

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case number: 15002/2020

Heard on: 23 March 2021

Date of judgment: 29 March 2021

In the matter between:

M[....] S[....]

Applicant

and

D[....] S[....]

Respondent

JUDGMENT

SWANEPOEL AJ:

[1] The applicant is Mr. D[....] S[....] (although he is referred to in the application as the respondent). I shall refer to him as 'the applicant' and to Ms. S[....] as 'the respondent' as is proper. Applicant applies in terms of rule 43 (6) that an order granted by Mokose J on 12 September 2020 be "set-aside and rescinded". That order requires applicant to:

[1.1] pay maintenance *pendente lite* to respondent in the sum of R 25 000.00 per month;

[1.2] maintain respondent and her daughters as members of his medical aid;

[1.3] pay respondent's daughter's cell phone accounts;

[1.4] make a contribution towards respondent's costs in the sum of R 20 000.00.

[2] The matter has quite a litigious history. After the rule 43 order was granted on 12 September 2020, applicant launched an application less than a month later to set it aside. That application was also ostensibly brought in terms of rule 43 (6). On 24 November 2020 Ranchod J dismissed the application. Respondent opposed the application on two points in *limine*. The first was that the application was an abuse of the process, in that it was a rescission application disguised as a rule 43 (6) application. The second was that no material change in circumstances had been demonstrated. The first point *in limine* was upheld. and the application was dismissed with costs on the attorney/client scale.

[3] This application was launched on 15 January 2021, less than two months after the first rule 43 (6) application was dismissed, and it seeks the same relief as had been sought in the first rule 43 (6) application. Applicant's counsel argued that the application was not a rescission application. but rather an application to vary the maintenance amount to zero. The notice of motion, which does not comply with rule 43, says something completely different, and this application seems to me to have been a second attempt at the rescission of the order of Mokose J. The applicant's sworn statement also states that the application aims to "set aside and rescind" the order of Mokose J. In any event, due to the view that I take on the matter, I will not be labour the point.

[4] Applicant admits freely that he has not paid anything towards maintenance, and he says that he was unable to afford to pay any money to respondent. Applicant says that the funds in his FNB and Standard Bank accounts have been attached, and he therefore has *no* money available to satisfy the order. He alleges that the trust relationship between himself and his erstwhile employer, Eminent Group Holdings (Pty) Ltd ("Eminent or the company") has broken down, and that he was dismissed following a disciplinary hearing on 14 December 2020.

[5] Applicant says that since 14 December 2020 he has had no income whatsoever, and he cannot comply with the order. When the respondent's sworn reply was filed the arrears maintenance amounted to R 150 000.00.

Applicant alleges that his expenses amount to R 19 382.31 per month, and he applies for an order that respondent should pay him interim maintenance of R 19 000.00 per month.

[6] Respondent says that applicant is in fact the controlling mind behind Eminent. Respondent was previously a director of Eminent, and, she says, they lived off the income generated by the company. If there had been a disciplinary hearing, it had been instigated by applicant, and he will either simply be re-instated later, alternatively she believes that he is still running the business of the company under a different guise. Respondent therefore disputes applicant's version that he resigned or was dismissed, and that he is destitute, in its entirety.

[7] There is a material dispute on the papers. In ***Plascon Evans Paints (Ltd) v Van Riebeeck Paints (Pty) Ltd***¹ it was held that in applications where a dispute of fact arises, a court is bound to determine the matter on the facts pleaded by the applicant which are not in dispute, together with facts pleaded by the respondent. If the case cannot be decided on that basis, then the application cannot succeed. That, it seems to me, puts paid to applicant's case.

[8] However, if I do consider the facts before me, I would have to say that I do not believe applicant's version. On 10 June 2020 applicant signed a letter on the company's letterhead in his capacity as managing director in which he stated that two clients who were responsible for 80% of the company's total income had gone into business rescue, causing the company to become financially distressed. In applicant's sworn reply in the rule 43 application dated 8 July 2020 he alleged that due to the Covid-19 pandemic Eminent's income had been adversely affected, and he was in the process of liquidating the company.

¹ 1984 (3) SA 623 (AD) at 634 H

Applicant was, at that stage already, setting the scene that he was in financial trouble.

[9] In the first rule 43 (6) application applicant blamed his erstwhile attorney for not including all relevant information in his original sworn reply. He made embarrassing comments with regard to his previous attorney's mental health, and he tried to shift the blame for the outcome of the rule 43 application onto his previous legal team.

[10] In his first rule 43 (6) sworn statement, which he deposed to on 6 October 2020, applicant alleged that he has never been a shareholder of the company. This averment is unlikely considering the fact that applicant started the company in 2005, and that he was its sole director for some years. It also contradicts applicant's (undated) financial disclosure form in which he said that he owned 70% of the shares in the company. In the same financial disclosure applicant alleged that he had been retrenched due to the company's dire financial position. Mr. Botes, applicant's counsel, argued that it was uncertain who had filled in the form, and that it may not have been the applicant. That contention is extremely unconvincing.

[11] What I also find strange is that applicant, who was still a director of the company at that stage, allegedly received a notice on 10 June 2020 that the company was considering liquidation. Applicant used the letter in support of his claim in the first rule 43 (6)- that the company was insolvent. The "notice" was on a company letterhead and simply stated that the company was considering liquidating itself. Ironically applicant himself was the author of the letter. He had not 'received' the notice as he alleged, he had signed it himself in his capacity as managing director. Applicant alleges that at a shareholders meeting held on 26 June 2020 a decision was taken to liquidate the company. This same 'insolvent company' granted applicant a loan of R 160 000.00 on 31 July 2020, a little more than a month after the decision to liquidate. On 15 September 2020, three days after the order of Mokose J, applicant's previous attorney wrote to respondent's attorney stating that applicant had been "laid off until 16 April 2020" (*sic*) and that

he had received no income from June 2020 onwards. The letter alleges that the directors (not the shareholders) of the company, (the directors being the applicant and one Van Rensburg at that stage), had taken the decision to liquidate the company.

[12] Miraculously, the company managed to survive until December 2020. Equally miraculously, applicant remained employed. I am not sure what happened to his alleged retrenchment. Applicant remained a director of the company until 10 December 2020 when he voluntarily resigned, a little more than a month after the first rule 43 (6) application was dismissed. Applicant's version is that he was summoned to a meeting on 14 December 2020 where he was charged with gross negligence in respect of conduct that had allegedly caused the company to lose R 120 000.00. The chairperson of the disciplinary enquiry was allegedly one Danie van Rensburg, an independent person. Applicant had apparently already decided to fall on his sword, to resign as a director, and to plead guilty to the charges. Nevertheless¹ Van Rensburg decided to proceed with the hearing in any event, and he found applicant guilty of the charge against him. Applicant says he was dismissed as employee, and removed from office as director. This version is hard to accept in view of the fact that applicant was not only the founder of the company, but he was also, on his own version, a 70% shareholder. Surely he would not simply walk away from what is, essentially, his own company.

[13] Strangely, the report on the hearing did not emanate from Van Rensburg, but from someone within the company itself and was written on a company letterhead. It recorded that the majority of the board of directors (the board then only being comprised of Van Rensburg) had decided to remove applicant as a director. The "board" did so despite the fact that applicant had already resigned four days before the hearing was held. The report is remarkably bereft of *any* facts as to what applicant was supposed to have done to warrant his dismissal. The report concludes with the following statement:

"You will receive your nonnal remuneration for services rendered to date less all

outstanding loans, money etc. and a final calculation of your salary will be done after this.”

[14] The report makes a mockery of applicant's version that he had not received any money since June 2020. He was obviously receiving a salary, despite which he did not pay respondent one cent. There are other discrepancies in applicants version, but I have made my point Applicant's version is simply unbelievable. I agree with respondent's counsel that the application was an attempt at rescission, contrary to Mr. Botes' argument that it was intended to vary the Mokose J order. I also agree that it was brought not because applicant is destitute, but because he simply does not want to pay respondent any maintenance.

[15] Consequently I make the following order:

[15.1] The application is dismissed.

[1.5.2] Applicant shall pay the respondent's costs on the attorney/client scale, including the costs of senior counsel.

JJC SWANEPOEL

ACTING JUDGE OF THE HIGH COURT

GAIUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement 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 29 March 2021.

COUNSEL FOR APPLICANT: Adv. F Botes SC

ATTORNEY FOR APPLICANT: Dawte de Beer Attorneys

COUNSEL FOR RESPONDENT: Adv. L Haupt SC

ATTORNEY FOR THE RESPONDENT: Van Heerden & Krugel
Attorneys

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