

SOUTH AFRICA / JUDGMENT

Parker and Another v Van Zyl and Others (1249/2006 , 48/2006) [2006] ZAECHC 63 (16 November 2006) [2006] ZAECHC 63

COURT
High Courts - Eastern Cape

BEFORE
Grogan

CASE / FILE NUMBER
1249/2006

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FORM

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SHEET FOR EASTERN CAPE JUDGMENT

ECJ

no : 48

PARTIES: NICOLENE

PARKER 1st

APPLICANT

HENRY STEPHEN

PARKER

2nd

APPLICANT

AND

TRUDY VAN

ZYL 1ST

RESPONDENT

GARY

BELLARDI 2nd

RESPONDENT
BRETT
CHAPPLE 3rd
RESPONDENT
KERRY
CHAPPLE 4th
RESPONDENT

Registrar: 1249/2006

Magistrate: High
Court: GRAHAMSTOWN
DATE
HEARD: 9 November 2006
DATE
DELIVERED: 16/11/06

JUDGE(S): Grogan A.J.
LEGAL
REPRESENTATIVES -

Appearances: for

the Applicant(s): ADV: Crouse
for
the Respondent(s): ADV: J.A.
Urban
Instructing

attorneys: Applicant(s)
PORT ELIZABETH JUSTICE CENTRE

Respondent(s): PAGDENS STULTINGS ATTORNEYS
CASE
INFORMATION -
Nature

of proceedings : Costs

Topic: Costs in custody matter.
IN
THE HIGH COURT OF SOUTH AFRICA
(SOUTH
EASTERN CAPE LOCAL DIVISION)
CASE NO.:1249/06
In

the matter between:

NICOLENE
PARKER First
Applicant
HENRY
STEPHEN
PARKER Second
Applicant
and
TRUDY
VAN
ZYL First
Respondent
GARY
BELLARDI
Second
Respondent
BRETT
CHAPPLE Third
Respondent
KERRY
CHAPPLE Fourth
Respondent

JUDGMENT

GROGAN A.J.:

- [1] This matter comes before me for decision on reserved costs. I do not propose to set out the background in any detail greater than necessary for that purpose.
- [2] Briefly, the dispute between the parties in this Court turned on who should exercise custody over an infant, G. B., pending the outcome of adoption proceedings, which have now been finalised.
- [3] The first and second respondents are G.'s biological parents. They are also biological parents of a daughter, J., now about [.....] years of age. Since neither the first nor the second respondents was in a position to care for J., she was placed by order of the Childrens Court in the care of the applicants, a married couple, upon whom she looks as parents. When G. was about [.....] months old, he too was placed in the applicants' care by order of the Childrens Court. Both children suffer from foetal alcohol syndrome. According to the applicants, Jadene developed a deep emotional attachment to G. after she was informed that he was her natural brother.
- [4] After G. had been in the applicants' care for about two weeks, the third and fourth respondents began proceedings to adopt G. That application commenced in the Childrens Court on 6 December 2005, but was postponed to 8 February 2006 for the completion of a social worker's report on the suitability of the third and fourth respondents as adoptive

parents. The first and second respondents consented to the adoption application, and a social worker confirmed that the third and fourth respondents were suitable adoptive parents.

- [5] When the adoption proceedings resumed on 8 February 2006, an attorney of the Legal Aid Board applied for a postponement to obtain legal representation for the two children to oppose the proposed adoption. By agreement, G. was left in the applicants' custody pending the finalisation of legal proceedings in the High Court and the Childrens Court.
- [6] The High Court proceedings were launched on 10 February 2006. This took the form of an application on notice by the applicants for an order granting them custody of both J. and G. On 15 February 2006, the respondents replied with a counter-application for

orders

appointing a curator ad litem for each of the children and directing the office of the Family Advocate "to conduct its inquiry and finalise its report as a matter of urgency", together with an answer to the applicants' founding affidavit. Five days later, the applicants launched an application in the Childrens Court for the adoption of J. and G.

- [7] The High Court proceedings continued to run their course. On 21 February 2006 the applicants filed their replies to the respondents'

answering affidavits, as well as a supplementary affidavit, in which they gave notice of their intention to amend the notice of motion to grant them custody pending the outcome of the adoption application(s). The amendment sought was the incorporation of the words "hangende die suksesvolle oorweging van die applikante se aansoek om aanneming van die genoemde kinders" after the first prayer in the notice of motion.

- [8] The following day, the respondents filed a fresh notice of motion on an urgent basis seeking inter alia an order directing the office of the Family Advocate to investigate and report to the Court on whether the relief sought by the applicants (i.e. as set out in their original notice) was in the best interests of the minor children.
- [9] On 8 March 2006 the third and fourth respondents filed replies to the applicants' supplementary affidavit.
- [10] On 31 March 2006 the third and fourth respondents filed yet another application, again on an urgent basis. This time the relief sought was for the appointment of separate curators ad litem for J. and G. The applicants filed answering affidavits in respect of this application on 4 April, and the matter was argued on that day. The dispute over this issue appears to have turned only on whether additional costs, to which the applicants were averse, should be incurred by the appointment of a curator ad litem from the Port Elizabeth Bar. An order was granted by agreement appointing two curators ad litem after the third respondent tendered to pay the additional costs occasioned by the appointment of a second curator. On the same day, the applicants filed the amended notice of motion foreshadowed in their replying

affidavit of 21 February 2006. The effect of the amendment was that the order sought by the applicants was to operate pending the outcome of the adoption proceedings, rather than permanently.

- [11] The Family Advocate filed his report on 13 April 2006. The report opined that it would not be unduly harmful to the children were they to be placed in separate households. On 21 April 2006, the respondent gave notice of their intention to amend their counter-application by the addition of a prayer for an order granting interim custody of G. to the third and fourth respondents.
- [12] When the application was set down for hearing on 25 April 2006, the applicants handed up a reply to the Family Advocate's report. After addressing the Court, the parties agreed that pending the outcome of the adoption proceedings, J. and G. would remain in the custody of the applicants. That agreement was made an order of court, and costs were reserved.
- [13] Although not pertinent to these proceedings, I record that the saga ended in May 2006, when the Childrens Court declared that the third and fourth respondents were the adoptive parents of G.
- [14] Ms Urban, for the respondents, contended in essence that the respondents were entitled to their costs because the applicants had sought relief they already had in the form of orders of the Childrens Court granting lawful custody to them. She added that, had the applicants sought the relief the respondents had sought in this Court – namely, legal representation for the two minor children and an inquiry by the Family Advocate – there would have been no opposition and unnecessary costs would have been avoided.
- [15] The applicants do not seek costs against the respondents, save for the costs of this hearing, which they contend should be borne by the third and fourth respondents. Mrs Crouse, for the applicants, argued that the only relief the respondents had obtained in this Court, namely, the involvement of the family advocates and the appointment of two curators ad litem was in any event unnecessary because the applicants had merely sought interim relief.
- [16] The principles applicable to costs in matters involving the custody of minor children are fully discussed in *Bethell v Bland & others* 1996 (4) 472 (W), in which Wunsh J, as he then was, sets out the following guidelines at 475E-I:
- “1. Generally speaking, a successful litigant is entitled to his or her costs.*
2. While it is quite true that a custody dispute should not be seen as an adversarial contest in the ordinary sense but rather as an enquiry into the best interests of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child. Often, too, the papers contain many attacks on the character and conduct of the opponents.

3. On the other hand it is also a consideration that a party should not be discouraged from putting up a case which he or she, on broadly reasonable grounds, thinks to be in the interests of the child for fear of having costs awarded against him or her if unsuccessful. By the same token, a party who is, on what turn out to be good grounds, confident that his or her case will prevail, should not be discouraged from taking or resisting action because of the costs which he or she will incur.
4. However bona fide and concerned a party may be, if his or her opponent's judgment of the issue prevails, it is not, in the absence of circumstances justifying it, fair that the opponent should be mulcted in his or her own costs."

See also *Schutte v Jacobs* 2001 (2) SA 478 (W); *Ex Parte Crichfield & another* 1999(3) SA 132 (W).

- [17] The approach to be distilled from these and other judgments in point is, I believe, to address two questions: (i) is the party seeking costs entitled thereto, and, if so, (ii) should costs be ordered in the circumstances of the case?
- [18] The respondents seek the costs of all proceedings in this Court, excluding those occasioned by the appointment of one of the curators ad litem, which the Court has already ordered be paid by the third respondent. As Mrs Crous pointed out, however, there is no mention of costs in the other order obtained by the respondents dated 22 February 2006, namely, that directing the Family Advocate to conduct an inquiry. From this it must be assumed that the Court intended each of the parties to bear their own costs in respect of that application. The order appointing the curators ad litem dated 4 April 2006 makes costs of that application cost in the cause in the main application. The final order, dated 25 April 2006, reserved the question of costs.
- [19] Each party claims that they were substantially successful, in that for the most part they obtained the relief sought in their respective applications. I agree that this was so. In the end the main application and counter-application were withdrawn and the interim relief sought by the applicants granted. In the meantime, by a number of ancillary applications, the respondents also obtained most of the relief they sought, save for interim custody of G., the subject of a separate application not pursued. In my view, an outcome so balanced would have justified withholding a costs order in any type of case. In this matter, that view is strengthened by the additional considerations mentioned in paragraph 3 of the extract from the *Bethell v Bland* judgment quoted above.
- [20] I am aware that the present matter does not involve a dispute between natural parents of the children concerned. However, it appears from the papers that the applicants were at all times motivated by the bona fide conviction that the two children should remain together. From that perspective, the applicants could perhaps claim a closer emotional attachment to G. than the third and fourth respondents, who had during these proceedings not yet had the baby in their care. As it happened, the Childrens Court did not share the applicants' view. Until the outcome of the adoption proceedings was known, however, I do not think it would be fair to hold against the applicants the steps taken by them to retain custody of both

children. It may be so that the applicants need not have brought the main application because G. was already de facto and de jure in their custody. It may also be so that the applicants were ill advised to seek a final custody order at the outset. However, the

proceedings would in my view have been significantly curtailed if the parties or their representatives had simply approached each other and worked out a modus vivendi pending the outcome of the adoption applications.

[21] There was in my view ample opportunity for both parties to do so. All the orders issued by this Court after the commencement of the main application were obtained by agreement. From an early stage, all the parties and their representatives knew that the role this Court could play pending the outcome of the adoption applications was merely of an interim or formal nature. The respondents were of course entitled to oppose the applicants' attempt to obtain orders placing G. permanently in their care. But had the original notice of motion been opposed on that basis, it would almost certainly have ended there – such an order would clearly have been inconsistent with any possible outcome of the two adoption applications. There was no need for the respondents to complicate issues by filing a counter-application for an order directing the Family Advocate to enter the fray. This could have been arranged directly with the office of the Family Advocate or by the Childrens Court. There may have been good reason for the respondents to launch a special application for the appointment of an additional curator ad litem for G. But that was clearly in the respondents' interest. I see no reason why the applicants should be mulcted with the costs of that application. They opposed only for fear that this would have increased costs, which the third respondent ultimately agreed to bear. However, since the applicants were wholly successful in resisting the respondents' claim for costs, I think it is fair that the respondents should bear the costs thereof.

[22] For the above reasons, I make the following order:

1. Subject to paragraph 2 below, the parties shall bear their own costs in all proceedings under case no. 1249/06.
2. The respondents shall pay the costs occasioned by the argument on costs jointly and severally, the one paying the other to be absolved.

J G GROGAN

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 09/11/2006

Date of judgment:

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Prepared on 11 October 2026 · Esheria