

SOUTH AFRICA / JUDGMENT

Z.D.P v Z.M (44209/19) [2024] ZAGPJHC 896 (16 September 2024) [2024] ZAGPJHC 896

COURT

South Gauteng High Court, Johannesburg

BEFORE

G.Y. Benson

CASE / FILE NUMBER

44209/19

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 44209/19

1.

REPORTABLE: NO
2.
OF
INTEREST TO OTHER JUDGES: NO
3.
REVISED.
IN
THE MATTER BETWEEN
D[...]
P[...], Z[...] S[...]
APPLICANT
and
M[...],
Z[...]
RESPONDENT

JUDGMENT

BENSON AJ

INTRODUCTION

[1] This is a Rule 43 Application, where the applicant seeks, inter alia, that the Court gives effect to the recommendations of the Family Advocate which recommendations are dated the 28th of February 2023. The applicant further seeks a contribution of R20 000.00 as against the respondent under Rule 43 for a contribution

towards his legal costs. This contribution is sought on a once off basis and as a punitive measure against the respondent.

[2] The respondent has also raised a counter claim against the applicant for maintenance for the minor children and a contribution towards her legal costs in the sum of R30 000.00.

[3] There are 3 minor children born of the marriage, namely:

H[...] D[...] P[...] (female) born 3 September 2010;

B[...] D[...] P[...] (female) born 21 August 2014;

R[...] D[...] P[...] (female) born 24 November 2018.

[4] Whilst this matter appeared initially to be highly contentious, only two essential issues require determination following the recommendations of the Family Advocates office. The first is whether H[...] must return to formal schooling, and the second as to the issue of legal contributions. The schedule prepared on behalf of the respondent in the applicable practice note was of great assistance to this Court, and essentially narrowed the issues for this Court to decide extensively.

- [5] What must be noted is that the financial position of both parties has not been extensively dealt with, and it is difficult for this court to properly assess the affordability for maintenance. This is not desirable in Rule 43 applications, and parties ought to assist this Court as far as is possible when requiring relief in terms of this Rule.
- [6] Whilst this matter was previously enrolled, and whilst mediation was attempted, the limited issues raised above, remain in dispute.
- [7] Upon consideration of the efforts made to finalise the outstanding disputes of the parties, and a prior agreement reached between the parties as early as the 11th of January 2020, all such efforts lacked lustre and did not permit a solution which would best serve the best interests of the minor children nor the parties. It is clear, despite the fact that both parties were legally represented, that neither party will compromise in order to reach an amicable and practical solution in this regard. The parties are exceptionally acrimonious towards one another, which is unnecessary and undesirable.
- [8] Section 6(4)(a) of the Child Care Act 38 of 2005 provides that:
- “In any matter concerning a child-*
- (a) An approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided;..”
- [9] The relevant portions of Section 7 of the Act further provide that:
- “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-*
- (a) the nature of the personal relationship between-
- (i) the child and the parents, or any specific parent; and...
- (b) the attitude of the parents, or any specific parent, towards:-
- (i) the child; and
- (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any changes in the child’s circumstances, including the likely effect on the child of any
- separation from-
- (i) both or either of the parents; or...
- (e) ...

- (f) the need for the child-
- (i) to remain in the care of his or her parent, family and extended family; and
- (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's –
- (i) age, maturity and stage of development;
- (ii) gender;
- (iii) background; and
- iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) ...
- (j) ...
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment closely resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
- (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
- (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) ...
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."

(-own emphasis added)

[10] These sections embolden parties to adopt an approach which is conducive to conciliation and problem solving, in order to avoid litigation and unnecessary confrontation. All potential litigants, including their legal practitioners (on the part of their clients), are duty bound to encourage actions and decisions which avoid and minimise legal and administrative proceedings in relation to children.

- [11] Despite these provisions, it is unfortunate that many legal practitioners do not make sufficient effort to timeously settle disputes such as the present, nor do they actively encourage their clients to act reasonably, with the result that the best interests of the minor child are adversely affected. It further results in the unnecessary (and often unaffordable) incurrence of legal costs and leads to the courts having to intervene and make practical decisions for the parties, where common sense ought to have prevailed. Often times, it further subjects minor children to countless assessments and continued conflict, to their long-term emotional and psychological detriment.
- [12] I wish to emphasise that I do not wish to unleash a specific attack or criticism upon the legal practitioners in the present matter, and I acknowledge that practitioners act on the instructions of their clients – both parties herein having conducted themselves in an unreasonable and obstructive manner thus far.

SCHOOL ATTENDANCE OF H[...]

- [13] What is of concern, however, is that H[...] has been removed from formal attendance at school in order to memorize the Quran. Whilst this is common in the Muslim community as stated by the respondent in her replying affidavit, it does not give effect to section 7(1)(h) of the Act as quoted above, in that H[...] is being denied intellectual and social rights, albeit that her cultural rights are being pursued.
- [14] Despite my misgivings in this regard, it was conceded on behalf of the applicant that he has no difficulty if H[...] is at least enrolled in a registered home schooling program. Owing to the fact that she has not been in attendance at school for many months, and has fallen behind her peers, which would cause her embarrassment were she to return, the parties deem that this is appropriate. Since the parties essentially reached agreement on this aspect during the course of argument herein, it is accordingly not necessary for this Court to decide whether she ought to be returned to a formal school at this stage. I would however encourage the parties to (in turn) encourage the minor children to attend at a formal school in future, in order that their intellectual and social interests be ensured, in parallel to their cultural and religious interests. This is an issue that can be dealt with by the trial court in the main action should this become necessary.

MAINTENANCE FOR MINOR CHILDREN

- [15] In so far as the issue of interim maintenance for the minor children is concerned, it is clear that there is dire need for same to be awarded. The counter claim on behalf of the respondent appears uncontested owing to various technicalities argued on behalf of the applicant. However, it is clear that the applicant retains the financial means to provide for some form of maintenance as the historical breadwinner, even on the scant financial disclosure provided by him. It was also argued on behalf of the applicant that he has no difficulty in ensuring that the minor children's educational needs are met.

APPLICATION FOR CONTRIBUTION TOWARDS LEGAL COSTS

[16] Insofar as the issue of a contribution towards legal costs is concerned, the applicant claims that the R20 000.00 as sought is a once off costs, which is sought as a punitive order owing to dilatory and obstructive conduct on the part of the respondent in failing to settle the disputes as between the parties.

[17] Uniform Rule 43(1)(b) provides for a contribution towards the costs of a matrimonial action, pending or about to be instituted. The guidelines for considering whether such relief is to be granted are now well developed by our courts, and as again recently pronounced upon by this Court. It is imperative to consider the claim for legal costs contribution against the prevailing legal principles as developed in the relevant authorities.

[18] As stated in *Van Rippen v Van Rippen*[1]:-

“...The court should, I think, have the dominant objecting view that, have the dominant objecting view that, having regard to the circumstances

of the case, the financial position of the parties, and the particular issues involved in the pending litigation, the wife must

be enabled to present her case adequately before the court.”

[19] *Eke v Parsons*[2] clearly affirmed the constitutional perspective on the Rule, and confirmed that the Rule is intended to ensure a fair trial or

hearing, and to secure the inexpensive and expeditious completion of litigation. However, this Court does not consider the Rule to be intended to operate as a punitive measure in the event that any party is said to be dilatory in the conduct of the proceedings. This is especially so when a party to the proceedings does not have access to endless financial means to do so. The respondent is clearly not a woman of great financial means, and has made attempts to further this matter, nonetheless.

[20] Accordingly, punitive costs must ultimately be claimed at the finalisation of the trial proceedings, as Rule 43(1)(b) does not contemplate a punitive costs order in any event.

[21] In addition, any costs order against either party at this stage would only serve to aggravate the acrimonious relationship between them, and would add to the negative impact this may have on the minor children, where such funds would be better utilised for their upkeep and maintenance. Once the parties have made a proper financial disclosure, this aspect can be better revisited.

[22] In the result I make the following interim order:

- a) Both parties are to retain full parental responsibilities and rights as contemplated in section 18(2) of the Children’s Act 38 of 2005 in respect of the minor children;

- b) Primary residence of the minor children is to remain with the respondent, subject to the applicant's rights of contact to continue in accordance with the Court Order dated the 6th of December
2022. The parties are to arrange, as far as possible, that they refrain from arranging family functions during the other party's contact periods;
- c) Both parties are directed to take part in the 'Kidsbuzz Re-Communication Course (or other such similar Course), with the costs thereof to be paid by the applicant;
 - d) The minor children and the applicant are to be enrolled in bonding therapy with a mental healthcare professional to assist them with issues and/or challenges which may arise from time to time, if any, in respect of the parent-child relationship. The mental healthcare professional is to assess whether the minor children ought to be formally enrolled at a registered school, and whether there is any form of parental alienation. The mental healthcare professional is also to recommend whether in extended phased-in contact – including sleepover contact – is necessary. The costs of such mental healthcare professional is to be borne by the applicant;
 - e) That pending any further assessment provided for in (d) supra, H[...] is to be enrolled for home schooling at the commencement of the next applicable school term following the issue of this Order, with a registered home schooling facility and/or entity appropriate for her age and level of academic progress, the costs of which are to be paid by the applicant;
 - f) A case manager is to be appointed within 30 days of this Order, which case manager is authorised to facilitate joint decisions between the parties in respect of the minor children, and to regulate, facilitate and review the contact arrangements, including the implementation of any recommendations following any assessments provided in (d) supra, the costs of which are to be paid by the parties in equal shares or as directed by the case manager's terms and conditions;
 - g) All communications between the parties is to be conducted by way of electronic communications and should remain as a record, and must be regulated in a manner to be directed by the case manager once appointed;
 - h) The applicant is directed to pay the respondent the sum of R3500.00 per month per child, payable on or before the 1st of every consecutive month to a nominated bank account of the respondent following the issue of this Order;
 - i) The applicant is to pay 100% of each of the minor children's medical aid and related expenses, as well as their reasonable school fees and other related and necessary educational expenses;
 - j) The parties' respective claims for legal contributions are dismissed;
 - k) Each party is to pay their own costs of this application.

G.Y. BENSON

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

Appearances:

Date of hearing : 30 January 2024

Date of

judgment:

: 16 September 2024

For the Applicants : Mr. Buckus

Instructed by : Buckus Attorneys

For Respondent : Adv. I. Vorster

Instructed by : Sadlers Attorneys

[1] 1949

(4) SA 634 (C)

[2] 2016

(3) SA 37 (CC)

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