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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2023-002520

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

29 January 2023

In the matter between:

J [....] L [....] M [....]

APPLICANT

And

K [....] W [....] K [....] 1 M [....] 1

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This application was heard on Saturday, 28 January 2023, at 19h00, as an extremely urgent application.

Background

[2] The background facts are as follows – The applicant and the respondent are embroiled in divorce proceedings. The applicant approached the urgent court on 19 January 2023 for an order in terms of rule 43 of the Uniform Rules of Court. The respondent's failure to promptly return the children after their holiday visit with him, prompted the first urgent court application. The applicant sought an interim order in accordance with the Family Advocate's report and the settlement agreement that the parties concluded during 2019, which was operative for the past four years, pending the finalisation of the divorce. She also sought an order authorising her to relocate to Limpopo to provide a stable home and education to the children.

[3] The application was heard by Nyathi J. He deemed the application sufficiently urgent to condone the applicant's non-compliance with the Uniform Rules of Court and to hear the application as an urgent application. He handed down his order, and the reasons for the order, on Friday, 27 January 2023. Nyathi J ordered that:

- i. The recommendation of the Family Advocate's report dated 15 April 2019 is confirmed to be an interim order pending the finalisation of the divorce action;
- ii. The 'agreement of settlement' signed by the parties on 21 November 2019, and endorsed by the Family Advocate on 3 December 2019, is confirmed to be operative as an interim order pending the determination of the divorce action;
- iii. The primary residence of the minor children is granted to the applicant, and the respondent is ordered to return the children to the applicant;
- iv. The applicant is authorised to relocate with the minor children to Limpopo, Elim;
- v. In the alternative the respondent is to secure accommodation for the applicant and the minor children as their primary residence in Gauteng, as well as to cover for their accommodation expenses and/or costs as well as to continue with the maintenance as per the settlement agreement;
- vi. The respondent is interdicted and directed to refrain from unlawfully removing and/or alienating the minor children from their mother without mutual written consent or a court order;

- vii. The respondent is to pay the costs of the application on an attorney and client scale, including the applicant's traveling costs between Limpopo to Pretoria.

[4] The applicant avers in the founding affidavit, that the respondent refused to return the children as per the court order handed down by Nyathi J on the basis that he intends to file an application for leave to appeal. He subsequently emailed an application for leave to appeal to the applicant's attorneys of record around 16:24.

[5] The applicant approached this court on an urgent basis. In the first instance, she seeks a declaratory order that the order granted by Nyathi J is an interim order pending the finalisation of the divorce and it does not have the final effect of a judgment, and that Nyathi J's order is not suspended by the filing of the application for leave to appeal and continues to be operational and enforceable pending the final determination of the appeal decision even if leave to appeal is granted. Secondly, the applicant seeks a declaratory order that the respondent's refusal to return the children to her as per the court order constitutes contempt of court. She additionally seeks an order that the Sheriff of the court is authorised to execute the order granted by Nyathi J, by returning the children to her.

[6] The respondent opposed the application and filed a counter-application. The respondent submits that the order handed down by Nyathi J contains several orders. According to the respondent, not all these orders are interlocutory in nature and their effect, at minimum, is final. As a result, the respondent submits, these orders are appealable, and in the absence of an order in terms of section 18(3) of the Superior Court's Act 10 of 2013, the operation and execution of the orders are suspended. In the counter application, the respondent seeks an order declaring that the current living arrangements of the children should not change pending a final determination of the leave to appeal, an order that the operation and execution of the order granted by Nyathi J are automatically suspended pending the finalisation of the application for leave to appeal, and an order directing the applicant to grant consent to the Voice of the Child to assess the views of the minor children involved.

Contempt

[7] I will first deal with the question as to whether it can be found that the respondent's refusal to return the children to the applicant after the court order was handed down on 27 January 2023 resulted in him being in contempt of court.

[8] *Fakie NO v CCII Systems (Pty) Ltd*¹ is the leading authority on contempt of court proceedings. Here the Supreme Court of Appeal held in paragraph [42]:

c) In particular the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

[9] In ***Pheko and Others v Ekurhuleni Metropolitan Municipality***² in a unanimous decision delivered by Nkabinde J, the Constitutional Court subsequently explained that:

'[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically leads to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....

[31] Coercive contempt orders call for compliance with the original order that

¹ 2006 (4) SA 326 (SCA).

² 2015 (5) SA 600 (CC).

has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the role of law.

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (ad factum praestandum), the following elements need to be established on a balance of probabilities: (a) the order must exist; (b) the order must have been duly served on, or brought to the notice of, the alleged contemnor; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or mala fide'.

[10] *In casu*, it is evident that the respondent is of the view that the order, or at minimum some of the orders, granted by Nyathi J is final in effect and thus appealable. As a result, the respondent, on the same day that the order was handed down, filed a notice informing the applicant of his intention to apply for leave to appeal the whole judgment and order of Nyathi J dated 27 January 2023. Irrespective as to whether the respondent is correct in his assertion that the order handed down by Nyathi J is appealable, it can hardly be said that a party who is of the view that an order is appealable and gives notice that he is seeking leave to appeal the order, is acting in wilful contempt of the court order handed down. The respondent was clearly advised that the order handed down by Nyathi J is final in effect and appealable. His position in this regard creates a reasonable doubt to the existence of wilfulness and *mala fides*. As a result, the prayers that a declaratory order is granted to the effect that the respondent's refusal to return the minor children to the applicant on 27 January 2023, stands to be dismissed.

Appealability of the order handed down on 27 January 2023

[11] The respondent contends that orders 4 – 8 granted by Nyathi J are final. Orders 4 – 8 are captured under paragraph [3]iii-vii, above. Despite orders 2, and 3

being interim, counsel submitted that they are final orders on the basis that they dispose of a substantial part of the divorce. The respondent further contends that, as a result of the order, the only outstanding issue in the divorce proceedings is the dissolution of the marriage.

[12] I disagree. This argument does not countenance the fact that rule 43 proceedings provide for, amongst others, interim care of a child and interim contact with a child. The Constitutional Court confirmed that rule 43 was not designed to resolve issues between divorce litigants for an extended period, but as an interim measure until all issues are properly ventilated at trial.³ Prayers 2 and 3 of the order granted on 27 January 2023 do not definitively deal with any issue in the divorce, as submitted by the respondent, since the Family Advocate's recommendations and the agreement of settlement were confirmed to be operative as an *interim order pending determination of the divorce proceedings*.

[13] Prayers 4 to 7 must be interpreted within the context of the nature of the proceedings. Prayer 5 which provides for the applicant's relocation with the children lies at the heart of the respondent's gripe with the order granted on 27 January 2023. Prayer 5, as prayers 4, 6 and 7, must, however, be interpreted contextually. No order handed down in rule 43 proceedings is cast in stone, since rule 43(6) provides that a court may vary its decision in the event of a material change occurring in the circumstances of each case. Prayer 5 only authorises the applicant to exercise her interim rights pertaining to the interim care of the children, in Limpopo. The order granted in this regard may be classified as far reaching, but not as final. This order does not fall 'beyond the spoke of rule 43' as submitted by counsel. In this context, I do not, as the court did in *ZO v JO*,⁴ interpret the relocation order as disposing of 'at least a substantial portion of the relief claimed in the main proceedings'. It does not 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing', but authorises that the children may stay with their mother in Limpopo pending the final determination of the divorce proceedings.

³ *S v S and another* 2019 (6) SA 1 (CC) (27 June 2019).

⁴ (2022/14941) [2022] ZAGPJHC 511 (15 June 2022).

[14] Section 16(3) of the Superior Courts Act 10 of 2013 provides as follows:

'Notwithstanding any other law, **no appeal lies from any judgment or order** in proceedings in connection with an application –

- (a) by one spouse against the other for maintenance *pendente lite*;
- (b) for contribution towards the costs of a pending matrimonial action;
- (c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or
- (d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted.'

[15] The Constitutional Court confirmed in *S v S and another*⁵ that the prohibition on appeals against orders granted in rule 43 proceedings is constitutionally permissible. In deciding the issue, the Constitutional Court recognised that:⁶

'It is undeniable that an appeal process would significantly delay the finalisation of rule 43 proceedings. Several applications could potentially be heard before the final order. These include: an application for leave to appeal; an application in terms of section 18 of the Act for the suspension of the order; an urgent appeal in terms of section 18; an application for leave to appeal to the Supreme Court of Appeal; an application for reconsideration by its President; an application for leave to appeal to the Constitutional Court; and finally a hearing in this Court.' (Footnotes omitted.)

[16] The Constitutional Court held that:⁷

'An appeal process that is subject to endless delays and protracted litigation will inevitably play into the hands of the litigant who is better resourced. It is

⁵ *Supra*.

⁶ *Supra*, par [30].

⁷ *Supra*, at par [35].

therefore inconceivable that it can ever be in the best interest of the most vulnerable members of our society, the children.

[17] In light of the provisions of s 16(3) of the Superior Courts Act 10 of 2013 and the Constitutional Court's decision in *S v S and another*, the respondent's reliance on *Cronshaw v Coin Security Group (Pty) Ltd*⁸ is misplaced. Counsel also referred the court to *KR v KR*⁹ a judgment referred to in *ZO v JO*. This judgment is published on SAFLII as *R v R*.¹⁰ The factual matrix of this judgment differs significantly from the facts of this matter, and reliance thereon is, likewise, misplaced.

[18] The order granted by Nyathi J on 27 November 2023 falls squarely within s 16(3) of the Superior Courts Act and no appeal lies against it. As for prayer 8, the costs order, it is evident that the costs order does not lie at the heart of the current urgent court application, or the application for leave to appeal filed. It is trite, however, that courts are generally reluctant to grant leave to appeal in respect of costs only, unless a matter of principle is involved and the amount of costs is not insubstantial. If the costs order is, however, determined to be appealable, the determination thereof does not affect the children's place of residence and an appeal against the costs order can only suspend the operation of the costs order.

The counter application

[19] The respondent filed a counter application seeking an interim declaratory order to the effect that the minor children are to primarily reside with him whilst the applicant is afforded reasonable contact with and access to the children while he approaches the children's court for a determination of a suitable place to live.

[20] This court is seized with the parties' divorce action and issues relating to their interim care and interim contact with the children.

⁸ 1996 (3) SA 686 (A).

⁹ Referenced in the heads of argument as 'Gauteng Division case number 44169/2019 dated 18 March 2021.'

¹⁰ (44169/2019) [2021] ZAGPJHC 35 (18 March 2021).

[21] In light of my finding that the order handed down by Nyathi J on 27 January 2023 is not appealable, with arguably, the exclusion of the costs order granted, there is no basis for the relief sought by the respondent in the counter application as it stands. The counter application thus stands to be dismissed.

[22] Since I have not pertinently been addressed on the appealability of the costs order, the order that follows deals exclusively with prayers 2 to 7 of the order handed down on 27 January 2023.

Costs

[23] The applicant was obliged to approach the court for relief due to the respondent's failure to give effect to the order handed down by Nyathi J. Despite having found that the applicant did not make out a case on the facts as it stood that the respondent wilfully and with *mala fides* disregarded the court order, the respondent's view that the rule 43 order is appealable is misplaced. The applicant cannot be expected to carry her own legal costs in these circumstances.

Miscellaneous

[24] The possibility of the respondent giving effect to the alternative provided in Nyathi J's order was canvassed with the parties. Whilst the applicant indicated her willingness to relocate back to Gauteng if the respondent provides the necessary accommodation and maintenance, the respondent indicated that he is not in a financial position to give effect to the alternative provided.

Concluding remarks

[25] Divorce, and the effects of divorce on children, are devastating. No amount of counselling can completely erase the impact of parents' acrimonious relationship on their children. What children need more than good education at renowned schools, is that their parents are able to set aside their strife and acrimony and act in the best interests of their children. Parents should be conscious of the fact that what they perceive to be in the best interest of their children, is not always objectively

considered, in their children's best interest. The effect of protracted litigation, and an emotional handover effected by the Sheriff of the Court assisted by members of the South African Police Services, on the minor children should not be underestimated.

ORDER

In the result, the following order is granted:

1. The applicant's non-compliance with the Uniform Rules of Court is condoned, and the application is heard as an urgent application;
2. It is declared that no appeal lies from the judgment and order handed down by Nyathi J on 27 January 2023;
3. It is declared that the respondent's application for leave to appeal the order handed down by Nyathi J on 27 January 2023 does not suspend the operation and execution of the order;
4. The respondent is to ensure that the minor children are available at his residence at 11h00 on 29 January 2023 to be collected by the applicant to give effect to the order handed down by Nyathi J on 27 January 2023;
5. The Sheriff of this Court is permitted and authorised to execute the order granted by Nyathi J on 27 January 2023 by removing the minor children and handing them over to the applicant, in the event that the respondent fails to facilitate the handover of the minor children to the applicant on 29 January 2023 at 11h00, wherever the children are found. The South African Police Services are directed to assist the Sheriff in the execution of this order if the need arises;
6. The application to declare that the respondent is in contempt of the court order handed down by Nyathi J on 27 January 2023 is dismissed;
7. The counter application is dismissed;
8. The respondent is to pay the costs incurred in both applications.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant: Adv. ZD Maluleke

Instructed by: Maakamedi MR Attorneys

For the respondent: Adv. MR Maputha

Instructed by: Mphahlele & Masipa Attorneys

Date of the hearing: 28 January 2023

Date of judgment: 29 January 2023