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

Case Number: 16610/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

26 August 2022

In the matter between:

M [....] I [....] R [....] 1

Applicant

And

N [....] L [....] R [....] 2 (born B [....])

Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

(1) The applicant seeks an order in terms of rule 42(1) of the Uniform Rules of Court, *alternatively* common law, rescinding the order granted by Fourie AJ on 3 August 2021 (“rule 43 court order”), on the basis that it was obtained as a result of fraudulent misrepresentations made by the respondent to the court. The respondent is opposing the application, and has filed a counter-application for contempt of rule 43 court order.

Background facts

(1) The parties married on 25 March 2006. There are three minor children born of the marriage between the parties. A son, G[....] born on 13 January 2009, a daughter B[....] born on 3 December 2015, and a son M [....] born on 6 June 2015. The parties are separated pending the finalisation of a divorce action.

(2) On 19 July 2021 the applicant launched a Rule 43 application in this court. On 3 August 2021, Fourie AJ granted the order. Paragraph 6 of the court order provides that:

“6. The applicant shall maintain the minor children and the respondent, pendente lite, by making payment:

6.1 to the respondent directly into such account nominated by her, as follows:

6.1.1 R75 000.00 per month, with effect from 1 August 2021, payable on or before the first day of each month (with the payment in respect of August 2021 to be made by no later than 10 August 2021);

6.1.2 R600 000.00 as a contribution towards the respondent’s legal costs, payable in 3 equal monthly instalments in the amount of R200 000.00 per month, the first instalment falling due within five days of the date of this order and the remaining instalments falling due on or before the first day of each of the two months succeeding the month in which the order is granted;

6.1.2A R300 000.00 in respect of the procurement of furniture, appliances, and other household equipment to equip alternate accommodation of the minor children and the respondent, payable in 3 equal monthly instalments in the amount of R100 000.00 per month, the first instalment falling due within five days of the date of this order and the remaining instalments falling due on or before the first day of

each of the two months succeeding the month in which this order is granted;

6.2 to the relevant service providers, alternatively to the respondent directly, timeously, as, and when, payment falls due as follows:

6.2.1 An amount of R45 000.00 per month, subject to the escalation, in respect of rent as well as the costs of any rental deposit, annual rental escalations, commissions, fees, and any other costs occasioned by the lease of alternate accommodation for the respondent and the minor children, selected by the respondent, in respect whereof the applicant shall, on demand, sign, and furnish to the respondent's attorney of record, any rental application forms and/or lease agreements and provide any required documents (in this regard, the respondent shall have the sole election as to whether the applicant alternatively the respondent shall be required to sign the relevant lease qua tenant, and in the latter event, the applicant shall, on request, sign any sureties as may be required to conclude said lease);

6.2.2 A further amount of R15, 000 per month as a contribution to the running expenses of the leased property;

6.2.3 All school fees and associated monthly and/or termly costs incurred in connection with the minor children's private primary and secondary education, including all stationery and clothing required for school and extra-mural activities;

6.2.4 The applicant shall maintain and pay the premiums required to keep the minor children on his medical aid scheme;

6.3 of any and all medical expenses, or portions thereof, incurred in connection with the minor children and the respondent that are not discharged or refunded, either wholly or in part, by any medical aid scheme including, but not limited to medical, dental, consultative, hospital, surgical,

ophthalmic, optometric (incorporating the costs of spectacles and contact lenses), chiropractic, orthodontic, therapeutic (incorporating speech therapy, hearing therapy, occupational therapy, physiotherapy), psychological, psychiatric, gynaecological, dermatological and pharmaceutical expenses.

(3) On 2 September 2021 the applicant brought the rescission application. I heard this application on 18 November 2021. During the hearing the applicant applied for the separation of the rescission application and contempt of rule 43 court order counter-application. I refused the separation application. I reserved my judgment on the rescission application and contempt of rule 43 court order counter-application.

(4) On 7 February 2022, the applicant filed a further supplementary affidavit in the rescission application alleging discovery of new evidence. The applicant was advised to make a formal application for the admission of the new evidence. On 23 February 2022, the applicant brought a formal application in terms of Rule 6(11) seeking the admission of further affidavits. On 17 March 2022 the respondent filed an answering affidavit opposing the admission of further affidavits. The applicant filed a replying affidavit on 25 March 2022. Thereafter the parties reach an agreement not to proceed with Rule 6(11) application, and that applicant's relevant supplementary affidavit be admitted. On 23 May 2022, the applicant filed supplementary heads of argument. The respondent filed her second supplementary heads of argument on 7 June 2022. On 20 June 2022, the applicant filed a further supplementary heads of argument in the rescission application and counter-application. On 30 June 2022, the respondent filed a brief response to applicant's further supplementary heads of argument in the rescission application and counter-application. I have granted leave for the filing of further affidavits and heads of argument.

(5) In this application, the following main issues arise for determination. First, I address the issue whether the applicant has met the requirements, either in terms of rule 42(1) or the common law, for rescission. Second, I turn to consider whether the respondent has established the requirements of contempt of court beyond reasonable doubt. Finally, I address the issue of costs of the rescission application and contempt of rule 43 court order counter-application.

Rescission

(6) The applicant brought this application in terms of rule 42(1) or common law. He contends that the rule 43 court order was granted as a result of certain fraudulent misrepresentations made by the respondent to the court, namely, that she was unemployed, impecunious, without financial means and in need of maintenance *pendent lite*.

(7) Rule 42(1) provides as follows:

“(1) 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) In order to succeed on the ground of fraud under common law, the applicant must prove that:

- (a) the successful litigant, *in casu* the respondent, was a party to the fraud;
- (b) evidence before Fourie AJ was in fact incorrect;
- (c) said incorrect evidence was presented fraudulently and with intention to mislead; and
- (d) that it diverged to such an extent from true facts that the court would, if the true facts had been placed before it, have given a judgment other than which it was induced by the incorrect evidence to give (*Swart v Wessels* 1924 OPD 187 at 189-190; *Markings v Markings* 1958 (1) SA 338A).

(9) It is common cause that the applicant was a party and successful in the rule 43 application. With regard to the requirement that the incorrect evidence was presented before the court, the applicant contends that the respondent failed to tell the rule 43 court in her answering affidavit that she was working for Cargo Compass and earning an income. In support of this contention, the applicant avers that he has established a connection and/or relationship and/or association and/or familiarity between the respondent and Cargo Compass. He relies on the email dated 14 May 2021 sent by the respondent to various clients that she was employed by Cargo Compass as proof that the respondent was employed at the time the court order was granted.

(10) The email of 14 May 2021 shows that the respondent referred clients to Cargo Compass; obtained information from the relevant client needed to establish an account; facilitated initial communication between the relevant client and Cargo Compass in regard to quotations and orders; and assisted in communicating the precise requirements of the relevant client to Cargo Compass for the purposes of the initial order.

(11) The applicant also attached other emails wherein the respondent was copied subsequent to the initial introduction, and the call records for the telephone calls between the respondent and Cargo Compass clients and customers of either Cargo Compass or Cargocare. The respondent admits the contents of 14 May 2021 email and other emails referred to herein. She also does not dispute the call records.

(12) Her version is that when she was constructively dismissed from Cargocare, she received telephone calls from several clients enquiring about her personally and professionally. Several clients of Cargocare were adamant that they were not inclined to have a business relationship with Cargocare without her managing this relationship. They required of her that should she re-enter the freight forwarding business she should let them know as they wish to consider alternative freight forwarders.

(13) She then sought a reputable freight forwarding and logistics company that she knew would be able to satisfy the needs of the clients, and one she could start a

relationship with, with the ultimate goal of obtaining permanent long-term employment with the said company at some point in the future.

(14) She established contact with Cargo Compass and advised that should she be requested by clients to provide a referral to a freight forwarding company she would refer said clients to Cargo Compass. It was discussed that she may receive a commission and a referral fee in respect of the referrals of any client to Cargo Compass that resulted in Cargo Company deriving income from said client, subject to formal agreement being concluded between the respondent and Cargo Compass.

(15) She explained to Cargo Compass that even though it would be servicing the relevant clients, the clients would expect that she, at least appear, to shadow and/or monitor the orders which would give them comfort and in turn create long-term business for Cargo Compass. She was prepared to be involved in the process of orders, in the absence of remuneration, as she wish to establish a future working relationship with Cargo Compass.

(16) The applicant contends that the respondent concealed the details of her working relationship with Cargo Compass from the rule 43 court, and that had the court knew about these details it would not have granted the rule 43 order in favour of the respondent.

(17) The respondent disputes that she concealed the details of her relationship with Cargo Compass. She contends that the applicant filed a replying affidavit in the rule 43 application, where he relayed the events which took place on 30 July 2021. These events were the investigations conducted by the applicant, by telephoning some of Cargo Compass clients in order to prove to the rule 43 court that the respondent was working for Cargo Compass.

(18) The respondent filed a supplementary affidavit in the rule 43 application addressing the allegations made by the applicant in his replying affidavit. She disclosed to the rule 43 court that she was referring clients to Cargo Compass. She also presented the evidence of the Human Resource Manager of Cargo Compass Linda Gouveia who confirmed that:

- (a) the respondent is not the employee of Cargo Compass and as such receives no salary from Cargo Compass;
- (b) the respondent is not a family member of any director of Cargo Compass;
- (c) since approximately mid-May 2021 the respondent and Cargo Compass had discussed the possibility of a business relationship where the respondent will act as an independent consultant referring work to Cargo Compass;
- (d) Cargo Compass has not paid the respondent any money to date, and any payment which will become due to her would be based on successful, profitable referrals made and paid in the ordinary course every three to four months after conclusion of the referral work and only provided an agreement being in place by then; and
- (e) The terms of the envisaged relationship have not yet been finalised and nor is there any agreement in place between the respondent and Cargo Compass notwithstanding referrals already having been made.

(19) The respondent gave more details of the nature of the relationship between her and Cargo Compass in her May 2022 further supplementary affidavit. This included the fact that she was involved in the introduction and handing over stage referred to as “extended process of referral. She explained why she had to be involved in the extended process of referral, and this included a strategy to keep the clients satisfied and to establish a future working relationship with Cargo Compass. Her explanation makes sense to me because, according to Gouveia, any payment which will become due to the respondent would be based on successful and profitable referrals. In my view had this further information been placed before Fourie AJ, it was not going to change the rule 43 order.

(20) I accept the respondent’s version as corroborated by Gouveia that at the time the rule 43 application was heard and the order granted, the terms of the envisaged relationship have not yet been finalised and nor was there any formal agreement in place between the respondent and Cargo Compass notwithstanding referrals already having been made.

(21) The respondent contends that the issue of whether or not she is employed by Cargo Compass was argued before Fourie AJ. The applicant is not disputing this contention. I am satisfied that the respondent's evidence regarding her relationship with Cargo Compass was placed and argued before Fourie AJ, as demonstrated in paragraphs 17 and 18 above, and as such there were no fraudulent representations made to the rule 43 court in this regard.

(22) The applicant contends that had Fourie AJ known that the respondent would receive payment of R500 000.00 from Cargo Compass in due course, equating to a nett payment of R50 000.00 per month from 1 May 2021 onward, the rule 43 order would not have been granted. The applicant submits that this was a material misrepresentation deliberately made to the court. The applicant has failed to place the evidence before me proving that at the time the rule 43 application was heard and order granted, that the respondent knew that she was going to receive R500 000.00 in May 2022 or in due course for referrals made to Cargo Compass.

(23) The respondent disputes that she was earning an income at the time she filed her affidavits in the rule 43 application, and at the time the application was argued and the order granted. She also disputes that she knew at the time of rule 43 application that she would receive payment of R500 000.00 in due course. She states that at the relevant time she did not know how much she was going to be paid for the referrals, because the negotiations were not yet finalised and the formal agreement not yet concluded. The written agreement between her and Cargo Compass referred to in Gouveia's affidavit, was concluded on 5 May 2022, some nine months after the court order was granted. In terms of the said agreement a once off referral fee of R500 000.00 is payable to the respondent for the referred business for the period 1 May 2021 to the end of February 2022. The once off referral fee of R500 000.00 was paid to her on 5 May 2022.

(24) I have considered all the affidavits and heads of argument filed by the parties. There is no evidence before me proving that, at the time rule 43 application was launched, argued and order granted, the respondent was earning an income from

Cargo Compass and quantum thereof. I find that the applicant has failed to discharge onus that respondent made fraudulent representations in this regard.

(25) I conclude that the applicant has failed to establish the requirements of rescission in terms of rule 42(1) or common law. The rescission application stands to be dismissed.

Contempt of court (counter-application)

(26) I now turn to determine the issue whether the respondent has established the requirements of contempt of court beyond a reasonable doubt.

(27) The respondent seeks an order declaring applicant to be in contempt of order granted by Fourie AJ on 3 August 2021 (“rule 43 order”). Further, the respondent seeks an order that the applicant be committed to prison for a period of not less than 60 calendar days, the operation and execution thereof be suspended for a period of 12 months from the date of granting of this order, on condition that the contempt is purged.

(28) For the applicant to be found to be in contempt of rule 43 court order, the respondent must prove the requisites of contempt (the order; service or notice; non-compliance, and wilfulness and *mala fides*) beyond reasonable doubt. But once the respondent has proved the order, service or notice, and non-compliance, the applicant bears an evidential burden in relation to wilfulness and *mala fides*: should the applicant fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt (*Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).

(29) It is common cause that the rule 43 court order was granted; that applicant was served with the rule 43 court order and has knowledge thereof; and the applicant has not complied with the rule 43 order. The issue in dispute is whether the applicant’s non-compliance with the rule 43 court order was wilful *and mala fide*.

(30) First, the respondent in her answering affidavit states that the applicant has failed to comply with the rule 43 court order in that on certain instances he was half an hour or an hour late in collecting or dropping off the minor children, or changed the locations for pick up. There is no prayer in the counter-application dealing with contact. The only relief sought relates to money. Accordingly, I am not inclined to determine the issue of contact.

(31) Second, the respondent states that the applicant is in contempt of the rule 43 court order in that he has wilfully and maliciously terminated all financial support to the applicant and the minor children, save for the payment of educational and medical expenses pertaining to the minor children. He is indebted to the respondent in the amount of R1 766 350.00 which is computed as follows. R57 350.00 being the balance due to the respondent in respect of September 2021 maintenance; R64 000.00 being the balance due to the respondent for October 2021; R450 000.00 in respect of the maintenance of the respondent and minor children for the period November 2021 to May 2022, which is an amount of R75 000.00 per month; R400 000.00 being the balance due in respect of the contribution towards the respondent's legal fees; R300 000.00 being the contribution towards the purchase of furniture and equipment at the respondent's rented accommodation; R360 000.00 in respect of the respondent's rent for the period December 2021 to May 2022; R45 000.00 in respect of the respondent's rental deposit; and R90 000.00 in respect of the respondent utilities for the period December 2021 to May 2022.

(32) The applicant's explanation for non-compliance with the rule 43 court order is that, first, there is a pending rescission application. In this regard section 18 of the Superior Courts Act 10 of 2013, which provides for the suspension of the court order pending the outcome of the proceedings launched against that court order, expressly excludes rescission application from the general rule. Furthermore, applicant was advised by Yacoob J during the hearing of urgent application and Maier Frawley J during the case management conference that he is obliged to comply with the rule 43 court order until varied or set aside. He has not heeded to my sisters' advice. The rescission application does not absolve the applicant from complying with the rule 43 court order. All orders of the court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside (*Culverwell v Beira* 1992 (4) SA 490 W).

(33) Second, he contends that he is not obliged to make payment of the amount due to acquire household furniture and equipment until such time as the respondent has acquired alternate accommodation. However, this condition was not imposed by Fourie AJ.

(34) Third, he contends that he is unable to pay the financial obligations imposed on him by the rule 43 court. The respondent is disputing this contention and in support thereof has annexed the applicant's Nedbank statements for the period September to October 2021, which show that he has an ability to maintain the respondent and the minor children. During the period 1 September 2021 to 29 October 2021, he had the funds in his Nedbank account varying between R92 819.42 to R458 587.71. The respondent also attached a schedule she prepared indicating that the applicant has interests in various entities. The applicant paid R3,5 million towards his legal costs. All these facts indicate that he can afford to comply with rule 43 court order, and his disregard for the authority of court.

(35) The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of the human dignity and equality is seriously compromised for those most dependent on the law (*Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) at paras 27-28).

(36) Courts have the power to ensure that their decisions or orders are complied with by all, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. Contempt of court proceedings exist to protect the rule of law and authority of the Judiciary. The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution demands, orders and decisions issued by a court bind all persons to whom and organs of State

to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions, risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced (*Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021).

(37) In conclusion, I find that the applicant has failed to discharge the evidentiary burden to show that his non-compliance with the rule 43 court order was not wilful and *mala fide*. Accordingly, the applicant has proved beyond reasonable doubt that the respondent is in contempt of rule 43 court order.

Costs

(38) The general rule is that costs follow the event. The application for rescission is dismissed and the applicant is liable to pay the costs of the respondent. The applicant is found guilty of contempt of court, and is liable to pay the costs of the counter-application. The respondent has sought the costs of the counter-application on a punitive scale. I am not persuaded that the applicant should be ordered to pay costs on a punitive scale.

ORDER

(39) I make the following order:

- 1 The application for rescission is dismissed with costs.
- 2 The applicant is declared to be in contempt of rule 43 court order granted under the above case number by Fourie AJ on 3 August 2021.
- 3 The applicant is committed to imprisonment at a correctional facility to be designated by the court for a period not less than 60 calendar days.

4 The operation and execution of the order in paragraph 3 *supra* is suspended for a period of 12 months from the date of this order on the conditions set out hereinbelow, namely that the applicant:

4.1 shall:

4.1.1 by no later than 15 September 2022 pay into the:

4.1.1.1 trust account of Steve Merchak Attorney, held with the Sandton Branch of Standard Bank with account number: 023201053 and branch code: 018105 the amount of **R200 000.00**, free of any deductions and bank charges, with the aforementioned amount to be available and accessible on the date and time referred to herein (as per paragraph 6.1.2 of the Rule 43 court order);

4.1.1.2 account of the respondent, held with the Northgate branch of Nedbank with account number: 1698066066 and branch code: 169805 the amount of:

4.1.1.2.1. **R200 000.00**, free of any deductions and bank charges, with the aforementioned amount to be available and accessible on the date and time referred to herein (as per paragraph 5.1.2A of the Rule 43 court order);

4.1.1.2.2. **R57 350.00** (being the balance due of the monthly maintenance) free of any deductions and bank charges, with the aforementioned amount to be available and accessible on the date and time referred to herein (as per paragraph 6.1.1 of the Rule 43 court order);

4.1.2 timeously pay to the:

4.1.2.1 respondent, the amount of:

4.1.2.1.1. R75 000.00 (as per paragraph 6.1.1 of the Rule 43 court order);

4.1.2.1.2. R100 000.00 (as per paragraph 5.1.2A of the Rule 43 court order);

4.1.2.2 respondent's attorney, into the trust account referred to in paragraph 4.1.1.1 *supra*, the amount of R200 000.00 (as per paragraph 6.1.2 of the Rule 43 court order);

4.2 is not found in contempt of the Rule 43 court order and/or this order and/or any other order of the court obtained against the applicant at

the instance of the respondent, within 12 months of the granting of this order.

5 In the event of a breach of any one of the conditions set out in paragraphs 4.1 and 4.2 (including the sub-paragraphs) *supra*, the respondent is given leave to approach the court on the same papers, duly supplemented, to seek that the suspension referred to in paragraph 4 *supra* be lifted and for the court to authorise a warrant of arrest and imprisonment of the applicant forthwith in execution of the order in paragraph 3 *supra*.

6 Nothing in this order shall detract from the continued operation and efficacy of the Rule 43 court order and any amount payable by the applicant in terms thereof.

7 The applicant shall be liable to make payment of the respondent's costs of the counter-application.

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division

(Electronically submitted by uploading on Caselines and emailing to parties)

Date of judgment: 24 August 2022

Counsel for the Applicant: Adv M Nowitz; Adv A Bishop

Instructed by: Dew Mclean Levy Inc.

Counsel for the respondent: Adv AA De Wet SC

Instructed by: Steve Merchak Attorneys