

SOUTH AFRICA / JUDGMENT

JJW v NVW (2019/26732) [2022] ZAGPJHC 808 (18 October 2022)

[2022] ZAGPJHC 808**COURT**

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2019/26732

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****LOCAL DIVISION, JOHANNESBURG)****Case No. 2019/26732****REPORTABLE: NO****OF INTEREST TO OTHER****JUDGES: NO****REVISED.****18 October 2022****In**

the matter between:

JJW
Applicant
and
NVW
Respondent**JUDGMENT****WILSON AJ:**

1 The applicant, Mr. VW, is in the midst of an acrimonious divorce from the respondent, Mrs. VW. On 29 November 2019, my brother Budlender AJ endorsed an interim order, to which the parties agreed, governing their rights and obligations regarding spousal maintenance,

together with custody of, and contact with, the parties' child, SA, pending the outcome of the divorce action.

2 Mr. VW now seeks to vary that order in terms of Rule 43 (6). My power to vary the 29 November 2019 is triggered only by a material

change in the parties' circumstances. The questions are whether any material changes have been established, and, if they have, what follows from those changes.

3 Mrs. VW makes far-reaching allegations of physical, sexual and emotional abuse against Mr. VW. She says that she has suffered severe

psychological harm as a result of Mr. VW's abusive conduct. Mr. VW denies these allegations, and points to the fact that he has been acquitted of twenty or so assault charges pressed by Mrs. VW, after criminal proceedings on those charges were terminated at the close of the State's case.

4 It is not necessary for me to resolve these allegations. But the fact that they have been made – and that they are not obviously vexatious – provides an important part of the context in which I must decide this application.

Contact between Mrs. VW and SA

5 The first variation Mr. VW seeks is in the contact regime between Mrs. VW and SA envisaged in the 29 November 2019 order.

6 The 29 November 2019 order is a complex and imperfect compromise between two people facing the end of their marriage, each carrying a sense of grievance and betrayal toward the other. It was particularly ill-suited to its purpose. The chief defect in the order

was its failure to set out an adequate framework for the arrangements to be made to preserve each party's relationship with SA. The order awarded primary custody to Mr. VW, and some very limited and temporary contact rights to Mrs. VW. A longer-term contact regime was to be put in place once a parenting co-ordination team had decided what contact Mrs. VW should have with SA, having regard to Mrs. VW's progress with a course of psychotherapy to which she agreed. Mrs. VW strenuously asserts that the psychotherapy has been rendered necessary by Mr. VW's treatment of her during the marriage.

7 Paragraph 10.1 of the 29 November 2019 order states that the parenting co-ordination team would remain in place for six months or

“for such longer or shorter period as agreed to by the parties in writing”. This is contradicted by paragraph 10.3 of the order, which states that the parenting co-ordination team “shall have the powers as per Annexure “A””. Annexure “A” was not placed before me until after I had heard argument, but paragraph 1 of the annexure states that the parenting co-ordination team will continue to act until it resigns, or is dismissed by agreement between the parties, or by order of this court.

8 Nonetheless, the intention of the order, and the agreement between the parties underlying it, appears to have been that the parenting co-ordination team would act for an initial period of six months, and that any variation in its term of office would have to be

agreed between the parties.

9 That being so, I would have expected the parenting co-ordination team either to have stipulated an ongoing contact regime by the end of the initial six-month period, or to have had its initial term extended until it had done so.

10 That was not to be. The parties did not agree to extend the initial period, and there is no sign anywhere on the papers that the

parenting co-ordination team had by that time determined a contact regime capable of facilitating an ongoing relationship between Mrs. VW and SA.

11 Without such a regime, the 29 November 2019 order leaves SA's contact with Mrs. VW entirely to Mr. VW. That is the only reasonable

interpretation of paragraph 4 of the order, which states that it is Mr. VW who will "make all major decisions regarding [SA's]

medical, educational, emotional and social needs" albeit "after having given due consideration to" Mrs. VW's wishes.

12 All of this made it virtually inevitable that the 29 November 2019 order would fail to achieve its purpose: the appropriate regulation of Mrs. VW's ongoing contact with SA. The parenting co-ordination team's ability to complete its work after its initial appointment period was dependent entirely on Mr. and Mrs. VW being able to engage and agree upon it doing so. Given the context in which the marriage broke down, that was plainly unrealistic. Mrs. VW alleges that Mr. VW is serially abusive. Mr. VW vehemently denies this. Both parties agree that Mrs. VW is in a psychologically fragile state. The prospects of ongoing co-operation in these circumstances were obviously slim.

13 The in-person contact arrangement provided for in the 29 November 2019 order completely collapsed on 9 October 2020, when Mr. VW terminated all in-person contact between Mrs. VW and SA. Mr. VW says that on that day Mrs. VW drove a car into her sister's

ex-husband, causing unspecified injuries to him, and what are called "minor" injuries to his father.

14 It is not clear from the papers whether the injuries were caused intentionally. Neither Mr. VW nor SA were present at the time. Mr. VW says that Mrs. VW's conduct was at the very least reckless, and that this made it dangerous for Mrs. VW to have any

further in-person contact with SA.

15 I do not think that case has been sustained on the papers. However, it is inarguable that there was nothing in the 29 November 2019 order to prevent Mr. VW from forming the subjective view that in-person contact with Mrs. VW would likely place SA in danger, and

from terminating Mrs. VW's in-person contact with SA after the 9 October 2020 incident. That is what he did.

16 The net result is that there has been almost no in-person contact between SA and Mrs. VW since October 2020.

17 Mr. VW now seeks to vary the 29 November 2019 order to provide for some limited and supervised contact between SA and Mrs. VW. He

relies on the 9 October 2020 incident to demonstrate the changed circumstances necessary to justify such a variation.

18 In my view, however, the 9 October 2020 incident is at best tangentially relevant. What counts more is the termination of in-person contact between Mrs. VW and SA that took place afterward. There is nothing in the 29 November 2019 order that suggests that there was ever any intention to completely extinguish Mrs. VW's contact with SA, but that is what has happened. The 29 November 2019 order has been overtaken by events.

19 In other words, circumstances have changed because the 29 November 2019 order has failed to achieve its purpose.

20 Mr. VW seeks the deletion of paragraphs 5 to 8 of the 19 November 2019, but much of that relief seems unnecessary. As Ms. De Wet pointed out during argument, those paragraphs deal almost exclusively with the limited interim contact to take place between Mrs. VW and SA during December 2019 and mid-January 2020. Those provisions of the order are now spent.

21 Only two parts of paragraphs 5 to 8 of the 29 November 2019 order could have had any ongoing effect. They are paragraph 5.3, which requires the parenting co-ordination team to specify Mrs. VW's contact with SA, and paragraph 6, which sets out that Mrs. VW has the right to be notified of, and to attend, SA's school functions.

22 Paragraph 5.3 can no longer apply, because the parenting co-ordination team is no longer in place. It should obviously be deleted, but only to make way for a new contact regime. For the same reason, paragraphs 8 to 12 of the order should also be deleted, because they stand over from an in-person contact regime that is no longer applicable.

23 There is nothing on the papers to suggest that paragraph 6 should be deleted. Mrs. VW's attendance at school events is inherently contact of a supervised nature, and if there were ever any real risk to SA from it, the school would always be entitled to take

the necessary steps to address that risk.

24 Beyond contact at school events, the regime Mr. VW now envisages includes daily video calls lasting half an hour, and an hour a week in-person contact supervised by a social worker or psychologist agreed between the parties. Failing agreement, Mr. VW asks to be empowered to nominate the social worker or psychologist.

25 In the circumstances of this case, I see no inherent difficulty with this arrangement as a starting point. But it became clear during argument that agreement on the identity of the supervising professional may well not be reached, and that Mrs. VW will likely refuse to participate in any in-person contact under the supervision of a professional chosen solely by Mr. VW. That would result in the in-person contact regime collapsing once again.

26 Accordingly, I intend to order contact of the nature of Mr. VW asks for. But I will not leave the identity of the supervising professional entirely to the parties. Nor will I order Mrs. VW to pay for the arrangement, as Mr. VW suggests.

27 In addition, I see no reason why more expanded contact ought not to be possible. Such contact would clearly be in SA's best

interests, provided that the supervising professional thinks that it is wise. My order will make provision for a process to determine

whether, in the fullness of time, more expanded contact ought to be allowed, at least while the divorce proceedings resolve themselves.

Spousal Maintenance

28 Mr. VW accepts that, at the time the 29 November 2019 was made, Mrs. VW was in need of spousal maintenance. The order provided for Mr. VW to pay Mrs. VW R36 000 per month in spousal maintenance, pending the resolution of the divorce proceedings.

29 Mr. VW says this has now changed because Mrs. VW is gainfully employed as "a masseuse and upmarket escort". He alleges,

based on online advertisements – that Mrs. VW does not really dispute are for her services – that Mrs. VW earns between

R80 000 and R150 000 per month. Mr. VW says that Mrs. VW has been earning these sums since 9 June 2021. He seeks an order

ending his maintenance payments. He also seeks an order that would have the effect of declaring that Mrs. VW was not entitled to any payments she received after 9 June 2021.

30 Mr. VW's papers are weighed down by unfortunate stereotypes of sex work and sex workers. He commences from the premise that being a masseuse and escort necessarily implies sexual contact (it does not, although the websites on which Mrs. VW is alleged to have advertised do strongly imply that sexual contact is likely). He then goes on to suggest that sex work is necessarily marred by exposure to violence and drugs. Again, those are stereotypes, not facts.

31 Ms. De Wet wisely declined to rely on any of these allegations. She argued only that Mr. VW's case – that Mrs. VW is no longer in need of maintenance – is substantially undisputed.

32 Mr. van der Merwe criticised Mr. VW's case as based entirely on speculation, requiring no more than the barest of denials. But that accounts neither for the true extent of Mr. VW's case, nor Mrs. VW's response to it. Mr. VW says that he has

identified Mrs. VW's pictures on the websites on which she is alleged to advertise. His calculations are based on the rates that appear on those websites. He has employed a firm of private investigators to confirm them. He says that Mrs. VW has incorporated

a limited company as a vehicle for her business. Mr. VW's estimate of Mrs. VW's present income is accordingly not a bare allegation. It is an inference from substantially undisputed facts.

33 Mrs. VW's answering affidavit is sparse. However, Mrs. VW admits that she works as a masseuse and escort. Mr. VW's detailed allegations relating to the websites on which she advertises and her overall rates and income are met with bare denials. Mrs. VW

says no more than she earns "some extra money", amounting to "a few extra rands".

34 Accordingly, the probabilities are that Mrs. VW is earning some money now, and that her need for maintenance is attenuated.

35 Nonetheless, given the inferential nature of Mr. VW's case, I am not satisfied on the evidence before me of the extent of Mrs. VW's earnings. In those circumstances, I am not prepared to finally relieve Mr. VW of his maintenance obligations without a better idea of the extent to which they should be curtailed.

36 Mrs. VW's actual earnings are peculiarly within her knowledge. She has not disclosed them. Ordinarily, that would result in an order in Mr. VW's favour. In this case, however, there are SA's interests to consider. It cannot be in SA's

interests to subject Mrs. VW to undue hardship or destitution. For that reason, I will suspend Mr. VW's maintenance contributions

until Mrs. VW has been given a further opportunity to make the financial disclosures normally required of parties in Rule 43 matters, and I have been placed in a position to make an order setting out what further maintenance, if any, is required.

37 I am not empowered to relieve Mr. VW of the obligation to pay spousal maintenance retrospectively. Paragraph 17.2 of the 19 November 2019 order requires Mr. VW to pay Mrs. VW R36 000 on or before the "first banking day of every month" from 1 January

2020. Once the due dates for payment of maintenance in terms of the order passed, the right to those payments vested in Mrs. VW.

Courts will seldom make orders that interfere with vested rights, and there is no basis on which I can do so in this case.

38 Ms. De Wet characterised Mr. VW's payments to Mrs. VW after she accessed gainful employment as a form of unjustified enrichment, but that argument was not advanced with any conviction. Even if it were, I would have some difficulty in accepting it. Unjustified enrichment is enrichment without legal cause. But the legal cause for the payments already made in terms of the 29 November 2019 order is plainly the order itself. The mere fact that the maintenance may no longer have been objectively required did not deprive the court order of its legal effect.

39 Finally, Mr. VW seeks the return of a Subaru motor vehicle made available for Mrs. VW's use in terms of paragraph 18 of the 29 November 2019 order. I am not prepared to accede to this request until I have a clearer idea of Mrs. VW's financial situation. For now, I will make no order on that part of Mr. VW's application.

Costs

40 Mr. VW asks for his costs on the scale as between attorney and client, but no case has been made out for that relief, and Ms. De Wet did not pursue it with any vigour. Each party paid their own costs in the initial Rule 43 application. I see no reason to depart from that arrangement.

Order

41 For all these reasons, I make the following order –

41.1 Paragraph 17.2 of the order of Budlender AJ, dated 29 November 2019 ("the Rule 43 order") is suspended.

41.2 The respondent is directed, if so advised, to make the financial disclosures of the nature and in the form required by this Court in *E v E* 2019 (5) SA 566 (GJ) ("the financial disclosures"), within one month of the date of this order.

41.3 If the financial disclosures are not made within one month of the date of this order, or within such further period as the court may allow, paragraph 17.2 of the Rule 43 order is deleted.

41.4 If the financial disclosures are timeously made, paragraph 17.2 of the Rule 43 shall remain suspended until this court orders otherwise.

41.5 Paragraphs 5.3 and paragraphs 8 to 12 of the Rule 43 order are deleted.

41.6 The respondent is forthwith entitled to –

41.6.1 Virtual contact with SA by video call daily between 18h00 and 18h30, on days during which the respondent does not also exercise in-person contact.

41.6.2 In-person contact with SA once a week for one hour at the rooms of a suitably qualified and experienced social worker or psychologist. The identity of the social worker or psychologist will be agreed between the parties alternatively determined by Wilson AJ on written application made by either party on notice to the other. A written application made in terms of this paragraph must include the names and qualifications of at least three professionals, together with the parties' submissions on their suitability.

41.6.3 The costs of the supervising professional will be borne by the applicant unless and until this court orders otherwise.

41.6.4 The supervising professional will submit a report to Wilson AJ, not more than three months from their appointment, setting out the basis, if any, on which Mrs. VW's contact with SA should be amended.

41.7 Wilson AJ will supervise the interim contact and maintenance regime in terms of Rule 43 until the main divorce action reaches finality.

41.8 Each party will pay their own costs.

S D J WILSON

Acting Judge of the High Court

HEARD ON:

12 October 2022

DECIDED ON:

18 October 2022

For the Applicant:

A A De Wet SC

Instructed by Moumakoe Clay Inc

For the Respondents:

LK van der Merwe

Instructed by Malan Kruger Inc

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Prepared on 11 October 2026 · Esheria