

IN THE NORTH GAUTENG HIGH COURT. PRETORIA
/ES (REPUBLIC OF SOUTH AFRICA)

CASE NO: 14702/2011, 20317/09

DATE:27/05/2011

IN THE MATTER BETWEEN

G: S

APPLICANT

AND

G: S S

1ST RESPONDENT

THE SHERIFF LENASIA NORTH

(ACTING SHERIFF SOWETO WEST)

2nd RESPONDENT

JUDGMENT

LEGODI. J

[1] This is a judgment on costs that was reserved on 12 April 2011 in a matter that was initially argued in an urgent motion roll and beyond the urgent motion roll.

[2] The applicant had initially brought on an urgent basis an application in terms whereof relief was sought as follows:

2.1 staying all execution steps arising from an order handed down by RAULINGA, J on 12

May 2010 under case number 20317/09:

2.2 declaring that the execution steps carried out under the aforesaid case number after the service and filing of the applicant's application for variation dated 1 July 2010 are unlawful;

2.3 ordering the second respondent to release from attachment all assets, items, goods, interests and shares attached as a result of the order mentioned above;

2.4 costs of suit only in the event of this application being opposed, against such party that opposes same.

[3] A background to the dispute between the parties might be necessary. The applicant and first respondent are married to each other. The first respondent instituted the divorce proceedings against the applicant. The divorce action at the time of the hearing of the present application was enrolled for hearing on 26 April 2011.

[4] On 12 May 2010 and under Rule 43, the first respondent obtained an interim maintenance order against the applicant in the amount of R42 000,00.

[5] On 13 July 2010 the applicant delivered an application for variation in terms whereof he sought R42 000,00 to be substituted with R13 000,00. He further sought a declaratory order in the following terms:

5.1 declaring that to the extent that section 20(7) of the Supreme Court Act 59 of 1959 prohibits an appeal of a decision for payment of interim maintenance and a contribution towards legal costs in terms of Rule 43, that such section is unconstitutional;

5.2 declaring that to the extent that Rule 43(6) only permits variations of a Rule 43(1) order under changed circumstances, that such rule is too narrow and unconstitutional.

[6] The first respondent opposed the application and challenged the applicant's alleged unaffordability. Whilst the application was still to be heard, on 17 February 2011 the first respondent proceeded to have the applicant's 50% interests or shares in Gatfam Investments (Pty) Ltd be attached. This was intended to have the said shares be sold on a public auction. The move had led the applicant to approach the court on an urgent basis and for relief as set out in paragraph 2 of this judgment.

[7] Till when the warrant of execution was issued on 9 February 2011 against the applicant's shares in the company aforesaid, the applicant had been paying monthly the sum of R13 000,00 to the first respondent contrary to the order in the amount of R42 000,00.

[8] The application on an urgent basis was initially laid before FABRICIUS, J on 22 March 2011. On that date, the matter was postponed to 31 March 2011. On this latter date the matter was laid before me.

[9] Counsel for the first respondent was engaged on a number of issues that worried the court. Much more time was spent by counsel on behalf of the first respondent and on occasions repeating herself despite concerns by the court with such repetitions. The matter indeed took much more time than one would expect in a busy urgent motion roll.

[10] Seeing that the issues could not be properly ventilated in the busy urgent motion roll, and much worried about other matters waiting to be attended to, I then decided to adjourn the matter until 12 April 2011. This was outside the urgent motion roll and this was done to accommodate the parties and to dispose of the matter as soon as possible.

[11] Again on 12 April 2011 counsel for the first respondent addressed the court. She was engaged, this time, particularly with regard to whether this was not an appropriate case to wait for the finalisation of either the application under Rule 43(6) or the divorce matter which was on the roll for 26 April 2011.

[12] Having taken instructions, an agreed draft order was placed before me and it reads as follows:

"7. The execution of the warrant of execution dated 7 February 2011 and any further execution steps arising from the order handed down by RAULINGA, J on 12 May 2010 under case number 2009/20317, is suspended pending the finalisation at the trial action or the application in terms of Rule 43(6), whichever comes first.

2. The Rule 43(6) has been allocated the date of 3 May 2011 for hearing by the Registrar.

3. Judgment on the issue of costs and the scale thereof in the urgent application is reserved."

[13] The draft order was made an order of court. I found it necessary to deal with the issue of costs regard been had to the issues that were argued before me. It might well be prudent to mention the two letters that were written to the first respondent's attorneys by the applicant's attorneys.

[14] The first letter is dated 29 March 2011. It reads as follows:

"The application scheduled for hearing on Thursday may be resolved by your client agreeing to stay further execution steps. The court most suited to adjudicate the issues in the pending variation application will be the trial court. The trial is scheduled for the 26th April 2011, less than 20 court days from now. No one will be prejudiced. Your urgent response is awaited."

[15] When this letter was produced, a suggestion by the first respondent was that the letter

was not received and that there was no knowledge of the letter. But of course the letter was addressed to the attorneys and at the top left of the letter there is a transaction report. The forwarding fax number is Oil 7287597. The date is 29 March 2011 and the time is 15:46. The fax number, by looking at some letters previously addressed to the applicant's attorneys, is the same as the one appearing on the letterhead of the first respondent's attorneys. I am therefore prepared to accept that the letter was received, as indicated on the transaction report.

116] Remember, on 31 March 2011 was when the matter was laid before me. Therefore, the proposal contained in the letter of 29 March 2011 was made two days before the matter was laid before me.

[17] The other letter is dated 4 April 2011 and the relevant portion thereof reads as follows:
"The trial is less than 14 court days ahead.

You are again requested to acquiesce that the current proceedings before LEGODIJ be stopped on the following basis:

i) with costs of these proceedings and the scale of such costs, more specifically for the proceedings on the 22nd March 20 J1 and 31st March 2011 be reserved;

ii) Your client stops further execution steps until after the trial.

(iii) Our client's variation applications be adjudicated by the learned

Judge adjudicating the trial. Undertakings given by/on behalf of your Mr Natha to return our calls were never upheld."

[18] The reply to this letter was three pages the letter, dealing with things that had happened

outside court between the respective legal representatives. I had previously indicated to the parties that I did not want to get involved with what had happened outside court whilst still ceased with the matter.

[19] It would suffice to quote the following response to the letter of 4 April 2011:

"5.3.1 The writer does advise that if you are prepared to discuss matters with him in a professional manner and without losing your temper then the writer will be prepared to discuss matters with you verbally.

5.3.2 Should you be unable to curb your unprofessional conduct then unfortunately our communications will have to be via written correspondence."

[20] An order for costs is an exercise of a discretion. The discretion has to be exercised judicially and fair, having regard to the facts of each case. Where the conduct of another party is wanting, a punitive costs order might be made as an indication of displeasure by the court.

[21] The two letters were obviously intended to avoid the costs of 12 April and 31 March respectively. Just perhaps to start with the response to the letter of 4 April 2011, it looks like the first respondent or her attorney was pre-occupied with personal issues than what is actually addressed or proposed in the letter from the applicant's attorneys.

[22] This is the difficulty of litigating by personalising issues than attempt to separate what is before the court with personal issues. For example, instead of responding to the suggestion to stop the proceedings scheduled for 12 April 2011. and give an undertaking as requested, the first respondent and her attorney concerned themselves with things that had happened outside court.

[23] Having dealt with the issue of unprofessional conduct allegedly by the applicant's attorney- in a letter of more than two and a half pages, it is then concluded as set out in paragraph 5.3.2 quoted in paragraph 19 of this judgment. The first respondent's attorney having stated as he did in paragraph 5.3.2 of his letter, failed or neglected to take "via written correspondence" their communications to the proposal contained in the letter of 4 April 2011. The opportunity to curb the costs of 12 April 2011 was allowed to be stolen by personalising the issues.

[24] From 5 April 2011, days had gone by without having a rethink on the costs implication to be caused by the attitude. On 12 April 2011 when the matter was called for further submissions, nothing was mentioned about the proposal to deal with the matter as suggested by the applicant's attorneys in their letter of 4 April 2011. Even at the time when the court engaged counsel for the first respondent whether this was not an appropriate case to wait for the finalisation of the trial in the divorce case or finalisation of the Rule 43(6) application, the proposal made in the letter of 4 April 2011 was not mentioned. It was only when the court insisted that the parties should argue costs that the first respondent through her attorney had to produce the response dated 5 April 2011.

[25] What should have been resolved long time ago, was only resolved on 12 April 2011 after all the efforts. The conduct of the first respondent in dealing with the matter is, in the circumstances, unreasonable deserving a sanction.

[26] Similarly, with regard to the costs of 31 March 2011. there is just no explanation why the proposal in the letter of 29 March 2011 was not responded or heeded thereto. Attempts to try

and play no knowledge of the letter of 29 March 2011 should be seen as displaying uncooperative conduct of the first respondent in dealing with applicant. For example, her attorney had received the letter on 29 March 2011 at 15:41. The letter was therefore either ignored or was seen as not being important deserving a response. Of course it was important. The draft order of 12 April 2011 could have been sorted out before 31 March 2011. Had this been done, costs of 31 March 2011 and 12 April 2011 could have been avoided.

[27] Lastly, the attitude of the first respondent with regard to the two letters should be seen in context. Not very long after the order of 10 May 2010 wherein R42 000,00 was made against the applicant, there was a suggestion that the applicant may not afford it. For example, on 1 June 2010 he paid R12 000,00. Thereafter he delivered on 13 July 2010 an application for variation in terms of Rule 43(6). By this time, I want to believe that the parties were aware that the trial in the divorce case was scheduled for 26 April 2011. Secondly, either party could have set down the application in terms of Rule 43(6) for hearing after close of the pleadings. I am just mentioning this inasmuch as the first respondent might have wished to suggest that the applicant was playing a delaying tactic in not complying with the order of 10 May 2010.

[28] Therefore, when the application under Rule 43(6) was launched, particularly taking into account the nature of the relief sought, the fact that the applicant continued to pay R13 000,00 and even most importantly the fact that the divorce action was set down for hearing on 26 April 2011, one would have thought the first respondent would not seek to execute or put in motion the order of 10 May 2010.

[29] For whatever it is worth, in the application under Rule 43(6) the applicant also seeks to challenge the application of Rule 48(6) in so far as it might be applied to say it relates only to

"changed circumstances". Secondly, the applicant seeks to challenge section 20(7) of the Supreme Court Act 59 of 1959 in so far as it tends to prohibit an appeal for payment of interim maintenance and a contribution towards legal costs in terms of Rule 43. Perhaps put the issue differently this way, "What should a respondent under Rule 43(1) do where there are no changed circumstances, but cannot under Rule 43(1) for financial reasons afford to comply with an order for maintenance and a contribution towards legal costs?" Fortunately, I do not have to deal with this issue in the light of the undertaking which has now been made.

[30] I am raising the question as I do, just to show that I do not think that in the present case, the application under Rule 43(6) could be seen as having been so hopeless that the first respondent in the instant case, was entitled to proceed to enforce the order of 10 May 2010 in the face of the pending application under Rule 43(6).

[31] In the urgent application seeking to interdict the first respondent, another issue was raised. That is, whether an application for variation under Rule 43(6) had in terms of Rule 49(11) automatically suspended the operation of the order of 10 May 2010. It is this issue on which more time was spent by counsel on behalf of the first respondent. This issue too has now been rendered academic in the light of an undertaking contained in the draft order which was made an order of this court on 12 April 2011.

[32] But I should still be concerned about the attitude of the first respondent. When the urgent application was served after having been issued on 4 March 2011, the first respondent in my view, should have made the undertaking not to proceed with the execution of the attachment. That is, the first respondent should have undertaken not to sell the attached shares. One is expected to persist with execution in the face of a challenge to the judgment or order upon

which the execution is based, if say for example, it is clear that the first respondent has an unanswerable case against the applicant.

[33] In the present case, I do not think that the first respondent can say she has an unanswerable case to the extent that she was entitled to proceed with the attachment of the applicant's shares and sale or transfer thereof. For example, the applicant in his papers states that when the order was made, his financial inability was not properly before the court. For example, that his salary was not before the court, although same was submitted to his attorney at the time. Dispute around this is the subject of the proceedings in terms of Rule 43(6). I did not have to deal with it fully or finally, bearing in mind that the proceedings before me was interlocutory. Prima facie, the salary establishes a case of inability.

[34] Remember, gross on the salary advice is indicated as R50 000,00 and nett thereof is said to be R35 000.00 per month. Confronted with all of these, and bearing in mind that the divorce proceedings was to take place on 26 April 2011, coupled with the fact that at the time the first respondent sought to enforce the order of 10 May 2010, the pleadings under Rule 43(6) were closed, one would have expected the first respondent not to oppose the urgent application, without making the undertaking as it now did. As I said earlier in this judgment, the least the first respondent could have done, would have been to set down for hearing the proceedings under Rule 43(6).

[35] The conduct of the first respondent was therefore as a whole in the circumstances of the case unreasonable, and it unnecessarily invited costs of litigation. Challenge on the applicant's alleged financial inability as pointed out by the applicant in the letter of 29 March 2011 when the first respondent was told that: "the court most suited to adjudicate the issues

in the pending variation application will be the trial court" was unreasonable. Perhaps the other court best suited for pending variation application is the court that has to hear the variation application itself in terms of Rule 43(6) and when the latter proceedings were instituted, at the risk of repealing itself, the first respondent should have thought twice before seeking to enforce the order of 10 May 2010.

[36] I am mindful of the fact that litigants should not be scared away from ventilating issues in court for fear of a punitive costs order against them. Such an order would not lightly be granted. The court will be dictated by the facts of each case. I find in the present case that the first respondent's conduct in enforcing the order of 10 May 2010 before finalisation of the proceedings under Rule 43(6), and in not making an undertaking not to dispose of the shares attached before finalisation of the trial scheduled for 26 April 2011 or the Rule 43(6), the latter which was said to be enrolled for 3 May 2011, warrants a punitive costs order.

[37] Consequently, the first respondent is hereby ordered to pay the costs of the application including the costs for 22 March 2011, 31 March 2011 and 12 April 2011 on an attorney and client scale.

M F LEGODI

JUDGE OF THE NORTH GAUTENG HIGH COURT

14702-201 I

HEARD ON:

FOR THE APPLICANT:

INSTRUCTED BY:

FOR THE RESPONDENT:

INSTRUCTED BY: