

SOUTH AFRICA / JUDGMENT

S.J (Born M) v M.K.J and Another (5250/17) [2017] ZAECMHC 53 (14 December 2017) [2017] ZAECMHC 53

COURT

Eastern Cape High Court, Mthatha

BEFORE

Z. M. Nhlangulela

CASE / FILE NUMBER

5250/17

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 5250/17

Heard on: 14/11/17

Delivered on: 14/12/17

In the matter between:

S. J. (BORN M.)

Applicant

and

M. K. J.

1st Respondent

THE MAGISTRATE, REGIONAL COURT,

MTHATHA

2nd Respondent

REASONS

FOR THE ORDER DATED 14 NOVEMBER 2017

NHLANGULELA DJP

[1] The Applicant is legally represented in this matter; and so is the first Respondent. The second Respondent was not legally

represented in as much as she did not file a notice to oppose the relief sought. When the matter served before me on 14 November

2017 I heard arguments presented on behalf of both parties. I thereupon granted an order that the application is struck from the roll with costs payable on the opposed motion court scale.

[2] A brief summary of how the application came to be launched is necessary. The Applicant and first Respondent (hereinafter to be referred to as the Respondent) are wife and husband, they having been married on 10 June 1997 at Mthatha which is within the jurisdiction of this Court. On 07 August 2013 the Respondent commenced divorce proceedings in the Regional Court. One of the issues that arose in the divorce papers was that the Applicant had committed adultery which produced a girl child. Since the maintenance of that child was one of the issues for the decision of divorce, the Magistrate ordered in 2016 that the Applicant and the child must undergo a blood tissue test to prove that she was born out of wedlock. The test results excluded the Applicant as the mother of the child. But on 18 October 2017 the Magistrate issued a second order directing the Applicant and the child to be tested by a different laboratory on 08 November 2017, at Room 95 of the Magistrates' Court building. Instead of complying with the second order, on 08 November 2017 the Applicant issued papers out of this Court for hearing on 14 November 2017 on urgency asking for a relief that, firstly, the second order made by the Magistrate be reviewed, corrected and set aside and, secondly, the execution of the that second order be suspended pending the finalization of the application for review.

[3] The application papers were served upon the Respondents on 09 November 2017 at 08h34 for hearing on 14 November 2017 at 10h00,

effectively giving the Respondent three days in which to prepare for hearing.

[4] It is common cause that the divorce matter was scheduled for hearing on 17 November 2017. Infact the Magistrate had postponed the hearing on 18 October 2017 to that date.

[5] Mr H. Zilwa, attorney for the Respondent responded to the application by filing a notice in terms of Rule 6 (5)(d)(iii) raising points of law with which to persuade the Court to strike the Applicant's application off the roll on three main grounds that urgency was self-created, the form of notice used to launch the application was not permitted by Rule 6 (12)(b) and that the urgent relief sought was of academic importance. These legal objections were not conceded by Mr Halam, counsel for the Applicant. Respondent's success on any one or more of the legal objections would entitle him to the striking of the matter from the roll. I next

deal with the objections.

- [6] On urgency, Rule 6 (12)(b) provides that the Applicant must set forth on affidavit explicitly the circumstances which she avers render the matter urgent and the reason why she claims that she could not be afforded substantial redress at the hearing in the normal course. The sub-rule has been applied in this Court – see: *Cekeshe And Others v Premier, Eastern Cape & Others* 1998

- (4) SA 935 (Tk) at 948E; *Mangala v Mangala* 1967 (3) SA 415 (E). Over and above this a practice has developed in this Division (in clause 12 of the Rules of Practice) that an Applicant

should disclose the urgency in a certificate of urgency which is a document that is separate from the founding affidavit.

- [7] In this case the Applicant waited for a period of approximately three weeks to bring the application. What appears on affidavit is that the decision of 18 October 2017 should be suspended because of the pending divorce hearing on 17 November 2017, yet the Applicant had been ordered to submit herself and the child to the laboratory for testing on 08 November 2017. She first breached the order and thereafter, apparently as a cover-up, she approached this Court for an interim order that would be retro-active in operation, and at a time when no urgency was in existence whatsoever.

- [8] I agreed with the submission that the Applicant abused the court process. She approached this Court on a truncated notice of motion when it was not necessary for her to do so. As correctly submitted on behalf of the Respondent the Applicant did not show cause for not utilizing Form 2 (a). In *Gallgher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) it was held that the invariable use of the short form of notice (Form 2) in urgent applications was said to be unacceptable. And *Kroon J in Caledon Street Restaurant CC v Monica D'Aviera* Case No. 2656/97 dated 7 November 1997 (E) (unreported) stated appositely at 8-9 as follows:

“Practitioners must accordingly again be reminded that the phrase “which shall as far as practicable be in terms of these rules” must not be treated as pro non scripto. The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2 (a) of the First Schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The

principle remains operative even if what the applicant is seeking in the first instance, is merely a rule nisi without interim relief. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately,

his legal advisors, must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey rule 6 (5)(a) and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by, the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies of the case demand (and it need hardly be added these exigencies must appear from the papers). On the practical level it will

follow that there must be a marked degree of urgency before it is justifiable not to use Form 2 (a). It may be that the time elements involved or other circumstances justify dispensing with all prior notice to the respondent. In such a case Form 2 will suffice. Subject to that exception it appears that all requirements of urgency can be met by using Form 2 (a) with shortened time periods or by another adaptation of the form, e.g. advanced nomination of a date of the hearing of the matter, or omitting notice to the registrar accompanied by changed wording where necessary. Adjustment, not abandonment of Form 2 (a) is the method”.

- [9] The present application strictly speaking should have been brought on long Form 2 (a) read with Rule 53 of the Uniform Rules. The Respondent was given only three days, instead of the normal twenty days, within which to file opposing papers. The hearing of the review application on the basis of urgency, as was suggested by the Applicant, and in the absence of the record of the Magistrates’ court proceedings, did not warrant a relaxation of the rules. Rule 6 (5) read with Rule 53 of the Uniform Rules ought to have been utilised towards addressing the relief in respect of reviewing of the decision made on 18 October 2017.
- [10] Since the event from which urgency emanated had passed, the date of hearing of divorce proceedings on 17 November 2017 ceased to be of any significance. As correctly submitted by Mr Zilwa the relief there-anent was *brutum fulmen*.
- [11] For the reason that an application for review was a non-starter, it having to be launched properly in accordance with the provisions of Rule 53, which incorporates the notice provisions of Rule 6 (5), it became necessary to strike the application from the roll. The costs of the wasted urgent application and the time unnecessarily spent on it had to be paid by the Applicant.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

Counsel for the Applicant : Adv. Halam

Instructed by

: Mdledle-Malefane &

Ass

MTHATHA.

Attorney for the Respondent : Mr H. Zilwa

: c/o Z M Petse Inc

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Prepared on 12 October 2026 · Esheria