REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 13283/2024
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
DATE:
SIGNATURE:

In the matter between:

J[...] E[...] D[...] R[...] **APPLICANT**

And

L[...] D[...] R[...] **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The applicant and respondent are married to each and their common home is in Musina. From their marriage relationship one minor child, a girl was born. The minor child is currently five years of age. The parties experienced some marital problems which led to the applicant instituting divorce proceedings against the respondent but has not yet been served on the respondent with divorce summons.

[2] The applicant had secured employment in Ermelo as an educator. On 21st October 2024 the applicant notified the respondent that she intended to relocate to Ermelo together with the minor child and her son from her previous relationship. That led to the respondent in December 2024 instituting an urgent application in this court seeking orders that the applicant be interdicted from relocating to Ermelo with the minor child and that he be awarded primary residence of the minor child. The application was set down for the 10th December 2024.

[3] The applicant opposed the respondent's application. On 10th December 2024 the parties reached an agreement, and by consent the agreement was made an order of court before Bresler AJ. The consent order read as follows:

"1. Mrs Sarie Nell is appointed to conduct a comprehensive investigation into the interest of the minor child XXX, born on … with specific focus on primary residency, contact and whether a relocation to Ermelo would be in the minor child's best interest.

2. Mrs Nelll is to compile a report and make recommendations on or before 3rd January 2025.

3. In the interim and pending final adjudication of the application, the minor child will rotate between the parties every ten days.

4. The minor child will be in the Applicant's care for the first ten days after the Respondent vacates the matrimonial home on 14th December 2024

whereafter the minor child will be in the Respondent's care for the following ten days from 24 December 2024.

5. Adjudication of Part A of the Applicant's urgent application as well as the Respondent's counterapplication is postponed pending the report by Mrs Nell.

6. The parties are entitled to approach the urgent court upon receipt of the report by Mrs Nell on the same papers duly supplemented on or before 10th January 2025.

7. Costs reserved".

[4] On 1st January 2025 Mrs Nell delivered an interim report in which she intimated that a forensic investigation was needed to be undertaken in respect to the primary care and residence and contact to the minor child due to multiple concerns raised by both parties, and the high-risk factors identified by the social worker in both parties' profiles. Therefore, the social worker could not make any recommendations regarding the best interest of the minor child at this moment.

[5] From December 2024 the minor child has been rotating between the parties in terms of the court order. The minor child was supposed to return to the applicant on 13th January 2025, however, but that did not happen. During July 2024 when things were still fine between the applicant and respondent, they applied for the enrolment of the minor child in grade R at a certain school in Musina and she was accepted. In January 2025 the respondent instead of returning the minor child to the applicant in compliance with the court order, enrolled the minor child at the school which the minor child has been accepted in Musina. The respondent enrolled the minor child without notifying and/or consent of the applicant. When the applicant demanded the return of the minor child, the respondent sent the applicant a message telling her that school's requirements for the child to attend school would generally override the court order if the court order disrupts the child's education. Further that it

would require a legal review or modification of the type of the custody order to align with the child's educational needs.

[6] The applicant and the respondent could not resolve their differences relating to the return of the minor child to the applicant in compliance with the court of the 10th December 2024. That led to the applicant launching the current contempt of court application against the respondent on urgent basis seeking orders that the respondent be found to be in contempt of court order of the 10th December 2024; he be committed to prison for a period of 30 days for contempt, alternatively for such period the court deems just and equitable; and also variation of the order in relation to primary residence of the minor child.

[7] The respondent is opposing the applicant's contempt of court application, has also filed a conditional counterapplication in which he is seeking that the order of the 10th December 2024 be varied to the extend that the minor child remain in his care pending the finalisation of the forensic evaluation by Mrs Alexa Young; finalisation of the investigation by Mrs Sarie Nell and further adjudication of the main application; the minor child remain enrolled at the current school she is schooling pending further adjudication of the main application; and that the applicant be entitled to contact, in Musina, every alternative weekend from Friday after school until Sunday at 17h00 provided that the applicant shall not remove the minor child from the current school.

[8] According to the respondent, the relief that the applicant is seeking is contrary to the minor child's best interest as the minor child had already commenced grade R at a school in Musina, and by the time the urgent application is adjudicated upon she would have completed an entire month in grade R. The respondent submitted that the order of the 10th December 2024 was supposed to remain operational until the 10th January 2025 as the intention of the appointment of Sarie Nell was to have the recommendations made available prior to the commencement of the academic year on 15th January 2025. The respondent admit that he had refused to comply with the 10 days contact rotation, as it is impracticable and detrimental to the minor child's

academic interests. The respondent submit that his refusal was not wilful and mala fide. It has not yet been determined that relocation to Ermelo would be in the minor child's best interest, and that the minor child remains domiciled in Musina, Limpopo, and resident in the respondent's care and at their former matrimonial home.

[9] The respondent further submit that he and the minor child have participated and completed their evaluation process of Mrs Young, and to the best of his knowledge the applicant interview and participation in the evaluation process will be finalised prior to the hearing of this application. It is the respondent's contention that the applicant's grievance does not pertain to his failure to comply with the existing order, but rather that he did not give her the opportunity to do so herself. The respondent submits that all that he had done is to ensure that the minor's child's best interest are protected.

[10] There are three issues which I am called upon to determine. The first is whether the respondent was in contempt of the order of the 10th December 2024; the second whether it is in the best interest of the minor child to vary the order of the 10th December 2024; and the third, if it is found that the order needs to be varied, whether it should be varied as prayed for by the applicant or respondent.

[11] It is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once all these elements are established, wilfulness and mala fides are presumed and the respondent bears evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established. (*See Secretary of Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*[1]*).*

[1] [2021] ZACC 18 (29 June 2021) at para 37

[12] The order of the 10th December 2024 was a consent order which the applicant and respondent agreed upon it at the door of the court and was thereafter made an order of court. It is not in dispute that the order was valid and the respondent had knowledge of it. The respondent conceded having not complied with the order. Therefore, there is a presumption which the respondent had to rebut that he was not wilful and *mala fide.*

[13] In *Fakie v CCII Systems (Pty) Ltd*[2] Cameron JA said:

> "The test for when disobedience of a civil order constitute contempt has to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)".

[14] It is not in dispute that the minor child was supposed to start schooling at the beginning of January 2025. It is not in dispute that the applicant secured employment in Ermelo as an educator and had relocated to Ermelo to start new employment in January 2025. This is what led to the respondent launching the urgent application in which the order of the 10th December 2024 was obtained. The main issue to be determined in that application is whether it is in the best interest of the minor child to relocate with the applicant to Ermelo. That issue has not yet been determined as the final report of the forensic clinical psychological evaluation has not yet been compiled.

[15] As far back as July 2024 the applicant and respondent have applied to a school in Musina in which the minor child was going to start her grade R and she had been accepted. By the time the school reopens, the dispute between the applicant and respondent had not yet been resolved. Whether the minor

[2] 2006 (4) SA 326 (SCA) at para 9

child was with the applicant or respondent the 10 days rotation of the minor child between the parties will be impractical to implement taking into consideration the distance between Musina and Ermelo. This is definitely going to affect and interrupt the minor child's schooling activities. If the 10th day fell during week when the minor child was supposed to go to school what will happen to her schooling activities is anybody's guess. At this stage the applicant is not in position to enrol the minor child in Ermelo as that issue has not yet been determined.

[16] The respondent whilst trying to act in the best interest of the minor child, has done it the wrong way. He should have first consulted the applicant and see whether they could not reach an amicable solution of what is in the best interest of the minor child, rather than acting unilaterally. Both the applicant and the respondent had joint and equal responsibility towards the minor child. If the parties could not agree on what was best for the minor child, the respondent could have approached the court for variation of the order. A duly granted court order is valid and enforceable until set aside by a court of competent authority, and that order should be respected and complied with by all the parties affected by that order.

[17] Even though the respondent in his answering affidavit has stated that he had refused to comply with the order, there is no evidence that it was done for ulterior motives. The minor child has already been accepted at a school in Musina which was identified by the parties jointly as far back as July 2024, and by then the schools have reopened. The minor child could not have missed starting her schooling because of the dispute between her parents which dispute there is no guarantee is to when it will be resolved. On the hand the if the school could have reopened whilst the minor child was in the applicant's care, she also could have enrolled the minor child in Ermelo before the dispute between her and the respondent was resolved.

[18] By enrolling the minor child in a school in Musina the respondent was acting in good faith, and his actions were not unreasonable. In my view, even though the respondent has acted unilaterally, had conceded that he refused to obey

the court order of the 10th December 2024, and did not attempt to vary that order, his actions were not wilful and mala fide. He mistakenly thought that he was doing the right thing which was in the best interest of the minor child. If follows that he cannot be found to be in contempt of the order of the 10th December 2024.

[19] The second issue is whether it is in the best interest of the minor child that the order of the 10th December 2024 be varied. When the partied agreed on that order to be made an order of order, they did not foresee that their dispute will drag beyond the 15th January 2025 which was the date for the reopening of the schools. The applicant had relocated to Ermelo, and the minor child had been enrolled in a school in Musina. Both parties are in agreement that currently, it impractical if not impossible to comply with the order that the minor child rotate between the parties every 10 days. I agree with the parties that it is not in the best interest of the minor child to leave that clause of the order in its current format. A compelling case by both parties has been made that the order be varied.

[20] The third issue is whether order should be varied in terms of the applicant or respondent's prayers. The courts as the upper guardian of minor children, and in disputes involving minor children, the court will determine the matter in terms of what is best interest of the minor children and not the best interest of their parents or guardians. In *Stock v Stock*[3] Diemont JA said:

"It has been said repeatedly by the Courts that where there is a dispute concerning the award of custody of minors there is substantially one norm to be applied, namely the predominant interest of the children. The same norm applies where the disputes relates, not to the award, but the variation of a custody order or where application is made to remove the children out of the jurisdiction of the Court. The parent who seeks such relief will be called upon to show cause, that he or she will have to satisfy the court on a balance of probabilities that the order made at the time of divorce should be varied.

[3] 1981 (3) SA 1280 (A) at 1290F-H

There are many factors to which the Court will have regard in determining whether the welfare of the children calls for such variation. So, for example, where there are several children in the family, it well be deemed inadvisable to separate the siblings. Then again the Court will bear in mind that any variation in the order will have a more lasting effect on the younger children than it will on the older children who will become independent sooner and can then make their own decisions".

[21] Sarie Nell in her interim report was unable to make any recommendation regarding the best interest of the minor child due to the multiple concerns raised by both the applicant and respondent and also the high-risk factors identified by the social worker in both parties' profiles, hence she recommended a forensic clinical psychologist evaluation. Sarie has also stated that although the minor child was 5 years old, she clearly indicated that both parents were involved in her caretaking task, and that she wants both parties in her living world. The minor child is therefore comfortable to live with both parent without having preference of one over the other.

[22] Since December 2024 up to date the minor child has been living with the respondent, and it does not seem that the respondent is not taking good care of the minor child. Both parties are in agreement that the forensic evaluation report may be received any time from now. Nobody at this stage knows what will be the final outcome of the parties' case, and it may go either way. If in this application before me, the order is varied to favour the applicant, it will mean the minor child will have to leave her current school and go and start a new school in Ermelo. A month later the court finds in favour of the respondent, the minor child will have to relocate back to Musina. That, in my view, will cause confusion and inconvenience to the minor child. Currently the minor child is staying in a place which all along she had regarded it as her home. She is schooling in a school that has been identified by both parents. For about two months the minor child has been with the respondent, there is no complaint about how the respondent is taking care of the minor child. In my view, it is in the best interest of the minor child if the status *quo* remains the

same. This is just a temporary arrangement, unless the parties wanted to unnecessarily drag the matter.

[23] With regard to costs, both parties were under the impression that the matter would have been resolved before the schools reopens. They did not foresee that their consent order was going to create problems for them. In my, view, the appropriate order will be that each party to pay his/her own costs.

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

24.1 The applicant's application is dismissed.

24.2 The respondent's conditional counterapplication is granted and the following orders are made:

24.2.1 Paragraph 3 to 6 of the order dated 10th December 2024 is varied and substituted with the following:

24.2.1.1 The minor child, shall remain in the care of the respondent, pending finalisation of the forensic evaluation by Mrs Alexa Young, finalisation of the investigation by Mrs Sarie Nell and further adjudication of the main application.

24.2.1.2 The minor child shall remain enrolled in M[…] Primary School pending further adjudication of the main application.

24.2.1.3 The applicant shall be entitled to contact, in Musina every alternative weekend from Friday after school until a Sunday at 17h00 provided that the applicant shall not remove the minor child from Musina area.

24.2.1.4 The applicant shall be entitled to daily telephonic contact.

24.3 Each party to pay his/her own costs.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicant	**: Adv E Malherbe**
Instructed by	**: Machobane Kriel Inc**
Counsel for the respondent	**: Adv A Koekemoer**
Instructed by	**: Radley Attorneys Inc**
Date heard	**: 18th February 2025**
Judgment delivered on	**: 20th February 2025**