

SOUTH AFRICA / JUDGMENT

N.E.W v N.W (2019/7644) [2023] ZAGPJHC 1435 (7 November 2023)

[2023] ZAGPJHC 1435

COURT

South Gauteng High Court, Johannesburg

BEFORE

Francis

CASE / FILE NUMBER

2019/7644

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2019/7644

In the matter between:

W,
N E
Applicant
And
W,
N
Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is an opposed application in terms of Rule 43(6) by the applicant to set aside the existing Rule 43 order dated 11 July 2019.
2. The applicant was in terms of the aforesaid rule 43 allowed contact with the minor children for a 5-hour period, every alternative weekend, on both Saturday and Sunday; every alternative long weekends on public holiday for a period of 5 hours per day, with the understanding that there would be no sleepover contact; this included, inter alia birthdays and Father's Day; the contact had to take place under supervision and the respondent supervised same; reasonable

telephonic contact was allowed at specific times; the applicant had to undergo a psycho analysis, receive the required therapy, if any, and take medication if so prescribed; the Family Advocate was instructed to investigate and report on primary care and contact and an interactional assessment also had to be done, possibly with the assistance of a clinical psychologist.

Background facts

3. The applicant commenced divorce proceedings by issuing a summons dated 28 February 2019 against the respondent. Two minor children to wit D and L, were born from the marriage.
4. On 3 April 2019 the applicant left the shared residence in Kempton park unannounced and removed all the children's belongings from the house without the knowledge or consent of the respondent. He took he belongings to a new rental house in Edenvale.
5. The applicant thereafter without the knowledge or consent of the respondent, removed D (then a boy of 3 years) from the premises of Mensieland Daycare Centre. He did so without the respondent's permission, while disregarding the school principal's attempts to stop him from doing so.
6. The applicant's actions caused the respondent to approach the Children's Court for an order compelling him to return D to the respondent. The order was granted on 5 April 2019 under Kempton Park file no. 77/2019 whereupon D was collected from the applicant, under police escort, at the Edenvale house on the same day.
7. The applicant thereafter approached this court for the relief set out in his initial rule 43 application. The relief sought included that primary care and supervision of the minor children be awarded to him, alternatively, that he be awarded specific rights of contact with the minor children.

8. The court refused the applicant's primary relief and granted him the relief set out in paragraph 2 above which included inter alia a maximum period of 5 hours supervised access to the children on specified occasions and he was required to undergo a psychological assessment before his visitation rights would be reconsidered.
9. The Family Advocate was ordered to investigate and report on the issue of primary care and contact.
10. The Family Advocate report was made available on 11 May 2021 and recommended that:
 - 10.1 The applicant's contact was to continue under the supervision of a Mental Health Care Professional;
 - 10.2 The applicant should undergo a comprehensive psychological assessment, and such report should be furnished to the Mental Health Care Professional;
 - 10.3 Dr Lynette Roux should be appointed to assist with the supervised contact and further assistance.
11. Dr Roux was appointed as Parenting Coordinator (PC) by both parties on or about 26 October
2021. The agreement inter alia provides at paragraph 5 on page 8 as follows:

"During the term of the PC agreement, the parents undertake not to initiate or renew court proceedings on matters that are within the scope of the PC's services as defined by this Agreement, without notifying the PC."
12. On 21 January 2022, Collen Johnson was appointed to supervise contact as per a recommendation from Dr Roux. She furnished her report on her findings on 7 February 2022. She deemed that contact between the applicant and the minor children to be positive.
13. On 18 February 2022, a psycho-legal report was completed by Ms Natali Benic (the expert that the applicant saw subsequent to Slater). No concerns were noted, and immediate reunification was recommended.
14. On 28 March 2022, Dr Roux's report was made available. The report recommended phased in contact.
15. On 25 June 2022 the second phase of the phased in contact commenced, with one sleepover.
16. In September 2022, the third phase of weekend sleepovers commenced. This is currently the status quo.
17. The applicant then brought the rule 43(6).
18. The application was opposed by the respondent on the following basis:
 - 18.1 There does not exist a dispute that needs to be adjudicated in order to grant the relief;

18.2 The applicant has failed to comply with a written Parenting Co-ordination agreement wherein he agreed not to undertake, initiate or renew court proceedings on matters that are within the scope of the Parenting Coordinator (the PC) services as defined by this agreement without notifying the PC;

18.3 The proposed order will interfere with the duties, functions and obligations of the PC to the detriment of the minor children;

18.4 There are no material changes in circumstances that justify the setting aside of the order;

18.5 The applicant has failed to cite the Parenting Coordinator who had a substantial and direct and legal interest in these proceedings.

The parties contentions

19. The applicant contended that the present arrangement in terms of the rule 43

order is not a court order and is subject to the whims of the respondent. The order being sought merely gives effect to the status quo, which is in line with the recommendations of Dr Roux. The concern regarding an assessment done before the Christmas 2022 holidays, has now become academic. The concern that the new amended rule 43 order will conflict with the existing protection order, is without merit. He can and does, exercise his contact without attending and entering the school premises. Thus, there is no such contravention of the order.

20. The applicant contended further that he has made out a proper case for the granting of the interim relief. The relief that he is seeking is in tandem with the best interests of the minor children involved, and is in line with the requirements of section 28(2) of the Constitution.

21. On the question of costs the applicant contended that he has done everything required of him, in order to have contact with the minor children. The situation of only seeing the minor children 5 hours a day, has changed materially, to his present contact of weekend sleepovers. This justifies his approach, in seeking to amend an existing order. The respondent has no valid opposition to the application and is merely being obstructive. He sought an order that the application be granted, pendente lite, as prayed for and cost be awarded in his favour.

22. The respondent contended that it is apparent from the content of the PC's Report that the prayers contained in the Rule 43(6) application falls within the scope of the PC's services as defined by the PC agreement. This so it was contended was also conceded by the applicant in the heads of argument where it is asserted in paragraph 25 that the order sought, merely gives effect to the status quo which is in line with the recommendations of Dr Roux.

23. The respondent contended further that during the consultation dated 27 September 2022, the PC confirmed to the respondent that the applicant did not inform her of his intention to launch the current application in terms of Rule 43(6) before he commenced with the application.

24. The respondent contended further that Dr Roux had also issued various written directives for the parties since her appointment as the PC. There has been no complaint by any party to indicate that her directives have not been complied with or that there is a need to enforce her directives in that regard.

25. The respondent contended further that it was against this background also

important to take cognizance of the mediation affidavit at paragraph 5 where the applicant's legal representative conceded that the parties did not embark on mediation. The legal representatives confirmed that Dr Roux was appointed as PC who released reports with recommendations and issued directives. The legal representatives then concluded with the remark that to date the parties are complying with the recommendation of Dr Roux. She clearly stipulated that the contact of the minor children with the applicant should follow a phased-in approach including evaluated contact.

26. The respondent contended further that there is no dispute between the parties evident from the papers. This is apparent from the applicant's case where it is submitted that the order sought, "merely gives effect to the status quo, which is in line with the recommendations of Dr Roux." It is clear from the affidavit that there cannot be any dispute between the parties.

27. The respondent contended that this is confirmed by the contention that the applicant seeks to set aside the order because the present arrangement is not a court order and subject to the whims of the respondent. However, in the founding affidavit it is not asserted that the respondent has abused the current order. Contrarily, the parties have subjected themselves to the PC who has the authority to issue directives with which the parties have to comply. There is no claim that the respondent failed to comply with directives issued by the PC or that she is whimsical. In the event of any dispute, or if the respondent fails to act in accordance with the parenting plan, the PC has the authority to intervene and to remedy any potential misconduct by issuing the appropriate directives.

28. The respondent contended further that the applicant had agreed that he would not initiate or change the scope of the PC's service as defined by the Agreement, without notifying the PC. The prerequisite was introduced to prevent any party from approaching this court without an attempt to resolve any dispute that may arise. The agreement is based on a common sense approach with the clear intention to prevent unnecessary litigation and the escalation of emotions. The applicant has not advanced any reasons for his failure to comply with the suspensive condition before he approached the court.

29. It was further contended by the respondent that it would appear that the current arrangements are functioning well without any complications. This was admitted by the applicant's legal representative who conceded in her mediation affidavit that to date the parties were complying with the recommendation of Dr Roux. The PC is acting in the best interest of the minor children and has been able to avoid conflict and an escalation of hostilities between the parties.

30. It was further contended by the respondent that the PC is, under the circumstances and pending a final order by this court, the best person to decide on the issues that form the subject of the current application as well as how to deal with any problems that may arise. The PC is best placed to intervene in any dispute that may arise between the parties, alternatively on whether contact between the applicant and the minor children should be extended or minimised or even withdrawn. The PC is best placed to react to, and deal with, any changes that may have an impact on the best interests of the children. The PC will be able to avoid parties from approaching this court in respect of minor disputes that should not impose on the scarce resources available to deserving litigants. The proposed amendments will impose on the discretion of the PC to issue directives in respect of access that may arise as a result of changed circumstances.
31. It was further contended by the respondent that the relief sought by the applicant will circumvent the PC, undermine her authority, and create uncertainty between the parties. There has been no material change in circumstances of this matter that justify the setting aside of the order and for this court to grant the relief prayed for in this current application. It is significant that it is conceded in the mediation affidavit that the applicant chose to disregard mediation because Roux was appointed as PC and because the parties are complying with her recommendations. It is inconceivable that the parties would not submit to mediation because Roux enjoys the confidence of the parties, but that the applicant would then turn to this court when there is no dispute between the parties.
32. The respondent contended that the relief sought by the applicant will not benefit the minor children but that it may prejudice the interests of the minor children in that the influence and decision-making abilities of the PC will be undermined to their potential detriment.
33. The respondent contended that a party must of necessity be joined in proceedings if he or she or it has a substantial direct and legal interest in those particular proceedings. Failure to join an interested party is sometimes a fatal shortcoming, but the court may in any event not grant an order in the absence of such party. The application was fatally and fundamentally flawed since the PC was not joined as a party to the proceedings.
34. The respondent sought an order that the application be dismissed with costs.

Analysis of the evidence and arguments raised

35. The applicant seeks to set aside the rule 43 order on the grounds that the present arrangement is not a court order, and is subject to the whims of the respondent.
36. It is common cause that rule 43(6) provides for the variation of an existing rule 43 order as a result of a change in circumstances.
37. It is trite that rule 43(6) is to be strictly interpreted. There must be a material change in circumstances and it is not permissible to seek a re-hearing or a review of an existing order under the guise of a rule 43(6) application or to appeal the existing order.

38. In the unreported case of J B vs M B (549/2020) ZAMPMHC 15, the applicant approached the court and applied for relief where no dispute was evident from the papers. The court held as follows at paragraph 27:

“The minor children’s best interest are well catered for by both parties. Applicant pay maintenance as agreed and has access to the children as agreed. There does not seem to exist a dispute needing to be adjudicated in order to grant relief.”

39. It is common cause that Dr Lynette Roux was appointed by the parties as their Parenting Coordinator (PC). I deem it necessary to refer to her letter dated 5 May 2023 which reads as follows:

“1. I have received correspondence from Mr Human regarding the Proposed Court order drafted by Mr W’s counsel.

2. I wish to clarify the following:

2.1 I agree with the Applicants Draft Order.

2.2 The Parenting Coordinator (PC) is empowered by the court to implement the Court Order.

2.3 Parenting is a “fluid process” and the PC should be empowered to issue directives which shall be binding on the parties until, or unless a Court of competent jurisdiction overturns or overrules a directive.

2.4 With regard to the residency and contact as court ordered, the PC cannot alter the residency. The PC can however make minor changes to the Court Ordered contact in the best interest of the children if the Court sees fit. The powers and the role of the PC are well accepted and regularly ordered by the courts.

3. Parenting Coordination involves mediation but is not limited to assessment and mediation. It involves issuing directives in order to bring finalisation to issues in order to enable the children’s lives to proceed. I believe that the role of the Parenting Coordination is clearly set out in the Parenting Coordination Agreement. This is attached to hopefully assist in bringing clarity to the role and powers of the Parenting Coordinator.

4. It is not necessary for a PC to be joined as a party in a court application. However, if necessary, the PC can testify in court, to assist the court.”

40. It is clear from the aforesaid letter that Dr Roux supports the relief that the applicant is seeking. She also disagrees that she should have been cited as a party in the proceedings. No substantive relief is being sought against her and she has been appointed to assist the court and the parties in this application.

41. Dr Roux has dealt with the misgivings and submissions that the respondent had about how the rule 43(6) application would have on her role as a PC. At the end of the day it is for this court to decide on the issues that form the subject matter of the current application and whether contact between the applicant and the minor children should be extended or

minimised or even withdrawn, guided of course by the recommendations made by the PC. The PC has not taken any issue with how the applicant has dealt with the matter and does not support or address the concerns that the respondent had raised.

42. Since the PC supports the applicant in the relief that he is seeking I can see no reason why the applicant should not be granted the relief that he is seeking.
43. Both parties had sought costs against each other. However, in the applicant's proposed draft order he has abandoned the costs order and sought that costs be costs in the cause.
44. I do not believe that this is a matter that warrants the granting of a costs order. An appropriate order would be that costs are cost in the divorce action.
45. In the circumstances the following order is made:
 - 45.1 The rule 43 order of 11 July 2019 be set aside.
 - 45.2 The applicant and respondent shall both have parental rights and responsibilities in respect of the minor children as envisaged by section 18 of the Children's Act 38 of 2005 which is to include, but not be limited to, the right and responsibility to:
 - 45.2.1 care of the minor children;
 - 45.2.2 maintain and contact the minor children;
 - 45.2.3 act as co-guardian of the minor children;
 - 45.2.4 contribute towards the maintenance of the minor children.
 - 45.3 The primary residence of the minor children shall be with the respondent
 - 45.4 The parties shall make joint decisions in respect of the education, medical care and treatment, religion, extra-mural activities and residence of the minor children.
 - 45.5 The applicant shall have reasonable contact with the minor children at all reasonable times which shall include, but not be limited to, the following:
 - 45.5.1 Every alternate weekend from after school on a Friday afternoon until Monday morning when the applicant shall return the minor children to school;
 - 45.5.2 One half of each and every school holiday period with Christmas and Easter to alternate between the parties;
 - 45.5.3 On the applicant's birthday and Father's Day;
 - 45.5.4 For half of the available time on the minor children's birthdays;
 - 45.5.5 Every alternate public holiday and long weekend;
 - 45.5.6 Reasonable telephonic contact with the minor children when they are with the

respondent;

45.5.7 The right to attend any activity, function and/or event in which the minor children are involved.

45.6 The appointment of Dr Lynette Roux as the Parental Coordinator is to continue. Her duties and powers remain unchanged, and are attached to the founding affidavit marked B. The costs of Dr Roux be shared equally between the parties.

45.7 Costs be costs in the cause.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR THE APPLICANT :

L NORMAN INSTRUCTED BY CANARIO

CORNOFSKY ATTORNEYS

FOR RESPONDENT :

P A WILKINS INSTRUCTED BY C.J.

HUMANS ATTORNEYS

DATE OF HEARING : 2 MAY 2023

DATE OF JUDGMENT : 7 NOVEMBER 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to caselines. The date and time for hand-down is deemed to be 12h15 on 7 November 2023.

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