

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No.: 5852/2009

In the case between:

H F W

Applicant

and

E C W

Respondent

JUDGMENT:

LEKALE, AJ

HEARD ON:

21 JANUARY 2010

DELIVERED ON:

28 JANUARY 2010

[1] This is an application for payment of maintenance *pendente lite* and contribution towards costs in terms of Rule 43 of the Uniform Rules of Court (“the Rules”).

[2] The respondent instituted divorce proceedings against the applicant under case number 1667/2008 which action is still pending before this court.

- [3] Subsequent to the foregoing the applicant secured a Rule 43 order for payment of maintenance pending litigation in the amount of R900,00 per month as well as contribution towards the costs of the action in the total amount of R1 000,00 on the 26 June 2008.
- [4] On the 26th November 2009 the applicant launched another Rule 43 application for payment of maintenance *pendente lite* in the amount of R7 600,00 per month and contribution towards the costs in the amount of R10 500,00.
- [5] In opposing the application the respondent, *inter alia*, raised two points *in limine* to the effect that the applicant lacks *locus standi in judicio* in so far as he and his doctors hold that he, at times, gets delirious due to the medication he takes and that the application amounts to an abuse of the court process in that it seeks to revisit the original order instead of asking for variation of the same on the basis of material change to circumstances as contemplated by Rule 43(6) of the Rules.

[6] At the hearing of the application on the 21 January 2010 Mr Greyling, counsel for the respondent, argued for either the dismissal of the application with costs on the basis of either of the foregoing preliminary points or the postponement of the matter in order to allow the applicant an opportunity to furnish medical evidence proving that he is of sound mind.

[7] On his part, Mr Bruwer, attorney for the applicant, effectively contended that:

7.1 reference to lack of legal capacity in the applicant's papers relates to contractual capacity with regard to a signed Deed of Settlement in the divorce action which the applicant intends to have rescinded;

7.2 he simply neglected to mention Rule 43(6) in the application and that the application is, in fact, a section 43(6) variation application;

7.3 if the application is dismissed it would be appropriate for an order for payment of costs to be made;

7.4 if the court deems it appropriate it may postpone the matter in order to allow the applicant to change the heading of the application by referring to Rule 43(6).

[8] I have no difficulty in dismissing the point challenging the applicant's *locus standi* as being bad both in law and on the facts on, *inter alia*, the basis that:

8.1 a proper reading of the papers, inclusive of medical certificates attached to the applicant's supporting affidavit, does not suggest any mental disorder or unsound mind rendering him legally incapable to litigate as at the date of the signing of the said affidavit;

8.2 generally persons are presumed sane until the contrary is proved and the onus of proving the same lies on the party alleging it. (See **ESTATE REHNE v REHNE** 1930 OPD 80 at 91 - 92 and **DE VILLIERS v ESPACH** 1958 (3) SA 91 (T) at 96A.)

8.3 there was, further, nothing before me to suggest that, even if it is correct that he sometimes gets delirium, he suffered from the same at the material time.

[9] Mr Bruwer effectively invited the court to look at the substance of the application and not its form in order to determine whether or not it was a Rule 43(6) application. On the other

hand Mr Greyling contended that the sub – rule in question should be strictly applied and only applies where there has been a material change in the circumstances of the applicant party.

[10] A careful perusal of the application shows that both its form and substance are consistent with and supportive of a Rule 43(1) application as opposed to a Rule 43(6) application insofar as:

10.1 no changed circumstances are either averred or set out in the application as correctly submitted for the respondent;

10.2 the most plausible inference that may be drawn from the application as a whole, inclusive of its form, is that it was meant as a new and independent Rule 43(1) application;

10.3 the circumstances that Mr Bruwer relied on as having materially changed were, *inter alia*, that the applicant wishes to rescind the Deed of Settlement in respect of the divorce action and, thus, required contribution towards costs in order to launch such an application.

This factor, in my view, is irrelevant to a Rule 43

application insofar as the costs contemplated by the rule are those of a pending matrimonial action and not any other action. Let alone the costs of an application of whatever nature. (Compare **MAAS v MAAS** 1993 (3) SA 885 (O) at 888J – 889B.)

[11] Mr Bruwer, further, contended that the respondent was not in compliance with the original maintenance order. Rule 43 proceedings are, however, not designed and intended to address non-compliance with orders. It, therefore, does not serve the interests of an aggrieved party to approach the court in terms of Rule 43 for a parallel maintenance and/or costs contribution order to be made where the original order is being frustrated or ignored. Other legal avenues designed to ensure compliance with court orders have to be pursued in such circumstances.

[12] Mr Greyling submitted that the applicant was guilty of abuse of the relevant court process and asked for an order for payment of costs. Mr Bruwer had no qualms with any such order being made in the event of the application being dismissed.

[13] Mr Greyling contended that the applicant was, in effect, inviting the court to revisit and review the original order. I am, however, of the view that what the applicant is, effectively, seeking to do is to secure another order, which is generally the same as the original order, on generally the same grounds with the only difference being the amounts prayed for. In other words, the applicant desires to have another maintenance and contribution order issued in the face of the existing one with the result that the two orders are to run and operate side by side or concurrently.

[14] Such a result is, in my view, neither legally permissible nor judicious. It is the situation targetted, as not being in the interest of finality and public policy, by the *exceptio res judicata* insofar as such a defence

“...was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions”

(see **BAFOKENG TRIBE v IMPALA PLATINUM LTD** 1999

(3) SA 517 9(B) AT 566 D-E and **KOMMISSARIS VAN**

BINNELANDSE INKOMSTE v ABSA BANK BPK 1995 (1)

SA 653 (A))

[15] I am satisfied, as was held in **GREENSPAN v GREENSPAN** 2001 (4) SA 330 (CPD) at 336B – C, that:

“...if the [present] application is not an abuse of the Court process, it is one which, at the very least, is so unreasonable as not to justify me exercising my discretion in favour of the applicant.”

[16] In the light of the foregoing it is, in my view, not appropriate to postpone the proceedings as such an exercise would be an essay in futility. In this regard it should be recalled that the onus of proving that a party is not of sound mind is on the one alleging the same while a mere amendment of the Notice of the application to reflect that the application is being brought in terms of Rule 43 (6) would not change its substance.

[17] **ORDER:**

In the result, the application is dismissed with costs.

L. J. LEKALE, AJ

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Instructed by
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BLOEMFONTEIN

On behalf of respondent: Adv Greyling
Instructed by:
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