

SOUTH AFRICA / JUDGMENT

N.D v P.D.P.D and Another (2022-020777) [2025] ZAGPPHC 326 (28 March 2025)

[2025] ZAGPPHC 326

COURT

North Gauteng High Court, Pretoria

BEFORE

N G M Mazibuko

CASE / FILE NUMBER

2022-020777

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 2022-020777

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE

28 March 2025

SIGNATURE

In

the matter between: N[...]
D[...]
Applicant
and
P[...]
D[...] P[...]
D[...]
First
Respondent
MADALEEN
BOTH A N.O.
Second Respondent

JUDGMENT

Mazibuko AJ

INTRODUCTION

[1] The applicant approaches the court in terms of Rule 43 on an urgent basis, seeking an order in the following terms:

PART A

'2. That the Office of the Family Advocate be appointed to urgently investigate the best interests of the minor children and under the below powers and mandate:

2.1. That the Office of the Family Advocate is authorised to consult with the applicant, first Respondent and minor children, and the applicant and First Respondent be mandated to ensure the minor children attend to the requested consultations by the Office of the Family Advocate;

2.2. That the Office of the Family Advocate is authorised to consult, comment, discuss and collect. Collaborative material from the relevant therapist of the minor children, applicant and First Respondent.

2.3. That the Office of the Family Advocate is authorised to consult, discuss and collect collaborative material from the appointed Curatrix.

2.4. The Office of the Family Advocate is mandated to review the directives by made by the Curatrix, as well as the contact and residency arrangements of the minor children towards the applicant and first Respondent, wherefrom the Office of the Family Advocate will amend, or revoke, or endorse such directive [with or without further amendment recommendations];

2.5. The Office of the Family Advocate be required to report to this Honourable Court by the return date of the hearing of Part B of this application;

3. That the curatrix must render any future directives to the Office of the Family Advocate, and forbe, endorsed either by the family (sic).
4. The curatrix (Second Respondent) be ordered to report to this Honourable Court by the return hearing of Part B of this application, the reasons, findings, basis, and collaborative material(s) in regard to paragraph 9.5 of the founding affidavit insofar as it purports to be an implementation of permanent primary residents with their First Respondent;
5. That the parties may supplement their papers regarding the hearing of Part B of this application, following the recommendations and report of the Office of the Family Advocate;
6. Costs of the application to be payable by the First Respondent if opposed, alternatively to be costs in the main divorce action;
7. Further and/or alternative relief.

PART B

1. Part B of this application is postponed to sine die until receipt of a report by the Office of the Family Advocate.
2. All parties are entitled to supplement their paper in accordance with the Rules of Court subsequent to receipt of the report up by the Family Advocate and/or Second Respondent regarding the implementation of such recommendations in relation to primary residence and contact, with full reservation of the rights of all parties to address the Court whether such recommendation should be implemented as is, amended or amplified.
3. Further and/or alternative relief.'

PARTIES

- [2] The applicant (Ms D[...]) and the first respondent (Mr D[...]) were married to each other in 2008. Two minor children, [G...D...] (GD), born in 2010, and [I...D...] (ID) in 2012, were born of the marriage.
- [3] The second respondent is an attorney appointed by the court on 22 March 2023 as a curatrix ad litem ('the curatrix') on behalf of the minor children.

BACKGROUND

- [4] Divorce proceedings were instituted in 2022.
- [5] It was common cause between the parties that in terms of the court order, the curatrix's power and duties were:
 - a. To investigate the issue of the minor children's best interest regarding care and contact and to report back to the court on her findings;

- b. To interview the parties, the minor children and any person whom the curator ad litem deems necessary for purposes of her investigation;
 - c. To refer the parties and their children for a forensic evaluation by a clinical psychologist in private practice and to request the clinical psychologist to investigate the issues of gatekeeping, parental alienation and care and contact, and to compile a report with their recommendation for the court;
 - d. To act as curator ad litem on behalf of the children in all litigation between the parties, involving the minor children;
 - e. To refer either party or child for the appropriate therapy and to liaison with the relevant therapists for purposes of the investigation;
 - f. To approach the courts in her capacity as curator ad litem for any relief that shall serve the minor children's best interest;
 - g. To appoint an attorney and counsel to represent her in capacity as curator ad litem.
 - h. To issue directives regarding care and contact in the children's best interest;
 - i. To direct correspondence to the Office of the Deputy Judge President to refer the matter for case management, if the curator deems same necessary;
 - j. To approach the court for an extension of her powers, to serve the minor children's best interest;'
- [6] In November 2023, the curatrix compiled a report and made recommendations concerning the minor children. A Case Manager was also appointed. The children were taken for psychological evaluation. The psychologist recommended, among others, a Parent Effectiveness Training course, Psychiatric evaluation, monitoring for substance abuse and therapy. The experts appointed had filed their respective reports. At the beginning of 2024, Mr and Mrs D[...] enjoyed sharing their respective residence with the children on a 50/50 basis.
- [7] In May 2024, she issued an urgent directive to remove the minor children from the care of both parents. They were placed with their maternal and paternal aunts. According to the curatrix's directive, Mrs D[...] has supervised contact with the children.
- [8] In September 2024, the Case Manager issued a directive regarding the parties' engagement with the curatrix.

CONDONATION

- [9] Mr D[...] brought an application seeking leave to file a supplementary affidavit. He stated that at the time of filing his answering affidavit, he had not yet been contacted by the Children's Court about Mrs D[...]’s initiation of legal proceedings regarding the welfare and protection of the children.

- [10] The condonation application is not opposed.
- [11] A party in a Rule 43 application must act with the utmost good faith and fully disclose all material information regarding their financial affairs. Further affidavits, information and annexures are sometimes permitted and limited according to the rules of evidence, viz; admissibility and relevance, for the adjudication of the Rule 43 application.
- [12] The supplementary affidavit intends to disclose information regarding the children involved in this application. I find that Mrs D[...] would suffer no prejudice when Mr D[...]’s supplementary affidavit is admitted as evidence. Therefore, in the interest of justice, the application for condonation to file further affidavit is granted.

Urgency

- [13] Rule 6(12) of the Uniform Rules requires applicants, in all affidavits filed in support of urgent applications, to set out the circumstances that render the matter urgent and why they cannot be afforded substantial redress at a hearing in due course. The rule affords the applicant the opportunity to create its own rules within which a respondent must file a notice to oppose and an answering affidavit. This is why condonation must be sought when the court is approached. An applicant who cannot convince the court of the rationality and necessity for the timeline devised by it should expect its application to be struck from the roll with costs.[1]
- [14] Deposing to her founding affidavit in support of her application, Mrs D[...] asserted that the application is urgent for the following

reasons:

[14.1] It concerns minor children. She had received several troubling messages and continuous phone calls from GD, stating she was unhappy and pleading with her to assist her, as she did not want to reside with her father. Her father had taken her cellphone away. On 4 February, GD made a call from Mr D[...]’s estate’s security guard’s phone, expressing her desire to run away from home. She could hear from her voice, and when she was with her at her father’s estate, GD was frantic and traumatised.

[14.2] On 5 February 2025, during a meeting between her attorneys and the curatrix, the curatrix informed that the children would live with Mr D[...] as a ‘trial run.’

[14.3] On 20 February, GD informed her about their move from their aunt’s house to Mr D[...]’s new home without her and her attorneys’ knowledge.

[14.4] She feared for ID as she had spent more time with Mr D[...] and had become aloof and defensive towards her, and her request for bonding therapy with ID had been refused.

[14.5] The curatrix issued directives, among others, for removing the children from their parents to the aunts without a prior court order confirming such a directive. The directives had not been approved or endorsed by the court, and the curatrix is not vested with the authority to implement and enforce the directives without the court's approval as the upper guardian.

[14.6] The curatrix had previously not informed, answered, responded to or given feedback on her question regarding the well-being of the children. Therefore, the Office of the Family Advocate is required to investigate, review, endorse or not endorse the curatrix's directives, ensuring that the voices of the children are heard and that there be an accountability and action plan, as she is not convinced that the curatrix' directives are in the best interest of the children.

[14.7] For the curatrix to provide feedback in respect of the children's primary residency of the children with Mr D[...] and the reasons thereof.

[15] In reply, Mrs D[...] stated the curatrix exceeded her authority extensively, acted outside the scope of her duties, and made uninformed decisions, which the court would not make.

[16] Mr D[...] disputed that the application was urgent since the same Office of the Family Advocate had already been approached by Mrs D[...] in June and October 2024 concerning the same request. The relief sought was not competent as the Office of the Family Advocate's statutory powers and duties are specific and not that wide.

[17] In a supplementary affidavit, Mr D[...] averred that Mrs D[...] had, in January 2025, approached the Children's Court in terms of section 53 of the Children's Act[2], initiating legal proceedings regarding the children's welfare and protection.

[18] The curatrix filed a report attaching expert reports regarding the well-being of the children and their relationship with their parents. She also provided voice notes of communication between Mrs D[...] and GD. She stated it would be in the children's best interest for the parties to expedite the finalisation of the divorce. She recommended that the children should reside with their father pending the finalisation of the divorce. Further, the children and their parents should continue with the recommended therapies.

Discussion

[19] The applicant must explicitly set forth the circumstances that render the matter urgent and the absence of substantial redress if not heard as a matter of urgency. This is not the equivalent of irreparable harm. Delay will not automatically result in the matter not being considered urgent.[3]

[20] Notwithstanding that Mrs D[...] is legally represented and knew on 31 January 2025 and again on 4 and 5 February that the children were living with Mr D [...], only on 4 March did she deliver her urgent application. The explanation proffered for the delay in filing the urgent application between 5 February and 4 March was that the attorneys were still drafting the papers to launch the urgent application to court. It can be accepted that Mrs D[...] had been fully appraised of her rights and any harm she could suffer with respect to the relief

sought at least since 31 January

2025. Nothing from the application suggested that its preparation could take a period of four weeks.
- [21] When a matter is brought to court on an urgent basis, the question to be answered is whether or not the applicant will be afforded substantial redress in due course.[4] In the event that the applicant does not succeed to convince the court that he will not be afforded substantial redress at a hearing in due course, the matter will be struck from the roll.[5] The matter may also be struck from the urgent roll where the court finds that urgency was self-created.
- [22] There is no evidence that the Office of the Family Advocate refused Mrs D[...]’s request when she approached them in June and October
2024. Mrs D[...] did not deny that she approached the Children’s Court, initiating legal proceedings regarding the children’s welfare and protection in January 2025, with the return date before the end of March. She stated that the purpose was to secure a social worker to supervise her contact with the children. It is not clear why Mrs D[...], this time around, sought the Office of the Family Advocate’s assistance through a court order granted on an urgent basis.
- [23] An argument was advanced on behalf of Mrs D[...] that the urgency was created by the arbitrary, one-sided and unfounded decision of the curatrix when she placed the children in the care of their father on what is referred to as a "trial run." The evidence reveals that in January / February, already this fact became known to Mrs D[...] and her attorneys.
- [24] The threshold to establish the juristic fact of "absence of substantive redress" is lower than that of "irreparable harm" for the purposes of establishing an interim interdict.[6]
- [25] It was not contested that during one of the case management meetings, after an extensive discussion, it was concluded that due to the involvement of the many experts, there was no need to refer the children to the Office of the Family Advocate. It is unclear why Mrs D[...] could not approach the Case Manager if she were unhappy with the curatrix’s directive or when her view regarding referral to the Office of the Family Advocate had changed.
- [26] It is prudent to mention that notwithstanding Mrs D[...]’s pleaded case, during the hearing, in the heads of argument filed on her behalf, through her counsel, complaints were levelled against the curatrix’s conduct, powers and duties.
- [27] Regarding urgency, Mrs D[...] proffered no persuasive explanation for the delay of four weeks before the launch of the urgent application. The appointment of the Family Advocate’s Office does not require a court order.
- [28] No facts or evidence were placed by Mrs D[...] before the court, justifying the urgent attention of the court with regard to the curatrix’s conduct concerning the placing of the

children, obliging the appointment of the Office of the Family Advocate to intervene. Mrs D[...] has not passed the threshold prescribed in uniform rule 6(12)(b) for the mentioned reasons. Therefore, the application ought to be struck off the roll due to lack of urgency. For this reason, I need not proceed to determine the issue of merits. This brings me to the next issue concerning the costs.

COSTS

[29] It was argued on behalf of the curatrix that though there is no relief sought against them, they have filed a report to assist the court by providing information that may not ordinarily be at the court's disposal, for instance, the fact that there exists a Case Manager for this matter and the other developments in the matter. The facts of the present matter and the interest of justice justify me to follow the general rule that the successful party should be awarded costs.

[30] Consequently, I make the following order.

Order:

- a) The urgent application is hereby struck off the roll due to lack of urgency.
- b) The applicant will pay the costs, including that of counsel for the first and second respondents, respectively, on scale B.

N G M MAZIBUKO

ACTING JUDGE OF THE HIGH COURT

PRETORIA

Heard on: 18 March 2025

Judgment

delivered on: 28 March 2025 For the applicant: Adv GL Kasselmann Instructed by: JJ Raubenheimer Attorneys For the first respondent: Adv I Vermaak Instructed by: Arthur Channon Attorneys For the second respondent: Adv LC Haupt Instructed by: Shapiro and Ledwaba Inc

[1] E.M.W v S.W (26912/2017) [2023] ZAGPJHC 710, para 10.

[2] Act 38 of 2005.

[3] (Molosi and Others v Phahlo Royal Family and Others [2022] 3 All SA 160 (ECM).

[4] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[5] SARS v Hawker Air Services (Pty) Ltd 2006 (4) SA 292 (SCA).

[6] Several matters on the urgent court roll 2013 (1) SA 549 (GSJ).

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