REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 18504/2015

In the matter between:

M L Applicant

And

S J D Respondent

Heard on: 20 June 2016

Delivered on: 24 June 2016

JUDGMENT

BOQWANA, J

Introduction

[1] The issue before me concerns costs in respect of an urgent application lodged by the applicant on 25 September 2015 seeking, inter alia, an order directing the Department of Home Affairs to process the renewal of the minor child's, M D ('the child'), passport without the respondent's consent or assistance

and/or his presence, or for such consent to be dispensed with; and for the respondent to be directed to consent to the child's travel to Mauritius, during 9 December 2015 and 28 December 2015, within 48 hours or his consent to be dispensed with or for the child to be removed without his consent in the event of his refusal.

[2] The matter was set down for hearing on 30 September 2015. On the date of the hearing the parties settled the matter and an order by agreement was made by Desai J to the effect that the respondent would attend the Department of Home Affairs, Wynberg on 1 October 2015 at 08h00 together with the applicant for purposes of the renewal of the child's passport and remain in attendance there and/or return on a date mutually agreed to by the parties which shall not be later than 5 days from 1 October 2015 to ensure that the process of renewal of the passport is completed. The order further stated that the respondent provides his written consent for the child to travel to Mauritius with the applicant during the period of 9 December 2015 to 28 December 2015.

[3] The issue costs was postponed for argument to a later date to be arranged by the Registrar.

[4] The applicant seeks an order directing the respondent to pay her costs on an attorney and client scale.

[5] The respondent is of the view that in these circumstances each party should be ordered to pay his or her own costs, or if the Court is minded to reward costs that the applicant not be ordered to pay costs unnecessarily incurred due to the applicant's taking of protracted and unnecessary legal steps. According to the respondent there is no basis for costs on a punitive scale.

Common cause facts

[6] The parties are biological parents of a six year old child born on 1 July 2009. They were divorced from each other on 28 March 2012 by an order of this Court. The divorce incorporated a consent paper and a parental plan in terms of

which they both retained co-guardianship for the child. In terms of clause 1.14 of the parental plan it is recorded that any party wishing to travel with the child overseas shall obtain written consent from the other party which shall not be unreasonably withheld. It is further recorded that the applicant's family resides in Mauritius and that it is her intention to travel to visit her family with the child annually during her portion of the December/January vacation.

[7] In terms of s 18 of the Children's Act No. 38 of 2005 ('the Children's Act') a parent who acts as a guardian of a child must give or refuse any consent required by law in respect of the child including consent for the child's application for a passport and consent to the child's departure or removal from the Republic of South Africa. Furthermore, the Department of Home Affairs requires both parents to be present when an application to renew the child's passport is made.

Applicant's case

[8] The applicant alleges that the respondent had been unreasonable and had refused to co-operate and attend with her to the Department of Home Affairs for the renewal of the child's passport. As a result of his actions she was forced to bring an application to compel him to do so.

[9] At the time of lodging the urgent application in September 2015 she had not yet booked flights as the issue of the renewal of the passport was unresolved. She intended to travel with the child from around 10 December 2015 to 27 December 2015 which was her allocated holiday time with the child.

[10] She had previously applied to this Court seeking an order directing the respondent to consent to the removal of the child from the Republic of South Africa. The respondent portrayed himself as consenting whereas he attached certain conditions to be met before consent could be given, as he had done in the current application. The application brought in September 2015, was the second one post the divorce. She was successful in the first application but she decided not to pursue the issue of costs.

[11] She had attempted for a number of months to resolve the issue of the child's renewal of the passport without resorting to litigation but the appellant had been unreasonable and obstructive in his approach and she received no co-operation from him. She annexed various email correspondence between her and the respondent starting from August 2015 as well as letters and emails between her attorneys and the respondent to support her contention. According to her the respondent had consistently been paying lip service regarding his willingness to assist her in obtaining renewal of the child's passport but yet set unilateral conditions that he required the applicant to meet. She required the respondent to meet her at the Department of Home Affairs, in Wynberg on a suitable date starting from August 2015. The requests to the respondent started in May 2015. The child's passport was due to expire on 25 November 2015.

[12] The respondent averred his willingness to assist but provided no date upon which he could attend at Home Affairs with her. Their facilitator did not have authority to assist her with the kind of relief sought. Her attorney also requested unconditional co-operation from the respondent to no avail.

[13] At the time of the application the applicant had been unable to secure flight bookings for the December trip as all airlines were fully booked for the period she wished to travel with the minor child.

Respondent's case

[14] The respondent alleges that he has unreservedly and unconditionally stated his willingness to co-operate by virtue of an email dated 18 September 2015 but instead of returning to him with a date, the applicant rather lodged an urgent application.

[15] According to him, the application was only issued on 23 September 2015, with an affidavit commissioned on 22 September 2015, whereas he had written his email recording his willingness to co-operate on 18 September 2015.

[16] According to him the application was not urgent it took seven days to be issued after attending Home Affairs. Accordingly the application was brought unnecessarily and the applicant's request that he bears the costs was unjustified and unwarranted.

Analysis

[17] It is trite that a party who is successful is entitled to costs. It is also established that in matrimonial matters the court is not quick to award costs against a losing party; that is however not a rule. In *Bethell v Bland and Others* 1996 (4) SA 472 (W) the court observed that there was no rule that no order as to cost should be made in cases involving minor children. In that case the issue was about custody of a minor child. The court captured the correct approach at 475E-I as follows:

> 'I consider the correct approach to be:
>
> 1. Generally speaking, a successful litigant is entitled to his or her costs.
> 2. While it is quite true that a custody dispute should not be seen as an adversarial contest in the ordinary sense but rather as an enquiry into the best interests of the child, it cannot be denied that in most cases the litigants are advancing their own preferences and seeking satisfaction of their love of the child. Often, too, the papers contain many attacks on the character and conduct the opponents.
> 3. On the other hand it is also a consideration that a party should not be discouraged from putting up a case which he or she, on broadly reasonable grounds, thinks to be in the interests of the child for fear of having costs awarded against him or her if unsuccessful. By the same token, a party who is, on what turn out to be good grounds, confident that his and her case will prevail, should not be discouraged from taking or resisting action because of the costs which he or she will incur.
> 4. However *bona fide* and concerned a party may be, if he or her opponent's judgment of the issue prevails, it is not, in the absence of circumstances justifying it, fair that the opponent should be mulcted in his or her costs.'

[18] In this case the respondent admits that the requests from the applicant for the renewal of the child's passport started in May 2015. On 4 August 2015, the applicant sent an email to respondent requesting his co-operation, for him to be present at the Wynberg Home Affairs in order to renew the child's passport from 8am until the passport has been processed. She asked him to respond with a day and date in August 2015, when he could make himself available. A response was required by Friday, 7 August, 13h00. She warned that if there was no response by then she would approach the relevant authorities.

[19] The respondent replied on 6 August 2015 with a detailed email referring to issues which he stated had not yet been clarified by the applicant. Amongst other things he stated the following:

> '…I have repeatedly assured you of my willingness to assist with the acquisition of our sons (sic) passport, while requesting confirmation on allied topics, which you unfortunately remain reluctant to clarify. It is therefore politely suggested that you re-read our exchanged correspondence (from your initial request 21/5), where you will be reminded of matters that you have yet to address. Again I ask the question as to how you can muster the ability to "tolerate" my presence in order to facilitate "your intentions" but unprepared to duplicate the determination on another occasion, to accommodate "my wishes". While I await your explanation for this intriguing conundrum, please also clarify why you feel that Mathieu's passport (to be "jointly" acquired) will be considered your "exclusive" property.'

[20] The respondent did not provide a suitable date for attendance to Home Affairs as requested by the applicant but instead demanded the applicant's convincing explanations by 13h00 on Friday 7 August.

[21] On the same day, the applicant responded to the respondent reminding him to raise the matters he felt needed to be addressed at the facilitation which was the appropriate forum. She further expressed that although the respondent stated that he was willing to assist, by not providing a date and day in August in 2015 he was demonstrating unreasonableness and was being uncooperative. She further noted that '*The renewal of Matt's passport is so that Matt can go on holiday end of*

September 2015, Mauritius in December 2015, and to Europe in March 2016 with his family. How could you not want this for our son – it is in his best interests.' (Underlined for emphasis)

[22] She once again reminded him of what was contained in her previous correspondence which was that he had until Friday, 7 August, 13h00 to respond with a date and a suitable day to go to Home Affairs, failing which she would approach the appropriate authority and insist that costs be for his account. In response to this on the same day, the respondent stated that the renewal of the child's passport was in the applicant's interest and not those of the child and that the child would be as happy on a beach in Muizenberg as he would in Mauritius. On 13 August the respondent wrote an email raising a number of issues and nothing about when the child's passport could be renewed.

[23] On 14 August 2015 the applicant again wrote to the respondent reminding him that she had written to him on numerous occasions informing him that the child needed a new passport and that it was legally required that both parties be present [at the Home Affairs] with the child. She further stated in the email that '*I have asked you to be reasonable and for your co-operation in providing a date and day that would suit you, so that this can be processed (taking into account how long a passport takes) and in the best interest of our son…It is unfortunate that your response to date has been obstructive, threatening and unreasonable. I have in no way held you to ransom…*' She further advised him that she had approached legal counsel in this regard.

[24] On 18 August 2015, the respondent wrote an email raising various issues but nothing about when he could make himself available to attend at the Home Affairs with the applicant to renew the child's passport.

[25] On 30 August 2015 the respondent sent a long response, stating that he volunteered to accommodate the applicant but there were certain interesting developments that needed to be clarified before the parties could move forward. He

still did not provide a suitable date to attend Home Affairs but instead was asking the applicant to clarity her '*surprising comfort with the arrangement*.'

[26] On 2 September 2015, the applicant indicated that she accepted the respondent's willingness to co-operate and gave him a date. She requested the respondent to meet her and the child on 4 September 2015 in Wynberg.

[27] The respondent wrote another long email on 03 September 2015, demanding certain assurance, the email read, inter alia, as follows:

> '…While I volunteered to accommodate your preference regarding the application date, you will recall this was proposed on 24/05. However, you will be first to appreciate there have been several interesting developments over the past three months, that I feel should be addressed before we move forward. You will further understand my caution, that if my requests for clarification are not considered at this stage, there is just the possibility they could be disregarded, once your goal has been achieved.'

[28] On 9 September 2015, the applicant's attorney addressed a letter to the respondent for him to unconditionally and unreservedly indicate by 12:00 noon, 10 September 2015, whether he would attend Wynberg Home Affairs, on 14 September 2015, for the renewal of the passport and on 15 September 2015 if it becomes necessary, so as to ensure the renewal is finalised. This request was made in order to avoid the applicant approaching the court and seeking a punitive cost order against him.

[29] On the same day (i.e. 9 September 2015), the respondent requested an extension by which to respond stating that he would respond by midday on 11September 2015. The applicant through her attorneys granted this extension in a letter dated 10 September 2015. The applicant's attorneys also notified that in the event his response resulted in a further delay, which had the effect of negating the object of the request; this in itself would be construed by the applicant as effectively a refusal on his part.

[30] On 11 September 2015, the respondent once again expressed his commitment to assist but stated that there remained an opportunity for the applicant to clarify her views on his topic of interest. He requested a negotiated resolution where both wishes could be accommodated. There was no comment about whether he could make himself available on the date suggested which was 14 September 2015 or an offer of an alternative suitable date to attend to Home Affairs.

[31] On 16 September 2015, the applicant's attorney wrote a letter to the respondent advising him that due to his failure to confirm, unconditionally and unreservedly by 11 September that he would attend Home Affairs Wynberg for the renewal of the child's passport, the attorneys had been instructed to proceed with the necessary relief.

[32] The respondent responded on 18 September 2015 in the following manner:

> 'As is well documented, I have repeatedly conveyed my willingness to cooperate with your client and have never refused to assist with the acquisition of our sons (sic) passport.
>
> However, I had hoped to obtain reassurance that your clients (sic) past practice of withholding our sons (sic) documentation could be discouraged, hence my request for clarification on the topic.
>
> Again, I am willing to cooperate as requested and ask that your client give fair notice of her preferred date for our visit to the Department of Home Affairs. I trust however that my possible future requests of your client, for our sons (sic) documentation, to travel outside RSA borders, will not be refused and be accommodated in a similar reasonable manner.
>
> In view of my cooperation communicated in this email, I regard an application as unnecessary and accept no responsibility for any legal costs in this regard.' (Underlined for emphasis)

[33] It is clear from the emails and letters outlined above that the applicant had been trying to obtain assistance from the respondent for months. The respondent

sought to use the issue of passport as bargaining tool for the resolution of other 'outstanding' issues between him and the applicant.

[34] Mr Abrahams who appeared for the respondent acknowledged that the respondent was unreasonable and obstructive up to a point. He submitted that the email of 18 September 2015 was a turning point. He argued that in that email the respondent displayed a change of heart. According to Mr Abrahams, at least from that point it was clear that the respondent was willing to cooperate; he requested a date that the applicant preferred. Therefore, legal proceedings ought not to have continued. The applicant instead should have given him a date that she preferred. According to Mr Abrahams the email of 18 September was different from others in tone and content. He therefore contends that the respondent should not be held responsible for the applicant's choosing of taking legal steps despite the email clearly stating his commitment to help.

[35] It was necessary to outline the various exchanges between the parties in some detail so as to obtain a better understanding of the history of the matter. These exchanges reflect a context. In my view, the email of 18 September should be viewed in the context of other correspondences that the respondent wrote. From as far back as May 2015 requests were made to the respondent. He expressed willingness to assist but made unrelated demands. He clearly had no intention to assist but merely paid lip service as submitted by Ms Heese who appeared on behalf of the applicant. The respondent clearly was intent on delaying the matter by failing to provide a suitable date and by constantly putting conditions and referring to other issues which were unrelated to the matter at hand which was to obtain renewal of the passport of the child. This unaccommodating stance was in my view an attempt to frustrate the applicant and to use the issue of the passport as a tool to fight unrelated battles. The applicant wrote numerous letters to the respondent warning him about legal action. That did not seem to move him. The respondent seemed to be putting obstacles and did the opposite of his expressed willingness to help. The letter of 18 September cannot be isolated from the rest of

the correspondence. Whilst it appeared from the email of 18 September that on the face of it the respondent was willing to compromise and even defer the clarification he had been demanding in relation to other issues, to another day, he provided no dates that could be considered by the applicant. Instead, in his email he requested 'fair notice' of a preferred date to be provided by the applicant. The email of 18 September was not unequivocal. In my view the applicant did not act unreasonably by viewing the said email correspondence in the same light as those that previously expressed willingness with no real action or commitment. I agree with Ms Heese that the manner in which the email of 18 September was worded, in particular, reference to 'fair notice' left a door open to the respondent to object to whatever notice given by the applicant as not being 'fair', which could delay the matter further. The steps that the applicant took to institute legal proceedings were not unwarranted, in my view. She did not view the email as any different from others, for reasons I have outlined. Her doubts about the respondent's sincerity in his latest email and the actions she took thereafter were merited.

[36] As regards urgency, I am satisfied that the matter was pressing and urgent enough in that although the passport took seven days to be issued, at the time of the lodging of the application there was no guarantee of how long it would take to be processed. Most importantly, even if it were to take a short period as it proved to have taken, the most compelling issue was the issue of the flight tickets to Mauritius for December 2015 which still needed to be booked. That could not be done without the passport issue being resolved. The respondent's actions were unhelpful and unsupportive.

[37] His conduct was certainly not in the best interest of the child. He was obstructive, unreasonable and sought to use the passport issue as some form of a *quid pro quo* towards him obtaining answers to his own demands.

[38] Although the order that the parties agreed to is differently worded to what was sought in the notice of motion, the effect is the same. The difference is that the relief sought in the notice of motion was to compel the respondent to cooperate

whilst in the order of 30 September 2015 he agreed to attend to the Home Affairs with the respondent and provided written consent for the child to travel to Mauritius. In the circumstances, there can be no question about the fact that the applicant was substantially successful. The respondent clearly left the applicant with little choice but to come to court. His behaviour was unreasonable and uncooperative. I do not think it would be just for the applicant to be denied a cost order, when costs could have been avoided. Costs should, accordingly, be awarded against the applicant.

[39] On the issue of whether the case justifies a cost order on an attorney client scale, whilst I would ordinarily have been hesitant to grant costs on this scale, I do think a case has been made out by the applicant that the court should show its displeasure towards the respondent's obstructive conduct by awarding costs on attorney and client scale against him.

[40] I therefore make an order in the following terms:

1. The respondent is directed to pay to the applicant:

    1.1 Costs of the urgent application instituted by the applicant under case number 18504/15;

    1.2 Costs occasioned by the hearing of argument in respect of costs of application referred in paragraph 1.1 above.

2. Such costs to be paid on attorney and client scale.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicants: Adv. AE Heese

Instructed by: Miller du Toit Cloete Inc., Cape Town

For the Respondents: Adv. R Abrahams

Instructed by: Machanik Attorneys, Cape Town