

1 JUDGMENT
IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

DATE: 17 APRIL 2008
CASE NUMBER: 9109/2007

5 In the matter between:

ANGELIKA HERMAN

And

ULRICH OTTO VON OPPEL

10 JUDGMENT

THRING, J:

15 The parties in this matter were previously married to each other. On the 1st November, 2004 their marriage was dissolved by order of this Court. There was a consent paper signed by both parties which was made an order of Court. Since then it would seem that they have been locked in litigation against each other almost without respite.

20

The present piece of litigation which, as I shall presently show, has metamorphosed into what, in substance, amounts to several discrete pieces of litigation, first saw the light of day on the 9th July, 2007. At that stage it took the form of an application brought by the applicant as a matter of urgency against the respondent. The relief sought in that application

25

related exclusively to certain consents and other arrangements necessary in relation to the then proposed permanent removal to Germany by the applicant of the three minor children born of the parties' marriage. By agreement between the parties, all the relief sought by the applicant in that application was granted in this Court nine days later, on the 18th July, 2007 save for the applicant's prayer for costs, which was ordered to stand over for later determination. Such determination was postponed for consideration on the semi-urgent roll on the 19th November, 2007. On what possible basis the question of costs could have been regarded as semi-urgent escapes me. However, that was the order agreed upon by the parties, which they asked the Court to make, and which the Court did make.

By the 19th November, 2007 it would seem that the parties had found fresh matter to quarrel about. This related to the computation of certain interest accrued on a capital payment of R750 000 which the applicant had agreed to make to the respondent in their consent paper signed several years ago when they were divorced in November, 2004. On the 20th November, 2007, again by agreement between the parties, this new dispute about interest was postponed for adjudication today, the 17th April, 2008. Again inexplicably, the matter was accorded priority by being placed on the semi-urgent roll by agreement of the parties. All questions of costs were again

ordered to stand over for later determination, presumably today. How either the dispute about the calculation of the interest payable or about the costs of the proceedings could have been regarded as requiring semi-urgent attention, again escapes me.

On the 11th February, 2008 the goalposts were on the move again. On that day the applicant delivered a supplementary notice of motion in which yet further fresh relief was sought by her. This consisted of a *condictio indebiti* pertaining to an alleged overpayment of some R140 000 to the respondent by the applicant as interest.

On the 1st April, 2008 the goalposts were shifted yet again.

On that day the applicant amended her supplementary notice of motion to claim, in addition, an order directing the respondent to pay the maintenance for the children which had been ordered by the Court on the 4th August, 2006 (R8 000 per month per child), not in South African Rand, but in pounds sterling or in Euros, as the applicant and the children had been residing in Germany since last year. The applicant also claimed in the amendment that, on the basis of her calculations, the respondent was in arrears with his maintenance payments to the extent of some 2 900 Euros, and she claimed this as well.

The applicant's latest supporting affidavit is dated the 31st March, 2008. On the 10th April, 2008 the respondent deposed to a supplementary opposing affidavit running to some 62 pages without annexures. By yesterday morning, the 16th April, 2008 the applicant had not yet delivered any replying papers. Yesterday morning an attempt was made by her attorneys to deliver such papers. In view of their lateness I declined to accept same, and they were handed in from the Bar this morning by the applicants' counsel. I have not read them. In breach of the provisions of Court Notice 10.1 no heads of argument have been delivered to date by either side.

The first thing that is obvious to me is that the matter, such as it is, is not ripe for hearing. Neither side, it seems to me, can yet have had an opportunity to consider properly and to digest the contents of the voluminous flurry of paper which has been generated in this matter over the past two weeks or so, and to formulate considered arguments for the benefit of the Court. This is manifest from the absence of heads of argument. Equally important is the fact that the Court itself has been deprived of a proper opportunity to read, digest and consider the content of the mass of recent documentation which has been delivered in this matter. Such consideration is essential to a proper understanding and ventilation of the issues and an adequate evaluation of the arguments to be advanced in Court

on behalf of the parties. That is one of the principal reasons for the existence of the rules which govern the periods within which affidavits and other documents must be delivered. The parties, and especially the applicant, have ridden rough-shod over those rules and treated them as if they did not exist. No doubt they were spurred on to do so by the unfortunate fact that this matter had, in my view, completely unjustifiably, been allocated a place on the semi-urgent roll.

10 Genuine urgency can sometimes call for a departure from strict compliance with the periods stipulated in the rules. In its absence they must, generally speaking, be observed.

Which brings me to what I perceive to be the second obvious
15 thing about this case. It is no longer urgent in any way. All the urgency went out of it on the 18th July, 2007 when the order relating to removal of the children to Germany was made. The other disputes which have arisen since then all relate to purely commercial matters, in particular to the mere payment of money. Even the applicant's claim for a *condictio*
20 *indebiti* has coupled with it a claim for interest thereon at the prescribed rate, so that, if it succeeds, she will be adequately, and indeed handsomely, indemnified by *mora* interest against any pecuniary loss which might be caused by delay.

As for the applicant's latest claim for a variation in the currency in which the children's maintenance is to be paid and for allegedly arrear maintenance, the respondent says in his latest affidavit that he has at all times to date since the 1st September, 2007 complied fully with this Court's order as to maintenance by paying to the applicant on or about the first day of each month a sum in Euros which is equivalent to the sum ordered in South African Rand, together with bank charges thereon. His allegations in this regard are supported by copies of correspondence with his bank which appear to be authentic. He denies that he is in arrears with his payments of maintenance for the children. And this denial, too, is supported by the bank documentation. I have no reason to disbelieve these substantiated statements made by the respondent, as they are, on oath. The mere fact that the applicant has a claim for maintenance which she avers is in arrears is insufficient basis, in my view, for the importation of an element of urgency in this matter.

The absence of urgency is eloquently confirmed, to my mind, by the fact that, although the applicant and the children have been living in Germany since the end of July, 2007, she has waited until the 1st April, 2008 to claim this relief.

What has happened here is that the applicant, having initially launched an application which was possibly correctly regarded as urgent at the time because it concerned the imminent removal overseas of the minor children, has commandeered the label of semi-urgency and quite unjustifiably and without further ado simply attached it to all the commercial disputes which have subsequently arisen between the parties after the possibly genuinely urgent aspect had been entirely resolved and disposed of by the order of the 18th July, 2007.

10

It would seem that she is being aided and abetted in this by the respondent, who agreed to the orders of both the 18th July, 2007 and the 20th November, 2007.

15 Such conduct on the part of litigants is, to my mind, highly reprehensible and constitutes nothing less than an abuse of the urgent process of this Court. Matters are to be dealt with as semi-urgent only if there is at least some element of urgency in them. As I have said, it seems to me to be abundantly clear that there is no aspect of any dispute presently existing between the parties on the papers which can properly be called either urgent or semi-urgent. After the order of the 18th July, 2007 had been made this matter ought not at any stage to have been allocated a place on the semi-urgent roll. By improperly securing its position on the semi-

20

25

urgent roll the parties sought to obtain and did obtain for themselves an unjustifiable and unfair advantage at the expense of other litigants whose matters were genuinely urgent or semi-urgent, but who have been unable to achieve as speedy a hearing as their matters may have deserved. This result is highly regrettable.

For the reasons which I have mentioned, this matter ought not to be on the roll today. It is accordingly struck off the roll. It is expressly ordered that when and if the matter is re-enrolled in the ordinary course the parties are to comply strictly with the requirements of Court Notice 101. As a mark of the Court's displeasure at the manner of which the parties have abused its process I order that neither of them shall at any time recover from the other any costs incurred in this matter from the 19th July, 2007 until today, the 17th April, 2008, both dates inclusive.



THRING, J