

SOUTH AFRICA / JUDGMENT

E.D v H.D (2023/107780) [2024] ZAGPJHC 499 (24 May 2024)

[2024] ZAGPJHC 499**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Goodenough

CASE / FILE NUMBER

2023/107780

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Policy**IN**

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG
DIVISION, JOHANNESBURG

1.**REPORTABLE: NO****2.****OF INTEREST TO OTHER JUDGES: NO****24****May 2024****CASE****NO: 2023/107780****In**

the matter between:

E[...]

D[...] Applicant/Respondent

a quo

and

H[...]

O[...] D[...]

Respondent/Applicant a quo

JUDGMENT

1. On 22 May 2024 I heard an opposed application under the above case number in the Family Court.
2. The Applicant (“Mrs D[...]”) sought an order in the following terms, namely:
 - 2.1. That pending the Appeal and/or Review of the order of the Honourable Acting Judge Meyer (“Meyer AJ”) dated 9 April 2024, the order of the Honourable Acting Judge Bezuidenhout (“Bezuidenhout AJ”) dated 19 January 2023 remain in force and effect;
 - 2.2. Costs of suit as between Attorney and own client.
3. After hearing argument, I made an order dismissing the application and reserving the question of costs for adjudication by Meyer AJ when she hears the application for leave to appeal which is set down for hearing on 28 May 2024.

HISTORY

4. The parties were married on 20 April 2016.
5. They have two little boys (“the children”): H[...] (“H[...]”), born on 28 March 2017 and B[...], born on 13 November 2018.
6. The children have been residing with Mr D[...] since 11 April 2024 pursuant to the order of Meyer AJ in circumstances described further below.
7. On 4 February 2022, an Interim Protection Order was granted against Mr D[...] prohibiting verbal and physical abuse. It appears that Mr D[...] admitted having perpetrated violence on Mrs D[...] and he said that she had also been abusive towards him.
8. On 14 April 2022, Mrs D[...] instituted a divorce action wherein she sought primary residence of the children, child maintenance, shared parental rights and responsibilities and an order that the Respondent have reasonable contact with the children.
9. Mr D[...] in his plea and counterclaim sought primary residence of the children, child maintenance, shared parental rights and responsibilities and an order that Mrs D[...] have reasonable contact with the children.
10. On 14 April 2022, Mrs D[...] also applied to the Kempton Park Children’s Court under Section 53 of the Children’s Act for an investigation into the question of primary residence. That application has not been adjudicated.
11. Thereafter, Mrs D[...] and the children vacated the matrimonial home in Parys and went to live in Kempton Park.
12. Mr D[...] brought a Rule 43 application which was later withdrawn.

13. The children continued to reside with Mrs D[...]. Mr D[...] exercised contact with them.
14. Mrs D[...]’s son from a previous relationship, namely T[...] is now about 13 years old. I refer to him later.
15. While in Mrs D[...]’s care, B[...] suffered a burn injury, for which he was treated in hospital. I do not consider this fact to be relevant to the present application.
16. In this judgment I do not traverse all the many incidents and legal confrontations that have taken place since the divorce action started.
17. On 3 January 2023, Mr D[...] refused to return H[...] to Mrs D[...]’s care after a contact period.
18. On 7 January 2023, Mr D[...] stated that the reason for his refusal was that he suspected that T[...] was sexually assaulting H[...] and that Mr D[...] had laid criminal charges.
19. On 13 January 2023, Mrs D[...] brought an urgent application for the return of H[...] and a restoration of the status quo.
20. On 19 January 2023, Bezuidenhout AJ granted that application and directed the Family Advocate urgently to investigate and report on all aspects relating to the children.
21. In her order, Bezuidenhout AJ directed inter alia that:
 - (a) an independent clinical child psychologist should investigate the allegations of sexual abuse and that
 - (b) pending the investigations and recommendations by the Family Advocate’s and a clinical child psychologist, T[...] is to reside with Mrs D[...]’s brother and that T[...] should only interact with the children under Mrs D[...]’s supervision.
22. H[...] was duly returned to Mrs D[...]’s care. T[...] went to reside with Mrs D[...]’s brother, as required by the terms of the order of Bezuidenhout AJ.
23. The child clinical psychologist Dr Roux thereafter conducted an investigation and presented a report recommending that the children reside with the Respondent. I have not had sight of that report. Mrs D[...] does not agree with the contents of that report and alleges that Dr Roux was manipulated by Mr D[...].
24. The Family Advocate’s investigation has not yet been finalised.
25. On 19 October 2023, Mr D[...] launched an urgent application seeking the implementation of Dr Roux’s recommendations. The application was struck off the roll for lack of urgency.
26. In January 2024, Mr D[...] failed to return the children to Mrs D[...]’s care after holiday contact. Mrs D[...] enlisted the aid of the South African Police. Mr D[...] returned the children.

27. Thereafter, the Respondent brought an application - which he described as a Rule 43(6) application - for the variation of Bezuidenhout AJ's order. I express no view as to whether or not that application was governed by Rule 43.
28. On 9 April 2024, that application was granted by the Honourable Acting Justice Meyer ("Meyer AJ"). The order was expressed to be made to apply "pendente lite".
29. Mrs D[...]’s attorney indicated to Mr D[...]’s attorney that leave to appeal would be sought and that the children should not be removed from Mrs D[...]’s care. In response, Mr D[...]’s attorney made it clear that he was indeed going to remove the children on the strength of Meyer AJ’s order, stating that Meyer AJ’s order is not appealable because it is a Rule 43 order.
30. On 10 April 2024, Mrs D[...]’s application for leave to appeal was served.
31. On 11 April 2024, Mr D[...], together with several Sheriffs and Police Officers, removed the children from Mrs D[...]’s home.
32. The children are now residing with Mr D[...], who has removed them from the school they were attending in Kempton Park and has enrolled them in a school in Parys, which they have been attending since approximately 12 April 2024, that is for about five weeks.

REASONS FOR MY DECISION TO DISMISS THE APPLICATION:

- 32.1. In the present application, Mrs D[...] asks the Court to make an order that “pending the appeal and/or review of the order of the Honourable Acting Judge Meyer dated 9 April 2024, that the order of the Honourable Acting Judge Bezuidenhout dated 19 January 2023 remain in force and effect”
33. The wording of Mrs D[...]’s prayer which refers to “the appeal and/or review” embodies the unproven assumption that there is indeed going to be an appeal and/or review: The current position is that there may or may not be an appeal and/or review. It is possible that leave to appeal will be refused and it is possible that special leave to appeal will also be refused. It is of course possible that leave to appeal will be granted, but it remains to be seen whether or not that will happen. Be that as it may, I set out below the reason why I will not make an order that the children be removed.
34. The practical effect of the order sought would be that the children would now immediately - six days before the hearing of the application for leave to appeal - be removed from Mr D[...]’s care; be removed from their current school in Parys; be returned to Mrs D[...]’s care and be re-enrolled in their previous school. The result would be two major upheavals in the space of five weeks.

35. I do not approve of Mr D[...]’s hasty action of executing Meyer AJ’s order in circumstances where he knew that leave to appeal would imminently be sought. Neither do I approve of Mr D[...]’s high-handed action wherein he unilaterally declared that Meyer AJ’s order is not appealable - notwithstanding that this is an issue to be adjudicated not by Mr D[...] but rather by Meyer AJ during the hearing of the application for leave to appeal.
36. In my view, however, the material fact in the context of the present application is that the children have now already been uprooted and are busy trying to start a new life at their new school and in their father’s home.
37. I do not see how it could possibly be in the children’s best interests now to be taken out of this new life and sent back to their mother’s home and their old school. The disruption, stress and emotional trauma that such a second move would cause would in my view be contrary to their best interests. I imagine that, as it is, the children have already been traumatised by the strenuous and hostile litigation that has been taking place over the past two years.
38. Were I now to make an order directing the immediate return of the children to Mrs D[...], I would be overstepping my powers: In my view, it is not for me but rather for Meyer AJ, in the course of adjudicating the application for leave to appeal, to decide – if so requested - the question of whether the implementation of her existing order should be stayed pending the outcome of the application for leave to appeal.
39. It is possible that the same question regarding interim implementation or suspension will need to be decided again, more than once, in subsequent appeal-related court proceedings. This process could conceivably drag on for a matter of months or even years. At each stage, the Court then presiding may, qua Upper Guardian of the children, be called upon to consider this question based on the then current circumstances.
40. I find the possibility that the children may hereafter be moved back and forth between different homes and schools during the course of the forthcoming appeal-related litigation disturbing. I choose not to increase the possibility of such a situation arising.

COSTS

41. I was asked by Mr D[...]’s counsel to make a punitive costs order against Mrs D[...] based on various technical points including short service. I decline to do so.
42. I do not believe that Mr D[...] has suffered any prejudice by any short service . The technical points raised should more properly be canvassed during the application for leave to appeal.
43. Personally, I do not see any need to punish Mrs D[...] for bringing this application.
44. The decision in this regard will however be made by Meyer AJ in due course.

T[...]

45. Clause 5 of the order of Bezuidenhout AJ requires that pending the outcome of the Family Advocate's investigation, T[...] is to reside with Mrs D[...]’s brother and that interactions between T[...] and the children is only to take place under Mrs D[...]’s supervision.
46. Mrs D[...]’s counsel informed me during the hearing that since 11 April 2024, when Mr D[...] removed the children from Mrs D[...], T[...] has moved back and is once again residing with Mrs D[...]. It was submitted that there is no possibility that T[...] will sexually abuse the children because they now live with Mr D[...]. I express no opinion on this question, but I am not convinced that the possibility does not exist.
47. Upon my insistence, during the hearing, Mrs D[...] (who was present on the MS Teams platform via which the hearing took place) expressly undertook that T[...] will immediately return to reside with Mrs D[...]’s brother and will not sleep at Mrs D[...]’s house pending the outcome of the Family Advocate’s report. I am not making any accusations against T[...]. The point is that court orders must be complied with and it is not for the parties to decide for themselves that it is no longer necessary to comply.
48. The terms of my order are as follows:

39.1.The application is dismissed

39.2.Costs are reserved for determination by the Honourable Acting Judge Meyer in the Application for Leave to Appeal set down for hearing on 28 May 2024.

GOODENOUGH AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 24 MAY 2024

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Date of argument: 22 May 2024

Date of Judgment: 24 May 2024

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Prepared on 9 October 2026 · Esheria