

SOUTH AFRICA / JUDGMENT

Goliath and Another v Hutchinson and Another (280/2011) [2011] ZAECGHC 12 (3 March 2011)

[2011] ZAECGHC 12

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Andrews

CASE / FILE NUMBER

280/2011

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IN

THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

(EASTERN

CAPE, GRAHAMSTOWN) CASE NO: 280/2011

In

the matter between:

W

GOLIATH

.....FIRST

APPLICANT

E

GOLIATH

.....SECOND

APPLICANT

and

A

HUTCHINSON

.....FIRST

RESPONDENT

C

COETZEE

.....SECOND

RESPONDENT

JUDGMENT**ANDREWS, AJ**

[1] This is an urgent application where the applicants seek an order pendente lite pending an inquiry by the Family Advocate into permanent arrangements for custody and family responsibilities over W, the minor child of first applicant and first respondent.

[2] An order granting parental rights and responsibilities in the following terms was sought, by applicants:

a) that the full rights and responsibilities as set out in section 18 (2) of the Children's Act, 38 of 2005 ("the Act")

be granted to first applicant and first respondent;

b) that permanent place of residence of the minor child be granted in favour of first and second applicants subject to the first respondent's right to reasonable contact;

b) that specific parental rights and responsibilities in respect of contact with the minor child as set out in section 18 (2)(b) of the Children's Act 38 of 2005 be granted to first respondent on the following conditions:

(i) that the first respondent may remove the minor child twice per year for a three-week period during the short school vacations, to be rotated between the parties ;

(ii) that Christmas and New Year vacations be rotated between the first applicant and first respondent on a yearly basis;

(iii) that first respondent may have reasonable telephone contact with the minor child at reasonable times;

(iv) that visitation and contact rights be exercised in such a manner that does not interfere with the minor child's scholastic, sports, religious and social activities;

d) that parental rights and responsibilities in respect of the guardianship of the minor child as set out in section 18 (2)(c) and 18(3) of the Children's Act, 38 of 2005 be granted to first applicant.

e) that first applicant is responsible for the payment of all school fees of the minor child, including clothes and expenses relating to sport and recreational activities, camps and diverse expenses;

f) further and/or other relief.

[3] The following facts were not in dispute:

W is currently five years old. He has lived with his paternal grandmother, the second applicant in the town of Pearson, Eastern Cape, by agreement between the applicants and first respondent from December 2006 onwards, when he was a year old. First respondent did not intend this arrangement to be permanent but to endure whilst she was completing her four year studies. The arrangement commenced at the end of the first year of study. During the past four years, the first respondent saw W during the December holidays for periods of two to three weeks on each occasion, excluding the vacation at the end of 2009. She was unable to see him apart from this due to financial pressures. She was a student during this period. She completed her studies and obtained employment in

August 2010. The first applicant saw W more regularly but is based in Pretoria. Only he provided for the maintenance of W and not the first respondent.

[4] After W's visit to first respondent in the 2010 December holiday, she did not return him to the custody of the second applicant as per the usual arrangement. He is currently living with the second respondent, his maternal grandmother, in Alexandria,

a distance of approximately a hundred kilometres from first respondent's home in Grahamstown. This house has two bedrooms and he

shares a bedroom with his older brother and step brother. Some three months have therefore passed since he was living with second

applicant. There is no court order in place for formal custody arrangements over W. It was disputed by first applicant that discussions in regard to this issue were conducted between the parties during 2010. He stated that discussions about W's living arrangements took place between himself and first respondent in 2008.

Urgency

[5] The first applicant stated that the long-term close relationship between W and his primary caregiver, the second applicant had been disrupted without good reason by him being removed from second applicant's custody and placed in the custody of the second respondent. He was not aware of the circumstances under which the child was currently living. He argued that any parent who

suddenly loses custody over a child and does not respond summarily, does not act in the best interests of the child. These factors

rendered the matter urgent. The first respondent replied by stating that the first applicant had known throughout the year 2010 and at least in 2008 of her intentions to regain custody over W, but had not disclosed this fact in his founding affidavit. The matter was therefore not urgent. The Applicants argued that the onus rested on the Respondents to prove that the existing custody and contact arrangements, though not formalised through a court order,

were no longer appropriate and that a variation was justified.

- [6] First respondent averred that W had since December 2010 developed a good relationship with his elder brother aged seven years, with whom he shared a room together with the first respondent's eighteen year old step brother. He had fitted into school and had made a few new friends. In her view the care arrangements with the second applicant had not been adequate, which she inferred from having observed that W had poor manners, and used crude language. He did not appear to her to have spent much time in preschool as he could not count or identify colours. The first applicant disputed that these observations of behaviour were of consequence and that they justified W's removal from the stable custody arrangement with second applicant.
- [7] The first respondent stated that she had removed W without the agreement of the applicants because she did not anticipate that they would agree to her request to resume custody over him. Her long-term intention is for W to live with her and her husband but no date was indicated when this was likely to take place.
- [8] When considering both the urgency of this matter and the merits of the application the Court as upper guardian of minor children must give primary consideration to the best interests of the child and is guided in this regard by the factors set out in Section 7 of the Act. This provision reflects the factors set out in the judgment of King, J in *McCall v McCall*¹ and which must guide the court in determining which of the parents is better able to promote and ensure the physical, moral, emotional and spiritual welfare of the child. Some of the factors mentioned in this judgment which provide guidance to the present case include² :
- a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
 - b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
 - f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
 - i) the stability or otherwise of the child's existing environment having regard to the desirability of maintaining the status quo;
 - k) the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration
- [9] In the case where parental custody and access is being judicially determined for the first time, as is the case in this matter, there is no onus in the sense of evidentiary burden, or so called risk of non persuasion, on either party. (see *B v S3*).

[10] It is not in dispute that W had stability and happiness in his custody arrangements to date with the second applicant. The only criticism in this regard relates to his level of development and manners. Any change in this long term and primary caregiving relationship would have to be in the best interests of the child. However from the first respondents' averments it is not

clear that this has indeed taken place.

[11] It is common cause that the W has been removed from his paternal grandmother's house to his maternal grandmother's house, both of whom reside in towns some distance from where the first respondent lives. When asked to clarify how this was to the benefit of W, respondents' counsel explained that it would be easier for first respondent to visit the child at her mother's house, in Alexandria than at the second applicant's house in Pearson, because she did not have a good relationship with the second applicant. This might have been a good reason if the second respondent had developed a close relationship with the child over his life. However the respondents do not depose to facts suggesting the nature and depth of the care giving relationship between the second respondent and W.

[12] Over the past four years, and up until he was removed from second applicant in December 2010, first respondent only spent a few weeks in the December vacations with W and did not spend the 2009 December vacation with him. She did not visit him otherwise

due to financial reasons while she was studying in Port Elizabeth and he was living in Pearson. No facts are set out to suggest that second respondent spent any time developing a relationship with W over this period. W has therefore been removed from the custody of a person who has been his primary caregiver for a period of four years to the custody of a person with whom he could only have had contact for a matter of a few weeks at most at the end of the years 2007, and 2008. This suggests that serious disruption has taken place to the primary care giving relationship in this very young child's life. First Applicant suggested that more time could now be spent by the first respondent visiting W more regularly in order to develop a deeper relationship with him. He argued that although she had commenced working in August 2010 and indicated that she was well remunerated, she did not visit W until December 2010 when she removed him mala fide. This argument has merit.

[13] The current arrangement appears to have been motivated largely by convenience for the first respondent rather than the best interests of the child. There is no certainty as to what long-term arrangements will be made for W and when and under what conditions he might come to live with his mother. If arrangements remain unchanged W will remain in the custody of a person the nature of whose relationship with him has not been disclosed in any useful detail to the court. The relationship with his brother is also not described in sufficient detail for the court to evaluate it, though it is given primary importance in motivating for the continued

residence of W at second respondent's house.

- [14] The facts before this court demonstrate the proven stability and well being of the care giving arrangements for W with second applicant. He is a very young child. The stability of the child's living environment is recognised as a core issue in determining his or her best interests. The stability of Ws's long term living arrangements has been disrupted in a manner which was not planned and carried out with the consent of all the parties to this application. These changes were not effected in a way that would have made it possible for all concerned parties to know what his current and future arrangements will be. There is uncertainty, as a result of lack of information regarding the quality of his current care giving arrangements. In these circumstances the court is not able to determine how W's best interests are being served and the Court would be remiss to allow this situation to continue unhindered.
- [15] The applicants submitted that it would be in the best interests of the child for a provisional order of custody to be made pending an investigation by the Family Advocate as to the long term custody arrangements for W .
- [16] Given the tender age of the child, the uncertainty of his current circumstances and the potential detrimental effect of a disruption in the stability and security of his home and family circumstances, I consider this matter to be urgent. Over the past four years W has only spent intermittent periods residing with the first applicant, who lives in Pretoria. His primary place of residence has been in Pearson with second applicant. In the light of the facts and circumstances set out above, W's best interests would be served by him being returned to live with second applicant subject to rights of visitation and reasonable access afforded to his parents, pending the finalisation of an inquiry by the Family Advocate into his circumstances and suitable future contact and care arrangements.
- [17] It is ordered that:
1. a) that the full rights and responsibilities as set out in section 18 (2) of the Children's Act, 38 of 2005 be granted to first applicant and first respondent;
 - b) that the permanent place of residence of the minor child be granted in favour of second applicant subject to the first applicant, and first and second respondent's right of reasonable contact;
 - b) that specific parental rights and responsibilities in respect of contact with the minor child as set out in section 18 (2)(b) of the Children's Act 38 of 2005 be granted to first applicant and first respondent on the following conditions:
 - (i) that the first applicant and first respondent may remove the minor child once per year for a three-week period during the short school vacations, commencing with the first such vacation being allocated to first applicant and thereafter rotating the vacations between the between the parties ;

- (ii) that Christmas and New Year vacations be rotated between the first applicant and first respondent on a yearly basis commencing with the 2011 vacation being allocated to the first respondent;
- (iii) that first respondent and first applicant may have reasonable telephone contact with the minor child at reasonable times;
- (iv) that such visitation and contact rights be exercised in such a manner that does not interfere with the minor child's scholastic, sports, religious and social activities;
2. That paragraph 1 above is ordered pendente lite, pending an inquiry by the Family Advocate;
 3. That the application be postponed sine die with the further provision that when the report of the Family Advocate becomes available or if there is any change in the circumstances in respect of the minor child, the application can be enrolled again;
 4. That the first respondent file her answering application within 10 (ten) court days after the report of the Family Advocate becomes available.
 5. That after the report of the Family Advocate becomes available, any of the parties may file such supplementary affidavits as may be necessary arising from the report.
 6. Costs are reserved.

ANGELA ANDREWS

ACTING JUDGE OF THE HIGH COURT

DATE HEARD : 24 FEBRUARY 2011

DATE DELIVERED : 3 MARCH 2011

For the Plaintiff : ADV HUGO

Instructed by : NEVILLE BORMAN & BOTHA

GRAHAMSTOWN

For the Defendant : ADV J VAN ONSELEN

Instructed by : JUSTICE CENTRE

69 HIGH STREET

11994(3) SA 201

2At 205 A

31995(3) SA 571(A) at 584H- 585B

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