

SOUTH AFRICA / JUDGMENT

K v K (96997/2015) [2017] ZAGPPHC 194 (17 May 2017) [2017] ZAGPPHC 194

COURT

North Gauteng High Court, Pretoria

BEFORE

Manamela

CASE / FILE NUMBER

96997/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE NO: 96997/2015

17/5/2017

Reportable:

No
Of
interest to other judges: No
Revised.
In the matter

between:

G
K Applicant
and
K
K Respondent
Dates
of Hearing
:
09 & 11 May 2017
Date of
Judgment
:
17 May 2017

JUDGMENT

MANAMELA AJ

Introduction

- [1] On 04 or 05 July 2016,[1] my brother Thobane AJ, made an order pendente lite directing how parental rights and responsibilities and contact rights are to be exercised by the parties, in respect of their minor child. The order also directed the applicant, as the father or the minor child, to pay a specified monthly amount towards maintenance of the minor child. The order was in respect of a Rule 43 application brought by the current respondent, as the mother of the minor child.
- [2] In January this year, hardly six months after the abovementioned order, the applicant herein and therefore, the respondent in the Rule 43 application, brought this application in terms of Rule 43(6) of the Uniform Rules of this Court.[2] He submits that a material change in in his ·circumstances or those of the child or both of them, has taken place. He now seeks "*offsite ' and unsupervised visitation with a minor child twice a week*" [italics added for emphasis], alternatively, under supervision of an independent social worker, and sleepovers every Wednesday night and alternative weekend, by the minor child. The minor child was born on 25 December 2015 and is therefore about 17 months old.
- [3] In terms of the order by Thobane AJ (the Rule 43 Order), unsupervised visits of the minor child by the applicant will only be allowed from the time the child is 2 years old and sleepovers from 3 years old. The applicant submits that the alleged material change in circumstances warrants variation of the Rule 43 Order to his preferred visitation regime, part of which is, as stated above. The application is opposed by the respondent.
- [4] This matter came before me in the unopposed motion court on Tuesday, 09 May 2017, when it was stood down by agreement between the parties, to Thursday, 11 May 2017. Mr MD Kohn appeared for the applicant and Mr MR Hellens SC appeared for the respondent. I decided to prepare a written judgment in order to highlight some issues regarding the merits of the application and the conduct of the parties in this matter. Consequently, I reserved judgment for a few days, after hearing oral argument by counsel. I will nevertheless steer away from issues that may have a bearing on the pending divorce litigation between the parties.

Brief background and applicant's submissions

- [5] The parties have been married to each since 09 May 2015. As already indicated above, on 25 December 2015, a baby girl was born between them. By that time, the parties had already commenced the current divorce proceedings and the Rule 43 application actually preceded the birth of the minor child.

[6] As part of the legal proceedings between them, the parties were interviewed by the family advocate[3] on 14 June 2016.[4] The family advocate acquired the assistance of a registered social worker and family counsellor, with 21 years' experience as a

registered social worker and already at the time, having acted as a family counsellor for over three years,[5] for purposes of mediation of the disputes between the parties. Both of these experts furnished reports in terms of which they jointly

recommended gradual access to, or visitation of, the minor by the applicant. I consider it warranted to quote the following few

paragraphs from the family counsellor's report, which is incorporated by reference in the family advocate's report:

"7.4 The Defendant [i.e. the current applicant] is of the opinion that he should not be limited to having supervised contact

with the minor child. Age appropriate contact was explained to him and that contact with very young children are difficult, as parents need to go with the pace of the young child, and not according to their own needs.

7.5 It was discussed with the parties that the Plaintiff's mother should maybe be present during visitations, instead of the Plaintiff,

as this might minimize a lot of the conflict during visits. The Plaintiff's mother is also well-known to the minor child, as she is the care-giver during the day when the Plaintiff is at work. The minor child is well-known to her surroundings, as well as her

maternal grandmother, which might make these visits easier on the minor child.

7.6 According to literature, the minor child is currently still in her infancy years... The primary developmental tasks of infants

include establishing a sense of trust in their environment and the people around them. During infancy, attachment is built with the primary caretaker. Long separations from the primary caretaker can result in symptoms of depression and regression and later may result in problems with separation and the ability to form relationships. This is a concern for the undersigned, as the results of removing the minor child too soon from the primary caregiver, will only be seen later, when it will probably be too late...

7.7 Research also indicates that for young infants between six and eighteen months, short periods of one to three hours are recommended

if frequency for sharing time is low. The non-residential parent should recognize that the infant of this age needs predictability and familiarity. Time sharing will work best when time sharing occurs in the same location every time. The infant should not be left with another caregiver during time sharing unless the infant has had frequent opportunity to interact with that caregiver. Overnight time sharing is not recommended. The visitation period should be gradually increased and remain consistent as to days and times. ..

7.8 Due to the very young age of this minor child, the undersigned is of the opinion that contact should be gradually phased in, as that

will serve the best interest of the minor child, as stated in the Children's Act, Nr 38 of 2005."[6]

[underlining added for emphasis]

[7] The applicant submits in this application that the Rule 43 Order "awarded contact with the minor child in the exact terms of the family advocate without consideration of any argument" [italics added for emphasis]. [7] There, are other attacks, direct and subtle, of the Rule 43 Order. I will revert to this below.

[8] Further, the applicant makes submissions amounting to a review of the family advocate's report and attempts to cast doubts on the views expressed and conclusions reached, therein. It is not necessary to reflect the applicant's challenges in this regard. The reports formed part of the papers before the Court when the Rule 43 Order was made. Therefore, the applicant had an opportunity to direct the Court's attention to those parts he disagreed with and furnished his reasons in that regard, with or without the assistance of experts of his choice. The applicant, if anyone, has himself or his legal representatives to blame in this regard, should anything be amiss.

[9] To avoid doubt, I state that, I do not find anything raised by the applicant in his papers, warranting any change to the visitation or access regime ordered by the Court in terms of the Rule 43 Order, with assistance of appropriately qualified experts. The Court had regard to the best interests of the minor child and benefitted significantly from the family advocate and counsellor's reports.

Also, there is, I must add, nothing suggesting that the experts were motivated by bias towards the applicant or favoured the respondent,

but the contrary. The experts appear to have discharged their duties in an independent and able fashion, and ought to be commended for this.

[10] The applicant further states his frustrations and problems with regard to the exercise of the current visitation or access rights in terms of the Rule 43 Order. It is clear from the papers that due to the acrimonious relationship between the parties, the applicant may be finding it difficult to exercise unhindered access or visitation to the minor child. I am not saying that this is the case, but the papers are littered with allegations and counter-allegations of a very personal and unsavoury nature. The parties have even laid criminal charges and obtained

domestic violence orders against each other. Even, the nature of the language used by them in communicating with each other is peppered with expletives.

- [11] However, in my view, the problems or challenges allegedly experienced or faced by the applicant regarding the exercise of his visitation rights, suggest that there may be contempt of the Rule 43 Order. Therefore, what may be required is the enforcement of compliance with the provisions of the Rule 43 Order, rather than variation thereof. For, I do not see any order, including variation of the Rule 43 Order in the terms suggested by the applicant, changing the actual atmosphere prevailing when the visitation rights are exercised by the applicant. Even more, I do not consider the applicant's submissions to clear the hurdle imposed by the recommendations for gradual access by the family advocate.
- [12] However, I have noted that the parties appear to be co-operating with each other, regarding the appointment of some expert to facilitate the exercise of contact and matters relating to the primary residence of the minor child. Depending on the outcome of the assessments and review, the Court finds this as a commendable step in the right direction.

Respondent's submissions (selected)

- [13] Other than lamenting the voluminous size of the applicant's founding papers, the respondent included an application to strike out some parts of the founding papers. It was submitted in this regard that most of the material in the founding papers do not serve any purpose than "to create confusion and cast me [i.e. the respondent] in a bad light".[8] However, at the hearing of this application the striking out application was not pursued all. But, nothing will turn on this.
- [14] The respondent contends that the applicant does not have the best interest of the minor child at heart in seeking the orders currently sought in terms of this application. It is further added, perhaps for good measure, that the respondent is not able to properly handle the minor child during visitations and had to be assisted by the respondent's mother and even the respondent herself. Although, nothing also turns on this, in my view, the gradual access and supervision contemplated in the terms of the Rule 43 Order cater for the interests of all involved.
- [15] Overall, the respondent contends that the current application constitutes a review process of the Rule 43 Order, due to dissatisfaction of the applicant with the order and abuse of the process of the Court.

Analysis

of the facts/issues against applicable legal principles

- [16] The parties are clearly involved in acrimonious separation and divorce battles. As stated above, the papers before the Court bear testimony to this. However, this Court cannot serve as the frontier of the skirmishes between the parties. It would definitely not.

[17] There is no material change in the circumstances that prevailed when the Rule 43 Order was made. The current application, as correctly contended by the respondent, is an attempt to have a rehearing or review of the Rule 43 Order, under the guise that the alleged facts were not considered by the Court when the impugned order was made.[9]

[18] The procedure provided by Uniform Rule 43(6) is clear from the reading of the following material part:

"The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child..."

[underlining added for emphasis]

[19] As already indicated above, the alleged problems experienced by the applicant in the exercise of the visitation rights, availed by the Rule 43 Order, do not constitute a material change in circumstances. There may well be changes, but not of materiality contemplated in terms of Rule 43(6) to warrant variation of the Rule 43 Order. As I have indicated, the problems may actually point towards the enforcement of compliance with the Rule 43 Order, rather than the need to vary same. Should this be the case, the applicant's remedies would lie elsewhere than in the variation of the Rule 43 Order. Consequently, the application would be dismissed for want of merit, with costs.

Costs

[20] The applicant requested a punitive costs order against the respondent, in the event of opposition. He considered any opposition

to be a further attempt by the respondent to frustrate his visitation, contact and bonding with the minor child. The respondent

submitted that there was no basis for a punitive costs order, but at the hearing of the matter, Mr Hellens asked, on behalf of the respondent, for costs order on attorney and client scale. There are a few issues relevant for a determination of an appropriate costs order in this matter.

[21] As indicated above, the respondent complained about the voluminous nature of the applicant's papers. For the record the founding

affidavit, together with its attachments, is around 100 pages. The opposing papers, by comparison, are just over 60 pages. The

displeasure of this Division[10] and of others elsewhere,[11] regarding lack of restraint in the volume of submissions in matters in terms of the Rule 43 procedure, have been constantly reported.

[22] Although, the volume of papers herein is considerably lower, as compared to other non-compliant matters, I have come across, my concern is that most of space in this matter, is taken up by venting out of emotions and attachments of no consequence to the relief sought. The founding papers could have been of a far smaller size than what is currently the case.

The respondent was justified in the volume of her response and for applying self-restraint in some compliance with the Rule 43 process. Therefore, considering the fact that, the application clearly lacked any semblance of merit, I cannot allow the respondent to be out-of-pocket with costs of this application. I will make any order on attorney and client scale.

Order

[23] For the abovementioned reasons, an order is made in the following terms:

- (a) the application is dismissed with costs on attorney and client scale; and
- (b) the provisions of Rule 43(7) and 43(8) are waived.

K. La M. Manamela

Acting Judge of the High Court

17 May 2017

Appearances:

For the Applicant : MD Kohn

Instructed by : Christo Mulder Attorneys,

Randpark Ridge, Johannesburg

c/o Gerhard Botha & Partners Inc,

Erasmusrand, Pretoria

For the Respondent : MR Hellens SC

Instructed by : Marinus van Jaarsveld, Randburg,

Johannesburg

c/o De Beer Janse Van Vuuren Inc,

Hillcrest, Pretoria

[1] The draft order included in the papers have two dates, one (i.e. 04 July 2016) typed in and the other (i.e. 05 July 2016) in manuscript. The latter appears to be the date on which the presiding judge made the draft order and order of Court, initialed and marked all pages of the draft order.

[2] Rule 43(6) reads in the material part: "The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child..."

[3] Appointed in terms of section 2(1) of the Mediation in Certain Divorce Matters Act 24 of

1987.

[4] See par 1 on indexed p 37.

[5] See indexed p 37.

[6] See annexure "GK2" on indexed pp 41-42. The complete report appears on pp 31-44.

[7] See par 13 on indexed p 9.

[8] See par 5 on indexed p 110.

[9] See *Grauman v Grauman* 1984 (3) 477 (W) at 479H onwards.

[10] See generally *Du Preez v Du Preez* 2009 (6) SA 28 (TPD).

[11] See *Colman v Colman* 1967 (I) SA 291 (C) at 292A; generally, *Micklem v Micklem* 1988 (3) SA 259; *Patmore v Patmore* 1997 (4) SA 785 (W) at 788D; *Visser v Visser* 1992 (4) SA 530 (SE) at 531D.

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