

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

Case number: 036724/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 03 July 2023

In the matter between:

E[...] S[...]

Applicant

And

L[...] T[...]

First Respondent

THE DEPARTMENT OF SOCIAL

Second Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT AND CORRECTIONAL SERVICES**

Third Respondent

MINISTER OF HOME AFFAIRS

Fourth Respondent

JUDGMENT

LESO AJ:

INTRODUCTION

1. This is an application in terms of rule 6(12)(c) for a reconsideration of an order which was granted on 02 May 2022 in an urgent application wherein the judge ordered as follows:

1. *That the application be heard as an urgent application in accordance with and that the requirements pertaining to the forms of service be dispensed with.*

2. *That the applicant be granted full unilateral parental rights and responsibilities specifically in relation to my child T[...] T[...]’s upbringing, educational activities, medical activities, as well as consent to the child application for a passport.*

3. *That there be no order as to costs.*

BACKGROUND

2. In the initial application, the respondent approached the court on an urgent basis for an order on full unilateral parental rights and responsibilities concerning his two minor children's upbringing, educational activities, and medical activities as well as consent to the children's application for the passport of T[...] T[...] in terms of section 23(2) of the Children's Act¹ in conjunction with section 18(3) of the Children's Act.

3. It is common cause that the above order was granted in the absence of the applicant who has now re-enrolled the application for the court to consider the respective parties' arguments because the applicant did not have an opportunity to be heard.

4. The first respondent sought the urgent extension of parental rights for to assist his firstborn child with obtaining a passport in the absence of the applicant.

5. It is common cause that the applicant was aware of the urgent application and the date on which the application was to be heard and the applicant responded by email.

SUBMISSIONS BY THE PARTIES

Applicants submissions

6. I now turn to the applicant's case and I note the applicant's lengthy answering affidavit where she has raised points *in limine*. The applicant's case rests mainly on the irregularities in the main or initial application wherein she argued as follows:

6.1 that the application was flawed because the motion did not have the address of the correspondent attorney.

6.2 the late or short service of the application on the applicant.

6.3 that the application was not properly served because it was served by Email.

6.4 that there was no set setdown notice served on the applicant and as such the initial application should not be heard on 2 May 2023.

6.5 that the service affidavit is irregular because it was signed by the respondent instead of the attorneys

6.6 that the first respondent's replying affidavit was irregular.

6. Counsel for the applicant argued that the first respondent did not disclose the fact that there is a petition for a divorce between the parties instituted on 17 April 2023 in Malawi and the proceedings were adjourned to June 2023. That their parental plan was not made a court order as it is pending to be endorsed by the family advocate. The counsel argued that the are parallel processes instituted by the first respondent and the court in Malawi must proceed with the divorce proceeding and the issues involving the minor children as those are ceased with Malawi court. Lastly, the counsel submitted that the court would have dismissed the application and ordered cost *de bonis* if it was aware of the above facts.

First Respondent submission

8. The first respondent's counsel responded that the respondent's attorney was assisted by an attorney in Pretoria however there was an omission to include the correspondent address in the motion. Counsel conceded that the first respondent's attorney did not file and serve notice of set-down and he explained that the matter was already set down by the registrar when the application was issued. Counsel did not make any submission on the irregularities raised in respect of the affidavits filed by the first respondent.

9. The counsel responded that the first respondent is the biological father vested with the primary residence and care of both minors in terms of a parenting plan that the applicant plays a limited role in the upbringing of the children and the applicant has not been available to assist the respondent to make an application for T[...] passport his minor child who was to participate in sports in February 2023, this submission was not disputed by the applicant.

ISSUES TO BE DECIDED

10. This court must determine whether the applicant has made out a case for the reconsideration of a court order granted on 2 May 2023.

THE LAW

11. Rule 6(12)(c)¹ reads as follows:

(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.

Section 18(3) of the Children's Act provides that:

¹ See Rule 6(12)(c) Uniform Rules of Court.

(3) *Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must—*

- (a) *administer and safeguard the child's property and property interests;*
- (b) *assist or represent the child in administrative, contractual and other legal matters; or*
- (c) *give or refuse any consent required by law in respect of the child, including—*
 - (i) *consent to the child's marriage;*
 - (ii) *consent to the child's adoption;*
 - (iii) *consent to the child's departure or removal from the Republic;*
 - (iv) *consent to the child's application for a passport; and*
 - (v) *consent to the alienation or encumbrance of any immovable property of the child."*

Section 23(2) of the Children's Act²:

- (2) *When considering an application contemplated in subsection (1), the court must take into account—*
- (a) *the best interests of the child;*
 - (b) *the relationship between the applicant and the child, and any other relevant person and the child;*

² Section 23(2) of the Children's Act 23 of 2005.

- (c) *the degree of commitment that the applicant has shown towards the child;*
- (d) *the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and*
- (e) *any other fact that should, in the opinion of the court, be taken into account.*

DISCUSSION

12. I am of the view that this application is no different from rule 42 of the uniform rules of the high court which permits the courts to rescind or vary the court order previously sought or granted in default in favour of the respondent in erroneously or was granted by mistake or that the order was ambiguous, or has patent error omission. In this application, the applicant is however permitted to enroll the matter by filing the answering papers which were not before the court and in that affidavit the applicant ought to make out a case why the order ought not have been granted. Consequently court has to determine whether the applicant has established a case for the court to vary or rescind the order granted.

13. It is common cause that the respondent was served with the motion by email on 12 April 2023, in terms of the motion the applicant had to file her opposition on the same date and to file the answering affidavit on 24 April 2023. It is common cause that the respondent responded to the above application by email despite having been notified to file the answering affidavit by the applicant and that the urgent application was heard in the absence of the applicant.

14. The applicant has had a site of the application and she was aware of the date of set down but she elected not to file the opposition as she was directed in the motion. I am of the view that this court cannot strike off an urgent application involving the interest of the minor children because there is no correspondence address on the motion, surely this omission should be considered a mistake that can be condoned. Considering the nature of the application, I am persuaded to accept the explanation by the respondent counsel on the failure to include the

correspondent address and the short service of the application.

15. The argument on the admissibility of the affidavits does not take the respondent case anywhere because the affidavits that the applicants challenged played no role in the court's decision to award an order in favour of the applicant neither did I consider both the affidavit in this application. The respondent had made out a case for the relief granted as clearly and summarily as possible in the founding affidavit.

16. The respondent's counsel argued that the respondent had to approach the court because the applicant had refused to assist him to obtain a passport for the minor child as far as February 2023 and at the time of the application the passport was overdue, this was not disputed by the respondent.

17. I do not accept that the application was not set down for 2 May 2023 because the date of the hearing is reflected in the notice of motion which was served on the applicant on 12 April 2023, consequently, there was no need for the respondent to set the matter down.

18. It is common cause that the respondent is a father of the minor children who has been bestowed with the responsibility of being the primary caregiver and is awarded primary residence for both children in terms of the parenting plan as recommended by a social worker. It is also not in dispute that the fourth respondent has issued T[...] T[...] with the passport without the participation of the applicant.

19. The respondent is not a person who is directly benefiting from the relief sought however he was justified in terms of section 23(2) of the Children's Act to litigate as a father of a minor child. The applicant is equally entitled to approach the court because the order was granted in her absence however that cannot be the only reason why she must or can approach the court. She must consider the consequences or the implication of the reconsideration of the court order, in this case where the relief sought will harm the minor child because it will result in the cancellation of the passport.

20. Most of the issues raised by the applicant related to the relationship between the parties which has nothing to do with the court order nor the interest of the minor children or the passports. The pending divorce matter and the parental plan before Malawi court is not conflict with the itial applicant since in all the instutitutions the interests of children are of paramount importance in determining custody. When court considers the section 22 and 22 of the Children Act 38 of 2005 urgent application, what is pertinent is the best interest of the minor child. Section 28(2) reads: 'A child's best interests are of paramount importance in every matter concerning the child.'

21. It is common cause that the minor child is now been issued with the passport and the applicant has no issues with that fact. The order was granted for the benefit of the minor child and interfering with the order will be prejudicial to the child. I did not hear any submission that there are circumstances different from that under which the original order was obtained except that the minor child is been placed in a better before the court order was issued. Nowhere in the arguments did the applicant deal with the issue which is for the best interest of the minor children and the effect of the court order on her as a person.

CONCLUSION

22. The issues raised by the applicant have not persuaded me to make an order to dispose of the application as the counsel for the applicant submitted because none of the points raised in support of the application were of substance. it is clear that the respondent brought the application under the guise of rule 43(6) application or to appeal the existing order.

23. The applicant sought a dismissal of the urgent applicant granted in the interest of the applicants minor child without considering the implications of the relief sought, which is the cancellation of the passport issued in favour of the applicants and the first respondents minor child.

24. The is no basis for the reconsideration of the court order granted in the interest of the minor child and the application ought to be dismissed with costs.

AS A RESULT, THE FOLLOWING ORDER IS GRANTED:

ORDER

1. The application for consideration is dismissed.
2. The applicant is to pay the costs on a attorney and client scale.

JT LESO

Acting Judge of the High Court

Delivered: This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 03 July 2023.

Date of Hearing: 30 May 2023

Date of Judgment: 03 July 2023

Particulars of the Applicant

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