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

CASE NO: 16380/2019
DATE: 10-10-2022

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(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE
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In the matter between

T[...] T[...] Plaintiff/Respondent

And

R[...] K[...] Defendant/Applicant

JUDGMENT

OLIVIER, AJ: The application is brought in terms of Rule 43(6) read with Rule 6(12)(A) of the Uniform Rules of Court. There is only one issue, the accommodation needs of the respondent *pendente lite*. The applicant and the respondent are in the midst of a protracted divorce and there has been extensive litigation.

A Rule 43 order was granted by this Court on 31 July 2020, which was subsequently varied by order dated 12 August. The latter order made by Keightley J, ordered the applicant to provide the respondent and the two minor children with sole and undisturbed occupation of the former family home which he presently occupies, namely unit 3[...], The C[...] of S[...], by 30 September 2022.

The applicant brought this application shortly before he had to vacate The Claridges property in terms of the Keightley order. The August application was precipitated by an application by the landlord of the respondent's present property to evict the respondent from her present occupation due to non-payment of the rent by the applicant.

The respondent was due to be evicted on Friday 7 October, three days before this hearing, following an order dated 12 September 2022. However, the landlord's attorneys have given a written undertaking to hold over eviction until Monday 17 October, pending the outcome of this application.

The respondent resisted urgency on the basis that any urgency was self created. I do not agree. It is not to say that because the applicant had launched this application only shortly before he was due to vacate the matrimonial home, that there is no urgency.

There are deadlines that will impact significantly on the accommodation arrangements of both parties. The applicant was required to vacate the matrimonial home by no later than 30 September 2022, while the respondent is on the verge of being evicted from her present accommodation.

The applicant makes an argument that this would have a

significant impact on his business and the income he derives from it. He alleges that his circumstances have changed to such an extent that he is able to pay the respondent's rental in advance for one year, thereby ensuring that she will not be evicted and that she will remain in her present accommodation.

Even though they are not directly involved, the decision of this Court will impact the accommodation arrangements of the two minor children too. Either they will remain in their present accommodation, or they will return to the matrimonial home with their mother. These factors justify that the application is heard on an urgent basis.

The applicant wants the parties' current living arrangements to be maintained, namely that the applicant shall continue to occupy the Claridges property and that the respondent shall continue to reside at Unit 4[...], 2[...] W[...] R[...] S[...], S[...].

The applicant claims a material change in circumstances as follows: he has managed to secure a loan to pay the respondent's rental upfront for one year, as well as the water and electricity charges. The landlord has agreed to the extension of the current lease and the upfront payment arrangement. As a result, the respondent will not be evicted from her present accommodation. The loan amount has been deposited into the trust account of the applicant's attorneys.

Secondly there is an offer to purchase the Claridges property, which is owned by a company of which the parties are equal shareholders. There is no bond registered over the property. The matrimonial home is currently under offer and when sold, the respondent would receive half of the proceeds. The applicant undertakes to move out once the property has been sold.

Third reason: the applicant has conceded to a division of the joint estate and the appointment of a liquidator to divide said estate, which he claims will significantly reduce the issues in dispute in the divorce action. He has made a formal tender to the respondent to this effect.

In the alternative, the applicant claims that exceptional circumstances exist to grant the relief. He argues that the Keightley order was patently unjust and erroneous, as it amounts to eviction, alternatively ejectment which is not competent relief in a Rule 43 application.

The respondent submits that the applicant intentionally refused to pay the respondent's rental and is offering to do so now only to avoid compliance with the Keightley order. His contention that he needs to work from the family home does not accord with his plans for the family home to be sold.

Besides, there is no reason to sell the home now, as a liquidator will be appointed to divide the joint estate as the parties are married in community of property. Regarding this point about the offer, the applicant considers the offer to be reasonable, whilst the respondent disagrees. The consent of both parties is required to sell the property.

In her judgment, Keightley J considered the tendered property at West 20 unsuitable as an alternative home and granted the relief sought by the respondent, who was the applicant in that matter. The Court went on to consider the financial dependence of the applicant (respondent in this court) on the respondent (applicant in this court) and the obvious imbalance of power between them.

There is also the issue of the domestic violence orders. These issues are all of concern, but not for this Court to comment on or to consider in the present application.

The question which was before Keightley J was quite narrow; was the tender made by the applicant to provide the respondent with alternative accommodation of his choosing at 20 West, suitable in compliance with his obligations in terms of the Rule 43 order. That would be paragraph 6 of that order.

The Court found that his tender does not satisfy his obligation to provide suitable accommodation for the respondent and the children. On the contrary, the Court found that the family home does. The pertinent part of her judgment reads the following:

> "In the absence of any other proposal from the respondent, of somewhere else that may be suitable for the applicant if and when she is evicted, he must be directed to make the family home available to house the applicant and the children."

The question is this, would the order still have been granted in circumstances where the applicant offered suitable alternative accommodation or even simply tendered payment of the respondent's rental in her present accommodation?

The question before me is whether the payment of the rental upfront for one year, the offer of purchase and the concession that the parties are in fact married in community of property are sufficient to justify a variation of the order. It needs to be considered and borne in mind that a Rule 33 order is an interim order.

I take the view that there has been a change in

circumstances; the rental will be paid one year in advance *pendente lite*. The applicant's liability to provide furnished accommodation to the respondent and the children remains unaltered. Should the applicant fail to comply with his obligations as set out in the order, the respondent can approach the Court for immediate relief.

The threat of eviction from their present accommodation will no longer hang over the respondent's and the children's accommodation. There is an offer on the family home, whether it is a reasonable offer is not for this Court to decide, it is for the parties to reach agreement on.

Should the respondent not wish to accept an offer, so be it. Should it be sold before the divorce, the parties would share equally in the proceeds. The applicant, in his founding affidavit refers to a property in the UK, of which the parties are joint owners and which could also be sold. This would give them much needed liquidity. If not, it is then for the liquidator to deal with.

Considering the finding above, I need not consider the alternative ground, in particular whether such leave is competent in Rule 43 proceedings. The applicant filed an appeal against the order. During argument the respondent's counsel invited the applicant formally to withdraw the appeal, which was done by applicant's counsel following an instruction by the applicant's attorney. Initially he received bad advice; it is trite that Rule 43 orders cannot be appealed.

The respondent brought a counter application seeking a declaration that the applicant is in contempt of the Keightley order and that he be committed to imprisonment for 3 months, to be suspended for a period of 3 months, on condition that he complies with the Keightley order. The respondent claims that the

prescribed requirements have been met. Considering my finding above, the counter application is dismissed.

Had the applicant simply ignored the Keightley order without bringing this application, the outcome may very well have been different. Although I grant a variation of the order, I am placing the applicant on terms. He must pay the advance rental as undertaken by him, by no later than 14:00 on Friday 14 October 2022. This money, the loan amount has been deposited into the trust account of his attorneys and is accessible.

The question of costs remains, the respondent's counter application has failed. Regarding the main application, the applicant would not have had to bring this application, had he initially complied with the Rule 43 order and paid the respondent's rental. The respondent was entitled to oppose the main application.

It would be unfair to order the respondent to pay the applicant's costs in the main application, considering the circumstances of the case. The inequality of financial power in this relationship due to the respondent being financially dependent on the applicant is a factor to consider. Both parties have liquidity problems. The fairest outcome is that costs are costs in the cause.

I make the following order; you will be presented with a typed complete order:

1. The matter is declared urgent in terms of Rule 6(12) and noncompliance with any of the prescripts in terms of the rules is condoned.
2. The status quo regarding the applicant's and respondent's current living arrangement will remain in that the applicant shall continue to reside at unit 37, the

Claridges of Sandton, 4 Susan Lane Morningside and the respondent shall continue to reside at unit 401, 22 West Road South Morningside *pendente lite.*

3. The applicant shall make payment of the costs of the respondent's accommodation at unit 401, 22 West Road South Morningside, as well as the water and electricity charges in respect of the aforementioned accommodation *pendente lite*.

4. The applicant is ordered to make payment in respect of the costs of the accommodation in paragraph 3 in advance for a period of 12 months, as agreed with the landlord of unit 401, 22 West Road South, Morningside from 1 October 2022 by Friday 14 October at 14:00.

5. The respondent's counter application is dismissed and costs are costs in the cause.

OLIVIER, AJ
JUDGE OF THE HIGH COURT
DATE: 10-10-2022