

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 6201/2022

In the matter between:

L[...] **L[...]** **D[...]** **T[...]**

Applicant

and

H[...] **R[...]** **D[...]** **T[...]**

Respondent

HEARD ON: 23 FEBRUARY 2023

CORAM: JONASE, AJ

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 22 MAY 2023. The date and time for hand-down is deemed to be 22 May 2023 at 15h00.

Introduction

[1] This is an application brought by the applicant for an order in the following terms;

- a) That it be declared that the order made by this court on 11 December 2020 under case number 3451/2020 pursuant to Rule 43 proceedings between the applicant and respondent is of full force and effect.

- b) That it be declared that the respondent is to comply fully with the Rule 43 order until finalisation of the divorce action between the applicant and respondent.

Facts

[2] The jurisdictional facts are that;

- a) The divorce action was instituted in this court and it is still pending.

- b) By virtue of the provisions of Section 21(1)(c) of the Superior Courts Act, 2013, this court has the power to enquire into any existing, future, or contingent rights or obligations and can therefore grant a relief sought in this application upon a proper case being made.

[3] Subsequent to the granting of the Rule 43 order, on 6 August 2021 the applicant and the respondent entered a deed of settlement.

[4] The applicant alleges that after the withdrawal of both parties' previous legal representatives, the parties abandoned the deed of settlement.

[5] The reason for the parties to abandon the said deed of settlement is due to the circumstances between the parties specifically those in respect of the minor child materially changing.

[6] In terms of the deed of settlement, the minor child was to reside with both parties on a week-to-week basis. As such, the deed of settlement did not make provision for the payment of maintenance by the respondent in respect of the minor child.

[7] The minor child has recently started to permanently reside with the applicant. Therefore, the deed of settlement is not practically executable.

- [8] On 18 March 2022 the respondent's new attorneys of record, sent a letter to the applicant's new attorneys of record with effect that the divorce action was not finally settled by the deed of settlement but rather the deed of settlement should serve as a guideline for further negotiations between the parties.
- [10] The parties on other hand proceeded to take further steps in furtherance of the divorce action.
- [11] The applicant indicated that the divorce action was not finalised or settled.
- [12] The applicant further indicated that the Rule 43 order is still in existence, *pendente lite* the respondent has failed to comply with the order. The respondent has since stopped making maintenance payment for the applicant and the minor child and removed the applicant from the medical aid fund.
- [13] The respondent has taken a complete stance that the respondent is not compelled to comply with the obligations in terms of the Rule 43 order as the results of the deed of settlement concluded.

Issues

- [14] The applicant contends that the Rule 43 order stands, and the respondent is compelled to comply with the order until such time this court grants a decree of divorce.
- [15] The applicant further contends that there is a need for maintenance for the minor child and the respondent makes no payment for maintenance of the minor child. The respondent's removal from the medical aid fund compelled the respondent to pay own medical expenses.

[16] The applicant concludes that it will be just and equitable for this court to decree that the Rule 43 order is in force and effect and that the respondent is to comply with such order until such time the divorce action is finalised.

[17] The respondent alleges that after entering into the deed of settlement and having it submitted to the office of the Family Advocate for finalisation and approval, the Family Advocate held an enquiry regarding the best interest of the minor child.

[18] The Family Advocate's office issued a report in which it indicated that it will be in the best interest of the minor child that the parties amend the term that the minor child was to reside with both parties on a week-to-week basis.

[19] The respondent contends that the respondent has been willing that the deed of settlement be amended as proposed by the office of the Family Advocate but the applicant is not willing to cooperate and is frustrating the finalisation of the divorce decree.

[20] The respondent denies that the parties abandoned the deed of settlement but confirms the concern of the Family advocate as alleged by the applicant.

[21] The respondent further contends that according to clause 4 of the deed of settlement the respondent will pay interim maintenance to the applicant in the amount of R13 000-00 per month for a period of twenty -four months. The period is from 1 September 2021 to 1 September 2023. After this period the parties will have no further claims against each other in respect of maintenance.

[22] However, the respondent alleges that he was willing to amend the originally agreed rights and duties regarding the minor child to bring it in line with the proposals by the Family Advocate.

[23] The respondent further alleges that in the deed of settlement, parties agreed on the division of the assets. The report by the Family Advocate had no bearing on the

parties' s agreement regarding the division of assets. The respondent has no intention and reason to abandon the agreement in that regard.

[24] The respondent further contends that the only reason he was willing to amend the deed of settlement was because the Family Advocate indicated that it will be in the interest of the minor child if certain aspects regarding the parties' rights and duties towards him are amended as proposed by the Family Advocate.

[25] The respondent further contends that since the beginning of October 2022 he made several attempts to settle all outstanding disputes with the applicant and to prevent any unnecessary litigation.

[26] The respondent seemingly brought an application in this court for an order to suspend and set aside the writ of execution obtained by the applicant during August 2022. The applicant filed an opposing affidavit in which she confirmed that the deed of settlement was concluded but averred that the divorce action has not been settled.

[27] The respondent alleges that he has been advised that the applicant could have brought this application as a counter-application on the above application. Apart from being more cost-effective, it would make more sense as the cardinal issue that needs to be adjudicated in both applications is whether the applicant can rely on the original Rule 43 order after she had entered a deed of settlement.

[28] The respondent contends that the deed of settlement is a valid and binding contract. Seemingly, the applicant acted in accordance with it by taking full control of the respondent lucrative business and only after taking full control of the said business did the applicant want to renege on the agreement. The applicant is not entitled to do that.

[29] Finally, the respondent alleges that in the meantime and as agreed to in the deed of settlement, the applicant has taken full control of the lucrative business. The applicant's financial resources have significantly increased since obtaining the original Rule 43 order.

[30] the applicant's reply to the effect that the purpose of this application is not to amend or vary the existing Rule 43 order due to material change of circumstances. It is the applicant's case that;

- a) This court has granted an order *pendete lite* in terms of which the respondent was ordered to make certain payments,
- b) The effect of Rule 43 order is that it will remain in existence, and the respondent is to comply with the order until the divorce action is finalised.
- c) The divorce action the applicant instituted against the respondent has not been finalised and is still pending as there are various contentious issues which remains unresolved in the action; and
- d) The respondent has simply failed to comply with the Rule 43 order.

[31] The applicant emphasises that the deed of settlement does not nullify the Rule 43 order as same is of full force and effect until the divorce action is finalised.

Analysis

[32] Section 21(1) of the *Superior Courts Act No. 10 of 2013* provides for declaratory orders and states:

"Section 21(1) A Division has jurisdiction over all people residing or being in, and in relation to all causes of action arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a)...

(b)....

(c) *in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination”.*

[33] This subsection provides for declaratory orders.

[34] *Proxi Smart Services (Pty) Ltd v Law Society of South Africa*¹ the court held that;

“It is trite that a Court exercising a declaratory jurisdiction will follow a two-step process. In this regard the process established by the Appellate Division in 1942 is still good law where it was held:

Durban City Council v Association of Building Societies 1942 AD 27 at 32

“The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of discretion conferred on it”.

[35] The court went further to say:

“The Constitutional Court has emphasised that court orders must be framed in unambiguous terms and must be practical and enforceable. It must leave no doubt as to what the order requires to be done. In Eke v Parsons² the Constitutional Court stated the following;

“the rule of law required not only that a court order is couched in clear terms but also that its purpose is readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the

¹ (74313/16) [2018] ZAGPPHC 333

² [2015] (11) BCLR 1319 (CC)

Constitution. Furthermore, in appropriate circumstances, non-compliance may amount to a criminal offence with serious consequences like incarceration”.

[36] At paragraph 74 the court stated further that:

“If the order is ambiguous, unenforceable, ineffective, inappropriate, all lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that the court order must be effective and enforceable, and it must be formulated in language that leaves no doubt, as to what the order requires to be done. The order may not be framed in a manner that affords the person to whom it applies, the discretion to comply or disregard it”.

[37] At paragraph [76] the court stated that *“the court will not grant a declaratory order if the issue raised before it, is hypothetical, abstract and academic, or where the legal position is clearly defined by the statute.*

[38] The application at hand is based on the order made in terms of Rule 43 on the impending divorce action between the parties. The said order is clear as to the respondent’s obligations *pendente lite* and as such, it is fully effective and enforceable until finalisation of the divorce action between the parties.

[39] The applicant correctly pointed out that in *the Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*³that:

“it cannot be gainsaid that the orders of Court bind all to whom they apply. In fact, all orders of Court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside. This in addition to typifying common sense. The constitution itself enjoys. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies”.

[40] The respondent submitted, emphatically, that the parties did not abandon the deed of settlement and same is a valid and binding contract. The applicant

³ (CCT 5214/21) [2021] ZACC 18 at PARAS 59

acted in accordance with it by taking full control of the lucrative business. Only after the applicant had taken full control of it the applicant wants to renege on the agreement. The applicant is not entitled to do this.

[41] According to the respondent, by entering into the deed of settlement, the applicant has waived her rights in terms of the Rule 43 order.

[42] The deed of settlement stipulates that “... *AND WHEREAS the parties are desirous of settling the abovementioned action on certain terms and conditions, subject to the approval of the above Honourable Court, and subject to the specific conditions that the Plaintiff shall proceed to procure a final decree of divorce, with the incorporation of this agreement, on an uncontested basis*”.

[43] It is apparent that the said disputed deed of settlement was to be subject to certain terms and conditions, court approval and specific conditions for procuring the final decree of divorce incorporating it. That has not yet materialised.

[44] The respondent relies on the case of *Odgers v De Gersigny*⁴ in which the court stated that;

“There are no restrictions to the quantum and time frames to which that parties may bind themselves relating to payment of maintenance irrespective of whether the recipient spouse remarries...There is no bar to agreeing on the duration and extent of the payment of maintenance which is to be made, irrespective of any change in the parties’ circumstances, the agreement is valid and purely contractual in nature. It falls to be governed by the rules applicable in that sphere.....it does not matter whether the agreement is made an order of Court in terms of section 7(1) for its interpretation- the essence of the agreement remains the same”.

[45] The respondent submitted that the applicant’s financial resources have significantly increased since obtaining the original Rule 43 order. The

⁴ 2007 (2) SA 305 SCA at 309 A-D

settlement agreement is valid and binding. The applicant can only claim relief and exercise of her rights in terms of the settlement agreement.

[46] The *Odgers case* above is distinguishable in that the court there, for the reasons unknown, finalised the divorce action and the settlement agreement was not incorporated in the decree of divorce. The court clearly indicated that the settlement agreement was a normal contract the ex-wife was entitled to enforce and sue under the common law principles of contract (the court above said.....*It falls to be governed by the rules applicable in that sphere..*”).

[47] This is not the case in this matter due to the following;

- a) there is a dispute whether the deed of settlement was abandoned.
- b) The deed of settlement was not yet approved by this Court, and
- c) the applicant has not procured a final decree of divorce with incorporation of the agreement.

[48] Nothing inhibited the respondent to approach this Court in terms of Rule 43(6) should there be a material change of circumstances of the applicant.

[49] The defence of waiver by the respondent is misplaced and as such should fail.

Conclusion

[50] In the circumstances, I make the following order;

1. It is declared that the order made by this court on 11 December 2020 under case number 3451/2020 pursuant to Rule 43 proceedings between the applicant and respondent is of full force and effect.
2. It is declared that the respondent is to comply fully with the Rule 43 order until finalisation of the divorce action between the applicant and respondent.
3. The respondent to pay the costs of this application.

S. JONASE AJ

On behalf of the Applicant:
Instructed by:

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On behalf of the Respondent:
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