

SOUTH AFRICA / JUDGMENT

A.B v S.B (M160/17) [2017]

ZANWHC 25 (25 May 2017)

[2017] ZANWHC 25

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje

CASE / FILE NUMBER

M160/17

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IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: M160/17

In the matter between:

A B Applicant

And

S B Respondent

DATE OF HEARING : 04 MAY 2017

DATE OF ORDER : 04 MAY 2017

DATE OF REASONS : 25 MAY 2017

COUNSEL FOR APPLICANT : ADV K MONGALE

COUNSEL FOR RESPONDENT : ADV H SCHOLTZ

REASONS FOR JUDGEMENT

DJAJE AJ

Introduction

[1] This matter first came as an ex parte application on 12 April 2017 for an order in the following terms:

“1. That this application be heard on ex-parte basis and treated as urgent and that the ordinary rules relating to forms and services and ordinary time periods provided for in the uniform Rules of the Court be dispensed with and disposing of this matter on an ex-parte basis and as urgent in terms of Rule 6(12) of the Rules of this Honourable Court;

2. That the Honourable Court issue a Rule Nisi calling the Respondent to show cause, if any, on 18 May 2017, which is a return date or upon anticipation of such return date by furnishing the Applicant’s attorneys with 24 hours’ notice, why an order made in the following terms cannot be made final:

2.1 That the parenting plan concluded on 09 March 2017, which gave the primary residence of A1 B, A2 B and A3 B all born on [...] 2010, to the Applicant pending finalisation of the divorce proceedings between the Applicant and the Respondent be and is hereby made an order of Court;

2.2 That the Respondent be ordered to return the above mentioned three children to the Applicant immediately upon the service of this order on her;

2.3 That the assistance of the South African Police Service from the Mahikeng police station be sought to accompany the Applicant to collect the above mentioned three children from house no [...] Extension [...] T. Street Danville and/or from the Respondent back to their family home;

2.4 That the Respondent is prohibited from taking the above mentioned three children to her residence without the permission of the Applicant and that when such consent is given by the Applicant, the Respondent must return the three children on the day agreed upon with the Applicant which shall be in compliance with the parenting plan;

3. That the orders in paragraph 2.1, 2.2, 2.3 and 2.4 above operate in the interim with immediate effect;
4. That a copy of this order together with the application be served on the Respondent immediately and/or within a reasonable upon receipt of this order;
5. Cost of suits only in the event of opposition; and
6. Further and alternative relief.”

[2] The order was granted as prayed for in the notice of motion. The Respondent anticipated and the matter came before court on 20 April 2017 and the following order was made by agreement between the parties:

1. THAT: The matter be and is hereby postponed to the 4th day of MAY 2017.
2. THAT: The Respondent file her Answering Affidavit (and/or Counter-Application) on or before the 26th day of APRIL 2017.
3. THAT: The Applicant file Replying Affidavit on or before the 2nd day of MAY 2017.

4. THAT: Both parties will file Heads of Argument, if they deem it necessary, on or before 3rd day of MAY 2017.

5. THAT: The Rule Nisi be and is hereby extended and the following arrangement is made pending the return date :-

5.1 The Respondent will have contact with the children on the weekends of 21st to the 23rd APRIL 2017, and 28th

- 30th day of APRIL 2017, and will return the children to the Applicant's residence thereafter.

5.2 Any party not complying with this arrangement must furnish reasons on the return date as to why he or she is not guilty of contempt of Court.

6. THAT: Costs be reserved.

[3] The Respondent brought a counter-application with the following prayers:

"PART A

1. That the forms and service provided for in the rules of the above Honourable Court be dispensed with and that the matter be treated as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court.
2. That the alleged parenting plan which was concluded on 09 March 2017 between the Applicant and the First Respondent, be stayed pending the finalisation of PART B of the Notice of Motion.
3. That the Office of the Family Advocate (Second Respondent in the Counter Application) be ordered to, on an urgent basis, investigate and compile a report regarding the best interest of the children in respect of care, primary residence and contact with the Applicant and First Respondent, and to file same at the Honourable Court on a date and time established by the above Honourable Court.
4. The Advocate Motsepe from the offices of the Family Advocate be ordered not to be involved in the investigation referred to in prayer 2 above.
5. That, pending the filing and compliance of the above mentioned report by the Family Advocate, the following order be made:

5.1 That parental right and responsibilities regarding the guardianship of the minor children, as contemplated in section 18 (2) (c) and section 18

(3) of the Children's Act 32 of 2005, be awarded to both the Applicant and the First Respondent.

5.2 That the parental responsibilities and rights in regards to the care of the minor children, as contemplated in section 18 (2) (a) of the Children's Act 32 of 2005, be shared by the Applicant and the First Respondent.

5.3 That the primary residence of the minor children be vested with the First Respondent, with the Applicant having reasonable rights to contact as stipulated in section 18 (2) (b) of the Children's Act 32 of 2005.

6. That the Applicant be ordered to pay costs of the application, only in the event that the First Respondent opposes same.

7. Further and/or alternative relief.”

[4] On 4 May 2017 both the Applicant's application and the Respondent's counter application in relation to part A were argued and I granted the following order:

“1. THAT: The Rule Nisi granted on 12 April 2017 is hereby discharged.

(PART A)

2. THAT: In respect of the counter application the following order is made:-

2.1 The forms and services for in the rules of the above Honourable Court be hereby dispensed with and that the matter be treated as an urgent application in terms of Rule 6 (12) of the Uniform Rules of court.

2.2 The alleged parenting plan which was concluded on 09 MARCH 2017 between the Applicant and the first Respondent, be and is hereby stayed pending the finalisation of Part B of the Notice of Motion.

2.3 The Office of the Family Advocate (Second Respondent in the counter-application) excluding the third Respondent be hereby ordered

to, on an urgent basis, investigate and compile a report regarding the best interest of the children in respect of care, primary

residence and contact with Applicant and First Respondent, and to file same at the Honourable Court within 14 days of this order.

3. THAT: Pending the filing and compliance of the above mentioned report by the Family Advocate, the following order be and is hereby made:-

3.1 That parental rights and responsibilities regarding the guardianship of the minor children, as contemplated in section 18 (2)

(c) and section 18 (3) of the Children's Act 32 of 2005, be hereby awarded to both the Applicant and the First Respondent pending finalisation of PART B hereof.

3.2 That parental responsibilities and rights in regards to the care of the minor children, as contemplated in section 18 (2)(a) of the Children's Act 32 of 2005, be hereby shared by the Applicant and the First Respondent pending finalisation of PART B hereof.

3.3 That the primary residence of the minor children be hereby vested with the First Respondent, with the Applicant having reasonable rights to which will include

having the contact as stipulated in section 18 (2)(b) of the children every alternative weekend and telephonic contact during the week pending the finalisation of PART B hereof.

4. THAT: This order be served on the Office of the Family Advocate with immediate effect.

5. THAT: The Applicant be hereby ordered to pay costs of this application.”

I now furnish the reasons for the said order.

Background

[4] The parties herein are married in community of property and there are three minor children (“triplets”) born of this marriage. The said triplets are girls and at the time of this application aged [...] years old. Both the Applicant and Respondent are currently in a divorce process and decided to separate. The parties could not agree on who should have primary residence of the triplets.

[5] On 9 March 2017 the parties attended at the office of the family advocate where a parenting plan was drawn up and signed by both parties. In terms of the parenting plan the primary residence of the triplets was to be with the Applicant with the Respondent having rights of access which includes the right to have the triplets every alternate weekend from 17h00 on Friday to 17h00 on Sunday, the right to have the triplets every alternate short and long school holidays, every alternate Christmas and Easter holidays, mother’s day and

on the Respondent’s birthday. It is common cause that on 10 March 2017 the Respondent moved out of the common home and the triplets remained with the Applicant. It is not clear whether the Respondent voluntarily moved out or she was forced to by the Applicant. That is part of the dispute of fact raised in this matter.

[6] During the weekend of 17 March 2017 the triplets were with the Respondent and did not go back to the Applicant on 20 March 2017 as expected by the Applicant. This is what caused the Applicant to approach court on an ex parte urgent basis on 12 April 2017.

[7] The Applicant sought to make the parenting plan an order of court pending the finalisation of the divorce proceedings. Further that according to the said plan, the primary residence of the minor children is with him and the Respondent in refusing to bring them back after a weekend visit is in violation of the parenting plan. The submission by the Applicant was that the Respondent is not in a position to take care of the triplets as she has not recovered from the abuse that she suffered in the hands of her father whilst she was still young. Further that the Respondent is not emotionally stable, she only cares about her extra-marital relationships and exposes the triplets to a dangerous environment that might harm them. It was therefore the Applicant’s case that he is in a better position to take care of the triplets with the assistance of his mother and a helper.

- [8] As the application was brought on ex parte basis the following was stated by the Applicant in the founding affidavit as the basis for the application not served on the Respondent:

“11.8 I have reasonable apprehension of fear that should the application be served upon the Respondent before the Honourable Court grants me an interim order, the Respondent might cause some form of harm to the children as she had informed me that the children chose me over her.”

11.9 The fact that the Respondent took the children away without my consent and despite the parenting plan shows that she is capable of doing anything to worsen the situation”

On urgency the Applicant in his founding affidavit submitted that he first engaged the police and the children’s court to assist before bringing the ex parte urgent application.

- [9] The Respondent submitted in the answering affidavit and the counter-application that the effect of the ex parte order was that

the triplets were removed from her residence when the police arrived at night on 12 April 2017 with the Applicant’s Attorney. Further that this was extremely traumatic for her and especially for the triplets who are still very young. The application was only served on her on 19 April 2017 and that is how she anticipated and the matter came before court on 20 April 2017.

- [10] It is the Respondent’s case that she was chased out of the common home by the Applicant and refused her to take the triplets

with. As a result she is currently residing with her parents. The Respondent disputes all the allegations of abuse and emotional

instability made against her by the Applicant and in turn make allegations that the Applicant is not in a position to take care of the triplets.

- [11] In the counter-application the Respondent seeks an order to set aside the parenting plan and that primary residence of the triplets be given to her pending finalisation of the divorce proceedings. However as the application was brought in Part A and B, I only dealt with Part A which was to determine primary residence pending finalisation of Part B which is the setting aside of the parenting plan.

- [12] There is a clear dispute of fact between the parties about their ability to take care of the triplets and the effectiveness of the parenting plan. This is a matter requiring an investigation by the office of the Family Advocate about the suitability of either of the parties to have primary residence of the triplets pending finalisation of Part B and the divorce proceedings.

- [13] It is important to deal with the reason why the application was brought on an urgent ex parte basis. The Applicant decided to bring the application almost twenty days after he alleged the Respondent took the triplets without his consent. His reason was that he first wanted to exhaust other remedies available like approaching the children’s court. It was only after realising that the children’s court process will take long that he approached this court.

The Applicant was all along aware that the triplets were with the Respondent at her parental home and yet decided to bring the application on an ex parte basis. The Applicant's argument that the Respondent could have caused some form of harm to the triplets had she been served with the application is completely destroyed by the fact that he was willing to allow the triplets to spend weekends with the Respondent at her parental home unsupervised.

- [14] The Applicant in his founding affidavit makes unsubstantiated allegations about the Respondent's inability to take care of the triplets when he allowed her to have them during the weekend of 17 March 2017 at her parental home. It is not clear why the Applicant decided to bring the application on an ex parte basis when he was fully aware of the Respondent's whereabouts and had no evidence of any form of harm to the triplets. The Applicant in the founding affidavit could not make out a case why the Respondent was not served with the application and why the assistance of the South African Police Service was required to collect the triplets from the Respondent. As a result the six year old triplet's girls were collected at night by the police with the Respondent unaware of any order of court. There is no doubt in my mind that this action by the Applicant was not aimed at the best interests of the triplets and caused unnecessary trauma.
- [15] In my view, the Applicant's action in bringing the application on an urgent ex parte basis was an abuse of court process which resulted in a traumatic experience for the triplets. If the Applicant was really concerned with the safety and wellbeing of the triplets, he would have immediately refused the Respondent unsupervised contact with the triplets and thus cater for their best interest.
- [16] It was for the above reasons that I made the order as set out in paragraph three above.

J T DJAJE

ACTING JUDGE OF THE HIGH COURT

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Prepared on 23 October 2026 · Esheria