

SOUTH AFRICA / JUDGMENT

M.T.A v K.L.A (4323/2024) [2024] ZAECQBHC 79 (19 November 2024) [2024] ZAECQBHC 79

COURT

Eastern Cape High Court, Gqeberha

BEFORE

T Rossi

CASE / FILE NUMBER

4323/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GQEBERHA)

CASE NO.: 4323/2024

Matter heard on: 12 November 2024

Judgment

delivered on: 19 November 2024

In the matter between: -

M[...] T[...]A[...]

Applicant

and

K[...] L[...] A[...]

Respondent

In re: urgent return of minor child, S[...], to her place of residence

JUDGMENT

ROSSI AJ:

[1.] In this urgent application, the applicant, who is the father and co-holder of parental rights and responsibilities[1] in respect of S[...], a 3 ½ year old girl,[2] seeks her return to her place of residence, Gqeberha. The respondent, S[...]'s mother, a co-holder of parental rights and responsibilities, is the primary carer in terms of a deed of settlement executed between the parties and made an order of court on 8 August 2023.

[2.] On or about 25 October 2024 the respondent removed S[...] from Gqeberha and relocated to East London. It is common cause that this was done without the applicant's consent,[3] who arrived at the respondent's former place of residence on 27 October 2024 to collect S[...] for his contact and was informed by the landlord that they had vacated and moved to East London earlier that week.

[3.] The applicant seeks the following relief:

- a. The applicant's non-compliance with the normal rules of court relating to service, filing and time limits be condoned in terms of rule 6(12).
- b. That a rule nisi be issued calling upon the respondent to show cause on 26 November 2024 at 09:30 why an order in the following terms should not be granted:
 - i. The respondent be directed to return S[...] to the jurisdiction of this court within 48 hours of the granting of this order.
 - ii. In the event of the respondent electing to remain in East London, and not return to Gqeberha with S[...], the applicant shall travel to East London and collect S[...] from the respondent's home[4] forthwith.
 - iii. In the event of the respondent electing to return to Gqeberha with S[...], and pending final determination of the application:
 1. S[...] shall be in the care of the applicant and continue to have her primary place of residence with the applicant.
 2. The respondent shall be entitled to contact with S[...] every alternate weekend from Friday after school, with the respondent to collect S[...] from school, until Monday morning when the respondent will drop her at school; reasonable daily telephonic and video contact; and further or alternative contact by agreement between the parties.
 - iv. In the event of the respondent failing or refusing to return S[...] to the care of the applicant, as provided for above, the sheriff of this court, or his deputy, duly assisted by the members of the South African Police Services, if required at the discretion of the sheriff, shall do all things necessary to remove S[...] from the care of the respondent and deliver her to the applicant.

v. Each party to pay his or her own costs, alternatively, and in the event of the respondent opposing the relief sought, that she be directed to pay the costs of this application.

c. The relief set out above shall operate as interim relief with immediate effect.

d. The offices of the Family Advocate be directed to do an investigation

and report in writing to this Honourable Court as soon as possible, as to what arrangements in their opinion are in the best interests of S[...] with regards to her care, contact and primary residence.

[4.] The respondent opposed the interim relief and filed an answering affidavit. The office of the Family Advocate notified the court that they would only be in a position to commence their inquiry through consultation with the parties on 9 December 2024 and furthermore, that they would only be in a position to provide an estimate timeline in respect of the anticipated report after such consultation. I have issued the offices of the Family Advocate with a directive to undertake the investigation and to file their report.

Factual

background

[5.] The factual background is largely undisputed:

- a. The parties who were married to each other on 21 December 2019, were divorced by order of court on 8 August 2023. At the time of divorce, S[...] was 2 years and 2 months' old.
- b. In terms of the deed of settlement, both parties would continue to be co-holders of rights and responsibilities in respect of S[...] in terms of section 18(2)(a) of the Children's Act, 38 of 2005 (the 'Act'). The respondent would have primary residence over S[...] and the applicant would have contact with S[...] every alternate weekend from Friday afternoon (after school) until Monday morning. On the weekends that the applicant does not have S[...], he will have contact with her every Sunday and Monday night. The applicant was furthermore entitled to half of every school holiday as well as contact on special occasions, such as, birthdays and Father's Day.
- c. This equated to S[...] spending 6 nights out of 14 nights with the applicant. These contact arrangements, which predated the divorce, have been in place for the last 23 months.
- d. Both parties enjoy a close and loving relationship with S[...].
- e. The respondent initially raised a potential relocation to East London in October 2023, so that she could be closer to her parents. The applicant refused and nothing came of this until February 2024 when relocation was again broached. The applicant again refused, and the issue was referred to mediation.[5]

- f. The respondent's attorneys provided the following undertaking on 23 February 2024 – "(W)e confirm that our client will not relocate with the minor child, she will remain in Port Elizabeth. We agree that determining the best interests of the child requires thorough determination, however, we are of the view that we can begin the process of mediation so as to not delay the resolution of this dispute...Given that we have provided you with an undertaking that the child will not be relocated pending the outcome of the investigation and mediation...".
- g. Mediation was held on 26 February 2024. It was unsuccessful. The respondent cited financial reasons as her motivation for moving. This was met by an offer from the applicant to contribute a little extra to alleviate financial pressures.[6]
- h. Nothing further came of the proposed relocation until what transpired on 27 October 2024.
- i. The applicant attempted in vain to contact the respondent.[7] He then emailed her. Her curt response followed – 'As per my attorney's letter sent to your attorney on Friday 25/10/2024, please be advised that I have relocated to East London as of Friday to commence my employment on 01/11/2024. Any further communication can be sent to my attorney.'
- j. The correspondence of 25 October 2024 was sent just before 16:00 on Friday and went unnoticed by the applicant's attorneys until Monday morning. The letter conveys that the applicant 'intends on relocating to East London as previously contemplated. She has secured a job which begins on the 1st November 2024...We note that in terms of the Deed of Settlement, both parties reserve the right to make decisions with regards to the minor's education.[8] Our client has found an au pair who will look after S[...] for the rest of the year. In the meantime, our client will apply for S[...] to attend a crèche affiliated with her new employer'.
- k. Following engagement by the parties' respective attorneys, the applicant exercised contact with S[...] on the weekend of Friday 1 November to Sunday 3 November 2024 in Gqeberha, which contact was accepted under protest. This involved S[...] spending seven (7) hours in transit.

[6.] According to the applicant, primary care in the present instance is a 'misnomer' as he enjoyed almost shared residency.[9] He does however concede that the respondent was appointed as primary carer due to S[...]s tender age. An aspect to which I shall return.

[7.] The applicant was at pains to point out the surreptitious and impulsive manner in which the respondent went about relocating with S[...]. She was informed on 20 September 2024 that her application as relief staff member for a teaching position had been successful, albeit at that stage to take up the position in January. She does not disclose in her answering affidavit when that date was brought forward.[10] The relocation, which has wide-ranging consequences for S[...] and the applicant, was only disclosed to the applicant 5 weeks later,[11] when it was presented to him as a *fait accompli*. [12] This is contrary to her attorney's undertaking, another aspect which she

inadequately addresses in her affidavit. This is not what co-parenting entails.[13] There is merit in the applicant's criticism.

[8.] The applicant contends that the respondent's impulsive nature in removing S[...] from a stable environment shows her inability to act in her best interests.[14] The applicant contends further that he has always been a hands-on father and is able to provide for S[...].

[9.] The respondent alleges that due to the applicant's busy work and church commitments, he is not in a position to look after S[...] full time and often passes off responsibility to his fiancé and parents. She contends that in deciding to relocate she had regard to S[...]’s best interests, and her ability to financially provide for her.[15] Respondent further alleges that the applicant outright refused her relocation and was not open to compromise. In so far as the applicant's contact is concerned, the respondent is willing to make alternative arrangements with the applicant so that his contact is not significantly reduced. S[...] will also benefit from contact with her maternal grandparents and extended family in East London.

[10.] Respondent proposes an order in the following terms:

- a. Pending the filing of the Family Advocate's preliminary report, S[...] shall remain in the respondent's care in East London, subject to the applicant's interim contact as follows:
 - i. Daily video/Facetime calls of no less than half an hour between 17:00 and 19:00; and
 - ii. Alternate weekend contact in East London from Sunday 10:00 to Sunday 15:00.
- b. The costs to be reserved.

Application of the legal principles

[11.] An apposite starting point is to be alive to the distinction between applications of this nature, aimed at the return of a minor, and spoliations.[16] As was explained by Ramsbottom J some 70-years ago in *Gordon v Gordon*,[17] ‘(I)t seems to me on consideration of both cases referred to, the matter is entirely at the discretion of the Court, the paramount consideration being the interest of the child. The principle that in all custody matters the interest of the child is the paramount consideration, has been emphasised by the judgment of the Appellate Division in the case of *Fletcher v Fletcher* 1948 (1) SA 130. The mere fact that the applicant had the child and that it was surreptitiously taken away by the respondent therefore does not entitle her to the order that she claims. If it is a fact that the respondent took the child surreptitiously, which I am assuming against him, that is of course one of the factors in the case, but it is not decisive; I must consider whether, in all circumstances before me, it would be in the interests of the child that it should be returned to its mother now or whether the interest of the child requires that it should be left in the possession and care of the respondent.’

[12.] The Learned Judge in assessing the evidence before him in *Gordon supra*, and ultimately dismissing the application, said the following ‘the contention is that what ought to happen now is that the child ought to be given back to the applicant, and the respondent, if he wishes to have the child, ought to apply to Court. If then, the Court were to decide in his favour, the child would be

given back to him. I cannot think of anything worse for the child than what the applicant proposes. If the child were given to her today and the respondent might come back tomorrow and, if he should succeed, the child would be removed and given back to him. Nothing could be worse than that the child should be used as a shuttle-cock between the parents. A child requires a sense of security more than anything else. I think it would be very bad for the child that it should now be told to go back to the mother. It has now settled down to the idea that it is going to spend the next three weeks of holiday with its father. Probably it has already acquired some routine...'.
[18]

[13.] The concept of the best interests of the child finds expression not only in the Act,[19] but also in s 28 of the Constitution.[20] These sections are well-known and widely applied in our law. What emerges from a reading of these sections is that it is the child's

rights that are defined and not those of the parents.[21] In law the existence of a right is tantamount to the creation on the part of another of a duty to fulfil that right.[22] Guardianship and custody should not be viewed as vesting in the parent, but as duties imposed upon the parent.[23] Parents are required to exercise those duties in the interests of the child and in considering what is in the best interests of a child, the courts have, since Roman times, regarded the biological bond between child and parent as almost sacrosanct only to be disrupted or affected by the court, if dictated by the interests of the child, and not those of the parents.[24]

[14.] In assessing S[...]’s best interests, I am bound to take everything into account, including what may happen in the future if I make any specific order.[25] The court enjoys ‘extremely wide powers in establishing what is in the best interests of a minor child...It is not bound by procedural strictures or by the limitations of the evidence presented’ to the court.[26]

[15.] On what is before me, the manner in which the respondent went about relocating is far from ideal. She says she considered the applicant’s views but in light of her undertaking, I have my doubts about whether this took place.

[16.] In terms of s 31(2)(a) of the Act, the respondent was entitled to take such decision, after considering the applicant’s views and wishes. But once she did so, was ultimately entitled to act independently.[27] As was explained by the Full Court in *J v J (M)* ‘Moreover, failure to give consideration to the views and wishes of the appellant, and failure to inform the appellant of her decision in terms of s 6(5) of the Act, do not in themselves render the decision made by the respondent void or invalid – the decision is subject to review, the determining factor being whether or not the decision is in the child’s best interests.’[28]

[17.] But where does this leave S[...] and the present application? The court is placed in the unenviable position of having to make a determination, albeit on an interim and urgent basis, concerning the welfare of a very young little girl in circumstances where the Family Advocate has not had the opportunity to conduct an investigation. Effectively, the applicant seeks interim primary care, whether respondent returns to Gqeberha or not.

[18.] What is before me is that the respondent has been the de facto primary carer of S[...] for at least the last 22 months without demur from the applicant. Her capabilities as a parent are not seriously challenged. The applicant acknowledges that they both share a close bond with S[...]. It is so that she is criticised

for the impulsive and clandestine manner in which she approached the relocation. I have already expressed my views in that regard. The applicant's contact rights are indeed influenced by the move. That we cannot get away from.

[19.] But when all is said and done, does that mean that S[...] who is still very much of tender age will be best served to be taken out of her mother's primary care and placed with her father pending an investigation. Her mother has been her primary carer for most of her life. Given that any relief granted in this application is interim in nature and dependent on an investigation, I am moved by the sentiments expressed by Ramsbottom J in Gordon supra, which I have quoted in paragraph [12] above. If I were to grant the applicant's relief, S[...] will be taken away from her mother, and placed with her father. This may well be temporary. It is after all subject to an investigation by the Family Advocate. I must look to the future. It may indeed be found that the respondent remains best placed to be the primary carer.[29] This will in turn result in S[...] being taken away from her father and placed in the primary care of her mother. The shuttle-cock analogy is fitting.

[20.] In the premise, I do not find the interim relief to be in the best interests of S[...] and am inclined to grant an order as sought by the respondent with slight adjustment. I do not intend to prescribe to the applicant that he must exercise his contact in East London. I have also slightly extended his hours for contact.

[21.] In conclusion I express my gratitude to both counsel who approached the matter with not only professionalism but compassion and whose submissions I found to be most helpful.

[22.] I accordingly issue the following order:

1. Pending the filing of the Family Advocate's report, S[...] shall remain in the respondent's primary care in East London, subject to the applicant's interim contact with S[...] as follows:
 - 1.1. Daily video/Facetime call of no less than half an hour between 17:00 and 19:00;
 - 1.2. Alternate weekend contact from Saturday 09:00 to Sunday 17:00 commencing on Saturday 23 November 2024.
2. Costs are reserved.

T ROSSI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Miss Morris

Applicant's counsel

Instructed by:

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Central

Gqeberha

For the respondent:

Mr Gajjar

Respondent's counsel

Van Heerden Attorneys

147 Cape Road

Glendningvale

[1] Section 18(2)(a) of the Children's Act, 38 of 2005 (the 'Act').

[2] Born on 3 June 2021.

[3] Or his knowledge.

[4] The respondent's address, although specifically mentioned, is excluded from this judgment.

[5] Clause 4.3.3 of the deed of settlement reads – 'In the event of any disputes over their parental rights and responsibilities, the parties shall be obliged to first attempt to

resolve such disputes via mediation for which mediation the parties will consult with a qualified person in an attempt to resolve the dispute in an amicable fashion, with the costs thereof being shared equally between the parties. Notwithstanding the aforesaid, this shall in no manner preclude either party from launching any application for urgent or interim relief in the appropriate court, should the need arise.'

[6] The exact nature of what this entailed cannot be discerned from the papers.

[7] Both parties alleging the other to have blocked them.

[8] Clause 7.1 of the deed of settlement reads – 'Both parties will make decisions regarding the minor child jointly and undertake to involve the minor child in the decision making process as far as possible.'

- [9] His 6 nights against the respondent's 14 nights.
- [10] In her affidavit she states '(L)ater in October, I was telephonically contacted by Clarendon Primary, and they advised me that they needed me to start on the 1st November 2024, instead of the beginning of 2025.'
- [11] Her attorney's letter of 25 October 2024 or her email of 27 October 2024.
- [12] The respondent relocated on 25 October 2024.
- [13] See in this regard s 31(2)(a) of the Act which reads – 'Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.' Subsection
- (b) in turn reads 'A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have any significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.'
- [14] The respondent is also criticised for having had several boyfriends and new employment every couple of months.
- [15] Respondent alleges that the present position, which is at this stage temporary in nature, offers a better working environment, longevity and room for growth. Additionally, her employers are family friendly and stands to gain from family-related benefits.
- [16] *Mopeli v Botha* 1931 WLD 63 at 65.
- [17] *Gordon v Gordon* 1953 (2) SA (WLD) 41 at 48C-D.
- [18] At 48H to 49A.
- [19] By way of incorporation into s 9 of the Act which reads 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'
- [20] Of the Republic of South Africa, 1996.
- [21] *P and another v P and another* 2002 (6) SA 105 (NPD) at 107J to 108B.
- [22] *Ibid.*
- [23] *Ibid.*
- [24] *Ibid.*
- [25] *P and another v P and another supra* at 110D.
- [26] *Terblanche v Terblanche* 1992
- (1) SA 501 (W) at 504C.

[27] J v J 2008

(6) SA 30 (CPD) par 35.

[28] Ibid.

[29] Even if the applicant's temporary employment does not translate into a permanent position, she has been wanting to relocate to East London for some time. This is primarily so that she can benefit from the support, financial and otherwise, from her family there.

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