

SOUTH AFRICA / JUDGMENT

R (2016/00404), R v [2016] ZAGPJHC 68 (4 February 2016)

[2016] ZAGPJHC 68

COURT

South Gauteng High Court, Johannesburg

CASE / FILE NUMBER

2016/00404

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THE
HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 2016/00404

DATE: 4 FEBRUARY 2016
In

the matter between: R...
T...L.....APPLIC
ANT
And
R...
T...A.....RESPOND
ENT

JUDGMENT

- [1] On 12 January 2016, I heard an urgent application for the return of S... to the applicant and a counter application for inter alia the appointment of a forensic psychologist to investigate the interests of S... and B... in respect of their primary residency, as well as an order granting primary residency of the minor children to the respondent pending the fore-mentioned psychological investigation. I granted an order in terms of which the respondent shall return S... to the applicant by 6pm on 12 January 2016 and for the appointment of the forensic psychologist. I reserved my reasons as well as a ruling on costs of the forensic psychologist and costs of suit. I set out the reasons and my ruling on the later issues below.

- [2] The parties are embroiled in a dispute regarding the return of S... a minor child born of their marriage, as well as the primary residency of this child. The parties were previously married. Their marriage was terminated by a decree of divorce granted on 23 August 2006, incorporating a settlement agreement. The settlement agreement inter alia, regulates the primary residency of and the right of access to the parties' two minor children.
- [3] The two minor children born from the parties' marriage is B... a boy presently aged 15 years old and S..., a girl presently aged 13 years old. The order that I granted on the 12 January 2016 was in respect of the latter child. In terms of the settlement agreement, the applicant was awarded primary residency of both children subject to the respondent's defined right of access.
- [4] Contrary to the terms of the settlement agreement, B... currently resides with the respondent. The circumstances that led to a change in B...'s de facto primary residency are in dispute between the parties. However I am not called on to rule on this issue. What is important to note for the purpose of the current application and counter application is that B's current de facto primary residency is not in dispute and the applicant is not seeking his return.
- [5] The applicant enjoyed S...'s primary residency until the occurrence of the events that gave rise to this application.
- [6] By agreement between the parties, the minor children ought to have spent the period 7 January to 12 January 2016 with the applicant. At the end of this period, B... would be returned to the respondent and S... would remain with the applicant. B... attends a school in the area where the respondent lives while S... attends a school in a different area where the applicant lives. Both minor children return to school on 13 January 2016 for the start of the 2016 school year.
- [7] On 5 January 2016, the respondent informed the applicant that S... does not want to return to her and that he cannot force her to return. S... confirmed this by a WhatsApp message to the applicant, informing the applicant that she will no longer return to reside with her and that she will be attending the same school as B... from 2016. According to the respondent, B... also refused to visit the applicant during the period referred to in paragraph 6 above.
- [8] The applicant accuses the respondent of parental alienation since their divorce in 2006. In particular she alleges that when S... returns to her after visiting the respondent and his current wife M... she notes a marked difference in her nature and attitude towards her. She becomes rude and defiant towards her and after undertaking what she refers to as damage control; S... normalizes and warms up to her again. She attributes S...'s wish not to return to her as parental alienation by the respondent.
- [9] Contrary to their agreement, the respondent offered the applicant contact with the minor children at his office on 8 January 2016 under his supervision. He also expressed his intention to record the session to which the applicant did not agree. The applicant attended

the respondent's office that day with the intention of collecting the minor children. However, the minor children refused to go with her. This encounter was video recorded without the applicant's consent. The applicant resorted to this court for help with S...s return. She launched the current urgent application. The relief she seeks for S...s return is final.

[10] The respondent denies that:

10.1 the applicant's application is urgent;

10.2 he is orchestrating parental alienation of the minor children from the applicant

10.3 he refuses to return S... to the applicant. He avers that it is S... who refuses to return to the applicant and that for the past 2 years it has been S...s wish to have primary residence with him and have contact with the applicant on weekends; lastly

10.4 he accuses the applicant of not being suitable to exercise primary residency in respect of the minor child hence, despite a court order granting her primary residency of both children, he took over de facto primary residency of B... .

[11] To his answering affidavit he has attached a letter, purportedly hand written by S... where she expresses her wishes to live with the respondent, his wife and her brother and step-sister, as well as her reasons therefore. The content of the letter is typed into the respondent's answering affidavit. Together with his answering affidavit he filed in court a flash stick apparently containing a recorded conversation between S... and the applicant which took place on 31 July 2015. S... purportedly recorded the conversation and handed the recording to the respondent's current wife M....

[12] The respondent also accuses the applicant of frustrating his efforts to appoint a forensic psychologist to investigate S's best interests in respect of her primary residency by refusing to consent thereto.

[13] Simultaneously with his answering affidavit, the Respondent filed a counter application requesting the court to inter alia refer an investigation of the best interests of the minor children in respect of their primary residency to Robyn Fasser (Fasser), an acclaimed forensic psychologist, and granting him interim primary residency of the minor children pending finalization of this issue in the normal course.

[14] The dispute between the parties regarding S...s primary residency is not new to this court. On 22 June 2015, the respondent

launched an application in the ordinary cause, seeking S...s primary residency. In July 2015, following events that are not

necessary to set out for the purpose of the current application and counter application, the respondent unsuccessfully sought to expedite his primary residency of S... by seeking an interim order to that effect on an urgent basis. The latter application was heard by my brother Sutherland J. He dismissed that urgent application with costs. Despite the costs of this application being taxed in August 2015, the respondent is yet to pay them.

[15] In his judgment, my brother Sutherland J made scathing remarks against the respondent. He found his conduct in respect of the events that led to that application to be provocative, bullying and intimidatory.

[16] Sutherland J also made the following remarks in respect of S... primary residency:

'These papers are replete with the two parents' versions of what the daughter wants or how the daughter behaves. It is impossible for me to resolve these conflicts. It seems plain to me that these

complicating accounts point to the fact that whoever hears what S... (my style) has to say will have to very carefully edit out the risk and I put it no higher than that, that one or other or both parents are behaving improperly in seeking to alienate the child from the other and manipulate her moods and her wishes and wants.'

[17] After receiving legal advice, the respondent subsequently withdrew the application for S...'s primary residency which he launched in June 2015. In the light of his withdrawal of this application, I find his blaming the applicant for evading the appointment of a forensic psychologist to investigate S...'s best interest in respect of her primary residency to be insincere because there was no pending litigation necessitating the forensic investigation. Assuming that there was substance to his desire for the appointment of a forensic psychologist, he has done nothing since withdrawing the primary residency application about six months ago to secure the appointment. Nothing prevented him from seeking the intervention of this court.

[18] From his withdrawal of the primary residency application and supine attitude to the appointment of the forensic psychologist, one can infer that there is no fire that warrants a change in S...'s primary residency. If there is, it has not been articulated in the papers. Being bored at the applicant's, spending weekends with her uncle when the applicant spends time with her boyfriend in another city and not being allowed to do as she wishes may not constitute fire which would make her residence with the applicant intolerable, at least not as set out in the respondent's answer. These may be reasons why she would prefer to reside with the respondent. Her preference is a factor to consider when determining what is in her best interest but is not determinative of it. The reasons as set out in the respondent's answering affidavit certainly do not render his counter application urgent.

[19] I frown upon the respondent's conduct in relation to the issue of S...'s residency, which in his own words has been brewing for approximately 2 years and in respect of which there has been no change in the circumstances since Sutherland J handed down his judgment in July 2006.

[20] The respondent shies away from taking responsibility for not honouring the December 2015 and January 2016 school holidays visitation arrangement between him and the applicant and for allowing S... to remain in his home contrary to the terms of the

settlement agreement. He is simply hiding behind S...'s wishes. The respondent's insincerity in this regard is again too stark to ignore. Evidence suggests that the respondent has been working behind the applicant's back to take over S...'s primary residency.

[21] Firstly, there is a court order granting the applicant primary residency in respect of the minor children. He had an agreement with the applicant regarding the minor children's visitation arrangements, for the December 2015 and January 2016 school holidays. Him allowing B... and S... to remain in his home contrary to the terms of their agreement and his intention to take over S...'s primary residency contrary to the terms of their divorce order is not only contemptuous, it brings his approach to parenting to question. It points to laxity in parenting, inability to set and reinforce boundaries against minor children and modelling contemptuous behaviour to the children.

[22] Secondly, the respondent and M... have clandestinely applied to B...'s school for S...'s admission into grade 8 in 2016 without the applicant's consent as far back as 19 February 2015. An application form and correspondence between the School and M... attached to the respondent's answering affidavit evidences this. The respondent subjected S... to two assessments by Estelle Esterhuizen (Esterhuizen) a Pastoral Therapist registered with the Health Professions Council of South Africa (HPCSA) and Mari Lautenbach, an educational psychologist also registered with the HPCSA. He did not seek the applicant's consent prior to subjecting S... to these assessments. Lautenbach's report on S... is dated 16 November 2015. Esterhuizen saw S... on 17 May 2015. The respondent was clearly not deterred by Sutherland J's dismissal of his application for S...'s interim primary residency in plotting to reside with S... without the applicant's consent.

[23] Thirdly, in her written report Esterhuizen records that S...'s informed her that the respondent and his wife M... would like her to come and live with them but she is concerned about her mother.

[24] Fourthly, the respondent and his wife have secured S...'s admission at B...'s school for 2016. For the respondent to undertake in his counter application to daily transport S... to her current school after clandestinely securing her admission at B...'s school reflects consistent insincerity on his part. For him to purport to agree to what he refers to as S...'s wishes under these circumstances does not only reflect his utter disregard for an order of court and the rule of law but also reflects his utter disregard for the parental rights of the applicant and impudence towards her. His conduct basically amounts to taking the law in his own hands.

He is consistent in his bullying behaviour towards the applicant. Being an attorney by profession and an officer of this court, I find his behaviour reprehensible.

- [25] S...'s wishes expressed as hearsay evidence in the respondent's answering affidavit stands to be struck off because this evidence has not been properly placed before this court. No evidence has been placed before this court regarding S...'s competency to give evidence in these proceedings. Assuming she is competent to give evidence, the respondent did not file a supplementary affidavit by S...' confirming this evidence. This includes her hand written letter annexed to the respondent's affidavit and its content typed into the respondent's answering affidavit. I did not acquiesce to a request by Counsel for the respondent to listen to a recording of a conversation between S... and the applicant handed into court in a flash stick. In that recording, apparently S... also expressed her wishes to reside with the respondent. In the absence of a confirmatory affidavit confirming its contents, the recording lacks basis for admission in these proceedings because it is not confirmed by affidavit by the person who recorded it. I therefore strike this evidence out.
- [26] Even if the evidence in paragraph 24 above was admissible and I were to consider it, I'm in exactly the same predicament that my brother Sutherland J found himself as reflected in paragraph 15 above. He pointed to the risk of according weight to S...'s wishes in a context where a dispute of fact regarding her best interests exists between the parties. The thread of that risk runs through the present applications.
- [27] In her report on the assessment she conducted on S..., Lautenbach states that the degree to which children should be involved in the determination of their best interests are controversial. She sets out several factors to consider when deciding

when and how to provide children with an opportunity to add their voice to the process. The following remarks from the report are worth quoting:

"A third factor is the quality of the relationship between each parent and each child. If the overall family relationships are positive and relatively conflict free, children's input can be both valuable and unlikely to invite retribution from a parent, or between the two parents, has been contentious, the input may be tainted by fears and other considerations that are more about the family's dynamics than about the best interests of the child.

...

One concept that can be helpful is to distinguish between concerns and solutions. It may virtually always be helpful if children can voice their concerns. Proposing solutions, by contrast, where loyalty and safety issues are most likely to be potential difficulties."

- [28] In the light of Lautenbach's warning set out above and for the same reasons as Sutherland J, I am in no position to make any finding on S...'s best interest.

- [29] The respondent has failed to take this court into his confidence regarding why he resolved to withdraw his application for a variation of the settlement agreement in respect of the primary residency of the minor children, which he had filed in the ordinary course. Instead he elected to contemptuously devote time to clandestinely take over S...’s primary residency. Notably, the respondent has also failed to set out any facts that point to a grave risk of S...’s exposure to physical or psychological harm or that would place her in an intolerable situation if she returned to applicant. There is absolutely no reason why he took the law in his own hands and only thereafter launched a counter application seeking interim primary residency in respect of S... in response to the applicant's application for S...’s return.
- [30] It is a long established principle in our law that no party may take the law into their own hands. See *Nino Bonino v De Lange* 1906 TS 120 at
122. This principle has been repeatedly applied by our courts. In *Kotze v Kotze*, (2) SA 184 (C) Herbstein J applied this principle in a child custody and parental rights context. He said at 187F.

"The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands."

- [31] Our courts have always frowned upon a party who takes the law in his own hands and only thereafter approach the court for relief. That is exactly what the respondent has done here. I take an acutely dim view of his conduct in this regard. On this ground alone, his application for the primary residency of the minor children stands to be dismissed. I am however concerned about the prolonged dispute between the parties regarding S...’s primary residency. A prolonged dispute on this issue can never be in S...’s best interests. Therefore in my view, despite my misgivings on the respondent’s counter application, I take opinion that the appointment of a forensic psychologist is in S...’s best interest. It is for that reason that I deem it appropriate to exercise my discretion as S...’s upper guardian to refer this issue for forensic psychological assessment. In the premises, the respondent's prayers in respect of the appointment of Robyn Fasser stand to succeed.

- [32] In the foregoing, the applicant’s payer for S...’s immediate return to her stands to be granted.

COSTS

- [33] The respondent seeks an order in terms of which Fasser's costs are equally born by the parties. The applicant seeks punitive costs

against the respondent. It was argued on her behalf that the respondent should solely be liable for Fasser's costs. Our courts have held that in disputes relating to children, where parents in contesting the case have acted in the best interests of the child, there is no winner or loser and accordingly each party should pay their own costs. (See *McCall v McCall*)

- [1] There is sufficient reason to depart from this decision in determining the question of costs in this matter.

[34] I have already expressed my disapproval of the respondent's contemptuous conduct, lack of respect for the rule of law, and

complete disregard for the applicant's rights and standing as a parent. That as an attorney of this court he is expected to be

prudent in promoting and respecting the sanctity of the South African constitution by respecting the rule of law and complying with court orders. There is no better way to stamp my disapproval of his conduct than to order to pay the costs of the applicant's application on an attorney and client scale. The respondent's conduct in instigating a change in S...s primary residency as set out in paragraphs 21 to 25 above also warrants an order holding him solely liable for the costs of the forensic psychological assessment of the minor children.

[35] I therefore grant the following order:

ORDER

I confirm the following order granted on 12 January 2016:

1. The Applicant's non-compliance with the normal Rules of His Honourable Court relating to service, filing and time limits is condoned and the matter is dealt with as one of urgency in terms of Rule 6 (12).
2. Respondent is directed to deliver S.... to the Applicant's home by 18h00 today, 12 January 2016.
3. S...s primary residence shall remain vested with the Applicant, subject to Respondent's rights of contact, as stipulated in the divorce order and settlement agreement.
4. Robyn Fasser ("Fasser") is appointed to investigate the best interests of S..., specifically in relation to her primary residence.

For this purpose:

4.1 Both parties will make themselves available to consult with Fasser and shall co-operate with her reasonable requests;

4.2 Both parties shall make S... available for assessment and interviews for any other requirements of Fasser.

5. Fasser shall provide this Court and the parties with a written report of her findings and recommendations.
6. On receipt of such report, either party may, upon duly supplemented papers, approach this Honourable Court for a final order.
7. The costs of Applicant's application, Respondent's counter application and the costs of Fasser, shall be pronounced upon by this Court in her written reasons to be handed down in due course.

ORDER IN RESPECT OF COSTS

1. The respondent shall pay the costs of the applicant's application on an attorney and client scale.
2. The respondent shall solely bear Robyn Fasser's costs of conducting a forensic psychological investigation of the best interests of the minor children in respect of primary residency and reporting thereon.
3. Robyn Fasser shall furnish the applicant's attorneys with a copy of the report referred to in 3 above and file a copy in court.

[1] 1994(3) SA 201 (CPD) at 209 B-C

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