

SOUTH AFRICA / JUDGMENT

V v V and Others (2003/20813, 2007/9126) [2009] ZAGPJHC 114 (29 April 2009)

[2009] ZAGPJHC 114

COURT

South Gauteng High Court, Johannesburg

BEFORE

P.A. Meyer

CASE / FILE NUMBER

2003/20813, 2007/9126

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2003/20813

2007/9126

Date: 29/04/2009

In the matter between:

V

v. V & Ors

MEYER, J

[1] Mrs V, who is the first respondent in these proceedings, is the wife of Mr V. He is the applicant in this application. Mrs V was formerly married to Mr S. He is the second respondent in this application. B, who is the third respondent, and M, who is the fourth respondent, were born from the former marriage relationship between Mrs V and Mr S. When their marriage relationship was dissolved by order of this court, Mrs V was awarded the custody of the two minor children and Mr S access to them.

[2] Mr and Mrs V have been desirous of emigrating to New Zealand with B and M for the past few years. Mr S refused to consent to the minor children emigrating with their mother, and Mrs V accordingly launched an application under case number 2003/20813 in which she seeks leave to remove B and M from the Republic of South Africa for the purpose of emigrating to New Zealand ('the relocation application'). This application is not finalised and is opposed by Mr S, who, in turn, launched a conditional counter application wherein he seeks the interim custody of B and M while Mr and Mrs V 'investigated the environment in New Zealand'.

- [3] Another dispute that arose between Mr S and Mrs V is Mr S's access to or contact with the two minor children. This dispute culminated in Mr S launching an application under case number 2007/9126 wherein he seeks the restoration of his access to B and M ("the access application"). This application is also not finalised and is opposed by Mrs V.
- [4] On 19 June 2007, Victor AJ made an order referring the disputed issues in the access application for the hearing of oral evidence and consolidating the relocation application with the oral evidence to be given.
- [5] The Centre for Child Law launched an application on behalf of B and M to intervene in inter alia the relocation and access applications. On 11 June 2008, Victor J granted such relief. The minor children are presently independently

represented by the Centre for Child Law and counsel has also been briefed to represent them. They wish to emigrate to New Zealand with their mother and Mr V and they do not wish their father's contact to be restored.

- [6] Mr V now applies for leave to intervene in the relocation and access applications. The grounds upon which he relies in his founding

papers in support of such relief are essentially: that, although Mrs V had been represented by Deneys Reitz Attorneys and by counsel until about the end of 2008, she is not presently legally represented and Mr V wishes to render support and active assistance to his wife in her preparation for and conduct of the hearing; that Mr V wishes to testify on a number of aspects relevant to the issues that have been referred for the hearing of oral evidence; and that Mr S has made an attack on him in his affidavits and Mr V wishes to set the record straight or clear his name. Mr V's application for the granting of leave to intervene is opposed by Mr S. The Centre for Child Law has given notice that the minor children abide the decision of this court.

- [7] It is made clear in his replying affidavit that Mr V is not seeking to legally represent Mrs V in her conduct of the legal proceedings. The support and assistance that Mr V wishes to render to his wife in her preparation for and conduct of the hearing, do not, in my view, establish 'a direct and substantial interest in the subject-matter' of the litigation. See *United Watch and Diamond Co. (Pty.) Ltd. And Others v. Disa Hotels Ltd. and Another* 1972

- (4) SA 409 (C), at p 416.

- [8] The evidence which Mr V wishes to give appears to be relevant to the issues that are to be determined at the hearing of oral evidence. Mr V will, whether or not he is granted leave to intervene, probably be called as a witness at that hearing by either Mrs V or by the Centre for Child Law on behalf of the minor children, or even by Mr S. Mr V, Mrs V and the minor children are essentially on the same side in respect of the issues to be determined at the hearing of oral evidence. It is also to be noted that a subpoena to give evidence was served upon Mr V on behalf of Mr S when the matter was previously set down for hearing on 26 August 2008.

[9] In Wynne

v. Divisional Commissioner of Police and Others 1973

(2) SA 770 (E.C.D), Addleson J said this at p 776A – B:

‘Where there is an attack on the character of a person who is not a party to the litigation, it is conceivable that there may be a limited right to intervene, provided that it will be essential, for purposes of the judgment, that the correctness of such attack be considered and decided as part of the Court’s reasons for determining the issue between the parties. See, for example, the authorities referred to earlier in this judgment.’

[10] In his answering affidavit in these proceedings, Mr S inter alia states that Mr and Mrs V indoctrinated the minor children against him and alienated them from him; that, because of the conduct of both Mr and Mrs V, ‘the best interests of B and M have been gravely prejudiced’; that Mr S believes that the abrupt termination of his contact with the minor children ‘was orchestrated’ by Mr V; that Mr V ‘deemed it fit to interfere with every aspect of Mr S’s ‘parenting’ of the minor children; that Mr V ‘insisted on involving himself and conducted himself in a negative and obstructive manner’ towards Mr S; that Mr V ‘has made various efforts to obstruct and prevent’ his access to the minor children ‘and has in fact been successful in doing so for almost three years’; that Mr S considers Mr V ‘to be the continuing primary problem in the matter.

[11] Various allegations have also been made of manipulative, intimidating, interfering, and obstructive conduct, or attempts at such conduct, on the part of Mr V in relation to the court appointed case manager, Dr Wilke, and other experts and persons. It is alleged that Mr V ‘... has been a proverbial ‘troublemaker’ throughout these proceedings ...’

[12] Although Mr V will probably in any event be called as a witness, I am of the view that he should be granted leave to intervene in the consolidated proceedings that have been referred for the hearing of oral evidence.

[13] Many of the allegations made against Mr V are ‘directly in issue between the litigating parties and would necessarily have to be decided in the course of the judgment on the merits.’ Wynne (supra) at p 774A – H. It ‘... will be essential, for purposes of the judgment, that the correctness of such attack be

considered and decided as part of the Court’s reasons for determining the issue between the parties.’ Wynne (supra) at p 776A – B.

[14] Also, if the damaging allegations against Mr V were to be proved, and it is not suggested that they will be proved, orders that the court might wish to make in the best interests of the minor children may conceivably directly involve Mr V, such as to require his participation in certain actions or his refraining from certain conduct, despite the formulation of the relief prayed for in the respective notices of motion.

[15] It is common cause between all the parties that the litigation must come to an end and be finalised expeditiously. The matters on which Mr V intends to testify and many of the allegations made against him relate to the issues that have been referred for the hearing of oral evidence. To direct Mr V to file separate affidavits in the relocation and access applications and for the other parties to answer thereto, will, in my view, result in unnecessary delay and the incurrence of unnecessary additional costs. A single affidavit in which Mr V briefly sets out his intended evidence and answers to the allegations made against him insofar as they are relevant to the issues that have been referred for the hearing of oral evidence should, in the circumstances, suffice.

[16] In the result the following order is made:

Mr V is joined as the second applicant in the application under case number 2003/20813 ('the relocation application') and as the second respondent in the application under case number 2007/9126 ('the access application').

Mr V is ordered to file an affidavit within ten days of the date of this order, which affidavit must contain a brief summary of his intended evidence on the issues that have been referred for the hearing of oral evidence in terms of the court order granted by Victor AJ on 19 June 2007, and a brief answer to the allegations made against him insofar as they are relevant to such issues.

Any party may, on proper notice to all the other parties, approach this court for an amendment of paragraph 2 of this order or for further directions as to the further procedure in the consolidated proceedings that have been referred for the hearing of oral evidence.

The costs of this application, including the costs that were reserved on 3 March 2009, are to be costs in the cause.

P.A. MEYER

JUDGE OF THE HIGH COURT

29 April 2009

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