

SOUTH AFRICA / JUDGMENT

C v K (11285/2017) [2017] ZAGPPHC 537 (15 August 2017) [2017] ZAGPPHC 537

COURT

North Gauteng High Court, Pretoria

BEFORE

Motepe

CASE / FILE NUMBER

11285/2017

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REPUBLIC

OF SOUTH AFRICA

OFFICE

OF THE CHIEF JUSTICE

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 11285/2017

15/8/2017

In

the matter between:

O

C Applicant

and

K

K Respondent

JUDGMENT

MOTEPE AJ:

[1] The applicant brings an application for an order that the primary residence of the minor child, namely G K vests in him and that this primary residence of the minor child with the applicant be phased in over a period of 6 months. He further prays that a private social worker be appointed essentially to oversee the transition period of phasing in.

[2] The applicant is opposed by the respondent who is the maternal grandfather of the minor child. Sadly, the minor child's biological

mother passed away few days after giving birth. The minor child was born on 8 September 2015.

[3] The applicant alleges that he is the biological father of the minor child. After the passing of the biological mother, the applicant

agreed to leave the minor child in the care of the respondent and his wife, the maternal grandmother of the minor child. There is a dispute between the parties as to how long the applicant intended the minor child to remain in her grandparents' care. I am however not dealing with the merits at this stage. It is therefore an issue that I need not decide. It is however not in dispute that since the birth of the minor child to date, she has been in the care of the respondent and her wife, her grandparents. The applicant now seeks to change her primary residence as aforesaid.

[4] In the heads and in argument, the respondent's counsel referred the Court to the provisions of Natural Fathers of Children Born out of Wedlock Act.[1] Section 2(2) of this Act provided that the Court shall not grant an application by the natural father of a child born out of wedlock for access rights to or custody or guardianship of the child unless the Court is satisfied that it is in the best interest of the child and until the Court has considered the report and recommendations of a family advocate.

[5] In argument, counsel for the applicant pointed out that this Act has in fact been repealed by The Children's Act.[2] The respondent's counsel accepted this submission but pointed out that the Court must still have regard to the report of a family

advocate regardless. I agree with this submission. The family advocate's report is still necessary to guide the Court. In any event, the applicant has set the family advocate process in motion and the parties have informed me that they have already been

interviewed by the family advocate on 3 August 2017 and are awaiting her report.

[6] In the supplementary heads of argument filed by the respondent, an email from the respondent's attorney recording a conversation with the family advocate is attached confirming that her office is investigating the matter and that there is no need to appoint a Social Worker. While this did not form part of the pleadings, I cannot ignore it. The

applicant has in any event referred me to authority that says the Court may have recourse to any source of information which may be of assistance without being bogged down to procedure.[3]

- [7] It is apparent from the papers that the applicant did initiate the family advocate process. It would appear however from the notice of motion that he intended to proceed with this application without the Court having regard to family advocate's report. I note that he did request appointment of a social worker to oversee the phase in period but that is not sufficient. What is required is for an expert to firstly furnish a report to the Court recommending what will be in the best interest of the minor child. The Court must have regard to this report and make an appropriate order, being the upper guardian of all minor children.
- [8] I made it clear to the parties that such a report is essential for the Court to consider before dealing with this application. Faced with this stance, the applicant's counsel proposed a draft order in terms of which a private social worker is appointed at the applicant's costs. I then asked her to prepare the proposed draft order on which the respondent would also be given an opportunity to make submissions. The proposed draft order reads as follows:

"1 FAMSAs Pretoria shall within 10 days of receipt of the this court order nominate and appoint on behalf of the parties a private social worker; and

2. The appointed social worker will investigate the matter and provide a recommendation regarding contact to be exercised between the applicant and the minor child; and
3. The recommendation provide by the social worker shall be implemented as soon as it becomes available and until such time that another court directs otherwise; and
4. The applicant will be liable for the costs of the appointed social worker; and
5. The matter is postponed sine die;"

- [9] The respondent's counsel having considered the proposed draft order, raised objections. He submits that the matter is before a family advocate and there is therefore no need to appoint a private social worker. The applicant's counsel contends in her supplementary heads that this objection "is devoid of all .merit and a nonsensical submission". She contends that the employees of the office of the family advocate are and remain legal experts.

- [10] I disagree with the applicant's counsel with regard to importance of the family advocate. Firstly, the repealed legislation referred.to above does show that a Court could not consider an application by a natural father of a child born out of wedlock without considering the report by the family advocate. Secondly, even in applications for guardianship in terms of section 24 of the Children's Act, the Court is required in section 29 to have regard to a report of a family advocate, a social worker or any suitable expert. The legislature would not have placed such importance to reports by family advocates if their reports did not have sufficient weight. In any event, the applicant himself initiated the family advocate process, thereby

acknowledging its importance.

[11] While in principle I have no objection to the appointment of a social worker as proposed by the applicant's counsel, particularly in a matter of this nature, I however agree with the respondent's counsel that since a family advocate is already investigating the matter, there is no need to sanction a further expert in this regard. If the family advocate is of a view that a further expert is required, she will make appropriate recommendations which must then be considered by the Court. In addition, I cannot agree to the Social Worker's recommendation being implemented as soon as it becomes available without the sanction of the Court.

[12] Respondent's counsel also submitted a proposed draft order. It reads:

"1 THAT this application be postponed sine die.

2 THAT interim access be ordered according to the existing arrangement whereby the applicant may go and see the child at the respondent's house, between the hours of 11 am and 12 am on Saturdays, pending finalization of the family advocate's report.

3 THAT costs be reserved."

[13] I find the draft order to be reasonable. However, the interim access should not be pending family advocate's report but pending the decision of this Court after considering the family advocate's report.

[14] In the premises, I make the following order:

1. That this applicant be postponed sine die;
2. That the family advocate be directed to furnish her report to this Honourable Court with recommendations for consideration;
3. That pending the final determination by the Court, the applicant be afforded interim access in accordance with the existing arrangement whereby the applicant may go and see the child at the respondent's house situated at [...] in Pretoria West between the hours of 11am and 12am on Saturdays;
4. That costs be reserved.

JA Motepe

Acting Judge of the High Court

Matter heard on: 15 August 2017

Judgment

reserved on: 15 August 2017

Counsel for the applicant: Adv L Van der Westhuizen

Attorneys for the applicant: McCabe Burnett Inc, Pretoria

Counsel for the respondent: Adv B Geach SC

Attorneys for the respondent: Nadima Ebrahim Peera Attorneys

[1] Act 86 of 1997

[2] Act No 38 of 2005

[3] Applicant's supplementary heads, para 1.2; Terblanche v Terblanche 1992 (1) SA 501 (W) at 504C

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