

SOUTH AFRICA / JUDGMENT

Hendricks v Thomson (34519/2008)

[2008] ZAGPHC 276 (2 September 2008)

[2008] ZAGPHC 276**COURT**

High Courts - Gauteng

BEFORE

P.Z. Ebersohn

CASE / FILE NUMBER

34519/2008

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO.: 34519/2008

In the matter between

HENDRICKS, DARRYL Applicant

and

THOMSON, JENNY Respondent

CORAM: EBERSOHN AJ

DATE HEARD 8TH AUGUST 2008

JUDGMENT HANDED DOWN ON 2nd SEPTEMBER 2008

JUDGEMENT

EBERSOHN AJ.

- [1] The applicant is the biological father of a child N who was born on the 4th August 2005. The respondent is the biological mother of N. The parties are not married.
- [2] The applicant approached this Court on an urgent basis for an order to the effect that the primary care and residence of N be granted to him with immediate effect and also for ancillary relief.

- [3] In the founding affidavit the applicant set out that the purpose of the application was to safeguard the interests of N, with his special needs and chronic disease, with immediate effect, against harmful practices by the respondent and to protect N's health. He also stated that N, like all children, have a right to a healthy diet and to basic nutrition and be protected from maltreatment and neglect and to have basic health care services and that the respondent violated this right of N.
- [4] The applicant then gave particulars regarding the state of N's health, the alleged maltreatment of N on the part of the respondent, that he suffered from a chronic disease namely Diabetes 1 to such an extent that he required special medical care, therefore the urgent application.
- [5] The respondent vehemently denied the allegations against her and filed supporting affidavits.
- [6] It is clear that with regard to N the Court can, at this stage, make only an interim order.
- [7] The Court is faced with certain facts:
- a) N was diagnosed with Diabetes 1 in his first year and his condition did not improve whilst being under the care of the respondent and he is markedly underweight and is clearly an ill child;
 - b) the respondent's financial position is not good;
 - c) N, at the time when the application was brought, had been with the applicant for a longish period and apparently his condition, whilst being with the applicant, has improved to the extent that it became stable and with blood glucose levels that is within the acceptable boundaries of his age and according to the applicant keeps on improving. The contents of the reports by Dr. Bevan, annexure DH4 to the founding papers, and by Dr. Snyman, annexure DH5, which was accepted by the respondent in her answering affidavit, supports this;
 - d) N needs special care and it is necessary that he be further examined and treated by experts;
 - e) being with the applicant does not put N's health, treatment and general well being at risk. In this regard I do not take into consideration that the applicant apparently is a wealthy man and can afford these formidable expenses.
- [8] It is necessary, in the best interests of N, not to disturb the status quo but to order that he be examined by experts and others, all at the expense of applicant, and to have their reports put before the family advocate who is to mediate on an urgent basis in the matter in terms of the provisions of section 21(3) of the Childrens Act, No. 38 of 2005.

- [9] After the mediation the report of the family advocate and copies of all the other reports, referred to in paragraph 8 of this judgment, and of such other reports that may have been obtained from any other source regarding N, and such supplementary affidavits the parties may wish to file, must be filed as a bundle with the Registrar of this Court and the matter may be enrolled for final determination by this Court on an urgent basis.
- [10] There is a further matter to deal with and that is the counterclaims of the respondent against the applicant. The first is the claim regarding the payment of a certain amount of money. The claim is disputed and this Court cannot decide it on the papers and absolution from the instance will be ordered with no order as to costs. The second counterclaim is relating to the return of a motor vehicle. Whether spoliation in fact took place is disputed by the applicant and has not been proven and absolution from

the instance will be ordered with regard thereto with no order as to costs being made with regard to this counterclaim too.

- [11] The Court's displeasure with the conduct of the respondent's legal representative, who at stages became emotional, aggressive and impertinent and apparently tried to intimidate the Court, was recorded on record in Court and must be recorded here too for the benefit of the Judge who is to hear the matter ultimately. He also dragged out the proceedings tremendously by unnecessarily attempting to lecture the Court at length about the Court's duty, he persisted in advancing irrelevant arguments and kept on repeating arguments. The Court had to warn him regarding his conduct. If there is a repetition of this unacceptable conduct the Court must consider awarding costs *de bonis propriis* against him in his personal capacity.

- [12] The following order is made:

1. Pending the final determination of this matter

1.1 the interim primary care and residence of the minor child N, be awarded to the applicant with immediate effect;

1.2 the respondent be granted contact with and access to N every alternative Saturday and Sunday from 9:00 to 17:00 as well as every Wednesday from 17:00 till 20:00 subject to the following provisions:

1.2.1 that the respondent visits the child N under the

supervision of her aunt A S L, at [] Middelburg, a home which the applicant must provide at his own expense in order for these visits to take place, or such other place provided by the applicant in Middelburg, where such visits may also be convenient for the respondent, in order for the contact to take place between the respondent and N;

1.2.2 that the respondent, or any party accompanying her, may not bring along, when making such contacts with N, any medication, foodstuffs including sweets, or any other edible goods, and/or try to give it to N, but she may feed him and give to him during such contacts, such edible goods the applicant may supply on the advice of N's paediatrician and/or dietician;

1.2.3 that the respondent, or any party accompanying her, may not remove, or try to remove, N from the address where the contacts take place;

1.2.4 that the respondent may make one telephone call per day at a reasonable time, not exceeding four minutes in duration to N which calls may be recorded and transcribed by the applicant if necessary and may be presented as evidence in the Court;

1.2.5 that the respondent, and the party accompanying her, must conduct themselves calmly during such contacts and telephonic conversations

with N and may not upset and/or try to influence N in any manner;

1.2.6 that the respondent and/or the party accompanying her may not inflict any harmful and/or any other practices, whether physical or psychological, upon N;

1.2.7 that should the respondent or the party accompanying her be in breach of any of the foregoing provisions, the applicant may approach this Court on an urgent basis to suspend the respondent's contact with N with immediate effect.

2. That the applicant be ordered to at his own expense:

2.1 have N examined and treated by a paediatrician who specialises in diabetes;

2.2 have N thereafter examined and treated in so far as may be necessary by a physician who specialises in diabetes;

2.3 have N examined by a dietician who must liaise with the paediatrician and physician referred to in paragraphs 2.1 and 2.2 hereof and such other experts the dietician may deem necessary;

2.4 have N examined and treated by such other experts the paediatrician, physician and dietician referred to in paragraphs 2.1, 2.2 and 2.3 hereof, may deem necessary;

2.5 have an independent practising social worker briefed to investigate the case and to interview the paediatrician, physician, dietician and other experts referred to in paragraphs 2.1, 2.2 and 2.3 hereof, and also such other experts she may deem necessary to interview, to collect their reports and to thereafter file their reports and her final report with the family advocate in Pretoria;

2.6 have copies of the record of the matter be given to the experts referred to in paragraphs 2.1, 2.2, 2.3 and 2.5 hereof.

3. The applicant is ordered to pay the fees and expenses of all the doctors and other experts and/or practitioners referred to in paragraph 2 hereof upon receipt of their accounts.

4. The family advocate is requested to mediate in the matter upon receipt of the social worker's report and the reports she obtained, and such other reports the family advocate may require, and to report on the matter to this Court and to, simultaneously, file copies of all the reports the family advocate have received in the matter with the Registrar and to make copies of his report and of all reports received in the matter, available to the parties hereto.
5. Leave is granted to the applicant to file a supplementary affidavit in the matter within 10 court days after receipt of copies of all the reports others may have prepared in the matter and leave is granted to the respondent to file a supplementary affidavit within 10 days after receipt of the applicant's supplementary affidavit and the applicant may file a further affidavit within 5 court days after receipt of the respondent's supplementary affidavit wherein the applicant deals with matters raised by the respondent. The parties may attach supporting affidavits to the supplementary affidavits.
6. Absolution from the instance is ordered with regard to the two counterclaims of the respondent against the applicant with no order as to costs with regard thereto.
7. The costs of the main application is reserved.

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

Applicant's counsel Adv. M. Barnard

Applicant's attorneys Malan Nortje Attorneys

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