

SOUTH AFRICA / JUDGMENT

M.A.N v L.M.M; In re: A.S.K.M (1278/2016) [2016] ZAECHMC 33 (5 July 2016) [2016] ZAECHMC 33

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Mbenenge

CASE / FILE NUMBER

1278/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE HIGH COURT, MTHATHA)

CASE

NO: 1278/2016

In

the matter between:

M.

A. N.

Applicant

and

L.

M. M.

Respondent

IN

RE: A.
S. K. M.
The
minor Child
[Born
on [.....] 2005]

JUDGMENT

MBENENGE J:

- [1] This case is a scramble between the applicant and the respondent for the custody of their minor daughter, A. S. K. M. (A.), born on [.....] 2005. The applicant and the respondent are former lovers. Since A.'s birth, the parties have been resolving their differences, regarding who, at a particular point in time, should be custodian parent. The papers reveal that antagonism and conflicting interests best the parties when, from time to time, custody between them.
- [2] Stripped of verbiage, the common cause facts of this matter are as follows. The applicant and respondent met in Cape Town, where they lived together for approximately one and a half years, during or about 2004. At the time of parting ways, the respondent was pregnant with A.. Upon her birth A. continued residing with the respondent and her family in Mthatha until she was almost three years. The applicant contributed towards A.'s maintenance and accessed her few times a year.
- [3] Thereafter, the applicant became custodian parent for about three and a half years, in Cape Town, with the respondent in turn exercising reasonable rights of access to A., during school holidays. A. attendant crèche at this point in time. During this bout the respondent would pay for A.'s flight tickets to Mthatha, whilst the applicant would pay for the return air ticket to Cape Town. On some occasions the applicant would drive A. to and from Mthatha. The primary needs of A. were met by the applicant. The respondent was part of A.'s life, contributing towards her medical aid costs, whilst the respondent bore responsibility for all other costs pertaining to A..
- [4] The custody of A. passed from the applicant to the respondent, during December 2011. During the ensuing year, 2012, A. was enrolled at G. K. School, Mthatha, where she passed grade 1 in 2012, and grade 2 in 2013. The applicant accessed A. whilst she stayed with the applicant during this period.
- [5] Meanwhile, the applicant relocated to Johannesburg. A. resumed staying with the applicant at the beginning of 2014, and attended school, initially at Eden College, but was later moved to another school, Rembrandt Park School, Johannesburg (hereinafter

referred to as Rembrandt School).

- [6] During the Easter vacation, 2016, A. visited the respondent in Mthatha. The understanding was that A. would return to

Johannesburg at the end of the Easter holidays. That, however, did not come to pass, and resulted in the applicant, who felt

shortchanged, urgently seeking and obtaining a rule nisi on 15 April 2016 which called upon the respondent to show cause why she should not forthwith deliver A. into the custody of the applicant “along with all of [her] things as are in her possession.”

- [7] Upon a reading of the founding affidavit, by which the applicant must stand or fall and, as far as it could have been ascertained, the application is founded principally on the contention that the respondent has in effect taken the law into her own hands and varied the existing custody arrangement with the applicant without obtaining a court order, for reasons best known to her. The applicant contends that the only reason furnished to him as to why A. would not be returned to his custody was the fact that A. was unhappy. According to the applicant A. has, for the past two years, not verbalized any intention to reside with the respondent or that she experienced unhappiness in staying with him.

- [8] The applicant has further averred:

“[A.] has blossomed at Rembrandt primary school where she is currently enrolled and her fees have been paid up and until the end of the year...It is apparent from the affidavit [received from the school] that [A.] is doing very well at the school and it is not in her best interest to be uprooted.

...

Furthermore, given the history of his matter ...there is not one shred of evidence save for the respondent’s ‘say so’...that it is not in the best interest of [A.] to reside with me of greater moment is the fact that there is no assessment by an independent social worker or psychologist that is in the best interests of [A.] to live with respondent and not with me.”

- [9] In further support of the application, the applicant seeks to rely on an affidavit deposed to by a certain Ms R. C. M., employed by the applicant as a cook for A.. According to Ms M. A. has a good relationship with the applicant. The applicant lives in a big house “and [A.] occupies the second floor of the house”; the applicant and A. spend a lot of time together and share a close bond; when A. was told that she was to spend her Easter holidays with the respondent A. seemed sad, stating that she would prefer spending the holidays with the applicant, but did not give reasons as to why she did not want to visit the respondent.
- [10] The principal of Rembrandt School has, for her part, not deposed to any supporting affidavit. However, one of the annexures to the founding papers is a letter penned by the principal which states, inter alia, that A. is achieving well and will be re-admitted to Rembrandt School when she returns “within a reasonable time frame.”

[11] The respondent, on the other hand, contends that when the time came for A. to return to her father in Johannesburg she (A.) refused, begging to stay with her (the respondent) and pointing to the fact that the environment she lived in at Johannesburg was not a happy one.

[12] The circumstances which, according to the respondent, have disqualified the applicant from being custodian have been narrated as follows in the respondent's answering affidavit:

"15.2. The child complains that the applicant shouts at her frequently and sometimes beats her with a belt for no apparent reason. The child told me that last year the father called her (after the Spring Holidays) in October. He had the child's journal in front of him and a belt and forced her to explain to him what she wrote in her Journal that she wants to be with her mother. He thereafter threatened her telling her that he does not love her and that she is the devil's child. This upset the child very much. I believed this when it was told to me the minor child because he had told me that I am inherently evil, this I had been told when the child was just a baby. He told me that I was a mother fucking bitch together with my mother and we are a family of inherently evil people. She told the child she was not special and she will never be special.

15.3. The applicant does not allow her to have a phone, he crashed the first phone I bought her on wall and has confiscated the latest cell phone claiming he was taking it to a psychologist at the time he claimed he was taking the minor child to a psychologist.

15.4. The applicant employs Nannies to look after the child, but the Nannies do not usually stay for long, they quit and at the time the child came to me for the Easter week-end the applicant is having someone who comes to do only the washing. Sometimes the child is left alone, locked inside the house.

15.6. Recently in January 2016, applicant was with the minor child and he rolled with the car with the minor child travelling with him. I got to know of the accident through receiving a statement from the medical Aid, as I am the one who is paying the child's medical bills through my medical aid. The child confirmed that she was involved in such accident when she came to visit for the Easter week-end in 2016. It is the second time he rolled with the child and he never informed me on both occasions about the accidents."

[13] The respondent has further stated that the matter of returning custody of A. to her had been the subject of discussion between her and the applicant; she had asked the applicant to return A. to her custody at the end of December 2016, after learning about the abuse A. was being subjected to at the hands of the applicant, but the applicant did not accede to that, and enrolled her at a school in Gauteng in 2016 despite her (the respondent) having requested that she be custodian during 2016.

[14] The family advocate, Mthatha filed a report, to which is annexed a report compiled by a family counsellor who has concluded that the best interests of A. would be best served by her custody being awarded to the respondent. The family counsellor's

report, for which this court is thankful, is, by and large, a product of interviews held with the parties, A. and other witnesses who interacted with the parties and/or A..

[15] In her evaluation of the information supplied to her, the family counsellor states that A. confirmed that she has a good relationship

with both parents but that she is more attracted to her mother, although she has been living with her father and that she is scared

of her father who shouts at her. A. expressed a wish to remain in the care of her mother, but maintain connection with her father. This has been her wish for the past two years. The report has captured the essence of A.'s interaction with the family counsellor as follows:

“6.3 A. is currently at Vela Primary School since 11 April 2016. The school principal Mrs Marallier reported that the child has settled at school. She has made friends and she appears to be happy. She reported that she has just given the child some text books and the child has caught up on her notes. The school principal further reported that they have Tuesday and Thursday as sport days. A child chooses the sport she wants to be involved in. She reported that should they encounter any problems with the child they will let the parent know.

6.4 A. initially reported that she does not enjoy going to school because school is boring. However she knows that she has to go to school as her parents always encourage her to do so and she likes learning. She further reported that she enjoys being with friends at school. She indicated that Vela is her favourite school because she felt welcome on her first day. She made friends and all the teachers were good to her. She further indicated that she was happy because she got support from her mother, she was always there for her. A. indicated that the school she was enrolled in Johannesburg was a good school; however she is more comfortable at Vela Primary School.

6.5 A. reported that she has been enrolled at Vela on 11 April 2016. She reported that she did not want to return to Johannesburg and is hoping not to have return. She further reported that her mother requested that she returns to Johannesburg while she had to speak to her about it. However when she was about to leave the following

day, she saw the police and heard them [her] dream came true when her mother let her stay. She reported that she does not want to go to Johannesburg because she is scared of her father and should anyone force her she will find means to escape. She believes that her father loves her as a father should, but she does not feel that he loves her by what he is doing (shouting at her and shouting her mother in her presence).

6.6 During the assessment, form the Child's Voice Toolkit the “My World Chart” was used which indicates a child's attachment and feelings in respect of people significant in the child's life. A. indicated that people who are closest to her are her mother, maternal grandmother, her two cousins, maternal grandfather, baby cousin and her three maternal aunts. She did not put her father on the board.

6.7 A. reported that she loves her mother. Her mother always tells her that she is special. She does not hurt her feelings. She guides her, wants her to be educated and encourages her. She spoils her and gives her what she needs. She makes her laugh, narrate stories to her and takes care of her and her cousins. She further reported that she talks and openly to her mother.

6.8 A. reported that her maternal grandmother makes her happy, she does not get angry at her and she does not shout at her. She teaches her to do house chores as she does not want to sit and only watch while others are doing their chores. She reported that her great grandfather tells her stories, sing for her and he wants her to be happy all the time. She further reported that she likes her great-grandfather because he teaches her IsiXhosa.

6.9 A. reported that her cousin play with her and she enjoys their company. She plays with them and she feels that she has a family. The other cousin is reportedly hyper active. A. further reported that in Johannesburg, she is always in the house with her father. She is lonely. She only sees friends at school or at church. She always watches movies on her laptop and sometimes watches television at the neighbors as there is no television at her home. The neighbor confirmed that sometimes A. watches television at her home and she sometimes assists her with her homework. She further reported that there are no children of A.'s age at her house. However she sometimes sees children playing with A.. The helper reported that she has never seen children playing with A. since she only works on Wednesdays.

6.10 A. was also assessed by using the 'Feelings Chart' from the 'Child's Voice Toolkit'. She associated herself with a happy face. She indicated that what makes her happy is to be with her mother and the maternal family. She further reported that what makes her sad is when someone shouts at her and when someone tells her that he does not love her and that she is not special. She reported that her father is the only person who shouts at her. Sometimes he shouts at her for nothing. Sometimes when her father fights with her mother he comes next to her

room for her to hear when he shouts at her mother on the phone. She said that she then becomes very hurt. She further indicated that she understands when she has done something wrong. A. indicated that what makes her angry is when her father told her that he does not love her. She reported that her father read her journal without her consent and she does not like people who do not respect her privacy. Her father used to tell her that she must respect other people's privacy yet he did not respect her privacy. Her father read her journal while she was on holiday in Mthatha during October 2015. She reported that in her journal she wrote that she wants to live in Mthatha with her mother and her father was angry with her. She further reported that in the journal one of her friends wrote that her father's car is an old model and her father was angry. Her father denied that he read her journal. He reported that a helper saw a paper on the floor and gave it to him.

6.11 A. reported that she was staying with her father for the past two years. She reported that in these two years, she has been living in fear because her father always shouts at her and she cannot tolerate it anymore. She reported that her father loses his temper quickly and he is too quick to blame her. She reported that sometimes when her books are on the floor or when she got

64% for Mathematics, her father was angry at her and said that is not good enough. One time her father shouted at her when there was a glass that was broken by another child and not her. She reported that she is afraid to ask him why he shouts at her because he might lose his temper. A. further reported that subsequently to her father reading her journal, her father called her a devil's child, he does not love her and she is not special. She also scared to return to Johannesburg after this incident because her father will ask her about this holiday and perhaps lose his temper and shout at her or hit her. She reported that sometimes her father hit her with a wet towel, by hand or belt. She reported that sometimes he hit her until she cries but it does not happen every time. The father denied that he hit her. He reported that he only spoke to her about the paper.

6.12 A. indicated that she told her mother while she was still doing grade 3 that she does not want to stay with her father. However her mother kept on postponing until she (A.) became angry. A. never discussed with her father that she wants to live with her mother until her father saw her journal. She reported that she did not tell him because she was afraid that he will lose his temper and shout at her.

6.13 On the day of the inquiry, A.'s father wanted to have contact with her. They had contact at Wimpy. According to A. she reported that she thought it would be easy to have contact with her father. Unfortunately it was not as she thought, as her mother approached her to ask what she is going to eat. She reported that her father started shouting at her mother. She reported that she felt so embarrassed and the centre of attraction as everybody was watching at her. She hid under the table and cried. She further reported that she is still scared and hoping that this whole drama would come to an end. She further reported that she is scared even to go to school because she fears that her father will come and take her away. She further reported that she is having frequent headaches since that day and her mother is going to take her to the Doctor. She reported that she wants to have peace with both her parents and is willing to forgive them for what they are doing in front of her so that she will be able to live a normal life like other children. A. reported

that her father told her the history about her, her mother and her father, where they come from and why they went to court referring to everything in his court papers and that really made her angry."

[16] The arduous task that I must now embark upon is deciding which parent should be awarded custody of A.. The paramountcy of the interests of children has become entrenched in section 28(2) of the Constitution of the Republic of South Africa 108 of 1996 (the Constitution).[1] The children's Act 38 of 2005[2] promulgated inter alia to give effect to certain rights of children as contained in the Constitution also embodies significant provisions on the subject at hand. Section 7 of the Act encapsulates the best interest of child standard.[3]

- [17] Section 10 of the Act is of significance. It accords every child that is of such an age, materially and stage of development as to be able to participate in any matter concerning that child the right to participate in an appropriate way and provides that views expressed by the child must be given due consideration.
- [18] At the hearing of this matter it was argued, on behalf of the applicant, that the family counsellor's recommendation that A. remain in the respondent's custody, based solely on A.'s election, is misplaced. A. is, according to the argument advanced on behalf of the applicant, of tender age. Changing a custodial regime in the middle of a school calendar year purely at the whim of A. and without reason would be a dangerous precedent and land itself to abuse. I disagree. This case does not involve adjudication of a dispute between adversaries as in an ordinary civil case. The focus is on the child.
- [19] It is so that the onus rests on the non-custodian parent to show that the present situation is detrimental to the child's interests and that variation of the custody arrangement would be to the child's advantage.[4] For reasons that follow, the onus has been discharged by the respondent. The submissions that the case is solely about the views of A. is, with respect, an over simplification of what this case is about.
- [20] To begin with, I am satisfied, on the strength of the reports tendered, that A. is of an age and level of maturity to make an informed decision as to who she prefers to be custodian parent. Even though she prefers staying with her mother, the reports make it plain that she wishes to visit her father during alternate school holidays. There is sufficient motivation made for these choices in the relevant reports.
- [21] The factors adumbrated in paragraph 15 above all point to the fulfillment of the requirements set out in sub-sections 7(1)(a) 7 (1)(c), 7 (1)(f) and 7 (1) (h) of the Act.
- [22] No suggestion has been made, and I am unable to take judicial notice of the fact, that the education offered in Rembrandt School is of better quality than that offered at Vela School. In any event, better education is one of a number of factors that have to be taken into account in deciding on the custody of a child.[5] In its broadest sense, true education is well defined as the harmonious development of all faculties – the hand, the heart and the head. It is in early years in the home and in the formal schoolwork that the mind develops, a pattern of living is established, and character is formed.[6] Nor is the provision of better and spacious accommodation in and by itself a significant factor worthy of consideration. More often than not, materialism fails to fulfil the needs of life; it offers a house not a home; a plate but not appetite, a bed but not a good sleep. According to the family counsellor's report the respondent's home environment will provide balanced development for A., than the lonely and apparently threatening life provided by the applicant's home. That is, however, not where this matter ends.

- [23] I have not lost sight of the fact that, especially in the case of a young girl, the biological relationship a mother has with a child who she has nurtured in her body during her pregnancy and often suckled after birth, gives rise to a special bond between them.[7]
- [24] In *K v M*[8] recognition is given of the advantages that the parent of the same sex of the child will have as a custodian, hence a son needs life input and guidance from his father, whilst a daughter needs her mother, especially during puberty and in her teenage years.
- [25] There is also no doubt that removing A. from Vela School to Rembrandt School in Gauteng after the lapse of such significant period of time, will impact negatively on A.'s academic progress. There is nothing supportive of the fact that Rembrandt School might still take on A. even during the third term. On the contrary, that school is on record as having been willing to receive A. back if she had returned within a reasonable time frame. The time lapse from April to June is, in my view, sufficiently long to cause disruption to schooling.
- [26] For all the above reasons, the applicant's quest to be custodian parent must fail. He is, however, entitled to reasonable right of access.
- [27] The family counsellor has expressed concern that the parties are unable to communicate and make, unilateral decisions as if the other party did not exist in A.'s life. The papers sufficiently point to this unfortunate state of affairs. Because of the change of custody dispensation it would be proper to have the family advocate monitor the situation and report to this court on the exercise of custody by the respondent. This approach is not without precedent.[9]
- [28] Costs remain to be determined. In cases of this nature there is no winner and no loser.[10] The contest was about the best interest of the child. For that reason, it would be proper to make no cost order.
- [29] I therefore grant the following order:
1. The rule nisi granted by this court on 15 April 2016 is hereby discharged.
 2. The respondent is awarded custody of A. S. K. M. (A.).
 3. The applicant shall have reasonable access to A..
 4. The family advocate is requested to monitor the respondent's exercise of custody for as long as such monitoring is in the opinion of the family advocate necessary.
 5. The family advocate is requested to report to this court on the exercising of custody on 09 December 2016 or before that date if deemed necessary by the family advocate. Copies of the report shall be furnished to the applicant and the respondent.
 6. There shall be no order of costs.

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the applicant : Mr J L Hobbs

Instructed by

: Ivan Zartz Attorneys

Johannesburg

C/O Zolani Gwama Attorneys

Mthatha

Counsel for the respondent : Ms E N Nyobole

Instructed by

: Horrena Jilata & Ass

Date heard

: 14 June 2016

Judgment

delivered

: 05 July 2016

[1] Section 28 of the Constitution provides that a child's best interests are of paramount importance in every matter concerning a child. See also section 9 of the children's Act 38 of 2005.

[2] The Act.

[3] The Section provides: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely – (a) the nature of the personal relationship between – (i) the child and the parents or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstance; (b) the attitude of the parents, or any specific parent, towards- (i) the child and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs; (d) the likely effect on the child of any change in the child's circumstances including the likely on the child of any separation from- (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living; (e) the

practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially effect the child's right to maintain personal relations and direct contact with the parents, or any specific parents on a regular basis; (f) the need for the child- (i) to remain in the care of his or her parent, family and extended family and; (ii) to maintain a connection with his or her family, extended family, culture or tradition; (g) the child's- (i) age, maturity and stage of development; (ii) gender (iii) background; and (iv) any other relevant characteristics of the child; (h) the child's physical and emotional security and his or her intellectual emotional social and cultural development; (i) any disability that a child may have; (j) any chronic illness from which a child may suffer ; (k) the need for a child to be brought up within a stable family environment and where this is not possible in an environment resembling as closely as possible a caring family environment; (l) the need to protect the child from any physical or psychological harm that may be caused by- (i) subjecting the child to maltreatment, abuse neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior; or (ii) exposing the child to maltreatment, abuse degradations ill-treatment, violence or harmful behavior towards another person; (m) any family violence involving the child or a family member of the child; and (n) which action or decision would avoid or minimize further legal or

administrative proceedings in relation to the child”.

[3] The Section provides:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely –

- (a) the nature of the personal relationship between –
 - (i) the child and the parents or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstance;
- (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances including the likely on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially effect the child's right to maintain personal relations and direct contact with the parents, or any specific parents on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family and;
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development;
 - (ii) gender
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual emotional social and cultural development;
 - (i) any disability that a child may have;
 - (j) any chronic illness from which a child may suffer ;
- (k) the need for a child to be brought up within a stable family environment and where this is not possible in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior; or
 - (ii) exposing the child to maltreatment, abuse degradations ill-treatment, violence or harmful behavior towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child".

[4] Mc Call v Mc Call 1994 (3) SA 201 (C) at 204 I

[5] K v M

[2007] 4 All SA 883 (E).

[6] Ellen G White, Education, p7.

[7] Fraser v Children's Court, Pretoria North & Another 1997(2) SA 261 (CC) 274; 1997 (2) BCLR 153 (CC)

[8] Supra; also see Mc Call case (supra) and Van Pletzen v Van Pletzen 1998 (4) SA 95 (O) at 101, wherein Hancke J, rejected the assumption that the mother was in a better position to care for a child, but held that

the fact that the child was 4 years of age and a girl tipped the scales in favour of the mother as she would be particularly suitable to serve as a role model for the child and to look after her physical and emotional needs in the long term, including from that stage of her development until puberty.

[9] Mc Call case, supra, 203 and Hlophe v Mahlllela and Another 1998 (1) SA 449(T) at 462.

[10] Mc Call case, supra, 209.

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