

/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

DATE: 22/08/2007

CASE NO: 5766/2007
UNREPORTABLE

In the matter between:

MARIËTTE VAN DER WESTHUIZEN

APPLICANT

And

HG MKHANZI N.O.

1ST RESPONDENT

PETRUS JACOBUS VAN DER
WESTHUIZEN

2ND RESPONDENT

JUDGMENT

SERITI, J

1. Introduction

This matter came to court by way of a motion.

The notice of motion reads partly as follows:

“Take notice that Mariëtte van der Westhuizen (hereinafter called the Applicant) intends to make application to this Honourable Court for an order:

- (a) calling upon the Honourable Magistrate, Mrs H G Mkansi to show cause why the decision granted or proceedings followed on 18 December 2006 should not be reviewed and corrected or set aside.”

2. Founding Affidavit

It was attested to by the applicant. The first and second respondents are described.

She further alleges that on 4 October 2006 she applied for a variation of a maintenance order granted by the magistrate’s court, Tzaneen on 12 December 2005. The enquiry was held on 18 December 2006.

After she led evidence the first respondent dismissed the matter and stated that she has failed to make out a *prima facie* case, because, *inter alia*, of the following reasons:

- (a) The North Eastern Divorce Court has already dealt with the matter on 4 October 2006:
- (b) It was uncertain whether I would in fact relocate.

The first respondent gave the above reasons as a justification for

her decision, despite the fact that she testified that the aspect of maintenance for the minor child was not dealt with in the North Eastern Divorce Court and that she testified that she has already entered into an oral agreement to lease Flat no 3, Elemboog, Tzaneen and she will move into the said flat by no later than 1 February 2007.

She further alleges that the first respondent committed a gross irregularity by deciding that the second respondent need not testify and such attitude caused a failure of full investigation and enquiry of all relevant facts.

3. Answering Affidavit

It was attested to by the second respondent.

He alleges that on 4 October 2006 at the North Eastern Divorce Court a settlement agreement signed by applicant and him was made an order of court.

On the same day, after the settlement agreement was made an order of court, the applicant went to the maintenance office, Tzaneen to request a variation order of the maintenance order in terms of which he was paying maintenance of their minor child.

The first respondent made her decision, after the evidence revealed, *inter alia*, that the applicant signed the settlement agreement, which contained clauses dealing with maintenance and during cross-examination, the applicant could not give a definite date on which she was going to relocate and that she could not produce a written lease

agreement, the failure of the applicant to adduce evidence indicating why there is a need to urgently vary the standing maintenance order.

The applicant, who had an onus to discharge, failed to put forward reasons that would have justified an increase of the standing maintenance order.

He denies that the first respondent committed an irregularity.

4. Replying Affidavit

It was attested to by the applicant.

She denies that she is resident at 14 Pikkie Kamp Street, Aquapark and states that she is, from 1 February 2007 resident at 16 Second Avenue, Flat no 3, Tzaneen.

She further alleges that during the maintenance enquiry, she testified that the issue of maintenance was not dealt with by the North Eastern Divorce Court. The maintenance order was made on 12 December 2005 in the maintenance court, Tzaneen.

During the maintenance enquiry she testified that she was compelled to seek alternative accommodation because her parents, with whom she was staying together with the minor child, wanted to relocate.

5. Record of Maintenance Enquiry

During this enquiry, the applicant testified together with the second respondent they are the parents of an 18 months old son.

She is staying with her parents, who will be relocating at the end of

January. She needs to get her own place to stay. At the beginning of January or February she is moving to Flat no 1, Elmboog Flats.

She was asked the following question and she answered in the following manner:

“You mentioned that you will move in either 1 January or 1 February. What did you mean by that?

The people who are staying in the flat now, they are just waiting for a house to be registered in their names. So when they move out I will be moving in. I already have an arrange with the “opsigter” from the flats to pay the deposit when she ... but it will be the latest 1 February.”

On her list of expenditure the first item is rent of R1 800.0 and the second item is R250.00 for water and electricity. This expenses relates to the flat where she will be relocating and the item relating to water and electricity is just an estimate.

There was also an item of R500.00 relating to the day care centre where the minor child will go to. Respondent is suppose to pay 50% thereof.

In her testimony, she dealt with her other expenses and she said that she requires an additional amount of R1 000.00 per month, which amount must be added to the existing maintenance order.

Under cross-examination she testified that she is divorced on 4 October 2006.

When she signed the settlement agreement she was satisfied with the terms thereof.

The record also indicates that the following question was put to her an she replied in the following manner:

“Can you explain to the Court, since 4 October 2006, what drastic aspects changed in your life as well as in the minor

child, Mr AJ van der Westhuizen in approximately 40 days.

What has amended so drastically that you need an increase?

As I said your worship I am living with my parent at this stage. They will be moving out to another farm and we need to move on and staying on our own now. ...

So currently nothing drastic set for that intentional move has made an increase in maintenance necessary or are there any other reasons? No your worship.”

She was asked copy of lease agreement and she said that she has not signed any lease agreement, she has only a verbal agreement with the owner of the flats that the moment the people occupying the flat move out she will move in.

In its ruling, the maintenance court stated that for a variation order to be granted there must be a change of circumstances.

The court further said that the applicant referred to the fact that she was going to rent a flat but she could not produce any documentary evidence to substantiate that fact. Question of renting a flat, is something which is going to happen in the future. The applicant can bring an application for a variation of the maintenance order at a later stage. Maintenance court refused to vary the existing maintenance order.

6. Findings

In her evidence in chief, the applicant, besides dealing with her other expenses, she also included the amount for rental she was going to pay as and when she moves into a rented flat together with an estimated amount for water and lights.

She further testified that she has a verbal agreement with the caretaker of the flats she intends occupying.

During cross-examination, she testified that she has a verbal agreement with the owner of the flat.

She further testified that the only reason why she brought a variation application is because she is going to incur further expenses for rental, water and lights.

She conceded during cross-examination that there is no change in her circumstances except the fact that when she moves into a rented flat, her expenses will increase, and that fact prompted her to apply for the variation of the maintenance order.

During oral argument, the applicant's counsel submitted that at the maintenance enquiry, applicant demonstrated that she needs more money as the maintenance amount she is receiving is not sufficient.

The abovementioned submission is not born out by the evidence on record. The record indicates that the applicant testified that she needs the maintenance order to be varied because she is going to incur further expenses when she moves into a rented flat.

I should mention at this stage that during her evidence in chief, during the enquiry, she stated that either on 1 January or February she is

going to move into Flat no 1, Elmboog Flats and in her replying affidavit which she signed on 2 April 2007 she stated that from 1 February 2007 she is resident at 16 2nd Avenue, Flat no 3, Tzaneen, which is not the same flat she mentioned during the enquiry. This means that she did not occupy the flat that she mentioned during the enquiry.

It is not known whether the rental at the place she is now staying is the same as rental she alleged during the enquiry that she was going to pay or not.

The applicant's counsel further submitted that on the record it is obvious that there is no evidence which contradicts the evidence of the appellant that she needs alternative accommodation.

The said submission is correct, but the fact of the matter is that there is no admissible evidence that she has secured alternative accommodation and how much is the said accommodation going to cost her.

The verbal agreement she alleged she entered into has not been established during her evidence. In her evidence in chief, she alleged that she entered into a verbal agreement with a caretaker, under cross-examination she said she entered into an oral agreement with the owner of the flats in question. In her replying affidavit she alleges that she stays at another flat, which is not the same flat she mentioned during the enquiry.

In my view, at the enquiry the applicant failed to adduce admissible evidence about the alleged verbal rental agreement. This is borne out by the fact that at the time of signing of her replying affidavit she was staying at a flat not mentioned during the enquiry.

The applicant during cross-examination testified the additional expenses which she is going to incur as a result of relocating is the sole reason for her applying for variation of the maintenance order.

My opinion is that the magistrate's court was entitled not to proceed further with the enquiry because the calling of further witnesses would not have assisted the court to arrive at a fair decision.

The applicant's counsel submitted further that the magistrate should have heard further evidence and also subpoenaed further witness.

I cannot imagine which witnesses the court should have called as witnesses because the applicant testified that the only reason she is seeking a variation order is the rental she is going to pay, but failed to adduce admissible evidence indicating with whom she entered into the said rental agreement, and from which dated will the said agreement be effective.

The applicant should, in my view have gone back to the maintenance office after signing a lease agreement and requested another enquiry for a possible variation of the maintenance order.

The court therefore, make the following order:

1. Application is dismissed with costs.

W L SERITI
JUDGE OF THE HIGH COURT

5766/2007

Heard on: 7 August 2007

For the Applicant: Adv N van Niekerk

Instructed by: Messrs Davel de Klerk Kgatla, Pretoria

For the Respondent: Adv

Instructed by: Messrs C F van Rooyen, Pretoria

Date of Judgment: 22 August 2007