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

CASE NO: 34367/19

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

26.04.23

In the matter between:

C L J

Applicant

and

C L E

Respondent

Neutral Citation: *CLJ v CLE* (Case No: 34367/19) [2023] ZAGPJHC 386 (26 April 2023)

JUDGMENT

SEGAL AJ:

- [1] This is an opposed application in terms of Rule 43(6). The Applicant seeks *inter alia* to retrospectively vary the Rule 43 order made by Budlender AJ on

28 November 2019.

- [2] In support of his claim, the Applicant relies on both a purported change in circumstances as contemplated in Rule 43(6) as well as the suggested expansive interpretation of Rule 43(6) contemplated in *S v S and Another* [2019] ZACC 22 placing reliance on Section 173 of the Constitution.
- [3] Additionally, the Applicant, in a supplementary affidavit filed on 23 November 2022, relies on a Settlement Agreement entered into by the parties on 25 September 2020, some 10 months after the order of Budlender AJ was made, in which the parties agreed *inter alia* that the Applicant would pay maintenance for the minor child in the sum of R10 000.00 per month.
- [4] The Respondent opposes the relief sought by the Applicant and contends *inter alia* that the Applicant has not demonstrated a material change in his circumstances; that he baldly asserts that the Covid-19 pandemic led to a downturn in his income; that he relies on the same facts in this application as those that he relied upon in the initial application before Budlender AJ and that this application is a purported second bite at the cherry alternatively an attempt to appeal the Budlender AJ order.
- [5] Additionally, although the Respondent admits that the Settlement Agreement was signed by her, she contends that it was not made an order of court and furthermore, that it is thus unenforceable and void. The Respondent seeks an order dismissing the Applicant's claim with punitive costs.

[6] Accordingly, it falls upon this court to determine: -

- 6.1 whether the Applicant has demonstrated a material change in circumstances as contemplated in Rule 43(6);
- 6.2 whether the Applicant has demonstrated exceptional circumstances as contemplated in S v S and Section 173 of the Constitution, which include orders patently unjust or incorrect;
- 6.3 whether the Settlement Agreement entered into on 25 September 2020, has the effect of rendering the court order inoperative and/or of replacing it.

[7] I shall address these issues in turn.

[8] A perusal of the voluminous papers submitted by the Applicant in support of his application, fails to reveal what he in fact contends his financial position was at the time of the Budlender AJ order as opposed to what he contends that it to be now. His actual monthly income for each month between the grant of the Budlender AJ order and this application is not disclosed. Additionally, although pages of annexures are attached, these documents are of little assistance in establishing the Applicant's financial position and the extent to which he contends that it has varied.

[9] Significantly, there is no proper and detailed explanation supported by documentary evidence in substantiation of the Applicant's contentions that:-

- 9.1 covid-19 affected his business negatively;

9.2 his low mood and anxiety render him unable to work;

9.3 his incarceration for a period of approximately a month is a basis for the variation of the Budlender AJ order.

[10] Moreover, notwithstanding my request that supplementary heads of argument be filed in relation to the effect of a Settlement Agreement entered into between the parties on an order of court, the supplementary heads of argument were of little assistance to the court and certainly provided no authority for the Applicant's proposition that a Settlement Agreement concluded *inter partes*, has the effect of setting aside an order of court. This proposition is plainly wrong.

[11] Curiously, no proper explanation is provided by the Applicant in relation to:-

11.1 why he failed to enrol the divorce action on the unopposed divorce roll and seek an order that the Settlement Agreement entered into between the parties, be made an order of court;

11.2 why he does not do so now;

11.3 why he failed to inform his legal representatives of the existence of the Settlement Agreement for a period of two years, during the majority of which, he failed to comply with the Rule 43 order.

Alleged material change in circumstances

[12] The Applicant's affidavit raises more questions than it answers. In paragraph 14 of his Founding Affidavit the Applicant contends that he is self-employed in

the transport industry and that his hourly rate has been reduced by almost 50%. In his financial disclosure form, he states that he is a sole trader / partner in an entity [...]. The financial disclosure form does not appear to me to have been properly commissioned.

[13] At paragraph 17 of the Founding Affidavit, the Applicant asserts that his contractor informed him that he would no longer be permitted to work on site and may only provide consulting services from home until a pending criminal matter against him has been finalised.

[14] At page 00001-85 the Applicant attaches a letter purportedly written by a certain D K on behalf of [...] acknowledging that the Applicant (personally) is in the professional team to provide advisory and management services to the mini-bus taxi industry in Rustenburg, and Rustenburg Transit, as the operating entity formed to provide integrated public transport service in the City of Rustenburg.

[15] It is unclear what amounts are received by the Applicant from [...] (**“the Engineering business”**) and what amounts are received by the Applicant in his personal capacity as a contractor, from Future of Transport CC. According to the Applicant, the financial statements annexed as Annexure “B” reveal that the Engineering business rendered a gross annual income of R1 230 869.00 with a net income for the business of R1 161 941.00. Significantly, this is double what it was during February 2021, being the period in which he contends his circumstances had materially changed.

[16] In any event, these financial statements are somewhat unintelligible, and one

struggles to make sense of them in circumstances where no explanation is provided in either the affidavit or the notes to the financial statements.

[17] The Applicant contends that in respect of February 2020, the gross income which he received as Director of the Engineering business was R1 308 691.00 and reference is made to Annexure "D" (which appears at 00001-107). This is reflected in the column headed "Revenue". If one has regard to the financial statements for the year ended February 2022, it appears (at page 0001-90) that the column reflecting "revenue" reflects a sum of R1 230 869.00. This is around R70 000.00 less (per annum) than the February 2020 figure and certainly does not constitute a material change as contended for by the Applicant.

[18] Rule 43 (6) provides that the court may on the same procedure vary its decision in the event of a material change taking place in the circumstances of either party or a child or the contribution towards costs proving inadequate.

[19] In the matter of *Grauman v Grauman* ¹, the court stated the following about what amounts to material change:

"Rule 43(6) should be strictly interpreted to deal with matters which it says has to be dealt with, that is, a material change taking place in the circumstances of either party or child. That relates to a change subsequent to the hearing of the original Rule 43 application."

¹ 1984 (3) 477 WLD at 480 (C)

[20] Van Der Walt J in the *Grauman* matter went on to say:

“If the other party has obtained relief from a Court based on false information. There are ordinary motion proceedings... .”

“... the Court will be faced in any number of Rule 43 applications with virtually a review of a previous decision, based on the existing facts, but now having been given time to deal with the matter in more detail, having been able to utilise more information, another slant being given to those very same facts, or one or two additional facts might be discovered, which puts a different complexion on matters...”

[21] In the matter of Greenspan, the Applicant sought to revisit an Application previously adjudicated upon, the court found that to the extent that the Application was not an abuse of the court process it was so unreasonable as to justify an exercise of the court’s discretion in favour of the Respondent, in consequence of which the application was dismissed.²

[22] In the matter of I v H ³, the Applicant sought a reduction in maintenance payable in terms of Rule 43(6), on the basis that *inter alia*, his salary had been reduced by 50%. The court considered the application and stated thus:-

“...whilst it may seem tempting to conclude that a 50% reduction in salary would, of necessity, result in a material adverse change in financial circumstances on the part of the applicant, one cannot assume that this is so, particularly in light of the amount of time which has elapsed since the date that the founding affidavit was signed.

[12] In AP v IP 2018 JDR 0349 (GP) this court observed that the decline in the financial situation of the applicant could serve as a material change in the financial circumstances of the applicant as he derived his sole income from the business but found that the applicant had failed to establish that fact. The reason for this is that the applicant in that matter had failed to account for the

² Greenspan v Greenspan 2001 (4) SA 330 (C)

³ (97131-16) [2021] ZAGPPHC 60

rationalisation or adjustment of the financial obligations of the business and the impact that this would have had on its ability to meet its obligations to the applicant.

[13] Although the facts in that matter were different, the same principle applies by parity of reasoning. Without being provided with the full conspectus of the applicant's financial affairs, I am unable to conclude that the reduction in salary (as opposed to total income) would, of necessity, result in a material adverse change in financial circumstances on the part of the applicant.

[14] A considered reading of Rule 43(6) suggests to me that, in order to succeed in demonstrating a material change in circumstances, one must make a full and frank disclosure in regard to all of the numerous and varied elements which make up the broad overview of the applicant's financial situation.

... in an application under Rule 43(6), the applicant bears the onus of establishing that a material change has occurred in the circumstances of either party or a child, or a previous contribution towards costs proving inadequate. Although that onus is to be considered in the light of the robust and expedient nature of Rule 43 proceedings, it is nonetheless an onus which is to be discharged on a balance of probabilities.

To succeed in that endeavour, an applicant must demonstrate, not only that a change or even a significant change in circumstances has occurred but must place sufficient facts before the court to enable it to determine the materiality of that change in the context of the applicant's broader financial circumstances. This would, at the very least, entail a detailed exposition of all available sources of income and would not merely be limited to the income earned from his (now reduced) salary.

[20] On the information provided by the applicant, I am unable to determine what the impact of the reduction in salary is to the applicant and its materiality in light of the applicant's broader financial circumstances. I am accordingly of the view that the applicant has failed to discharge his onus in this regard."

[23] In the instant matter the Applicant has failed on all of these accounts to discharge the onus.

The Applicant's low mood and anxiety render him unable to work

[24] In a supplementary affidavit deposed to on 7 December 2022 by the Applicant, he raises various new evidence which he styles as "new documents discovered". These include a report from Dr F A Korb, the

Applicant's "qualified Clinical Psychologist and treating physician" addressed to Anel Jacobs, his attorney. The report is not confirmed under oath as one would expect in a matter of this nature and particularly having regard to the seriousness of the disputed issues.

[25] The report is dated 8 December 2022 (1 day after the supplementary affidavit was deposed to). From a perusal of the report, it appears that the Applicant's cognitive difficulties commenced as early as 2018 and 2019 when he first consulted with Dr Korb. The issues raised at that time, included cognitive problems, lack of concentration, poor focus, feeling of being overwhelmed, chronic poor energy, lack of organisation, his mind going "blank". The prescription of Ritalin LA 20mg and Stresam 100mg was added to the Applicant's treatment to help with his anxiety in 2020.

[26] It appears that the Applicant did not see Dr Korb again until 21 November 2022, (after this application had been launched) during which he reported severe stress relating to his marital situation, pending divorce and custody battle regarding his daughter. It is difficult to understand why in the face of the Applicant's failure to comply with the Budlender AJ court order on the basis of stress, he did not seek medical intervention until November 2022.

[27] In all events, it appears that a change of medication was prescribed together with continued trauma counselling. There is no indication that the Applicant is unable to be employed or to earn an income and this is an aspect that may well require oral evidence in order to obtain a proper indication, of the impact of the Applicant's condition on his ability to work.

[28] In the matter of D v D ⁴ the Applicant approached the court for an increase in maintenance and a contribution towards her legal costs in circumstances where there had been no real change in her circumstances and where the court considered the application to be a reconsideration / appeal of the initial application. Amongst the bases which the Applicant considered amounted to changed circumstances, the Applicant cited stress and ill-health (which had been considered in the original application). The court stated that:-

“...Divorce is a stressful phenomenon. Parties to a divorce could very well end up having medical conditions. The sequelae could be emotional or psychological. I am of the view that to elevate these sequelae to circumstances that would warrant the courts intervention in Rule 43 applications would be to lower the bar in these applications and result in a huge proliferation of Rule 43 and Rule 43(6) applications. I take the view that stress from divorce is not material enough a factor as to warrant the intervention of a court as envisaged in Rule 43(6) applications.

The effect of the Settlement Agreement

[29] Although it is common cause that the Settlement Agreement was signed, the effect of its signature appears to be in dispute. The Applicant contends that the agreement has the effect of setting aside and/or replacing the court order. The Respondent, on the other hand, contends that the agreement is unenforceable and void.

[30] The validity of the agreement is not something that can be resolved in this

⁴ 5571/2017) [2019] ZAGPPHC 197

court. This is a matter that must be dealt with by the trial court once the pleadings have been amended.

[31] Insofar as the Applicant's contention that the agreement has the effect of setting aside and/or replacing the Budlender AJ court order is concerned, I am unmoved.

[32] The founding value of South Africa's constitutional democracy is the rule of law. It is trite that Court Orders remain of full force and effect unless and until set aside by another court of competent jurisdiction. Indeed, it was contemplated by the parties that Settlement Agreement would be made an order of court upon the grant of the Decree of divorce. Why this was never proceeded with, remains unexplained.

[33] Our Courts have consistently reaffirmed that Court orders are binding until set aside by a court of competent jurisdiction.⁵

The Minor Child A

[34] Insofar as the minor child, A is concerned the parties have agreed that this Court should appoint Advocate Linda De Wet of the Johannesburg Society of Advocates as the *curator ad litem* for A and I shall do so in my order which follows.

⁵ Department of Transport v Tasima (Pty) Ltd ZACC 39; Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma [2021] ZACC 18

- [35] The parties confirmed that this matter has been allocated to Judge Dippenaar for the purposes of Judicial Case Management and in the circumstances no order in this regard is necessary.
- [36] The Applicant seeks an order for the appointment of a forensic expert to investigate the issue of whether or not A was sexually abused. I referred the parties to Dr Barnes of the Teddy Bear Clinic, and I have no doubt that she will be of great assistance in relation to the criminal complaint and the allegations in this regard. Whilst I understand the Applicant's request in this regard, I am not inclined to appoint a forensic expert at this stage because I do not want to interfere with the criminal investigation process and I do not know whether the relevant SAPS officers who are dealing with the matter, intend to appoint or have already appointed such an expert, in which event there would be a duplication of forensic experts.
- [37] I am of the view that the opinion and directions of the SAPS officers handling the matter must be requested and, if they are in favour thereof, a forensic expert may be appointed by Judge Dippenaar, the Judicial Case Manager, after considering the views of the SAPS and the parties, of which I have not had the benefit.
- [38] In all the circumstances of this application, and for reasons set out above, I am not persuaded that the Applicant has made out a case for the order which he seeks.
- [39] The proper place for the determination of these issues is the trial court and the parties should use their best endeavours to advance this matter to trial

without delay.

Accordingly, I make an order in the following terms:

1. The Applicant's application is dismissed.
2. Advocate Linda De Wet (**Adv De Wet**) of the Johannesburg Society of Advocates is appointed as the *curator ad litem* for A.
3. The costs of Adv De Wet shall be paid by the Applicant and the Respondent in equal shares.
4. The Applicant shall make payment of the costs of this application.

SEGAL AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 26 April 2023

Heard on: 22 February 2023

Delivered on: 26 April 2023

Appearances:

L van der Westhuizen:

for the Applicant

D Charles:

for the Respondent