

SOUTH AFRICA / JUDGMENT

**In Ex parte: Kearney; In re: Kearney
v Esterhuizen (19685/2014) [2016]
ZAGPPHC 1104 (23 November 2016)
[2016] ZAGPPHC 1104**

COURT

North Gauteng High Court, Pretoria

BEFORE

M W Msimeki

CASE / FILE NUMBER

19685/2014

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IN THE HIGH COURT OF SOUTH AFRICA,

NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 19685/2014

DATE: 23/11/2016

In the matter between:

In the Ex-Parte application of:

BAREND KEARNEYApplicant

In re:

BAREND KEARNEY.....Applicant

and

CHARNE

ESTERHUIZEN.....Respondent

J U D G M E N T

MSIMEKI J,

INTRODUCTION

- [1] On 10 March 2014, the applicant, on an urgent basis obtained an interim order for the primary care and residence of A. E. born on [.....] 2011 ("the minor child"). The urgent application consisted

of part A and Part 8. The interim order which was granted subject to an investigation by the Office of the Family Advocate and/or a report of the social worker relating to the best interest of the minor child and returnable on 16 May 2014 has been extended a number of times.

BRIEF BACKGROUND FACTS

- [2] The Family Advocate's report took time to reach the Court which ultimately ordered that an interim report be furnished by the Office of the Family advocate. The interim report would enable the Court to give an interim ruling on the care and residence of the minor child. On 30 June 2014 the Family Advocate issued the interim report which recommended that the status quo, as per the interim order remain. The final report was finally given on 13 August 2014. The final report recommended that "the respondent be granted primary residency of the minor child" and that "the applicant be granted specific parental responsibility and rights over the minor child which should be exercised as stipulated on (sic) paragraph (sic) 21.3.1 to 21.4.6". Subsequent to receipt and perusal of the final report, the applicant appointed two external and independent social workers, namely, Ms Ruth Ann Garb and Ms Lizette Labuschagne to again conduct investigations into the best interest of the minor child, A.. It is important to mention that the respondent, at the instance of her legal representatives, refused to co-operate with the two independent social workers and refused to be interviewed by either of them. This, according to the applicant's counsel, delayed the producing . of the reports which were only available during November 2014.
- [3] The applicant and the respondent were duly represented by Advocate K. Potgieter (Ms Potgieter) and Mr A. J Kotze respectively, when the matter was argued.

THE ISSUE

- [4] The issue is whether the prayers in Part B of the Amended Notice of Motion should be made final or, as Mr Kotze submitted, whether there is no need to interfere with the position as it was prior to the applicant's ex parte application.
- [5] In terms of paragraph 9 of the Interim Order granted on 10 March 2014, the applicant was granted leave to supplement his founding Affidavit insofar as it might become necessary. The applicant took advantage of the Court order and supplemented his papers. The respondent was also allowed to supplement her papers or to respond to the applicant's supplementary affidavits. It was submitted on behalf of the applicant that the respondent had not taken advantage of that. The respondent on 13 April 2015 requested an indulgence to file her supplementary affidavit and tendered the wasted costs. The respondent, according to Ms Potgieter, at the time their heads of argument were filed still had not responded to the applicant's supplementary affidavit.

[6] The applicant, together with his supplementary affidavit, filed a Notice of Intention to Amend Part B of the Notice of Motion dated 10 March

2014. Ms Potgieter submitted that the applicant's Amended Notice of Motion was deemed to have been duly consented to in the absence of an objection to such proposed amendment. The submission, in my view, appears correct. For completeness sake, Part 8 of the Notice of Motion before amendment read:

"1. Ordering Respondent, to forthwith, make available, to the Registrar of the above Honourable Court, the Minor child's Original Birth Certificate. This Order is to extend to any other related identity or travel related documents for the Minor child.

2. Upon receipt of the final report and recommendations of the Office of the Family Advocate and other experts instructed by either the Applicant or Family Advocate, a Final Order shall be sought in accordance with such recommendations.

3. The Respondent, shall take steps that may be necessary and shall sign all documentation, required, to register the Minor child's surname, with the Department of Home Affairs, as to bear Applicant's surname of "Kearney", same to take place within 5 days from date of Order granted by the above honourable Court. Failing compliance, that the Sheriff or his Deputy, be authorised and directed to take all steps necessary and to sign all the documentation that may be required to register the Minor child's surname as "Kearney".

4. Costs of the Application, only in the event of the Respondents opposing the relief sought herein.

5. Further and/or alternative relief."

Save for prayers 1, 3 and 4, Part B of the Notice of Motion, after amendment, reads:

"2. That a final order be granted in the following terms:

2.1 The Applicant and Respondent shall be co-holders of full parental responsibilities and rights in terms of Sections 18, 19 and 20 of the Children's Act, No 38 of 2005 in respect of A. E. (the "minor child") , subject to the minor child's primary residence vesting with the Applicant and subject to the Respondent's rights of reasonable contact to the minor child as follows:

2.1.1 For the first three months from date of service of this Court Order:

- a) the right to visit the minor child at the Applicant's residence from 09h00 to 15h00 every alternative Saturday;
- b) If applicable, the right to jointly celebrate the minor child's birthday at the Applicant's residence;
- c) Regular and reasonable telephone contact with the minor child.

2.1.2 After the expiration of the three month period as set out in paragraph 2.2.1 supra:

- a) If applicable, the right to remove the minor child on mothers day and the Respondent's birthday from 9h00 to 17h00;
- b) The right to remove the minor child every alternative weekend, either the Saturday or Sunday from 9h00 to 17h00;
- c) The right to visit the minor child at the Applicant's residence from 18h00 to 20h0 every Wednesday evening;
- d) If applicable, the right to remove the minor child on her birthday for a period of 5 (five) hours, which is to be arranged between the parties prior to the minor child's birthday;
- e) Regular and reasonable telephone contact with the minor child.

2.1.3 After the expiration of the three month period as set out in paragraph 2.2.2:

- a) The right to remove the minor child every affirmative weekend, from Friday 17h00 to Sunday 17h00;
- b) The right to remove the minor child on mother's day and the Respondent's birthday from 9h00 to 17h00;
- c) If applicable, the right to remove the minor child on her birthday for a period of 5 (five) hours, which is to be arranged between the parties prior to the minor child's birthday;
- d) Regular and reasonable telephone contact with the minor child.”

[7] The issue to be determined, as shown above, is whether the best interest of the minor child dictates that the interim order be made final or that the status quo as it was prior to the ex parte application remains intact.

[8] It is important to point out that the applicant is the biological father of the minor child while the respondent is her biological mother. The applicant is married to Mrs Kearney who currently lives with the applicant and the minor child.

[9] The Family Advocate's final report favours the respondent while the two social workers' reports (i.e.: Ms Garb and Ms Labuschagne) favour the applicant.

[10] Having perused the parties respective papers, it becomes evident that Ms Potgieter's submission that the factual issues in dispute are a classic case of "he said" and "she said", has merit.

[11] It is submitted by Mr Kotze, for the respondent, that Ms Garb's and Ms Labuschagne's reports do not come as a surprise as they both are paid for their reports by the applicant. This, in my view, is not necessarily so. Besides, the two have their professional ethics to contend with.

- [12] On the other hand, Ms Potgieter submitted that the respondent, apparently at the instance of their legal representative, has refused to participate in the investigation and interviews. Indeed, she has not participated although she was found by both Ms Garb and Ms Labuschagne at the applicant's residence while visiting the minor child. She, at one stage, was prepared to participate but later became unwilling to do so. One has to remember that there does not appear to have been participation on her side when Ms Garb and Ms Labuschagne were chosen and appointed. Her scepticism, having regard to what transpired in this matter, becomes understandable. It is also true that Ms Garb and Ms Labuschagne may have been very professional in their investigations and interviews but the fact remains that the respondent appears not to have been involved in their appointment.
- [13] Ms Potgieter criticises the Family advocate's final report on the basis that the Family Advocate neglected to take certain material factors into account when it conducted its evaluation and investigation. Ms Potgieter submitted that Ms Garb and Ms Labuschagne duly dealt with the issues in their reports.
- [14] It will be remembered that the respondent holds the view that the reports were expected to be as they are because Ms Garb and Ms Labuschagne were appointed and paid by the applicant. Although this may not be necessarily so, one cannot ignore the fact that the respondent had no say in their appointment by the applicant.
- [15] The court, as the upper guardian of minor children, has to pay due regard to the interest of the minor children when issues such as the Court is concerned with have to be determined.
- [16] Expert reports in these matters become very valuable in the determination of issues. First, because of what the parties say in their affidavits. Secondly, because the interests of the minor children are key to the determination of the issues. This matter, because of its uniqueness, is no exception. This is borne out by the provisions of Section 28 of the Constitution of the Republic of South Africa 1996.
- [17] The interests of the children are also properly covered by Section 7(1)(a) to 7(1)(g) of the children's Act 38 of 2005. The interests of the children have also been adequately dealt with in our case law to which I have been referred by both Ms Potgieter and Mr Kotze.
- [18] However, having regard to what I have discussed above, it is to me abundantly clear that for the interest of the minor child to be properly catered for, both parties have to cooperate and participate in the necessary investigations and interviews.
- [19] It is my duly considered opinion that the relevant experts in the field of matters such as this must be brought into the picture because their expertise is paramount in the determination of the issues.
- [20] Independent and external social worker and/or child psychologist mutually agreed upon between the applicant and the respondent should be appointed by both parties for a proper assessment and investigation into the welfare and best interest of the minor child.

Regard must be had to all the issues raised in the parties' various affidavits filed in this matter. The circumstances and relevant

factors of both parties must be duly considered in the process.

[21] It will be prudent, fair and just that the status quo in respect of the primary residence of the minor child and the respondent's supervised contact with the minor child, as per the interim order dated 10 March 2014 remain intact pending the receipt of the required reports by the Court and the parties and the determination of the issue by the Court.

[22] The applicant appears not to have involved the respondent when Ms Garb and Ms Labuschagne were appointed to conduct the investigations,

interviews and assessments to assist the Court in the determination of the vexed issue. The respondent too does not appear

to have done anything to inform the applicant that she too needed to be involved in the appointment of Ms Garb, Ms Labuschagne or any expert for that matter. It therefore, will be proper to order that each party pay their own costs incurred up and until date of this order.

ORDER

[23] The following order, In the result, is made:

1. For a proper assessment and investigation into the welfare and best Interest of the minor child A. E., an independent and external social worker and/or child psychologist, mutually agreed upon between the applicant and the respondent, Is to be appointed by both parties. During the assessment and Investigation regard must be had to all the issues that the applicant and the respondent raised in their various affidavits filed under the above case number as well as all the relevant factors and circumstances pertaining to both the applicant and the respondent
2. The applicant and the respondent are hereby ordered to participate and cooperate in the assessment and Investigation that the social worker and/or child psychologist appointed in terms of paragraph 1 above will carry out
3. The social worker and/or the child psychologist, after conducting the assessment and investigation, must prepare reports which will be furnished to the Court and the parties' legal representatives to enable them to finalise the matter.
4. Pending the assessment and investigation, the furnishing of the reports and the final determination of the matter, the status quo in respect of the primary residence of the minor child, Adelei Eaterhuizen as well as her supervised contact with the respondent, as per the interim order dated 10 March 2014, shall remain intact
5. Each party Is ordered to pay Its own costs Incurred up and until date of this order.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA

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