

IN THE HIGH COURT OF SOUTH AFRICA [TRANSVAAL
PROVINCIAL DIVISION]

CASE NO: 40730/06 DELIVERED ON: 14
SEPTEMBER 2007
Not reportable

In the matter between:
TAME. NIGEL RONALD
Applicant
and

. TAME. COLLEEN DEANNE (born JENZEN) MINISTER OF SAFETY AND SECURITY

COMMISSIONER OF POLICE

First Respondent
Second Respond~nt
Third Respondent

JUDGMENT

NTHAIAJ

A. INTRODUCTION

[1] The applicant brought an urgent application against the respondents. The second and third respondents did not oppose the application. The applicant sought an order in the following terms:

[1.1] Dispensing with the forms and services provided for in the rules of this Honourable Court and disposing of the matter by way of urgency in terms of Rule 6(12);

[1.2] That the Applicant is entitled to exercise his right of access and to take the two minor children born of the marriage between the

parties, namely D D T (born 16 February 1993) and K D T (born 15 March .1995) on

*...
holiday with him for the first half of the. December 2006 school.
holidays from Q December 2006 until 24 December 2006;*

[1.3] That the First Respondent be ordered to withdraw the kidnapping charges laid against the Applicant and to provide proof thereof to the Applicant within two (2) hours of the Court Order;

[1 .4] That the First Respondent be ordered to disclose the details of where the kidnapping charges have been laid, the case number and the investigating officer attending to the matter within two (2) hours of the Court Order;

[1 .5] *That the South African Police Services be precluded from taking any steps to arrest. or detain the Applicant and/or to remove the two minor children from the Applicant's control in terms of the kidnapping charges instituted by the First Respondent on or about 6 December 2006;*

[1.6] *That the First Respondent be ordered to make available for collection the minor children's clothing and holiday kits (including toys, fishing rods and other holiday paraphernalia);*

[1.7] *That the First Respondent be ordered to pay the costs of, this application on the scale as between attorney and own client, such costs to include the costs consequent upon the employment of two counsel;*

[1 .8] *That the Second and Third Respondents be ordered to pay the costs of this application only in the event of them opposing the application.*

[1 .9] *Further and/or alternative relief.*

[B] BACKGROUND

[2] In view of the conclusion reached in this matter, it is not necessary to detail the facts contained in the pleadings. The matter was before court on 8 December 2006. A draft order was made an order of court. Costs of the application were reserved. In essence, none of the parties can claim success based on the court order. The court order is neutral and reads as follows:

[2.1] *"THAT the applicant is entitled to exercise his right of*

and to take the two minor children born of the marriage between the parties,

namely D D T (born 16 February 1993) and K D T (born 15 March 1995)

on holiday with him for the first half of December 2006 school holidays from 6 December 2006 until December 2006.

[2.2] *THAT the respondents agreed to the relief in paragraph 2 without conceding the applicant's entitlement thereto, but only for settlement purposes.*

[2.3] *THAT the application is postponed sine die, costs reserved.*

[2.4] *THAT the applicant is to pay the airfare of the two children to Cape Town on 25 December 2006. This payment is made*

under protest and can be reclaimed by the applicant if so advised. ..

[3] The first respondent enrolled the matter in order to address the question of liability of the costs of the application. Both parties have correctly abandoned their initial stances of seeking a punitive costs order.

[4] The urgent application arose as a result, *inter alia*, of a dispute between the parties over the alleged agreement entitling the applicant to take the two minor children on holiday with him for the first half of the December 2006 school holidays from 6 to 24 December 2006~ The

applicant alleges that there was such an agreement. This is denied by the first respondent.

[5] In the heads of argument filed by the applicant, it is stated that this matter could be resolved at the hearing of the application as the minor children would be present in court and as such, the court "could independently verify the correctness of their statement." There is an admission by the first respondent that during the past three years, the children have by agreement spent the first part of the holidays with the applicant. I was also further urged to look at the conduct of the children at the time to determine the issue in question.

- [6] The second issue that triggered the urgent application was the kidnapping charges laid against the applicant by the first respondent. However, by a letter dated 7 December 2006, the applicant was assured that the kidnapping charges would not be proceeded with. The applicant alleges that he was arrested twice in the presence of the minor children. This is denied by the first respondent. She reckons that the arrest had nothing to do with her. The other issue was who should pay for the traveling expenses of the children from Umgazi River Bungalows (Kwazulu-Natal) to Cape Town, including the return of one of the minor children (D) to Johannesburg. The applicant adopted the attitude that he had no obligation in law to pay for such traveling cost. The cost for the airline tickets amounts to R2 496-00 (two thousand four hundred and ninety six rand).
- [7] above facts must be considered against the backdrop that the parties were married to each other on 20 October 1990 and the two minor children were born from the marital relationship. Since 2003, the parties have been involved in a bitter divorce proceedings. The first respondent launched a rule 43 application as a result of which an order of court was made on 4 February 2006. This court order was amended on 12 April 2006. That the parties are involved in an acrimonious relationship is evinced by the facts in this case.
- [8] In the midst of these disputes, the minor children have become pawns and casualties in the game of deepening mistrust, revenge and

suspicion between the parties. I have no doubt that had the relationship between the parties been normal, the current dispute could have been easily resolved.

[9] There is one other issue that I have to mention which was totally unacceptable and uncalled for. I have already indicated that in the heads of argument filed on behalf of the applicant, I was invited to resolve the issue of the existence of the agreement by asking the minor children who were to be present in court .. When the matter was argued before me, the applicant arrived in court accompanied by the two minor children. I must add that they were in school uniform which led me to believe' that they were either fetched from school or we're prevented from going to school. Mr Williams SC who appeared for the applicant apologised profusely for the conduct of his client. I ordered that the minor children should be removed from court. I find this conduct totally unjustified and deserves censure. It is of outmost importance to protect minor children from getting involved in court proceedings unless it cannot be avoided. I must however indicate that when arriving at the decision in regard to costs, I have not taken the conduct of the applicant on that day into consideration.

[10] The question is whether given the peculiar circumstances of the instant case, the general rule that costs follow the event must be adhered to.

In other words, who is the successful party that should be awarded costs.¹

[11] It is clear from the conduct of both parties that each one of them share a blame in ultimately having this dispute being decided by the court.

[12] The basic rule remains that the award of costs is in the discretion of the court~ In *Kruger Bros & v Ruskin*, 2Innes CJ articulated the position as follows:

"The rule of our law is that all costs - unless expressly otherwise enacted - are in the discretion of the judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission."

[13] In the circumstances of the present case, I have in fact apportioned blame to both parties equally. It is clear that there exists a certain degree of acrimony between the parties.³

Peiser v Levy 1905 TS 466 at 469; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) 912; *Gauteng Provincial Legislature v Kilian* 2001 (2) SA 68 (SCA) 76 G _ I
1918 AD 63 at 69

Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk 1986(1) SA 819 (A) (This case involves punitive costs. However I do not see any reason why the same principle cannot be extended to the present case)

[14] I am of the view that none of the parties should be awarded any costs against one another.

[15] In the result, I would, in the circumstances of the present case, make no order of costs. The following order is made:

[15.1] There is no order as to costs.

S A NTHAI

ACTING JUDGE OF THE HIGH COURT