

SOUTH AFRICA / JUDGMENT

Z.I.O v J.S.O (4715/21) [2023] ZAGPJHC 825 (25 July 2023) [2023] ZAGPJHC 825

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

4715/21

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE NO: 4715/21

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

25.07.23

In the matter between:

O,

Z I

Applicant

And

O,

J S

Respondent

IN

RE: O,
Z I
Plaintiff
And
O,
J S
First Defendant
P,
P S
Second Defendant
B,
J I
Third Defendant

JUDGMENT

YACOOB J

1. The applicant and the respondent have been married since April 2015 and have three young children. There is an existing Rule 43 order. The applicant seeks a variation of that order on the basis that there has been a material change in circumstances.
2. The respondent opposes the application on the basis that her circumstances have not materially changed, and that the applicant's allegations regarding the material change in his financial situation should be rejected because there are inconsistencies in his financial disclosure which show that his evidence cannot be relied upon. Rule 43(6) does not permit general review of an existing order, and therefore the court is not empowered to examine the reliability of the respondent's own version, because if there is no material change that is the end of the matter.
3. The original order was granted when the parties were both resident in Gauteng, and on the basis of the respondent's claim of what she would need to support herself and her children, as she intended to obtain a residence for them and live independently. The respondent lives with her parents and works for her mother.
4. The applicant is a businessman who has various projects, and in addition has some business with his brother.
5. Both parties appear to have obtained loans and other support from their families.
6. On 26 May 2022 the respondent moved to the Western Cape with the children and her parents. This, according to the applicant, is the primary material change on which he relies for this application.
7. The contact portion of the order has already been dealt with, all that remains to be dealt with is the maintenance.

8. The applicant also contends that his financial situation has changed, partly as a result of the move, and also that the respondent's financial situation has changed and is materially different to what it was when the original order was made. All these changes, the applicant contends, mean that the court is empowered to vary the original order in terms of Rule 43(6).
9. The respondent, on the other hand, contends that, as far as maintenance and other financial aspects are concerned, the move to Stellenbosch does not constitute a material change. She also denies that her financial situation has materially changed. The respondent also points to a number of inconsistencies (or apparent inconsistencies) in the applicant's various Financial Disclosure Forms, and in his affidavits, and to one aspect regarding which the applicant has acknowledged that he had not been entirely forthcoming with the court. The respondent submits that the applicant's evidence therefore cannot be relied upon at all. His allegations about material change in his financial circumstances therefore must be dismissed. The court does not have a general review power, and therefore the court is not entitled, absent the required material change, to examine the various (apparent) inconsistencies in her own Financial Disclosure Forms and affidavits. The respondent therefore submits that the application therefore must be dismissed.
10. I am satisfied that the respondent's move to Cape Town results in a material change in circumstances, not only logistically, but also to the financial basis on which the respondent sought and obtained the initial Rule 43 order. It also has an obvious impact on the financial obligations of the applicant, insofar as he seeks to maintain meaningful contact with the children.
11. The respondent's counsel attempted to convince the court that it was not entitled to go into any detailed analysis of the respondent's financial situation. However, when one of the issues before the court is whether the respondent's financial situation had changed, which was part of the applicant's case, the court is obliged to consider it.
12. In particular, the basis on which the original order was obtained was that the respondent intended to acquire accommodation separate from her parents. To this end she was awarded R30 000 maintenance which she claimed would be the rental of a furnished house. The respondent is however still living with her parents, now in Stellenbosch. This is clearly a material change from the basis on which the order was obtained.
13. In respondent's current Financial Disclosure Form, she coincidentally states that her expenses which she pays towards her mother for lodging and groceries amount to almost R30 000. There is no proof of this, or in fact of what she pays her mother.

14. It is submitted for the respondent that this amount is still an obligation she is responsible for, and that she therefore requires the maintenance, particularly because, when the parties were married they lived with her parents and contributed to the household. However this argument falls flat for two reasons, one is that it is not the basis on which the maintenance was sought and granted, and second that the respondent does not disclose the extent of the contribution to the household when the parties were married.
15. It was submitted for the respondent that much of the applicant's Financial disclosure stood to be rejected, not only because he has acknowledged that he previously did not disclose everything, but also because he is in business with his brother, that he has "family loans" from his brother, and the closure of his business appears to be somewhat convenient for the purposes of the Rule 43(6) application.
16. However, the same arguments apply to the respondent. She also is employed by and supported by family, being in this case her parents/ mother. The amounts that she earns and allegedly pays to her parents are not objectively verifiable, and are as easy to manipulate as she accuses the applicant's amounts of being.
17. I do not make any finding regarding the reliability of either party's version of what they earn. Nor do I consider it necessary to go into each party's (similar) allegations that the other can take money out of what is owing to them on the sale of the marital home (co-owned by the respondent's parents, and around which there is a dispute) and apply it to maintenance. The parties clearly have access to funds which they must apply to the upkeep of their homes and children with discretion. It is equally clear to me that neither has been completely open with the court.
18. Be that as it may, on what is before on the respondent's own papers, I am satisfied that there is no longer any need for the applicant to continue to pay the R30 000 per month maintenance to the respondent.
19. The applicant also seeks to reduce the amount that he contributes to various expenses for the children to 50% of those expenses and also to reduce the cash component of his maintenance to the children to R6 000 per child per month from R8 000 per child per month. I do not consider that the applicant has established that his resources have reduced enough to require that reduction, nor that the move to Cape Town has stretched him to the extent that the change is necessary.
20. Taking into account that it is my considered view that neither party is entirely open with the Court regarding the resources available to them, and I do not consider it appropriate to make any order as to costs.
21. For these reasons I make the following order:

1. The applicant shall continue to pay maintenance pendite lite, for the three minor children born of the marriage between the applicant and respondent in accordance with the existing rule 43 order dated 15 June 2021, made by Manoim AJ.
2. The applicant shall no longer pay any cash maintenance to the respondent.

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant:

A Bester SC

Instructed by:

HJW Attorneys

Counsel for the respondent:

C Reilly

Norman, Wink & Stephens Attorneys

Date of hearing: 19 July 2023

Date of judgment: 25 July 2023

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