

SOUTH AFRICA / JUDGMENT

J.M v T.K.M (13405/21) [2021] ZAGPPHC 663 (7 October 2021)

[2021] ZAGPPHC 663

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi

CASE / FILE NUMBER

13405/21

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO THER JUDGES: NO

(3)

REVISED

7/10/2021

CASE

NUMBER: 13405/21

In

the matter between: J[....]
M[....]
APPLICANT
And
T[....]
K[....] M[....]
RESPONDENT
In
re:-
T[....]
K[....]
M[....]
APPLICANT
J[....]
M[....]
RESPONDENT

JUDGMENT

TLHAPI J

[1] On 28 April 2021 the applicant gave notice of an application that the order granted by Davis Jon 31 March 2021 be re-considered in terms of Rule 6(12)(c) of the Rules of Court and in which the following relief is sought:

"1. Directing that this application for reconsideration is heard as one of urgency in terms of Rule 6(12)(c) and condoning the applicant's con-compliance pertaining to time limits, forms and service provided for under this rule;

2. Setting aside the court order granted against the applicant on 31 March 2021;

3. Ordering the return of the minor children back to the Republic of South Africa within 5 (five) days of the order and directing the respondent to pay costs of this application on an attorney and own client scale.

The application was served on the respondent by email dated 28 April 2021, setting the application down for hearing 4 May 2021. Another amended notice was issued and it was served by email on 4 May 2021, calling upon the respondent to file her opposing papers no later than 6 May 2021 and, setting the matter down for hearing on 11 May 2021. A letter of demand with attachments of 5 May 2021, for the safe return of the minor children was also addressed by Messrs Solly Patel Hamir and Lawrence to the National Legal Aid Clinic for Women in Lusaka, Zambia. Legal Aid South Africa through attorneys appointed by them were also served with the application. The applicant's attorneys were already informed that they no longer represent the respondent as she had left the country with her minor children. Then National Legal Aid Clinic for Women in Lusaka also advised that they no longer represented the respondent and they returned the documents previously attached and advised that the respondent be served personally.

[2] The respondent appeared before Davis J in an urgent application on 31 March 2021 and obtained the following order:

"1. The rules pertaining to the form of this application and time periods for service is dispensed with and the matter is heard as one of urgency;

2. The respondent is ordered, immediately upon service on him of this order, to to hand over the passports of the minor children, M[....] M[....] M[....], a a boy born on 10 February 2009; M[....] J[....] M[....], a girl born on 21 January 2011 and Marilyn, a girl born on 7 April 2004, to the applicant or the person serving this order and to sign all necessary documents consenting that the minor children mentioned above may accompany the applicant to Zambia;
3. In the event that the respondent should fail or refuse to sign all necessary consent documentations referred to in paragraph 2 above, this court grants permission as contemplated in section 18(5) of the Children's Act, Act 38 of 2005, that the minor children mentioned in paragraph 2 above may accompany the applicant herein to Zambia without the consent of the Respondent and should any further documents be necessary for this, any sheriff of this court is hereby authorised to sign such documents."

[3] In *Ultimate Sports Nutrition (Pty) Ltd v Jurie Bezuidenhout* (62515/20) 8 December 2020 (unreported judgment of Mabuse J) the court emphasized the importance of first establishing what an application

in terms of Rule(12)(c) should entail. In several cases considered it seemed there were different views of what a reconsideration

application should entail. In *Rhino Hotel Resort (Pty)Ltd and others* 2009

(1) SA 1180 (W) at 1182 8-E Joffe J stated:

"In terms of Rule 6(12)(c) of the uniform rules of court a party against whom an order was granted in his absence in an urgent application

made by a notice set the matter down for reconsideration of the order the rule envisages a redetermination of the matter. The court that entertained the application in the absence of the respondent does not have the benefit and advantage of argument from the respondent.

Accordingly, when the application is re-enrolled by the respondent for consideration it is a re-determination with the benefit of argument from the respondent where Rule 6(12)(c) is utilized the original application is reconsidered

on its own without reference to anything else."

[4] I align myself with those decisions which state that of importance was to have before the court the version of both parties, albeit that in this matter the respondent has not replied. However, her papers that served before Davis J are on case lines and have also been annexed as annexures to the applicant's founding affidavit; *ISDN Solutions (Pty) Ltd v CS D N Solutions CC and Others* 1996

(4) SA 484 (W); *Lourenco and Others v Fereia (Pty) Ltd and others* (N01) 1998 3 SA 281 (T) at 290 A-H. In *IS D N Solutions supra* Farber A J stated at 487D:

"Something needs to be said about the procedure. Although no hard and fast rule need to be laid down, it seems desirable that a party seeking to invoke the Rule ought in an affidavit to detail the form of reconsideration required and the circumstances upon which it is based".

[5] It is trite that section 28 of the Constitution of the Republic of South Africa, 1996 and the Children's Act 38 of 2005 entrench the paramount importance of the rights of children in all matters that concern them, in matters concerning their care, protection and their well-being. It was contended that the minor children were uprooted without arrangements being made by both parents for their life, schooling and livelihood.

[6] The application before Davis J was launched on 12 March 2021 and the applicant was called upon to file his opposing papers by 16 March 2021. The matter had first been enrolled to be heard of 23 March then, he was informed that it would be heard on 30 March and the matter was set down for 30 March 2021 in the urgent court. The applicant contended that it had always been his intention to oppose the removal of the minor children to Zambia. Such intention had been communicated to the respondent's attorneys.

[7] As he had intended to travel to Zambia on 28 March 2021 to renew his visa and those of his children, he approached the registrar to arrange a postponement of the hearing. He was informed that the matter had not been enrolled for the 30th March. He was assisted to track movement of the application on case lines. He was later informed by the registrar and respondent's

attorneys that the matter was heard on 31 March 2021 and an order obtained. The respondent removed the children, took them out of school and travelled with them to her parental home in Zambia. The respondent's family confirmed that she had arrived with the children, The headmistress at Lynwood Primary School where the minor children were attending was not aware that they had left the country.

[8] The applicant attempted to serve the respondent in Zambia with the papers in this application. In my view, it is unfortunate that Legal Aid South Africa could not be part of the re-consideration proceedings on grounds that the respondent had left the country with the children. It would have benefitted this hearing to have insight into what occurred before Davis J.

BACKGROUND

- [9] The respondent followed the applicant to South Africa with their two older children, and from the birth certificate, the youngest child was born in South Africa. The respondent contended that the applicant was on a working diplomatic visa employed by the African Institute Zambia Embassy. The respondent was a pharmacist by profession and also had a further qualification in Human Sciences. She was unemployed when the application was launched. Previous to that, she had started her own business and used to be awarded tenders from the United Nations and Non- Governmental Organizations, which work dried up as a result of Covid 19 restrictions.
- [10] It is common cause that the parties were divorced on 15 June 2018 and that in terms of the settlement agreement the applicant and respondent retained full co- parental rights and responsibilities in terms of section 18(2) (a) of the Children's Act 38 of 2005 and, that in the best interests of the minor children care and permanent residence was awarded to the respondent. The applicant had access to the children every two weeks and he was responsible for contributing R2500 towards maintenance of the children and, in terms of the settlement agreement the respondent was entitled to an amount for maintenance until she was employed.
- [11] According to the respondent, the applicant and respondent had initially agreed to both return to Zambia with the children at the end of 2020. One of the pertinent issues herein was, that he was in possession of the passports of the minor children because they fell under his visa and whenever they had to renew them he would make copies and forward to Zambia for renewal. The respondent annexed emails she exchanged with the applicant on their discussions about their relocation, or hers with the minor children. The plan was for her to go ahead alone and he would follow with the children. She left the country and travelled by bus on 27 December 2020 so as to take lots of luggage. She had to return to fetch the children after realizing that the applicant was not following her to Zambia as promised. He had changed his mind.
- [12] On her return in January the applicant denied her access to them. She did not know where he lived with the children. She wanted them back into her care and she had to approach the Children's Court. She obtained a court order dated 26 January
2021. The police could not serve the order on him and he refused to advise her of his residential address. He informed the police that he had travelled with the children to Zambia to look for schools. On another occasion he told the police that the children's passports were in Zambia for renewal. She went to the Zambian Embassy to enquire and she was informed that there were no applications for the renewal of the children's passports
- [13] At the time the children were still on holiday as schools opened on 15 February 2021. A further attempt by the social worker to negotiate for him to hand over the children's passport to her failed. It was only when the schools opened on 16 February 2021 that she was able to see the children at the school premises. She managed to get hold of her son as he had

left the school premises via a different exit. She found the applicant waiting for her son and he was in the presence of her two daughters who had also exited the school premises from a different exit point. The applicant refused to release them and drove off while she remained behind with her son. The respondent brought her daughters in the evening and they were crying. They informed her that they were not aware that she had returned from Zambia. Between January 2021 and March 2021 the respondent had been to the Children's Court, they had consultations with their social worker assigned to them and there was one also at the school. There was a session of mediation with a family advocate and discussions did not end well. The social worker assigned to them and the social worker at the school tried to engage the applicant on the issue of the passports to no avail.

- [14] As the applicant had cancelled the lease where she resided with the children in December 2020 the landlord wanted her to sign a new lease in her name and she could not as she was unemployed. She was given notice to vacate the apartment by 31 March 2021 and as at that time she had nowhere to live with the children. She relied on her family in Zambia for assistance.
- [15] Her plans on returning to Zambia are to register with the Department of Health for renewal of her licence to work as a pharmacist. She managed to find a school for her children. Her mother owned several properties in Zambia and she will occupy one of them when available. She plans to live with her mother for the time being. The applicant also has property in Zambia where he can stay should he wish to return.
- [16] The applicant's main complaint was that the children's circumstances had not been investigated before the order was granted. Their education had been abruptly disturbed in the middle of the term and their academic year had been seriously harmed; their home environment had been abruptly changed to one that was foreign to them. By moving them the respondent had abruptly terminated his access. He saw them every single day; he picked them up from school; he was involved in assisting with their school work; he was entitled to have them with him, he attended to their personal needs after school and returned them to their mother's home in the evenings and, this was besides the right he exercised every two weeks to have them with him. He was an integral part of their life, and they had lived in South Africa their entire lives. No investigations were conducted to establish the suitability of their move and whether his home was suitable for them to live in after the respondent had moved to Zambia. He pleaded with his in-laws to advise respondent not remove the children and did not consent to their removal and he was not consulted neither were the children.
- [17] The applicant denied that he was ever employed by the African Institute Zambian Embassy. He contended that the respondent had failed to take the court into confidence by divulging the true reasons for her wanting to leave the country. He attached a document to show that he had paid maintenance for the months from October to December 2020, which included the rental. She never approached him for assistance when the lease was terminated and she had failed to attach any document as proof of such termination. He denied having failed to

maintain the children

- [18] During November he informed the respondent of his intention to visit Zambia for the holidays. The intention was for him to look at the suitability of the schools the respondent had suggested and where the children would be taken to should they permanently relocate to Zambia. He denied that he too had intended to relocate to Zambia. He had intended to visit only. The respondent had left her belongings in the apartment which meant she too had intended to return to South Africa after the December Holidays. He was not averse to the children relocating to Zambia but he wished for a suitable environment to be created in Zambia for them before relocating, however their best interests had to be looked into. His son who was in grade 6 would lose out on qualifying for his grade 7 examinations
- [19] During January 2021 he obtained an order restraining the respondent from coming to his home to intimidate and harass him. Their appearance before the Children's Court and the Family Advocate revolved around the children and the respondent had not exhausted that process which was still ongoing when she obtained the order entitling her to remove the children

Analysis:

whether there was a deliberate attempt to mislead the court by the respondent in her application heard on 31 March 2021; whether a misrepresentation was committed thereby resulting in the erroneous grant of an order by Davis J/ Has the applicant made out a case for the setting aside of the order of Davis J.

- [20] First of all I indicated that Legal Aid South Africa could not represent the respondent in this application, probably because it did not have the jurisdiction to deal with the matter because the respondent had left the country with the children. It was contended for the applicant that there was a mysterious exclusion of the applicant in the proceedings of 31 March 2021. I do not have any explanation as to why the application was not proceeded with on 30 May 2021. Save to note that it is practice that cases heard in any urgent court week of this division, usually commences on a Tuesday, because of the number and sometimes the complexity of

issues to be dealt with and are usually spread by the presiding judge throughout the week. Parties given a date falling on a Tuesday are expected to be available for the week. The applicant was given proper notification of the 23 and 30 March 2021 before he decided to travel to Zambia to renew the study visas of the children. He indicated that he applied for pro bone representation. He annexed an email to Legal Aid on 15 March 2021 'JM4' to the effect that he was seeking pro bone assistance as he will be opposing the application. An application for pro bone assistance is attached as 'JM5'. It does not seem as if a proper notice to oppose was filed by him, except that he notified the respondent's attorneys by letter. I cannot attribute the hearing of the matter on 31 March 2021 to any mala fides on the part of the respondent. Since this is not an appeal or a rescission application but a re-consideration, I shall deal with both affidavits and annexures and

have regard to the heads of argument as presented to Davis J and those presented herein.

- [21] The issue of service of the application was raised in counsel's updated heads of argument, where it was contended that service by email on the respondent of the application should be condoned, that is, in view of the circumstances under which the minor children were removed from the country and, in view of the fact that the minor children's visas had not expired. Another consideration was that the children were not registered in a school in Zambia and had to be returned to continue with their education. I understand the application to be a reconsideration and for that purpose the applicant has annexed to his papers the application and annexures before Davis J. I am cognizant of the fact that the respondent was not in attendance and that service might be an issue. I am of the view that the matter can be dealt with even in her absence as shall be seen below.
- [22] It was contended for the applicant that his parental rights had not been considered and that only the untested version of the respondent was before the court when the order was granted. In violation of the Constitution and the Children's Act the order had the effect of changing the existing parental plan between the parties and, that at that time the court did not have input of the applicant, the children and relevant experts. In *VN v MD and Another* 2017 (2) SA 328 (ECG) it was stressed the importance of input from a family advocate, psychologist and social worker when consideration is to be given to a variation of an existing parental place and this would seem to be necessary even where it was not pertinently provided for by section 33(5) of the Children's Act. Such input was generally required when consideration had to be given to the exercise of parental rights and responsibilities.
- [23] The respondent contended that she had been in discussions with the applicant about moving back to Zambia since about November 2020. In my view the applicant cannot deny that there were discussions towards relocation. Among other issues the applicant had stopped paying for rental for the apartment and he was not maintaining her and the children properly. It seems to me that although the applicant stated that he did not consent to the relocation, he was not averse to such a move. He wanted to have assurance that the children would be placed in schools he approved of, in a proper environment, that there would be a gradual introduction to their new surroundings in Zambia and that he had to satisfy himself that the respondent would be in a position to maintain the children when in Zambia. The issue of maintenance was by settlement and made an order of court. The responsibility to maintain the children would remain even when they had left the country and the responsibility to maintain the respondent remained as long as she was unemployed. While these were important issues to consider, pertinent to the application was the expiry of the

applicant's diplomatic visa

- [24] As I see it, the main motivation for the application was that the respondent and the children were in South Africa on a diplomatic visa which was about to expire on 22 February 2021 and their validity had been temporarily extended to the 31 March

2021. The children's passport were apparently linked to the applicant who had been employed by the African Institute Zambia Embassy and had lost his employment during August 2019. It was contended that since they had come on a diplomatic visa neither the applicant, the respondent and the minor children would qualify to be in the South Africa after expiry date. What was not explained was if the applicant was on a diplomatic visa, would him and family still be entitled to keep a diplomatic visa after his employment was terminated.

Having

regard to the applicant's version the children's passports were still in his possession when Davies J gave the order on 31 March 2021. Although there is no explanation in this regard, I would therefore assume that the children left the country by means of documents other than their passports but by those signed by the Sheriff because the order of Davis J gave authorisation for such to happen.

[25] The applicant denied that he was employed by the African Institute Zambia Embassy. At the time of deposing to his affidavit in this application he was Head of Agriculture and Environment at FCK Investments (Pty) Ltd. When he applied for pro bono assistance, he was unemployed. In the statement made before the police he states under oath that he was retrenched by the Africa Institute during August 2019. No explanation is proffered by him for such denial or, for him to give an explanation for the benefit of the court where the respondent could have gained the impression that he was in South Africa on a diplomatic visa. The respondent contended that on expiration they would all be illegal in the country including the applicant. This was suggested to him by Legal Aid South Africa long before the respondent launched her application. The applicant's attorneys at the time did not deem it necessary to respond to this allegation and this is seen from letters exchanged between by Legal Aid South Africa and Matloga Attorneys for the applicant on 18 and 22 February 2021 as seen on case lines 07 - 68-70 and 07 - 73 74.

[26] What actually is the Africa Institute for Environmental Sound Management of Hazardous and Other Wastes and does it have any relationship with the Zambia Embassy. If the reason for the denial related to the name accorded by the respondent by adding "Zambia Embassy", which was probably incorrect then it was incumbent on him to give the correct name and an explanation. Under oath he admitted employment with the Africa Institute which retrenched him. In my view, if the true nature of the applicant's visa and those of the children were explained to the respondent and to Legal Aid, the respondent probably would not have laboured under the impression that the applicant and children were still on a diplomatic visa and their diplomatic visas would expire at the end of February 2021. The respondent was persistent when she approached the court that they were all here in South Africa on a diplomatic visa and I am of the view that this is what the applicant has to show in this application was not the case.

[27] In my view if the children had valid visas, the applicant does not explain why he had to travel to Zambia on 28 March 2021 to renew study visas of the children and the renewal of his work permit and critical skills visa as seen from the receipts annexed as JM27 and JM28.

According to JM26 Government Gazette No 44336 of 26 March 2021 the renewal had to be done at VFS Global which operates in South Africa. The application for the study visas were done on 31 March and according to the applicant the passports were left with the South African High Commission in Zambia for processing as it would take 20 days for approval. This activity was engaged

while the applicant was aware that the application would be heard at least on 30 March 2021. The question that comes to mind is whether these were new applications or not because, the respondent did not refer to their children as having study visas independent of what she alleged were their passports which were linked to the applicant's diplomatic visa. The passports were always in his possession. When the applicant got the alert on 31 March 2021 that an order had been granted, he was in Zambia and when the respondent called to inform him that she had arrived with the children in Zambia, the applicant was still in Zambia as he had not as yet made an application for his critical skills visa. This application was only launched on 28 April 2021.

[28] There are several facts disputed by the applicant in the affidavit of the respondent, however, as I see it, it would be unnecessarily dragging the proceedings, if consideration had to be given to the application of the trite principles relating to disputes of fact. It has also been suggested on the applicant's behalf that, while he would agree to relocation of the children provided certain standards and conditions are met by the respondent in Zambia, consideration be given to proposals by the applicant for bringing the children and the respondent back to South Africa. The reasons are commendable and could be viewed as being in the best interests of the children, but this is not the case made out on the papers. In my view there should be nothing preventing such move but this could be accomplished by both the applicant and respondent engaging in another process. It is for the above reasons that I am of

the view that the applicant has not made out a case for the setting aside of the order of Davis J and that his application should be dismissed.

[29] In the result the following order is granted:

1. The application is dismissed;

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON

: 11 MAY 2021

JUDGMENT RESERVED ON

: 13 may 2021

ATTORNEYS FOR THE APPLICANTS :

MALISEHA ATTORNEYS

ATTORNEYS FOR THE RESPONDENTS :

LEGAL-AID NAMIBIA

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Prepared on 12 October 2026 · Esheria