

SOUTH AFRICA / JUDGMENT

J v S (2016/13621) [2016]

ZAGPJHC 125 (24 May 2016)

[2016] ZAGPJHC 125

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala

CASE / FILE NUMBER

2016/13621

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2016/13621

In the matter between:

J B APPLICANT

(ID No: [8.....])

And

S S RESPONDENT

(ID No: [8.....])

J U D G M E N T

TWALA AJ

[1] On the 21 April 2016, the Applicant brought an ex parte application before Keightley J on urgent basis and was granted an order in the following terms:

1. The minor children:-

1.1 A R, a boy born on [...] May 2008 and currently 7 years old (hereinafter referred to as “A1”);
and

1.2 A R, a girl born on [...] September 2009 and currently 6 years old (hereinafter referred to as “A2”),

(hereinafter collectively referred to as “the minor children”)

Forthwith be returned to the care of the Applicant and that the minor children’s care and primary residency be restored with the Applicant with immediate effect.

2. In the event of the Respondent refusing to hand the minor children over to the Applicant, the Sheriff of the above Honourable Court is hereby ordered and directed to remove the minor children from the Respondent or wherever they may be found and forthwith place the minor children in the Applicant’s care.
3. Pending the final outcome of the Family Advocate’s investigation, an independent forensic assessment by social worker E L or such other suitable registered healthcare professional as may be agreed upon between the parties and the final determination of Part B of this application:-

3.1 The full parental rights and responsibilities in respect of the minor children is granted to the Applicant as contemplated by section 18(2) read with section 1, 18(3) and 20 of the Children’s Act, Act 38 of 2005 (hereinafter referred to as “the Act”) which rights shall inter alia entail that:-

3.1.1 The Applicant shall be the minor children’s primary caregiver;

3.1.2 The minor children’s primary place of residency shall be at the Applicant’s place of residence;

3.1.3 The Applicant shall be the minor children’s guardian.

3.2 The Respondent shall have the following specific rights and responsibilities in respect of the minor children:

3.2.1 The right to in terms of Section 18(2) have contact to the minor children under the supervision of the Applicant and/or the Applicant’s mother at the Applicant’s mother’s place of Residence at the plot situated at [...], Gauteng at such time as may be mutually agreed upon between the parties, unless otherwise recommended by E L after the assessment;

3.2.2 The right to in terms of Section 18(2) (c) in conjunction with the Applicant be a co-holder of guardianship in relation to the minor children.

4. The matter is hereby referred to the Family Advocate and the Family Advocate is hereby directed and requested to, as a matter of urgency, investigate what will be in the minor children’s best interests pertaining inter alia to the parties’ parental rights and responsibilities and contact rights, if any, and make recommendations to this Court in this respect.

5. Social worker E L, alternatively a suitable independent healthcare professional as may be agreed upon between the parties conduct a forensic assessment in relation to the minor child A2 regarding A2's possible oversexualised behaviour and report back to this Court.
6. The costs of Part A of this application are reserved pending the outcome of part B of this application.

[2]. Before me, is an urgent application brought by the respondent for an order in the following terms:

- a) Dispensing with the forms and services provided for in the Uniform Rules of Court and allowing the matter to proceed as an urgent application as is provided for in Rule 6(12) of the Uniform Rules of Court.
- b) That the Honourable Court reconsiders the order made in the ex parte application on 21 April 2016 and set the order aside with the restoration of the status quo ante as is set out in prayer 4 herein

below.

- c) Alternatively, that the Honourable Court, allowing the expedition of the hearing of Part B of the application, dismiss the application for the relief requested under Part "B" and instead order the return of the position as it truly were (the status quo ante) before the granting of the order in terms of portion "A" of this order namely:
- d) That the minor children:

I. A1, born on [...] May 2008, and

II. A2, born on [...] September 2009

Be returned to the respondent's care with immediate effect and that the minor children be primarily resident with respondent pending finalisation of the assessment of the minor children by the family advocate and Mrs E L

III. Both parties are to remain co-holder of parental rights and responsibilities including guardianship subject to the following:

- (1) The minor children are to reside with the respondent pending finalisation of the reports;
- (2) The Applicant shall have reasonable rights to access the children under the supervision of his mother, and
- (3) That the matter of interim contact and care, after finalisation of the reports proceed as part of the Rule 58 proceedings that is pending in Kagiso Regional Court.

IV. Costs of the application.

- [3] Due to the urgency of the matter, I granted orders B and D of the Respondent's notice of motion on the day of hearing of the matter. My reasons for such an order will appear hereunder.
- [4] It is common cause that the parties were married to each other out of community of property in terms of a duly registered Antenuptial Contract in Johannesburg on the 2nd March 2013 and the marriage still subsists. There are two minor children born of the marriage between the parties, namely:-
- I. A1, a boy, born on [...] May 2008;
- II. A2, a girl, born on [...] September 2009.
- [5] On the 17 March 2016 the respondent instituted divorce proceedings out of the Regional Court for the Regional Division of Gauteng held at Kagiso. The applicant filed its notice of intention to defend the divorce action. On the 24 March 2016 it was agreed between the parties that a roundtable meeting will be held on the 20 April 2016. It was further agreed that the applicant will exercise his rights of access and contact with the children only under supervision by his mother and the respondent will collect them after each visit.
- [6] Applicant contends that the respondent has unlawfully removed the minor children and kept them out of school on the 18 March
2016. On the 18 April 2016 he received an e-mail from the after school teacher informing him that the minor children have not been attending school for the past five (5) days. He then approached his lawyers and instructed them to bring an ex parte application.
- [7] It is the applicant's contention that the respondent left the common home in 2013 and left the minor children in his care. Respondent is living on a farm with a man known as Norman and they are using dependence drugs. He admits that he was also using drugs but has since stopped. On the 16 April 2016 Norman refused him access and contact with the minor children.
- [8] The respondent contends that she left the common home with the minor children only in August 2015. She initially left the common home with the children in 2013 but returned because the applicant was unstable and threatened to commit suicide. She did not stay for long in August 2015 as the applicant continued using dependence drugs and was abusive and assaulting her every time he was under the influence of the drugs. However, the applicant had easy and unsupervised contact with the minor children. They sometimes slept over at his place.
- [9] It is contended further that applicant's girl-friend informed the respondent that she suspects the applicant is abusing the minor child A2 because she has become overly sexualised. Respondent had also noticed the changed behaviour of the minor child and instructed her attorneys to arrange that the applicant should have supervised contact with the children. The children have at all times been in the primary care of the respondent. Although she

lives forty (40) kilometres from the children's school, she brings them to school in the morning and collects them in the afternoon since she works only four (4) kilometres from the school. She admits having used dependence drugs but has stopped using the drugs in January 2016.

- [10] After observing the changed behaviour of the minor girl child and having made the arrangements for supervised contact, the parties started negotiating as to which healthcare professional should they engage to assess the minor child. On the 20 April 2016 the respondent issued and served on the applicant an application in terms of Rule 58 of the Regional Court for the maintenance of herself and minor children pendent lite. This application was served on the attorneys of record for the applicant on the 20 April 2016. She was surprised that the applicant would approach the Court ex parte the next day when they both have attorneys on record. Applicant did not take the Court into his confidence and placed all the material

facts before it.

- [11] Counsel for the respondent contends that the applicant did not place all the material facts of the matter before the Court when he brought the ex parte application. Applicant deliberately misled the Court by alleging that he was the primary care giver of the minor children and that they were taken out of school by the respondent. The children were only absent from school for two (2) days because they had a flu buck. Had the respondent been aware of the ex parte application, she would have brought all these facts before the Court including that the applicant is one of the suspects for abusing the minor child, A2 – hence the arrangement for supervised contact with the children. The children have always been in the care of the respondent but would visit the applicant and sleep over at his house. He was never a primary care giver of the children.

- [13] It is apparent from the papers that the marriage between the parties has been a rocky one. Both parties have admitted to using dependence drugs although both claim to be clean of the drugs now. Drugs are destroying our society. With married couples, drugs are not only destroying the marriage but have adverse effect on the minor children. Drugs go to the core fabric of our society and it is time for the society to decisively deal with the situation.

- [14] Rule 4(1)(aA) of the Uniform Rules of Court provides as follows:

“Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.”

- [15] I agree with the Counsel for the respondent that the applicant failed to take the Court in his confidence when he brought this application on ex parte. The attorneys for the respondent served the attorneys for the applicant with an application for relief pendente lite on the 20 April 2016. On the 21 April 2016 the applicant approaches the Court on urgent basis per ex parte application without serving the application on the respondent's attorneys of record.

This, in my view, was deliberate and intended to mislead the Court without giving the respondent an opportunity to answer to the case of the applicant.

- [16] It is absurd for applicant's Counsel to argue that the Court directed them to serve and they served the ex parte application by e-mail on the respondent when in fact they e-mailed the application to the respondent's work e-mail address after 16H00 when they knew she had already left work at 16H00. There is no explanation why applicant did not serve or e-mail the ex parte application to the attorney on record for the respondent. Further, applicant did not attach the Rule 58 application to its papers nor inform the Court about it whereas the application was served on his attorneys the previous day. Applicant was selective as to what he presents to the Court so that he could obtain the order. He deliberately withheld information from the Court.
- [17] Applicant does not tell this Court why he did not take action to restore the status quo ante when the respondent hijacked the children on the 17 March 2016. Instead he instructs his attorneys to conclude an agreement with regard to his contact with his children. On the 24 March 2016 he agrees to contact with his children under the supervision of his mother. That is after he has been served with the divorce summons. The school reopened on the 5 April 2016 but still he did not fetch the children from the respondent as he alleges that he was living with the children since the respondent left them in 2013. He made the Court to believe that he was galvanised into action because of the e-mail he received from the after school care teacher on the 18 April 2016.
- [18] I therefore conclude that the applicant was galvanised into action when he received the Rule 58 application on the 20 April
2016. He wittingly failed to attach the rule 58 application to his ex parte application – thus withholding that vital information from the Court. I am of the view that had the applicant placed all the facts before the Court including that he was exercising contact with the children under supervision from his mother, the Court would not have granted him the order.
- [19] In the circumstances, I confirm the orders as I granted in paragraph 3 supra, as follows:
- A. That the order granted ex parte on the 21 April 2016 is hereby set aside and the status quo ante restored;
- B. Applicant to pay the costs of the application.

TWALA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of Judgment: 24 MAY 2016

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