

SOUTH AFRICA / JUDGMENT

R.G.T v M.S.D and Another (87688/19)

[2021] ZAGPPHC 664 (9 September 2021)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Mthimunye

CASE / FILE NUMBER

87688/19

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED:

NO

09/09/2021

CASE NO: 87688/19

In

the matter between: R[....] G[....]
 T[....]
 Applicant
 AND
 M[....]
 S[....]
 D[....]
 First Respondent
 DIRECTOR-GENERAL,
 HOME AFFAIRS
 Second Respondent

JUDGMENT

Mthimunye AJ

- [1] This is an application for an order directing the first respondent (Ms S[....] M[....] D[....]), the biological mother of the minor child, to complete necessary forms and submit certain documents to the second respondent (the Director-General Home Affairs) for the application of a passport on behalf of the minor child; and to do everything else required by the office of the second respondent to that end. The second respondent is cited in his official capacity and as an interested party only, no order is sought against him.
- [2] The applicant (Mr R[....] G[....] T[....]), the biological father of the minor child, further seeks the first respondent to be ordered to provide the applicant with a certified copy of her identity document and an affidavit granting permission to the applicant and specific listed family members of the applicant to travel with the minor child to Dubai or any other country where the applicant may be resident. The listed family members are
- R[....] K[....] - the applicant's wife
- T[....] T[....] -the applicant's biological brother
- M[....] T[....] - the applicant's biological sister
- R[....] T[....] - the applicant's biological sister
- A[....] T[....] - the applicant's biological sister
- [3] In his papers, the applicant also sought to re-instate the contempt and committal order granted by my brother Mabuse J on 20 March 2015 against the first respondent. During submissions the applicant abandoned this prayer and confirmed that he now has regular telephone contact with the minor child. As such this court will henceforth make no mention of the prayers related thereto and arguments advanced to that end.
- [4] The applicant and the first respondent were married to each other in the year 2011, which marriage was dissolved by divorce on 13 September

2013. From the said marriage one minor child was born, which child is the subject of this application. In terms of the settlement agreement which was made an order of court, the first respondent was given primary residence and care of the minor child, and full parental responsibilities in respect of the minor child in terms of Section 18(1) and (2) of the Children's Act 38 of 2005.

[5] The applicant was awarded the following rights:

- (a) Guardianship of the minor child;
- (b) the responsibility to contribute towards the maintenance of the minor child as set out below; and
- (c) right of contact with the minor children (sic) as follows;
 - (i) every alternative weekend from Friday at 17H00 until Sunday at 15H00, when the child is seven years' old
 - (ii) long and short school holidays to be shared equally between the parties;
 - (iii) Reasonable contact on children's birthday;
 - (iv) Christmas season to be rotated between the parties;
 - (v) Telephone contact with the minor children (sic) at all reasonable times;"

[6] The settlement agreement further provided that:

"the right to contact over weekend will be exercised in such a manner so that it does not interfere with the minor children's (sic) school, religious and/or social activities;

Neither the Plaintiff nor the Respondent (sic) will have the right to take the minor children (sic) outside the boundaries of the Republic of South Africa without prior consent from the other party, which consent will not be unreasonable (sic) withheld."

[7] In November 2018, the applicant obtained permanent employment with [...] South in Dubai. Consequently, he relocated to Dubai. To exercise his right of contact, including visitation rights, the applicant requires the minor child to visit him in Dubai during school holidays. For this to be a reality, depends on two enabling factors. Firstly, the minor child must have a valid passport. Secondly, the first respondent as the mother of the minor child must give consent for the applicant to take the minor child outside of the Republic of South Africa, in accordance with the provisions of the settlement agreement.

[8] The applicant avers that prior to leaving for Dubai he attempted to obtain a passport for the minor child and was advised by the second respondent that, in terms of its regulations, the first respondent must be present when applying for the minor child's passport. The first respondent refused to cooperate. The applicant's pleas and attempts, including making an appointment online for the first

respondent to attend to the office of the second respondent for this purpose were all met with resistance. To date, the minor child is not in possession of a passport and as such cannot travel to visit the applicant. The applicant argues that he is being denied his visitation rights to the minor child, hence this application.

[9] He avers that the first respondent is unreasonable and obstructive. In one of her responses to the applicant's plea, the first respondent

told the applicant to come to South Africa every alternative weekend if he wants to see the minor child otherwise the minor child will only visit him in Dubai after he turns thirteen. He states it is very clear from the first respondent's attitude that even if the applicant could obtain the passport for the minor child, the first respondent will refuse to grant the required consent for the minor child to be taken outside of the Republic of South Africa.

[10] Although the applicant is willing to travel to South Africa to collect the minor child during long school holidays, he cannot do so on every visit. This would be impractical and very costly. For this reason, he is requesting the court to direct the first respondent to also give consent for the minor child to travel with members of the applicant's family listed in paragraph [2] above.

[11] The first respondent objects to the minor child being taken outside of the Republic of South Africa without her, as his biological mother, accompanying him. The applicant in his reply, stated that he has no issues with the first respondent accompanying the minor child to Dubai however, the first respondent would have to bear her own travelling and accommodation expenses.

[12] The first respondent avers that the applicant becomes aggressive and insulting when discussing matters pertaining to the minor child with her, making a civil conversation impossible. as a result, she limits conversations with the applicant. Text messages where the applicant insulted the first respondent were submitted to this court. She argues that the applicant's attitude towards her is such that she believes that he will not return the minor child to South Africa and should it be so, she will have no recourse since there is no extradition treaty between the Republic of South Africa and the United Arab Emirates.

[13] Further, she alleges that the applicant is in arrears with maintenance and school fees for the minor child and, in one of the text messages, he threatened to stop maintaining the minor child. The applicant in his response, denies being in arrears with maintenance and avers that the amount quoted by the first respondent as owing to the school is unsubstantiated and was added just for ambiance and atmospheric reasons.

- [14] The first respondent confirms that she is not willing to apply for the minor child's passport and to grant permission for the applicant to the Republic of South Africa until he has turned 13 (thirteen) years of age. Until then, she maintains, the applicant can exercise his contact rights within the borders of the Republic of South Africa. She further states that a blanket permission for members of the applicant's family to travel with the minor child cannot be in the interest of the minor child.

Condonation

- [15] At the onset, this court was seized with an application for condonation for late filing of the applicant's replying affidavit. The contextual background thereto is that the applicant issued this application on 21st November 2019 and served the first respondent on 26th November 2019. The first respondent filed her notice to oppose on 8 January 2020 and her Answering Affidavit on 6 July
2020. In terms of Rule 6(5)(d)(ii) of the Uniform Rules of this court, the respondent had 15 (fifteen) court days to file the answering affidavit after a notice to oppose was delivered. The first respondent was therefore seven months late in filing her answering affidavit. The applicant raised no issue with the first respondent's non-compliance.
- [16] The applicant filed his replying affidavit on 3 March 2021 i.e. almost eight months after receipt of the first respondent's answering affidavit. In terms of Rule 6(5)(e), the applicant had (10) ten days to file his replying affidavit after receiving the respondent's answering affidavit. Assuming that the first respondent will extend the same courtesy shown by the applicant in respect of the first respondent's answering affidavit, the applicant did not deem it necessary to file an application for condonation of his late filing of the replying affidavit. Three months after receiving the applicant's replying affidavit, in her heads of argument, the first respondent raised an issue with the applicant's non-compliance with the Rules of court as a point in limine, resulting in the applicant bringing this condonation application in terms of Rule 27(3).
- [17] In response to the condonation application, the first respondent brought a Rule 30 complaint that the first respondent's Notice of Motion and the Affidavit for the condonation application is not compliant with Rule 6 as it were. The Rule 30 application was not before me and is mentioned herein only to contextualise the first respondent's failure to file opposing papers herein and consequently opposing the condonation application from the bar.
- [18] Having read the applicants' papers and considered Counsel submissions from both sides, exercising this court's judicial discretion, and being satisfied that good cause for condonation has been shown by the applicant and to avoid unnecessary delays, I granted condonation for the applicant's late filing of his replying affidavit.

- [19] I now turn to deal with the main application and the legal principles applicable thereto. What is in dispute here, is the applicant's right of contact with the minor child, more specifically, visitation rights. In terms of the settlement agreement, neither of the parties have a right to take the minor child outside of the Republic of South Africa without the written consent of the other, which consent should not be unreasonably withheld.
- [20] The respondent has made it clear from her papers that she is not willing to apply for the minor child's passport and is not prepared to give consent for the minor child to visit his father in Dubai until the minor child turns thirteen years old. She argues that what the applicant seeks is a mandatory final interdict and for such to succeed the applicant must prove a clear right, an injury actually committed or reasonably apprehended and the lack of adequate alternative remedy.
- [21] What this court is called upon to answer are the following questions:
- (i) Whether the applicant has a clear right herein i.e. if he has a right for the minor child to visit him in Dubai or any other country where he may be resident.
 - (ii) If the answer to the above is in the affirmative, whether or not the refusal by the respondent to enable the applicant to exercise this right by signing the required forms and submitting the required documentation to the second respondent for the minor child to obtain a passport, and further grant consent for the child to be taken out of the Republic of South Africa amounts to a violation of the applicant's right and is unreasonable under the circumstances.
 - (iii) Whether or not there exists other adequate alternative remedies for the applicant.
- [22] In dealing with the establishment of a clear right on the part of the applicant, I must first deal with the legal principle that must be applied in matters pertaining to rights that involve minor children.

In terms of section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996, "a child's best interests are of paramount importance in every matter concerning a child."

To give effect to this constitutional provision, section 9 of the Children's Act 38 of 2005 ("the Children's Act"), provides that "In all matters concerning the care, protection and wellbeing of a child, the standard that the child's best interests is of paramount importance, must be applied".

- [23] Section 7 of the Children's Act sets out factors that must be considered in applying the child's best interest standard as follows:

"(a) the nature of the personal relationship between -

- (i) the child and the parents, or any specific parent; and
- (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-

- (i) the child; and
- (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- ...;

[24] In *Lubbe v du Plessis* 2001 (4) SA 57 (C) at 66E, the court articulated that the best interest of a child or children in any particular case, is a question of fact in that

specific case. The list in Section 7 of the Children's Act is non-exhaustive and the sum total thereof is that in every decision involving a minor child, the best interest of that child is paramount and must be given first and primary consideration.

[25] Section 20 of the Children's Act clearly stipulates that the biological father of a child has full parental rights and responsibilities in respect of the child if he is married to the child's mother, alternatively if he was married to the child's mother at the time the child was conceived or born or anytime between conception and birth. This is based on the common law principle that a man acquires full rights and responsibilities over a child by virtue of his marriage to the mother. The applicant was married to the first respondent when the minor child was born. Upon divorce, his rights of access and visitation were affirmed and articulated in the settlement agreement which became an order of court.

[26] At the risk of repetition, I quote herein the provisions of the settlement agreement on the last paragraph of Clause 4:

"Neither the Plaintiff nor the Respondent (sic) will have the right to take the minor children (sic) outside the boundaries of the Republic of South Africa without prior written consent from the other party, which consent will not be unreasonable (sic) withheld".

This provision in the settlement agreement, follows or qualifies the parental rights and responsibilities of both the applicant and the first respondent. That a provision for the child to be taken 'outside of the Republic of South Africa' was included in the settlement agreement which both parties agreed to be made and order of court, means that both parties recognised that, in exercising the rights of either of the parties, there may be instances that may require the child to be taken outside of the Republic of South Africa. The right was then provided for subject to consent from the other parent. It is the exercising of that right that is subject to consent, not the right itself. I hold the view that the applicant's right herein is clearly established by Section 20 of the Children's Act and affirmed in the settlement agreement.

[27] The exercise of the applicant's right to access and visitation under his current circumstances, is dependent firstly on the minor child having a valid passport, and secondly on the first respondent granting consent for the applicant to take the minor child outside of the Republic of South Africa. This consent, in terms of the settlement agreement, is not to be unreasonably withheld. The respondent has raised a number of issues upon which she bases her refusal to cooperate in applying for the minor child's passport and granting consent. Based on these reasons, she avers that her withholding consent is reasonable. I now will address these

reasons

separately, although not in the order raised by the first respondent.

[28] The first reason cited by the first respondent is that she fears that the applicant may not return the minor child to the Republic of South Africa and should it be so, she will have no recourse since the United Arab Emirates (UAE) is not a party to the extradition treaty. This she maintains despite the applicant's undertaking under oath that he has no intentions of keeping the minor child in Dubai permanently, nor disrupt the child's life by forcing him to change schools. The applicant further explained that keeping the minor child illegally in Dubai would be a criminal offence and certainly would jeopardise not only the child's life, but his career. At the conclusion of arguments, Counsel for the applicant produced and handed to the court a document confirming that an extradition treaty was signed by the UAE and RSA on 10 June 2021. Counsel for the respondent objected to this being brought in at this late stage in the matter, having not been given an opportunity to consider the document. Counsel for the applicant submitted that the document had just come to her attention and it was important to submit it as it directly addresses the first respondent's fear. In the interest of justice, I admitted the document and invited both counsels to file supplementary heads on this aspect if they so deem it fit. No supplementary heads were filed and the court has considered this document in arriving at its decision.

- [29] The first respondent's allegation of the applicant's intention in this regard is speculative. Nonetheless the applicant has under oath assured the first respondent and this court that he has no intention of kidnapping his own child. The applicant is quite aware of the fact that that would be a criminal offence. Further, the signing of the extradition treaty between the UAE and RSA should put to rest the first respondent's fear as articulated in her papers.
- [30] The respondent also raised the issue of arrear maintenance by the applicant as the basis for refusal to cooperate on this matter. The applicant denies being and stated that this issue was referred to the Maintenance Court and remains pending since the respondent took no steps to take the matter further. Although the issue of maintenance was not before this court, this court had to consider whether or not a party can deny the other rights of access or any other right to a minor child on the basis of arrear maintenance by the party who is being denied. In law, maintenance and access are treated separately. This means that a custodial parent cannot withhold access to the child because the non-custodial parent has not paid maintenance. The Maintenance Act 99 of 1998, in section 26 deals with the recovery of arrear maintenance from a defaulting party. There are avenues in terms of which a party can have legal recourse against a party who is in contempt of a maintenance order. Maintenance and access are not interlinked. Consequently, I hold a view that the issue of arrear maintenance is irrelevant in the determination of the dispute before this court and as such must be rejected.
- [31] It is evident that the relationship between the applicant and the first respondent is quite acrimonious. The applicant has in a number of text messages to the first respondent used insulting and demeaning words against the first respondent. In turn, the first respondent became even more obstructive. The applicant has tried to blame his attitude towards the respondent on frustration. This excuse is rejected with the contempt it deserves. It is inexcusable that the applicant would use such condemnable language in venting out his frustration. Clearly there is no respect left between the applicant and the first respondent and quite evidently had it not been for the minor child, it appears they would prefer never to deal with each other. The paramount issue however, remains, being that of the interests of the minor child born of the two parties. Can the acrimonious relationship between the parties be deemed a valid legal reason for the first respondent to deny the applicant his rights of visitation in respect of the minor child.
- [32] In *V v V* 1998 (1) SA 169 (C) at para 189 it was emphasised that access rights are to be considered as rights of a child:

"the rights which a child has to have access to its parents is complemented by the rights of parents to have access to the child".

This means the right of access is not only that of a parent holding such right by virtue of legislation or a court order, it vests on the child too. Therefore, in the determination of the best interest of a child, the child's right is paramount to that of both parents.

- [33] The refusal by the first respondent to cooperate directly goes against the interest of the minor child to spend quality time with his father. This will certainly be detrimental to the bond between the applicant and the minor child. Applying the best interests of child test as articulated throughout this judgement, the respondents' refusal to cooperate on the basis of her relationship with the applicant falls short. The first respondent has a number of legal recourses to address the applicant's attitude towards her, and those do not include the thwarting of the applicant's rights to the minor child.
- [34] Lastly, I wish to deal with the request for consent to be extended to members of the Applicant's family. The applicant has requested that the first respondent be directed to also grant consent for the listed members of his family, whom the minor child acknowledges as uncles and aunts, to travel with the minor child to Dubai or any country where the applicant may be a resident. That it would be impractical and costly for the applicant to travel to and from South Africa to fetch and return the minor child is valid and accepted by this court. The only other option, if his family members are refused access, would be for the minor child to travel as an unaccompanied minor. Again, using the best interest of a minor child test, it would be more suitable and calming for the minor child to travel with his known aunts and uncles as opposed to travelling such a long distance unaccompanied.
- [35] The respondent argues that members of the applicant's family have no rights in respect of the minor child and as such she cannot be compelled to grant them permission to travel with the minor child. It was brought to this court's attention that the first respondent has brought an application to interdict members of the applicant's family from having access to or contact with the minor child, which application is pending. Although that application is not before this court, it is important for the purposes of the order sought herein as it addresses the same subject matter. To avoid conflicting decisions from the same Division, I deem it prudent to defer this particular aspect of this application to the outcome of the interdict application.
- [36] The last aspect is whether or not there is another alternative remedy to the order sought by the applicant. The first respondent submits such alternative to be that the applicant must exercise his visitation rights only within the borders of the Republic of South Africa. In other words, the applicant must come visit the minor child in the Republic of South Africa if he wants to spend time with him. The applicant is employed in Dubai. What the first respondent proposes as an alternative is not only impractical and costly, but unreasonable and spiteful. Consequently, the first respondent's proposal must be rejected by this court. In casu I find therefore, that no other adequate alternative remedy exists for the applicant.
- [37] Consequently, I make the following order:
1. The first respondent is directed to complete the necessary forms for the application of the minor child's passport and submit such

documentation to the second respondent, and to take all necessary steps as may be required by the second respondent to that end, within thirty (30) days from the date of this order.

2. The first respondent is directed to provide the applicant with a certified copy of her Identity Document and an affidavit granting the applicant permission to travel with the minor child to Dubai or any other country in which the applicant may be resident.
3. No order as to costs.

Mthimunye DP

Acting Judge of the High Court

Gauteng Division

Appearances:

For the Applicant : Ms B Lekokotla

Instructed by: Maliseha Attorneys

For the Respondents: Mr G Van der Westhuizen

Instructed by:

Msimeki (A) Attorneys

Date of Hearing: 03 August 2021

Date of Judgment : 09 September 2021

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Prepared on 10 October 2026 · Esheria