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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 23735/2016

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date:

WHG VAN DER LINDE

In the matter between:

G, A C

Applicant

And

G, D M

Respondent

Judgment

Van der Linde, J:

[1] This is an application drawn by a lay person for interim relief pending a divorce action only set down for next year. The applicant is the wife; the source of a substantial activity of interlocutory applications is a rule 43 order made last year by Meyer, J in terms of which the

respondent husband was directed to pay, pendent lite, R35000 per month as maintenance for the applicant and their two minor children. He also had to pay additional amounts.

- [2] The respondent's counsel explained that since then there have been an unsuccessful application by the respondent to reduce the rule 43 amount, an application by the applicant to commit the respondent for contempt of court for not paying the maintenance ordered in the rule 43 application, a judgment to that effect, a notice of appeal by the respondent against that judgment, an application by the applicant for leave to execute the contempt order pending the appeal, an interdict application by the respondent to freeze the proceeds of the sale by the applicant of the matrimonial home, and a further application by the applicant for contempt of court and payment of arrear maintenance.
- [3] Counsel further explained that the latest orders made by these courts were by Matojane, J as recently as last week. The learned judge then dismissed two applications of the applicant, one for leave to execute the contempt of court order pending the appeal by the respondent, and the other for a fresh contempt of court order and payment of arrear maintenance.
- [4] The last mentioned application is the only one of immediate relevance before this court, because the mainstay of the respondent's resistance against the present application, as argued by counsel, apart from relying on the predictable factual disputes, is *res judicata*, meaning that Matojane, J has decided the relief sought and has dismissed it.
- [5] That brings one at last to what the applicant wants in the present matter and what Matojane, J decided last week. The applicant's relief is poorly formulated, because the notice of motion is not also coherent and is interspersed with factual averments. This matter is again raised below in the context of costs; but in oral argument the applicant made it plain that she wants in these proceedings is payment of R46068 and payment of R11000.
- [6] Dealing first with the latter amount, the R11000 is due, per month, for school fees. This particular amount was due on 1 July 2016. According to paragraph 2 of the notice of motion

that came before Matojane, J that relief was also sought there. Since it was dismissed by the learned judge, there is no scope now to revisit it.

[7] The R46068 is made up of three smaller amounts. One such amount is R22810 as maintenance for June 2016, payable on 30 June 2016. That amount too was specifically identified in the notice of motion before Matojane, J and dismissed by my colleague. It too cannot be revisited.

[8] That leaves R23 258 which by definition was not sought before Matojane, J because no further amounts were there claimed. This amount is therefore not struck by the res judicata defence, and the question becomes whether the applicant has made out a case for payment of this amount.

[9] This amount is made up of three components: R2898 being a loan the applicant incurred to provide food for the children, R2352 in respect of medical braces for the children, and R18 008 owed to the applicant's brother in respect of a loan to be able to pay school fees for the children.

[10] The starting point is that in terms of the rule 43 order the respondent had to pay R35000 as maintenance, and all dental costs, and all private school fees. In the present matter the papers before me do not include an answering affidavit by the respondent. They comprise only the applicant's notice of motion, founding affidavit and annexures to the founding affidavit, being A, B, C, D, F, G, H, I, J, K, L, P, Q, R, S, T, U, V, W, X, Y, Z1, Z2, Z3, and W4 to W8.

[11] The founding affidavit makes averments that these amounts were properly incurred and are owing, particularly since the respondent is in arrears with his rule 43 payments in a substantially larger amount. These assertions are not traversed and disputed in an answering affidavit. It appears the respondent adopted the attitude, reflected in a letter of Monday's date (11 July 2016), handed up during the hearing (12 July 2016), addressed by his attorney to the applicant, that the same application has again been placed before the court.

[12]The applicant was accordingly advised in the letter to withdraw her latest application and tender costs, “failing which we will request a dismissal of the pending application and seek a punitive cost order against you on attorney and client scale.”

[13] But a successful plea of res judicata requires for the same, or substantially the same, relief to have been sought in the earlier matter between the parties. The only documents placed before me were the present papers (comprising only papers on behalf of the applicant), and the founding papers (some 159 pages) that served before Matojane, J.

[14]And the only documents of relevance for the res judicata point are the two notices of motion, because they convey what was claimed earlier and what is being claimed now. As pointed out above, a comparison of those two shows that some items now claimed were in fact not claimed then.

[15]In the result the plea of res judicata cannot be upheld in respect of the three items making up R23258, referred to and discussed above.

[16]The applicant asks for costs. She appeared in person, and it was not clear what costs she would have incurred. She made no submissions in that regard. In any event, the papers are badly drawn and do not comply with the rules of court in many respects. They are, in places, also incoherent and difficult to follow. In the result I am not prepared to make a costs order.

[17]The following order issues:

- (a) Judgment is entered in favour of the applicant against the respondent for R23258.
- (b) No order as to costs will issue.

WHG van der Linde
Judge, High Court
Johannesburg

For the applicant: in person

For the respondent: Adv. Garvey

Instructed by Masilo Freimond Inc
011-9580488

Date heard: 12 July 2016
Date judgment: 13 July 2016