

SOUTH AFRICA / JUDGMENT

T.P.M v M.B.M (M439/19) [2021] ZANWHC 14 (16 March 2021)

[2021] ZANWHC 14

COURT

North West High Court, Mafikeng

BEFORE

A.H. Petersen

CASE / FILE NUMBER

M439/19

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE NO: M439/19
In

the matter between:

T[....]
P[....] M[....]
Applicant
and
M[....]
B[....] M[....]
Respondent
DATE
OF HEARING
: 25
FEBRUARY 2021
DATE
OF JUDGMENT
: 16
MARCH 2021
FOR
THE APPLICANT
: ADV.
L. MULAUDZI
FOR
THE RESPONDENT
: ADV.
G. V. MAREE

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time of the handing down of judgment is deemed to be 14h00p.m. on 16 March 2021.

ORDER

(i)
The Office of the Family Advocate, Johannesburg and Mmabatho, are ordered to investigate and report to this Court on the best interests of the minor child concerning her primary place of residence, contact and care, which investigation should have regard to the period 2015 to date.

(ii)
Pending the outcome of the aforesaid investigation by the Office of the Family Advocate, the minor child's current primary place of residence shall remain with the respondent.

(iii)
The report of the Family Advocate is to be forwarded to the Registrar of this Court and the legal representatives of the applicant and respondent within eight (8) weeks of this order, and no later than 14 May 2021. The

date may be extended on written notice
to the Registrar of this Court
and a Chamber Book approval by Acting Justice Petersen.
(iv)
The Applicant or
Respondent, upon receipt of the report of the Family Advocate, may
enrol the main application, for further adjudication
by Acting
Justice Petersen, on application for allocation of a date, with the
Office of the Judge President.
(v)
There is no order as to costs. The parties are to bear their own
costs.

JUDGMENT

PETERSEN AJ

Introduction

[1] This is an opposed application where the applicant seeks an order in the following terms:

“1 ...

2 The respondent be found to be in contempt of the court in her failure to comply with Court orders namely:-

2.1 Court order granted by the Magistrate/Presiding Officer C.G. Becker of the Tlhabane Children’s Court on the 28th October 2015 under case number 14/1/2- [14/2015].

2.2 Court order granted by the Magistrate/Presiding Officer of the Rustenburg Children’s Court Mamabolo on the 03rd April 2018 under case number: 14/1/4 – 117/2018.

2.3 Court order granted by Justices Gura and Kgoele J on the 22nd March 2019 in review application under case number: M204/2018 in the High Court of South Africa, North West Division, Mahikeng.

2.4 Court order granted by Justice (Gura – my insertion) on the 24th June 2018 in the divorce under case number: DIV3/2015 of the High Court of South Africa, North West Division, Mahikeng.

3. The Respondent be committed to prison or periodical imprisonment for the contempt of Court for a period of ninety (90) days or such period as the court deems just and equitable.
4. The Respondent (sic) committal to prison be suspended for a period of one year on condition that:

4.1 The Respondent complies with the court orders (sic) Court order granted by the Magistrate/Presiding Officer C.G. Becker of the Tlhabane Children's Court on the 28th October 2015 under case number 14/1/2- [14/2015], Court order granted by the Magistrate/Presiding Officer of the Rustenburg Children's Court Mamabolo on the 03rd April 2018 under case number: 14/1/4 – 117/2018, Court order granted by Justices Gura and Kgoele J on the 22nd March 2019 in review application under case number: M204/2018 in the High Court of South Africa, North West Division, Mahikeng.

5. The Respondent be declared and found to be a vexatious litigant in terms of section 2(b) of the Vexatious Proceedings Act 3 of 1956.
6. No legal proceedings may be instituted by the Respondent against the Applicant in his personal capacity without having obtained the permission of the court, or any judge thereof and such permission shall not be granted unless the court or judge is satisfied that the proceedings are not an abuse of the process of the court and there is prima facie ground for the proceedings.
7. The Respondent is required, prior to:
 - 7.1 proceeding with the existing applications instituted in the Johannesburg Children's Court under case numbers 14/1/4-415/2018 and Johannesburg Maintenance Court under case number: 1170/2018/011 ("the Existing Applications"); and/or
 - 7.2 instituting any further legal proceedings against the Applicant in his personal capacity and/or in any other capacity to first seek the leave of the Deputy Judge President of the relevant division in respect of which the Respondent intends to institute or continue proceedings;
8. That the Respondent is interdicted from instituting any further legal proceedings or continuing with the Existing Applications against the applicant (in whatever capacity) unless the respondent has first obtained the written leave of the relevant Deputy Judge President to institute such specified legal proceedings;
9. That prior to seeking the leave of the relevant Deputy Judge President to institute any legal proceedings (including the Existing Applications), that the respondent shall furnish 48 hours written notice setting out in full her basis for seeking such leave to the relevant Deputy Judge President and any respondent or defendant to those proceedings of her intention to seek such leave, to enable such respondent or defendant to those proceedings to make written submissions to the relevant Deputy Judge President in response to the respondent's intention to seek such leave;
10. All the files in which the respondent is involved must be taken to the office of the Chief Registrar for supervision and before she places any on the roll, she must first approach the Deputy Judge President for leave to proceed with any litigation.

11. That in the event of the relevant Deputy Judge President granting leave to the Respondent to institute or proceed with any litigation (including the Existing Applications) that the Respondent is ordered and hereby required to provide security for legal costs to the respondents or defendant in that litigation in an amount and form to be determined by the Registrar.
12. Respondent to pay the costs of this application on an attorney and client's scale.
13. Further and/or alternative relief.”
- [2] The respondent served and filed a Counter-Application on 23 February 2021 in which an order is sought in the following terms:

“1. That a curator ad litem be appointed for and on behalf of the minor child.

2. That the curator ad litem be ordered to:

2.1 investigate and report to the above Honourable Court on the best interests of the minor child concerning her principle (sic) place of residence, contact and care; and

2.2 represent the minor child in the pending legal proceedings.

3. The pending the outcome of the aforesaid investigation by the curator ad litem the minor child's current primary place of residence remains with the Respondent.
4. That the Applicant and Respondent pay the costs of the curator ad litem jointly and severally, the one to pay the other to be absolved.
5. That the Applicant pays the costs of this counter-application only in the event of opposing it.
6. Such further and/or alternative relief the above Honourable Court deems fit.”

Points in limine raised by the respondent in the main application

- [3] The respondent raised three (3) points in limine in the main application under the following headings:
 - (i) Notice of Motion Void/Voidable,
 - (ii) Lis alibi pendens, and
 - (iii) Relief sought incompetent.

Notion of Motion Void/Voidable

- [4] The respondent on this point in limine relies on the Full Court decision of this Division in *AECI Limited v Laufs* (CIVAPPF8/2016) [2016] ZANWHC 63 (1 December 2016) at paragraphs [6] to [8] where Hendricks J (DJP) as he then was said and held:

“[6] Central to this appeal is the issue whether an attorney, who is not admitted in this Court (Division), can sign a notice of motion and what is the effect thereof if such an attorney signs a notice of motion. The attorney (or the applicant if the applicant appears in person) issuing the notice of motion, has to sign the notice of motion and that attorney must be duly admitted in the Division in which the notice of motion is issued. Rule 1 of the Uniform Rules of Court define “attorney” as “an attorney admitted, enrolled and entitled to practice as such in the division concerned”. (my underlining)

- [7] It is common cause that Appellant’s attorney was not admitted, enrolled and entitled to practice as an attorney in the North West Division, Mahikeng of the High Court of South Africa. The attorney was therefore not entitled to sign the notice of motion qua attorney as he is not an attorney of this Division. The notice of motion is voidable because it was not issued and signed by “an attorney admitted, enrolled and entitled to practice as such in the division concerned”. (my underlining)
- [8] ... Therefore, the signing of the notice of motion by an attorney who is admitted and practice as such in another division amounts to an irregularity which is voidable.” (my underlining)
- [5] The decision of the Full Court was premised on the definition of “attorney” in Rule 1 of the Uniform Rules of Court. The definition of “attorney” in Rule 1 has since been amended following the commencement of the Legal Practice Act 28 of 2014 (“the Legal Practice Act”). Rule 1 now defines an attorney as follows:

‘attorney’ means a legal practitioner as defined, admitted and enrolled as such, under the Legal Practice Act, 2014 (Act 28 of 2014);

The Legal Practice Act in turn defines an attorney as follows:

‘attorney’ means a legal practitioner who is admitted and enrolled as such under this Act;

- [6] The admission, enrolment and right of appearance of a legal practitioner (attorney) under the Legal Practice Act is provided for in sections 24 and 25 as follows:

“Admission and enrolment

24. (1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.

Right of appearance of legal practitioners and candidate legal practitioners

25. (1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to

be struck off the Roll or he or she is subject to an order suspending him or her from practising. (my underlining)

[7] A legal practitioner (attorney) is accordingly entitled to practice throughout the Republic of South Africa. The point in limine in my view was accordingly correctly abandoned by Mr Maree when the aforementioned was pointed out by this Court.

Lis alibi pendens

[8] It is common cause that the applicant instituted proceedings in the Gauteng Local Division, Johannesburg (“the GLD”) seeking relief similar to the relief in the present application. The proceedings in the GLD were removed from the roll on 29 July 2019 by order of Modiba J. The respondent in relying on lis alibi pendens submits that no formal notice of withdrawal of the proceedings in the GLD has been filed and for that reason the application remains pending in the GLD.

[9] The allegation is pertinently made in the founding affidavit that the application in the GLD was removed from the roll for lack of jurisdiction.

[10] It should follow logically, that the application having been removed from the roll in the GLD, the GLD can never be vested with jurisdiction to consider the relief sought in this application. This point in limine must accordingly fail.

Relief sought incompetent

[11] The respondent relies on the decision in *Dreyer v Wiebols* and

Others 2013 (4) SA 498 (GSJ) at paragraph [11] which reads as

follows:

“[11] The applicant has several difficulties. Firstly, he never made, or purported to make out a case at all, on his papers, that the Magistrate Court’s remedy for contempt of its orders, i.e. section 106 of the Act, was not effective, or as effective as the High Court procedure. Secondly, the applicant never made out a case in terms of which he requested this Court to exercise its jurisdiction as a ‘process-in-aid’, to supplement what is lacking in the contempt procedures provided for by the Act. Thirdly, the applicant has not made out a case (even in argument) that the remedy in the Magistrate’s Court, i.e. section 106 of the Act, is, in fact, less effective in protecting his rights than the remedy in the High Court...”

[12] In *M v M* (A3076/2016) [2017] ZAGPJHC 279 (28 March 2017), Modiba J (Carelse J concurring), referred with approval to the ratio in *Dreyer v Wiebols*, and held as follows:

“[19] The respondent was not without a remedy in the Magistrate’s court. The Magistrate’s jurisdiction to hear an application for and to grant an order for contempt of court is set out in section 106 of the Magistrates’ Courts Act. This section gives the Magistrates’ Court jurisdiction over criminal contempt of court matters. This is the procedure that Ms M ought to have followed to enforce the divorce order. The remarks of my brother Coppin J in Dreyer are pertinent. He stated as follows at para 6:

“The Magistrates’ Court does not have the jurisdiction to grant the relief claimed in prayers 4, 5, and 6 by virtue of the limitation of its jurisdiction imposed by section 46(2)(c) of the Act, and the Magistrates’ Court is limited to imposing a criminal sanction in terms of section 106 of the Act. It was further submitted on behalf of the applicant that the procedure in the Magistrates’ Court entailed the laying of a charge with the police, where-after the matter would then be in the hands of the police and the prosecuting authorities, whereas the procedure in the High Court allowed the applicant to be in control of the process.”

- [20] Only the High Court, exercising its inherent jurisdiction may grant an order for civil contempt of court. Therefore if Ms. M desires to obtain an order for civil contempt of court, she ought to launch such proceedings in the High Court. An order for civil contempt of court is a discretionary remedy that will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that other court at the disposal of a party seeking such an order. The High Court will only grant such an order in exceptional circumstances. To succeed in the High Court, Ms M will have to show that there is good and sufficient reason for the High Court to enforce the divorce order, being an order of another court. (my underlining)
- [13] The order which forms the subject matter of the relief sought by the applicant at prayer 2.2, in my view, is inextricably linked to the order which forms the subject matter at prayer 2.1. In turn, the order granted by this Court on 22 March 2019 in the review of the order which is the subject matter of prayer 2.2 is inextricably linked to both orders of the Children’s Court (prayers 2.1 and 2.2).
- [14] The authorities are clear, in the ordinary course an applicant would be required to exhaust the contempt remedy provided for in section 106 of the Magistrates Court Act 32 of 1944. In the present application, the unique position is that the relief sought embraces two Court orders from the lower court and two Court orders from this Court. In my view, the peculiar circumstances of the main application constitutes exceptional circumstances for this Court to entertain the application in respect of the two orders of the lower court with the two orders of this Court, considering the nexus between the said

orders.

- [15] This point in limine in this regard must accordingly likewise fail.

The Main Application

- [16] The heads of argument prepared on behalf of the applicant by counsel other than Adv Muluadzi on which he relies, makes the following points. The respondent is aware of all four court orders. The minor child resided with the applicant before and after the court order of 28 October 2015, until removed by the order of court of Rustenburg, which order was reversed by magistrate Mamabolo, on the basis that there could not be contradictory orders from the Children’s Court. A review of the order of Ms Mamabolo by this Court in effect confirmed the primary residence of the minor child as being with the applicant. The final

divorce decree of July 2019 retained the primary residence of the minor child with the applicant.

- [17] The defence of the respondent to the allegations of contempt of court in the main application may be succinctly summarised, as extracted from Mr Maree's heads of argument, as follows. That whilst the review application under case number M204/2018 confirmed the status quo of the lower court order dated 28 October 2015, no specific order was made that the respondent return the minor child to the applicant. The order of this Court of 22 March 2019, in the review application, is not an order *ad factum praestandum* and the respondent therefore cannot be held in contempt thereof.
- [18] The respondent submits that there is a bona fide defence for not complying with the final decree of divorce of 24 June 2019, in that,
- (i) she was not fully aware of the nature thereof; (ii) she acted in the best interest of the minor child as a natural guardian, being prohibited by the Children's Act 38 of 2005, from acting to the detriment of the minor child and relies on an incomplete report of the Family Advocate and Family Counsellor, Johannesburg in this regard; and (iii) that the minor child has not participated in the proceedings which primarily concerns her, where the Children's Act makes provision for such participation. For these reasons Adv Maree submits the respondent did not wilfully or mala fide fail to comply with the court order of 24 June 2019 and/or any other court order.
- [19] I do not intend to engage in any great detail on the relief sought that the respondent be declared a vexatious litigant. In my view, there is no merit in the said relief sought under this prayer. At most the litigation instituted by the respondent in the Children's Court may merit castigation for the forum shopping embarked upon by the respondent insofar as it was designed to seek an order contrary to those of the lower courts in this Division and the orders of this Court, however it falls gravely shy of being vexatious litigation. In respect of the claim for maintenance in the Maintenance Court, the minor child retains a basic constitutional right to maintenance from both the applicant and the respondent. By instituting the maintenance proceedings, the best interests of the child remains the focal point, whether or not the minor child may be said to be with a parent to whom primary care and residence has not been granted by a competent court.

The Counter Application

- [20] The counter application is premised on an incomplete report from the Family Advocate, Johannesburg, which is accompanied by a report from a family counsellor/social worker. The Family Counsellor interviewed the minor child on 23 October 2019 and in the report of the family counsellor dated 01 April 2020, it is noted that the minor child verbalised that she was told by the respondent, her mother, that she would be interviewed "to say who I want to stay with". The minor child alleged that whilst living with the applicant, her father, he wanted to "use" her to become a sangoma and to this end would bring traditional medicine from Limpopo which she was forced to drink. Several other allegations were made by the

minor child to the Family Counsellor/Social Worker which I do not propose to traverse in this judgment, for reasons which will become clear.

- [21] The counter-application was filed on the eve of the main application being heard and no answering affidavit was accordingly filed. Submissions were made that the Court should have no regard to the counter application for failure to comply with the Uniform Rules of Court and a counter argument that the nature of the application is such that no compliance with the Rules is required.
- [22] In any matter involving the best interests of the child, this Court remains mindful that it should not be constrained by the rigidity of the Rules and procedure but concern itself more with substance, the core of which is the best interests of the minor child.

The legal position in respect of contempt of court

- [23] The Constitutional Court in *Mathjabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd* 2018
- (1) SA 1 (CC), confirmed the essential requirements for civil contempt as set out in *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA), being (i) the order; (ii) service or notice; (iii) non-compliance; and wilfulness and mala fides, which the applicant must prove beyond a reasonable doubt. It further confirmed that once the order has been proved, there has been service or notice, and non-compliance, that the respondent bears an evidential burden in relation to wilfulness and mala fides. If the respondent fails to adduce evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

Discussion

- [24] On the evidence, it cannot be gainsaid that the applicant has proven the four (4) orders, that the respondent was given notice of the orders and in fact bears personal knowledge of the orders, and that there has been non-compliance with the orders.
- [25] On the respondent's version, the only defence raised, in the face of being seized with an evidential burden to adduce evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, is the best interests of the child and duties or obligations placed on guardians in the Children's Act.
- [26] On a careful reading of the evidence, the only report with some involvement of the minor child in the dispute surrounding where the primary residence should be, is the incomplete Johannesburg report. The allegations by the minor child in the report are undoubtedly of a very serious nature and merits investigation. This Court, as the upper guardian of minors, cannot shirk its responsibility to ensure that the best interest of the minor child remains a paramount consideration. After all, the dispute which is central to the adjudication of the main application, involves the minor child and where the child's primary residence should be.

[27] In my view, there is merit in the Counter-Application. The Children's Act gives effect to the rights of children as entrenched in section 28 of the Constitution. In respect of the "care" of children, the definition in the Act provides as follows:

"care', in relation to a child, includes, where appropriate-

- (a) within available means, providing the child with-
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

[28] Section 18 of the Children's Act provides as follows in respect of guardianship, which both the applicant and respondent are vested with:

18.(1) A person may have either full or specific parental responsibilities and rights in respect of a child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-

- (a) to care for the child;

- (b) to maintain contact with the child;
- (c) to act as guardian of the child; and
- (d) to contribute to the maintenance of the child.

[29] Section 31 of the Children's Act is instructive in respect of major decisions involving the child and provides as follows:

"Major decisions involving child

31.

- (1) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph
- (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.
- (b) A decision referred to in paragraph (a) is any decision-
- (i) ...;
- (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
- (iii) ...; or
- (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.
- (2) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.
- (b) A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child."

[30] On a reading of section 31 of the Children's Act insofar as it impacts on the defence raised by the respondent to any wilfulness or mala fides, it is imperative that due consideration must be given to any views and wishes expressed by the child.

- [31] Whilst there is prima facie evidence of contempt of court on the part of the respondent, the question cannot be conclusively decided unless regard is had to the views and wishes of the child through a detailed investigation by the Office of the Family Advocate, with the involvement of the applicant and respondent, for the period at the very least from 2015 to date.
- [32] This Court, as the matter presently stands, is not in a position to render a final decision on the relief sought in the main application, pending investigation by the Office of the Family Advocate.
- [33] In my view, once such investigation has been completed, the applicant and respondent will be fully entitled on papers duly amended, to approach this Court, for appropriate relief.
- [34] The respondent in the counter application seeks an order for the appointment of a curator ad litem. I do not deem it necessary that a curator ad litem be appointed for the minor, which will bring unnecessary costs to bear on the applicant and respondent. A referral to the Office of the Family Advocate for investigation and a report to this Court, in my view should suffice.

Costs

- [35] Both parties have been partially successful in the relief sought in the main and counter-application as it presently stands. I accordingly propose no order as to costs and that each party accordingly should bear its own costs.

Order

- [36] In the result, the following order is made:
- (i) The Office of the Family Advocate, Johannesburg and Mmabatho are ordered to investigate and report to this Court on the best interests of the minor child concerning her primary place of residence, contact and care, which investigation should have regard to the period 2015 to date.
 - (ii) Pending the outcome of the aforesaid investigation by the Office of the Family Advocate, the minor child's current primary place of residence shall remain with the respondent.
 - (iii) The report of the Family Advocate is to be forwarded to the Registrar of this Court and the legal representatives of the applicant and respondent within eight (8) weeks of this order, but no later than 14 May 2021, which date may be extended on written notice to the Registrar of this Court and a Chamber Book approval by Acting Justice Petersen.
 - (iv) The applicant or respondent, upon receipt of the report of the Family Advocate, may enrol the main application, for further adjudication by Acting Justice Petersen, on application for a date, with the Office of the Judge President.
 - (v) There is no order as to costs. The parties are to bear their own costs.

A. H. PETERSEN

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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