NO PRECEDENTIAL SIGNIFICANCE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 1684/2013

In the matter between:

M K Applicant

and

R K Respondent

J U D G M E N T

Date delivered: 27 September 2013

THATCHER AJ

[1] The applicant, who is 39 years old, and the respondent who is 32, were married on the 25th January 2003. Within weeks of their marriage, they moved to the United Kingdom where the applicant took up employment. On the 27th April 2005, while they were living in England, the respondent gave birth to A, a girl, who is now 8 years old. The parties separated on the 2nd March 2009, over five years ago, when the child was nearly 4 years old. The respondent returned to South Africa with her.

[2] It is unclear from the papers when the applicant returned to South Africa, but in 2009 he brought an action for divorce in this court. That action is pending.

Since May 2012 he has been employed as a petroleum engineer in the Sultanate of Oman where he will in all likelihood be for the foreseeable future.

[3] It would appear that from 2009, the parties have been unable to agree on appropriate access to A for the applicant. This resulted in an application by him for defined access and this court making an order on the 29th December 2010 that the applicant receive unsupervised access during the second half of all school holidays, and, importantly for this case, telephonic contact at all reasonable times. Given that the applicant now only returns to South Africa about four times a year, for most of the time he is limited to telephonic contact with A which is obviously of great importance not only for him but to enable A to maintain a relationship with him.

[4] The applicant apparently returned to Oman on the 15th January 2013, after having spent the December 2012 / January 2013 school holidays in South Africa during which time A spent three weeks with him, part of which they spent in Cape Town. According to the applicant, he has not been able to speak to the child on the telephone since the 24th January 2013. This is questionable. I say so because in his founding affidavit, deposed to by him on the 16th February 2013, he states, importantly in the present tense, as follows:-

> *"Although I telephone either the respondent's cellular phone or her landline daily, I have been lucky to speak to A twice a week at best. When I do manage to get hold of the respondent, and A and I are left to talk, our conversations generally last between 20 and 40 minutes."*

[5] The events leading to the applicant bringing this application are the following. On the 25th January 2013, the applicant's attorney addressed a letter to the respondent in which it was alleged that the applicant had been unable to maintain regular telephonic contract with A because the respondent had failed or refused or neglected to allow such contact, he alleged, by not answering her home telephone or cell phone. The respondent was told that she was to facilitate telephonic contract by making A available to speak to the applicant and by answering her (the respondent's) cellular telephone. An offer was made to provide a cell phone solely for the purpose of the applicant contacting A. The letter further went on to state as follows:-

> *"This [telephonic] contact must begin this evening failing which our instructions are to approach court immediately for an interdict forcing you to comply with this request or alternatively charges will be opened against you at the police."*

The letter addressed two further issues, namely A's school expenses and the quality of the school she was attending. The letter ended with the following:-

> *"Kindly provide us with your responses to the above request by close of business on 1 February 2013."*

[6] On the 28th January 2013, the respondent replied in a lengthy email. She advised that the applicant is free to contact A *"at the reasonable time of 5 pm"* and she accepted the applicant's offer to provide her with a cell phone. The respondent then went on to deal at length with the other issues raised in the applicant's attorneys' letter concerning A.

[7] On the 31st January 2013, the applicant's attorney sent a further letter advising that a cellular telephone had been delivered to the respondent's mother on the 29th January 2013, but that it had been returned because A was allegedly *"too small for a cellular telephone"*. It was further alleged that the applicant had tried calling at 5pm the previous day and there was no answer from either the home telephone or the respondent's cellular telephone. The letter further stated as follows:-

> *"Our client is still being prevented from having telephonic contact with A and in the circumstances if you do not grant our client telephonic contract this evening between the hours of 17h00 and 18h00 or allow our client to provide the minor child with a cellular telephone and continue to allow this permanently, an application to court will be brought against you without further notice to you on an urgent basis and a punitive costs order will be sought against you."*

[8] It is not known whether there was telephonic contact that evening. There was, however, no written response to this letter, and, it would seem, no oral response.

[9] On the 18th February 2013, this application was launched as a matter of urgency and was set down for hearing on the 21st February 2013.

[10] On that date the respondent was present in person and a *rule nisi* was issued with interim relief. That interim relief was as follows:-

> *"1(a) The respondent ... is ... directed to ensure that the applicant shall have telephonic contact to (sic) the minor child A ... daily between 17h00 and 19h00 for a duration of not less than 10 minutes per telephone call;*

> (b) *The respondent is interdicted and restrained from interfering with, or seeking to limit, the telephonic contract referred to in paragraph 1(a) above."*

That relief was apparently granted by consent. I was advised by Ms Konigkramer, who appeared for the applicant, that on that day it had been hoped to resolve the entire application, but it had not been possible to do so because the respondent had declined to consent to an order for costs being made against her on the scale as between attorney and client. The applicant apparently insisted on a costs order on that scale being made.

[11] On the 10th March 2013, the respondent delivered a brief answering affidavit, apparently drafted without legal assistance. In that affidavit she opposed only the grant of an order for costs against her. She further stated as follows:-

> "(a) *The urgent application brought against me was unnecessary and the grounds for this application are unfounded. I strongly deny the applicant's allegations, in particular that I have deliberately restricted telephonic access to the minor child. This is completely untrue. ...*
>
> (g) *The applicant has not fulfilled his maintenance obligations which has contributed detrimentally to my current parlous financial situation. If I have to pay costs to the applicant such payment will make matters worse not only for me but for our child."*

She also alleged that she had been unable to gather information which would demonstrate that she had not restricted the applicant's telephonic access. In support of this she attached an affidavit deposed to by her recording that she had requested a list of incoming calls from Telkom.

[12] On or about the 12th June 2013, the applicant delivered a replying affidavit in which he stated that the limited content of the answering affidavit demonstrated that the respondent was acting *"in bad faith and unreasonably in denying and restricting and/or restricting"* his contact with A. He pointed out that it is not surprising that the respondent had been unable to put up proof of *"incoming calls"* as, he understood, only those calls which are answered are reflected on a telephone account. (Thus the applicant was aware that the respondent disputed that he had attempted to telephone A on a daily basis but had been unable to speak to her because of the respondent's conduct. He persisted in his contention that the respondent's conduct was unreasonable and malicious and that the respondent ought to pay the costs of the application on the attorney and client scale. I will revert to the significance of the applicant's comment that it is not surprising that the respondent had been unable to put up proof of *"incoming calls"* later in this judgment.) The applicant in his replying affidavit also stated as follows:-

> *"Further, the respondent refused to consent to a final order being granted at the hearing of the application on 21 February 2013, as she wished to "place her version" before this court."*

[13] On the 8th July 2013, the application was set down for hearing on the opposed application roll on the 17th September 2013, it being clear that the only issue was the costs of the application. On the 6th September 2013, the applicant's heads of argument were delivered to the Durban Justice Centre, who was now representing the respondent.

[14] When I received the court file before the hearing, it contained both the application papers and a separate bundle comprising a notice of motion dated the 9th September 2013 for an order that the respondent be given leave to deliver a supplementary answering affidavit, and to which was attached a single affidavit deposed to by the respondent. That affidavit dealt firstly with the grounds upon which the further affidavit ought to be admitted, and secondly, her response to the applicant's replying affidavit. I read these documents together with the parties' heads of argument before the hearing commenced.

[15] At the hearing, Ms Konigkramer, for the applicant, sought the adjournment of the matter in order to afford the applicant the opportunity of delivering yet another affidavit. As the respondent's further affidavit had not yet been admitted into evidence, I requested Ms Gopal, who appeared for the respondent, to move her application for the admission of the further affidavit and to address me on the merits of that application and she did so. Thereafter Ms Konigkramer made submissions on why the application to admit the further affidavit ought to be refused.

[16] After hearing argument, I ruled that the further affidavit should not be admitted into evidence. My reasons are the following.

[17] A court has a discretion whether to allow further affidavits and it will only exercise its discretion to do so where there is good reason for doing so.

> <u>Hano Trading CC v JR 209 Investments (Pty) Ltd</u> 2013 (1) SA 161 (SCA) at 164 E

[18] In the case of Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C) at 617B-F, Davis, J summarised the relevant considerations in such an application, which he stated are:-

(a) the reason why the evidence was not led timeously;

(b) the degree of materiality of the evidence;

(c) the possibility that it may have been shaped to *"relieve the pinch of the shoe"*;

(d) the balance of prejudice, namely the prejudice to the respondent if the application is refused and the prejudice to the applicant if it is granted;

(e) the stage which the particular litigation has reached;

(f) the *"healing balm"* of an appropriate order as to costs;

(g) the general need for finality in judicial proceedings.

[19] The proposed further affidavit did not place before the court any material evidence and essentially took the matter no further. There is therefore no prejudice to either party if it is not admitted.

[20] There is a further reason why the supplementary affidavit should not be admitted. Since the 7th March 2013, the only issue in the application had been

the costs of the application. The further answering affidavit invited the applicant to put up his telephone records evidencing that he had telephoned the respondent but that his calls had gone unanswered. Ms Konigkramer submitted that if the further answering affidavit was admitted, the applicant wished the matter to be adjourned so that he could place this evidence before the court. According to Ms Konigkramer, the applicant telephoned on Skype and that system records when a number is dialled, even when the call is not answered. Thus the admission of the further answering affidavit would result in the matter being adjourned with further costs being incurred to afford the applicant the opportunity to produce evidence which he knew he should have produced in his replying affidavit, but did not. It seemed to me that it was in the parties' interests and in the interests of justice that the matter be finalised and that no further costs should be incurred solely in order to determine who was to pay the costs of the application.

[21] It was for these reasons that I ruled that the further affidavit should not be admitted into evidence.

[22] This brings me to the issue of the costs of the application.

[23] Counsel for the applicant contended that not only had the applicant been successful and so ought to be awarded the costs of the application, but that those costs ought to be on a punitive scale because the respondent's conduct had been unreasonable and in bad faith and that she was not justified in interfering with the applicant's telephonic conduct with A.

[24] One can sympathise with the applicant. Living overseas, his only contact with A is via telephone. The respondent in her email of the 28th January 2013 gave him an undertaking that he was free to contact A at 5pm, and accepted his offer of a cellular telephone to facilitate telephone contact with A. It must have been, to say the least, frustrating for him not to have been able to exercise this telephonic contact daily.

[25] In addition, a second undertaking had been sought on the 31st January 2013 because he had still not been able to contact A daily. Furthermore, by that date the cellular telephone that the respondent had agreed to accept to facilitate the telephone contact, had been returned.

[26] The applicant was therefore justified in bringing the application, and thus ought to be entitled to his costs of the application.

[27] That is not, however, the end of the matter. The respondent was summoned to appear at court on the 21st February 2013 on, at the most, three days' notice to her. On that date she appeared in person and consented to an order that she ensure that the applicant has telephonic access with A daily between 5pm and 7pm for a duration of not less than 10 minutes per telephone call and that she be interdicted and restrained from interfering with or limiting that telephonic contact.

[28] Ms Konigkramer submitted that the respondent ought to pay all of the costs of the application on the attorney and client scale. She submitted that had

the respondent consented to such an order on the 21st February 2013, final relief could have been obtained on that date and no further costs would have been incurred. The respondent opposed any order that she pay the applicant's costs and sought an order that the applicant pay her costs on the attorney and client scale.

[29] The principles in regard to the award of costs, including attorney and client costs, were summarised by Holmes, JA in the case of Ward v Sulzer 1973 (3) SA 701 (AD) at 706 G to 707 A as follows:-

> *"1. In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides .. Ethical considerations may also enter into the exercise of the discretion ...*
>
> *2. The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs ... Moreover, in such cases the Court's hand is not shortened in the visitation of its displeasure."*

[30] When the respondent appeared in court on the 21st February 2013, she consented to the relief sought by the applicant and only opposed the application on the question of costs. When she delivered her answering affidavit on the 9th March 2013, again it was clear that the only issue was the question of costs. It was also clear from her answering affidavit that the respondent persisted in her denial that she had deliberately restricted telephonic access to the child. This denial gave rise to a dispute of fact, the applicant having alleged in his founding affidavit that the respondent was making it extremely difficult for him to have

regular telephonic contact with A. The applicant had an opportunity in reply to put up proof of his failed attempts to speak to A over the telephone. He however did not put up any such evidence. Thus this dispute of fact remains. However justice requires that this application be brought to finality and that the dispute of fact remains is because of the applicant's failure to put up evidence in reply which would have gone some way to resolving this dispute.

[31] I do not believe that her conduct can be characterised as vexatious, unscrupulous, dilatory, mendacious or in bad faith. She consented to the relief sought by the applicant at the first hearing of the application. While there is no evidence that the respondent would have been prepared to pay the applicant's costs on a party and party scale, what we do know is that the applicant has sedulously, and in my view, unjustifiably, after the 9th March 2013 persisted in his demand that the respondent pay all the costs of the application on an attorney and client scale. The applicant, not having placed any evidence before the court to refute the respondent's denial that she had deliberately prevented his telephonic access to A, ought not to have persisted in seeking costs on a punitive scale. He ought to have sought costs on the party and party scale, but he did not do so.

[32] The manner in which the applicant placed the application before the court is also a factor I take into account. The applicant launched the application on the 18th February 2013, some 18 days after he had sought an undertaking from the respondent, and set the application down as an urgent one for hearing 3 days later, on the 21st February 2013.

[33] When I queried this with Ms Konigkramer, she advised me that the delay in launching the application was occasioned by the applicant being out of the country and the difficulties associated with getting his founding affidavit authenticated. That may be so, but this does not explain why, after a delay of some 18 days, the application was set down for hearing a mere 3 days after it was brought.

[34] There is no valid reason why the respondent should not have been given a longer period in which to consider her position and possibly obtain legal assistance. The application was, by the time it was launched, not so urgent that the respondent should only have been given 3 days to decide whether to oppose the application or to obtain legal advice. Had the respondent been given a reasonable time to seek legal advice, wiser counsel may have prevailed and the matter resolved at the first hearing.

[35] The respondent sought an order that the applicant pay her costs on the attorney and client scale. In the light of the facts I have described above, there is no basis for any order that the applicant pay her costs.

[36] Having regard to the facts of the matter, and seeking to be fair to both parties, I make the following order in this application:-

The *rule nisi* granted on the 21st February 2013 is confirmed in the following terms:-

1. The respondent is directed to ensure that the applicant shall have telephonic contact with the minor child, A, a girl, born on the 27th April 2005, daily between 17h00 and 19h00, for a duration of not less than 10 minutes per telephone call.

2. The respondent is interdicted and restrained from interfering with, or seeking to limit, the telephonic contact referred to in paragraph 1.

3. The respondent is ordered to pay the costs of the application incurred by the applicant up to and including the 10th March 2013.

4. Each party will bear his and her own costs incurred after the 10th March 2013.

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THATCHER AJ

Application heard on:	17th September 2013
Counsel for the applicant:	Adv M Konigkramer
Instructed by:	Shepstone & Wylie
Counsel for the first respondent:	Adv T Gopal
Instructed by:	Durban Justice Centre
Judgment handed down on:	27th September 2013