

SOUTH AFRICA / JUDGMENT

LM v Goldstein NO and Others (27168/2013, 12782/2014) [2014] ZAGPJHC 401; 2016 (1) SA 465 (GJ) (5 September 2014)

[2014] ZAGPJHC 401

COURT

South Gauteng High Court, Johannesburg

BEFORE

Francis

CASE / FILE NUMBER

27168/2013, 12782/2014

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG LOCAL
DIVISION)

CASE NO: 27168/2013

12782/2014

DATE: 05 SEPTEMBER 2014

In the matter between:

[V..... D.... M.....],
[L.....] (Born
[V.....]).....Applicant
And
JUDGE GOLDSTEIN,
EZRA.....1st
Respondent
DR DUCHEN,
RONEL.....2nd
Respondent
[V..... D.....
M.....],
[M.....].....3rd
Respondent

JUDGMENT

FRANCIS J

Introduction

1. There are two applications brought by the applicant in this matter. In part A of the first application (the main application) the applicant seeks a declarator that she has full parental rights and responsibilities and guardianship as envisaged in the Children's Act 38 of 2005 (the Act). She is also seeking an order that the office of the Family Advocate be appointed to investigate and report in terms of the provisions of section 22(b), 29(5)(a) and (b) of the Act regarding the well-being of the minor children as a result of her parental rights and responsibilities and guardianship; the effect on the well-being and best interests of the minor children and as a result of the aforesaid suspension; the appointment of Adv Kolbe SC as curator and/or representative of the minor children; the well-being and best interests of the minor children as a result of the appointment of Adv Kolbe SC and the applicant and the minor children's contact and care to each other as well as the residence of the minor children.
2. Pending the finalisation of the appointment of Adv Kolbe SC and the report of the Family Advocate, that the applicant and the minor children shall have contact with each other every Sunday from 16h00 to 19h00 at [5.....] [S.....], [M.....], the contact to be supervised by [E.....] [V.....]an [D.....] [L.....].
3. Part B of the application be postponed sine die pending the finalisation of the report by the Family Advocate and the appointment of Adv Kolbe SC.
4. In the second application filed on 5 April 2014 under case number 12782/14, the applicant sought an order to review the ruling of the first and second respondents dated 3 April 2014. She also sought an order reinstating her limited supervised contact with the minor children as stipulated in the decision/recommendation of the first and second respondents dated 21 September 2011, which contact includes two hours per week at a public venue, supervised by the third and fourth respondents.
5. The urgent application was opposed by the third respondent who was granted leave to intervene as an interested party. The urgent application was postponed sine die and the court directed that the urgent application be heard together with the main application.

Background facts

6. The applicant and third respondent were married to each other on 2 February 2002 and from their marriage two minor children were born namely [H.....] [L.....] [V.....] [D.....] [M.....] (L.....) a boy born on [... J..... 2.....] and [H.....] [M.....] [V.....] [D.....] [M.....] (H.....)

a girl born on 16 November 2006.

7. The applicant and third respondent's marriage was dissolved by an order of divorce incorporating the agreement of settlement, which order was granted on 10 September

2010. In terms of the agreement of settlement:

7.1 Parental responsibilities and rights relating to the care and guardianship of the minor children were awarded jointly to the applicant and the third respondent;

7.2 The residence of the minor children was shared between the applicant and the third respondent which arrangement, as from 1 September 2011, entailed that the minor children reside with each party on a rotating week to week basis;

7.3 The minor children were to commence with safe harbour play therapy to be undertaken by Meyer;

7.4 The case managers were appointed with specified terms, conditions, powers, mandate and/or authority;

7.5 The remaining terms of the agreement reached between the applicant and the third respondent in the context of their divorce including, but not limited to, spousal maintenance and proprietary issues, were recorded.

8. The case managers who were appointed in terms of the settlement agreement are retired judge Ezra Goldstein (the first respondent) and Dr Ronel Duchon (the second respondent). Since 22 September 2011 the minor children have resided primarily with the third respondent and the applicant's contact with the minor has been limited to periods of supervised contact in terms of the 21 September 2011 ruling. The case managers granted the third respondent full parental responsibility towards the minor children.

9. The applicant was dissatisfied with the ruling of the case managers and brought the main application.

10. The applicant was required to exercise contact with the minor children on 25 March 2014 at 16h30 in a restaurant which did not take place because she was not allowed to see the minor children after she was accused of attending [L.....'s] school the day before which she denied.

11. In a ruling dated 3 April 2014 by the case managers the applicant was not allowed to exercise contact with both the minor children for the foreseeable future.

12. The applicant was dissatisfied with the above ruling and brought an urgent application. The urgent application was postponed sine die and the court ordered inter alia that the urgent application be heard together with the main application.

The parties' contentions

13. As can be expected both applications were opposed by the third respondent on several grounds. The third respondent contended that the applicant should have approached this court by way of review proceedings in the main application and has failed to do so. Further that there are no grounds of review set out and that the application should be dismissed.
14. It was further contended that the case managers were appointed in terms of a settlement agreement and that they acted in terms of the powers granted to them by both parties.
15. It was further contended that because the children have settled in well under the new regime and are thriving at school, it is not in the best interest of the children that the main application be granted. They will be subjected to more trauma if the office of the Family Advocate was used and advocate Kolbe was to be appointed as a curator ad litem. It was further contended that a Family Advocate cannot be appointed in terms of the Act once the divorce proceedings have been finalised. It was pleaded that should the court decide to refer the matter to the Family Advocate that the Family Advocate should consult with the parties, including the experts and the case managers. It was contended that it will not be in the best interests of the minor children for them to be subjected to interviews by the Family Advocate.
16. It was further contended that the urgent application has become academic since the applicant's access rights were reinstated.
17. It was contended on behalf of the applicant that although the urgent application has become academic, the court should still grant the applicant the relief that she is seeking because the effect of the ruling dated 3 April 2014 is that she now has a record and the granting of the order would expunge that record against her.
18. It was further contended by the applicant that nothing prevents her from seeking a declarator and that there was no need for her to approach this court by way of review proceedings. The case managers did not have the power to suspend her parental responsibility rights and only this court could do so.

Analysis of the facts and arguments raised

19. The court papers in this matter are voluminous. It indicates what happens when adults use their children whom they profess to love as pawns in their battles. The only real victims in this case are the minor children. There is a tirade of tasteless acrimony spewed forth in these papers. It is not necessary for this court to deal with the all the acrimony spewed in these papers.

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20. The central issue for determination is whether the case managers could suspend the applicant's parental rights in terms of the settlement agreement. The source of their power is located in the settlement agreement. If they could not do so, it follows that their decision to do so is a nullity. The further question for determination is whether the Family Advocate should be appointed and whether it is in the best interest of the minor children to be examined by the Family Advocate and for advocate Kolbe SC to be appointed as a curatrix.
21. It is common cause that the case managers were appointed by the parties in terms of the settlement agreement referred to in paragraph 7 above. 22. Clause 24 of the settlement agreement provides as follows: "[E] Case Manager
24. Retired Judge Ezra Goldstein and Dr Ronelle Duchen have been appointed as case managers and they have accepted their appointments. The case managers are empowered and required, at the request of either party, to –
- i. Mediate and investigate disputes between the parties relating to the children with particular reference to the (1) joint parental responsibilities, (2) joint rights, (3) control, (4) contact (5) joint residency (6) maintenance (for the children and the plaintiff in accordance with 30 (ii)) and
 - (7) other parenting issues, including, but not limited to, the additional contact and/or the substitution of contact periods as and when this may be required having regard to the best interests of the children.
 - ii. Resolve disputes between the parties relating to the children and furnish written recommendations with reasons therefor.
 - iii. Assist the parties as and when the need arises in relation to any issue arising out of the exercise of joint parental responsibility and rights relating to the care, residence, maintenance of, and contact with the children.
 - iv. Refer the parties to an appropriate professional to draft a parenting plan.
 - v. Refer either party for any further appropriate therapeutic or medical interventions and further parenting skills and/or training.
 - vi. Refer the children for any further appropriate therapeutic or medical interventions.
 - vii. Co-ordinate with any professional previously involved, in any capacity, with the interests, well-being and affairs of the children.
 - viii. Assess and report on any alienating behaviour emanating from either party.
 - ix. Sanction any party committing alienating behaviour and attend to such behaviour by suggesting and implementing supervised contact between the offending party and the children.
 - x. Consult with either or both children if required
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- xi. Instruct and implement an independent investigation to establish what would be in the best interests of the children.
- xii. Mediate and investigate any dispute arising out of any term of this agreement or the interpretation thereof.
- xiii. If a dispute arises as to whether or not the defendant has withheld his approval or consent unreasonably, the dispute shall; be referred for resolution to the case managers who shall be entitled to call upon a person having the necessary expertise, having regard to the nature of the dispute as determined by the case managers. The decision of the case managers shall be final and binding, subject to the overriding jurisdiction of the above Honourable Court.
25. In the event that either of the parties do not agree with the recommendation made by the case managers, they shall have the right to approach the appropriate Court for the relief, in which event either party shall be entitled to rely upon, and make available to the appropriate Court, the recommendations made by the case managers and reasons advanced by him or her in support thereof.
26. The recommendations of the case managers shall be binding on the parties pending a decision of the Court as per 25.
27. The costs of the case managers shall be paid by the parties as determined by the case managers.
28. The case managers shall, in their sole discretion, determine the procedure to be adopted in the case management process”.
22. The case managers made the following ruling which is the subject matter of the main application was as follows:

“In my view the cumulative effect of the foregoing is that we have substantial, if not overwhelming evidence from many quarters of [L.....’s] instability and of her attempts at alienation of the children from their father. The problems have persisted for too long and are of such a serious nature I agree with Dr Duchon that the children’s primary residence ought to be with [M.....] and that, sadly and unfortunately [L.....’S] contact with them supervised. I agree too that this situation ought to be reviewed 5 months after the establishment of the new regime recommended by us.

[M.....] has asked us also to rule that [L.....] is cohabitating with another person and the provisions of the agreement between the parties relating to such cohabitation are triggered. There is a dispute of fact about this allegation. It would require much time for us to resolve this dispute and it is, of course, undesirable to delay this report in order to do so.

In the result, we recommend that [M.....] [V....] [D.....] [M.....] be granted full parental responsibilities and rights to the minor children [L.....] and [H.....] [V.....] [D.....] [M.....] subject only to [L.....] [V.....] [D.....] [M.....]'s rights to have access to the children on Wednesdays between 16h00 and 18h00 and on their birthdays and on Mother's Day between 16h00 and 18h00 provided that such access shall be supervised by a person approved of by Dr Duchon and provided further that such access shall be reassessed after the passage of 6 months inception."

23. It is apparent from the powers of the case managers that when it comes to a dispute between the parties around the issue of joint parental responsibilities the case managers may mediate and investigate such a dispute. They must resolve disputes between the parties relating to the children and furnish written recommendations with reasons therefor. Where either of the parties do not agree with the recommendation made by the case managers, they shall have the right to approach the appropriate court for relief, in which event either party shall be entitled to rely upon, and make available to the appropriate Court, the recommendations made by the case managers and reasons advanced by him or her in support thereof. The recommendation of the case managers shall be binding on the parties pending a decision of the Court. All that a case manager can do in a dispute around joint parental responsibilities is to may mediate and investigate and issue a recommendation. Nowhere in the settlement agreement are they given the right to terminate or suspend the parental responsibilities and rights of the applicant.
24. The third respondent or any party referred to in section 28(3) of the Act could approach this court or the divorce and children's court for an order in terms of section 28(1) of the Act to suspend or terminate the applicant's parental responsibility. The suspension could only take place in terms of a court order.
25. The suspension of the applicant's parental rights is a nullity and stands to be set aside. There was no need for the applicant to approach this court by way of review proceedings.
26. I am of the firm view that as the upper guardian of minor children I should utilise my inherent powers to order the office of the Family Advocate to investigate and report to this court about the well-being and best interests of the minor children, as well as the effect that the suspension of the applicant's parental rights and responsibilities and guardianship may have had on their well-being and best interest. The Family Advocate is objective and is competent to assist this court in that regard. It must also report on the applicant and the minor children's contact and care to each other, as well as residence of the minor children and the applicant and the minor children's contact pending the finalisation of the report.

27. It was contended on behalf of the third respondent that should the court decide to refer the matter to the Family Advocate, I should not subject the minor children to further trauma by letting the office of the Family Advocate interview them for purposes of the report. It was further contended that I should not meet the children. I find this contention to be odd. What does the third respondent fear will happen if this court

was to elicit the views of the minor children? What further trauma will the minor children suffer if they were to meet with the Family Advocate? What trauma are they suffering in that they are only allowed to see the applicant, their mother for only two hours per week? I am of the view that the Family Advocate would be able to provide this court with a report about what is in the best interests of the minor children.

28. This case is not about what is in the best interests of the parties but rather what is in the best interests of the minor children. It is telling that the third respondent has stated the following at page 663 at paragraph 246.5 of the answering affidavit:

“The minor children are the victims and they must be protected from the Applicant. If the court were to rule in favour of the Applicant in this matter I will lose the mechanism, namely the case management process, that I have available to protect the minor children from the Applicant”.

This shows it is all about the parties rather than the minor children. All the more reason why the relief should be granted.

29. I have taken into account that [L.....] is [...] years old and [H....] [.....] years. From all intents and purposes they are able to express themselves adequately.

30. It is clear that the case managers who are persons of great integrity have unwittingly been seeped into the skirmishes between the applicant and third respondent. The reports have not been challenged by the applicant in these proceedings but in my view the office of the Family Advocate would be more objective in conducting the report that this court would want it to conduct.

31. I do not believe that it is necessary for advocate Kolbe SC to be appointed as a curatrix in this matter. The Family Advocate would be able to investigate the matter and provide this court with its recommendation. There is no reason why a curatrix should be appointed.

32. The relief sought in the urgent application has become academic. It was in any event postponed to be determined with the main application which relief that I have granted takes care of it.

33. The main application stands to be granted.

34. It was agreed between the parties that I should reserve the questions of costs for determination when part B of the application is going to be heard. I agree.

35. In the circumstances I make the following order:

35.1 It is declared that the applicant has full parental rights and responsibilities and guardianship as envisaged in the Children's Act 38 of 2005.

35.2 The Family Advocate is to investigate and report to this Court in terms of section 22(5) and 29(5)(a) of the Children's Act about the following:

35.2.1 The effect on the well-being and best interests of the minor children as a result of the suspension of the applicant's parental rights and responsibilities and guardianship;

35.2.2 The applicant and the minor childrens contact and care to each other, as well as residence of the minor children.

35.3 Pending the finalisation of the report by the Office of the Family Advocate, the applicant and the minor children shall have the following contact with one another:

35.3.1 Every Sunday from 16h00 to 19h00 at [5.....] [S.....], [M.....].

35.3.2 The contact shall be supervised by [E.....] [V.....] [D.....] [L.....].

35.4 Part B of the application is postponed sine die pending the finalisation of the report by Office of the Family Advocate.

35.5 The costs are reserved for determination when Part B of the application will be heard.

JUDGE OF THE HIGH COURT

FOR APPLICANT : E KILLIAN; H LOUW, F BEZUIDENHOUT

INSTRUCTED BY SHABAN CLARK COETZEE

FOR RESPONDENT: A DE WET INSTRUCTED BY STEVE MERCHAK ATTORNEY

DATE OF HEARING : 26 & 27 AUGUST 2014

DATE OF JUDGMENT : 5 SEPTEMBER 2014

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