

SOUTH AFRICA / JUDGMENT

AS and Another v LCE and Others (2022/5530) [2022] ZAGPJHC 497 (22 July 2022)

[2022] ZAGPJHC 497

COURT

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal CSP

CASE / FILE NUMBER

2022/5530

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG.

CASE

NUMBER:2022/5530

Reportable: No
Of
interest to other Judges: No

Revised: No
22/7/2022
IN

THE MATTER BETWEEN: In
the matter of
A[.]
S
[.]
FIRST APPLICANT
A[.]
C[.]
SECOND APPLICANT
And
L[.]
C[.]
E[.]
FIRST RESPONDENT

DEPARTMENT
OF SOCIAL DEVELOPMENT,
SECOND RESPONDENT
GAUTENG
VAN
DEN BERG LETITIA
THIRD RESPONDENT
In

Re the minor child: L[.]
M[.] M[.]

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ

Introduction

- [1] The applicants have brought an application on an urgent basis in which the following order is sought:
1. That the rules, time limits, forms, and procedures provided for in the Uniform Rules of Court and the Practice Manual of the Gauteng Local Division are dispensed with, to the extent necessary, and leave is granted for this application to be heard as a matter of urgency.
 2. That pending the outcome of the adoption proceedings to be instituted by the first and second applicants:

2.1 The first and second applicant are hereby assigned the parental responsibilities and rights of care and contact as envisaged in section 18(2)(a) and (b) read with section 23 of the Children's Act 38 of 2005 ("Children's Act") in respect of LMM.

2.2 The first and second applicant are hereby assigned the parental responsibility and right of guardianship as envisaged in section 18(3)(a) and 18(3)(b) read with section 24 of the Children's Act of LMM.

2.3 The first respondent's parental responsibilities and rights of guardianship, care and contact, as envisaged in section 18(2)(a) – (c) and 18(3) read with section 28 of the Children's Act, are hereby suspended in respect of LMM.

In the alternative to prayer 2:

3. That—
 - 3.1 it is declared that LMM is a child in need of care and protection.
 - 3.2 LMM is to remain in the care of the first and second applicants, pending the outcome of the adoption proceedings to be instituted by them.

3.3 no person may interfere with the first and/or second applicants' rights and duties of care and contact in respect of LMM, unless a High Court orders otherwise.

[2] The application is not opposed by the respondents.

Background of relevant

facts

[3] The applicants were married on 8 April 2007. Because they were unable to conceive, they decided to adopt a child.

[4] During 2015/2016 after discussion with their friends and family, they got in touch with the third respondent ("Van den Berg"), whom they established was an accredited adoption social worker, practicing since 2002.

[5] On 9 June 2016 the applicants approached Van den Berg in order to assist them with the adoption process. Following the discussion, the applicants completed an application form, forwarded to them by Van den Berg, in order to commence with the adoption process.

[6] On 22 June 2016 the applicants met with Van den Berg. During the meeting Van den Berg explained to the applicants that adoption was a lengthy process and therefore, they should be patient. She however, informed them that they would ultimately be successful in adopting a child in need of a loving and caring home.

[7] Following the meeting the applicants were provided with all documentation which were necessary to begin the adoption process, which documents were completed and forwarded to Van den Berg.

[8] During August 2016 Van der Berg arranged individual interviews with the applicants, whereafter she conducted a home visit, on 19 November 2016. During the home visit the first applicant's brother and his wife were present as references.

[9] On 26 November 2016 the applicants and Van den Berg's clients had a group meeting. The purpose for the meet-and-greet was to emphasise the emotional journey that all had embarked upon by opting for adoption.

[10] All went quite after November 2016, only during September 2017 Van den Berg telephonically informed the applicants that she possibly had a match for them. She further informed them that the arrangement would be made once the baby was born. The applicants were, however requested to contribute towards the mother's medical expenses, which they did.

[11] The applicants were later informed by Van den Berg that the mother elected not to place the child up for adoption and that they need to wait for another opportunity.

- [12] On 8 October 2018 Van den Berg telephonically informed the applicants that she again had found a match and that they need to collect the baby the following day. On 9 October 2018 the baby was handed over to them following a brief introduction to her biological mother, the first respondent. The first respondent during the meeting handed over the Road to Health Card of the baby girl to the first applicant.
- [13] The applicants thereafter left with the baby girl, LMM. Later that day the first applicant noticed that Van den Berg posted a photograph on Facebook of their adoption.
- [14] Van den Berg also provided the applicants with a letter in support to add LMM on their medical aid. She also addressed correspondence to the first applicant's employer in support of her request for maternity leave.
- [15] Van den Berg previously informed the applicants that there was a 60-day cooling-off period before any steps could be taken to legally finalise the adoption, which they accepted.
- [16] During 2019 until January/February 2020 the applicants via SMS messages enquired about the status of the adoption. Van den Berg did not respond to the enquiries. At the end of March 2020, the national state of disaster was proclaimed which resulted in the entire country to be grounded to a standstill.
- [17] On 4 December 2020 the applicant again requested Van den Berg to let them know as to what documentation was outstanding in order to finalise the adoption.
- [18] During July 2021 the applicants couriered documents requested to Van den Berg. However, the said documents were lost by the courier company. After the documents were resend to Van den Berg, the latter only replied on 9 November 2021 that she received the document and would proceed with the paperwork, in order to obtain a court order.
- [19] After receiving the above confirmation, the applicants on numerous occasions, enquired as to the finalization of the adoption. Only on 25 May 2022, Van den Berg responded that the adoption was finalized and she only had to collect the court order.
- [20] However, on 3 June 2022, the first applicant became aware that charges had been brought against Van den Berg, she immediately

contacted Ida Strydom ("Strydom") at the Department of Social Development regarding their adoption application. On 11 June 2022 Strydom informed the applicants that their adoption application was not among the files that the Department of Social Development received from Van den Berg and that they would request the said file from her.

- [21] The applicants thereafter instructed Clarks Attorneys to investigated the matter. After various enquiries by the attorneys, it was established that the adoption of LMM was never finalized and no court order was obtained. As a result, this application was instituted by the applicants.

Arguments by the applicants

[22] Counsel for the applicant argued that position that the applicants now find themselves in is less than ideal. Despite been given assurances, they have been stripped of their parenthood in respect of LMM.

[23] The applicants assert that it is in LMM best interests. They therefore, and as an interim measure, and whilst they attempt to cure the issues that have arisen following the debacle with Van den Berg, seeks in the interim, for full parental responsibilities and rights in respect of LMM.

Issues for

determination

[24] The following issues are for determination;

1. Whether the matter is urgent; and
2. Whether the applicants have made out a case for the interim relief.

Is the matter urgent?

[25] A litigant that approaches court for relief on an urgent basis must comply with rule 6(12)(b) of the uniform rules of court. The rule reads as follows;

“In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”

[26] From the above it is clear that the rule has two legs to it, namely;

1. Circumstances which render a matter urgent;
2. Reasons why substantial relief cannot be achieved in due course.

[27] The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[1] put it as follows:

“[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 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.

be determined by the facts of each case. An applicant must make out his case in that regard.”

[28] The applicants rely on the following in seeking to show that the matter is urgent;

1. There is a very real risk of irreparable harm to LMM should the application not be entertained. LMM has been in sole and uninterrupted care of the applicants since 9 October 2018. There is, following the revelation that her placement with the applicants has not been regularised, a very real risk that she may be uprooted and removed from the applicants’ care; this will be deleterious for her physical and emotional security and her intellectual, emotional and psychological development.
2. That it is in LMM’s best interests that the applicants act expeditiously.
3. There is an urgent need for her legal status to be brought in line with de facto position. In this regard, and as matters stand:

3.1 The applicants are unable to consent to any medical examination or treatment that LMM may require.

3.2 The applicants find it difficult to enrol her in a primary and secondary school in future, because they will be required to provide the school with documentation in support of their claim to be acting as her “parents”.

3.3 Furthermore, they are unable to travel, domestically, with LMM. This is particularly so when flying meaning that should they, as a family, decide to go on a holiday or visit friends and loved ones they have to drive.

[29] Notshe AJ continued, in dealing with the requirement of substantial redress in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*, supra, and said the following;

“[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.”

[30] I am of the view that if the matter were to be enrolled in the normal cause the applicants would not be afforded substantial redress. The best interest of the LMM is of paramount importance in this matter and therefore there can be no argument to the contrary in that this application should be heard in the ordinary cause. Therefore, even on the second leg of the test, urgency is established.

Best interest of the child

[31] The Constitution entrenches the child's best interests as of paramount importance in every matter concerning the child.[2] This constitutional principle is repeated in section 9 of the Children's Act.[3]

[32] Section 28(2) of the Constitution has been held to create an 'expansive guarantee' and constitutes, not only a guiding principle, but also a right. It also provides the standard against which every decision that impacts a child must be measured.[4]

[33] The Children's Act, however, shifts from "parental authority" to a more child- focused concept of parental responsibilities and rights.

[34] In section 7 of the Children's Act, the legislature provides a list of factors that courts must take into consideration when

determining what is in the best interests of the child.[5] It is important to note that section 7(1) of the Children's Act lists fourteen factors that must be taken in consideration when deciding a child's best interests. The approach requires a close and individualized examination of the situation of the child.

[35] It is therefore clear, that these constitutional and legislative standards need to be determined on a case-by-case basis, taking into account the specific context and facts of the dispute before the Court.[6]

[36] In terms of sections 23[7] and 24[8] of the Children's Act, any person having an interest in the care, well-being and/or development of a child may apply to the Court for an order granting them parental responsibilities and rights. Moreover, the following is important in assessing such an application:

1. The best interests of the child.
2. The relationship between the applicant(s) and the child, and any other relevant person and the child.
3. The degree of commitment that the applicant(s) has shown towards the child.
4. The extent to which the applicant(s) have contributed towards the expenses in connection with the birth and maintenance of the child.
5. Any other fact that should, in the opinion of the court, be taken into account.

- [37] The overarching principle in matters involving children is always, what would be in the interest of the child. At times facts speak for themselves and in such circumstances it is easy for the court to determine what it deems to be in the interest of the child.
- [38] LMM was born on 31 August 2018 and a month later, on 9 October 2018, she was placed in the care of the applicants. Since then, to date, she was cared for by the applicants. She is currently 4 years old and undoubtedly shares a close attachment with the applicants, her “mother” and “father”. It is evident that if LMM is separated from the applicants she will suffer tremendously. A child of such young and tender age will without a doubt suffer dire physical and emotional consequences when uprooted and removed from the “parents” she knew since birth.
- [39] Furthermore, the applicants in the past and presently take care of LMM’s day-to-day needs and requirements, which include her medical, educational and social needs. It is evident that they have shown a great degree of commitment towards her material needs, daily care, emotional wellbeing, and education.
- [40] The applicants in this matter have at all times acted in good faith during the “adoption” process facilitated by Van den Berg. They have acted to secure LMM best interests by providing a loving and stable family environment in which she can thrive during the process. I can fully appreciate the “fear” that they are experiencing at this stage. Furthermore, the fact that they launched this application is an indication of their commitment and love for LMM.

Conclusion

- [41] I am of the view that the applicants in this matter clearly showed that it will be in the best interest of LMM to remain in their care until there is clarity as to the adoption of LMM.

Order

- [42] In the premises of the above I make the following order:

1. The draft order attached hereto, marked “X” is made an order of Court.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

22 July 2022 - 10h00

DATE JUDGEMENT DELIVERED: 22 July 2022 - 12h00

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[1] (11133767)

[2011] ZAGPJHC 196 (23 September 2011) in paras 6 and 7.

[2] Section 28(2) of the Constitution, 1996.

[3] Act 38 of 2005.

[4] S v M (Centre for Child Law as Amicus Curiae)

[2007] ZACC 18.

[5] See paragraph [49].

[6] Minister of Welfare and Population Development v Fitzpatrick and Others [2000] ZACC 6; 2000

(3) SA 422 (CC) at paragraph [18].

[7] “Assignment of guardianship by order of court 24.

(1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant. (2) When considering an application contemplated in subsection (1), the court must take into account- (a) the best interests of the child; (b) the relationship between the applicant and the child, and any other relevant person and the child; and (c) any other fact that should, in the opinion of the court, be taken into account. (3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child’s existing guardian is not suitable to have guardianship in respect of the child.”

[7] “Assignment of guardianship by order of court

24.

- (1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.
- (2) When considering an application contemplated in subsection (1), the court must take into account-
 - (a) the best interests of the child;
 - (b) the relationship between the applicant and the child, and any other relevant person and the child; and
 - (c) any other fact that should, in the opinion of the court, be taken into account.
- (3) In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child."
- [8] "Certain applications regarded as inter-country adoption 25. When application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act."
- [8] "Certain applications regarded as inter-country adoption
25. When application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act."

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