Editorial note: Certain information has been redacted from this judgment in compliance with the law.

HIGH COURT OF SOUTH AFRICA, WESTERN CAPE DIVISION,

CAPE TOWN

Case No.: 7521/24

In the matter between:

E[…] A[…] L[…]-B[…] Applicant

and

A[…] V[…] M[…] Respondent

JUDGMENT

MTHIMUNYE AJ:

Introduction

[1] This is an opposed urgent application in terms of which the applicant seeks an order condoning its non- compliance with the forms, time limits and service period in terms of the Uniform Rules of Court 6(12).

[2] In terms of the notice of motion the applicant seeks relief based on a divorce settlement agreement which was made an order of court on 11 November 2016. The applicant seeks it be ordered that the respondent immediately return to Johannesburg with the minor children, G[…] 16 years of age, A[…] 11 years of age and O[…] L[…]-B[…] 9 years of age

("the minor children") so that the children immediately recommence attendance at […] School and […] School respectively.

[3] Alternatively, in the event that no order is made directing the minor children to return to Johannesburg, the applicant seeks on order directing the Family Advocate Cape Town to conduct an urgent investigation regarding the circumstances of the minor children and to furnish a report to the Court regarding the children's best interests and to make recommendations regarding the parties' parental rights and responsibilities, including the negotiation of a parenting plan, and minor children's primary residence and including pertaining the relocation of the minor children, whether to Somerset West where the minor children shall reside with the respondent, alternatively to Hilton KZN, where the minor children shall reside with the applicant and a parenting plan to be concluded between the parties.

[4] The relief sought by applicant in Part B, that the respondent be found in contempt of court is at this stage of the proceedings not being dealt with, as requested by the applicant pending the report by the Family Advocate, the determination of Part B is to be postponed to the semi urgent roll. In the applicant seeks further and alternative relief.

[5] In addition, the applicant seeks an order that the respondent pays the costs of this application. The scale of the fees as contemplated by sub-rule (3) of the Uniform Rule 67A in accordance with scale C of Uniform Rule 69(7).

Factual Background

[6] When the matter was called I heard argument from the parties on both urgency and the merits of the application. I reserved judgment in order to deal

with urgency and, depending on my decision thereon, the merits if appropriate.

[7] A brief material background of the matter will be relevant to understand the relief sought. The parties during their divorce on 11 November 2016 entered into a settlement agreement which was made an order of court. In terms of the relevant clauses of the settlement agreement:

"[1.2] the parties agreed that any decision which is likely to significantly change or have an adverse effect on the minor children's living conditions, education, health or personal relations with a parent or family member or generally in regard to the minor children's wellbeing, shall be made jointly between the parties.

[1.3] Decisions affecting the children's every day care and routine shall be made by the party in whose care the children are at the relevant time.

[1.4] The parties agree to inform each other with regard to any material change in circumstances which relates to the children, including but not limited to, change in employment, retrenchment or a significant increase or decrease in salary only insofar as it impacts upon that party's obligations under this agreement…, if any dispute arise with regard thereto, either party may refer the matter for mediation in terms of clause 7 below.

[1.8] The parties agree to keep their communication brief, informative and friendly, and agree that day-to-day communication regarding the children will be done by way of SMS, WhatsApp message or email. In the event of an emergency requiring an urgent response, the parties will call one another.

[3.28] Subject to clause 3.27 above, <u>in the event of either party wishing to reside permanently in a province outside of the Gauteng area, such party agrees to confer with the other party with a view to discussing whether such a</u>

move is in the interests of the children. *If the parties agree that such move is in the best interests of the children, the contact and maintenance provisions contained in the agreement shall be reviewed between the parties, if appropriate. Should the parties fail to agree that the move is in the interests of the children, the parties shall refer the matter to the appropriate expert for mediation as contemplated in clause 7 below.*

[7] ***DISPUTE RESOLUTION***

[7.1] Any difference or dispute between the parties concerning any matter pertaining to this agreement insofar as the children are concerned, or any other issue, including: -

i the interpretation of;

ii the effect of;

iii the implementation of;

iv the parties' respective rights or obligations under;

vi determination of;

the agreement, shall be submitted to the facilitator in accordance with the ensuing provisions. There shall be one facilitator who, failing agreement between the parties shall be, if the matter in dispute is principally: -

7.1.1 a financial or legal matter -an advocate or attorney of at least 15 (fifteen years standing appointed jointly by the parties, and failing agreement between the parties, appointed by the Chairman of the Johannesburg Bar Council…; "

[8] Pursuant to this settlement agreement the parties shared residence of the children equally with them rotating every week between the parties' residences while the applicant was still residing in the Johannesburg.

[9] Notwithstanding, on 18 July 2023 the applicant after retaining the children without the respondent's consent, was ordered by the Johannesburg High Court ("July order") to return the children to the respondent. Additionally, in terms of the July order a psychologist Claire Mahoney ("Ms Mahoney") was appointed to investigate and make recommendations regarding the allegations the applicant levelled against the respondent's new husband. In addition, she also had to determine what would be in the best interests of the children. Furthermore, Ms Mahoney had to make recommendations with regard to the parental rights and responsibilities of the parties. The July order did not stipulate when the investigation, findings and recommendations by Ms Mahoney had to be concluded.

[10] In the course of her investigation Ms Mahoney became conscious of the disagreement between the parties with regard in whose primary care the children should be placed. The applicant wanted the children to primarily reside with him and his new wife in KZN, whilst the respondent wanted the children to primarily reside with her and her new husband in the Western Cape. Following her investigation Ms Mahoney recommended in her report that the respondent should not relocate outside Johannesburg for the next two years. According to the respondent she never agreed to this recommendation.

[11] During September 2023 the applicant moved from Johannesburg to live and work in KwaZulu-Natal ("KZN"), whilst the children remained in the primary care of the respondent. Even more important the applicant after relocating to KZN exercised contact with the children only during school holidays and weekends when he visited Johannesburg and telephonically.

[12] On 31 March 2024 the applicant, after exchanging correspondences with the respondent became aware of her intention to move to the Western Cape.

[13] On 1 April 2024 the respondent relocated with the children to Somerset West, Western Cape.

[14] On 5 April 2024 the applicant instructed his counsel to address a letter to the respondent expressing his concern about her relocation and the effect it would have on the children. Afterward on 8 April 2024 the applicant became aware that the respondent was attempting to enrol the children in the […] School. This prompted the applicant to instruct his counsel to write to the […] school and inform them that he was not consenting to the children being enrolled in the school.

[15] The applicant sent an email to the respondent on 12 April 2024 of his intent to travel to Cape Town to exercise his contact with the minor children on the weekend of 20 to 21 April 2024. At the time of deposing to his founding affidavit he had not yet received a response from the respondent.

[16] Subsequently, this led to numerous correspondences between the applicant's and respondents' counsel. Which caused the applicant's counsel to launch an urgent application on 15 April 2024 in this court. The matter was then allocated a date for 22 April 2024 to be heard on the urgent roll.

[17] On 22 April 2024, I received the papers in dribs and drabs as the parties still handed up further affidavits intended for the hearing on that day. Further no practice- note or index was filed with the papers by the applicant. The court questioned the applicant's counsel with regard to the failure to comply with the practice directives and was informed by the applicant's counsel that she was not aware that she had to file a practice note for an urgent matter as well.

[18] The applicant's counsel then persisted that the matter must not only be heard but dealt with as one of urgency as it involved three minor children who were at that stage of the proceedings not enrolled in a school and that the applicant had no contact with the minor children.

[19] Accordingly the matter stood down till 2h00 in order for the applicant to file the practice note and that I may read all the papers. Where after, the applicant's argument lasted some two hours. This caused the matter to stand down till 23 April 2024 for argument by the respondent's counsel and replication by the applicant's counsel.

Issues to determine

[20] Three questions arose in the arguments:

20.1 whether this matter was urgent

20.2 whether the matter was properly enrolled

20.3 the issues surrounding the merits of the application being the issues raised by the applicant that minor children be immediately returned to Johannesburg.

The applicant's submissions as to urgency

[21] Applicant contends that the respondent had suddenly unlawfully uprooted the children from their primary residence in Johannesburg and moved them to Somerset West on 1 April 2024. Further the respondent misled him in that she was enrolling the children at the […] school before she left Johannesburg.

[22] Furthermore, he became aware on 8 April 2024 that the respondent relocated with the minor children without securing a place for them in a school. Thus, the respondent has not only breached the terms of the July order but that of the settlement agreement as well. By not deciding jointly on any change to the minor children's education, well- being or living arrangements the respondent did not only breach the settlement agreement but was in contempt of court. He has currently no physical contact with the children.

[23] He further claims that the children will suffer irreparable harm should they remain in Cape Town in the event this court does not grant a return order immediately. Besides he has currently no physical contact with the minor children.

[24] The applicant further contends that if the application was set down on the ordinary roll, it would not have been determined any time soon, in the meantime, the minor children would not be in a school.

Respondent's submission as to lack of urgency

[25] In this matter the respondents contend that:

25.1 the urgency is self-created by the substantial delay in the applicant's launch of the application;

25.2 That the time limits adopted were completely unjustified and unsupported by the relevant facts as to urgency.

[26] These contentious as in respondents' answering affidavit are fully set out below:

26.1 The application was brought at 11h20 on 15 April 2024 and set down for hearing on the urgent roll on 22 April 2024. That it was entirely unreasonable of the applicant to have set severely truncated time periods unilaterally for her to file her notice of opposition by 16 April 2024 and her answering affidavit by 18 April 2024.

26.2 She informed the applicant by email on 30 March 2024 that she intended to relocate together with the minor children to the Western Cape, which she subsequently did on the following day, 1 April 2024. She was then notified on 5 April 2024 by way of correspondence sent by the applicant's

counsel that the applicant did not intend to institute urgent court proceedings for the immediate return of the children to Johannesburg pending the investigation of the Family Advocate. She accepted the applicant's proposal to have matter investigated by the Family Advocate on 12 April 2024, three days before the applicant's counsel launched the urgent application.

26.3 In the meanwhile the applicant's counsel addressed correspondence to the […] school stating that the applicant will not co-operate in the enrolment process of the children. Nevertheless, […] school on 16 April 2024 advised applicant's counsel that they would continue with the enrolment process of the children.

26.4 Furthermore, she finds issue with every allegation and argument put forward by the applicant with regard to the urgency of this matter. In addition, she contends that the applicant failed to show that the children would suffer irreparable harm as they are currently enrolled in a school, the […] school.

26.5 Over and above the applicant failed to show that he would not be afforded substantial redress in due course. Additionally, that the urgency was in fact self-created, and the application should accordingly be struck from the roll.

Urgency

[27] Before a court makes finding on the merits of an urgent application, the court must first consider whether the applicant has made out a case for urgency in his papers and further set forth reasons why he could not be afforded substantial redress at a hearing in due course. Likewise, where the facts indicate that the urgency is self-created, such application must be struck from the roll.

[28] It is trite that urgency must not only be judged against Rule 6(12) of the Uniform Rules of Court but jointly with the Rules of the Practice Directives of the division. The onus being on the applicant to persuade the Court in his papers that non-compliance with the Rules and the Practice Directives, and extent thereof, is justified on the grounds of urgency. In addition, the applicant must also demonstrate that it will suffer irreparable harm were it to rely on normal motion procedure at a later stage.

[29] The fact that the applicant wants a matter to be resolved urgently does not automatically render a matter urgent. An applicant cannot simply sit back till the last moment and wait for the normal rules to no longer apply. By doing so he is creating his own urgency.

Legal Principles

[30] In East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others **[2011) ZAGPJHC 196,** the court laid out the test for urgency as follows:

"The import thereof is that the procedure set out in Rule 6(12) is not for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot afford substantial readdress at a hearing in due course.
The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of substantial readdress in the application in due course. The rules allow the court to come to the assistance of a litigant because of the latter, were to wait for the normal course laid down by the rules, it would not obtain substantial readdress.
It is important to note that the rules require absence of substantial redress. This not equivalent to irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an

application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in this regard."

Analysis

Children not being enrolled in a school

[31] On a proper analysis of the applicant's founding papers and arguments, the applicant was aware as far back as 6 February 2024 that the respondent wanted to move to Cape Town and have the children enrolled in the […] school. It is not disputed that the respondent had invited the applicant to go with her to the school to satisfy himself. Besides the applicant being fully aware that the respondent wanted to enrol the children in the […] school since February 2024, applicant proceeded to instruct his counsel to address a correspondence to the said school informing them that he was not consenting to the enrolment of the children in the school. More importantly while matter was still being argued in court on 23 April 2024 the […] school enrolled the children.

[32] It cannot be ignored by this court that had it not been for the applicant withholding his consent for the children to be enrolled in the […] school, the issue of the children not being in school would not have been raised as a ground of urgency. Nevertheless, the issue of children not being enrolled in a school is now a moot point, as the children has subsequently been enrolled in the […] school.

Contact with the children

[33] It is apparent from the facts of this matter that the applicant works and resides in KZN. Furthermore, the children were and is in the primary care of

the respondent since the July order was granted. In addition, since taking up his new employment in KZN the applicant did not have regular physical contact with the children but only visited with them on school holidays and public holidays when possible. Therefore, to use contact as a ground of urgency is not reasonable under the circumstances. Especially when he admits in his founding papers that he had sent an email to the respondent on 12 April 2024 that he intended to visit with the children over the weekend of the 20 to 21 April 2024. Merely because the respondent had not responded to him by 15 April 2024 does not mean that he would not have been able to exercise his contact with the minor children.

[34] Even more important is that at the time of this application neither he nor the respondent were residing in Johannesburg. It can therefore not have been in the best interest of the children to have requested that they be returned immediately to Johannesburg. Moreover, it would not be in the best interest of the minor children to return to […] School and […] School in Johannesburg as they have already been enrolled in […] School and another significant change would have a major impact on their studies.

[35] It is further not in dispute that the applicant sent the respondent a letter on 5 April 2024 that he would not bring an urgent application for the immediate return of the children but instead proposed that matter had to be investigated by the Family Advocate as to what would be in the best interests of the children. It makes no sense to this court why the applicant would then turn around and do the total opposite and sought the court's assistance as a matter of urgency. It is apparent that the applicant considered it to be appropriate that the matter to be investigated by the Family Advocate as an alternative remedy then coming to court on an urgent basis. Additionally, the applicant's explanation that he delayed bringing this matter before court due to experiencing problems consulting with his counsel in Johannesburg and Cape Town cannot be seen as a reasonable or satisfactorily explanation for the delay in seeking urgent assistance from the court.

[36] Against this backdrop I therefore agree with the respondent that the applicant's urgency is self-created. The fact that this application involves minor children does not exonerate the applicant from complying with Uniform Rule 6(12)(b).

[37] I find that this matter should not have been enrolled and heard as one of urgency. Further it is clear that the applicant will be afforded substantial redress in due course.

Procedural Deficiencies

[38] It is worth to say that from the onset the applicant's papers were not in order for the matter to have been heard and should have been struck of the roll then already. The file of the applicant was not indexed, although it was paginated. On the date of argument there was no practice note filed by the applicant. Rule 20(2) of this divisions Practice Directive clearly states:

"The applicant's Legal representative must file a practice note when setting the matter down, indicating –

(a) whether or not matter is likely to proceed on allocated date;

(b) where applicable, the grounds of urgency;

(c) if the matter is to be postponed, the reason(s) for the postponement;

(d) full details, including contact numbers, of the legal representatives of all the parties

(e) In all matters concerning minor children, confirmation that there has been service of the papers, duly indexed and paginated, on the Family Advocate.

[3] where the matter is likely to proceed on the allocated date, the papers in the court file must be collated, indexed and properly paginated before the matter is set down. "

[39] In Grootboom v National Prosecuting Authority and Another **2014 (2) SA 68 (CC)** at para [32] the apex court explained the objectives of the rules of court directions in the following terms:

"I need to remind practitioners that the Rules and Court directives serve a necessary purpose. Their primary aim is to ensure that the business of our Courts is run effectively and efficiently, invariably this will lead to the orderly management of our Courts' rolls which in turn will bring about the expeditious disposal of cases in the most cost – effective manner. This is particularly important given the ever-increasing cost in litigation, which if left unchecked will make access to justice too expensive." I concur with these sentiments, it is not for the urgent court to separate the sheep from the goats.

[40] In my view there has been non-compliance not only with the rules relating to urgency as set out in the founding papers of the applicant, but also with the Practice Directives of this division. Consistency is important in this context as it informs legal practitioners that the rules of court and practice directives can only be ignored at a litigant's peril. It is obvious from the facts set out above that the applicant's urgency was self -created in more ways than one.

[41] For all these reasons, I am not convinced that the applicant has passed the test prescribed in Uniform Rule 6(12)(b) and I am of the view that the application ought to be struck off the roll for lack of urgency.

Costs

[42] Turning to the issue of costs. It is trite that a successful party should be awarded costs subject to the judicial exercise of the court's discretion. The general rule in the matters of costs is that the successful party should be awarded costs. I am of the view that the interests of justice and the facts of this matter justifies a deviation from the normal rule of costs being awarded in favour of the party who is successful. Due to the complexity of this matter and that both parties have acted in what they believed to be in the best interests of the children it would only be fair that each party pays its own costs.

[43] Accordingly, I am of the view that the relief sought by applicant does not need the court's urgent attention. For this reason, I need not proceed to determine the issue of merits.

In the result I make the following order:

1. The application is struck from the roll.
2. Each party pays his or her own costs.

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MTHIMUNYE AJ
JUDGE OF HIGH COURT

Counsel for the Applicants: **Adv L Buikman SC**

Counsel for the Respondent: **Adv Gassner SC**

On behalf of the children: **Adv Mc Curdie SC**

Attorneys for the Applicants: Brand Potgieter Attorneys
Attorneys for the Respondent: E Roux and Associates

Argument took place on 22 and 23 April 2024
Date of judgment: 14 May 2024