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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 514/2021

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE.....	SIGNATURE:.....

In the matter between:

M[...] **F[...]** **P[...]**

APPLICANT

And

N[...] **P[...]**

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] During February 2021 the applicant instituted a Rule 43 application on urgent basis in which she applied for maintenance *pendent lite*. The matter came before my sister Naude AJ on 23rd February 2021. The respondent was opposing the applicant's application. On that date the respondent raised two

points *in limine*, that of lack of urgency and *lis alibi pendens*. The parties agreed to dispose the two points *in limine* before going into the merits of the application.

[2] After the parties have submitted their arguments, Naude AJ ruled that the matter was urgent, and enrolled it to be heard on urgent basis. From the transcribed record, in her judgment in relation to urgency, she held that the court has dealt with the points *in limine* of urgency and *lis pendens*, and in the process of arguing those points *in limine* counsel for both parties have touched on the merits, but it would not be in the interest of the parties or the minor children to adjudicate the matter on the merits without having considered the full financial disclosure as completed under oath on the full financial disclosure form. Naude AJ made orders that both parties file a full financial disclosure form under oath on or before 13h00 on 26th February 2021; both parties to file additional or supplementary heads of argument on or before 13h00 on 2nd March 2021; and judgment in respect of the point *in limine* of *lis pendens* and merits was reserved.

[3] After the order was made counsel for the respondent sought clarity for the subsequent filing of necessary documents, and before he could finish what he wanted to say, Naude AJ intervened and said the following:

“No, what the court’s intention was that the case has been made on the papers, both parties argued in respect of the merits therefore the court wants a full financial disclosure form this matter is urgent. Then based on the full financial disclosure form, and the papers before record both parties to make out their argument in the heads of argument. That is why the court ordered that a full disclosure form be filed by Friday, and the heads of argument only Tuesday thereafter.”

- [4] Both parties have filed supplementary affidavits and supplementary heads of argument. Judgment of the Rule 43 application was delivered on 7th April 2021 which was on both point *in limine* of *lis pendens* and merits of the application. Naude AJ dismissed the respondent's point *in limine* of *lis pendens* and held that the applicant had partially succeeded with her claim on merits and made several orders in favour of the applicant. The respondent did not comply with the court order of the 7th April 2021.
- [5] The applicant has instituted contempt of court application on urgent basis against the respondent for his failure to comply with the order of the 7th April 2021. The applicant is further seeking that the applicant be ordered to comply with the order of 7th April 2021 within seven days, failing which a warrant of arrest be issued committing the respondent to imprisonment for contempt of court for a period of sixty days.
- [6] The respondent is opposing the applicant's contempt of court application. The respondent in his opposing answering affidavit has raised points *in limine* that the applicant's application is not urgent and that the order of the 7th April 2021 is unenforceable, vague and ambiguous. The respondent has also filed a conditional counter application submitting that there has been various material change in circumstances, which the applicant failed to disclose during the urgent Rule 43 proceedings which renders majority of the orders granted unenforceable. The respondent in his conditional counter application is seeking that the order of 7th April 2021 be stayed pending an application in the Maintenance Court where the issue of maintenance will be completely adjudicated. The respondent has further submitted that the order of 7th April 2021 was granted on merits without the merits being argued. The respondent

further submitted that the judgment of the 7th April 2021 came as a surprise as on 23rd February 2021 they argued only the points *in limine*. The respondent has also submitted that he does not have a medical aid, and did not have one at the time of the Rule 43 application.

- [7] The applicant's counsel before this court conceded that the merits of the Rule 43 application were never argued. However, counsel for the applicant submitted that the proper route which the respondent should have followed was to bring an application in terms of Rule 43(6). It is the applicant's contention that the order of the 7th April 2021 should be obeyed despite its defect and relied on the case of *S v S and Another*¹.
- [8] I will first determine whether the applicant's application is urgent. Urgent applications are regulated by Rule 6(12) of the Uniform Rules of Court (Rules). In terms of Rule 6(12)(b), an applicant who brings an application on urgent basis must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course.
- [9] This is a contempt of court application which also involves the interest of minor children. It is trite that applications which involves minor children and contempt of court applications are by nature urgent. The applicant has attached an email from PEPPS School which is a school wherein the parties have enrolled one of their minor child. In that email the school is threatening to deregister the parties' minor child from school as they were three months in arrears with payment of the minor child's school fees. Should the minor child be deregistered it will be detrimental to her future educational progress. This

¹ 2019 (6) SA 1 (CC)

matter therefore concerns a potential serious violation the minor child's right to education. That on its own render the matter to be urgent. (See *Moko v Acting Principal of Malusi Secondary School and Others*². The matter is accordingly enrolled as urgent.

[10] Turning to the second point *in limine* which the respondent alleges that the order of the 7th April 2021 is unenforceable, vague and ambiguous. On 23rd February 2021, the parties argued two points *in limine*, that of lack urgency and *lis pendens*. After the two points *in limine* were argued, the presiding Judge made a ruling only in relation to urgency which she found the applicant's application to be urgent and enrolled it as such. She reserved judgment in respect of the point *in limine* of *lis pendens* and merits of the application despite the merits not been argued. She went further to give directives of submitting further supplementary heads of argument without informing the parties that they must adequately cover merits in their heads of arguments as she was dispensing with the hearing of their oral submissions.

[11] During the analysis of the arguments presented to her in relation to the two points *in limine*, the presiding Judge stated that during the arguments of the two points *in limine*, counsel for both parties have touched on the merits of the case, but that it was not in the interest of the matter, the parties or children to adjudicate on the merits of the matter without having considered the full financial disclosure as completed under oath on the full financial disclosure form. By stating that the merits were touched, the presiding Judge was implying that the merits of the matter have not been fully ventilated. The financial disclosure form on its own will not adequately address the merits of

² 2021 (3) SA 323 (CC)

both parties' versions. The transcribed record also shows that at some stage counsel for the applicant during her argument, was venturing into the merits of the application, and the presiding Judge reminded her that they are dealing with urgency and not merits. However, after judgment on urgency was delivered, when counsel for the respondent sought clarity as to filing of further documents, the presiding Judge interjected him and told him that the intention of the court was that the case has been made on papers, and that both parties have argued the merits. The presiding Judge made this ruling despite having prevented counsel for the applicant to argue the merits, and also despite having observed in her analysis of the two points *in limine* that the merits were only touched.

- [12] Counsel for the applicant has conceded that the merits of the Rule 43 application were not argued. It is clear from the transcribed record that the parties did not agree that the filing of the disclosure form and further supplementary heads of argument and supplementary affidavits were sufficient for the Court to dispose the matter, and that they were dispensing with arguing the merits of the matter further. The Court on its own decided to dispose the matter in the manner in which it did without first obtaining the consent of the parties. This was the parties matter, and their consent was necessary if the Court was to deviate from the normal way of disposing matters. The presiding Judge in her judgment should have stopped were she dismissed the point *in limine* of *lis pendens*, as when she made a ruling on urgency she has clearly stated that the issues that were argued were the two points *in limine* whilst merits were only touched. Basically the judgment that was reserved was that of the point *in limine* of *lis pendens* and not merits as the merits were not argued.

[13] In *Knoop and Another NNO v Gupta (Tayob Intervening)*³ at para 28 Wallis JA said:

“Section 34 of the Constitution guarantees a ‘fair hearing’ before a court. In *De Beer, Yacoob* J said: ‘A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.’ Where an issue is not raised in the pleadings or affidavits in a case, and the order granted is one on which neither party has been heard, there is a breach of a constitutional right.”

[14] In the case at hand the presiding Judge has given an order on the merits of the case without giving both parties an opportunity to be heard, or the parties agreeing that the matter be disposed on papers without oral submissions. The order granted on merits is also problematic. Firstly, judgment was electronically delivered on 7th April 2021 but requires the respondent to make payment of the first instalment of contribution towards the applicant’s legal costs on 1st April 2021. The respondent was already in contempt on the day he receives the order. Whether this was a typing error it will be for Judge who granted the order to know. Secondly the respondent has stated in his answering affidavit that at the time the Rule 43 application was heard he did not have a medical aid. However, part of the order is that the respondent retains the applicant and minor children on his medical aid. Had the matter being properly ventilated, this issue would have been clarified.

[15] Counsel for applicant has argued that the proper route which the respondent should have followed, is the remedy provided for in Rule 43(6). However, Rule 43(6) is a remedy in which a court may vary its own decision in the event of a material change occurring in the circumstances of either party or child, or contribution towards costs proving inadequate. The order of the 7th April 2021

³ 2021 (3) SA 135 (SCA)

goes beyond changed circumstances as there is a breach of a constitutional right to a fair hearing since neither party has been heard before the order on merits was granted.

[16] It trite that an order of court of law stand until set aside by a court of competent authority. Until set aside, the court order must be obeyed, despite whatever reservation one might have. Counsel for applicant submitted that despite the defects in the order of the 7th April 2021, it should be enforced and relied on the case of *S v S* above in which the Constitutional Court dismissed the appeal despite the Rule 43 order having some defects. However, *S v S* is distinguishable from the case at hand in that in *S v S* the parties have argued the matter on the merits and the appellant had an avenue to bring a Rule 43(6) application in order to rectify the defect in the order, and that avenue was pointed to him in the first High Court judgment.

[17] The order of the 7th April 2021 if it is allowed stand in its present format will cause grave injustice to the respondent as certain orders are unenforceable and the orders as a whole on merits were granted without affording the respondent an opportunity to be heard. In *S v S* at paragraph 58 Nicholls AJ said:

“There may be exceptional cases where there is need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted. In those instances, where strict adherence to the rules is at variance with the interest of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interest of justice.”

[18] In the case at hand Rule 43(6) avenue will not adequately address the respondent's problems, and that will result in a grave injustice to the

respondent. The proper route which the respondent should have followed was bring an application to declare part of the order of the 7th April 2021 a nullity as there was a breach of a constitutional right to a fair hearing. The respondent in his provisional counterclaim did not seek an order declaring part of the order of 7th April 2021 a nullity, and should I grant that order I will be granting an order that goes beyond what the respondent had sought. However, if the order of the 7th April 2021 is allowed to stand in its present format, as I have already pointed out above, will cause grave injustice to the respondent. This court is empowered to exercise its inherent powers in terms of section 173 of the Constitution and regulate its own process in the interest of justice. The proper remedy under the circumstances is to stay the proceedings pending the respondent bringing an application to declare the order of the 7th April 2021 in relation to merits of the Rule 43 application a nullity.

[19] In the result I make the following order

19.1 Non-compliance with the Rules is condoned and the matter is heard as one of urgency.

19.2 The order of the 7th April 2021 is stayed pending an application to be brought by the respondent to declare the order of the 7th April 2021 in relation to merits to be a nullity.

19.3 The respondent to bring that application within ten days of this order failing which the applicant will be entitled to re-enrol this matter on the same papers and supplement where necessary.

19.4 No order as to costs

KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

Counsel for the plaintiff	: Ms MC de Klerk
Instructed by	: DDKK Attorneys Inc
Counsel for the respondent	: Adv R Ferreira
Instructed by	: HLM Mamabolo Attorneys
Date heard	: 15th July 2021
Date delivered	: 22nd July 2021