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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 16606/2015

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

DATE: 18 -06- 2021

In the matter between:

D B[...] P K

APPLICANT

Passport No: [...]

And

D B[...] M C J

RESPONDENT

Identity Number: [...]

JUDGMENT

KUBUSHI J,

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 18 June 2021

INTRODUCTION

[1] This is an application wherein the applicant, P K D B[...] seeks variation of an urgent order granted in 2015 so as, inter alia, to allow the applicant to travel to Thailand with the minor child, M' D B [...], and to limit physical contact between the minor child and the respondent M C J D B [...], pending a forensic investigation by the Family Advocate.

[2] The initial relief sought by the applicant was in respect of the variation of the order granted in 2015. However, because of an allegation of abuse of the minor child which occurred during one of his visits to the respondent, the notice of motion was later amended to include a prayer to limit the physical contact between the respondent and the minor child.

[3] Although the relief sought by the applicant in the main relates to the variation of the order granted in 2015, however, in argument in court the applicant sought, specifically, an order allowing the minor child to travel with the applicant abroad, and costs to be paid by the respondent in respect of this application. The applicant, also, provided a Draft Order in which she sought to state the travel arrangements and/or itinerary of the trip in Thailand, so that the respondent should, at all times, be aware of the whereabouts of the minor child.

[4] The respondent is opposing the application (in respect of the initial relief sought), inter alia, on the following basis:

- 4.1 he fears that the applicant will not return from Thailand with the minor child;
- 4.2 he believes that the applicant will change the name of the minor child so as to avoid the minor child being traceable;
- 4.3 in light of the above, he believes that he is not unreasonably withholding consent.

[5] Nevertheless, when arguing the matter in court, the respondent relied mainly on his belief that the applicant will not return with the minor child if she were allowed to travel with the child abroad.

[6] The applicant disputes the respondent's belief as unfounded since in the first place, the applicant is now firmly established within South Africa; secondly, the minor child's primary residence is with the applicant, and the respondent has not had any physical contact with the minor child since February 2020; and thirdly, the minor child is older (he was [...]months at the time the urgent application was brought in 2015).

[7] It should be noted that the respondent appeared in court in person without any legal representation. He confirmed that he was prepared and will be able to conduct the matter on his own.

[8] The application was heard virtually, and not in open court, as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTUAL MATRIX

[9] The parties were married to each other in 2013. The minor child was born of such marriage in [...]. In late 2013 early 2014 the parties visited Thailand with the minor child. The marriage turned sour and the parties separated. The applicant left the matrimonial home with the minor child. In January 2015 the respondent instituted divorce proceedings against the applicant, which proceedings are still pending.

[10] In March 2015 the respondent launched an urgent application against the applicant to, inter alia, attain primary residence of the minor child and to prevent the applicant from travelling to Thailand with the minor child. The Family Advocate was ordered to investigate the matter. The Family Advocate's Report recommended contact between the minor child and the respondent.

[11] On 1 April 2015 the respondent was interdicted from removing the minor child, M' d B[...], from the borders of the Republic of South Africa, pending the finalisation of the divorce action between the parties. The residency of the minor child was awarded to the applicant, with removal rights to the respondent for full weekends.

[12] In October 2019 the applicant approached court on an urgent basis for the variation of the court order granted on 1 April 2015. The matter was struck from the roll for lack of urgency and was later placed on the opposed motion roll on 14 February 2020.

[13] On 3 August 2020 the Family Advocate was requested to investigate the issue of the minor child being able to travel abroad with the applicant as well as the allegations of abuse of the minor child by the respondent as raised by the applicant. The Family Advocate issued an interim report which stated, amongst others, that –

“I, the undersigned, SALOME ANTOINETTE LANGEVELD-GOOSSEN, declare as follows:

1.

I am a Family Advocate, duly appointed to the High Court of South Africa, Gauteng Division, Pretoria, in terms of the Mediation in Certain Divorce Matters Act, 24 of 1987 since May 1993.

2.

2.1 On 3 August 2020 the Honourable Court requested this office to investigate the issue of the minor child, being able to travel abroad with the Applicant as well as the allegations of abuse of the minor child by the Respondent as raised by the Applicant.

2.2 This follows a Court Order dated 1 April 2015, where the Respondent is interdicted from removing the minor child, M’ d B[...], from the borders of the Republic of South Africa, pending the finalisation of the divorce action between the parties. The residency of the minor child was awarded to the mother, with removal rights to the Applicant for full weekends.

2.3 The minor child born out of the marriage is:

(i) M[...]’ —[...]years ([...]).

3.

I requested Mrs A. Botha, a registered social worker with 21 years’ experience and appointed as a Family Counsellor since January 2021, to assist me with the enquiry into the best interests of the minor child.

4.

4.1 During the joint interview with the parties, it transpired that the minor child's contact with the Respondent was suspended by the Applicant in February 2020, due to the alleged physical abuse of M[...] by the Respondent. The Respondent denied the allegation and indicated that he has never raised a hand on M[...], nor his girlfriend. The Applicant confirmed that M[...] was removed by him on alternate weekends since 2015 before all physical contact was suspended in February 2020 by a domestic violence Court Order. The Applicant confirmed that the Respondent has only telephonic contact with M[...] as directed by the Domestic Violence Court Order.

4.2 The Respondent requested that his contact with M[...] must be re-instated, while the Applicant wants contact with M[...] to be supervised by her.

5.

The minor child was individually interviewed. He indicated that he was happy to visit his dad before L[...] came along. He portrays his father in a very negative light and signs of indoctrination by the Applicant is present. M[...] indicated physical altercation between his father and L[...] during his visits with his father.

6.

The following information is needed to finalise the investigation:

- 6.1 Final report of Mrs Johnson [the psychologist].
- 6.2 A school report of the minor child.
- 6.3 Alleged physical abuse of the minor child.
- 6.4 An interview with L[...], girlfriend of the respondent.

7.

I am not in a position to make a recommendation in this matter, without the outstanding information.”

[14] The matter was previously before Lingenfelder AJ during August 2020 at which hearing the matter was postponed sine die in order to give the respondent, an opportunity to file his Heads of Argument and Practice Note, and for the Family

Advocate to urgently investigate and file a report. An interlocutory application compelling the respondent to file his Heads of Argument and Practice Note was brought and an order thereto granted on 12 March 2021. The respondent failed to file the said documentation.

[15] On 10 May 2021, the matter was before KOLLAPEN J, who postponed it to a case management meeting on 20 May 2021. On the said date, KOLLAPEN J held the case management meeting virtually between the parties whereat the following order was granted:

15.1 the matter was postponed to the opposed motion roll of 07 June 2021;

15.2 the psychologist Collins Johnson's report was to be provided to the Family Advocate;

15.3 the Family Advocate was to be informed that the matter was proceeding on the roll of 07 June 2021 and that the Family Advocate be urged to attempt to finalise its report before then; and

15.4 costs were reserved.

[16] On 4 June 2021, the Family Advocate issued a second interim report which stated the following:

"I, the undersigned, SALOME ANTOINETTE LANGEVELD-GOOSSEN, declare as follows:

1.

I am a Family Advocate, duly appointed to the High Court of South Africa, Gauteng Division, Pretoria, in terms of the Mediation in Certain Divorce Matters Act, 24 of 1987 since May 1993.

2.

I submitted an interim report dated 4 May 2021 regarding the outstanding information needed to finalise the investigation into the best interests of the minor child:

M[...] — [...]years ([...]).

3.

I requested Mrs A. Botha, a registered social worker with 21 years' experience and appointed as a Family Counsellor since January 2021, to assist me with the enquiry into the best interests of the minor child.

4.

4.1 On 20 May 2021 I was informed by the Applicant's attorney that the matter was postponed to 7 June 2021, after a case meeting before The Honourable Justice Kollapen on 20 May 2021. This date was never discussed with me or the Head of the office.

4.2 I was never informed of the case meeting, although I submitted an interim report on 4 May 2021

4.3 The report of Mrs. C Johnson, educational and counselling psychologist, was made available to me on the same day.

4.4 I responded on 24 May 2021 and my letter is attached hereto marked Annexure "A"

4.5 I received the school report from Hurlyvale Primary School regarding M[...]', the minor child, on 20 May 2021.

5.

5.1 As indicated in the interim report, the alleged physical abuse of M[...] by the Respondent, and an interview of L[...], girlfriend of the Respondent are still outstanding. There is no information available regarding the proposed vacation in Thailand by the Applicant and the minor child.

5.2 It would be necessary to facilitate a round table conference with the experts, before a final recommendation can be submitted.

6.

To submit recommendations based on only partially obtained information may be detrimental to the best interests of the minor child. Therefore, recommendations made by this Office must be based on all the available information and I am clearly not in a position to make any recommendation without the outstanding information as indicated."

ANALYSIS

[17] From the reasons that follow hereunder, I am of the view that the application should not be granted.

[18] In the first place, the relief sought by the applicant in court is not the same as that sought in the notice of motion. It is common cause that the relief that the applicant seeks in the notice of motion is for an order to vary the Court Order granted on 1 April 2015 and in addition an order limiting the physical contact between the minor child and the respondent pending the Family Advocate's final report, in that regard.

[19] It is trite that a court would not grant a relief that is not sought in the papers as this would be prejudicial to the other party who was not prepared for such relief and would have come to court not prepared.

[20] The applicant's proposition that the court should grant such relief using its inherent powers as the upper guardian of children and find it to be in the best interest of the minor child to travel with the applicant to Thailand, is not sustainable.

[21] Secondly, there is no evidence to establish that it is in the best interest of the minor child to travel with the applicant to Thailand. The applicant's reliance on the report of Colleen Johnson, the psychologist, which recommended that the minor child should travel, does not assist her case.

[22] It should be noted that the report that is required by the court is that of the Family Advocate. It is the Family Advocate that requested to be provided with the report of the psychologist in order to evaluate it together with other reports and make a recommendation to the court. This is evident also in the court order granted by Kollapen J, wherein he ordered that the report of the psychologist be referred to the Family Advocate and that the family Advocate be informed that the matter was to be heard on 7 June 2020 and in that regard the Family Advocate to be urged to provide the final report by that date. However, the Family Advocate having been given very short notice could not compile the requested report but filed a second interim report wherein it is explained why the final report has not been finalised. In particular, the Family Advocate could not complete the report because not all the information requested in the first interim report had been provided.

[23] Lastly, the main relief sought in the notice of motion is to vary the court order of 1 April 2015. In her own version when arguing in court, the applicant contended that she was not certain whether the said court order has expired or is still in existence. The applicant's submission is that both the applicant and the respondent laboured under the understanding or they believed that the court order exists, hence the court must also accept that the court order exists.

[24] I do not agree with that proposition. The existence of a court order is factual. It either exists or it does not exist. It cannot exist because the parties believe that it exists. Even then, these allegations are not contained in the applicant's papers but were presented from the bar – giving evidence from the bar.

CONDONATION

[25] The applicant filed the replying affidavit out of time and has applied for condonation which is unopposed. Having considered the condonation application, it ought to be granted.

ORDER

[26] In the premises I make the following order

1. The condonation application by the applicant is granted.
2. The application is postponed sine die pending the final report of the Family Advocate.
3. Any of the parties is granted leave to approach court on the same papers immediately the report of the Family Advocate is available.
4. No order as to costs is made.

E.M KUBUSHI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearance:

APPLICANT COUNSEL : ADV D BLOCK

Applicant's Attorneys : DI SIENA ATTORNEYS

Respondent's Counsel : Personal representation

Respondent's Attorneys : Unknown

Date of hearing : 10 June 2021

Date of judgment : 18 June 2021