

SOUTH AFRICA / JUDGMENT

T.A.E.N v E.N (41999/15) [2015] ZAGPPHC 465 (26 June 2015)

[2015] ZAGPPHC 465

COURT

North Gauteng High Court, Pretoria

BEFORE

M F Legodi

CASE / FILE NUMBER

41999/15

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 41999/15

IN THE MATTER BETWEEN

T. A. E. N.

Applicant

and

E. N.

Respondent

JUDGMENT

LEGODI J

[1] The issue argued before me is whether this court has jurisdiction to entertain an application in terms of Rule 43 brought on an urgent basis, by Mrs T. A. E.N., a foreign national who is married to the respondent an Ugandan employed in South Africa allegedly as a diplomat serving at the African Development Bank. Their marriage was concluded on 26 August 2010 at Kampala, Uganda. The applicant is asking for maintenance, guardianship of the minor children and other related reliefs thereto pending finalization of the divorce

proceedings.

[2] The respondent is opposing the application and has raised a point in limine. That is, this court does not have jurisdiction to entertain the application, in particular, that this court does not have jurisdiction over the respondent as he enjoys immunity from civil jurisdiction by the South African Courts.

[3] In his supplementary affidavit the issue is raised as follows:

"2.2 I attach hereto as "EN1" a copy of my Passer which contains my temporary resident permit that clearly indicates that same is issued and must be read with the Provisions of section 9(1) of the Act.

2.3 I also attach hereto as "EN2" my certificate of identity, the reverse side of which also indicates that such certificate was issued in terms of the Act.

2.4 I also refer to Article 31 of the Vienna Convention which states that the Diplomatic agent shall enjoy civil immunity from the jurisdiction of the receiving state (sic), the receiving state in this case being South Africa. These proceedings as brought by the Applicant do not form part of any of the exceptions as contained in this article, therefore I submit that I have diplomatic immunity from these kind of proceedings and that this Honourable Court does not have Jurisdiction to entertain this application.

2.5 Article 29 of the same Vienna Convention further states that the person of a diplomatic agent shall be inviolable. I submit that the current application serves to violate my status and I am not prepared to waive such status though institution and defending civil cases that enjoy immunity in terms of the above

2.6 On this premise I make the submission that based on the provisions of the Act, this Honourable Court does not have the Jurisdiction to hear this matter".

[4] Section 9 of the Diplomatic Immunities and Privileges Act 31 of 2001 deals with the keeping of Register of Persons entitled to immunities or privileges. It provides as follows:

"9 Register of persons entitled to immunities or privileges

- (1) The Minister must keep a register in which there must be registered the names of all the persons who enjoy-
 - (a) immunity from the civil and criminal jurisdiction of the courts of the Republic; or
 - (b) immunities and privileges in accordance with the Conventions or in terms of any agreement contemplated in section 7.
- (2) The Minister must cause a complete list of all persons on the register to be published on the Website of the Department of Foreign Affairs, and must cause the list to be updated as frequently as may be necessary, and made publicly available.

[3] If any question arises as to whether or not any person enjoys any immunity or privilege under this Act or the Conventions, a certificate under the hand or issued under the authority of the Director-General stating any fact relating to that question, is prima facie evidence of that Act".

[5] The section clearly does not deal with conferring of immunities or privileges, section 7 of the Act does, and subsection (2) thereof provides as follows:

"The Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisations as may be specified by the notice in the Gazette".

[6] What the respondent is suggesting is that he enjoys immunity from civil jurisdiction of the courts of the Republic of South Africa and that such immunities have been conferred on him purportedly by the Minister. Subsection (3) of section 9 quoted above is therefore applicable. For this purpose, the applicant in her replying affidavit annexed a certificate issued on the 23 June 2015 by the Department of International Relations and Cooperation and it reads:

"I, the undersigned Ambassador NN Losi-Tutu, Chief of State Protocol in the Department of International Relations and Cooperation and as such duly authorised by the Director-General of the Department of International Relations and Cooperation, hereby state the following facts relating to the status of Mr E.N., (date of birth: [.....]) who is the holder of Passport number [.....] and diplomatic Id number [.....].

According to the Department's records, Mr N. as an AFDB (African Development Bank) diplomat, enjoys functional immunity and privileges in the Republic of South Africa in terms of Section 9(3) of the Diplomatic Immunities and Privileges Act 2001 (Act No. 37 of 2001)". [Underlining is my own emphasis].

[7] The attorney for the respondent in a way conceded that "functional immunity" which the respondent enjoys in terms

of the certificate issued in terms of section 9(3), does not confer immunity from civil jurisdiction of this court, inasmuch as the applicant's case of action does not arise from the respondent's actions in the performance of his duties as senior country economist for the African Development Bank.

[8] The attorney for the respondent took a swipe at the reliability of the certificate in that the passport number recorded in the certificate differs from the passport number appearing on annexure "EN2" to the respondent's supplementary affidavit. Annexure "EN2" is "certificate of identity" issued to the respondent by the Department of International Relations and Cooperation. The passport number is indicated as 8008286 expiring on 31 December 2015 whilst on the certificate issued in terms of section 9(3), the passport number is indicated as [.....] and expiry date is not reflected. However, in both documents, the diplomatic identity number is indicated as [.....].

- [9] In my view, the passport document alone will not indicate the extent of the immunity or privilege conferred to any person, but registration of conferment of any such immunity or privileges enjoyed by any person, is what gives guidance to the question whether or not the respondent enjoys any immunity or privilege.
- [10] The document issued in terms of section 9(3) is prima facie evidence of that fact. Therefore, the onus is on the respondent to show on a balance of probability that such a certificate cannot be relied upon and I am not satisfied that the applicant has succeeded in showing that no reliance can be placed on the certificate.
- [11] The diplomatic number appearing on the certificate is the same as the one appearing on annexure "EN2". Different passport numbers appearing on these documents bearing the same diplomatic identity number coupled with the issuing of the certificate in terms of section 9(3), in my view, make such difference immaterial.
- [12] I do not find it necessary to deal in detail with the provisions of the Vienna Convention referred to in paragraphs 2.4 and 2.5 of the respondent's supplementary affidavit quoted in paragraph 3 of this judgment. It suffices to mention that in paragraph 2.6 of the supplementary affidavit, the respondent seems to be relying heavily on the provisions of the Act, than on the provisions of the Convention. In any event, I do not think that Articles 31 and 29 advance the respondent's contention. Article 31 grants immunity to diplomatic agent, not only from criminal jurisdiction, but also from civil and administrative jurisdiction. Diplomatic agent in terms of Article 1(e) means the head of the mission. In terms of Article 1 (c) members of the diplomatic staff are the members of the staff of the mission having diplomatic rank.
- [13] The question of immunity has arisen in this matter and one is guided by the legislative framework and in particular section 9 of the Act. The certificate issued on 23 June 2015 gives clarity as to the nature and extent of the immunity or privilege granted to the respondent. No other immunity or privilege can be inferred from the facts of the case. A point in limine is destined to fail.
- [14] I decided to deal with the point in limine as I came to the conclusion that the matter is urgent. Minor children aged 5 and 3 years respectively are involved here. This court is the upper guardian of all minors. The last time the applicant saw her children was on 6 February 2015 and according to her, that was when the respondent caused her to leave for Tunisia and allegedly caused her VISA for a stay in South Africa to be cancelled.

The applicant and the children were to join her in Tunisia during March 2015. She returned to South Africa on 10 March 2015 and all efforts to reconnect with the children upon her return were allegedly frustrated by the respondent. To date she has not seen the minor children and the only contact she made was by phone and every time she talks to the children they cry, wanting to see her or enquiring when she will be returning home. All of this should be of great concern to this court and irrespective of the delay by the applicant since she returned in March 2015, the

court must step in to protect the interests of the two minor children. The applicant has never worked and as I said, is asking for maintenance. She is in a foreign country with no financial resources and is dependent on the generosity of other people. It was on all of the above that I found the matter to be urgent.

[15] Consequently, the point in limine is hereby dismissed with costs.

M F LEGODI

JUDGE OF THE HIGH COURT

JUDGMENT RESERVED ON: 24 JUNE 2015

For the Applicant: ADV JJ SCHERMAN

Instructed by:

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For the Respondent: ADV.

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JUDGMENT HANDED DOWN: 26 JUNE 2015

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