REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2017/6235

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

29 March 2018

MODIBA J

In the matter between:

L F Applicant

And

L A Respondent

J U D G M E N T

MODIBA, J:

[1] The applicant seeks an order declaring that the order granted on 21 August 2015 by my sister Mahalelo AJ (as she then was), in terms of Rule 43

of the Uniform Rules of Court, under case number 14868/201, is set aside as at the date it was granted, alternatively from the date of the respondent's employment. Alternatively, the applicant seeks to have the order discharged and further alternatively declared void. He also seeks an order declaring that the respondent is disentitled to claim arrear maintenance amounts in respect of the said order from the date of the order, alternatively from the date of the respondent's employment. If successful, he seeks punitive costs. The respondent opposes the application. She seeks its dismissal with punitive costs.

[2] The applicant is a national of the Kingdom of Norway. He met the respondent, a South African national, when he was visiting South Africa for the 2010 World Cup event. They got married in South Africa on 11 November 2011. Their first child, a boy was born in South Africa on 30 November 2011. Their second child, also a boy, was born in South Africa on 28 April 2014.

[3] They have had an elaborate litigation history. This history, as well as material facts concerning the parties' relationship and marriage is narrated in the judgment by Monama J and a full court judgment by Wepener J. I do not intend regurgitating them here as doing so would serve no purpose. I only do so to the extent such facts provide a relevant chronology for this application.

[4] In July 2015, the applicant instituted proceedings in terms of The Hague Convention to have the parties' children repatriated to Norway. The basis of those proceedings was the alleged unlawful retention of the children

in South Africa by the respondent from March 2015. The Hague Convention application was heard Monama J who ruled that the children's retention is unlawful and ordered their return to Norway. The respondent applied for leave to appeal Monama J's decision to the Supreme Court of Appeal ("the SCA") after Monama J refused her leave. The SCA granted her leave to appeal to the full court of this division. Those proceedings culminated in the full court decision by Wepener J. The full court upheld Monama J's judgment and ordered the children's return to Norway. As I will demonstrate later, the full court judgment has substantially curtailed the issues in this application.

[5] The circumstances that led to The Hague Convention proceedings are as follows: the parties and their children, who as Monama J found, confirmed by the full court on appeal, had become habitual residents of Norway from June 2013, visited South Africa in March 2015 to attend to the applicant's mother who had to undergo a surgical procedure. It was during that visit that the respondent surreptitiously initiated divorce proceedings and sought to have summons served on the applicant within 2 days of their arrival in the country. On the advice of his Norwegian lawyer, the applicant tried to urgently leave South Africa to evade service of the summons. He was arrested at the Gautrain Station and detained until the summons had been served on him. He then departed for Norway leaving the respondent and the boys in South Africa. His plea for the children's return to Norway fell on deaf ears. He initiated The Hague Convention proceedings in July 2015. Monama J heard the application on 20 and 21 January 2016 and ruled in the applicant's favour. The full court only ruled on the appeal against Monama J's judgment in March

2018. As a result, the applicant has not been able to see his children since he left South Africa in March 2015. His attempts to visit them in South Africa were thwarted by the respondent's threats to have him arrested for failing to comply with the Rule 43 order.

[6] While The Hague Convention proceedings continued to play out in South Africa and notwithstanding the respondent's pending divorce action, the applicant instituted separation proceedings against the respondent in Norway on 30 March 2015. Separation proceedings are a precursor to divorce proceedings in Norway. Pursuant thereto, a divorce license was granted by County Governor of Norway on 23 September 2016. The respondent disputes its validity on the basis that she was not served with the summons. Further, she alleges that those proceedings are inappropriate given that her pending divorce action – which the applicant is opposing - predates the divorce proceedings in Norway. The applicant stands by the divorce license, and seeks to use it as one of the basis for the order he seeks in the present application. He contends that the Rule 43 order lapsed on 23 September 2016 with the granting of the divorce license. The other grounds he relies on are:

[6.1] Article 16 of The Hague Convention prohibits the granting of the order granted by Mahalelo J. The children ought to have been returned to him in Norway on 4 February 2016 in terms the order by Monama J. The said order provides for the maintenance of the respondent and the minor children;

[6.2] the respondent's non-disclosure of material facts during the Rule 43 proceedings which resulted in that order being granted and

subsequent fraudulent misrepresentation, precluding him from pursuing a Rule 43(6) application.

[7] The respondent has raised the following points *in limine*:

[7.1] the applicant's failure to comply with her request for security for costs;

[7.2] the rule on which the applicant relies for the relief he seeks is unclear. He fails to meet the requirements of Rule 53. An order in terms of Rule 43 may not be amended in terms of Rule 42, Rule 31 or the common law. The order sought by the applicant is incompetent in the absence of an application for variation in terms of Rule 43(6) or an agreement between the parties;

[7.3] there is a pending Rule 43(6) application launched by the applicant seeking the same relief he seeks in this application.

[8] The respondent's counsel informed the court from the bar that the respondent abandons her request for security for costs. As I find below, the other points *in limine* are spurious and stand to be dismissed.

[9] There are two disputes of fact on the papers. One relates to the parties' and their children's habitual residence. The applicant contends that Norway is. The respondent contends that it is not Norway but South Africa. This dispute was very central to The Hague Convention proceedings where the respondent opposed the return of the children to Norway on the basis that South Africa is their habitual place of residence. The dispute is also playing out in the

respondent's divorce proceedings where the applicant has raised a special plea placing the jurisdiction of this court in dispute based on his version of the parties' habitual residence. Monama J found against the respondent. The relevance of this dispute in the present proceedings is the respondent's continued insistence that South Africa is the parties' habitual residence and that Monama J found wrongly. The full court upheld Monama J's findings. The respondent has not appealed the full court judgment. From submissions made by the applicant's counsel from the bar, which were not contested by the respondent's counsel, the respondent has complied with the full court judgment. She travelled with the children to Norway on 19 March 2018 as ordered by the full court. That dispute is therefore settled.

[10] The second dispute relates to the divorce in Norway. The respondent refuses to acknowledge it because she was not duly served with divorce papers. It is for that reason that she contends that she was denied the opportunity to defend it. According to the applicant, the respondent's attorneys were advised of these proceedings by his Norwegian attorneys by email but neglected to respond thereto. He further contends that the office of the Norwegian County Governor also notified the respondent's attorneys of record of the proceedings. The Norwegian County Governor has not filed a confirmatory affidavit to that effect. These emails are not disputed by the applicant. What she is asserting is the importance of personal service of summons given that the said proceedings would change her personal status. Personal service of summons in such proceedings is a requirement under South Africa law. It is unclear what the prescribed requirements are under

Norwegian law. The applicant has not placed this information before the court. From the papers it appears that the respondent has appealed the divorce license. During argument counsel for the applicant was in possession of a supplementary affidavit deposed to by the applicant wherein he sought to appraise the court of further developments in respect of the said appeal. Counsel for the respondent objected to its admission because she had not read it. She asserted the respondent's right to reply thereto. The applicant's counsel did not persist in his attempt to place the supplementary affidavit before the court, correctly so because the respondent would be prejudiced by its admission having not been afforded the opportunity to reply thereto.

[11] In my view the dispute of fact in relation to the divorce is not material to the present proceedings. It will more appropriately play itself out in the respondent's divorce action where, on his counsel's submission the applicant intends filing a special plea contending that the marriage between the parties no longer exists.

[12] Further, even on the respondent's version of the disputed Norwegian divorce license, the pending divorce action in South Africa does not justify the continuation of the Rule 43 order. The respondent is in Norway with the children. The full court judgment makes full provision for their maintenance solely by the respondent in Norway, including provision for the respondent's legal costs in Norway where the merits of the dispute relating to the custody of the children will be determined as envisaged by Article 16 of The Hague Convention. Therefore to the extent that the full court judgment provides for

the maintenance of the respondent and the children as well as the respondent's legal costs in Norway, the Rule 43 order cannot co-exist with it. On this basis alone, the said order stands to be discharged. The question that arises is the date and terms of its discharge.

[13] The point *in limine* in relation to the pending Rule 43(6) application is not only a red herring; it has also been overtaken by events. The applicant would have probably set it down for hearing had the respondent – as I find below – not failed to disclose material facts relating to her employment prospects and subsequent employment status. It is disingenuous of her to bemoan the applicant's failure to have the Rule 43(6) application determined given her conduct in these proceedings. As at the hearing of the present application, the applicant had withdrawn the said Rule 43 (6) application. There is no merit to the respondent's complaint that the applicant did not properly withdraw that application in absence of an agreement between the parties or a court order and a cost tender. In terms of Rule 40(1) which regulates the withdrawal of proceedings, an applicant may unilaterally withdraw proceedings before they are set down for hearing. That the Rule 43(6) application had not been set down when the applicant delivered the notice of withdrawal is common cause. Further, the embodiment of a cost tender in the notice of withdrawal is not a peremptory requirement.[1] The

[1] Rule 41 (1) *(a)* provides that: *"*A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and *may* embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party. *(Emphasis added).*

…

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.

respondent may if she seeks the applicant's liability for costs determined, bring an application for such relief in terms of Rule 41(1) (c). It remains to be seen whether the respondent will succeed in such an application given her prejudicial conduct in these proceedings.

[14] The applicant seeks the Rule 43 order set aside from the date it was granted for several reasons. It was contended for the applicant that as Monama J found, confirmed by the full court, the children's retention in South Africa from March 2015 to 19 March 2018 was unlawful. Being habitual residents of Norway, their maintenance ought to have been determined by the Norwegian Court in terms of the law of that Kingdom. Further, it was contended for the applicant that the respondent flouted her undertaking to the Family Advocate that pending The Hague Convention proceedings, she would not set the application down for hearing.

[15] Article 16 prohibits the determination of the merits of a dispute regarding the children's custody, not their maintenance. *De facto* the children remained in South Africa for the aforementioned period. They had material needs in South Africa. In terms the Rule 43 order, the applicant had to provide for their maintenance in fulfilment of his legal duty of support. He deliberately disregarded that order because he disagreed with it. Instead of the R20, 763.13 he was ordered to pay to the respondent monthly for the maintenance of each child, he paid R15, 000 for both children as he believed the latter amount was adequate for their needs.

[16] The applicant's counsel sought from the bar to have the children's needs reconsidered in these proceedings and for the amount for their maintenance reduced to R15, 000. Such a case is not made out in the papers. In prayer 2 of the notice of motion, the applicant seeks the respondent's disentitlement to the full maintenance arrears. I take a dim view to this request. The applicant's view that R15, 000 per month was adequate for the minor children's maintenance is not only arbitrary; it is disrespectful of the South African judicial authority. He defended the Rule 43 application. The amount set for the children's maintenance was based on their needs and his ability to solely meet them. That he believed the amount was inflated does not justify his retrospective request for a reconsideration of the order in the present application.

[17] The applicant's counsel also argued that I exercise a discretion to reduce this amount by the amount the respondent was legally obligated to maintain her children from the date of her employment and that I quantify her obligation at 20% of the children's maintenance.

[18] This court not only recognizes but also upholds the parents' joint legal duty to maintain their children and would enforce it without hesitation. However, the applicant did not come to court seeking the reciprocation of the respondent's parental duty of support and as such did not make out such a case on the papers. He came seeking to be fully absolved from arrear maintenance as well as an order articulated in paragraph 1 of this judgment.

Therefore the request for the retrospective apportionment of the children's maintenance is also not entertained.

[19] South African courts normally denounce a litigant who acts unlawfully by refusing to come to their aid. The circumstances of this case warrant a different approach firstly because both parties do not stand before this court with clean hands but more importantly because the matter involves the children's interests and the court has regard to their paramountcy in terms of section 28 of the Constitution of the Republic of South Africa. That is the most appropriate way in my view of disentangling the web of unlawfulness that the parties are embroiled in.

[20] The applicant's refusal to comply with the Rule 43 order in respect of the children's maintenance cannot be condoned. To do so would condone his disregard for the sovereignty of the Republic of South Africa and disrespect for its judicial authority by a foreign national. On the other hand, the respondent's conducts is, as I find below, *prima facie* unlawful.

[21] Even if on the applicant's contention that he would have applied for a reconsideration application earlier had the respondent duly disclosed her employment to him when asked to, such disclosure would probably not have absolved him from his legal duty to maintain his children. At best, there would have been an apportionment of the children's maintenance based on the proportionate means of the parties. As mentioned above, no case is made out to retrospectively apportion the maintenance.

[22] I hold a different view in respect of the respondent's arrear maintenance. The Rule 43 order provides for R20, 763.13 monthly in respect of her maintenance. The applicant seeks this portion of the order set aside from the day it was granted. The respondent initially opposed this. During argument, her counsel submitted that the respondent is willing to forfeit her portion of the maintenance. Therefore this portion of the Rule 43 order stands to be discharged from 21 August 2015. Despite the respondent's late withdrawal of this portion of her opposition, it is appropriate that I deal with the reasons that hard-pressed her to this resort as they justify other terms of the order I intend handing down in these proceedings.

[23] When the respondent launched the Rule 43 proceedings in April 2015 following her now found to be unlawful retention of the children in South Africa, although she informed the court in her founding affidavit that she is unemployed, that she intends re-entering the job market and that she had taken concrete steps in that regard; she painted a bleak picture of her employment prospects. She cited as a reason the fact that she had been out of employment for 4 years. She is a qualified chartered accountant. Before she met the applicant she was employed by Rand Merchant Bank ("RMB") and well remunerated commensurate with her qualifications. She resigned with the applicant's concurrence after she conceived the parties' first child.

[24] After the Rule 43 order was granted, the applicant sought to be appraised of the efforts she has taken to return to work. His first request to the respondent was by email on 10 September 2015 to which he received no reply. His repeated requests both to the respondent's attorneys of record and to the respondent directly also did not yield a response. His efforts to obtain this information include a request for further particulars for trial and a question at the pre-trial conference held in the respondent's divorce action. Her attorneys undertook to take instructions from her and to revert to the applicant's attorney but never did so. With the passage of time, the applicant began to suspect that the respondent was employed. By then some 15 months had lapsed since his first request. In addition, the applicant also enquired of this directly from the respondent telephonically in the first half of December 2016. She responded in the negative.

[25] The applicant placed this question in issue in these proceedings by documenting in his founding affidavit all the requests directed initially to the respondent and later to her attorneys of record including the aforementioned telephone conversation. He further mentions that he recently became aware that the respondent is employed by RMB Private Bank, a Division of First Rand Bank Limited since October 2015; hence he sought the Rule 43 order set aside with effect from this date in the alternative. He called on the respondent to make a full disclosure to this court of her employment circumstances, details of the process that led to such employment and the terms of employment.

[26] In her answering affidavit deposed to on 20 March 2017, instead of directly answering these questions, the respondent questions the purpose of the applicant's non-disclosure allegations, and contends that if the applicant is of the view that there has been a change of circumstances since the Rule 43 order was granted, he ought to have the order changes varied in terms of Rule 43(6). She also placed the applicant's allegations in dispute. Despite being afforded another opportunity to disclose her employment status and to play open cards with this court, she responded as stated above.

[27] In reply the applicant filed documents relating to the respondent's employment with RMB Bank obtained on a *subpoena duces tecum* ("the subpoena"). The applicant's attorney of record caused the subpoena to be personally served on the Head of Human Capital at RMB on 24 March 2017 after probingly calling RMB to verify if the respondent is employed there. From these documents, it appears that on 1 September 2015, approximately 10 days after the Rule 43 order was granted, the respondent was offered employment by RMB as an accountant with effect from 1 October 2015 for an annual remuneration of R800, 000, a variable annual bonus and participation in a share incentive scheme. She received a 10% increment in 2016.

[28] The applicant's founding affidavit, the respondent's answering affidavit and the applicant's reply to which the respondent's employment records with RMB are filed, contains *prima facie* evidence under oath, of the respondent's material non-disclosure of her efforts to find employment during the Rule 43 proceedings, as well as a fraudulent misrepresentation of her employment

status at least from 10 September 2015 when the applicant addressed an email to her soliciting this information. It is improbable that the process of placing a chartered accountant would take less than 10 days. It is therefore probable that when the Rule 43 application was argued on 21 August 2015, the process that resulted in the respondent's placement with RMB had commenced. Nothing precluded the respondent from delivering a supplementary affidavit disclosing her participation in the RMB placement process. Her counsel could have done so even from the bar at the very latest. That the process that led to the respondent's employment with RMB had commenced when the Rule 43 application was argued is a reasonable inference to draw in these circumstances. As displayed by her subsequent *prima facie* fraudulent misrepresentation of her employment status, she probably deliberately failed to disclose this information and continued to lie to the applicant regarding the true state of affairs. I find the respondent's conduct in these proceedings improper and distasteful.

[29] As mentioned above, the respondent has tended to forfeit her arrear maintenance amount. The date from which the Rule 43 order ought to be discharged remains relevant in respect of the children's arrear maintenance. For reasons advanced earlier, 19 March 2018 being the date on which the children were returned to Norway in compliance with the full court judgment, is the appropriate date for such discharge.

[30] For reasons set out above, the applicant stands to partially succeed in having the Rule 43 order set aside from 21 August 2015 in respect of the

respondent's maintenance. The remainder of the Rule 43 order stands to be discharged from 19 March 2018. The Rule 43 order also makes provision for the children's monthly educational expenses in the amount of R7, 700 payable by the applicant directly to the relevant service providers. To the extent that the applicant defaulted on this payment, it is appropriate that he is also ordered to pay this amount.

[31] Cost orders are rarely granted in family related matters. However the respondent's, improper, despicable and *prima facie* perjurous and fraudulent conduct in these proceedings warrants a punitive costs order. Further it is proper that the respondent's conduct in the Rule 43 proceedings and these proceedings is referred to the South African Institute of Chartered Accountants ("SAICA") as well as to the Office of the Director of Public Prosecutions for investigation because, *prima facie*, it is inconsistent with the ethical standards applicable to members of the accounting profession who are required to conduct themselves with integrity. Further it is *prima facie* unlawful.

[32] Although the applicant also acted unlawfully by refusing to fully comply with the Rule 43 order, the evidence of malicious intent on his part is absent. The extent of his efforts through Hague Convention proceedings and the appeal proceedings in relation thereto to be reunited with his children paints the picture of a father who places a high premium to his parental responsibilities. Although his disrespect for the Rule 43 order is not condoned, it is clear that the respondent sought to gain an unfair advantage from that

order. Therefore the respondent's prejudicial conduct in my view vindicates him, justifying an indulgent response from this court. Refusing his request to have the arrears in respect of the children's maintenance quashed is in my view appropriate censure for his conduct in these proceedings.

[33] In the premises, the following order is made:

ORDER

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L T MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

1. The Rule 43 order, handed down by Mahalelo AJ, dated 21 August 2015, is hereby discharged.

2. The Applicant is hereby ordered to pay to the respondent *pendente lite* maintenance in respect of the two minor children as from 21 August 2015 up and until 19 March 2018, at the rate of R20 763-13 per month per child, less any and all amounts paid by the Applicant to the Respondent up and until 19 March 2018.

3. To the extent that the Applicant has defaulted on paragraph 3 of Mahalelo J's order, he is also ordered to pay to the relevant service provider R7, 700 per month in respect of the children's educational expenses from 21 August 2015 until the respondent's liability to the

relevant service provider is extinguished in terms of the agreement between the respondent and the said service provider.

4. To the extent that the respondent paid for the children's educational expenses, the applicant is ordered to reimburse the respondent in respect of such expenses for the period referred to in paragraph 3 above to the maximum of R7, 700 per month.

5. The Applicant shall not be liable to pay any maintenance to the Respondent *pendente lite* in terms of the order by Mahalelo AJ as from 21 August 2015 up and until her departure from the Republic of South Africa on 19 March 2018.

6. The Respondent is referred to the South African Institute of Chartered Accountants to enable them to investigate the conduct of the Respondent in the Rule 43 proceedings before this Court under Case No: 14868/2015 and in these proceedings.

7. The Respondent is referred to the Office of the Director of Public Prosecutions to investigate the conduct of the Respondent in the Rule 43 proceedings before this Court under Case No: 14868/2015 and in these proceedings.

8. The costs of this application shall be paid by the Respondent, on the attorney client scale, such costs to include the postponed proceedings from 31 August 2017, as well as the hearing before me including the costs of two counsel.

9. The Registrar of this court is directed to cause the papers in these proceedings and in the proceedings under case number Case No: 14868/2015 before this court, as well as this judgment to be delivered to the Chairperson of the South African Institute of Chartered Accountants and to the Office of the Director of Prosecutions for the investigation of the Respondent's conduct as aforesaid and for appropriate action.

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MADAM JUSTICE L. T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES

Plaintiff Counsel:	Adv J Berlowitz & Adv CJ Smit
Instructed by:	Shapiro-Aarons INC
Defendant's Counsel:	Adv S Martin
Instructed by:	Fiona Marcandonatos INC
Date heard:	22 March 2018
Date judgment delivered:	29 March 2018