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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 19688 / 2016

In the matter between:

S[...] D[...] N[...]

Applicant

and

M[...] D[...] N[...]

Respondent

Coram: Wille, J

Heard: 21st of April 2021

Delivered: 30th of April 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] The applicant applies for the variation of an interim maintenance order¹, granted by agreement between the parties on the 13th March 2017. This *pendente lite* as the trial in the main action has not yet commenced. I was advised by both counsel that the trial action was due to commence in May 2021. I was assured that the trial action will be postponed. The summons in this matter was issued out during 2016 and it seems to me that these action proceedings have since progressed with no sense of real urgency. This, in itself may constitute a ground for a variation of the interim maintenance order.

[2] The applicant argues that his total monthly package payment to the respondent amounts to the sum about R75 837,94. He further argues that he can no longer make these payments for reasons beyond his control, due mostly to events which followed the Covid-19 pandemic², together with a general downturn in the building industry. In the main, the applicant seeks to reduce the R18 000,00 - cash payment - portion of his maintenance obligation and also to trim certain other expenses he is obligated to pay, *pendente lite*. His case is further, that should this occur, the respondent will not be left without.

[3] The respondent's opposing papers were filed out of time and the respondent also belatedly filed a supplementary affidavit. The applicant's counsel took no issue with the late filing of these papers and I condoned the late filing of the respondent's opposing affidavit and her supplementary affidavit and admitted this material into the record for the purposes of the opposed hearing. In addition, any bar that may have existed was lifted and set aside.

¹ The previous rule 43 order – the 'prior order'

² The 'pandemic'

THE APPLICANT'S CASE FOR VARIATION

[4] The applicant contends that prior to the pandemic, he was in advance of his obligations in terms of the prior order. As at the end of March 2020, he had 'pre-paid' to the extent of R14 654,72. In contrast, by the end of August 2020, the applicant was in arrears to the sum of R47 381,12. This equates to a shortfall of about R7896,85 per month. It is the applicant's case that his inability to pay is simply as a direct consequence of the material changes in his financial circumstances, which have taken place since the prior order was granted in March 2017.

[5] The applicant contends: that he used his salary and other monies loaned from a close corporation³ to pay his maintenance obligations imposed in terms of the prior order: that this proved unsustainable: that accordingly he was obliged to sell his members interest in and to the said close corporation to his father as security for this indebtedness: that he is now employed by his father's close corporation and that he is now no longer receiving his full salary due, *inter alia*, to the economic devastation caused by the pandemic.

[6] Besides, he advances that the close corporation does not have the necessary empowerment and transformation status⁴, so as to qualify for the award of any worthwhile building contracts. In this connection, he has experienced that even low tenders are unsuccessful as price alone no longer matters, with the result that his employer is finding it more difficult to compete and secure any building contracts.

³ De Nobrega CC

⁴ The necessary 'BBBEE' scores

[7] In support of these allegations, the applicant offers up to the court a detailed letter by the accounting officer of the close corporation, exhibiting that in 2017 the close corporation made a profit of R377 000,00. Whilst in 2019, a loss of R258 788,00 was recorded.

[8] A further major blow was suffered as a direct result of the then applicable 'pandemic disaster regulations' which effectively throttled the already besieged building industry. Besides, the close corporation is further suffering financially as it is unable to collect monies that are due to it. The applicant stopped receiving his salary and he has only received a single payment of R6859,68 in the form of disaster management relief funding. He is not possessed of any assets that he can sell or encumber and does not have any investments. He simply has no way or generating sufficient funds to enable him to comply with the prior order.

[9] The applicant also strongly relies on the fact that he requested the respondent to reduce her expenses in the circumstances. In this connection, he advances that the parties orally agreed that their domestic helper would no longer be paid. This, I must say at the outset, does not sit well with me. More about this later. The applicant applies for a reduction in the following respects: that the cash payment would reduce from R18,000.00 to R4000,00: that the monthly electricity spend would be capped at R800,00: that the water account would be limited to R200,00: that the monthly petrol spend would be capped at R1000,00 and that the DSTV package would be exchanged for a more affordable Netflix package.

[10] The argument goes that the respondent will not be left destitute and she will still be provided with the following conveniences: that she will continue to reside in the former matrimonial home complete with all-expenses paid, inclusive of rates and taxes, electricity, water, refuse, sewerage, maintenance, insurance and security: that she has a monthly grocery benefit card to the value of R2000,00: that she will have monthly spending money in an

amount of R4000,00 and that she has the use of a fully maintained motor vehicle. This, together with a comprehensive medical aid.

THE RESPONDENT'S OPPOSITION

[11] The respondent's case is this: that the business structure by the applicant is champetas: that the applicant did not have to make any loans and that the surety bonds that were registered a security for these purported loans, have simply been registered to devalue the joint estate. I pause to mention that the respondent holds the view that the parties are married in community of property. In contrast, the applicant relies heavily on the antenuptial contract entered into between the parties. The respondent contends that this agreement is invalid and of no force and effect.

[12] The respondent also takes the view that very little weight (if any), may be attached to the (2) page financial analysis⁵, in connection with the financial status of the close corporation. The argument is that this constitutes 'insufficient evidence' and falls to be ignored for the purposes of the present application. This despite the fact that the respondent does not materially engage with this material. There are vast passages in the applicant's founding affidavit that are not touched at all by the respondent, save in the form of a bald denial of the truth of the content thereof.

DISCUSSION

[13] On the material before me, I am inclined to accept that the reasons for the decline in the business of the close corporation are left somewhat unchallenged. I am by no means

⁵ Presented in the form of a 'letter' as an attachment to the applicant's papers

suggesting that any onus in this connection rests of the respondent. The advent of the pandemic subsequent to the hearing of the original order, as a matter of logic, must have posed enormous challenges. The respondent herself was unable to work as a photographer for not insignificant periods of time. This, undoubtedly due to the effects and challenges surrounding the financial devastation caused by the pandemic.

[14] The applicant requested the respondent to provide him with a revised budget in an attempt to cater, so it seems, for the respondent's reasonable requirements. I agree that while there existed no legal obligation on the respondent to have complied with the applicant's request, a comprehensive reply by the respondent, may very well have narrowed some of these issues, alternatively, led to an amicable resolution of the matter sans this court's intervention.

[15] Put in another way, the opposition to the application by the respondent is largely based on the premise that the applicant is not entitled to a variation of the prior order. This is the nub of the legal argument contended for by the respondent.

[16] As alluded to earlier, as at the end of March 2020, the applicant had 'pre-paid' his maintenance obligation to the sum of R14 654,72. Thereafter, by the end of August 2020, the applicant was in arrears to the sum of R47 381,12. This equates to a shortfall of about R7896.85 per month. In addition to the cash component of the maintenance payment, the respondent is in possession of a buyer's card with a grocery store which enables her to effect purchases to the value of R2000,00 per month. These arguments go to the cash component of the maintenance paid by the applicant.

[17] The other variations sought are in connection with the respondent's monthly electricity spend, her monthly water bill and her monthly petrol spend. I do not find favour with these variations because: the amounts are not currently excessive: they are not luxurious and, in any event, these expenses must naturally have been subjected to an inflationary increase since the prior order in 2017. In view of the amounts involved, I also do not find favour with the argument that the DSTV package should be swapped out for the more affordable Netflix package.

[19] As far as the position of the domestic helper is concerned, the following: the undertaking to pay for the domestic helper was essentially to assist the respondent with the children⁶, so as to enable her to pursue her career as a photographer: the domestic helper is also now required to assist the respondent in the home schooling of the minor children and the applicant contends that the services of the domestic helper could be dispensed with as this was by agreement.

[20] This agreement as contended for by the applicant was not accepted by Rogers J, in his judgment on the contempt proceedings.⁷ It is argued that this expense is luxurious and is no longer affordable by the applicant. I disagree. The services of the domestic helper and the payments to her are not subject to legal termination on short notice and without respecting her rights, her circumstances and her specific financial position.

⁶ There are (2) minor children of the marriage who are (6) and (7) years old

⁷ The respondent sought to hold the applicant in contempt of court for non-compliance with the prior order

[21] In addition, I hold the view that the respondent has set out sufficient information in order to demonstrate that she is in need of the services of the domestic helper. This, in any event will assist should she attempt to supplement her income in her field and career as a photographer. As a matter of logic, the respondent must be given an opportunity to supplement her income in these circumstances.

[22] It is now settled law that interim maintenance orders may be varied⁸, in the event that the party is able to prove that their circumstances have changed materially. In my view, the applicant's financial position has changed materially: because he can no longer earn or borrow sufficient monies to pay the respondent: because he no longer owns part of the members interest in and to the close corporation: because he has borrowed funds and he has had to provide security for these loans and because his employer faces severe financial challenges due to the pandemic which have been exacerbated by a downturn in a depressed building industry.

[23] I take the view that the applicant has demonstrated that his circumstances have changed materially since the prior order and that he can no longer afford to pay the maintenance which he previously provided. I also mention that the respondent's application to hold the applicant in contempt for falling into arrears with his payments in terms of the prior order was unsuccessful. A declaration of the amounts due owing and payable by the applicant to the respondent followed, presumably placing the respondent in a position to levy execution. It is not apparent from the material before me as to what has transpired in this connection.

⁸ In terms of rule 43(6)

[24] I take the view that the applicant's position has materially changed to at least the extent of the approximate monthly shortfall that occurred since March 2020. In the result the following order is made:

1. That paragraph 1.1 of the prior order (granted by Justice Meer on 13 March 2017 under case number 19688/2016), is varied to the extent that the cash portion of the maintenance in the sum of R18 000,00 is hereby deleted and substituted for the sum of R10 000,00 in its stead, with effect from the 1st of October 2020.
2. That each party shall be liable for their respective costs of and incidental to this application.

E. D. WILLE

(Judge of the High Court)