

SOUTH AFRICA / JUDGMENT

JDL v FNR (36807/2021) [2021] ZAGPJHC 135 (20 August 2021) [2021] ZAGPJHC 135

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

36807/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case No: 36807/2021

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

DATE:

20 August 2021

In

the matter between:

JDL

Applicant

and

FNR

Respondent

JUDGMENT**WILSON AJ:**

1 Until recently, the applicant (“Mr. L”), the respondent (“Ms. R”) and their three-year-old child, (“H”), lived together the parties’ marital home in Germiston. Mr. L and Ms. R separated on 28 July 2021, when Ms. R left the marital home with H. Ms. R relocated to a house in Alberton with H, where she shares her abode with DT (“Mr. T”).

2 Mr. L was, perhaps understandably, aggrieved by Ms. R’s vacation of the parties’ home with H. Mr. L was, on anybody’s version, unaware of where Ms. R and H now live until Ms. R’s answering affidavit was filed, on 12 August 2021.

3 On Tuesday 3 August 2021, Mr. L instituted an urgent application in which he sought an interim order granting him sole custody of H, along with orders drastically limiting Ms. R’s contact with H, and supervising the nature of that contact when it occurs. That order was intended to operate pending an application for final relief, to be enrolled once the Family Advocate has issued a report on H’s best interests, and their consequences for the custody and contact regime then to be implemented. The application was served by way of e-mail and WhatsApp on Ms. R.

4 On 6 August 2021, the matter came before my brother Antonie AJ. Ms. R appeared in person. Antonie AJ granted an order substantially in the terms Mr. L requested, but only pending a return day before which Ms. R would be entitled to file an answering affidavit. I do not know whether Antonie AJ gave reasons for that order, but none were provided to me.

5 On the return day, 17 August 2021, the matter was argued before me, with the benefit of affidavits and written submissions from both parties.

6 As is often the case in matters of this nature, the papers in this case are replete with overheated, and often irrelevant, material, in which each party seeks to impugn the integrity and general trustworthiness of the other. It can never be emphasised enough that, in matters of this nature, a court has the delicate task of determining what is in the best interests of the children who are caught up in them. It does no-one, least of all the children whose well-being is at stake, any good to layer the papers with allegations of a purely rhetorical nature, or which accuse a party of outlandish behaviour without providing any primary facts from which the truth or falsity of those allegations can be inferred.

7 Still less does it credit legal representatives who find themselves co-opted into the habit of presenting the case in moral, rather than legal and factual, terms. While there is obviously an overlap between moral value and legal principle, very little of worth can ever be achieved, in matters of this nature, by encouraging a court to cast the parties as “good” or “bad” people, and to award custody to the “good” parent, as if it were a trophy.

8 I wish I could say that the legal representatives in this case completely avoided these pitfalls, but I cannot. At the hearing, it was necessary to concentrate the parties' submissions on relevant fact and law, and to discourage at least one or two unnecessary asides.

9 Once this case is stripped to its essential facts, it becomes a good deal simpler. But that simplicity only reveals the extent to which deciding custody matters in urgent court is significantly less than ideal. I know very little of relevance about Mr. L, Ms. R and H. Given what I know, I would ordinarily have been very reluctant to entertain this matter as an urgent application, or to disturb the status quo absent a clear and credible allegation that H faced imminent harm.

10 Be that as it may, Antonie AJ has already determined that the matter is urgent, and his order has been executed. Despite an invitation I issued during argument for the parties to come to an agreement on at least some of the issues between them, there is no agreement on what is best for H, and I must decide, at least as an interim matter, where her best interests lie. For the reasons I give below, it would neither be appropriate to dismiss the application and discharge Antonie AJ's order completely, nor to leave it entirely undisturbed.

H's best interests on the facts of this case

11 Section 7 of the Children's Act 38 of 2005 ("the Act") gives content to a court's duty, under section 28 of the Constitution, 1996, to give priority to a child's best interests. The factors it sets out must be considered where relevant. I do not propose to rehearse the extensive range of factors listed in section 7, but I will have regard to them where they appear to me to be relevant.

12 Both Mr. L and Ms. R have struggled in the past with drug addiction. They met in a drug rehabilitation facility, and, at the outset at least, their relationship appeared to provide a path out of addiction. In the papers before me, each party sought to convince me that the other has relapsed, and routinely uses drugs. Other than a short relapse that Ms. R suffered two years ago, which she admits – and which I do not regard as particularly relevant – I cannot accept any of these allegations.

13 What is important is that both parties have struggled with addiction, and will probably have to deal with a vulnerability to addiction for much of the rest of their lives. That being so, the social support network that they can rely on is critical, both to their well-being, and to H's. The strength and stability of such a network is clearly relevant to assessing whether either parent can meet a child's need, emphasised in section 7 (k) of the Act, for a stable family environment, or something that resembles such an environment as closely as possible.

14 It is this factor in the Act, together with the fact that I am convinced that I must disturb the status quo as little as possible, that leads me to the conclusion that it is in H's best interests to be as close to the familiar marital home as possible, and to an extended family that will support her.

15 It is plain to me from the papers that Mr. L can offer this, but that Ms. R cannot, at present, do the same.

16 Mr. L can rely on his mother, and other extended family members, to provide a caring support network for H in an environment that will be familiar to her.

17 Ms. R's only domestic support at the moment is Mr. T. There is no dispute that Mr. T is a recreational user of cannabis. There is absolutely no moral opprobrium to be attached to this. So long as it takes place in private, there is no legal penalty to be attached to it either. But that does not make it irrelevant in this case. Ms. R's history of addiction, and her lack of practical, reliable support from anyone who is not regularly using drugs, presents a significant risk to her ability to provide a stable environment for H. To that I must add that Mr. L has stable employment. The nature and stability of Ms. R's employment is not clear to me on the papers.

18 Finally, I have had regard to the fact that H's life has been severely disrupted at least twice in the last month – first by her departure from the marital home, and second by the execution of Antonie AJ's order. I do not criticise either Ms. R's decision to leave Mr. L or Antonie AJ's decision. I consider only that I can see no benefit, and a good deal of risk, to an interim order that would require H's primary residence to change again.

19 Having said that, I am not satisfied that Ms. R's contact with H should be limited to the extent that Mr. L seeks. There is nothing on the papers that justifies the conclusion that Ms. R should not have frequent and unsupervised contact with H. Mr. L was at pains to resist an order that would permit H to sleep over at Ms. R's current home. On balance, I am not convinced that there can be any real risk to H's wellbeing were I to permit unsupervised contact with Ms. R at her current home.

20 Mr. L entered a video into evidence which purports to show that H's urine tested positive for cannabis – presumably as a result of Mr. T's use of that drug. That video has no evidential value. It satisfies me of very little that is relevant to my decision. It is impossible for me to see from the video what the results of the test were. Ms. R and Mr. T accept that it is not appropriate for H to be exposed to drug use, and they undertake that this will not happen. I have no reason to doubt the reliability of these undertakings.

21 Much was made of a bruise H sustained while apparently in Ms. R's care. There is nothing in the evidence before me that suggests that the bruise was sustained during anything other than innocent play between H and a friend. I cannot, on the evidence, attribute what appears to be a very minor injury to mistreatment or unfitness on Ms. R's part.

22 H clearly has an interest in a stable and loving relationship with both of her parents. This is recognised in sections 7 (a) and

(b) of the Act. I am convinced that I should, insofar as I can, facilitate the continuation of that relationship by allowing H to see Ms. R in an environment of Ms. R's choosing, where she feels safe and relaxed. Ms. R says that she left Mr. L because he was physically and emotionally abusive. Her allegation of physical abuse is not substantiated on the papers – which is of course not the same as saying that it did not happen. I make no finding in that respect.

23 But what is clear from the papers is that Mr. L is capable of saying and writing things to Ms. R that I can only hope that he now regrets. It is not necessary for me to set out what these things are. It is only necessary for me to say that it is not realistic to require Ms. R's contact with H to be supervised by Mr. L, to take place only at Mr. L's home, or to be supervised by anyone who represents Mr. L and his interests. Ms. R must be free to interact with H in an unforced manner that affirms their relationship, rather than risks their alienation.

Costs

24 Neither party asks for the costs of Part A. Mr. L asks that they be reserved for Part B. To avoid the risk of immiserating one or other party, or to generating a perception, however unfounded, that there has been a "winner" and a "loser" in this application, I do not think any costs order should be made at all. I hope it is not naive to foresee a time when the parties will be able to decide on, and give effect to, H's best interests without court intervention. I strongly encourage them to take the steps necessary to reach that stage as soon as possible.

Order

25 For all these reasons, I make the following order –

25.1 Pending the determination of Part B of this application –

25.1.1 The parties will jointly exercise their parental rights and responsibilities in respect of H under the Children's Act 38 of 2005.

25.1.2 H will reside with the applicant.

25.1.3 Ms. R shall have in-person contact with H, at Ms. R's home, at the marital home, or at any other location agreed between the parties –

25.1.3.1 Every alternate weekend between the hours of 15h00 on Friday and 15h00 on Sunday.

25.1.3.2 Every Wednesday and Thursday between the hours of 15h00 on Wednesday and 15h00 on Thursday.

25.1.3.3 The contact hours set out above may be varied by agreement between the parties.

25.1.4 The Family Advocate is directed forthwith to conduct an investigation into H's best interests, specifically in respect of care, contact with her parents, and primary residence. The report is to be filed with the Registrar and delivered to both parties as soon as it is available.

25.2 Part B of the application is postponed sine die.

25.3 There is no order as to costs.

S D J WILSON

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 20 August 2021.

HEARD ON:

17 August 2021

DECIDED ON:

20 August 2021

For the Applicant: H Scholtz

Instructed by Alers van Aardt Bester Attorneys

For the Respondent: J Swanepoel

Instructed by Brider & Associates

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