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**In the High Court of South Africa
(Western Cape Division, Cape Town)**

**Case No: 14491/2020
14490/2020
19594/2021**

In the matter between:

R[...] A[...]

Applicant

And

F[...] A[...]

Respondent

Heard: 14 December 2023

Delivered: 09 February 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an urgent application in terms of Rule 45A of the Uniform Rules to suspend the operation and execution of a Rule 43(6) order granted on 24 October 2023, pending the determination of an application for rescission thereof, same to be instituted and heard in the ordinary course. On 07 May 2021, the applicant and the respondent

concluded a deed of settlement pursuant to the respondent's initial application in terms of Rule 43. The deed of settlement, which provided for interim maintenance for the respondent and their three minor children, was made an order of court on 27 May 2021.

[2] On 24 July 2023, after the aforesaid settlement agreement was concluded, the respondent applied in terms of Rule 43(6) to increase the maintenance obligations of the applicant. The applicant opposed the application; however, on 24 October 2023, in the applicant's absence, the court granted an order in terms of Rule 43(6) against the applicant. It is this order that the applicant seeks its suspension in these proceedings. The respondent opposed the application but failed to file the necessary answering affidavit.

The Background Facts

[3] The applicant and the respondent were married to each other in terms of Sharia law in January 2014. They subsequently concluded a civil marriage in community of property on 05 October 2017, and their marriage is still in subsistence. The respondent has instituted divorce proceedings against the applicant under case 14490/2020, which is still pending. The applicant has divorced the respondent in terms of Sharia law by issuing a *Talag* on 04 October 2019. The parties agree that their marriage has broken down irretrievably and that there are no prospects of reconciliation towards a normal marriage relationship. Three minor children aged 16, 13, and 9 were born in their marriage. The minor children are currently in the respondent's primary care.

[4] In April 2021, the respondent issued an application under the present case number for interim maintenance and for a contribution towards her legal costs in terms of Rule 43. In that application, the respondent sought maintenance *pendente lite* in the sum of R39 200 as maintenance for herself. The respondent also sought maintenance in the sum of R7466.67 per month per child for their two youngest children and R8 466 per month for the eldest child.

[5] The applicant opposed the application, and the case was scheduled for hearing on 10 May 2021. However, the parties later opted for mediation, and the case was subsequently removed from the roll. Pursuant to the mediation process, the applicant and the respondent concluded a written deed of settlement. In terms of the deed of settlement, the parties agreed that the applicant would pay spousal maintenance *pendente lite* in the sum of R12 000 from 1 June 2021. The parties also agreed that the applicant would pay R15 000 monthly maintenance *pendente lite* for the three minor children. The applicant also agreed to pay R60 000 as a contribution towards the reasonable legal costs of the respondent.

[6] Subsequent thereto, on 24 July 2023, the respondent applied in terms of rule 43(6), claiming variation of the existing order. The respondent sought an order varying the existing amount of maintenance payable to the respondent by increasing the sum reflected in the deed of settlement from R12,000 per month to R23,000 per month. The respondent also sought an order varying the amount of maintenance payable to the

respondent with respect to the three minor children by increasing the sum reflected in the deed of settlement from R15,000 per month to R31,000 per month. In addition, the respondent sought an order directing the applicant to make a contribution to the respondents' legal costs in the sum of R590 559.25, and to effect certain repairs at the respondent's residence.

[7] Furthermore, the respondent sought an additional clause in the court order granting the respondent leave to approach this court for an order declaring the applicant to be in contempt of court should he fail to contribute to the respondent's legal costs in the sum of R590 559.25. The respondent has requested that if the applicant is found to be in contempt of court, the court should sanction the applicant. This sanction would include a fine, imprisonment from Friday at 5:00 pm to Monday at 5:00 am or any other suitable punishment deemed appropriate by the court.

[8] The applicant filed a notice to oppose the application. Notwithstanding, he failed to attend court, and on 24 October 2023, the court granted the order the respondent sought, as detailed above. The applicant asserted that he instructed his legal representative, Ms Ziemkendorf, to oppose the respondent's application. His legal representative advised him that it would be in the applicant's best interest to approach and appoint a new attorney who deals more extensively in family and matrimonial litigation. On 23 October 2023, the applicant's attorney filed a notice of withdrawal as the applicant's attorney of record. The applicant reiterated that at all material times, he intended to oppose the respondent's application in terms of rule 43(6). To this end, his

erstwhile attorney advised him to attend court personally and request that he be allowed to appoint a new legal representative to assist the applicant in the matter.

[9] The applicant further stated that, regretfully, his erstwhile legal representative notified him of the incorrect date of the hearing of the application. He acted on such information and attended court personally on 09 November 2023. When he was in court, the applicant discovered that the respondent's application was not enrolled for a hearing on 9 November 2023. He immediately contacted his erstwhile attorney, who advised him that as the matter was not enrolled for hearing, he may leave the courthouse and return home.

[10] On 21 November 2023, the applicant's current attorneys of record addressed a written correspondence to the respondent's legal representatives advising them that as the applicant's financial position was rapidly deteriorating, they were in the process of attending to an application for the liquidation of the applicant's business. In response, the respondent's attorneys attached a copy of the court order dated 24 October 2023 in terms of Rule 43(6) granted in the applicant's absence. The court order varied the Rule 43 maintenance agreement. In terms of the Rule 43(6) order, the applicant was ordered to pay interim maintenance as specified in paragraphs 6 and 7 above.

[11] The applicant immediately consulted with his current attorneys of record and instructed them to urgently proceed with the necessary steps to suspend the operation of the order and to proceed with an application for the rescission of the order granted in

terms of 43(6). The applicant avers that he acted upon the incorrect information provided to him by his legal representatives, and by no negligence or fault of his own, he personally attended court on the incorrect day to request a brief postponement of the application so that he could instruct a new legal representative to assist him in furtherance of his opposition to the respondent's application in terms of rule 43(6). The applicant also submitted a confirmatory affidavit of his erstwhile attorney to confirm his assertions.

[12] According to the applicant, had he been aware that the respondent's application was enrolled for hearing on 24 October 2023, he would have personally attended court. According to him, this very fact is evident by the filing of his notice of intention to oppose. The applicant stated that his business has consistently suffered accumulated losses with a repeated indication that the liabilities fairly assessed, exceeded the assets fairly assessed. The liquidity of his business has deteriorated further following the COVID-19 pandemic and the national lockdown in 2020 and 2021. His monthly income has decreased to an average of R15,000, and he has consistently utilised his business accounts to not only meet his expenses but also to facilitate the payments of his obligation to the respondent in terms of the deed of settlement. The applicant stated that he has since instructed his attorneys to proceed with the necessary steps to liquidate his business.

[13] While the respondent is entitled to maintenance *pendente lite*, the applicant contended that such maintenance should be reasonable, considering his financial

capacity to meet such requirements. According to the applicant, had he been afforded an opportunity to instruct an attorney and to file opposing papers, the court would not have granted an order against him, which is impossible to satisfy. The applicant implored the court to exercise its discretion in his favour so that he could proceed with an application for rescission of the order granted against him. As explained above, the respondent did not file any answering affidavit to the applicant's application.

Submissions by the parties

[14] Mr Klopper, the applicant's legal representative, submitted that the order in terms of Rule 43(6) was granted in the applicant's absence. The applicant intended to oppose that application. Counsel submitted that the applicant was unfortunately misled by his previous attorneys of record. It was Mr Klopper's submission that this matter was brought on an urgent basis as the applicant was threatened with contempt of court proceedings. Counsel submitted that on 7 December 2023, the respondent's attorneys addressed correspondence to the applicant's attorneys advising, among others, that more than 30 days had elapsed following the grant of Rule 43(6) order against the applicant, that the applicant would be afforded until 12 December 2023, in which to purge his contempt failing which the respondent would proceed with execution steps against the applicant's movables and launch an application to declare the applicant in contempt of Rule 43(6) order.

[15] Counsel further submitted that the consequence of the respondent's threatened conduct aforesaid is evident from paragraph 10 of the Rule 43(6) order, which expressly

stated that the applicant would be sanctioned by the imposition of a fine, incarceration from a Friday at 5:00 pm to Monday at 5:00 am or such other sanction as the court deems fit. Counsel implored this court to grant the order as prayed for in the notice of motion.

[16] Ms. Omar, the respondent's counsel, submitted that the argument that the applicant was not aware of the date of hearing of the Rule 43(6) application is of no consequence. Counsel submitted that the Registrar of this court gave the applicant's erstwhile attorney the correct date of hearing of the Rule 43(6) application. Ms Omar further submitted that the applicant's legal representative was informed via email on 25 August 2023 of the date of the hearing. The Registrar sent this information to the applicant's erstwhile attorney a month before the latter could withdraw as the applicant's attorney of record. Counsel conceded that urgency has been properly pleaded and proven on the papers. Ms Omar further implored the court dismiss the application and to reserve the issue of costs for later determination.

Issues to be decided

[17] The issue to be determined in this matter is whether this court should suspend the operation and execution of the Rule 43(6) order granted in the absence of the applicant pending the institution of the rescission application. Simply put, whether the applicant has made out a case for the suspension of the Rule 43(6) order granted in his absence.

Relevant Legal Principles and Analysis

[18] Rule 45A of the Uniform Rules regulates the suspension of orders in the High Court. For completeness, Rule 45A provides as follows:

“The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.”

[19] Rule 45A employs the modal verb 'may', indicating that a court has a wide significant discretion to either approve or deny an application to stay the implementation of a court order. This discretion must be exercised judicially and not arbitrarily. In my opinion, the language of this rule makes it clear that the court has a broad discretion to grant or deny such a motion. Furthermore, it is a discretion which must be exercised judicially but which is not otherwise limited. See *Whitfield v Van Aarde* 1993 (1) SA 332 (E) at 337F. In *MEC, Department of Public Works and Others v Ikamva Architects and Others* 2022 (6) SA 275 (ECB) the court held that hard and fast rules circumscribing a court's discretion to order a stay are to be avoided.

[20] In considering an application in terms of Rule 45A, the guiding principle is the interest of justice. The interest of justice is the touchstone that ordinarily should guide the court in exercising its discretion. The court will generally grant a stay of execution where real and substantial justice requires such a stay or put otherwise, where real injustice would otherwise be done or caused. *Strime v Strime* 1983 (4) SA 850 (C) at

852A. An applicant must establish that he has a prima facie right that he wants to protect in the main action.

[21] The general principles for the granting of a stay in execution were succinctly summarised as follows in a locus classicus case of *Gois t/a Shakespeare's Pub v Van Zyl* 2011 (1) SA 148 (LC) at 155H – 156B, where the court stated:

- '(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.
- (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.
- (c) The court must be satisfied that:
 - (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and
 - (ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.
- (d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the underlying causa is the subject matter of an ongoing dispute between the parties.
- (e) The court is not concerned with the merits of the underlying dispute — the sole enquiry is simply whether the causa is in dispute.'

[22] In this case, an order in terms of Rule 43(6) was granted in the absence of the applicant. The respondent has threatened to execute the order against the applicant. If the order is executed, there is a likelihood that the applicant may be declared to be in contempt of court and may be committed to prison. Additionally, his movable assets can be sold in execution to recover the amount due as per the order. The applicant plans to file an application to rescind the order. Meanwhile, the applicant requests the court to suspend the execution of the order until the application for rescission is decided.

[23] The respondent in this application did not file any opposing affidavit. The averments in the applicant's affidavit are uncontroverted. It is common cause in this matter that the Rule 43(6) order was granted in the absence of the applicant. It is also common cause that the applicant had filed a notice to oppose the respondent's Rule 43(6) application. For all intents and purposes, the applicant intended to oppose the respondent's application. The applicant asserted that he attended court on 09 November 2023, thinking it was a date of hearing to request the court to postpone the matter so that he could file his answering affidavit. Unfortunately, the case was not on the roll on that date.

[24] The applicant argued that if he had known about the hearing date of the respondent's application on 24 October 2023, he would have attended court. In my opinion, this claim is unassailable. It is underscored and bolstered by the applicant's notice of intention to oppose the Rule 43(6) application which was filed in court. The applicant was in the process of securing the services of another attorney to assist him in opposing the respondent's application when judgment was granted against him in default. His absence at the hearing was because his erstwhile attorney had informed him of the incorrect date and had withdrawn as his attorney of record. The fact that the applicant attended court personally on 9 November 2023 to request a postponement for the appointment of a new legal representative supports his contention that he was eager to oppose the respondent's application.

[25] Notably, the applicant's erstwhile legal representative filed a confirmatory affidavit confirming that, indeed, she erroneously informed the applicant to attend court on 09 November 2023. I am of the opinion that the applicant should not be prejudiced for not attending court on the hearing of the Rule 43(6) application on 24 October 2023. Significantly, the applicant contended that his financial position had deteriorated and that his business had consistently suffered losses. Furthermore, his income has decreased to an average of R15 000. The respondent did not challenge these averments and must be accepted by this court. The applicant intimated that he intends to apply for rescission of the Rule 43(6) order as he cannot pay the amount sought by the respondent in that order.

[26] It must be stressed that pending the outcome of the proposed rescission application, the court order against the applicant in terms of Rule 43(6) remains in effect until a competent court sets it aside. Until that is done, that court order stands. See *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA (CC). In *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3, the Constitutional Court reiterated that court orders granted by a court are binding until set aside by a competent court in terms of section 165(5) of the Constitution, irrespective of whether they are valid; and that wrongly issued judicial orders are not nullities.

[27] As previously stated, the respondent's attorneys have expressed an intention to institute an application to declare the applicant in contempt of the order in terms of rule 43(6). The respondent's attorneys have also expressed an intention to proceed with

execution steps against the applicant's movable property. Pursuant to the provisions of the order, if the respondent proceeds with such threatened application, the applicant would be sanctioned by the imposition of a fine, incarceration from a Friday at 5:00 pm to Monday at 5:00 am or such other sanction as the court may deem fit. If the Rule 43(6) order is not stayed, in my view, real and substantial injustice would result. The applicant is likely to be incarcerated, and there is a potential that his movable assets may be sold in execution.

[28] It is trite that an application for the rescission of a court order does not automatically suspend its execution. In my view, the applicant was justified in bringing this application on an urgent basis as the applicant intend to bring an application to rescind the Rule 43(6) order, which was granted in his absence. The fact that the applicant's financial circumstances have deteriorated significantly weighs heavily in favour of the applicant. This aspect is expected to be placed before the court dealing with the rescission application. Furthermore, since the Rule 43(6) order was granted in the absence of the applicant, this court accepts the applicant's averments that his current financial position was not considered when the order was granted.

[29] I share the views expressed by Mr Klopper that the applicant's financial position ought to be placed before and considered by the court when a determination is made whether to increase the applicant's maintenance obligations or not. This is consistent with the *audi alteram partem* rule. On a conspectus of all the evidence placed before the court, I am of the firm view that the applicant would suffer irreparable harm if the Rule

43(6) order against him is enforced as he will be incarcerated. Alternatively, his movable assets would be sold in execution.

[30] Given all these considerations, I am of the view that a proper case has been made for the stay of the Rule 43(6) order.

Order

[31] In the result, the following order is granted.

31.1 The operation and execution of the Rule 43(6) order granted against the applicant on 24 October 2023 is hereby suspended pending the determination of an application for the rescission thereof and such application to be instituted and heard in the ordinary course.

31.2 The applicant is directed to honour and comply with the provisions of the Rule 43 order dated 27 May 2021.

31.3 The respondent is ordered to pay the cost of this application.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

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