IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED

Case number: A 357/2018
Date: 10 December 2018

J,O A **Appellant**

and

J, K **Respondent**

REASONS

SWANEPOEL AJ (TOLMAY J and JANSE VAN NIEUWENHUIZEN J concurring):

[1] This is an appeal against an order granted on 9 July 2018 by Opperman J, in terms of section 18 (3) of the Superior Court Act, Act 10 of 2013 ("the Act"). The material parts of the order read as follows:

> *"1. Mr. Joubert1s application for leave to appeal is granted to the full court of the Gauteng Division, Pretoria.*
>
> *2. The order handed down by Opperman J on 24 May 2018 is declared to be effective and enforceable pending the outcome of any appeal process lodged by Mr Joubert or the finalization of the separated maintenance issue as contained in Judge Phatudi's order dated 15 December 2015.*

3. *Mr Joubert is ordered to comply with the order handed down on 24 May 2018 by 18h30 on Friday 13 July 2018, which compliance includes the payment of maintenance in terms of the Rule 43 order granted under the abovementioned case number on 1*5 *May 201*5, *including but not limited to the contributions that were payable on or before 28 April 2018, 28 May 2018, and 28 June 2018.*

4. *……*

5. *Any maintenance paid by Mr Joubert in terms of paragraph 3 hereof shall be deducted from the amount of accrual payable to Mrs Joubert at the final determination of the separated issues* as *contained in Judge Phatudi's order dated* 15 *December 2015, in the event that Mr Joubert's appeal is upheld.*

6. *Costs of the application for leave to appeal and of the section 18 application are reserved for determination by the court hearing the appeal."*

[2] At the commencement of the matter, an application was brought to stay the appeal, and to adduce further evidence before the Court *a quo.* We were also advised that the costs of a prior spoliation application that had been launched by Respondent, had been reserved for determination by this Court. After hearing argument, the following orders were granted, and reasons for judgment were reserved:

APPLICATION OF 7 DECEMBER 2018:

1. The application which was launched on Friday the 7th of December 2018 (7/12/2018) is dismissed with costs.
2. The costs are costs on an attorney and client scale including the costs of two counsel.

APPEAL ORDER:

1. The appeal is dismissed.
2. The appellant to pay the costs of the appeal on an attorney and client

scale and which costs will include the costs of two counsel.

SPOLIATION APPLICATION ORDER:

1. The first and second respondents are to pay the costs of the spoliation application on a party and party scale.

APPLICATION TO ADDUCE FURTHER EVIDENCE

[3] At the start of this matter, Appellant's counsel moved an application for leave to adduce further evidence before the Court a *quo.* On 6 December 2018, four days before this appeal was to be heard, Appellant filed an application stay the appeal, and to adduce further evidence in the main application. It is Appellant's averment that during "further litigation" between him and Respondent, he delivered notices in terms of rule 35 (3), seeking certain documents. He alleges that as a result of the discovery process, he obtained documents that reveal that Respondent's financial situatiof1 is not as dire as she alleges. Respondent deposed to an answering affidavit, denying Appellant's contentions. In argument, Mr. Beyleveldt for Appellant conceded that this application could not succeed, given the contents of the answering affidavit, and the disputes of fact raised therein. However, we believe that even standing uncontroverted, the application could not have succeeded.

[4] Section 19 (c) of the Act, 2013 provides as follows:

> *"The Supreme Court of Appeal or* a *Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other Jaw-*
>
> *(a) . . ...*
>
> *(b).....*
>
> *(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions* as *regards the taking of such further evidence* as *the Supreme Court* of *Appeal* or *the Divisi9n deems necessary; or....."*

[5] In **Staatspresident en 'n ander v Lefuo 1990 (2) SA 679 (AD)** the Court was concerned with the interpretation of section 22 of the Supreme Court Act, 1959, essentially the predecessor of section 19 of the Superior Court Act, 2013. In analysing the authorities, the following principles have been laid down as to when evidence may be accepted by an appeal court, or the matter remitted for further evidence to the trial court:

5.1 The applicant must provide a reasonable explanation why the evidence was not available previously;

5.2 The evidence must be of substantial importance to the case;

5.3 The evidence must likely be such that it might change the course of the matter.

[6] The reluctance of courts to reopen a case that has been adjudicated on has been restated on numerous occasions. It is in principle in the interests of justice that finality be reached. (See: **De Aguiar v Real People Housing** 2011 (1) SA 16 (SCA) at 19 G; **Colman v Dunbar** 1933 AD 141 at 161; **Rail Commuters Action Group and Others v Transnet Ltd *t/a* Metrorail and Others** 2005 (2) SA 359 (CC).

[7] In **Ca Aguiar** *(supra),* the Court referred to **S v De Jager** 1965 (2) SA 612 (A) at 613 B with approval, holding that the following principles apply to the question as to whether evidence should be admitted:

7.1 There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not lead at the trial.

7.2 There should be a *prima facie* likelihood of the truth of the evidence.

7.3 The evidence should be materially relevant to the outcome of the trial.

[8] Appellant avers that he has obtained further evidence relating to Respondent's financial affairs through the rule 35 (3) discovery process. However, the application is silent bout when Appellant delivered the rule.35 (3) notices, and why the evidence has only now become available. What we do know, is that on 9 February 2018 Appellant delivered a rule 35 (3) notice to Respondent. On 16 April 2018, at a pre- trial meeting, Appellant recorded that he

was prejudiced by Respondent's failure to respond to the notice. If this is the same rule 35 (3) notice as is referred to in this application, then Appellant has not provided any reason why this evidence was not at hand earlier.

[9] Respondent had in any event dealt with the alleged new evidence in her founding affidavit in support of the section 18 (3) application, by setting out her financial circumstances in detail. The allegedly new evidence is not new, and would not have taken the matter further.

[10] In the circumstance's the interlocutory application to admit new evidence was dismissed with costs on a punitive scale, including the costs of two counsel.

BACKGROUND

[11] The current dispute has its origins in a divorce action that Appellant instituted against Respondent during October 2013. The parties were at that time married out of community of property, with the inclusion of the accrual system. The issues in the divorce action were firstly, the decree of divorce itself, secondly, the calculation of the accrual of each party's respective estate, and thirdly, spousal maintenance for Respondent.

[12] There is no doubt that the litigation between the parties has been acrimonious and protracted. During 2015 Respondent brought an application against Appellant for maintenance *pendent lite* in terms of rule 43, and on 15 May 2015 an order was granted against Appellant. Appellant was ordered to pay Respondent R 20 000.00 per month, to pay a further R 2 500.00 per month as a petrol allowance, and to effect certain payments in respect of the common home, municipal council charges, Respondent's vehicle, medical aid and various other expenses.

[13] The first payment in terms of the order was made on 29 May 2015, and Appellant continued to pay Respondent in accordance with the order until March 2018.

[14] The divorce action was set down for 28 August 2015. Respondent had in the meantime launched an application in terms of rule 43 (6), seeking a substantial contribution to her costs. As a result of the rule 43 (6) application not being finalized timeously, the trial could not proceed. Respondent applied for a

postponement, which Appellant opposed. Appellant countered with an application in terms of rule 33 (4), seeking to separate the divorce decree from the remaining issues.

[15] In the founding affidavit in support of the separation application, Appellant made the following statement:

> *"Apart from the fact that the (sic) no children have been born of our marriage, such a division of issues, namely that* a *final decree of divorce will be granted will in no way prejudices (sic) the Defendant in that the present Rule 43 order will continue to be operative and the Defendant retains any rights that she may have by virtue of the provisions of Rule 43."*

[16] The separation application was granted, and subsequently a decree of divorce was granted, with the remaining relief being postponed. Appellant continued to pay the interim maintenance for nearly two years. During March 2018 Appellant instructed new attorneys, Greyvensteins, to act on his behalf. On 15 March 2018 Appellant's new attorney wrote to Respondent's attorney recording *inter alia,* that Appellant was suffering ongoing prejudice due to the fact that he was paying maintenance to Respondent, whilst the issue of spousal maintenance was still in dispute. Absent from the letter was any contention that the rule 43 order had lapsed at date of divorce.

[17] Appellant was evidently not satisfied with his new attorney because, on 26 April 2018, Respondent's attorney received a letter from one Brendan Weldrick, who had been appointed as Appellant's new attorney. Weldrick stated that he had advised Appellant that the rule 43 order had been "extinguished" upon divorce. He further recorded that Appellant would not make further payments in terms of the order. Appellant demanded repayment of the maintenance that he contended had been paid erroneously after the date of divorce. Respondent's attorney took the opposite view, that the order was still of force and effect, and denied that Respondent was liable for repayment of any monies. Appellant made no further payments after March 2018.

THE DECLARATORY ORDER

[18] It is within the above context that Respondent brought an urgent application on 8 May 2018, for the following relief:

18.1 That the rule 43 order granted on 15 May 2015 be declared to remain in force and effect pending the final determination of the remaining disputes in the divorce action, and that Respondent may approach the Court for further relief in terms of rule 43;

18.2 That Appellant be found to be in contempt of court and be committed to imprisonment;

18.3 Alternatively to the above orders, that the separation order be set aside and the rule 43 order revived;

18.4 Costs on the attorney client scale.

[19] The crux of the matter before the Court a *quo* was whether the rule 43 order had survived the decree of divorce, or whether it was extinguished thereby.

[20] Opperman J found for Respondent, (applicant in that application), and granted a declaratory order that the Rule 43 order was still of full force and effect. That order is the subject of a different appeal, and does not concern us.

THE SECTION 18 (3) ORDER

[21] Pursuant to the granting of the declaratory order, Appellant brought an application for leave to appeal. The result of the application for leave to appeal was that the operation of the order of the Court a *quo* was automatically suspended pending the appeal. Respondent then launched an application in terms of section 18 (3) of the Act, for an order that effect be given to the declaratory order, and in consequence also to the Rule 43 order, pending the finalisation of the appeal. The application was vehemently opposed. Nevertheless, on 9 July 2018 an order was granted in Respondent's favour, in the general terms set out in paragraph 1 above.

[22] It is against the latter order that the Appellant now appeals to this court.

[23] Section 18 (1) and (3) of the Act reads as follows (subsection (2) deals with interlocutory decisions and is not relevant):

"18 Suspension of decision pending appeal

(1) 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, is suspended pending the decision of the application or appeal.*

(2) .....

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to court to order otherwise, in addition proves on a *balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm. if the court so orders."*

[24] It has been common law practice that the noting of an appeal (or an application for leave to appeal), suspends the working of any order given by a court. See: **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (AD).** The purpose of the rule was to prevent irreparable harm from coming to an Appellant should the order be given effect to, and later be set aside on appeal. Nevertheless, a Court has always had a wide discretion whether or not to allow execution pending the appeal.

[25] Rule 49 (11) of the Uniform Rules of Court, which has been repealed, largely restated the common law position. However, section 18 of the Act has resulted in a higher threshold for the granting of such an order than was previously the case. In **Incubeta Holdings (Pty) Ltd v Ellis 2014 (3) SA 189 (GJ)** it was held that the test was now twofold:

(a) Whether or not exceptional circumstances existed;

(b) Proof on a balance of probabilities that:

(i) The applicant would suffer irreparable harm should the order not be granted;

(ii) The respondent would not suffer irreparable harm should the order be granted.

[26] The word 'exceptional' in the Shorter Oxford English Dictionary is defined as "unusual, out of the ordinary". It is clearly something that is out of the norm. What constitutes exceptional circumstances was specifically addressed by Sutherland J in **Incubeta Holdings** *(supra* at 195 G):

> *"Necessarily, in my view, exceptionality must be fact specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been invented by s 18 by the use of the phrase. Although that phrase may not have been employed in the judgments, conceptually the practice as exemplified by the text in rule 49 (11), makes the notion of the putting into operation an order in the face of an appeal process* a *matter which requires particular* ad hoc *sanction from* a *court. It is expressly recognised, therefore,* as a *deviation from the norm, ie an outcome warranted only exceptionally."*

[27] In **MV *Ais Mamas* Seatrans Maritime v Owners MV *Ais Mamas* and another** 2002 (6) SA 150 (CPD) Thring J considered the meaning of 'exceptional circumstances' within the meaning of section 5 of the Admiralty Jurisdiction Regulation Act, 1983. Having analysed the authorities, it was held that in considering whether exceptional circumstances existed, the following principles apply:

27.1 The words "exceptional circumstances" contemplate something out of the ordinary or of unusual nature;

27.2 The circumstances must arise from or be incidental to the case;

27.3 The determination whether exceptional circumstances exist does not depend on the exercise of a judicial discretion, but is a fact-based exercise;

27.4 Depending on the context of its use, the phrase 'exceptional

circumstance's have primary meaning of 'unusual' or 'different', or in its secondary meaning, 'markedly unusual' or 'specially different';

27.5 Where in a statute it is directed that a fixed rule shall be departed from only in exceptional circumstances, a strict rather than liberal meaning should be given to the phrase.

[28] It is not necessary for any one factor to be exceptional. If the circumstances of the parties, considered in their totality, and considered in conjunction with the possible harm that either party may suffer, are exceptional, then the Court may grant an order in terms of section 18 (3). The potential harm that either party may or may not suffer would, as a matter of logic, have a bearing on whether exceptional circumstances exist. The nature of the relief sought may also be relevant to the consideration process. However, it must always be borne in mind that the granting of a section 18 (3) order is an extraordinary deviation from the norm, which is that in principle an appeal suspends execution of the order. (See: **Ntlemeza v Helen Suzman Foundation** 2017 (5) SA 402 (SCA) at 416 A.)

[29] In **University of the Free State v Afriforum & another** 2018 (3) SA 428 (SCA) the Court considered whether the prospects of success in the appeal should play a role in the consideration of whether exceptional circumstances are present. In approving of the decision of Binns-Ward J in **Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another (2016] ZAWCHC 34,** the Supreme Court of Appeal held the following (at 434 F):

> *"I am in agreement with the approach of Binns-Ward J. In fact, Justice Alliance serves as a prime example why the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief."*

[30] *In casu* the Respondent alleged that she was unemployed, and that her sole income was the maintenance paid to her by Appellant. Respondent had

worked for Appellant, but when they separated he terminated her employment. Respondent alleged that she was reliant upon selling her jewellery and other assets in order to make ends meet. Respondent had managed to obtain a loan of R 42 000.00 from her bankers, but was otherwise at the end of her credit limit. In short, Respondent was left destitute by Appellant's failure to effect payment of the interim maintenance.

[31] Appellant denied that Respondent was in financial distress. Appellant did not dispute that Respondent was unemployed and had no other source of income. He did not deny that she was surviving by selling her assets, neither did he suggest how she would be able to survive without an income. Appellant's denial that Respondent was suffering financial distress was perfunctory and without substance. In our view, Respondent has shown that she would suffer irreparable harm should the order not be implemented.

[32] Appellant did not even attempt to make out a case that he would be irreparably harmed should the order be granted. In Weldrick's letter dated 26 April 2018, in which he recorded that Appellant would not make any further interim payments, Weldrick suggested that should there be a dispute regarding the applicability of the rule 43 order, he would advise Appellant to pay the monies into his trust account. If Appellant is able to pay the maintenance into his attorney's trust account, then it is clear that affordability is not a problem.

[33] It is common cause that Appellant's estate has shown a much greater accrual than that of Respondent, and that she is entitled to a substantial payment from Appellant. Should the appeal be successful, Appellant will be able to recover what he has paid in the interim. Therefore on the one hand, one is faced with a destitute party who is in severe financial distress. On the other hand, Appellant can afford to pay the maintenance, and is able, should his appeal be successful, to offset all payments made to Respondent against the accrual due to her. The balance of convenience was clearly in favour of Respondent being granted the section 18 (3) order.

[34] Mr Beyleveldt for the Appellant correctly, in our view, and as expected from an officer of this Court, submitted that the appeal did not have any merit.

[35] Finally, one must have regard to the prospects of success on appeal. We

have had the opportunity to read tl1e judgment of Opperman J in the main application. In our view she correctly found that a divorce action is composed of various components, such as the determination of the accrual of the respective parties' estates, spousal maintenance, etc. The actual decree of divorce is but one of the issues in dispute. Without pre empting the appeal on the main application, we can find no fault with the findings of the Court a *quo,* and in our view the prospects of success in the appeal are slim. As was held in the Afriforum matter *(supra),* that fact should also be cast into the melting pot.

[36] In our view the Court a *quo* was correct in finding, on a balance of probabilities that Respondent would suffer irreparable harm should the order not be given effect to, and that Appellant would not be irreparably harmed. The exceptional circumstances existed in the fact that Respondent was destitute, and that the potential of harm to her was substantial. In those circumstances it was proper to grant the section 18 (3) order.

COSTS

[37] Respondent sought costs on the attorney/client scale against Appellant in the appeal. and on the party/party scale in the spoliation application.

[38] A Court has a discretion to make whatever costs order it deems fit in the circumstances, and may, where it wishes to express its displeasure with a party's conduct of the matter, impose a punitive costs order (See: **Mc Donald t/a Sport Helicopter v Huey Extreme Club** 2008 (4) SA 20 (CPD)).

[39] A Court may also express its displeasure where an appeals record has not been prepared properly, by imposing a punitive costs order. (See: **Ingledew v Financial Services Board** 2003 (4) SA 584 (CC)). *In casu,* Appellant sought a preferential date for the hearing of the appeal, and on 9 October 2018 a pre-trial meeting was held at which the Deputy-Judge President issued a directive that Appellant was to file the record of proceedings and its heads of argument by 22 October 2018. Appellant failed to do so, and we were left without the advantage of having reasons for the decision of the Court *a quo,* nor did we have Appellant's heads of argument.

[40] After some consideration we formed the view that the absence of reasons

did not preclude us from hearing the matter. However, in **Strategic Liquor Services v Mvumbi NO** 2010 (2) SA 92 (CC) it was held (at 96 H) that the failure to supply reasons "will usually be a grave lapse of duty, a breach of litigant's rights, and an impediment to the appeals process. Appellant's failure to file the record of proceedings and heads of argument is regrettable.

[41] Finally, something needs to be said about Appellant's conduct in bringing these proceedings in the first place. Appellant is an attorney who is expected to conduct himself in the manner appropriate to an officer of this Court. Appellant himself stated under oath that the rule 43 order would survive the separation order granted in October 2015. He paid in accordance with the order for close on two years, before abruptly stopping the payments, leaving the Appellant destitute. Instead of considering that the judgment of Opperman J might be correct, the Appellant pursued the appeal to its fullest extent. We find Appellant's conduct to be reprehensible, and not what one would expect of an officer of court. He has brought this needless litigation upon himself, and should bear the cost thereof on a punitive scale.

[42] For the above reasons the order was granted as set out in paragraph [2] above.

Swanepoel AJ
Acting Judge of the High Court,
Gauteng Division, Pretoria

I agree:

TOLMAY J
Judge of the High Court
Gauteng Division, Pretoria

I agree:

JANSE VAN NIEUWENHUIZEN J

Judge of the High Court

Gauteng Division, Pretoria