

Practice Directive 61

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA

Case Title: Ashley Clint Beukes v Corne Danielle Loss Beukes	Case No: HC-MD-CIV-MOT-GEN-2020/00262
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: Honourable Mrs Justice Rakow, AJ	Date of hearing: 12 August 2020
	Date of order: 21 August 2020
Neutral citation: <i>Beukes v Beukes</i> (HC-MD-CIV-MOT- GEN-2020/00262) [2020] NAHCMD 371 (21 August 2020) Having read the record of proceedings as well as submissions made by counsels for the applicants and the respondent: IT IS HEREBY ORDERED THAT: <ol style="list-style-type: none">1. That the Applicant's non-compliance with the forms and service provided for in the Rules of the High Court of Namibia is condoned and leave is granted to the applicant to bring this application on an urgent basis as envisaged by Rule 73(1) read with rule 73(3);2. The Applicant is authorised and allowed on 24 August 2020 to collect Azeya Catalea Beukes (a girl born on 4 June 2016) ("Azeya") from the Respondent's address at Erf 6213, Anamona Street, Khomasdal, Windhoek for a period of 2 weeks and thereafter each alternative 2 weeks until a social welfare report is obtained and the matter currently pending in the Family Court of the Windhoek Magistrate's court (filed on 22 June 2020) is finalized or a different order is made by the said court.3. That the Respondent refrains from in any manner preventing the Applicant the aforesaid access as well as future access to Azeya;4. That Azeya be allowed to stay in the house with the Applicant at No 1591, Spect Street, Hochland Park, Windhoek;5. Cost of suit.	

Reasons for orders:

Introduction

[1] The Applicant brought an application on an urgent basis on Monday 10 August 2020, seeking the following order:

1. That the Applicant's non-compliance with the forms and service provided for in the Rules of the High Court of Namibia is condoned and leave is granted to the applicant to bring this application on an urgent basis as envisaged by Rule 73(1) read with rule 73(3);
2. That the Applicant be authorised and allowed on 10 August 2020 or as soon thereafter as the above Honourable Court directs to collect Azeya Catalea Beukes (a girl born 4 June 2016) ("Azeya") from the Respondent's address at Erf 6213, Anamona Street, Khomasdal, Windhoek for a period of 2 weeks and thereafter each alternative 2 weeks until a social welfare report is obtained / alternatively for 1 week and thereafter each alternative week until a social welfare report is obtained;
3. That the Respondent refrains from in any manner preventing the Applicant the aforesaid access as well as future access to Azeya;
4. That Azeya be allowed to stay in the house with the Applicant at No 1591, Spect Street, Hochland Park, Windhoek;
5. Ordering that the Respondent be ordered to pay the costs of this application on a punitive scale as between attorney and client.

[2] The Applicant and Respondent are married, although they no longer stay together. They have one child together, a daughter, born on 4 June 2016. At the time of her birth, the Applicant and Respondent resided together in Windhoek. During June 2017, the Applicant and the minor child moved to Uppington, South Africa, where the Respondent joined them in November 2017. During November 2018, the Respondent and the minor child moved back to Windhoek, leaving the Applicant behind in South Africa. He returned to Windhoek during December 2018 to visit his child, but was denied access to the minor child, Azeya. During January 2019 the Applicant returned to South Africa without seeing his child. He again visited Windhoek in May 2019, the Respondent again denied him access to his minor child. In January 2020 he again travelled to Windhoek, and this time they agreed that the minor child could stay with him from 27 – 31 January 2020. During this time the Applicant, Respondent and a social worker met and certain undertakings were made regarding the payment of maintenance and the minor child being allowed to travel to South Africa to visit the Applicant.

[3] The Applicant returned to South Africa and had no further contact with the Respondent. He only spoke

to the child when the child was with his mother, who stays in Windhoek. The child was staying with the Respondent's father in Grootfontein and he would bring the child to visit with the Applicant's mother when they were in Windhoek. The Applicant then resigned from his employment in South Africa and returned to Windhoek during April 2020 and resides at his mother's house. When he tried to contact his child, the Respondent informed him to contact her father. On the birthday of the child, 4 June 2020 the Applicant insisted on seeing his child and the Respondent refused. He then proceeded to open a case with a social worker and on 22 June 2020 the Applicant applied for custody of the minor child, which case was postponed to 2 September 2020 for a social welfare report. Subsequently the Applicant and the Respondent arrived at an interim parenting plan which allows for the child to be in the care of the Applicant for two weeks per month, before being returned to the father of the Respondent for the remainder of the month. He initially collected the child on 3 July 2020 and returned her on 17 July 2020.

[4] The Applicant expected to be able to collect the child again on 31 July 2020 and to have her with him up till 14 August 2020. His legal representative inquired as to where the child can be collected from, from the legal representative of the Respondent. She informed the legal representative of the Applicant that the Respondent will not grant him access to the child. This then led to the filing of the urgent application.

[5] The application was filed on the Respondent and her legal representative filed a notice to oppose the application but during the appearance at court on Monday 10 August 2020 no further documentation was filed on the matter by the legal representative of the respondent nor was the legal representative present at court. The legal representative just sent word through the legal representative of the Applicant that she is in self-isolation because she had been in contact with someone that tested positive for COVID-19. The court then gave the legal representative of the respondent a further opportunity to file opposing papers by the morning of 11 August 2020, but no further documentation was filed. The matter was therefore dealt with on the basis of not being opposed.

[6] Regarding the issue of urgency, the court holds the same view as expressed in *H v D*¹ by Damaseb JP as follows:

'The pedantic approach requiring an applicant seeking urgent relief to meticulously explain the reason for every delayed action in coming to court should not be encouraged in proceedings such as the present. No doubt, there will be circumstances where the facts are such that a delay in coming to court to ventilate issues affecting children's rights is palpably unreasonable and oppressive that the court would refuse to come to the assistance of an applicant on an urgent basis, but this is not such a case.'

¹ (A3/2012) [2012] NAHC 7 (27 January 2012).

[7] When deciding on a matter involving children and their interest Nugent, J in *Godbeer v Godbeer*² expressed the following sentiment regarding the roll of the court as the upper guardian of minors:

‘While this Court is the upper guardian of all minors and may insist in appropriate cases upon limiting the freedom of choice of the custodian, I do not think that should be translated into this Court imposing its own subjective whims upon the children of the parties concerned. In Bailey’s case at 136 the Court quoted the following extract from the judgment of the Court in *Du Preez v Du Preez* 1969 (3) SA 529 (D) at 532E - F, apparently with approval:

‘This is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside, indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent’s decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent’s decision and the emotions or impulses which have contributed to it.’

[8] It is also true that this court can deal with matters of custody of minors if it is in the best interest of the child. Damaseb JP in *H v D*³ said the following:

‘This court is upper guardian of minor children. It can, if the circumstances justify (i.e if it is in the best interests of the child) , vary a custody order in favour of the non-custodian parent. That is so because a custody order is not a final order. It is perfectly legitimate for the non-custodian parent to approach this court to change a custody order if they have a basis for believing that it is in the best interests of the minor child. The minor child is entitled to protection from the custodian parent if the latter is acting against its best interests. What is in the child’s best interests will of course depend on the circumstances of each case.’

[9] In this instance the court is of the opinion that the child, although still quite young, has a bond with her father and has, in the past, spent time with him alone. The child therefore has a right to have access to both her mother and her father and the parties also agreed to an access regime when they agreed to a interim parenting plan. In light of this, the court will generally follow the interim plan already agreed by the parties.

Legal Principles on Attorney and Client costs

[10] Herbstein and Van Winsen⁴ qualify the fundamental rule relating to awards of costs as follows:

‘Upon judicial discretion and must be exercised on grounds upon which a reasonable person could have come

² 2000 (3) SA 976 (W) at 982D – F.

³ Supra.

⁴ The Civil Practice of the High Court of South Africa, Fifth Edition at page 954-955.

to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,

.... the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he does this, and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion.

Even the general rule, viz that costs follow the event, is subject to the overriding principle that the court has a discretion in awarding costs.'

[11] The general rule, namely that costs follow the event, that is, the successful party should be awarded his or her costs. The making of a punitive order is however over and above the general rule. In the current matter, the application was not opposed and the court therefore will grant a normal cost order.

[12] The court therefore makes the following order:

1. That the Applicant's non-compliance with the forms and service provided for in the Rules of the High Court of Namibia is condoned and leave is granted to the Applicant to bring this application on an urgent basis as envisaged by Rule 73(1) read with rule 73(3);
2. The Applicant is authorised and allowed on 24 August 2020 to collect Azeya Catalea Beukes (a girl born 4 June 2016) ("Azeya") from the Respondent's address at Erf 6213, Anamona Street, Khomasdal, Windhoek for a period of 2 weeks and thereafter each alternative 2 weeks until a social welfare report is obtained and the matter currently pending in the Family Court of the Windhoek Magistrate's court (filed on 22 June 2020) is finalized or a different order is made by the said court.
3. That the respondent refrains from in any manner preventing the Applicant the aforesaid access as well as future access to Azeya;
4. That Azeya be allowed to stay in the house with the Applicant at No 1591, Spect Street, Hochland Park, Windhoek;
5. Cost of suit.

<div style="text-align: right;"> <hr style="width: 100px; margin-left: auto;"/> E Rakow Acting Judge </div>	
Judge's signature	Note to the parties:
	Not applicable.
Counsel:	
Applicants	Respondent
Mr Marco Schurz Of Delport Legal Practitioners	