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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 023432/2024

DATE: 2024-03-08

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES : NO

(3) REVISED: YES

SIGNATURE

DATE: 12/11/2024

In the matter between

N[...] P[...] K[...]

Applicant

and

K[...] A[...] K[...]

Respondent

JUDGMENT

HARDY, AJ: Here follows a quick *ex-tempore*-judgment in the matter. The Applicant, Ms K[..] is seeking a stay of execution of the Rule 43 order granted by F. Bezuidenhout AJ on 16 January 2024, pending the determination of an application in terms of Rule

43(6), that is for a variation of the order, to be instituted by her.

She brings this application as a matter of urgency, having launched it on 01 March 2024, the very same day that the order referred to introduces unsupervised contact by the Respondent to their minor child, and then as of today, alleges ongoing urgency after that.

In this matter the Applicant has known since at least 16 January 2024 that there was going to be a need to do something on or before 01 March 2024 - the unsupervised contact was coming. Even though throughout that time she has been hunting for new legal representation, it could not have escaped her that something needed to be done if she wished to prevent unsupervised contact becoming a reality.

What has happened with the contact? Neither party has told me that there had been any problems with unsupervised contact at all in the last week. The only information I have in that regard, is that it has gone well, and that the minor child is happy, according to the answering affidavit.

So, to rely on ongoing urgency as the Applicant wishes to do, she would need to show on the papers that there has been a problem; that there will be ongoing problems with unsupervised contact in the future; and she alleges a fear of victimisation of the child. Nothing concrete in that regard is set out in the founding affidavit.

So, it does not appear to me, nor am I entirely convinced that the matter is urgent, but we are dealing with a minor child - and a fairly young one - so I am erring on the side of caution.

If I am to deal with the matter on an urgent basis, I then need to consider the merits and have regard to the fact that this is an application in terms of Uniform Rule of Court 45A, to suspend the operation of the court order for some period of time, or suspend the execution for whatever period the Court deems fit.

In all of the commentary on Rule 45A, it is very clear that the suspension may never be for speculative reasons.

Furthermore, the decision in *Gois trading as Shakespeare's Pub v van Zyl* 2011 (1) SA 148 (LC) sets out a number of requirements for suspending the operation of a court order. The most pertinent here is that a suspension may only happen to facilitate real and substantial justice requirements, or to prevent an injustice.

Regard must be had to the requirements for an interim interdict and in particular, the concept of irreparable harm. The case authority goes so far as to suggest that irreparable harm will be a given where the underlying *causa* may be removed.

So, my understanding simply is that when the appeal or variation - depending on the type of matter - is ultimately heard, if the fundamental point of the judgment that is sought to be stayed is going to go away, then there will be irreparable harm and the application should be granted.

Which then runs us clearly into the merits here, because I am told that a Rule 43(6) will be brought on two changed circumstances which would render the judgment of F. Bezuidenhout AJ a nullity.

I take it not much further than that the entire order would

be set aside and no variation would be required, but I do not think strong evidence of that has been set out.

The more fundamental concern is the allegation that the changed circumstances will be that the Respondent will be criminally prosecuted for the sexual assault on the parties' daughter.

This poses a challenge, because as things stand at the moment, it is quite clear that the NDPP are refusing to prosecute the Respondent and have set this out in a letter addressed to the parties.

The second allegation is that this decision not to prosecute will be overturned because of an incomplete docket.

The real difficulty with both of these allegations - a fake record of decision and/or an incomplete docket - as a changed circumstance, is that, as of today, they represent no more than a hope.

As regards a fake document, Advocate de Kock's (of the NDPP) own letter, so his own later writing, sets out that the document is not a fake - the document recording the decision not to prosecute is not fake. Some of the correspondence is under his hand and some of the correspondence has been done under the hand of an authorised staff member acting on his instruction.

The founding affidavit takes it no further than the allegation of a fake document that should be investigated. But that is where it leaves it. Bearing in mind that the document - recording that there would be no prosecution - has existed since October 2023 and that the Applicant's father has already been

challenging it, that certainly is not a new issue that has arisen on the handing down of the judgment by F. Bezuidenhout AJ.

The further challenge that the docket is incomplete also poses some difficulty. The documents attached to the founding affidavit already show that Captain Nel disputes this since he states the docket was complete. To the extent that any reliance is placed on the say-so of Advocates Jabelo or Chikane or of what was said in a meeting about the decision not to prosecute the Respondent, that forms hearsay and is not a proof that the docket was or would be incomplete.

The Applicant has also in argument placed much reliance on an advocate at the prosecuting authority she spoke to last year, who said she would never have considered a docket without the child statements being in the docket. One would therefor infer that all of her colleagues would do exactly the same.

As things stand today, it is at best speculation that the docket was incomplete. There is nothing to tell me that it was incomplete. The highest point that has been reached is to say that the docket at the time of decision and the docket that exists now should be identical, but there is nobody who has said that they are not identical or that the child's statements were missing at the time of deciding not to prosecute the Respondent.

Thus the changed circumstance on which the Applicant would primarily rely, do not yet exist and is at best a hope that they may exist in the future.

The circumstances why contact changed from supervised to unsupervised was the decision not to prosecute. At this stage, the Applicant engaging with the police and pursuing a reopening

of the investigation has not yet got to the point of a change of the decision not to prosecute. That may happen - it may not. We are speculating.

In light of the time that the first investigation took, one cannot expect that this decision is going to happen any time soon. As set out before, the Applicant has been aware since at least August 2023 and very definitely October 2023 of her allegations regarding the police and the NPA - it was thus not necessary for her to wait until the judgment on 16 January 2024 to start pursuing her complaints that she had against those entities.

Having set out that the changed circumstances at this stage is only a *spes* or a hope on the part of the Applicant, that may not even materialise, I also have regard to statements by the minor child that were only uploaded to Caselines yesterday. Although there is some dispute as to whether these formed part of the original docket, neither of these two statements in any way, shape or form accused the Respondent of perpetrating sexual abuse on her.

In the result there is no change of circumstances yet. We simply do not - I simply do not - know if there ever will be. There is thus no underlying *causa* that will be changed or removed in the intervening period or before the hearing of the Rule 43(6) and thus, I am not able, on the facts to find that there is irreparable harm as required by the *Shakespeare's Pub* matter.

In the circumstances, I cannot suspend the execution of the Rule 43 order granted by F. Bezuidenhout AJ.

I am however mindful that if at any point these changed circumstances ceases to be a *spes*, but becomes a reality, it is

quite possible to go from launching a Rule 43(6) application to it being heard in this division within six weeks in term time - that is a fairly short time frame, much shorter than a regular opposed motion.

I am aware then, in light of the finding I have just mentioned, that I cannot suspend the order, that the Applicant has been unsuccessful, and cost usually follow the result.

Although this is a matter involving a minor child, when the Court usually orders each party to pay their own costs in circumstances where the parties have been behaving in a reasonable fashion, I cannot reach this conclusion.

Where it has become quite apparent to me in the papers and through the argument that this Applicant will not rest at all until the Respondent and minor child can only enjoy supervised contact and/or until the Respondent has been criminally charged with some offence, she will continue to litigate.

In the circumstances I am going to make an order that the costs follow the result, but on a party and party scale.

In the result, my order is:

ORDER

[1] The application before me today to stay or suspend the execution of F. Bezuidenhout AJ's order granted on 16 January 2024 until such time as a Rule 43(6) can be heard is dismissed.

[2] The Applicant is to pay the costs of this application on a scale as between party and party.

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2024-03-08

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JUDGMENT

HARDY, AJ
ACTING JUDGE OF THE HIGH COURT
DATE: