

Short notes on:

RULE 43 MAINTENANCE ORDERS CANNOT BE APPEALED – IS THIS CONSTITUTIONAL?

Introduction

Rule 43 of the High Court rules provides a mechanism for a litigant in divorce proceedings to approach the court for an order granting them interim child and / or spousal maintenance pending finalization of the divorce.

It is well established that these orders cannot be appealed. But is this principle constitutional?

The Issue

The Constitutional Court was tasked to decide this very question. Litigants in a divorce approached the Court when an order for maintenance was granted against the Husband for an amount exceeding the amount he had offered.

He appealed the court order to the Supreme Court of Appeal. The appeal was dismissed on the basis that Rule 43 orders were not appealable. The basis for this was to protect the best interests of the child in situations where children may be prejudiced by continuous appeals. He then proceeded to the Constitutional Court to challenge the constitutionality of this prohibition.

Rights in question

The Husband argued that his right to equality and access to courts were being infringed as well as the rights of the child in this particular instance because it was he who wanted custody of the children. As such he would be taking care of them.

The question then before the court was: does the prohibition violate the best interests of the child? Secondly, does it infringe the right to equal protection of the law? And finally, does it infringe the right to access courts?

In answer to these questions the court held the following: The appeal process could cause considerable delays and as such leave the children or spouses that require the maintenance impoverished. Should any Rule 43 order not serve the best interest of the child – it could be decided on a case by case basis and if needed it can be varied.

When dealing with the second issue raised being equality – the court held that Rule 43 serves an important purpose: to “provide a speedy and inexpensive remedy, primarily for the benefit of women and children”. So, the court found that to enable an appeal would undermine the very purpose which Rule 43 seeks to advance. The prohibition has a legitimate purpose.

And finally, regarding access to courts, the court found that a litigant still had access to courts albeit not within an appeal procedure. The court pointed out that a litigant may approach the court to vary the order if there is a change in “material circumstances”: which may justify it.

In this case the husband had argued that his estranged wife had found employment and was living with her new partner who was in part supporting her. These may be grounds which he could argue in an application for variation.

The appeal was accordingly dismissed.

Is there legal recourse if I am dissatisfied with a Rule 43 order?

Yes. As stated above, while you may not be able to approach the courts to appeal a Rule 43, you can certainly approach it to vary an order. However, in order to be successful, you would need to prove that there was a change in “material circumstances” which justify the variation.

Either litigant can approach for variation on any grounds which it feels is a change in material circumstances and that they can prove to court. Whether that is to increase or decrease the maintenance amount or for a change in the primary care giver, etc.

Conclusion

Rule 43 is an important mechanism that if utilized correctly will provide maintenance for yourself and your children while the divorce is pending. Divorce proceedings may take some time to finalize and having an order such as this in place will go a long way to ensuring financial security during the uncertainty of the proceedings.

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