

SOUTH AFRICA / JUDGMENT

Stroebe! v Stroebe! (19332/2017) [2017] ZAGPPHC 1041 (8 December 2017)

[2017] ZAGPPHC 1041

COURT

North Gauteng High Court, Pretoria

BEFORE

AH Petersen

CASE / FILE NUMBER

19332/2017

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19332/2017

8/12/2017

Reportable

Of interest to other judges

In the matter between:

PIETER
ANDRIES
STROEBEL
Applicant
and
MONIA
STROEBEL
Respondent

JUDGMENT

PETERSEN AJ:

INTRODUCTION

- [1] This matter initially came as an application for condonation accompanied by an application for leave to appeal the whole of an order handed down on 12 May 2017 in proceedings in terms of Uniform Rule 43. The applicant was informed by way of reasons that Rule 43 proceedings are not appealable and that Rule 43(6) would ordinarily be applicable to any

changed circumstances. The applicant subsequently filed a supplemented notice of application for leave to appeal challenging as an alternative to the initial grounds, the constitutionality of section 16(3) of the Superior Courts Act, Act 10 of 2013 ("the

Superior Courts Act").

THE GROUNDS OF APPEAL

[2] The grounds of appeal are repeated seriatim to appreciate the nature of the application:

"1.1 It is respectfully submitted that the learned Acting Judge misdirected himself in refusing to grant a postponement for the purposes of filing a replying affidavit.

1.2 The learned Acting Judge erred in placing insufficient weight upon the fact that the respondent lives with, and is maintained by another man. The learned acting Judge erred in failing to consider the appropriate judicial authorities on this point adequately or at all. In this regard, the learned Acting Judge failed to have proper regard to the Applicant's reticence about where she actually lives.

1.3 The learned Acting Judge erred in failing to promote the proper ventilation of the issues by omitting to accept the Respondent's answering affidavit and then allowing the Applicant to reply thereto, subject to suitable interim arrangements.

1.4 The learned Acting Judge misdirected himself in failing to allow the Applicant the opportunity to file a replying affidavit, as contemplated by Rule 43(5).

2.1 The learned acting Judge erred in failing to have regard to the fact that the respondent expressly challenged the applicant to adduce further evidence, which by necessary implication means filing a further

affidavit with the leave of the Honourable Court.

2.2 The learned Judge erred in failing to evaluate fully or at all the balance of prejudice and convenience in refusing the postponement and denying the applicant the right to meet the allegations against him.

2.3 In refusing to grant the applicant the postponement for the purpose of filing replying papers, the learned Judge attached insufficient weight to the fact that the factual basis for the application for postponement was not disputed, and no notice of intention to oppose had even been filed.

3.1 Failed to properly consider the suggestion emanating from counsel for the Respondent, to the effect that an interim order could be made, pending the proper adjudication of the matter once all the financial information was available.

3.2 In the exercise of his discretion, the learned Acting Judge failed to have proper regard to the cogent (and effectively uncontradicted) allegations of fraud and theft against the Respondent.

3.3 In failing to make a proper order as to the terms of the postponement and the right to file a replying affidavit, the learned Acting Judge failed to consider the procedural history of the matter, and the lack

of prejudice to the Respondent.

3.4 In failing to make a suitable interim award pending the postponement and filing of replying papers, the learned Judge failed to take into account the possibility of prejudice to the minor children in placing

the Applicant in a dire financial position.

4.1 In failing to make a proper order as to the terms of the postponement and the filing of a replying affidavit, the learned Acting Judge failed to consider the obvious financial prejudice to the Applicant that would

be caused by the granting of monthly maintenance in the amount of R40 000,00.

4.2 In failing to make a proper order as to the terms of the postponement and the filing of a replying affidavit, the learned Acting Judge failed to have regard to the fact that the Applicant's statement of disposal income was in effect uncontradicted, yet the Court proceeded to order maintenance comfortably in excess of the stated amount of monthly income, which could conceivably stay in place for a period of twelve months until the trial matter is heard, which constitutes a misdirection.

4.3 The learned Acting Judge erred in failing to consider properly the Respondent's own draft order in setting out suggestions for postponement that would eliminate any conceivable prejudice, and amending same to facilitate a proper ventilation of the disputes.

4.4 In failing to afford the Applicant the opportunity to postpone and file a further replying affidavit, the learned Acting Judge unjustifiably deprived the Applicant of his right to be heard.

4.5 The decision to refuse the postponement, the Learned Acting Judge erred in misdirecting himself in the order so provided by him that it would have the effect of being a final order and therefore deprives the Applicant to continue as requested.

5.1 It is contended submitted that the provisions of section 16(3) of the Superior Courts Act (Act 10 of 2013), insofar as same can be interpreted as constituting a blanket prohibition on appeals against the refusal of a postponement in order to file a replying affidavit and notwithstanding the fact that the interests of minor children are adversely affected by such refusal, is inconsistent with the Constitution in that:

5.2 The aforesaid section 16(3) of Act 10 of 2013 violates the constitutional right of children enshrined in s28(2) of the Constitution (Act 108 of 1996), which stipulates that a child's best interests are paramount

in every matter concerning the child. The offending section 16(3), insofar as it precludes an appeal where the best Interests of a minor child are concerned, imposes an unjustifiable limitation on the rights afforded by s28(2) .

5.3 The aforesaid section 16(3) of Act 10 of 2013, as a result, unjustifiably and unconstitutionally limits the fundamental right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, as guaranteed in section 34 of the Constitution.

5.4 The aforesaid section 16(3) violates the principles of the rule of law and equality before the law as provided for in sections 1(c), (2) and 9(1) of the Constitution by preventing a party to appeal against a decision of a Court in any of the type of applications as set out in the sub-rule where grave irregularities gave rise to such decision;

5.5 The aforesaid section 16(3) violates the principles of the rule of law and equality before the law as provided for in sections 1(c), (2) and 9(1) of the Constitution by unjustifiably preventing a party, specifically one who is tasked with the day-to-day custody of minors, to appeal against a decision of a Court in any type of applications as set out in the sub-rule where grave irregularities gave rise to such decision;

5.6 Furthermore, insofar as the aforesaid section 16(3) of Act 10 of 2013 can be interpreted as imposing an all-embracing prohibition on appeals in relation to the matters listed therein, without regard for the best interests of the minor children affected, unjustifiably and unconstitutionally infringes the inherent jurisdiction and discretion vested in Judges of the High Court."

CONDONATION

[3] The notice of application for leave to appeal was served and filed on the 23 June 2017 with a request for reasons for judgment. The reasons were furnished on 28 July 2017 and received by the applicant on 31 July

2017.

[4] The attorneys of record for the applicant upon receipt of the reasons contend that they considered a potential infringement of the rights of the minor children and considered themselves obliged to investigate the possibility of an alternative constitutional challenge to section 16(3) of the Superior Courts Act as read with Uniform Rule 43.

[5] The reasons for the late service of the application to supplement is said to have been caused, amongst others, by the illness of the wife of the attorney of record and related treatment, the illness of the

applicant causing a delay in consultations and delays in consultations with auditors of the applicant's company.

[6] The application for condonation is unopposed. Having considered the

reasons

furnished for the delay, condonation for the late filing of the supplemented application for leave to appeal is granted.

THE APPLICABLE LAW

[7] Section 16(3) of the Superior Courts Act provides as follows:

"16 Appeals generally

- (3) Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application-
 - (a) by one spouse against the other for maintenance pendente lite;
 - (b) for contribution towards the costs of a pending matrimonial action;
 - (c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or
 - (d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted."

[8] Uniform Rule 43 provides as follows:

"43 Matrimonial matters

- (1) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:
 - (a) Maintenance pendente lite;
 - (b) a contribution towards the costs of a pending matrimonial action;
 - (c) interim custody of any child;
 - (d) interim access to any child.
- (2) The applicant shall deliver a sworn statement in the nature of a declaration, setting out the relief claimed and the grounds therefor, together with a notice to the respondent as near as may be in accordance with Form 17 of the First Schedule. The statement and notice shall be signed by the applicant or his attorney and shall give an address for service within eight kilometres of the office of the registrar and shall be served by the sheriff.
- (3) The respondent shall within ten days after receiving the statement deliver a sworn reply in the nature of a plea, signed and giving an address as aforesaid, in default of which he shall be ipso facto barred.
- (4) As soon as possible thereafter the registrar shall bring the matter before the court for summary hearing, on ten days' notice to the parties, unless the respondent is in default.

- (5) The court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision.
- (6) The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate."

THE APPLICATION

[9] I have carefully considered the arguments of Counsel for the applicant

and respondent. I propose to deal with same against the background of the applicable law and judicial authorities.

[10] Section 16(3) of the Superior Courts Act has codified judicial precedent. It is trite that no appeal lies from any judgment or order in connection with Rule 43 proceedings.

[11] The grounds of appeal set out at paragraphs 1 to 4 of the initial notice

of application for leave to appeal run counter to the provisions of section 16(3) of the Superior Courts Act. Section 16(3) read with Uniform Rule 43 ordinarily provides that no appeal lies:

1. against any judgment in connection with any relief sought in terms of Rule 43(1)(a)-(d); or
2. any order in connection with Rule 43 proceedings.

[12] The effect of section 16(3) of the Superior Courts Act is accordingly:

1. that the order of the court of 12 May 2017 is not appealable; and
2. that the refusal of condonation for the late filing of the respondent's answering affidavit, which was an order in connection with the Rule 43 proceedings is likewise not appealable.

[13] The supplemented application for leave to appeal essentially seeks to challenge the constitutionality of section 16(3) insofar as it does not sanction an appeal against the judgment or order of the court or the refusal of condonation for the late filing of the respondent's affidavit. It further seeks to extend the application in the interest not only of the applicant but members of broader society who may be affected by the injunction in section 16(3) of the Superior Courts Act.

[14] The applicant, save for relying on section 28 of the Constitution, the

best interest of the child provision, asserts his right to have access to the court as provided for in section 34 of the Constitution.

[15]

The submission on the right to access to the court set out in the supplemented application is not novel. In *Apleni v President of the Republic of South Africa and Another* (65757/2017) [2017] ZAGPPHC 656 (25 October 2017), Fabricius J, was faced with a similar contention, albeit in a different context. He held at paragraph 17: "I do not however agree with the assertion by the

Minister that she can justifiably directly rely on the provisions of s. 34 of the Constitution of the Republic. The section does not say that a person is constitutionally entitled to · “Access to Court” irrespective of relevant provisions of substantive or procedural law. Access to Court and related matters, both of a substantive and procedural nature are now regulated by the Superior Courts Act No. 10 of 2013, the Uniform Rules of Court, and relevant Practice Manuals and Directions relating to urgency.. . A party cannot justifiably rely on the provisions of s. 34 of the Constitution to demand time to consult, gather evidence or prepare argument. Were it otherwise, this article in the Constitution could be used (and abused) to prevent or delay almost any urgent application. The principle of subsidiarity prohibits such an approach. This means that where legislation gives effect to constitutional rights, it is not permissible to go behind that legislation by relying on the Constitution directly. The rights in s. 34 are given effect to, inter alia, by the Uniform Rules of Court.

See: *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) at par. [24] It is clear that a litigant who seeks to assert a constitutional right should in the first place base his or her case on any legislation enacted to regulate the right, not the Constitution.

See: *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at par. [52]."

[16] I agree with the reasoning at paragraph 17 of the Apleni decision. The applicant has recourse in Rule 43 to give effect to his right of access to the court. There is no basis for a constitutional challenge to Rule 43 which provides for interim orders which are susceptible to variation. The best interests of the child to my mind are likewise protected by Rule 43. If appeals against Rule 43 orders were to be endorsed by the courts that would run counter to the best interests of the child where there is an inherent risk of suspension of any orders made in terms of the Rule.

[17] In light of these findings, I do not propose to deal with the grounds set out in the initial application for leave to appeal as the orders of the court are not appealable in respect of the orders of 10 May 2017 and 12 May

2017.

[18] The respondent seeks an order as to costs on the scale as between attorney and own client. In *re Alluvial Creek Ltd* 1929 CPD 532 at 535 the court said:

"An order is asked that he pay the costs between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may be granted without any reflection upon the party where the proceedings are vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary

trouble and expense which the other side ought not to bear."

[19] Whilst the applicant may have set out from the premise that he was embarking on this application "with the most upright purpose and a most firm belief in the justice of his cause", the application

was futile from inception. The respondent was put to unnecessary trouble and expense of opposing an application which had no basis in law. I can therefore find no reason not to grant costs on a punitive scale.

ORDER

[20] In the result, it is ordered that:

1. The application for condonation is granted.
2. The application for leave to appeal is dismissed.
3. The applicant shall pay the costs of the respondent on the scale as between attorney and client.

AH PETERSEN

ACTING JUDGE OF THE

HIGH COURT OF SOUTH AFRICA

Appearances:

For the Applicant : Advocate S. Davies SC

Instructed by: JW Wessels and Partners Inc.

For the Respondent: Advocate M. Haskins SC

Instructed by: Shapiro and Ledwaba Inc.

DATE HEARD: 31 OCTOBER 2017

DATE OF JUDGMENT: 08 DECEMBER 2017

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