

SOUTH AFRICA / JUDGMENT

M C v F D (5544/2017) [2020] ZAGPJHC 19 (30 January 2020)

[2020] ZAGPJHC 19

COURT

South Gauteng High Court, Johannesburg

BEFORE

L T Modiba

CASE / FILE NUMBER

5544/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 5544/2017

In the matter between:

C, A Applicant

And

D, F Respondent

J U D G M E N T

MODIBA, J:

- [1] On 5 September 2019, I granted two orders at Mr C's instance. The first is an order striking out Ms D's defense and counter claim in a divorce action instituted against her by Mr C. The second, an order varying a Rule 43 order in terms of Rule 43(6). Ms D has requested reasons for the

orders.

- [2] In this judgment, I also deal with the dispute in respect of costs which erupted on 14 January 2020 when Ms D withdrew in court, an application she had brought seeking an order in terms of which I am to recuse myself as the case manager in the divorce action, but refused to tender costs on the basis that she did not set the application down for hearing.
- [3] The parties are involved in an acrimonious and protracted divorce action. The only issue in dispute is the primary residency and the non-custodial parent's contact rights with the minor children. The parties' long litigation history is well documented in approximately 8 judgments that have been handed down to date. No purpose would be served by regurgitating it here.
- [4] The Deputy Judge President appointed me to case manage the divorce at the beginning of 2018. Therefore, I am privy to the parties conduct in the matter.
- [5] Ms D's conduct is characterized by dilatory tactics, such as her attorneys withdrawing from record at a pertinent point in various applications, pleading indigence and taking time to appoint new attorneys but later briefing senior counsel, not responding to correspondence, ignoring invitations to case management meetings or failing to instruct her attorney to attend case management meetings and the like. She has changed attorneys more than 20 times since the divorce action commenced.
- [6] She had not filed opposing papers when the above applications were granted, despite the long time it took Mr C to have them heard. She spent the time pursuing my recusal through inappropriate means, thereby holding the further conduct of the divorce action to ransom.
- [7] Prior to the applications being heard, a case management meeting was scheduled at Mr C's request. A request to Ms D's attorney for convenient dates for the meeting was not responded to. The meeting was scheduled in the absence of such confirmation at my directive. On the eve of the meeting, Attorney Japhta who was on record at the time, informed me that he holds no instruction to attend the case management meeting on behalf of Ms D, but rather, to bring an application for my recusal. The meeting proceeded as scheduled. Subsequently, the recusal application was not forth coming.
- [8] In a surprising twist to this trail, Ms D personally addressed a long letter to the Judge President, despite the fact that she was legally represented at the time, without copying Attorney Japhta and Mr C's attorney, and without fully disclosing material facts. In the letter, she cited issues in which her petition to the Supreme Court of Appeal in respect of an order I granted in 2018 incarcerating her for civil contempt of court had been dismissed, and failed to disclose this to the Judge President. The Judge President directed her to copy the relevant parties before he would attend to her complaint. She failed to comply with this directive and did not pursue the request further.

- [9] Attorney Japhta subsequently withdrew from the record. Her new attorney of record, Ms Pillay pestered me for a meeting in my chambers to discuss my recusal, without copying Mr C's attorneys in the emails where she made the request. She ignored my directive to cease from such behaviour. She withdrew as Ms D's attorney of record after I threatened to report her to the Legal Practice Council for her unprofessional conduct.
- [10] In the meantime, Ms D's threats to seek my recusal held the proceedings to ransom as she did not take further action. It is in this context that the applicant set the applications down for the hearing.
- [11] On the date of hearing, Ms D re-instructed Japhta attorneys who briefed counsel to appear on her behalf to seek a postponement from the bar. Due to the history of Ms D's obstructionist and dilatory conduct, particularly after these applications were issued, and given that the postponement application was brought at the last minute and informally from the bar, I refused to entertain it. I proceeded to grant both applications as I was satisfied that Mr C had made out a proper case thereof.
- [12] The order in terms of Rule 43(6) is not appealable. Therefore, Ms D's request in respect of this order is academic.
- [13] The prejudice that Mr C and the minor children have suffered due to Ms D's dilatory and obstructive conduct in these proceedings justified the striking out order, despite the substantial effect of the order on Ms D's case in the divorce action.

COST ORDER IN RESPECT OF THE RECUSAL APPLICATION

- [14] A punitive cost order in respect of this application is justified, primarily because the application was incompetent from the beginning, as it was handed up by Ms D's counsel in court on 5 September 2019 after I handed down the above orders and certified the divorce ready for trial. It is also justified for other reasons set out below.
- [15] In her customary dilatory and obstructive conduct, Ms D failed to respond to subsequent requests for a date of hearing the recusal application. She had become unrepresented yet again, hence the requests were addressed to her personally.
- [16] I pursued the hearing of the recusal application as it held the further conduct of the divorce to ransom, even after it had become unopposed as a result of the striking out order. On 13 September 2019, Mr C's attorneys enrolled the divorce action for hearing on the unopposed divorce roll. It did not proceed at Ms D's instance as she informed Acting Judge Shingisa that she intends seeking reasons for the 5 September 2019 orders and to appeal the striking out order.
- [17] The prospect of an application for leave to appeal rendered the determination of the recusal application pivotal, as I would have to determine the former application. Again the further conduct of the divorce stalled as Ms D ignored requests for the date of hearing. She was compelled to give attention to the recusal application when she brought an urgent

application during the December 2019 recess before Acting Judge Millar. The recusal application had been raised in the papers filed in that application. At this stage, Shapiro Attorneys had come on record as her attorneys. This is how her attendance in court on 14 January 2020 was secured.

- [18] Shapiro Attorneys withdraw on the eve of the later hearing. On 14 January 2020, an Advocate appeared on behalf of Ms D, having been briefed by her new attorney of record. Ms D withdrew the application on the basis that it is redundant, as it is clear from the order of 5 September 2019 that I have certified the divorce action trial ready, and thus have become functus officio as the case manager.
- [19] I certified the divorce action trial ready before the application was served and filed. Therefore it was already redundant when it was served and filed. Ms D did not have to proceed to serve and file it, and having done so, to wait another 5 months before withdrawing it. She could have even withdrawn it before Acting Judge Millar to avoid it being set down at his directive, but failed to do so.
- [20] The circumstances sketched-out herein justify a punitive costs of this application against Ms D.
- [21] In the premises, the following order is made:

ORDER

1. Ms D shall pay Mr C's costs of the recusal application on the attorney and client scale, which costs shall include Advocate Bedeker's appearance fee for 14 January 2020,

L T MODIBA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the applicant: Adv L Bedeker

Instructed by: Fiona McLachlan Attorneys

Counsel for the respondent:

Instructed by:

Date of hearing: 5 September 2019, 14 January 2020

Date of judgment: 30 January 2020

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Prepared on 10 October 2026 · Esheria