

SOUTH AFRICA / JUDGMENT

P.D and Another v A.R and Another (D779/2023) [2024] ZAKZDHC 27 (17 May 2024) [2024] ZAKZDHC 27

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D779/2023

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FLYNOTES:

FAMILY – Children – Contact – Applicants
not biologically related – Agreement of care between parties ended – Applicants contend they provided for all minor child's needs – Urgency not established – Applicants have no entitlement in law – Proposed contact by family advocate is inappropriate – Would diminish respondents' rights to manage their own daughter's life without justification or reason – Parents are entitled to regulate lives of their children – Application dismissed.
IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
Case
no: D779/2023
In

the matter between: P[...]
D[...]
FIRST APPLICANT
M[...]
D[...]
SECOND APPLICANT
and
A[...]
R[...]
FIRST RESPONDENT
M[...]
R[...]
SECOND RESPONDENT

Coram: Mossop J

Heard: 17 May 2024

Delivered: 17 May 2024
ORDER
The

following order is granted: 1.
The application is enrolled.
2.
The application is dismissed.
3.
The applicants shall pay the respondents'
costs of suit jointly and severally, the one paying, the other to be
absolved on
scale A.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] This is an opposed motion that was initially instituted as an urgent application.

In their notice of motion, the applicants seek the following relief:

‘1. That this application be heard as an urgent application in accordance with the provisions of the Uniform Rules - Rule 6(12) and that the requirements pertaining to service and the rime (sic) periods be dispensed with.

2. That a rule nisi do issue calling upon the First and Second, (sic) Respondents to show cause, if any, on the day of

2023 at 9.30 a.m. or so soon thereafter as the matter may be heard why the following should not be granted.

3. That pending the finalisation of this application

3.1 The Applicants and Respondents retain care and parental contact in respect of the minor child namely Q[...] R[...], born on the 3 May 2018 [hereinafter referred to as ‘the minor child’] as provided for in Section 23 and 33(1) of the Children’s Act 38 of 2005 [hereinafter referred to as the act]

3.2 The Family Advocate be requested to conduct a thorough and comprehensive investigation into the affairs and the best interest of the minor child and to provide this Court with a report and recommendation regarding both parties’ parental responsibilities and rights in respect of the minor child’s primary care and the manner in which the Applicants should exercise reasonable contact and access in respect of the minor child.

3.3 That the status quo of minor child’s primary care and responsibility continue to be exercised in the following manner

3.3.1 That the minor child will reside with the Applicants from 17h00 every Sunday to 17h00 every Friday.

3.3.2 That the minor child will reside with the respondents from 17h00 every Friday to 17:00 every Sunday.

3.3.3 That the respondents be directed to allow the minor child to occupy her place at Creston College to continue her Group 5 education.

4. That paragraph 3.3.1, 3.3.2 and 3.3.3 above operate with immediate effect as an interim order pending the final determination of this application.

5. That the First and Second Respondents be ordered to pay the costs of this application, jointly and severally, one paying the other to be absolved.’

[3] It will be discerned that the notice of motion provides in some detail for what is to occur whilst this application is being debated and determined. But it does not explain what the ultimate relief is

that is sought by the applicants. That is entirely irregular. I accordingly raised this with counsel for the applicant. He advised

that the applicants had intended to rely on the findings of the Family Advocate to define the relief that they finally sought.

Besides being improper in not defining the actual relief sought, it was a dangerous strategy because the Family Advocate may have decided that they should be afforded any contact.

[4] The facts underpinning this application are unusual, but not complex. The respondents are the biological parents of the minor child referred to in the notice of motion (the minor child). From what I

have been told this morning by counsel for the applicants, by bringing this application the applicants seek to establish structured

rights of contact with the minor child. On the face of it, this is a novel proposition for the applicants are not blood relatives of the minor child. The only link of consanguinity between the parties is the rather tenuous one that the second applicant's grandmother was the sister of the first respondent's grandfather. The respondents have opposed this application and have delivered answering affidavits in which they have made clear the grounds upon which they resist the relief claimed.

[5] It would appear that whatever relief the applicants seek is based upon their allegation that since the minor child was two weeks old they have been her primary caregivers. Both the applicants and respondents reside on the lower south coast of KwaZulu-Natal. The applicants say that shortly after her birth, the minor child was placed in their care and would remain with them from a Sunday afternoon to a Friday afternoon. The minor child would be returned to her parents on Friday afternoon but would return to the applicants again on the next Sunday afternoon.

[6] That allegation, however, must be approached with some caution if due regard is had to the report of the Family Advocate, who reports that this arrangement did not immediately commence as stated by the applicants. In the Family Advocate's report, the following is stated:

'The child started to visit the Applicants for a day, when the child was 2 weeks old... When the child was a month old, the child started to sleep-over, twice a week, at the Applicants (sic) home. The Applicants took care of the child when the child was a year old during 2019. The applicants used to take care of the child from Sunday afternoon to Friday afternoon as the Respondents worked away from their home.'

The position was therefore not exactly as presented by the applicants.

[7] The applicants eventually enrolled the minor child at a private school in Shelley Beach, which enrolment was approved of by the respondents and the applicants volunteered to pay the costs of this schooling. The applicants state that they provided for all of the minor child's needs and came to regard her as part of their family. As they operate a logistics company from their place of residence they were always in attendance to care for her when she was not in school. They were parents to three of their own children, the youngest of which is presently 17. The minor child has apparently

bonded well with the applicants' children.

- [8] This arrangement prevailed for just over four and a half years. I stress that it was an arrangement (the arrangement), for what occurred gave the applicants no right in law to the minor child. She did not become their child because of the existence of the arrangement. She remained at all times the child of the respondents. The arrangement commenced and continued only with the consent of the respondents who were entitled at any stage to terminate the arrangement without reason.
- [9] The arrangement was eventually terminated on 9 December 2022, when the respondents decided that the minor child would thereafter

remain with them permanently, would not be returned to the applicants and would be enrolled in a different school. Much space is devoted in the founding affidavit to speculation over why the respondents terminated the arrangement. I need not also engage in that speculation. Suffice it to say, the respondents decided that the applicants had overstepped the mark in removing the minor child from their home on an occasion when the minor child became ill and they did not want her returned to the applicants. The applicants consequently launched this urgent application.

- [10] The urgent application was enrolled for hearing on 6 February 2023, nearly two months after the respondents terminated their arrangement with the applicants. That gap of two months excited comment in the respondents' answering affidavits when they alleged that the matter was not, in truth, urgent, a position that they still incline to today. The applicants devoted approximately a page and a half of the founding affidavit ostensibly to the issue of urgency. They quoted from the Children's Act and stressed their patience and tolerance of the respondents' wishes. They indicated that they have acted solely in the best interests of the minor child but indicate that she now appears to be 'forlorn' in recent photographs that they have seen of her. Why the application is now rendered urgent is, however, not explicitly discussed. The delay in bringing it is also not mentioned.

Significantly, the applicants do not indicate why they could not be afforded substantial redress at a hearing in due course.

- [11] No heed whatsoever has been paid by the applicants to the provisions of Uniform rule 6(12) (b) notwithstanding that they rely upon, and reference, that very rule in their notice of motion. That sub-rule reads as follows:

'In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.'

- [12] The requirement that a litigant claiming urgency must establish that they will not obtain substantial redress at a hearing in due course is an important requirement in bringing an application on an urgent basis. Explicit reasons must be advanced by an applicant establishing why substantial redress would not be obtained if the matter is not forthwith

dealt with. This does not require an applicant to establish that irreparable harm will eventuate, for substantial redress alludes to something less exacting than that. In *M M v N M and Others*,^[1] the court approved of the following statement:

‘Harm does not found urgency. Rather, harm is a mere precondition to urgency. Where no harm has, is, or will be suffered, no application

may be brought, since there would be no reason for a court to hear the matter. However, where harm is present, an application to address the harm will not necessarily be urgent. It will only be urgent if the applicant cannot obtain redress for that harm in due course. Thus: harm is an antecedent for urgency, but urgency is not a consequence of harm.’

I agree with these words.

[13] In considering the fate of this application, I remain mindful of the fact that s 34 of our Constitution provides that:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

The Constitutional Court explained in *Mukaddam v Pioneer Foods (Pty) Ltd and Others*^[2] that this guarantee does not include the right to choose the method of approaching and placing a dispute before a competent court. The process to be followed when a court is approached is for the court itself to determine.

[14] The courts have thus determined that a party relying on urgency must establish why it would not be able to obtain substantial redress at a hearing in due course. The procedure prescribed in Uniform Rule 6(12)(b) is not there merely for the taking. Having considered the allegations in the founding affidavit, I am not sure why the applicants hold the view that they would not achieve substantial redress at a hearing in due course, because, as previously explained, this has not been addressed by them at all. Nor am I able to say what the harm is that is being suffered, nor for that matter, who is suffering it.

[15] The appropriate order when the point of urgency has been taken by a respondent, as it has been in this application, and the point has been sustained, is to strike the matter off the roll. In *Commissioner for SARS v Hawker Air Services (Pty) Ltd; In Re Commissioner for SARS v Hawker Aviation Service Partnership and Others*,^[3] Cameron JA, observed that:

‘Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under rule 6(12)(a). The matter is then not properly on the court’s roll, and it declines to hear it. The appropriate order is ordinarily to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance.’

[16] The respondents' argument that the matter is not urgent must be upheld. The matter ought not to be permitted to find a place on the court's roll. But I am not inclined, however, to merely strike the matter from the roll to enable it to remain alive, capable of again being brought before the court on proper notice. In my view, the application is ill conceived and cannot succeed.

[17] I take this view, partly, because of the deficiencies in the notice of motion referred to earlier in this judgment. But largely, it is because the applicants have no right to demand contact with the minor child. On a pure consideration of the law, a citizen unrelated to a minor child has no right to maintain contact with that child contrary to the biological parent's wishes. It is important to consider that no allegations have been made by the applicants that the minor child is at risk physically of any harm. The well-being of the minor child is not threatened if an order is not granted in favour of the applicants. For the applicants

have not been able to criticise the parenting skills of the respondents, because they state in the founding affidavit that:

'We as a family concede that the Respondents are not bad parents.'

[18] The Family Advocate has also not raised any red flags in this regard either. Indeed, the Family Advocate has recommended that the minor child be cared for by the respondents. If it is accepted, as I must do, that the respondents are good parents, well capable and entitled to look after their daughter on their own terms, on what basis may this court interfere with their right to choose with whom their child interacts? I can conceive of none. The respondents wish the minor child to reside with them. They are within

their rights to so insist. If they do not wish the minor child to have contact with the applicants that, too, is their right.

[19] The applicants appear to try and explain what motivates them in seeking the relief that is detailed in the notice of motion when they state the following:

'We reiterate that we do not wish to usurp the Respondents rights as parents but we are entitled in law and more especially emotionally

and psychologically entitled to let Q[...] know that we have not abandoned her and to ensure that her best interest (sic) are of

paramount importance to us.'

[20] In making that statement, the applicants are incorrect. They have no entitlement in law. It is not their duty to explain to the minor child why the arrangement no longer prevails. That is the function of her parents, for the applicants seem to lose sight of the fact that they are not the minor child's parents, even though they appear to take some pleasure from the fact that she began calling them 'Mummy' and 'Daddy' when she spent time with them. The observation by the applicants that the minor child appears 'forlorn' in a photograph is a subjective interpretation that can have little persuasive value when the reason behind the

posing for, and the taking of, the photograph is not known. For all that is known, the minor child may have been asked to look sad when the photograph was taken.

[21] The respondents admit that the arrangement existed, but they remained involved in all aspects of the minor child's life. The reason for the arrangement was that the respondents both worked, the first respondent in Port Shepstone and the second respondent in Harding, and they were afraid to travel long distances each day with the minor child in either of their motor vehicles. The applicants volunteered to care for her during the day. The minor child had her own room at the respondents' home, replete with her own clothing and belongings. After stopping the minor child from returning to the applicants' home, the respondents invited them to visit her at their home. They came twice and thereafter did not return.

[22] The respondents state that the minor child has a sister and that they all now live together in harmony. They are not in favour of the minor child holding the view, as she presently does, that she has two 'mums' and two 'dads'. That notion makes them feel uncomfortable, something that the applicants brushed off as being a sign of love and respect. The first respondent states that:

'I have never denied the applicants contact to the minor child. They are welcome to visit her and call her but I will not allow her to reside with them any longer.'

The first respondent further makes the point that:

'The applicants are not entitled to care and contact of the minor child when there is no valid reason for such an exceptional order...

The minor child has parents that love her and care for her and that alone is reason enough to prevent a 3rd party from having such control over a minor child that is not the parents.'

[23] In their notice of motion, the applicants required the Family Advocate to report on both parties':

'... parental responsibilities and rights in respect of the minor child's primary care and the manner in which the Applicants should exercise reasonable contact and access in respect of the minor child.'

[24] The relief claimed is confused in its construction, for the applicants are not the parents of the minor child. They therefore have no 'parental responsibilities and rights'. The minor child's parents are alive and competent to care for her and are entitled to make decisions relating to her. The Family Advocate agrees that the minor child's parents must retain their parental rights and responsibilities and that the minor child must have her place of residence with them. The Family Advocate, however, proposes that the applicants be afforded the following extensive rights of contact with the minor child:

'One weekend a month from Friday after school to Monday morning at school.

Every Wednesday from after school to Thursday morning when the child is dropped off at school.

Video calls on Monday and Thursday from 18h00 to 18h30.

Reasonable telephonic contact.

Two nights per week during the short school holidays.

Two weeks during the long school holidays i.e., June/July and December/January.

Two hours on the child's birthday.

Additional contact by mutual agreement between the parties.'

[25] In my view, this proposed contact is inappropriate, not the least because the respondents do not favour it. It is the type of access usually granted to separated, biological parents of minor children. It fails totally to consider the rights of the respondents to enjoy, shape and direct the life of their own daughter. It does not appear to assess the fact that the minor child is a member of her own family and has her own sister (aged 7) with whom she interacts. The recommendation appears, finally, to only consider what is in the best interests of the applicants and not what is in the best interests of the minor child. It may be so that the

minor child has brought joy to the applicants, particularly the second applicant who is disabled. That is no basis to award the

relief they claim in their notice of motion. I accordingly do not intend adopting the Family Advocate's proposals, well-meaning

though they may well be, because I do not regard them as being in the minor child's best interests.

[26] Parents are entitled to regulate the lives of their children. They may determine with whom their children have contact and on what terms. That there was an arrangement that for a period suited both the applicants and the respondents' brooks of no doubt. That the applicants were generous with their time and their money is likewise to be acknowledged. But they knew that they were not the minor child's parents when they entered the arrangement. That arrangement is no longer in place and the minor child's parents cannot be compelled to recommence it against their wishes. To accede to the Family Advocate's contact proposal would be to diminish the respondents' rights to manage their own daughter's life without justification or reason. The first respondent states that what is being attempted here is:

'... a round about adoption of the minor child.'

There is more than a grain of truth in that observation.

[27] The first respondent states in his answering affidavit that this application is an utter abuse of this court's processes. I agree. The application accordingly falls to be dismissed. It follows that costs should also be awarded against the applicants. In the exercise of my discretion, I direct that those costs shall be on scale A.

[28] It is for these reasons that I make the following order:

MOSSOP J

APPEARANCES

Counsel for the applicants: Mr R Naidoo Instructed by: Alvia Nair Attorneys 4 Hillclimb Road Westmead Pinetown Care of: Kushen Sahadaw Attorneys Suite 5, 2nd Floor 44 Walls Avenue Morningside Durban Counsel for the respondent: Ms L A Reddy Instructed by: Raoof and Associates 31 Roberne Court 75 West Street Durban

- [1] M M v N M and Others [2023] ZAKZPHC 122 para 8. The extract referred to is found in an article written by V de Wit entitled 'The correct approach to determining urgency' (2021) 21(2) Without Prejudice 12 at 13.
- [2] Mukaddam v Pioneer Foods (Pty) Ltd and Others [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC).
- [3] Commissioner for SARS v Hawker Air Services (PTY) Ltd; In Re Commissioner for SARS v Hawker Aviation Service Partnership and Others [2006] ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA).

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