
SOUTH AFRICA / JUDGMENT

J.B.J and Another v C.L.D and Another (3996/2017) [2017] ZAECHGC 121 (14 November 2017) [2017] ZAECHGC 121

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe, JM Roberson

CASE / FILE NUMBER

3996/2017

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 3996/2017

In the matter between:

J. B. J.

First Applicant

(Biological father)

I. M.

Second

Applicant

(Biological Mother)

And

C. L. D.

First Respondent

THE LEARNED MAGISTRATE NOMINE

OFFICIO IN THE CHILDREN'S COURT FOR

THE DISTRICT OF ALBANY IN CASE

NUMBER 14/1/4 – 6/2016

Second Respondent

REASONS FOR ORDER

BESHE J:

[1] Sitting with Roberson J on the 12 September 2017 and having heard Advocate Smuts SC counsel for the applicants and Advocate Sephton and Advocate Finn for the first respondent and Ms H. for the minor child, we reserved judgment. Thereafter on the 13 September 2017 we issued an order in the following terms with

reasons

to follow:

“1. THAT the applicants’ non-compliance with the Rules of Court relating to service, time periods and forms be and is hereby condoned.

2. THAT the decisions of the second respondent of the 4th of September 2017 to

2.1 set aside the parental plan signed by the Applicants on the 30th and 31st August 2017;

2.2 not uphold the first applicant’s application to be appointed primary carer of P. G. M. in terms of the parental plan;

2.3 to dismiss the first applicant’s application that P. G. M. be returned to the second applicant within 48 hours of the granting of an order, alternatively, for a period deemed meet by the Children’s Court;

2.4 to extend the order granted by agreement on the 21st of July 2017;

be and are hereby suspended pending the finalization of the applicants’ review of the decisions of the second respondent dated 4th of September 2017.

3. THAT the first respondent be and is hereby directed to return P. G. M. to the second applicant within 48 hours of the granting of this order, pending the finalization of the applicants’ review application against the second respondent’s decisions of the 4th of September 2017.

4 THAT the Applicants be and are hereby directed to institute the aforesaid review proceedings against the decisions of the second respondent of 4th September 2017 within ten (10) days of the date of this order, or such longer period as may be agreed between the parties, failing

which the interdict and prayers (2) and (3) above shall finally lapse.

5. THAT there is no order as to costs.
6. THAT reasons for this order are to follow.”

The following are those reasons.

- [2] To a large extent the order we issued mirrors the relief sought by the applicants in their amended notice of motion. The application stems from the applicants’ dissatisfaction / unhappiness with an order that was issued by the second respondent sitting as a Children’s Court. In the said order the second respondent inter alia dismissed the first applicant’s application that the minor child be returned to the second applicant by the first respondent. The order that was sought by the applicants which we duly issued is of an interlocutory nature. It was sought pending the finalisation of applicants’ review application of second respondent’s decision as aforementioned.
- [3] The background facts to this application are succinctly set out by the minor child’s representative, Ms H. in her heads of argument. The applicants (J. and M.) are the biological parents of the minor child. First respondent is the minor child’s non-biological mother. She is currently

married to the second applicant. Albeit that their relationship has broken down and they live apart or have separated. The main

application is for primary care of the minor child and was brought by the first respondent (D.) before the Grahamstown Children’s Court. The basis for the application by D. is that M. is unable to provide for the day to day needs of the minor child and that therefore it would be in the child’s best interest to primarily reside with D.. The minor child in question is two (2) years old. The matter was first heard on the 26 May 2017 during which proceedings D. and M. agreed that the latter would retain primary care of the minor child pending the finalization of D.’s application. This agreement was made an interim order of the court. The matter was postponed to 23 June 2017. It was on this date that first applicant (J.) entered the fray. Not only did he attend the proceeding, he also opposed D.’s application for primary care in respect of the minor child. He also made a counter application for the primary care of the minor child to be awarded to him. Parties having agreed to undergo psychological assessment to determine their suitability to raise the minor child, the matter was postponed to the 21 July 2017 for a progress report in this regard. It was also agreed that the interim order granted on the 26 May 2017 be extended. On the 21 July 2017, in J.’s absence, D. applied for the variation of the interim order of 26 May 2017 which was to the effect that M. would retain primary care of the minor child. M. did not oppose the variation application. The order was varied awarding primary care to D. in the interim. The matter was then postponed to the 18 August 2017.

- [4] On the 18 August 2017 a number of assessment reports had come to hand. The following, amongst other things, emerged from the reports:

According to Doctor Rauch, a social worker, M. and D. have a complicated, conflictual relationship.

J.'s psychological and psychological circumstances are more favourable to be a primary care giver of the minor child.

D. should be part of a well-structured transition for the minor child.

[5] According to clinical psychologist, Ms Andrews' report, J. had no psychological personality features.

The minor child has been exposed to the dysfunctional relationship between M. and D..

M. and D. have a pathological relationship which results in the latter interfering with M.'s contact with the minor child.

It would be in the best interest of the minor child that he child resides with J. as soon as possible.

D.'s involvement in the minor child's life should be determine by further testing and a process of assessment by a clinical psychologist.

[6] Ms Damana who is a Child Welfare Social Worker reports that the minor child in question is not a child in need of care and protection. She recommends that the interim order granted on the 26 May 2017 should remain in force until the matter is finalized.

[7] A further report submitted by a social worker from the Department of Social Development for the Western Cape Government makes a recommendation that J. should remain involved in the minor child's life through a parenting plan.

[8] Applicants assail the decision made by second respondent on the basis that it is wrong in law and not based on any facts that support her decisions and as not being in the best interest of the child. That to this end they will accordingly seek its reviewal and setting aside

[9] The application before us was opposed by the first respondent on the basis inter alia that the matter is not urgent, if urgent the urgency is self-created. The fact that arrangements have been made for the minor child to move to Stellenbosch in early September should not be taken into consideration. First respondent also contends that these proceedings

have been improperly brought. Applicants approached this court instead of seeking a variation of the Children's Court order in terms of Section 46 (2) of the Children's Act 38 of 2005. That this application has been brought to circumvent the Children's Court process. It was also contended that the applicants have not met the requirements for the granting of interim relief. And that there are no prospects of the application for review succeeding. Further that it would not be in the best interest of the minor child to be removed from first respondent who has been the minor child's primary care giver throughout the minor child's life. First respondent also contends that first applicant is yet to acquire full parental rights in respect of the minor child as provided for in Section 21(1) (b) of the Children's Act. Alleging that he has not contributed to the minor child's upbringing and has not exercised any regular visitation rights in respect of the minor child.

[10] Second respondent gave notice to abide by the court's decision.

[11] The representative for the minor child in her submissions refutes the contention that J. does not have parental rights, and counters that he acquired same in terms of Section 21 of the Act. She submitted that M. has full parental rights in respect of the minor child in terms of Section 19 of the Act. She argues that D. is the one who does not have parental rights and responsibilities in respect of the minor child in view of the fact that the formalities

required by Section 22 of the Act have not been met. Further that the second respondent erred in finding that M. extended parental rights and responsibilities to D. by agreeing to an interim arrangement with her in respect of the minor child. According to her, it is in the best interest of the minor child to be placed in J.'s care.

[12] As rightly pointed out by counsel for the first respondent, these proceedings do not concern the substantive review of the Children's Court Order sought to be reviewed by the applicants in due course.

[13] Applicants as well as the representative for the minor child express misgivings about the manner in which the matter was dealt with in the Children's Court. Irregular and irrational conduct is imputed to the Children's Court proceedings sought to be reviewed, inter alia, in that first respondent was at some stage granted leave to remove the minor child from Grahamstown to Mossel Bay without notice to all the parties. The Children's Court ignored evidence of expert witnesses and extended the varied interim order. As well as by setting aside the parental plan signed by the applicants. Also by not upholding first applicant's application to be appointed the primary carer of the minor child.

[14] Ms H. rightly pointed out in addition that, in light of these difficulties encountered before the Children's Court, the applicants are entitled to approach this court as the upper guardian of minor children. I am inclined to share this sentiment. In my view in the circumstances the remedy that is open to the applicants is to seek a review of the Children's Court's decision. That is circumstances where it is contended that the decision was not in the best interest of the minor child and where irregular conduct was imputed to the Children's Court, to me it would defy logic to go to the same Children's Court to seek a

variation of its order. This court, as the upper guardian of all minor children has a duty to determine what is in the best interest

of the minor child and to make orders to ensure that the best interests of the minor child are properly served. This is especially

so, in my view, because matters concerning minor children are by their very nature urgent. See Section 6 (b) of the Children's Act. The applicants were justified in seeking this court's urgent intervention to safeguard the interests of the minor child in question. If regard is had to experts' reports in this regard, the best interests of the child seem to lie not with being cared for by the first respondent but with the first applicant, who is said to be in a psychologically and psychosocially better position to provide for the emotional and physical needs of the minor child.

As opposed to M. and D.. It would be understandable for the applicants to apprehend that the minor child would suffer harm should they continue to reside with D.. Applicants do in fact express their fear that the minor child will suffer irreparable psychological harm as a result of the toxic

situation / relationship between second applicant and first respondent if the relief sought is not granted. See paragraph 97 of

the founding affidavit. I am satisfied that the applicants have established that they have a prima facie right that needs to be protected.

[15] In my considered view the applicants have made out a case for the interim relief they seek. It was for these reasons that the order of the 13 September was issued.

N G BESHE

JUDGE OF THE HIGH COURT

ROBERSON J

I agree.

JM ROBERSON

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Date Heard

: 13 September 2017

Date of Order

: 13 September 2017

Date Reasons made available : 14 November 2017

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