

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 44641/2016

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12 June 2018
DATE


.....
SIGNATURE

In the matter between:

STOFILE, ANDILE LUNGA

Applicant

and

MVULANE, NOMATHAMSAQA

First Respondent

MVULANE, ROSEMARY

Second Respondent

JUDGMENT

YACOOB, AJ:

- 1 The applicant and the first respondent are the parents of two minor children, a girl now aged thirteen, and a boy now aged nine. The second respondent is

the grandmother of the children, who live with her and with the first respondent, their mother.

- 2 The purpose of this application is to hold the first and second respondents in contempt of two orders obtained by the applicant in 2016. The first, a parenting plan made an order of the Children's Court in the absence of the first respondent and her legal representative, and the second an order obtained on an urgent basis in this Court, with the consent of the first respondent.
- 3 The primary basis of this application is that the children did not go with the applicant to the Eastern Cape over Christmas 2016, as provided for in the parenting plan and again in the urgent order. At that stage the children were eleven and seven years old respectively. The applicant contends that the children did not go with him because the respondents did not prepare them to go. He also alleges that the respondents have actively alienated the children from him and that the children did not want to spend time with him.
- 4 The respondents' version, on the other hand, is that the applicant had constant access to the children at their home until December 2016, and would often stay there watching television rather than interacting with the children. This the applicant does not deny. The respondents say that there were some difficulties with the applicant picking the children up from school and taking them out, but that, nonetheless, the applicant had constant contact with the children and that they did not alienate the children from him. The respondents

contend that it is the applicant's own behaviour that has alienated the children. The children had never been away overnight with the applicant and simply did not want to go. The respondents contend that, since the applicant at that stage saw the children regularly, he was as much responsible to prepare the children (mentally and emotionally) for their holiday and failed to do so.

- 5 The first respondent states that she was advised to consent to the urgent order, on the basis that if the children did not want to go she would not have to force them.
- 6 There is no affidavit from any independent person who has consulted with the children.
- 7 In a supplementary affidavit the respondents have informed the Court that there is a process taking place re-establishing contact between the children and the applicant, which had ceased after December 2016. An order was obtained in the Children's Court on 28 March 2018 which phases in contact between the children and the applicant, starting with supervised contact.
- 8 The relief sought by the applicant is an order finding the respondents guilty of contempt of court, and placing the first respondent in prison for three months in addition with imposing a fine of R100 000 on each respondent.
- 9 Before considering the sanction, I must first determine whether the applicant has satisfied me that the respondents should be found guilty of contempt.

- 10 Disobedience of a court order is not automatically contempt. It is contempt when the court order is disobeyed deliberately and in bad faith.¹ An application for a finding of contempt is usually used as an enforcement mechanism, rather than as a penalty for non-compliance, although in certain circumstances it is appropriately used only as a penalty.² A finding of contempt may also be used to preserve the integrity and dignity of the courts.
- 11 The applicant must prove beyond a reasonable doubt that the respondents' non-compliance with the court orders is wilful and *mala fides*.³
- 12 The applicant's own version is that the children told him they did not want to go with him to the Eastern Cape, but that they wanted to go with the respondents and their (the children's) cousins who were there at the respondents' home with them on their annual holiday. The applicant contended that by giving the children an option to go on this annual holiday, the respondents showed wilful and *mala fides* disobedience of the order.
- 13 The applicant attempted to show the first respondent unduly influencing the children on telephone calls with him, by alluding to "transcripts" in his affidavit. However the so-called "transcripts" attached to the affidavit are simply the applicant's own narrative, and there is no transcription or reconstruction of what the first respondent allegedly said, simply a comment that the applicant

¹ *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at [9]

² *Fakie*, above, at [7]

³ *Fakie*, above, at [42]

could hear her in the background. Even if these attachments had any evidentiary value, which is doubtful, they do not assist the court in any way.

- 14 I am not convinced that the respondents have disobeyed the orders of the courts wilfully and in bad faith. The reasonable doubt in my mind on this issue arises from the applicant's own version, rather than just the respondent's, which only confirms those doubts.
- 15 The applicant complains of phone calls not being answered, but shows phone calls made within ten minutes of one another, when a person may simply not have been available. He complains that the children are picked up from school before he gets there, but does not deny the respondents' version that this is sometimes because he has not arrived at after care by the time it closes.
- 16 It is clear that there has been some difficulty in the relationships among the parties, which have impacted on the applicant's relationship with the children. However I am not convinced that the respondents have deliberately disobeyed the court order with the intention of perverting the course of justice.
- 17 There is therefore no need for me to consider the somewhat harsh sentence sought by the applicant.

18 For these reasons, I make the following order:

The application is dismissed with costs.



S YACOOB
ACTING JUDGE OF THE HIGH COURT

APPLICANT'S ATTORNEYS:

IAN ALLIS OF THERON AND THERON INC

COUNSEL FOR RESPONDENT:

MS KEIJSER

RESPONDENT'S ATTORNEYS:

NOLS NOLTE ATTORNEYS

DATE OF HEARING

05 JUNE 2018

DATE OF JUDGMENT

12 JUNE 2018