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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 23365/2013

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED.

4 July 2019

DATE

.....
SIGNATURE

In the matter between:

A M

Applicant

and

N M

Respondent

JUDGMENT

MIA, AJ

[1] The applicant brought an application on an urgent basis for the following relief:

“1. That this matter be heard as one of urgency, and that the time limits, forms and service provided for in the Rules of Court, be dispensed with in terms of the provisions of Rule 6(12);

2. Declaring that the Respondent is in contempt of the court order handed down by the above Honorable Court on 29 January 2015 by the Honourable Justice Borochowitz, under case number 23365/2013 (divorce order), a copies of which are annexed as **“AM1”** and **“AM2”** **to the founding affidavit attached to this Notice of Motion;**
3. Directing the Respondent to sign the Department of Home Affairs parental consent affidavit for Connor’s travel to Spain and France during August 2019, which document was provided to Respondent’s attorney by email on 28 May 2019, by no later then 15h00 on the day succeeding the date on which this order is granted;
4. Directing Respondent, through his attorney of record or otherwise, to inform Applicant when the signed consent affidavit is available for collection by Applicant from the Respondent’s attorneys’ offices;
5. Directing Applicant to email a copy of the draft order to Respondent’s attorney as soon as is practically possible after the granting of this court order;
6. Failing compliance with paragraphs 3 and 4 above, committing the Respondent for imprisonment for a period of 90 days or for such other time period as the court may deem appropriate;
7. Ordering the Respondent to pay Applicant’s costs of this application on the punitive scale as between attorney and client.”

[2] The matter was opposed. It was apparent from the answering affidavit¹ at various paragraphs that the Respondent did not oppose the Applicant travelling to Europe with the minor child. In view of the Respondent indicating in the answering affidavit that there was no objection to the consent affidavit being signed, the matter stood down to afford the parties an opportunity to attend to the signing of the affidavit before further argument was heard on the matter on the issue of contempt. It followed that the issues above fell away and the only remaining issue was the issue of costs.

¹ Answering affidavit, p64, para 2.1; p70, para 10.1;p71,para 13

- [3] Mr Davel, appearing for the Applicant, argued that the matter did not strictly relate to a child but related to the Respondent's contempt of a court order and that this was the consideration to be borne in mind when determining the costs applicable. He submitted that the Respondent was wilfully in contempt of the court order of Borochowitz J. Further, despite the Applicant's attempt to negotiate through her attorney to secure the signed consent affidavit to travel to Spain in August, the Respondent refused to sign the consent to travel, unless the Applicant signed a blank consent affidavit to enable the Respondent to travel in December which he submitted was not possible or permissible.
- [4] He argued that it was necessary for the Applicant to approach this Court on an urgent basis as the time periods to apply for a visa were close to the period of travel and she required adequate time to apply for a visa application to be processed. He argued that the settlement agreement provided that the parties mediate save in the event of urgency and the present circumstances had become urgent in view of the time frames required to apply for a visa. The applicant was thus not obliged to mediate first and then approach this court as it would comprise the securing of the visa and prejudice her travel plans which had been paid for.
- [5] Ms Theodorellis, appearing for the Respondent submitted that the Applicant failed to make out a case for urgency. She argued that the matter could easily be dealt with on 2 July 2019 after proper compliance with court procedures to allow the matter to be heard in the normal course. This would have afforded the Applicant 10 days to seek an appointment and 25 days thereafter for the approval of the visa after the date of the appointment and still allow the Applicant to leave by 9 August 2019.

- [6] She argued further that the Applicant was obliged to refer the matter to mediation before approaching this court on an urgent basis. This she submitted was a less costly and useful way of resolving the parties problems and was preferred by the courts.² If the Respondent refused to sign the consent affidavit after mediation failed the Applicant was then entitled to bring the matter before a court to compel him to sign same.
- [7] Moreover, she argued that the Respondent did not object to signing the consent affidavit which was already signed and was available for collection by the Applicant at her convenience. The Respondent only sought to ensure that he was not prevented from travelling with the minor child internationally later in the year and requested the Applicant to sign a similar consent affidavit and to furnish this to his attorney before he released the one the Applicant requested.
- [8] The question of contempt was no longer in issue, however the Applicant did have to come to court to ensure the consent affidavit was released. I do not agree with Ms Theodorellis' submission that there would have been sufficient time to apply for the visa and attend the appointment if the normal route was followed by mediating the matter then coming to court and complying with the request for a visa approximately 35 days before date of departure when the flights were booked in May 2019. The request that the Applicant sign a consent affidavit where the dates were not inserted is absurd and her refusal is understandable. The request was premature and the signing of her consent affidavit should not have been withheld based on her signing a similar undated consent affidavit. In the circumstances the Applicant was compelled to approach the court for relief. In the circumstances the costs should follow the cause.

² MB v NB 2010(3) SA 220 (GSJ) para 52-59

ORDER

- [9] For the reasons above the respondent is ordered to pay the Applicants costs on a party and party scale

**S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances:

On behalf of the applicant : Adv W Davel
Instructed by : Sian Richardson Attorney

On behalf of the respondent : Adv D Theodorellis
Instructed by : Tilney Attorneys

Dates of hearing : 25 June 2019

Date of judgment : 4 July 2019