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

Case Number: 16610/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

30.06.23

In the matter between:

R, N L

Applicant

And

R, M I

Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] The applicant seeks an order in terms of section 18(1) of the Superior Courts Act 10 of 2013 (“the Act”), rendering operative and executable certain provisions of my order granted on 26 August 2022 (“the rescission order”), pending the finalisation of the appeal. In terms of that order the rescission application brought by the respondent was dismissed, and the respondent was found to be in contempt of the rule 43 order granted by Fourie AJ on 3 August 2021 (“rule 43 order”).

[2] The section 18(1) application is opposed by the respondent on various grounds, including that the immediate execution of the rule 43 order cannot be authorised because there is an existing order granted by Crutchfield J on 24 December 2021 suspending the execution of the rule 43 order pending the final determination of the rescission application and the application for setting aside writs of execution (“Crutchfield J’s order”). Further, the respondent contends that the immediate execution of the contempt order cannot be authorised because the rescission order has been suspended on 27 August 2022, when leave to appeal application was delivered.

Background facts

[3] The detailed background facts are contained in the rescission judgment and I do intend to repeat same here. The parties married on 25 March 2006. They are separated pending the finalisation of their divorce action. There are three minor children born of the marriage between the parties.

[4] The respondent brought an application before this court, rescinding the rule 43 order on the basis that it was obtained as a result of fraudulent misrepresentations made by the applicant to the court. The applicant opposed the rescission application and filed a counter-application for the order declaring the respondent to be in contempt of the rule 43 order, and compelling him to make good of his contemptuous conduct, failing which he ought to be committed to prison for a certain period.

[5] On 26 August 2022 this court granted the order in the following terms:

- 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 [...]with account number: [...]and branch code: [...] 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 [...]with account number: [...]and branch code: [...]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.

[6] The respondent lodged an application for leave to appeal the rescission judgment to the Full Court of this Division, and it was granted on 19 October 2022. The applicant brought the section 18(1) application seeking an order that the operation and execution of paragraphs 2, 3, 4, 5 and 6 of the rescission order are not suspended pending the outcome in the appeal.

Discussion

[7] The respondent contends that the immediate execution of the rule 43 order cannot be authorised, because of the existence of Crutchfield J's order suspending the execution of the rule 43 order, pending the final determination of the rescission application and the application for setting aside writs of execution. Further, he contends that the rescission application has not been finalised because the appeal against my order is pending.

[8] The applicant contends that Crutchfield J's order was discharged when the rescission judgment was delivered, and therefore, this court may grant the execution order.

[9] It is not correct that Crutchfield J's order was discharged on 26 August 2022. The final outcome of the appeal against my rescission order is pending. It is common cause that the application to set aside writs was timeously launched and is also pending. Crutchfield J's order has not been set aside by a competent court with the requisite jurisdiction. Therefore, it remains extant until the finalisation of the appeal and application setting aside the writs of execution of the rule 43 order. This court cannot disregard the existence of this order. On this basis alone the immediate execution of the rule 43 order pending the final outcome of the appeal cannot be authorised.

[10] Section 18(1) of the Act provides that '*subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*'

[11] In addition to establishing the existence of exceptional circumstances, the applicant is required, in terms of section 18(3) of the Act, on balance of probabilities to prove that she will suffer irreparable harm if the execution order is not granted; and that the respondent will not suffer irreparable harm if the execution order is granted.

[12] The Supreme Court of Appeal in *Knoop NO and Another v Gupta (Execution) 2021 (3) SA 135 (SCA) para 46*, stated that the exceptional circumstances must arise from the facts and circumstances of a particular case, and in the context of

section 18(3) they must be ‘..... something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from.’

[13] The applicant states that her case is exceptional for the following reasons:

[13.1] The degree of the respondent’s contempt of rule 43 order, in that save for partial compliance by him with the rule 43 order in August 2021, and certain payments towards the educational, medical, and extra-mural expenses of the minor children, he has refused, since the granting of the rule 43 order to discharge any of the rule 43 financial obligations, leaving the applicant and minor children vulnerable and financially destitute, with the applicant owing millions which she has borrowed to maintain herself and the minor children;

[13.2] The respondent’s litigious campaign implemented to prevent enforcement of the rule 43 order, in that he instituted the rescission application, and has in bad faith, relied on the institution thereof as a reason for his refusal to comply with rule 43 order despite the fact that a rescission application does not stay the rule 43 order, and him being repeatedly advised of his obligation to comply with the rule 43 order. After the rescission application argument, he filed supplementary affidavits to delay the determination of the rescission application in the result that the papers filed therein totalled over 1000 pages. On 13 December 2021, he launched an application seeking suspension of the execution of the rule 43 order, pending final determination of the rescission application and application setting aside writs of execution. On 17 January 2022, he launched an application for review and the setting aside of the writs, and has taken no further steps in the setting aside application for a period of approximately 10 months;

[13.3] The quantum of the amounts owed by the respondent in terms of the rule 43 order, in that the respondent at the time the applicant’s heads of argument were filed was indebted to the applicant in excess of R2,5 million; and

[13.4] The effect of the respondent’s contempt of rule 43 order upon the applicant and minor children, in that it directly and imminently threatens the financial, physical, emotional, and psychological security and wellbeing of the applicant and minor children. If the execution order is not granted, the applicant and minor children will have no funds with which to provide for their food, clothing, housing and transport.

[14] In response to the stated exceptional circumstances, the respondent contends that he cannot be in contempt of an order that is *ipso jure* void, but, even if this was legally possible, then his bona fide belief that he is not bound by the order discharges the duty upon him to show that it is a reasonable possibility that he did not wilfully and mala fide defy the rule 43 order. The allegation of obstructive litigious

campaign is without substance. He has not improperly resorted to litigation. It is his constitutional right to have disputes resolved by a court of law. The rescission application was necessitated by the applicant's fraud that she committed upon the court. The further affidavits filed after the rescission application argument disclosed the evidence that the applicant had hidden from the court, and demonstrated her fraud. The application to review and set aside the writs was brought to stop the applicant from executing writs she had issued on the strength of the fraudulently obtained rule 43 order. The leave to appeal has been granted against the refusal of the rescission and contempt orders. In respect of the quantum of the amounts owed by the respondent, he contends that this cannot constitute a proven fact, since the indebtedness is in dispute. He disputes that the effect of his contempt on the applicant and minor children is an exceptional circumstance. He states that it is not seriously disputed that the applicant lives in a home she pays R45 000 per month, and she drives a new BMW car. He submits that this is hardly indicative of any adverse effects upon the applicant and minor children.

[15] I have considered the stated exceptional circumstances and the respondent's contentions. In my view the degree of the respondent's contempt of rule 43 order as described in paragraph 13.1 above, and the effects of his contempt on the applicant and the minor children as described in paragraph 13.4 above do not without more constitute exceptional circumstances in the context of section 18(1) and 18(3) of the Act. This is because the very question of whether this court was correct in finding the respondent to be in contempt of the rule 43 order is the subject of an appeal to the full court, and this court granted the respondent leave to appeal on the grounds that the appeal has reasonable prospects of success. Also, the alleged litigious campaign that the applicant contends the respondent embarked on and the quantum of the amounts owed by the respondent do not constitute exceptional circumstances. I agree with the respondent that it is his constitutional right to have disputes resolved by a court of law and this court has not found the respondent to be a vexatious litigant. Accordingly, the applicant has failed to establish the existence of exceptional circumstances warranting a departure from the default position.

[16] In relation to whether the applicant will suffer irreparable harm if the execution order is not granted, she states that she and the minor children will be destitute as they will be deprived of accommodation and basic necessities such as food, clothing and medical care. She will not be in a position to continue to afford litigating against the respondent in the result she will be compelled to represent herself in such litigation. If she is unable to accommodate the minor children, the respondent will no doubt insist on assuming their primary care which will be contrary to the recommendations of Dr Robyn Fasser, who recommended that the minor children should reside primarily with the applicant. It is not in dispute that the respondent has continued to provide for some of the basic necessities of the minor children, despite his contestation of the rule 43 order. In my view, the harm alleged by the applicant is not irreparable,

[17] The immediate execution of an order such as the one in issue when the appeal is pending, and with a probable different outcome on appeal, has the potential to cause enormous harm to the party that is ultimately successful (*Knoop and Another NNO supra para 1*). Section 18(3) requires the applicant to establish that the respondent will not suffer irreparable harm if the execution order is granted. If the applicant cannot show that the respondent will not suffer irreparable harm by the grant of the execution order, the court has no discretion to grant an execution order (*Knoop and Another NNO supra para 48*).

[18] The applicant states that if the respondent is successful in the appeal he will not suffer irreparable harm because the rule 43 order may only be rescinded in part, and any claim for reimbursement of amounts disbursed in terms of rule 43 order will be limited. He would retain a claim for damages against the applicant should same be factually and legally sustainable. Any damages payable by the applicant will be discharged through her future income, and set off any proprietary award to which the applicant may be entitled in the divorce action. This submission by the applicant misses the point. One of the orders the applicant wants to be put into operation pending the appeal is the contempt of court order and incarceration of the respondent. An order which infringes on the freedom and security of a person such as imprisonment of a person cannot be put into operation pending the appeal because of the manifest harm and prejudice that would be suffered.

[19] I therefore agree with the respondent's contention that the operation of the order would entail possible incarceration of the respondent for 60 days, and that the minor children would suffer irreparable harm if he is sent to jail. The respondent further submitted that his committal to jail would be an infringement of his constitutional rights to freedom and security of his person, human dignity, privacy, freedom of movement and residence, freedom of association, freedom of expression, and freedom of trade, occupation and profession. None of these harms can be compensated.

[20] The applicant has not dealt with the harm to be suffered by the respondent and the children if the immediate execution of the contempt order is authorised. This is fatal. If the immediate execution of the contempt order is authorised, and the respondent is incarcerated before the finalisation of the appeal, his success on appeal will be academic. It is common cause that the respondent makes some financial contribution towards the minor children's needs, and spends significant time with them. I agree with the respondent that if the immediate execution of the contempt order is granted he and the minor children will suffer irreparable harm. I find that the applicant has failed to show on balance of probabilities that the respondent will not suffer irreparable harm if the execution order is granted.

[21] The applicant has failed to make out a case for the relief sought. I find no reason why I should deviate from the general rule that the costs follow the event.

[22] In the premises the following order is made:

Order

1. The application is dismissed with costs.

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division

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

Date of judgment: 30 June 2023

Appearances

Counsel for the Applicant:

Adv AA De Wet SC

Instructed by:

Steve Merchak Attorneys

Counsel for the respondent:
Instructed by:

Adv A Bishop
Nowitz Attorneys