

HIGH COURT

(BISHO)

CASE NO.: 89/2000

In the matter between:

BUSISWA NOBAZA

and

MPUMELELO MFIKILI

J U D G M E N T

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EBRAHIM J: This is an application to strike out certain portions of a replying affidavit which has been filed in an application relating to the custody of a minor child. The application is brought on the basis that, what is now raised in the replying affidavit, constitute new matter and is further vexatious and irrelevant. Mr Chemaly who has moved the application to strike out submits that to permit this information to remain would be prejudicial to the respondent. Moreover it was information which was in the knowledge of the applicant and should have been introduced in the founding affidavit. By introducing it in the replying affidavit it broadens the ambit of the application which has been brought and on that basis the respondent is prejudiced since he cannot reply. Moreover the allegation are of a serious and in my view of a highly inflammatory nature.

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Mr Goosen who appears for the applicant contends that since
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the respondent in his answering affidavit alleged that he and the deceased's mother of the minor child dearly loved each other, that on that basis the applicant was entitled to reply and to expand on that by indicating that in fact the relationship of the respondent with the deceased's mother was not one of love but one where he had assaulted her on certain occasions.

As I have indicated the main application relates to the custody of the minor child of whom it is clear the respondent is the natural father. The mother of the child is of course deceased. In my view the matter which has been introduced by the applicant in its replying affidavit is indeed new matter and moreover is vexatious and irrelevant. It may paint a certain picture of the respondent and may influence the Court in forming a particular opinion of the respondent which is detrimental to him and in regard to his defence of the application for custody of the minor child. 10

In any event it is quite clear that this information was in the knowledge of the applicant and if it had been relevant insofar as the applicant was concerned it should then have been introduced in the founding affidavit. The basis for introducing in the replying affidavit is clear in my view since the respondent cannot reply thereto. 20

In the circumstances the application to strike out is granted in the terms set out in the application, namely:

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1. The first seven words of the second sentence of paragraph 3 of the said replying affidavit; and
2. The fourth, fifth, sixth and seventh sentence of paragraph 3 of the replying affidavit.

In the circumstances of the matter it appears to me there is no reason to refuse the respondent his costs in respect of the application to strike out, nor has Mr Goosen been able 10 to present any evidence in regard to this aspect and in my view a proper order is that the costs should be awarded to the respondent.

Y EBRAHIM

JUDGE : BISHO HIGH COURT

11 MAY 2000