

SOUTH AFRICA / JUDGMENT

Fellgiebel v Bradley, In re: Ex Parte Bradley (2017/7949) [2017] ZAGPJHC 395 (12 December 2017)

[2017] ZAGPJHC 395

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman

CASE / FILE NUMBER

2017/7949

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2017/7949

Not reportable

Not of interest to

other judges

Revised.

12/12/2017

In

the matter between:

FELLGIEBEL,
NICOLE Applicant
and
BRADLEY,
PHILIP
STUART Respondent
In

re:

Chianna
Bradley

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] This is an application in which the applicant approaches this court for an order in terms whereof the settlement agreement entered into between the applicant and the respondent on 17 May 2010 and which was made an order of court on 20 July 2010 ('the settlement agreement'), is amended by providing that the child, Chianna ('the child') be registered as a dependant on the applicant's medical aid, at the respondent's cost, and that the respondent be directed to sign all documents and take all steps required in order to facilitate the removal of the child from his medical aid and the registration of the child on the applicant's medical aid.

[2] This matter came before Wepener J on 30 August

2017. The relief sought at that stage related to both the renewal of the child's passport and the change of the medical aid. Because the respondent's heads of argument had not found its way into the court file (due to no fault on his or his legal representatives part), Wepener J did not entertain the entire application but, having

heard counsel for the parties, made the following order:

1. Dispensing with the requirement of the Respondent's consent in terms of Section 18(3)(iv) of the Children's Act 38 of 2005 as amended, the Applicant is granted leave in terms of Section 18(5) of the Children's Act, 38 of 2005 to make application, whenever required, for the passports and travel documents of the child, and the renewal thereof without the Respondent's presence, consent or signature being required, provided that the Applicant at all times furnishes the Respondent with copies of any renewal passports and travel documents for the child.
2. The operation of the order in 1 above is suspended until 1 September 2017 at 10h15, after which the order will become final.
3. The Respondent is to pay wasted costs.
4. The application is postponed sine die.

('the interim order')

SUMMARY OF FACTS RELATING TO PASSPORT

- [3] The child, born on [...] July 2003, and presently 14 years of age, was born from the marriage between the parties. She held a passport from 25 February 2005. Upon expiry of such passport, subsequent to the decree of divorce having been granted, the applicant, duly supported by the respondent, applied for a renewed passport, which was issued on 9 November 2010. The second

passport lapsed during November 2015. The applicant, as she had done during 2010, approached the respondent for his support in applying for a new passport by attending at Home Affairs, signing the pre-prepared documents and application forms and paying the required fee. The respondent, despite undertakings to do so, failed to attend at Home Affairs and sign the requisite documents. He finally raised the fact that he feared that the child would be removed from the borders of South Africa and made the placement of the child's passport in the hands of a third party, a pre-condition to him signing the required documentation. As a consequence of the interim order, the applicant has now applied for a new passport for the child and one has been issued to her. A third party is not keeping the passport.

REGISTRATION OF THE CHILD ON THE APPLICANT'S MEDICAL AID

Points in limine in re relief pertaining to the medical aid

- [4] The respondent raised a point in limine being that the application should be dismissed as a consequence of the applicant's failure to have referred the issue of the removal of the child from the respondent's medical aid and the registration of the child on the applicant's medical aid, to mediation.
- [5] Mediation is a process where disputes are resolved by consensus. In the absence of agreement, the process fails. The respondent's attitude has throughout been unequivocal that he would not agree to the change in medical aid for the child. He insisted on an official amendment of the agreement and a court order. The respondent's attitude indicates that the issue has no prospects of being successfully mediated. In my view, mediation would have delayed determination of the issue as well as have been

costs inducive. This point in limine fails.

- [6] The respondent further contends that the application for the relief in regard to the change of medical aid should be dismissed as a consequence of foreseeable disputes of fact pertaining to the payment or failure to pay medical expenses or effect reimbursements of funds expended by the applicant for which the respondent is liable. I disagree. This Court is not called upon to adjudicate the contended disputes of fact pertaining to payment and/or reimbursement of medical expenses. The issue which this court is called upon to determine is whether the applicant has made out a case for the amendment of the agreement and the court order. On this issue, the facts are, in the main, common cause (more about this later). This point in limine accordingly also falls to be dismissed.

Repayment model agreed upon

- [7] In terms of the settlement agreement, the respondent is responsible for the child's medical, dental, hospital, ophthalmic, orthodontic and prescribed pharmaceutical expenses and other expenses. The respondent may in terms thereof, include the child as a beneficiary under a medical aid scheme and in such event he will be liable to pay the costs thereof as well as all expenses not covered by the medical aid. He is thus able to insure himself against medical expenses to facilitate his compliance with his obligation to pay the child's medical expenses. The settlement agreement does not in the first instance direct him to register the child on a medical aid (at his costs) but directs him to pay the child's medical expenses. The parties agreed that a certain repayment model would be implemented for refunds of medical expenses paid by the applicant in respect of the child's medical care and for which the respondent is liable. In this regard, it was specifically agreed that the respondent would reimburse the applicant for any medical costs incurred by her within seven days of submission of the relevant documentation or invoices to the respondent. The child is registered on the respondent's medical aid.

Difficulties with the existing re-payment model

- [8] Numerous and on-going problems exist between the parties pertaining to the implementation of the repayment model and the reimbursement of funds expended by the applicant in respect whereof the respondent is liable. A summary of examples of such on-going claims and disputes for the past 12 months only is contained in a table annexed to the papers.
- [9] The on-going practical difficulties that the applicant faces include, submitting claims, duly supported by proof of the medical service rendered and the proof of payment which form the subject matter of the refund claimed; delays in responses or acknowledgment of her claims; the need to re-send both proof of the medical service rendered and the proof of payment made by the applicant; the need to prepare and send lengthy reconciliations and proof of expenses and payments thereof to satisfy the demands of the respondent; the need to send numerous reminders to pay refunds claimed; extensive delays in refunds; extensive correspondence required to ensure that a refund is received, prior to such refund being effected. As examples of the foregoing, the applicant attached to her papers no less than 18 letters/ emails informing the respondent of medical claims. The applicant was obliged to wait in excess of 11 months prior to receiving a refund in respect of Dr Weakley's professional fee in the amount of R280. In respect of this single claim, the applicant was obliged to address no less than 7 correspondences and was ultimately refunded the sum, paid

only as a consequence of reconciliations done by the respondent in preparation of his answering affidavit and opposition to the

applicant's founding statements and claim for a variation of the court order during April 2017. A further example of the problem is the refund of the payment of orthotics. The invoice in respect of the orthotics for the child was provided to the respondent on 25 May 2015. No less than 5 correspondences were exchanged prior to a refund having been received. Expenses already incurred as far back as October 2016 and in respect whereof invoices and proof of payment were submitted to the respondent, were only refunded during April 2017.

[10] The on-going communication pertaining to refunds of medical expenses paid, follow-ups and reminders to cajole the respondent into refunding the funds expended, lead to aggravation and unnecessary stress for the applicant. In addition she is not in a financial position to carry the burden of expenses for which she is not liable and in respect of which she is not refunded timeously.

Basis for the opposition to change the re-payment model

[11] The respondent opposes the relief sought on the ground that the applicant has and will further alienate the child from him, the applicant will abuse the medical aid by taking the child to doctors unnecessarily to compel the respondent to make more payments and this application ought to have been brought in the maintenance court.

[12] It is not common cause that the applicant has indeed alienated the child from the respondent. It is clear from the communication and correspondence as well as the report by Ms. Tanya Kriel as well as Dr. M E Kruger that the reasons for the compromised relationship between the respondent and the child is much more complex than what he contends. Sadly, despite having undergone reconstructive therapy the relationship between the respondent and the child has not been restored.

[13] The fear of further alienation if the relief is granted, appears to be seated in the fact that the respondent will be excluded from the information relating to the nature of the medical treatment received by the child. It is apparent from the correspondence exchanged between the parties that the applicant keeps the respondent informed of the reasons for the medical treatment and expenses. It is clear from the communications between the parties that despite their acrimonious

relationship, the applicant continues to communicate with him about the child. According to the reports of particularly Dr. Kruger and Ms. Charine Glen-Spyron, the applicant supported and assisted the reconstructive process between the respondent and the child to the best of her ability. She has supported all other interventions and therapies. The applicant has communicated the child's medical and other needs to the respondent throughout. The applicant went as far as to complete the form required by the respondent's

medical aid and submitted such form for the extension of therapeutic benefits in support of interventions for the child and the

reconstructive therapy between the respondent and the child. There is no merit in the respondent's contention that the applicant will 'further alienate' the child should the agreement and court order be amended as sought in the notice of motion.

[14] The respondent argued that this matter ought to have been brought in the maintenance court. It was not argued, nor suggested, that the Maintenance Court has jurisdiction to have entertained the issue relating to the child's passport. The application was accordingly necessary in respect of such relief and was successful on that score. It is only this court that can amend the provisions of the settlement agreement as requested herein. This application does not concern the payment of monies but rather the restructuring of a re-payment model in relation to the payment of maintenance.

[15] During argument I enquired from the parties whether there would be any objection to making it part of the order that the respondent be entitled to access to the medical aid records pertaining to the child of the medical aid in respect whereof the child is a registered dependent member. There was no objection to this proposal, nor could there be, as the respondent is entitled, as of right, to be informed of the medical condition of the child. Were this to be embodied in the order, he could access the information independently. This will enable him to assess both the nature of the treatment and the reasonableness of the costs incurred. I intend including this as part of the relief, not because I find that the exclusion by the respondent of such information would have the effect of alienating the respondent from the child, nor because I find that were this not part of the order, the potential exists for the

applicant to abuse the respondents maintenance obligations relating to the child's medical expenses. Clause 3.4 of the settlement

agreement already provides comfort to the respondent as it records the respondent's entitlement to be informed of the child's

medical condition. I intend including this simply to provide the respondent with added comfort and in an attempt to limit the acrimony

between the parties. With this information at his disposal, the respondent will be able to assess the nature of the medical care

provided to the child and the reasonableness of the costs relating thereto.

[16] It is in the child's best interests that her medical needs are met. This can be done more readily and with less stress and tension by registering her on the medical aid of the applicant, which is exactly the same medical aid and level of medical aid as the respondent's medical aid, being Discovery Classic Comprehensive. Consequently, there is no increased financial

exposure or other burden on the respondent. The respondent will, instead of paying the medical aid premium to Discovery by debit

order, simply reroute the payment of the child's medical aid contribution to the applicant, again by debit order. Not only will the applicant not have to enter into extensive and on-going communication with the respondent, but she will no longer have to accept the on-going delays of refunds, as the medical aid, refunds payments made by members within 7 days of an invoice and proof of payment having been submitted to the medical aid. The applicant will, in addition, be able to better administer the available benefits and the funds in the medical aid savings account, which will no doubt be in the interests of the child. She will also have access to the information pertaining to benefits and refunds of payments to which only a member has. There exists no cogent reason why the applicant should not be assisted in this regard and the future aggravation avoided.

[17] It is, undoubtedly, in the best interests of the child that her medical care be provided without on-going disputes and no reason exists as to why the applicant should be burdened in having to enter into endless correspondence with the respondent to implement

a provision that, as between these two parties, has not, and apparently cannot, be implemented successfully and effectively.

The test for a variation - sufficient reason

[18] Medical expenses are a component of the duty to support a child and thus an element of maintenance, see *Thomson v Thomson* 2010 (3) SA 211 (W). An order for maintenance for a minor may always be varied on sufficient reason to do so having been shown. The applicant must show that there is sufficient reason to amend the maintenance order dated 2 July 2015, *Pieterse v Pieterse* 1965

(4) SA 344 (T) at 345 G-H, *Beukes v Beukes* 1995 4 SA 429 (O) at 432 D - E (sufficient reason is not only constituted by a change in financial circumstances), *Reid v Reid* 1991 1 SA 443 (E), *Dawe v Dawe* 1980 1 SA 141 (Z). In *Havenga v Havenga* 1988 (2) 438 (T) at 445C - F, the court held that a provision in terms whereof either party could approach the Maintenance Court for a variation of the maintenance provisions in a settlement agreement which was made an order of court was a competent provision that entitled either party to do so. In the settlement agreement forming the subject matter of this application, the parties similarly agreed in clause 3.14 that either party may approach a court of competent jurisdiction for a variation of the maintenance provisions.

[19] In my view, sufficient reason exists and a proper case has been made out for the amendment of the court order dated 2 July 2010 relating to the transfer of the child from the respondent's medical aid to the applicant's medical aid.

COSTS

[20] The respondent's objections and failure to comply with the applicant's request to attend at Home Affairs and sign the documents have taken various shapes and forms. Initially, he failed to respond to the applicant's request, the respondent then undertook to do so when next in Roodepoort, he thereafter raised his busy work schedule as the reason for his failure

to have attended to the passport application at Home Affairs and despite being invited to do so on a Saturday (when he had no work obligations), he persisted with his failure to comply with the applicant's request that he sign the documents at Home Affairs.

[21] There is no basis upon which the respondent can reasonably rely when insisting that the passport, once obtained, be held by a third party. The respondent does not in this application make out a case for such pre-condition.

[22] During the divorce proceedings the respondent informed staff at Home Affairs that he feared that the applicant might abduct the children (the child and her half-sister). This fear was addressed by Janine Meyburgh, the attorney who acted on behalf of the parties in the divorce action and who intervened during 2010 when the respondent failed to comply with his duty as guardian to sign the

application form for the renewal of the child's passport.

[23] To date the applicant has not attempted to remove the child from South Africa (with or without the respondent's consent), even temporarily for purposes of holiday or travel, or for any other purpose. The respondent's fear that the applicant will unlawfully remove the child from South Africa without his knowledge or consent, is not based on any fact or circumstance.

[24] The respondent, in his answering affidavit, expresses the fear that the child would travel outside the borders of South Africa 'without his knowledge'. The respondent's expressed fear is, it would appear, irrational as no facts which could support the conclusion that this fear has any foundation, has been placed before this court. The applicant has repeatedly attempted to placate the respondent's fears in this regard by recording in correspondence between the parties that she will obtain the respondent's consent prior to removing the child from South Africa.

[25] The other concern raised by the respondent was that the applicant is a German citizen and the child is thus eligible for a German passport. The respondent does not rely on any action of the applicant, historic or otherwise, which may demonstrate that the applicant has in the past or may in the future, apply for a German passport for the child without his knowledge or consent. She acknowledges that she would require the respondent's co-operation and signature should she wish to apply for a German passport for her. The applicant has at all times approached the respondent for his consent and co-operation in applying for a South African passport for her, including in 2005 (while still married), after the divorce in 2010 as well as during 2015. It is common cause that South Africa is the applicant, and her childrens' home and that she has no intention of leaving South Africa.

[26] The respondent was informed in correspondence that should he persist with his conduct and his failure to comply with the applicant's requests for assistance in making application for a new passport for the child, the applicant would apply to Court for the necessary relief.

- [27] The applicant, since November 2015 to as recent as after the hearing on 30 August 2017 attempted to resolve the issues pertaining to the child's renewed passport. She personally requested and reminded the respondent that his co-operation was required on no less than 11 occasions and through her attorney of record, on no less than 2 occasions prior to launching this application. Subsequent to the respondent delivering his answering affidavit the applicant's attorney of record addressed no less than three letters to the respondent's attorney of record requesting the respondent to provide his co-operation and avoid incurring unnecessary legal costs. All to no avail. The respondent was not prepared to co-operate.
- [28] The respondent was equally obstructive when requested by the applicant for the sake of pragmatism and a smooth and seamless provision of the child's medical requirements and needs, to resign her from his medical aid and assist the applicant to register her on the applicant's medical aid, which is exactly the same as the respondent's medical aid, and with no greater financial obligation for the respondent.
- [29] The applicant requested the respondent's consent and co-operation on 29 July 2016, 5 December 2016 and 7 January 2017. Her attorney similarly addressed various requests to the respondent in this regard, all in order to avoid having to launch this application.
- [30] The respondent was steadfast in his refusal to consent to the variation of the maintenance provisions for the child. His response was that he would not do so without an official amendment i.e. a court order to the effect that the child be removed from his medical aid and registered on the applicant's medical aid. His attorney of record confirmed this attitude.
- [31] The applicant should not be non-suited and neither should she be out of pocket as a consequence of the legal costs of this application. She did all in her power to avoid having to bring this application and avoid the legal costs which flow from legal proceedings.
- [32] The respondent was again afforded an opportunity by Wepener J to reconsider his position on 30 August 2017. The operation of the order that was granted on 30 August 2017 was suspended until 1 September 2017 and pending a possible resolution between the parties of the issues pertaining to not only the child's passport but also her medical aid. The respondent did not avail himself of the opportunity to resolve the issues and finalise the application. He did not even approach the applicant or her legal representatives to discuss a possible resolution of the remaining issues in this application. It is thus solely as a consequence of the respondent's intransigent attitude that the application was again enrolled and substantial costs were again incurred.
- [33] The applicant moved for an order in terms whereof the respondent pay the costs of the application, including the costs of senior counsel as between attorney and client. Proper notice of the intention to move for an order for such punitive costs has been given to the respondent. In my view, such an order would be appropriate having regard to the facts highlighted herein.

ORDER

[34] I accordingly grant the following order:

34.1. The settlement agreement entered into between the parties and dated 17 May 2010, which was made an order of Court on 20 July 2010 under case number 2010/17126 is amended by deleting clauses 3.11 and 3.12 in their entirety and replacing them with the following clause 3.11:

‘The child shall be registered as a dependant on the plaintiff’s medical aid scheme or fund, at the defendant’s cost. The defendant shall pay the monthly amount due in respect of the child’s membership of the plaintiff’s medical aid scheme or fund, which amount shall be paid to the plaintiff by the defendant effecting transfer into the plaintiff’s nominated bank account on or before the 1st day of each and every month. The defendant shall sign all necessary bank documents to establish a debit order so that such amount is transferred monthly by way of debit order directly into the plaintiff’s nominated bank account. The defendant shall be

entitled to access the medical aid records pertaining to the child of the medical aid in respect of which the child is a registered

dependent member’

34.2. The respondent is to sign all documents and to take all steps required when called upon to do so to facilitate the removal of the child from his medical aid scheme, being Discovery Medical Scheme with membership number 079068450 and to enable the applicant to register the child as a dependent on her medical aid scheme, Discovery Medical Scheme, with membership number 341667282.

34.3. The respondent is to pay the costs of the applicant as between attorney and client including the costs incurred in respect of the employment of senior counsel.

I OPPERMAN

Judge of the High Court

Gauteng Division, Johannesburg

Heard: 5 December 2017

Judgment

delivered: 12 December 2017

Appearances:

For Applicant: Adv A de Wet SC

Instructed by: RMB Wands Attorneys

For Respondent: Adv van der Merwe

Instructed by: Kerremans Attorneys

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