43 order.
- 27. The applicant and, notably, the parties' minor children, are (or potentially are) severely prejudiced by the fact that the first respondent is using the application for leave to appeal as a shield against making payment under the Rule 43 order (see *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and others* 1999
- (2) SA 599 (T) at 611C-F). It goes without saying that the best interests of children involved in litigation are of the utmost importance. In the present matter, the children's basic maintenance is at stake. This aspect of the application is, in the circumstances, clearly urgent. This consideration, together with the fact that the notice of application for leave to appeal is fatally irregular given the existing state of the law, bolsters my view that the applicant's non-compliance with the time periods stipulated in Rule 30 should be condoned, whether in terms of this Court's inherent jurisdiction to protect and regulate its own processes, or under the provisions of Rule 27(3).
- 28. In any event, Rule 30 deals with matters of procedure - irregularities of form – and not matters of substance (*Graham and another v Law Society, Northern Provinces and others* 2016
- (1) SA 279 (GP) at par [40]). I am inclined to agree with the applicant's submission that whether an order for interim maintenance may be appealed is not merely procedural, but in fact a substantive matter. There is no appeal available in the circumstances.
- 29. In my view the first respondent will not suffer any material prejudice as a result of the setting aside of the application for leave to appeal on this basis.
- 30. In these circumstances, the first respondent is with immediate effect obliged fully to comply with the terms of the Rule 43 order.

The contempt application

- 31. There is a dispute between the parties about whether the first respondent has accumulated arrears because of the non-payment of the cash amounts under the Rule 43 order. The applicant says that the first respondent already owes more than R106 000,00. He also did not

make payment of an amount of R100 000,00 required as a contribution to the applicant's legal costs. When the matter was heard on 17 January 2023, the first respondent had, due to time constraints, delivered merely a "preliminary" answering affidavit in which the arrear amounts set out by the applicant are disputed.

32. There was also a dispute as to whether the first respondent was mala fide in not performing in terms of the Rule 43 order (an issue in respect of which the first respondent has an onus of rebuttal: *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006
- (4) SA 326 (SCA) at paras [22], [23] and [41]), given the fact that he had been advised that his application for leave to appeal excused him from performance.
33. In the course of argument the parties were in agreement that the contempt application was not ripe for hearing, as the first respondent needed to respond fully to the applicant's allegations as regards his alleged contempt. I was also of the view that the contempt application was not of such urgency that it required immediate determination.
34. The applicant's counsel argued that the contempt application should be postponed on certain conditions, including that the first respondent repay the arrears accumulated under the Rule 43 order pending the hearing of the application.
35. I agree, however, with the first respondent's argument that the issues inherent in the proposed conditions are, for the most part, issues that need to be addressed in the contempt application, particularly insofar as the parties are in dispute about the amounts actually paid from the date of the order to the present. On the first respondent's version, for example, various amounts have in fact been paid and there are no longer any instalments owing in respect of the applicant's motor vehicle. The applicant disputes this. It appears from the first respondent's preliminary answering affidavit that these, and other issues in relation to the contempt application, need to be fully canvassed, and the first respondent will have to prepare a supplementary answering affidavit.
36. This is of course not the case in relation to the required contribution of R100 000,00 towards the applicant's legal costs. This amount has admittedly not been paid. It is due, the first respondent having been ordered to pay it by no later than the end of December 2022. Now that the application for leave to appeal has been set aside, there is no excuse for the first respondent to refuse to make immediate payment thereof.

The application for an emoluments attachment order

37. The applicant contends that an amount of R54 500,00 should be "attached" from the first respondent's salary, and the second respondent should be ordered to pay this amount directly to the applicant. This will serve to prevent unnecessary contact between the parties and ensure compliance with at least part of the Rule 53 order, given the hostile relationship between the parties.

38. This may be so, but on the papers before me (including the service affidavit delivered by the applicant's attorney) it appears that the second respondent did not receive notice of the application. There was no appearance on its behalf at the hearing of this matter.
39. I am hesitant to grant an order that will bind the second respondent to making direct payment of part of an employee's salary to the applicant without such respondent having had notice of the relief sought against it and having had the opportunity to place its views on the matter on record (should it wish to do so).
40. In the circumstances, the relief sought against the second respondent will be postponed together with the contempt relief sought against the first respondent for determination in due course. The applicant's attorney is to ensure that service take place and that proof thereof is available to the Court determining the relief sought in relation to the second respondent.

Compliance with Rule 41A

41. The first respondent contends that the applicant has failed to comply with the provisions of Rule 41A, and that that renders the application fatally defective.
42. The applicant admittedly failed to submit the required form. As stated in the case of *M N v S N* [2020] ZAWCHC 157 (13 November 2020) at para [10] I do not wish to be understood as underestimating the value of mediation and the importance of compliance with the rule. Nevertheless, the first respondent's legal representative has also not delivered such notice when giving notice of opposition or upon delivering his preliminary answering affidavit, as he was required to do in terms of Rule 41A(2)(b). There is no statement under oath from the first respondent that he would have wanted the matter to be referred to mediation.

43. I accordingly do not think that the applicant's non-compliance with the Rule scuppers her application.

Costs of the application

44. In the exercise of my discretion and given the circumstances of the matter, I am of the view that it would be just and equitable that:
- 44.1. the first respondent pay the costs of the application in terms of Rule 30 on the scale as between party and party; and
- 44.2. the costs of the application in relation to the relief sought in paragraphs 3 to 7 of the applicant's notice of motion stand over for determination by the Court hearing the contempt application and the application for the payment of the sums owing under the Rule 43 order by the second respondent to the applicant directly.

Order

45. I accordingly grant the following order:

45.1. The application is heard as one of urgency under Rule 6(12) and the applicant's non-compliance with the forms, service and time periods prescribed by the Uniform Rules of Court is condoned.

45.2. The first respondent's notice of application for leave to appeal against the Rule 43 order granted on 17 October 2022 is set aside.

45.3. The application for the relief sought in paragraphs 3, 4, 5, 6, and 7 of the applicant's notice of motion dated 13 December 2022 is postponed for hearing on the semi-urgent roll on Wednesday, 31 May 2023.

45.4. The respondents shall deliver answering affidavits in relation to the relief sought in paragraphs 3 to 7 of the applicant's notice of motion by no later than Friday, 24 February 2023.

45.5. The applicant shall deliver her replying affidavit(s) by no later than Friday, 17 March 2023.

45.6. The parties shall deliver heads of argument in accordance with the provisions of the Consolidated Practice Directions.

45.7. The first respondent shall pay the costs of the application in terms of Rule 30 on the scale as between party and party.

45.8. All other questions of costs (in particular, the costs of the application in relation to the relief sought in paragraphs 3 to 7 of the applicant's notice of motion) stand over for determination by the Court hearing such application.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant:

H. N. de Wet,

instructed by

N. Hassan Attorneys

For the first respondent: F. Moosa,

instructed by

Moosa & Pearson Inc.

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