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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 6385/2017

In the matter between:

A P

Applicant

And

F P

Respondent

CORAM: VOGES, AJ

HEARD ON: 22 AUGUST 2019

DELIVERED ON: 29 AUGUST 2019

- [1] The parties in this application are involved in a protracted divorce action under case number 6385/2017. Both parties desire to be awarded care and residency of their minor child.
- [2] After a Rule 43 hearing primary residence of the child was awarded to the respondent *pendente lite*, subject to certain conditions.
- [3] As the Applicant was not amenable to the report/recommendations of the Family Advocate and allegations of substance abuse were made between the two parties, the Applicant was of the opinion that the three of them (Applicant, Respondent and child) should be evaluated by a psychologist. At the time of the Rule 43 hearing the Respondent was not opposed to this idea.
- [4] The Applicant obtained an appointment with one Dr Giada Del Fabbro for 6 February 2019 and the Respondent's attorney was so informed on 18 January 2019. He responded on 21 January 2019: "We have noted the date and will make the necessary arrangements with client and the minor."

On 23 January 2019 a further letter was forthcoming from the attorney stating: "Unfortunately the client is of the view that your client must follow the rules and proper protocol and serve the necessary notice in terms of rule 36. Unfortunately our client also holds the view that your client is requesting this examination not in our best interest but merely to satisfy his curiosity"

- [5] With reference to the Respondent's refusal to the use of a forensic psychologist, as previously agreed, the Applicant's attorneys informed the Respondent's attorneys on 9 April 2019 : "... is ons in die proses om 'n aansoek in die hof te rig tot die effek. Hierdie aansoek sal eersdaags op u beteken word."
- [6] On 12 April 2019 a notice of motion was served on the attorneys of the Respondent under Case number 6386/17 wherein the Applicant applies for the following relief:

1. That the applicant be authorized to appoint Dr Giada Del Fabbro, a qualified and registered clinical psychologist practicing at the Village Medical Centre, 12 Seventh Avenue, Parktown North, Gauteng to conduct a psychological evaluation and assessment as reasonably required by De Del Fabbro in order to report to the applicant and the respondent as to the

award of the parental rights and responsibilities in respect of the care and contact of the minor child, A P, born on [...] 2014, as contemplated in section 18(2) of the Children's Act, 38 of 2005 and any matters regarding the best interests of A related thereto;

2. That the respondent be directed to sign and provide the written consent, annexure "F14" to the founding affidavit to Dr Del Fabbro within 5 days after the date of the granting of this order;
3. That the respondent be ordered and directed to make A and herself available for and attend the psychological evaluation and any and all interviews, consultations, assessments or other related and required assessment, evaluations or processes as reasonably required by Dr Del Fabbro, on the dates to be determined by Dr Del Fabbro on reasonable notice to the respondent;
4. That the applicant be directed to compensate the respondent for the reasonable travelling costs at the rate of R1.73/km and accommodation to be arranged by the applicant for the respondent and A for attending the evaluations;
5. That the applicant be ordered and directed to make a copy of any and all reports issued and received by Dr Del Fabbro to the respondent and/or the respondent's legal representatives within 7 days from the date of receipt thereof;
6. That the costs of this application be paid by the respondent, alternatively that the costs of this application be costs in the main action instituted under case 6386/2017;
7. Further and/or alternative relief.

[7] On 26 April 2019 the respondent filed a Notice of Intention to Oppose and on 14 May 2019 she filed her Answering Affidavit, setting out her reasons for not attending the appointment with Dr Del Fabbro in February 2019. It can be summarized in short as:

- She was not aware of the nature of the proposed examination

- The psychologist was chosen by the Applicant;
- The confirmation of arrangements was made by the attorney under the impression that she will be agreeable;
- No formal notice was given to her;
- She was not prepared to enter into a contract with Dr Del Fabbro

Eventually, in par 22 she states “I will nevertheless consent to the enquiry demanded by the Applicant in the hope that this can lay his reservations to rest.”

[8] On 21 June 2019 a Notice of Set Down was served on the respondent’s attorneys setting down the matter for trial on 22 August 2019 under case number 6385/2019.

[9] On 22 August 2019 Mr De Beer, for the Respondent, argued as a point *in limine* that case 6385/2019 (the divorce action) was set down for trial as per the Plaintiff’s Notice of Set down and that it should be struck from the roll due to non-compliance with the Mediation in Certain Divorce Matters Act, 1987 and that costs should be awarded to the Respondent as she came to court prepared for the divorce trial.

Interestingly enough the Respondent filed heads of argument under case number 6386/2019, dealing with the Applicant’s application.

[10] It is clear from the papers that the wrong case number was erroneously inserted on the Notice of Set Down.

It is equally clear that the Respondent was fully aware that it was the application that was set down on the role of opposed motions and not the divorce trial. Both parties came to court prepared to argue the application of the applicant.

Because of the urgency that the matter of the primary residency and care of the minor child be finalized and because the incorrect case number was a bona fide error the court directed that the hearing of the application should proceed. This order did not prejudice any party in any way.

[11] With reference to *Muller v Groenewald*, unreported judgment of ECD case no 2624/11 Mr De Beer persisted with the argument that Rule 36 is/can be applicable and that the Applicant did not give proper notice to the defendant.

Rule 36 is applicable to proceedings where damages in respect of bodily injuries are claimed and medical examination is required. In this matter the psychological evaluation of the respondent is required for a proper investigation into the primary care and residence of the minor child. As pointed out in *Muller v Groenewald*, supra the court, as upper guardian of minor children, plays a far more inquisitorial and active role in such matters and the court should exercise its jurisdiction in terms of the common law and the Children's Act.

I am not convinced that the procedures of Rule 36 are applicable.

- [12] It was common cause between the parties that the Respondent has since subjected herself and the child to evaluation by Dr Del Fabbro. The relief sought has thus become moot and only the matter of costs was argued.
- [12] For the applicant it was argued that costs for this application should be awarded to the Applicant, as the Respondent withdrew her consent for the evaluation, necessitating the Applicant to bring the application to force her to comply with something she had previously agreed to. After she decided to subject herself to the evaluation process, she did not file a letter of consent, but instead filed an opposing affidavit and heads of argument. By so doing, unnecessary costs were incurred.
- [13] On behalf of the Respondent it was argued that this is an interim application and that costs should only be decided during the main trial. The submission is that the trial court will first have to decide whether the evaluation by Dr Del Fabbro was necessary to adjudicate the matter.
- [14] The general rule in matters of costs is that the successful party should be given his costs on a party to party scale. This rule should only be departed from in exceptional circumstances. The determination of an appropriate order is in the discretion of the court, who should exercise this discretion judicially. See in this regard:

Erasmus, Superior Court Practice D5-7

Intercontinental Exports (Pty) Ltd v Fowels 1999(2) SA 1045 (SCA) at par [25]

In ***Baptista v Stadsraad van Welkom*** 1996 (3) SA 517 (O) op 521A word verwys na die “...*basiese beginsel dat die suksesvolle party op sy koste geregtig is en dat van sodanige reël slegs indien spesiale omstandighede aanwesig is, afgewyk sal word*’.

- [15] In ***Intercontinental Exports (Pty) Ltd v Fowels***, supra at par [27] it was pointed out that the purpose of an award of costs is to indemnify a party.
- [16] In this matter the Respondent's actions - to withdraw her consent and to oppose the application of the Applicant - were the cause of this action to proceed. Voluminous papers were prepared in order to put the application before court. Costs were incurred to do so. All this was not necessary, especially so as the Respondent is now indicating that she is prepared to have an independent report obtained and even desirous of such.
- [17] As prayers 1 and 3 of the Applicant have already been complied with prayers 2 and 5 also became moot. It is thus not necessary to make any order in respect of those prayers.
- [18] Although the Respondent consented to the tariff for travelling during the interim custody ruling, she still protests the tariff of R1.73 per kilometer tendered by the Applicant for travelling to the psychologist. It was submitted that this matter be argued during the main trial.
- [19] In the premises of the above the following orders are made:
1. The Applicant must compensate the Defendant for reasonable travelling costs for attending sessions with Dr Del Fabbro at the rate of R1.73 per kilometer. Any claim for a higher amount to be argued during the main trial.
 2. The Respondent must pay the Applicant's taxed party and party costs for this application.

On behalf of Applicant:

Adv. C.P. Ploos van Amstel

Instructed by:

Peyper Austen Attorneys

Bloemfontein

On behalf of Respondent:

Adv J. M de Beer

Instructed by:

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