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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2022-045185

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: YES/~~NO~~

DATE: **13 August 2024**

SIGNATURE

In the matter between:

S[...]: B[...] L[...] D[...]

Applicant

And

S[...]: G[...] N[...] M[...] J[...]

Respondent

ORDER

-
1. The husband's application for rescission is dismissed.
 2. The wife's counterapplication for contempt of court is dismissed.
-

JUDGMENT

LIEBENBERG AJ

Introduction

[1] On 23 January 2023 the respondent's wife obtained an order against the applicant husband in her application in terms of Rule 43. The order was obtained on an unopposed basis. The husband failed to deliver his replying statement within the prescribed 10 day period. This Rule 43 order forms the subject matter of the husband's application for a rescission thereof, as well as the wife's counterapplication for contempt of court.

[2] The present application was launched barely two days after the Rule 43 order was granted. What ought to have been a relatively simple application, morphed into an inordinate number of affidavits being delivered, including those filed in relation to a substantive application for postponement in August 2023, which gave rise to financial disclosure, all running in excess of 1400 pages.

[3] To add insult to injury, neither party deigned it necessary to adhere to the Practice Directives of this Division: No practice note or heads of argument were filed on behalf of the husband, and those filed on behalf of the wife were of little assistance to the Court. A query raised by way of a widely shared case note on the Caselines platform was eventually responded to on the very day the matter had been enrolled for hearing, and just prior to court commencing, the wife's representatives delivered supplementary heads of argument. Also on this date, the husband's attorney filed a notice of withdrawal, his mandate having been terminated. I was mindful of striking the matter from the roll but believe it in the interest of justice to deal with the matter once and for all.

[4] The application and the counterapplication being distinct, I deal with each in turn.

The rescission application

[5] In order to set aside an order granted in default, an applicant must meet the requirements for a rescission of judgment as set out in the provisions of Rule 31(2)(b) or Rule 42(1)(a) or the common law.¹ Even if an applicant meets these

¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (11) BCLR 1263

requirements, a court is not compelled to grant the rescissions sought. It is rather a discretion of a court to do so.² Ultimately, it must still be in the interests of justice for a court to exercise its discretion in favour of an applicant.³

[6] As this matter does not concern a default judgment against a defendant in an action, the provisions of Rule 31 are irrelevant.

[7] Rule 42(1) provides:

The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

[8] Presently, the wife was procedurally entitled to approach the Court without further notice to the husband in the absence of his replying statement being delivered.⁴ Thus, the Rule 43 order cannot be termed erroneously sought.⁵

[9] An order is not labelled as erroneously granted when the court that granted the order was not aware of the existence of a defence on the merits when it granted the impugned order.⁶

(CC) at para 50 referring to *Minister for Correctional Services v Van Vuren, In re Van Vuuren v Minister for Correctional Services* [2011] ZACC 9; 2011 (10) BCLR 1051 (CC) at para 7 (Zuma).

² Zuma above at para 53 referring to *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] ZASCA 36; [2003] 2 All SA 113 (SCA); 2003 (6) SA 1 (SCA).

³ Zuma above at para 50.

⁴ Rule 43(4).

⁵ *Lodhi 2 Properties Investments Cc v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para 25 and 27 (*Lodhi 2*).

[10] Accordingly, the husband is not entitled to a rescission of the order in terms of the provisions of Rule 42(1)(a).

[11] The husband's case is primarily founded on the common law principles for a rescission of the Rule 43 order. To succeed, the husband must show 'sufficient' or 'good cause' to warrant rescission. The former Appellate Division espoused the requirements for 'good cause' to include two elements, both of which must be met: firstly, a reasonable and acceptable explanation for the applicant's default, and a bona fide defence which carries some prospects of success.⁷ These requirements have been confirmed by various courts, including the Constitutional Court in *Government of the Republic of Zimbabwe v Fick*⁸ and *Zuma*.

[12] I am not satisfied that the husband has met both of the elements of 'good cause' nor that it would be in the interests of justice to grant the rescission sought.

[13] The wife's Rule 43 application was served on the husband personally on Friday, 11 November 2022. The summons in the divorce action was served four days later, on Tuesday, 15 November 2022. The husband's suggestion that as a layperson he 'had no idea what a Rule 43 application was' and believed it to be a duplicate of the summons, does not ring true. At the relevant times he had attorneys of record, who were involved in prior divorce litigation in the regional court. The husband fails to explain why he did not immediately contact his then attorneys upon receipt of the Rule 43 application. Furthermore, had the husband, who is by all accounts an intelligent, educated and successful man, given the document served on him even a cursory glance, he would have realised the consequences he would suffer should he ignore it.

[14] The husband's affidavits are replete with attempts to place blame all and sundry for his attorneys not being able to access the Court Online platform. This

⁶ *Lodhi 2* above at para 17.

⁷ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

⁸ ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

does not assist him. Asserting second set of attorneys⁹ were not familiar with family law procedures, is not a reasonable and acceptable explanation for his default.

[15] Accordingly, the husband does not pass muster for the first of the jurisdictional requirements referred to above.

[16] The founding affidavit does not contain sufficient allegations in support of the husband alleged defence to the Rule 43 application. But for a reference to his current salary of R185 655.17 per month¹⁰ and the termination of tenders cancelled apparently because of the COVID pandemic, he provides no details of his income from all sources, his means or his monthly expenses.

[17] It is only in his supplementary affidavit that the husband details expenses paid through his business (an aggregate of R341 571.00 per month), the extent of his loan account (being R13 241 608.92 as at 28 February 2023 – a date after the granting of the Rule 43 order), his ‘personal cash flow projection for the next twelve months’, and financial statements for his business as at 28 February 2023. Also included is his criticism of the living expenses of the wife and the two children, which he contends does not exceed R70 698.00. He concludes his affidavit with a tender amounting to approximately R115 000.00 per month.

[18] Ultimately, the husband’s case in the supplementary affidavit is founded on his then-current and anticipated financial circumstances, rather than his circumstances at the time of service of the Rule 43 application. The belated financial disclosure and various supplementary affidavits served to obfuscate and detract from the nature of the relief the applicant sought – a rescission of the Rule 43 order.

[19] I could not glean from the electronic court file whether the husband in fact delivered a notice of intention to amend his notice of motion, as he intimated in his supplementary affidavit that he would. In my view, the proposed amendment to include an alternative prayer for the variation of the Rule 43 order in accordance with

⁹ The husband appoint a different attorney after service of the Rule 43 application and the summons.

¹⁰ Which includes a salary deduction of R47 322.21 for ‘savings’.

the provisions of Rule 43(6) would have been the more appropriate course of action. But that is not the case I was called upon to determine.

[20] In sum, the husband does not meet the requirements entitling him to a rescission of the order of 23 January 2023.

Contempt of court

[21] The rule of law is cornerstone of South Africa's constitutional democracy, and to maintain the rule of law, judicial decisions must be implemented and adhered to. Judicial authority should not be impugned, and court should protect their institutional authority and judgments.

[22] When a litigant fails to adhere to an order, the innocent party has various remedies at disposal to enforce compliance. In the case of an order sounding in money (an order *ad pecuniam solvendam*) execution may be levied by issuing out a writ of execution to attach moveable or immovable property in terms of the provisions of Rule 45. To compel a party to comply with an order to do something (an order *ad factum praestandum*) or a prohibitory interdict (an order not to do something), civil contempt of court proceedings may be apposite, but relief may also take the form of declaratory orders, mandamuses or structural interdicts.¹¹

[23] The wife seeks an order that the husband be convicted of the offence of contempt of court for his wilful and *mala fide* non-compliance with the Rule 43 order, the relevant portions of which are:¹²

“IT IS ORDERED THAT:

3. The Respondent to make payment of all of the direct expense, directly to the services providers, as listed in annexure FA9 hereto on a monthly basis.

¹¹ *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) at para 54.

¹² The “Applicant” being the wife and the “Respondent” being the husband.

4. The Respondent to make payment of the sum of R 156 000.00 per month respect of maintenance of the Applicant and the minor children, the first of which sum to be paid within 5 days of the granting of this order and all further payments to be made on or before the first day of the month.

5. The Respondent to make payment monthly to the Applicant the full amount due to the medical aid to ensure that she and the children are retained on the comprehensive medical aid scheme of which the Applicant is the primary member.

6. The Respondent is to return the Range Rover Autobiography (2020 MODEL) to the Applicant within two days from date of this order.

7. In addition to the aforesaid cash sums and direct expenses as per annexure FA9, the Respondent is to make payment of the following expenses directly to the service providers concerned.

7.1 The rates and taxes and lights and water account in respect of the home that is occupied by the Respondent.

7.2 The monthly mortgage bond repayments in respect of the matrimonial home and all imposts related to same as well as any bonds and service costs related to the business property of S[...] E[...] Group.

7.3 The balloon payment in respect of the Applicant's Range Rover Sport to BMW Financial Services within 30 days from date of this order.

7.4 The costs of maintenance and repairs to the Applicant's Range Rover Sport as and when same arise, and to the Range Rover Autobiography.

7.5 The deposit payment required for the rental property where the Applicant is residing with the children.

8. The Respondent shall pay to the Applicant a contribution towards her legal costs in the sum of R 1 716 083.50 (one million seven hundred and sixteen thousand eight three Rand and fifty cents) within 14 days from date of this order payable into the Trust account of the Applicant's for attorney."

[24] The expenses reflected in Annexure FA9 to the order are:

"2. Motor vehicle license

3. Motor vehicle insurance and instalment and repairs to vehicle

4. Toll fees

5. Tyres

6. Tracker

...

18. Garden maintenance

...

23. Accommodation rental

24. Rates and taxes, levies

25. Lights and electricity/gas

26. Domestic workers for the Applicant (Two are employed)

...

32. Household goods insurance

...

36. Current primary school fees, extramural activities and related expenses

37. Excess medical expenses

38. All other insurance policies currently in place"

[25] Axiomatically, seeking final relief, as the wife does, factual disputes must be adjudicated in terms of the rules laid down in *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*.¹³

[26] The wife asserts that the husband failed to pay the cash maintenance in full, failed to return the Range Rover Autobiography to her, did not pay the contribution towards her legal costs, and failed to make such payments in respect of the Range Rover (it is not clear which of the two) as he was ordered to do. The husband's response is simply that he cannot afford to make the payments.

[27] At the hearing, I was told from the bar that the Range Rover has been delivered to the wife. The husband, who appeared in person, confirm this. Accordingly, what remains is the non-compliance with orders sounding in money.

[28] Whilst it is indubitably correct that a maintenance order is both a judgment *ad pecuniam solvendam* and a judgment *ad factum praestandum*, I am of the view that, on condition that the amount of maintenance payable is certain or easily ascertainable,¹⁴ execution by way of a writ is generally the most appropriate manner to enforce compliance with a maintenance order. By way of a writ, the maintenance creditor is more likely to receive payment of the arrears than should the maintenance

¹³ 1984 (3) SA 623 (A).

¹⁴ E.g. *De Crespigny v De Crespigny* 1959 (1) SA 149 (N)); *Le Roux v Yskor Landgoed (Edms) Bpk En Andere* 1984 (4) SA 252 (T); *Butchart V Butchart* 1997 (4) SA 108 (W) D at 115G in respect of a so-called "expense clause".

creditor be incarcerated. The execution process is generally more expedient and less expensive than a full blown opposed motion.

[29] It is not the duty of this Court to “teach the husband a lesson” by holding him in contempt of court, as submitted by the wife’s counsel during the hearing. This Court must find that the husband is guilty of contempt beyond a reasonable doubt.

[30] On the wife’s version, the husband has paid at least a portion of the maintenance due in terms of the order, and the vehicle has (eventually) been delivered. Whilst I do not accept that the husband is as financial destitute as he sets out in his affidavit, I cannot reject outright his explanations for not complying in full with the Rule 43 order. These explanations do cast reasonable doubt on his wilfulness in not complying with the Rule 43 order.

[31] On a conspectus of the all the allegations before me, I am not prepared to convict the husband of contempt of court and urge the wife to utilise alternate remedies at her disposal to recoup the arrear amounts due to her.

[32] If there were material changes in the husband’s financial circumstances since the granting of the Rule 43 order, he is at liberty to approach this court for a variation in terms of Rule 43(6) or a maintenance court of competent jurisdiction. Until the Rule 43 order is varied, he must comply with its terms, in full and on time.

[33] As neither party was successful, it is appropriate that I make no order as to costs.

[34] In the result:

1. The husband’s application for rescission is dismissed.
2. The wife’s counterapplication for contempt of court is dismissed.

S LIEBENBERG
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the applicant:

In person

For the respondent:

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Heard on 31 July 2024

Judgment on 13 August 2024