

SOUTH AFRICA / JUDGMENT

A.M v S.W (7813/2022) [2022]

ZAWCHC 84 (16 May 2022)

[2022] ZAWCHC 84

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

7813/2022

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Source record

In
the High Court of South Africa
(Western
Cape Division, Cape Town)
Case
Number: 7813/2022
In

the matter between: AM
 Applicant
 And
 SW
 Respondent

JUDGMENT

DELIVERED THIS 16TH DAY OF MAY 2022

LEKHULENI, J

- [1] This matter came before this court on an urgent basis in terms of rule 6 (12) of the Uniform Rules of Court. In this matter, the applicant sought an order for the appointment of an expert forensic psychologist, Dr Leigh Pettigrew for the purposes of conducting the care and contact assessment in respect of the parties' minor child. The applicant also sought an order that the draft order made by this court on 04 July 2018 regulating care and contact of the parties' minor child be amended to replace all sections of the draft order where it reads "unsupervised contact" with the words supervised contact with a social worker or a person

that both parties agree upon. The respondent opposed the application and also instituted a conditional application on an urgent basis in terms of which he sought an order that, Dr Matilda Smit be appointed as an expert to conduct a care and contact assessment pertaining to the minor child for the purposes of reporting to the Regional Court in Bellville under case number RCC: BELL655/2018.

FACTUAL

BACKGROUND

[2] The applicant and the respondent are still married to each other and their divorce is pending at the Bellville Regional Court. The parties have a minor child who was born on 10 February 2016. The minor child is currently in the care of the maternal grandmother. The applicant avers that during September 2018, the minor child began advising her that the respondent had been touching and hurting her. The child informed her that the respondent hurt her head and vagina. On 09 November 2018, the minor child reported to her in the presence of the grandmother that she did not want to return home as the respondent would hurt her vagina. On 01 December 2018, the applicant's mother caught the minor child attempting to take photos of her private parts with a cell phone.

[3] On 14 January 2019, the applicant enquired from the minor child as to who was hurting her vagina and after much persistency, the child informed her that the respondent puts his fingers into her vagina and thereafter attempts to imitate the movement. In light of the serious allegations made by the child, she then attended at Brackenfell Police Station on numerous occasions and deposed to numerous affidavits highlighting what the minor child informed her relating to the respondent. She implored the court to appoint, Dr Leigh Pettigrew to conduct the care and contact assessment in respect of the minor

child and more specifically to investigate the allegations of sexual abuse levelled against the respondent by the minor child. In light of these allegations against the respondent, the applicant applied that the respondent be afforded supervised access to the child. The applicant conceded that she delayed in bringing this application as she was ill-advised by her previous attorneys of record.

[4] Meanwhile, the respondent disputed the allegations levelled against him and also launched an urgent conditional application for the appointment of Dr Matilda Smit to conduct a care and contact assessment report pertaining to the minor child. The respondent averred that to the knowledge of the applicant there is absolutely no truth in any of the allegations of sexual or other abuse of their daughter. The respondent further averred that the allegations of sexual abuse were thoroughly investigated and no evidence could be found to support their accusations. He enjoyed unrestricted access to their minor child since this court's order of the 04 July 2018. The respondent contends that the applicant is merely raising her old false allegations of sexual abuse of the minor child in an ill-conceived attempt to persuade the court to appoint Dr Leigh Pettigrew as an expert.

[5] The respondent further contends that the applicant has not made out a case in her founding affidavit for any form of urgency and yet she abuses the court process by placing this matter before the urgent court on 25 March 2022 after serving the issued papers on his attorneys of record on 23 March 2022 at 15h57. In the respondent's

view, this court does not have jurisdiction to appoint an expert to conduct a care and contact assessment seeing that it is not sitting as the divorce court and that the respective parental rights and responsibilities are already one of the issues pending before the Regional Court in Bellville. In the event that the court does not agree with her in this regard, the respondent requested the court to appoint, Dr Matilda Smit, a social worker to conduct the care and contact assessment. The respondent states that the applicant obtained an interim protection order against him on 11 April 2018. The protection order was dismissed on 18 April 2019 after oral evidence was heard. In February 2019, the applicant instituted Children's Court proceedings against the respondent based on the same allegations of sexual abuse. The allegations of sexual abuse were investigated by Sergeant Goodwin of the dedicated unit called FCS of the South African Police Services ("SAPS"), Kraaifontein and she could not find any evidence to support the applicant's allegations. The minor child was further subjected

to a medico-legal examination and it too reported no evidence of sexual assault on the minor child. The respondent further contends

that the minor child was further subjected to a forensic assessment by Captain McKinnon, a specialist social worker in the employee of SAPS and she also could not find any evidence or support of the alleged sexual abuse.

[6] The matter was further investigated and assessed by Ms Lynn Andrews, a registered social worker in the employee of Badisa Trio for the purposes of the Children's Court proceedings. Ms Andrews found that despite all the allegations the applicant made against the respondent, ever since the respondent announced that he wanted a divorce, every allegation has been investigated and was seemingly unfounded as no evidence was found to support these allegations and the child concerned has not disclosed the alleged abused to any person other than the applicant. Ms Andrews also recommended that the

matter be referred to the office of the Family Advocate to resolve the existing issues around care and contact.

ISSUES

[7] This case in my view raises two critical questions, namely whether this application is urgent as envisaged in rule 6 (12) of the Uniform Rules and if so, whether Dr Pettigrew or Dr Smit should be appointed in this regard to conduct the care and contact assessment report for the parties.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

Is this matter urgent?

- [8] This application was brought on an urgent basis. This court was asked to dispense with all forms of service provided for in the rules of court and to treat this application in terms of rule 6 (12) of the Uniform Rules of this court. In my view, before the court can consider the matter on the merits, the court must determine whether the requirements of urgency have been satisfied. Rule 6 (12) provides inter alia that a court may dispose of urgent applications at such time and place and in such manner and in accordance with such procedure it deems fit. The circumstances that an applicant avers renders a matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course must in terms of rule 6(12)(b) be set forth explicitly in the founding

affidavit.

- [9] The approach to adopt in determining urgency was set out in *In re: Several Matters on the Urgent Court Roll 2013 (1) SA 549*, where the court referred with approval to the views of Notshe AJ in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at paras 6-7 where the court stated:

"[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

- [7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."
- [10] In this matter, the applicant frankly conceded that there was a delay in bringing this application. Her reasons for bringing this application late is that she was unfortunately ill-advised by her previous attorney of record and that on /or about 22 January 2022 she terminated her mandate of her erstwhile attorneys and instructed her current attorneys of record. Her current attorneys of record perused the relevant affidavit and after consultation with her, advised her to bring this application.
- [11] This case, in my view is not urgent, the issues raised by the applicant in the founding affidavit have been dealt with by various professionals and institutions. Various legal representatives as well represented the applicant before her present attorneys of record came on record. I find it difficult to accept that all these legal representatives ill-advised the

applicant not to launch this application in time. Furthermore, the issues raised by the applicant in the papers are not new issues. From the correspondences filed in the conditional application, it is evident that the parties engaged for several weeks regarding the appointment of an appropriate expert to conduct a care and contact assessment report. Notwithstanding, the applicant still chose to bring this application on an extremely urgent basis.

- [12] Most importantly, the allegations against the respondent have been dealt with by various professionals including the Police and the Children's Court in the past. A medico-legal report was also prepared pursuant to these allegations. In other words, these complaints are not new and have been investigated in the past. They date back to the year 2019. The respondent has been enjoying unsupervised access since July 2018. Ms Andrews in her report alludes to the fact that the minor child is not in need of care and protection and that unsupervised access with the respondent can only benefit the minor child's development.
- [13] Furthermore, the applicant does not indicate in her papers what harm or prejudice the child will suffer if the application seeking to appoint Dr Pettigrew was filed in the normal course. Notably, at the Children's Court, after considering all the complaints of sexual abuse raised by the applicant, Ms Andrews recommended that the issues relating to care and contact of the minor child be referred to the Family Advocate for investigation. The parties never considered this option. Of great importance is that the child was subjected to a lot of assessment by various professionals. The observations of Ms Andrews in my view are opposite. She states that owing to the multitude of allegations made over a short period and the amount of assessments that the child concerned underwent since the start of the investigation, she is of the opinion that it would not serve the best interest of the child concerned to undergo another assessment.
- [14] I am aware that this case involves the interest of the minor child. The Constitution of the Republic of South Africa Act 108 of 1996 unequivocally articulates the principle in Section 28(2) thereof that a child's best interests are of paramount importance in every matter concerning a child. Our common law also prescribes that the child's best interests must determine the outcome when a court has to make an order regarding a child. In other words, in all matters concerning the care, protection, maintenance and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied (see section 9 of the Children's Act 38 of 2005. In addition, section 6(2)(a) of the Children's Act provides that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote, and fulfil the

child's rights as set out in the Bill of Rights and must respect the child's inherent dignity.

[15] In light of the above discussion, I am of the view that the applicant has failed to make out a case for urgency and for that reason her application stands to fail. However, I am of the view that in keeping with the best interest of child, the office of the Family Advocate must be instructed to conduct a thorough investigation in this matter with the assistance of a family counsellor envisaged in section 3(1) of Mediation in Certain Divorce Matters Act 24 of 1987 in order to compile a report on care and contact of the minor child.

ORDER

[16] In the circumstances, I make the following order:

16.1 The office of the Family Advocate Cape Town is hereby ordered to urgently investigate the issue relating to care and contact of the minor child and to make that report available to the Regional Court sitting in Bellville Regional Court.

16.2 The application is hereby removed from the roll for lack of urgency with no order as to costs.

LEKHULENI J

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv A Heunis

Attorney for the Applicant: RP Attorneys

Date of hearing: 25 March 2022

Date of judgment: 16 May 2022

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Prepared on 9 October 2026 · Esheria