

SOUTH AFRICA / JUDGMENT

L and Others (20403/2015), R v [2015] ZAGPPHC 777 (12 November 2015)

[2015] ZAGPPHC 777

COURT

North Gauteng High Court, Pretoria

BEFORE

Mali

CASE / FILE NUMBER

20403/2015

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DATE: 12/11/15

CASE NO: 20403/2015

REPORTABLE

OF INTEREST TO OTHER JUDGES

In the matter between · ·

B. R.

APPLICANT

and

M. L.

FIRST RESPONDENT

E. L.

SECOND RESPONDENT

K. L.

THIRD RESPONDENT

J U D G M E N T

MALI AJ:

- [1] This is an application for the return of the minor child A. A. L. ("the minor child") to the applicant by the respondents.

That the minor child's primary residence vests with the applicant subject to the first respondent's reasonable rights of contact and that the applicant and the first respondent shall share equal parental responsibilities and rights over the minor child.

- [2] The minor child was born on [.....] 2013 between the applicant and the first respondent. The applicant and the first respondent were unmarried to each other.

- [3] The applicant is currently employed as an Assistant teacher at Wonderland Pre- School in Polokwane. The first respondent resides and works in Polokwane as a Financial Advisor at Attooh Discovery. The

second and third respondents are -pensioners and are-the-parents of the first respondent. The first respondent stays in a separate apartment at his parents' property.

- [4] The applicant and the first respondent met on or about July 2012 and had a brief relationship. On or about 20 August 2012 it emerged that the applicant was pregnant with the minor child. It is not in dispute that the first respondent initially denied paternity and wanted the applicant to abort the minor child. The applicant refused to undergo abortion. The first respondent later reconciled with the situation and even attended the birth of the minor child in Jeffrey's Bay, Eastern Cape where the applicant's parents reside.

- [5] Approximately two weeks after the birth of the minor child the applicant travelled to Polokwane with the minor child. The applicant

and the minor child stayed with the first respondent in the property of the second and third respondents. Later the first respondent and the applicant could not get along but the applicant continued her stay at the first respondent's parents' home.

- [6] The applicant soon found the living conditions with the respondents unbearable. According to the applicant this was due to the second and third respondents controlling attitude over her and the interference with her handling of the minor child. The applicant informed the first respondent that she was unhappy with the living circumstances at his home and intended to move back to Jeffrey's Bay with the minor child. The applicant later learnt that the first respondent had obtained an ex parte interim order from the Children's court in Polokwane. The order which had a return date of 21 August 2013 granted the primary custody of the minor child to the first respondent.

- [7] The order was extended -13 (thirteen) times since 21 August 2013 until 25 September 2014. For two occasions the court indicated that it had no jurisdiction over the matter. The first respondent

recorded their unwillingness to approach the High Court hence the applicant decided to approach this court. In between the

extensions of the interim order numerous experts' reports were required by the court including the report of a Family Advocate.

- [8] The issue to be determined is who is entitled to the primary residence and care of the minor child between the applicant and the first respondent.
- [9] Section 19 (1) of the Children's Act 38 of 2005 ("the Act") provides that the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. The section is in line with the common-law rule that a woman acquires parental authority over her child when she gives birth to the child. Section 21 (1) (1)
 - (b) of the Act provides that the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child if he, regardless of whether he has lived or is living with the mother -
 - (i) Consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
 - (ii) Contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
 - (iii) Contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
- [10] Section 21 (3) (a) of the Act provides that if there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professionals or other suitable qualified person. Section 21 (3) (b) of the Act provides that any party to the mediation may have the outcome of the mediation reviewed by a court.
- [11] The fundamental principle consistently applied by South African courts in custody disputes is entrenched in section 28 (2) of the Constitution, which provides that a child's best interests are of paramount importance in every matter concerning the child. See JACKSON v JACKSON 2002(2) SA 303 (SCA) at 307 i-308 A. See also P VP 2006 (5) SA 94 (SCA) at 99J.
- [12] The basis of the applicant's case is that although the Children's court granted the interim order for the primary custody and care of the minor child to the first respondent, the second and the third respondents are for all intent and purposes the ones exercising the primary custody and care over the minor child. Due to the unbearable living circumstances to the extent that the second and third respondents kept a journal recording the applicant's movements; towards the end of August 2013 the respondents instructed the applicant to move out of the main house to a separate residence on the same property without the minor

child. The respondents insisted that the minor child sleeps with the second and third respondent in their bedroom. The respondent's argument is that the applicant is an unfit and careless mother and that the respondents were only assisting her. The first respondent stated that the applicant at times requested their assistance. This has been confirmed as seen in the text messages.

- [13] The applicant further stated that the actions of the respondents were and designed to alienate her minor child from her, including the fact that the first respondent obtained the interim court order on ex parte basis. In *C AND OTHERS v DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT GAUTENG, AND OTHERS* 2012 (2) SA 208 (CC) at

8/32 it was stated:

"Section 28 (2) of the Constitution requires an appropriate degree of consideration of the best interests of the child. Removal of a child from family care, therefore, requires adequate consideration. As a minimum, the family, and particularly the child concerned, must be given an opportunity to make representations on whether removal is in the child's best interests".

- [14] The first respondent stated that the reason he obtained the order on ex parte basis is because the applicant was threatening to take away the minor child to Jeffrey's Bay. When the order was extended several times it was clear that the applicant was no longer taking away the child. By the first's respondent's own admission the applicant was improving and getting better. The applicant has since got employment in Polokwane.

- [15] On 21 August 2013 the return date of the interim order, the applicant appeared in the children's court in person. It was then agreed that a psychologist would be appointed, one Ms Pieterse. At that stage the first respondent had the primary care of the minor child but the second and third respondents being the ones who were and are still in charge of the minor child. The matter was then postponed to 14 October 2013. The applicant cooperated with Ms Pieterse, it was submitted on behalf of the applicant that Ms Pieterse was friends and or acquainted with the second and third respondents. The respondents could not dispute the applicant's averments.

- [16] On 2 October 2013 Ms Pieterse filed her report with the court; her conclusion was that both the applicant and the first respondent were not to be regarded as suitable parents. She made various recommendations including that the minor child's parents attend classes aimed at improving the skills in caring for the minor child. She further recommended that both parents live on the same property as the second and third respondents in separate apartments whilst the minor child leaved with the second and third respondents. The applicant and the second respondent would take turns to visit the minor child strictly under the supervision of the second and third respondents. It was submitted on behalf of the applicant that recommendations were strictly followed by the applicant whereas the first respondent could do as he pleased. This was not disputed by the respondent.

- [17] From the above it is clear that even the first respondent who supposedly had the primary care of the minor child could not exercise one. It is apparent that the primary care rested upon the second and third respondents. According to Ms Pieterse's recommendations the order was extended for a period of three months to ensure that the applicant and the first respondent obtain the requisite parental skills. On 14 October 2013 the matter was postponed to 2 December 2013 for the social worker to conduct the investigations.
- [18] On 2 December 2013 on the strength of the Social Worker's report the court found that the minor child is not in need of care and that the Children's court had no jurisdiction over the matter. The Social Worker had conducted a home visit and she reported that she could notice nothing negative on the applicant's side. In this regard the Family Advocate's report notes as follows: "the social workers were of the opinion that the child is not in need of care and protection and that the parents, especially the Applicant be given a chance to take care of her child". Nevertheless the Children's court extended the order and confirmed that the arrangement--as it- were-should prevail. At least-the- - matter could have ended there and then, resulting to the primary custody of the minor child reverting to the applicant.
- [19] No expert report found the applicant to be an unfit mother except for recommendations about parenting and or caring skills. This should be expected from a first time mother of applicant's age who was at her early twenties. She in fact followed through the recommendations to be better equipped to take care of her child.
- [20] During the process various experts and private doctors reports including that of Dr Verster were enlisted. The applicant had to pay half of the fees to Dr Verster on her meagre earnings. Dr Verster and Ms Pretorius who conducted home visits approved the applicant's property as suitable to live with her child. This is subsequent to her eviction by the second and third respondents on a 24 hour notice due to her failure to pay rent. She left without her child. It is the applicant's submission that she found this to be another way of alienating her from her child.
- [21] Ms Pieterse further recommended that the applicant attend basic parenting classes which led her attending a five week course with the minor child called "Baby Gym". The applicant stated that the second and third respondent continued with their interference even with this programme. They ended up being the ones who attended the graduation ceremony at the end of the course with the minor child. This is because they refused to allow the applicant to take the child to the ceremony. This is disputed by the respondents they state that the applicant requested their assistance.
- [22] I find it difficult to accept the respondent's version above. It is of no logic that the applicant who worked so hard to improve her parenting skills; that on a special day like the graduation of her minor child whom she had been attending classes with would simply entrust the attendance upon the people who_ appeared resolute on alienating her from her- child.

- [23] The interim order kept on being extended numerous for report upon reports whilst the applicant was granted visitation rights. It is not in dispute that Ms Pretorius, the Social Worker recommended in an open court that the minor child be placed in the applicant's care. Ms Pieterse in one of her reports noted that the applicant had a stronger bond with the minor child than the first respondent. The report also noted that the second and third respondents indicated that the applicant was a disruption in Amelia's life. On 23 February 2014 Ms Pieterse at page 55 of the bundle wrote "Amelia should be placed in care of Mr Lee's parents who have been her primary caretakers until now".
- [24] The above has not been disputed. It is not understood that subsequent to 2 December 2013 the court still continued to extend the order. Assuming that the applicant initially came across as unfit mother to anyone whether they mattered or not in the process; for the processes she had gone through should by now if not earlier have proven to anyone that she was/is indeed fit to have primary custody and care of her child. There is no evidence of any wrong committed by the applicant from the very first day the minor child was born.
- [25] Subsequent to the postponement of the matter on 20 January 2014 the applicant continued to visit the minor child. The second and third respondents continued with their intrusion and at times disallowing the applicant the activities she had planned for the minor child. The first respondent would also interfere with the visits despite him seeing the child on daily basis. It is further the applicant's submission that the alienation by the respondents went as far as cultural heritage as they would refuse the minor child to watch English programmes on television. They made it clear that she would be raised as "boeremesie". The applicant was ordered not to refer to the minor child as of Portuguese descent since the applicant is also one.
- [26] The respondents disputed the above submissions by the applicants, almost all the allegations are countered by the fact that they were merely assisting the applicant or were asked by the applicant for assistance. In my view people who are eager to assist do not evict the mother of their grandchild on 24 hour notice for failure to pay rent; and then order the mother to leave the child with them more especially in the peculiar circumstances prevailing.
- [27] The first respondent's basis for opposing the applicant's application is that he is a better parent than the applicant. Since May 2014 he had primary custody of the minor child. His parents look after the child during the day when he is at work. They never intended to alienate the child from the applicant. In the experts report there is no indication that he is an unfit parent, and that the family advocate's report indicate that the other is a good parent. In this regard the same report at 6.6. notes:

"The Applicant has indicated that she and the First Respondent descends from two different cultures (paragraph

5.24.4 of her Founding Affidavit) and it is respectfully submitted to the above Honourable Court that the minor child can only benefit from having and maintaining a strong bond with the Applicant as in the matter of *Chodree v Vally* 1996 (2) SA 28 (W) ..."

[28] The counsel for the first respondent further submitted that the first respondent did not want to subject the minor child to the life of uncertainty with the applicant. The experts' report including those of Dr Verster who inspected the living conditions of the applicant approved the suitability of the applicant's residence. The Family Advocate's report notes that the applicant is an Assistant Teacher at Wonderland Pre- school and that she is studying for a Diploma in Early Childhood Development. In my opinion that on its own is an indication that the applicant is capable of taking care of the kids. To be specific the minor child would benefit from a mother who works in a pre-school environment other than having the child left home with grandparents for no apparent reasons.

[29] One of the examples cited by the first respondent depicting the applicant as unfit or not a better parent is that once during the night she insisted on seeing the minor child whilst she was sick. This could be viewed either way in that, the applicant is a caring mother. She was anxious to see her sick child whom she was refused contact.

[30] It was further submitted that the Family Advocate's report is in favour of the first respondent. However in the Family Advocate's

report at page 8 paragraph 6.1 The Family Counsellor states " it is unclear to the undersigned at which point exactly the First Respondent took over the primary care of the minor child" At paragraph 7.4 page 11 the report further states " The Applicant and the First Respondent has a strenuous relationship. When they communicate with each other it always ends in quarrelling and fighting" At page 14 paragraph 10.4 it is stated "It seems that the minor child is settled in her current position of primary care with the First Respondent as supported by the Second and Third Respondents as they are important role players in the minor's child's life and separation from any of them will be traumatic for the minor child at this stage. The Applicant initially had limited contact with the minor child until her contact was extended gradually

[31] The above are recommendations which cannot be accepted. The manner in which the close bond between the minor child and respondents got achieved was through a court order that was unnecessarily extended. This of course gave the respondents unfair advantage over the applicants. The applicant is not a total stranger to the minor child. In my view the child could settle without difficulties with her mother.

[32] I cannot imagine any trauma greater than the separation of a child from her mother for the benefit of a certain set of grandparents. The applicant's argument that the first respondent is not the one taking care of the minor child is compelling. Considering the above the co-parenting plan recommended by the Family Advocate finds no place in casu. On findings of facts it is obvious that the first respondent's parenting role is delegated and extended to his parents to the detriment of the minor child.

[33] Having regard to the above I find that it is in the interests of the minor child that the primary custody be awarded to the applicant. The following order shall issue

1. The minor child A. A. L. shall be returned to the care of the applicant with immediate effect;
2. The applicant and the first respondent share equal parental responsibilities and rights over the minor child;
3. The children's court proceedings held at Polokwane under case number: 14/1/4-15 is hereby set aside.
4. The minor child's primary residence shall vest with the applicant subject to the respondent's reasonable rights of contact, inter a/ia as follows:

4.1 The first respondent shall have the right to remove the minor child every third weekend of every month from Friday until Sunday.

4.2 The respondent shall have the minor child with him every Father's Day, should this not fall together with a normal contact weekend of the First Respondent, from 08:00 to 16:00.

4.3 The first respondent shall have the right to remove the minor child on his birthday from 08:00 to 16:00.

4.4 The respondent shall have the right to remove the minor child on the minor child's birthday for a period 4 hours.

4.5 Once the minor child starts attending formal schooling (grade 1) the first respondent shall have the right to remove child for half of every school holiday and long weekends falling of school holiday shall rotate between the applicant and respondent .

4.6 Reasonable and age appropriate telephonic contacts.

5. The Second and Third respondent shall have the following rights of contacts to the minor child:

5.1 The right to remove the minor child every first weekend of every month from Friday until Sunday.

5.2 Reasonable and age appropriate telephonic contacts.

6. An order that Respondent return the following property to the Applicant:

6.1 Immunization record;

6.2. Baby thermometer;

6.3 Birthday and Christmas presents brought by the applicant; .

6.4 Grooming set;

6.5 Stuffed and educational toys;

6.6 Babies feeding utensils;

6.7 Old and current baby clothes and shoes;

6.8 All the necessities that the applicant purchased for the daughter

7. Costs of this application shall be paid by the Respondents jointly and severally the one paying the other to be absolved.

NP MALI ACTING

ACTIING JUDGE OF THE HIGH

COURT GAUTENG DIVISION

PRETORIA

APPEARANCES

FOR THE APPLICANT: R. FERREIRA

Instructed by: - MARNERWICK & GREYLING ATTORNEYS POLOKWANE, C/O BROWYN MAY
ATTORNEY

FOR THE RESPONDENTS: GT KYRIAZIS

Instructed by: DDKK INCORPORATED C/O VAN STADE VAN DER ENDE INCORPORATED

Date of hearing: 9 November 2015

Date of judgment: 12 November 2015

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