

SOUTH AFRICA / JUDGMENT

M.U v W.H (2022/026981) [2023] ZAGPJHC 79 (6 February 2023) [2023] ZAGPJHC 79

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2022/026981

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

6 February 2023

Case

No. 2022/026981

In

the matter between:

MU

Applicant

and

WH

Respondent

JUDGMENT

WILSON J:

1 On 3 February 2023, I dismissed an application for leave to appeal brought by the respondent, WH, against my order of 11 January

2023. In that order, I directed WH to return two children, DPH and DWH, to the care of the applicant, MU. As well as dismissing WH's application for leave to appeal, I directed the South African Police Services to take the steps necessary to execute my order of 11 January 2023. I indicated that my reasons for refusing leave to appeal would follow in due course. These are my

reasons.

The divorce, the related proceedings and the urgent application

2 WH and MU are in the midst of an acrimonious divorce. DPH and DWH are WH's and MU's children, born during the marriage.

Pending the finalisation of the divorce, DPH and DWH have resided with MU, subject to WH's agreed rights of contact with them. Initially that arrangement was embodied in an agreed interim order of the Germiston Children's Court. However, that interim order expired when the Children's Court inquiry was closed on 8 March 2022.

3 After the expiry of the interim order, MU moved with DPH and DWH to Swellendam in the Western Cape. WH was not happy with this, but MU described it as a necessary step to secure access to a home and an income. Various proceedings brought by WH in this court to obtain an order placing the children in his care have so far been unsuccessful. The latest iteration of those proceedings is a directive from the Deputy Judge President of this court staying WH's application for primary residence and care of DPH and DWH pending a report from the Family Advocate, which has not yet been produced.

4 That notwithstanding, late last year, WH and MU agreed that WH would have unsupervised contact with DPH and DWH between 5 and 26

December 2022, and return them to MU's care at Tyger Valley Mall at 10am on 26 December 2022. The arrangement was reduced to writing and signed by WH.

5 WH did not honour the arrangement. He instead returned to Gauteng with DPH and DWH, and broke off contact with MU.

6 On 10 January 2023, MU placed an application for the return of DPH and DWH on my urgent roll. WH opposed that application in person.

Mr. Scholtz, a member of the Pretoria Bar, represented MU. When the matter was first called before me, WH said that he had not had adequate time to prepare his argument. In order to afford WH some extra time, I stood the application down to 11 January 2023.

7 On 11 January 2023, having heard extensive argument from WH and Mr. Scholtz, I took the view that WH had advanced no good reason

for failing to honour the agreement with MU, and I ordered that DPH and DWH to be returned to MU's care. My reasons for making that order were given *ex tempore*. My judgment was later transcribed and made available to the parties.

The application for leave to appeal

8 It was not always easy to understand the bases upon which WH sought leave to appeal against my order. My questions to WH in seeking to clarify his argument were, to put it mildly, not welcomed. In the end, WH asked that I listen in silence to a speech he had pre-written and wished to read out to me. I acceded to WH's request and listened carefully to the speech. I sought to distil from it the bases on which WH sought leave to appeal.

9 I was able to identify three broad grounds of appeal, which I will address in turn.

10 WH first argued that MU's urgent application should not have been entertained at all. That proposition was apparently based

on a letter from the Deputy Judge President which states that, pending the delivery of the Family Advocate's report, to which

I have already referred, WH's application for primary residence and care of DPH and DWH may not be set down in the Family Court. The Deputy Judge President also directed that "neither party shall bring any other ancillary or extraneous proceedings whilst [WH's] case is pending". WH argued that MU's urgent application was barred by that directive.

11 I do not think that is correct. Read as a whole and in context, the Deputy Judge President's directive was clearly intended to preserve the situation as it stood at the time the letter was written. The Deputy Judge President clearly did not contemplate

that WH would attempt to force a change in DPH's and DWH's primary residence, and his directive cannot reasonably be read to prevent MU from bringing an application to reverse the effect of WH's conduct.

12 Even if I am wrong in that respect, the Deputy Judge President's directive is not binding on me. It would, of course, be a weighty consideration in deciding whether to entertain MU's urgent application, but the ultimate decision to entertain MU's application was mine, and mine alone.

13 The second ground of appeal WH pursued was that he had been forced into signing the agreement to return DPH and DWH to MU's

care, because MU would not otherwise allow WH to see the children. However, WH's claim of duress is not consistent with his

concession, while arguing the main application, that he entered into the agreement with MU freely and voluntarily. I questioned him directly on whether he had signed the agreement freely at the outset of his argument. WH said that he had. While he later sought to disavow that admission, I do not think that the disavowal was realistic. In addition, I am not satisfied that a person who signs an agreement to obtain a benefit is under duress simply because they would not obtain the benefit without signing the agreement. If the benefit was being unlawfully withheld, or being made subject to unlawful or unconscionable conditions, things might be different, but there was no suggestion of that in this case.

14 The third ground of appeal discernible from WH's argument was the suggestion that I had improperly excluded affidavits WH wished to introduce which tended to show that DPH and DWH did not want to leave his care, and were being abused in MU's care. I excluded these affidavits because WH had not previously raised the issues that they addressed in his answering affidavit or in argument, and MU had been given no opportunity to deal with them. The existence and content of the affidavits were revealed in what WH clearly intended to be a flourish at the end of his submissions. It had never been suggested, at any stage before WH's argument, that MU had exposed DPH or DWH to abuse, or was otherwise unfit. The claim that there was now important new evidence, based on conversations between WH and the children, that DPH and DWH were in danger in MU's care, struck me as incredible and vexatious.

15 WH did finally place the affidavits before me as annexures to his written application for leave to appeal. They were signed and commissioned on 16 January 2023, five days after I had given judgment. It is accordingly clear that I could not have erred in failing to admit them in the main application, because they did not exist at that time. The affidavits purport to be "transcripts"

of conversations between WH, DPH and DWH. For the most part, they record DPH and DWH telling WH what WH has already suggested to them that he wants to hear. They are, as evidence, of very little value.

16 This, I hope, summarises WH's main grounds of appeal. It is clear that none of them carries any prospect of success, and that

I was bound to refuse leave to appeal as a result.

The putative amicus curiae

17 At the commencement of the hearing of the application for leave to appeal, a man identifying himself as "Lieutenant Commander Sylvester Vulani 'Madala' Mangolele" sought to place himself on record as amicus curiae. Lt. Com. Mangolele had not applied for admission as amicus curiae. He had not participated in the main application. He had not sought MU's consent to intervene. Even after I gave him the opportunity to address me on the reasons for his presence in court, it was not at all clear to me what submissions he wished to advance, or what interest he had in the proceedings. I refused to hear from him on the basis that he was not properly before me, and had

no rights of audience as a result. I made clear that he was welcome to remain in the public gallery as an observer, but that he had no standing in the matter before me. Lt. Com. Mangolele nonetheless initially declined to retreat to the public gallery, and it became necessary for me to adjourn the court for a short while to allow him the opportunity to reconsider his position.

18 When I came back into court, Lt. Com. Mangolele, had, wisely, taken a seat in the public gallery, and argument on the application

was allowed to proceed. Lt. Com. Mangolele nonetheless sought to address me again after I gave my order dismissing the application. I refused his request to do so, and adjourned the court again.

19 WH complained that he was prejudiced by my refusal to grant Lt. Com. Mangolele a right of audience. That complaint obviously misconceives the role of an *amicus curiae*, which is to assist the court, not to assist the parties. While a party might be prejudiced by the improper admission of an *amicus curiae* that goes on to make inappropriate submissions, it is inconceivable that there can be any legally recognisable prejudice to a party from a court's decision not to admit an *amicus curiae*. Indeed, not only was I satisfied that I would not be assisted by anything that Lt. Com. Mangolele had to say, but it would also have been irregular and potentially highly prejudicial to MU to entertain argument from him.

20 It was for these reasons, and in these circumstances, that I refused WH's application for leave to appeal, and directed that

the DPH and DWH be returned to MU forthwith.

The second application for leave to appeal

21 On Saturday 4 February 2023, WH filed a further application for leave to appeal. That application was directed at my decision to

refuse WH's first application for leave to appeal, and my decision not to afford Lt. Com. Mangolele standing in the first

application for leave to appeal.

22 WH's second application for leave to appeal is obviously irregular. There is no basis on which I can entertain an application

for leave to appeal against my own order refusing leave to appeal. WH lacks the standing necessary to challenge my decision not to recognise Lt. Com. Mangolele as *amicus curiae*, and that decision is, in any event, not appealable in itself. The second application for leave to appeal strikes me as a vexatious attempt to thwart the execution of my order of 11 January 2023. It will be struck from the roll with costs. An order on those terms will be delivered to the parties with these reasons.

23 For the avoidance of doubt, I record that neither WH's application for leave to appeal, nor my order striking it from the roll has any effect on the rights of MU to enforce my order of 11 January 2023. I also record I will not entertain any further attempt

to seek leave to appeal from me against any of the orders I have made in this matter. WH's further remedies, such as they are, are spelt out in the Superior Courts Act 10 of 2013.

S D J WILSON

Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 6 February 2023.

HEARD ON: 3 February 2023

DECIDED ON: 3 February 2023

REASONS: 6 February 2023

For the Applicant: H Scholtz

Instructed by JJR Botha Attorneys

For the Respondent: In person

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