

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

REPORTABLE

Case No.: 1214/09

Date heard: 29 April 2010
Date delivered: 4 May 2010

In the matter between:

**G J K
CHERYL-ANN LEE**

**1st Applicant
2nd Applicant**

and

**K A S K
(born B)**

Respondent

JUDGMENT

KROON, J:

[1] The outstanding issue in this matter is the question what would be an appropriate order in respect of the costs of the application.

[2] The first applicant and the respondent were formerly married to each other. The marriage was dissolved by order of this Court on 23 September 2008. The order incorporated the terms of a deed of settlement entered into by the parties. Paragraph 2 thereof dealt with the care and control of the minor children born of the marriage, two daughters then aged 7 years and 4 years. It was provided *inter alia* that the children would reside with the respondent, who would be their

primary carer subject to the first applicant's right of reasonable access to them (which was partially defined in the order).

[3] The second applicant was the fiancé of the first applicant when the proceedings were commenced. The applicants have since married each other.

[4] On 6 May 2009 the applicants launched the present proceedings as a matter of urgency. The main relief sought was an order varying the regime relating to the care and control of the children, in essence decreeing that the first applicant be the primary carer of the children and that they live with him, with the respondent having rights of access to them, as determined by the Court after receipt of a report from the Family Advocate.

[5] Ancillary relief sought was an interdict restraining the respondent from assaulting, threatening to assault or in any way communicating with the second applicant.

[6] The notice of motion sought the issue of a rule *nisi* calling upon the respondent to show cause why orders as set out in paragraphs 4 and 5 above should not be granted (with an interim interdict in terms of such orders) and why the respondent should not be directed to pay the costs of the application in the event of her opposing same.

[7] A further prayer in the notice of motion sought an order defining the respondent's right of access to the children pending the determination of the application in respect of the relief referred to in paragraph 4 above. The definition sought was *inter alia* to restrict the respondent to supervised access to the children and to subject the access to the conditions that the respondent be sober at the time, that she not partake of alcohol during the period of the access and that she not transport the children in her vehicle.

[8] On 8 May 2009 this Court issued orders as sought in the notice of motion, with the return day being 14 May 2009. These orders were made by agreement between the parties. An initial report by the Family Advocate dated 13 May 2009 in substance endorsed the agreement.

[9] On 14 May 2009 an amended rule *nisi*, returnable on 13 August 2009, was issued calling upon the respondent to show cause why an order should not issue:

(a) directing that the children be placed in the primary care of the first applicant and reside with him;

(b) defining the respondent's right of access to the children as set out in the order (including a restriction that the access be under prescribed supervision and a prohibition against her transporting the children in a vehicle);

(c) directing the respondent not to assault, threaten to assault or in any way engaging with the second applicant;

(d) directing the respondent to pay the costs of the application in the event of her opposing same.

It was further ordered that interim orders in terms of (a), (b) and (c) would operate. Again, the orders were issued by agreement between the parties.

[10] A further report by the Family Advocate dated 11 August 2009 recorded that the respondent was attending sessions of Alcoholics Anonymous, that she was undergoing therapy by a psychologist and that she reported that she had successfully abstained from the use of alcohol for the preceding three months.

[11] After considering all the information before her the Family Advocate *inter alia* qualified the earlier report by recommending that the respondent's contact with the children be unsupervised (provided that she maintained sobriety). A further recommendation was that the parties agree on the appointment of a social worker or psychologist for a period of 18 months *inter alia* to monitor the respondent's recovery from alcohol dependency and to facilitate alternative (including supervised) contact between the respondent and the children in the event of the former failing to maintain sobriety, until the Court could be approached for appropriate relief.

[12] On 13 August 2009 the matter was postponed to 5 November 2009 with the rule being extended accordingly. No costs order was made. Mr *Ronaasen*, who appeared for the applicants advised me that he thought that the reason for the postponement might have been that the Family Advocate's further report was not yet to hand. That, however, could not have been the reason: the report had in fact been filed on the previous day.

[13] On 14 September 2009 the respondent's attorneys withdrew as her attorneys of record. No other attorneys were thereafter appointed by the respondent to act on her behalf, and she represented herself.

[14] On 5 November 2009 the matter was postponed to 14 January 2010, the rule extended accordingly and the costs were reserved. Counsel advised me that the postponement was occasioned by a defective preparation of the papers attributable to the applicants' camp.

[15] On 14 January 2010 a postponement to 28 January 2010 was ordered and it was further ordered that there be no order as to costs. A further order of postponement on 28 January 2010 to 4 March 2010 was accompanied by an order that the costs be costs in the cause. On 4 March 2010 the matter was again postponed to 29 April 2010 (when the matter came before me) with the costs being reserved. The reason for the postponement was that the applicants' heads of argument were not in the file (although I was advised by Counsel that a copy thereof

had been handed to the Judge who had presided on an earlier occasion).

[16] In the result, the parties reached agreement on the order I would be requested to make on the merits. That order, firstly, made provision for the first applicant to be the primary care giver of the children, for them to reside with him, and for the respondent to have structured supervised contact with the children (the supervisor to be the respondent's mother or another adult person agreed upon between the parties). The order requested was in accordance with the recommendations of the Family Advocate in her final report (see paragraph 29 below). In the second place the order provided for a restraint on the respondent against assaulting, threatening to assault or in any way engaging with the second applicant.

[17] The parties were, however, unable to reach agreement on the issue of costs and that was the sole issue argued before me. As indicated above, the respondent appeared in person. It was because the issue of costs remained on the table that the history set out above, and that which follows, has been recorded.

[18] In his founding affidavit the first applicant, on the issue of the care and control of the children, set great store by the respondent's addiction to alcohol. He *inter alia* mentioned that the respondent had during March 2009 booked herself into a rehabilitation centre in Cape Town for a period but that he had gained the impression, during

telephonic conversations with the respondent on 13 April 2009, that she had again been drinking and he received confirmation from the respondent's mother during a telephone call on that date that the respondent had relapsed into drinking again as well as other hearsay information to the same effect. He also referred to his assessment, based on a telephonic conversation with the respondent on 24 April 2009, that she had been drinking and, again, received telephonic confirmation by the respondent's mother that the respondent had had a 'slight' relapse with respect to alcohol. On the same day, the respondent had, with her boyfriend, taken the children in her vehicle to the beach. The respondent's brother also confirmed on 27 April 2009 that the respondent was drinking again. A further telephonic conversation with the respondent's mother elicited further confirmation. He also referred to an incident at his home on 28 April 2009 when the respondent, in a drunken state, behaved aggressively after having driven there while intoxicated. At his request a Mr Snowball arrived at the home in order to drive the respondent home. The respondent, however, continued to be recalcitrant. She, however, agreed to be driven home by Snowball, but insisted on taking the younger child with her. It is unnecessary to detail the further allegations of the first applicant as to the events on the evening in question, nor the tabulation of the reasons set out by him for seeking the orders reflected in the notice of motion.

[19] In her supporting affidavit the second applicant tendered confirmation of the allegations of the first applicant. She, however,

went into further detail concerning the events of 28 April 2009 at her residence (after having averred that the respondent had on previous occasions physically assaulted and/or verbally threatened her). In short, prior to the arrival of Snowball, the respondent, in her intoxicated state, verbally abused her in extreme terms, and resorted to physically assaulting her. The children were emotionally upset at the events.

[20] Snowball's affidavit constituted support for the allegation that the respondent was clearly inebriated on the evening in question.

[21] On 3 November 2009 the first applicant deposed to a supplementary affidavit. Adverting to the fact that the respondent had not yet delivered a notice of intention to oppose the proceedings the first applicant recorded that the respondent's erstwhile attorney had 'indicated' that she would be opposing the proceedings. So also the respondent's counsel had given a similar indication in Court on 8 and 14 May 2009. What the extent of the opposition was to be was, however, not elucidated.

[22] It was further recorded that the first applicant's attorney had addressed an open letter dated 24 August 2009 to the respondent's attorneys proposing that the matter be settled on the following basis:

(a) a regime in respect of the children in accordance with the Family Advocate's reports of 13 May and 11 August 2009 (see paragraphs 8

and 11 above) save that the respondent's unsupervised contact with the children would in certain respects be structured differently;

(b) confirmation of the rule *nisi* in respect of the relief sought by the second applicant;

(c) each party to pay their own costs.

It was further conveyed that failing a settlement the respondent was on terms to file her opposing papers and should she elect to oppose the relief sought a costs order as prayed for in the notice of motion would be sought.

As stated above, the respondent's attorneys withdrew from the matter on 10 September 2009. It was not indicated whether there was any response to the letter.

[23] The further allegations in the supplementary affidavit were to the effect that notwithstanding that the respondent had intimated to the first applicant that she was receiving treatment for her alcoholic dependency and that same seemed to be effective, the respondent had started drinking again, and the result was that the children were adversely affected. In this regard, the first applicant referred to various incidents and information received from other persons, including the respondent's mother and the children. The first applicant accordingly adopted the stance that all contact the respondent has with the children was to be supervised, pending the respondent's rehabilitation. A

confirmatory affidavit was filed by the second applicant in respect of certain events deposed to by the first applicant.

[24] On 5 November 2009 the respondent filed an affidavit which she stated was in response to the first applicant's supplementary affidavit. She placed in issue a number of factual averments made by the first applicant. Specifically, save for what follows, she denied that she had resumed drinking. She admitted only a single incident which occurred on Sunday 25 October 2009, when the children were with her. After the children had bathed and eaten supper and while they were watching television she consumed two glasses of wine. She realised the error of what she had done and called her mother to come to the house. After her mother's arrival she began to feel ill as a result of the combination of alcohol and a medicine called Antibuse (designed to induce her not to partake of liquor) which she had taken earlier and was still in her system, and she was caused to vomit. The children only became aware that she had taken some wine after the arrival of her mother, and understandably they were stressed by their parent getting sick in front of them.

[25] The respondent's mother filed an affidavit confirming the above events. She further denied the first applicant's averment that she had on a subsequent date advised him that the respondent had started drinking again. On being asked by him about the respondent's drinking she had replied that the respondent had had a 'minor slip' on the evening of 25 October, and that he, the first applicant, was making 'a

mountain out of a molehill'. She also confirmed the respondent's denial of the first applicant's averment that there was any alcohol available at the birthday party of one of the daughters on 10 October 2009.

[26] The respondent went on to refer to the Family Advocate reports and specifically the recommendation that she be allowed unsupervised access to the children and she averred that until the incident of 25 October 2009 the first applicant was quite satisfied with her having unsupervised access. She contended that supervised access would put a strain on her relationship with the children as her mother, the proposed supervisor, would not always be available and her access would accordingly be limited, nor could her mother be expected to participate in all the activities involved.

[27] She confirmed that she is still attending 3 AA meetings per week and is receiving counselling during her recovery, about which she is very positive despite the setback referred to above, the only occasion on which she partook of alcohol during the preceding six months.

[28] The Family Advocate submitted a final report on 27 November 2009. In essence, the report takes the stance that while the respondent had earlier shown considerable commitment to overcoming her alcohol addiction, she did have a lapse on the evening of 25 October 2009, and that what was referred to as her inability to abstain from alcohol during periods of contact with the children placed the latter

at physical and emotional risk. It was therefore recommended that the respondent's access to the children be supervised.

[29] Mr *Ronaasen* initially sought an order that the respondent be directed to pay all the costs incurred by both applicants in the application. The respondent submitted that a fair order would be that each party bear his or her own costs, or, stated differently, that there be no order as to costs.

[30] Counsel subsequently conceded (correctly) that the order he sought should not embrace the costs of a number of the hearings referred to earlier in this judgment. It is not necessary to instance the hearings in question in view of the conclusion to which I have come in respect of the costs order to be made.

[31] It will be convenient to dispose first of the issue of the costs relating to the interdict restraining the respondent from assaulting, threatening to assault or in any way engaging with the second applicant. Counsel's submission was in essence that in securing the interdict, based on the respondent's conduct (which she had not placed in issue), the second applicant had achieved success and accordingly the ordinary rule that the costs follow the event should operate.

[32] It will be recalled, however, that the notice of motion reflected that a costs order would be sought against the respondent in the event of her opposing the application. The respondent did not, however, file

any papers opposing the grant of the interdict and there is no other indication in the papers that at any stage she offered opposition the grant of the interdict. On the contrary, the respondent advised me from the Bar that it had been made quite clear to the applicants' representatives from the start that the grant of the interdict was not opposed. Mr *Ronaasen* did not seek to cross swords with this statement.

[33] Accordingly, as regards the issue of the interdict it would be appropriate that there be no order as to costs.

[34] In respect of the relief relating to the care and control of, and access to, the two minor children, counsel adopted the same argument: success had been achieved by the first applicant and the costs should follow the event.

[35] The history of the matter detailed above reflects, however, that it was only at a late stage that the respondent offered any opposition to the application and then only in respect of the circumscribed issue whether her access to the children should be supervised or not. The question then is whether that opposition, limited in time – the respondent in the result did not persist therein, no doubt in the light of the recommendation in the final report of the Family Advocate – justifies the costs order pressed by counsel.

[36] Counsel accepted that I had a wide discretion in the matter of costs subject thereto that the discretion should be judicially exercised. He referred me to the judgment of *Wunsch J* in *Bethel v Bland and others* [1997] JOL 357 (W). In the course of his judgment the learned Judge referred to a number of previous cases where a variation of a custody order was in issue and where it was decided that it would be appropriate to make no order as to costs. He also noted that the approach is supported by various authors. The general basis for the approach was the sentiment that in such cases there are no winners or losers in the conventional sense and that where the parents act in what they *bona fide* consider to be the best interests of the children neither should be visited with an adverse costs order. In one case it was even said that the usual rule applicable was that there be no costs order made.

[37] The learned Judge pointed out, however, that there is no basis for talk of a 'usual rule' and that the instances of rulings such as those referred to are no more than guidelines to the exercise of judicial discretion, to be weighed against other considerations. The learned Judge concluded as follows:

'I consider the correct approach to be:

1. Generally speaking, a successful litigant is entitled to his or her costs.
2. While it is quite true that a custody dispute should not be seen as an adversarial contest in the ordinary sense but rather as an enquiry into the best interests of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child. Often, too, the papers contain many attacks on the character and conduct of the opponents.
3. On the other hand it is also a consideration that a party should not be discouraged from putting up a case which he or she, on broadly reasonable grounds, thinks to be in the interests of the child for fear of

having costs awarded against him or her if unsuccessful. By the same token, a party who is, on what turn out to be good grounds, confident that his or her case will prevail, should not be discouraged from taking or resisting action because of the costs which he or she will incur.

4. However *bona fide* and concerned a party may be, if his or her opponent's judgment of the issue prevails, it is not, in the absence of circumstances justifying it, fair that the opponent should be mulcted in his or her own costs.'

[38] The approach of the learned Judge is in general to be supported save that in my view *bona fides* concerning what is in the interests of a child may well, depending on the other circumstances of the case, be sufficient to avoid an adverse costs order. In the result, on a conspectus of all the circumstances, I am persuaded that the limited opposition of the respondent, which she eventually did not persist in, but in which, so I find, she *bona fide* acted in what she considered to be in the interests of the children, does not constitute sufficient justification for making a costs order against her.

[39] The following order will accordingly issue:

1. The order of this Court on 23 September 2008 in case no 365/2007 is varied by the deletion of paragraphs 2.4, 2.5, 2.6 and 2.7 of the deed of settlement incorporated in the said order.
 2. The terms of the agreement reached between the parties as recorded in the Deed of Settlement concluded between them and filed of record on 21 April 2010 are made an order of Court.
 3. There will be no order as to costs.
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F KROON
Judge of the High Court
Appearances:

For the applicants:

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For the respondent:

Mrs Klare in person