

SOUTH AFRICA / JUDGMENT

I.B.F v A.D.K and Another (015928/2023) [2024] ZAGPPHC 296 (22 March 2024)

[2024] ZAGPPHC 296**COURT**

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

015928/2023

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**IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA**

Case number:

2023-015928

Date of hearing: 18
March 2024**Date delivered:**

22 March 2024

1. Reportable: No
2. Of interest to
other judges: No
3. Revised
22
March 2024**In the matter between:**IBF Applicant
and
ADK
First Respondent
THE OFFICE OF THE
FAMILY ADVOCATE
Second Respondent
IN ITS CAPACITY AS
CENTRAL
AUTHORITY IN TERMS OF
THE
HAGUE CONVENTION ON
THE CNIL ASPECTS
OF INTERNATIONAL CHILD

ABDUCTION

JUDGMENT

SWANEPOEL J:

[1] This judgment relates to three issues: Firstly, I intend to provide reasons for the costs order that I shall make in respect of the first respondent's urgent application of 15 September 2023. Secondly, I shall give reasons for the dismissal of the first respondent's postponement application, in which the first respondent sought to postpone the final determination of the rule nisi which I granted on 31 August 2023. Finally, I intend to give reasons for the confirmation of the rule nisi. The history of the matter is fully canvassed in my judgment of 31 August 2023, and I will not repeat the contents thereof.

THE COSTS OF 15 SEPTEMBER 2023

- [2] On 30 August 2023 the first respondent's attorney wrote to the applicant's attorney. He indicated that the first respondent wished to take the children on holiday to Spain from 29 September 2023 to 10 October 2023. These dates included two days of schooling. On 5 September 2023 the applicant's attorney replied, seeking details of the envisaged trip, including an itinerary, flight times and dates.
- [3] On 6 September 2023 the first respondent's attorney replied to the applicant in a highly aggressive manner. He alleged that it was impossible to provide an itinerary until the applicant had agreed to allow the children to accompany the first respondent. This reasoning is off course spurious, because there was nothing preventing the first respondent from providing a provisional itinerary, subject to confirmation once the applicant had consented, and all air tickets had been purchased. On 12 September 2023 the first respondent's attorney sought the assistance of Adv Maree in facilitating the holiday arrangements. When Adv Maree had not responded by the following day, the first respondent launched the urgent application giving approximately 48 hours' notice of the application, and affording the applicant a day to respond.
- [4] When the matter came before me, I was told that the first respondent considered the application to be moot. I removed the application from the roll and undertook to consider the costs.
- [5] In my view the urgent application was a clear abuse of court processes. The application was launched on the most urgent of timelines, some eight days after the applicant had requested details of the holiday. Urgency was not specifically dealt with as is required by the practice directives, nor do I believe that the application was urgent at all. Furthermore, the request by the applicant for an itinerary was reasonable, and had the first respondent acted in a more conciliatory manner, the application may not have been necessary at all. I intend to express my displeasure with the first respondent's conduct by making a punitive costs order.

THE POSTPONEMENT APPLICATION

- [6] On 11 March 2024 the first respondent launched an application for the postponement of the main application and the counter-application. The first applicant also sought extensive interim relief, including, inter alia, an investigation by the Office of the Family Advocate, extensive relief in respect of the care of the minor children, an order in respect of holiday contact with the minor children, and the appointment of a parental coordinator who would be empowered to appoint a therapist for the children.
- [7] The basis for the postponement application was the allegation that the applicant had continued to alienate the children from the first respondent. The first respondent wished to "prevent the further abuse of my children... as well as to restore my relationship with my children." To this end the first respondent wanted a different parental coordinator and therapist in place.
- [8] In my view the postponement application should fail for a number of reasons. Firstly, the first respondent has provided no evidence of alienation, save for his own conjecture. He has, furthermore, not demonstrated how the proposed way forward would benefit the children. The parental coordinator, Adv Maree, and the therapist, Ms Linstrom are familiar with the children and their issues and have gained their trust. The first respondent's proposed order seems intended to benefit the first respondent's purposes alone, and not the children. I also set out below that I believe that it is in the children's best interests that the matter be settled once and for all. For those reasons I intend to dismiss the postponement application.

CONFIRMATION OF THE RULE NISI

- [9] The first respondent referred to a number of incidents that had occurred during and after he had had holiday contact with the children in December 2023. Early on in the holiday M tried to break open the door to the house in which they resided in Hartenbos. The first respondent provided a partial transcript of his conversation with M in which she spoke to him in the most abominable manner. M expressed her hatred of the first applicant during very distressing

conversation. M's conduct resulted in the first respondent giving her a hiding. M then ran away, only to be found an hour later. The assault (corporal punishment is assault) on M was so distressing that a neighbour of the first respondent called the applicant and told her that the first respondent was busy beating the child to death. The first respondent denies the assault.

- [10] There can be no doubt that the relationship between M and the first respondent is broken, and in urgent need of restoration. First respondent's relationship with his son J is only marginally better.

[11] The first applicant also provided a transcript of his conversation with the applicant. It is quite clear that the relationship between them is acrimonious, to say the least. The first respondent even accuses the applicant of sabotaging the children's cellular phones, and of instructing

the children how to sabotage their phones, in order to frustrate his contact with the children.

[12] The applicant denies any wrongdoing. She says that M tried to run away after the first respondent had given her a hiding. She says that the children use foul language at times, which she attributes to the manner in which the applicant and the first respondent had spoken to one another previously, whilst they were still living together. She says that the first respondent has cursed the children at times, and, she says, this behaviour that should be dealt with in therapy.

[13] The report of Adv Maree is insightful. He says that after the December holidays more than thirteen tracking devices were found in the children's belongings. According to the children the first respondent had taken their purses and suitcases and had travelled into town. Presumably the first respondent then installed the tracking devices. The first respondent's attempts to keep track of the children had resulted in them feeling resentful and mistrustful towards the first respondent.

[14] Evidently, the children enjoyed the December holiday, at least to an extent, although the incident with M marred their enjoyment, as did the presence of the first respondent's girlfriend. However, the fact that the first respondent has gone to such great lengths to keep track of the children is of great concern to the children.

[15] Adv. Maree's sense is that the first respondent wishes to remove him as parental coordinator because he does not pander to the first respondent's wishes. He says that he has been privy to some of the first respondent's telephonic conversations with the first respondent, and that they are the normal conversations that one can expect between a parent and a child. He also says that the first respondent's contention that he has no access to the children's sporting activities is untrue, as he was present when the first respondent was added to a sports Whatsapp group. In essence, Adv Maree believes that the first respondent wants to have his way, immaterial of anyone else's views.

[16] In my view the first respondent harbours a deep-seated resentment, and experiences frustration, at the fact that the children now reside in South Africa. He has great antipathy towards the applicant and also towards the country, which he regards as excessively dangerous. His resentment seems to express itself in his aggressive behaviour towards the applicant, the children and Adv Maree. On his own version as expressed to Adv Maree, the first respondent has "ways and means" of tracking the applicant's movements, even in Mauritius, and also that of the children. He wishes, I believe, both Adv Maree and Ms Linstrom to be removed from the case so that he can appoint a team that is more sympathetic towards his wishes. The first respondent even went as far as obtaining the services of a social worker to assist him with the children without the knowledge of Adv

Maree, and without applicant's consent.

- [17] There is little doubt that M's behaviour on holiday caused the first respondent to assault her, causing her to run away and only to be found on the beach some while later. However, a parent must show restraint and the first respondent cannot blame his own uncontrolled conduct on the child.
- [18] I am concerned that the children discuss matters concerning their parents' financial affairs, matters of which they should not have any knowledge. I have previously expressed my concern that the children are obviously being exposed to discussions regarding the disputes between their parents, that they should not be exposed to. Such disclosures can only come from the applicant or her parents. However, although that may have a peripheral effect on the children's views on their father, it seems to me that the first respondent is to a large extent the author of his own misfortune as far as his relationship with the children is concerned. His aggressive approach is clearly not in the children's best interests, and ultimately it impinges on his relationship with the children.
- [19] Overall, the children seem to be settled in their current home and school, and it is, in my view, in their best interests to have certainty as to their circumstances. For that reason, I intend to confirm the rule nisi. However, going forward, there should be an assessment of all the parties, to establish what interventions may be necessary to assist

the parties and the children to stabilize their relationships.

- [20] I have been asked to confirm the maintenance order handed down in St Maarten, and to make a costs order in favour of the applicant relating to certain travel costs. Those issue have not been fully canvassed in any of the papers, and I decline to do so.

COSTS

- [21] It is more often than not the practice not to make costs orders in family matters such as these. However, the egregious conduct of the first
- respondent merits, in my view, a punitive costs order. The first respondent has brought two meritless urgent applications. The tone of his attorney's letters has been unceasingly hostile, contrary to the intentions of the Children's Act, 2005 which requires parties to take a reconciliatory approach to matters involving children.
- [22] The first respondent has had a near obsessive concern that the children's passports are kept by the applicant, and he launched a campaign over a period of time attempting to gain possession of the passports. He did so by claiming, untruthfully, that he needed the passports for the children to travel by air in South Africa. He has now brought an application for a postponement at the last minute, again without merit.
- [23] The first respondent has not made payment of any of the maintenance ordered by the Courts in St Maarten. He has refused to pay Adv. Maree's account, despite my order that he should pay 50% of those costs. By 12 March 2024 the first respondent had not paid Ms

Linstrom. I am also told that the first respondent has caused criminal charges to be brought against the applicant, and that he has attached her bank accounts, causing her severe financial distress. The first respondent has shown no interest in implementing the rule nisi in an amicable manner that would benefit the best interests of the children, and he opposes its confirmation.

[24] All of the aforesaid, added to the first respondent's unacceptable behaviour in tracking the children and his behaviour towards M, lead me to believe that the first respondent has no interest in dealing with the matter in a conciliatory manner. He refuses to consider any views other than his own. In the colloquial, it is his way or the highway.

[25] In the circumstances I intend to confirm the rule nisi, albeit in slightly different terms.

[26] I note that I failed to deal with the first respondent's counter- application in my judgment of 31 August 2023. It follows that having granted the applicant's application, the counter- application should have been formally dismissed. I shall record as much in this order.

[27] I make the following order:

(27.1) The first respondent shall pay the costs of the urgent application of 15 September 2023 on the attorney/client scale, including the costs of two counsel where so employed.

(27.2) The first respondent's application for a postponement is dismissed with costs on an attorney/client scale, including the costs of two counsel where so employed.

(27.3) Paragraphs 1, 2, 3, 4, 5, 7, 9, and 10 of the rule nisi dated 31 August 2023 is made final.

(27.4) When the minor children are in the first respondent's care, the applicant may exercise the same telephonic contact as that enjoyed by the first respondent in terms of this order.

(27.5) The minor children shall undergo therapy with Ms.Elsie Lindstrom and the first respondent shall effect payment of her account within 5 days of receipt of an invoice. In the event that the applicant makes payment of such costs, the first respondent shall reimburse the applicant within 5 days of receipt of a demand for payment.

(27.6) The first respondent shall pay the costs of the parental coordinator, which costs shall be paid within 5 days of receipt of an invoice. In the event that the applicant makes payment of such costs, the first respondent shall reimburse the applicant within 5 days of receipt of a demand for payment.

(27.7) The parental coordinator shall within 10 days hereof appoint a registered clinical psychologist who shall assess the parties and the minor children, and report back to this Court with a recommendation regarding the children's best interests relating to contact between the first respondent and the minor children, and relating to possible parental alienation.

(27.8) The parties shall give their full cooperation to the clinical psychologist during the assessment process.

(27.9) The first respondent shall be solely Hable for payment of the costs of the clinical assessment, which costs shall be paid within 5 days of receipt of an invoice. In the event that the applicant makes payment of such costs, the first respondent shall reimburse the applicant within 5 days of receipt of a demand for payment.

(27.10) The first respondent shall pay the costs of the application subsequent to 31 August 2023 on an attorney/client scale, including the costs of two counsel where so employed.

(27.11) The counter-application dated 27 February 2023 is dismissed.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

COUNSEL FOR APPLICANT:

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Adv B Bergentuin

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Arthur Channon Attorneys

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ATTORNEYS FOR FIRST RESPONDENT: Hartzenberg Inc

DATE HEARD:

18 March 2024

DATE OF

JUDGMENT:

22 March 2024

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