

SOUTH AFRICA / JUDGMENT

R.J.D v M.D (007450/2022) [2022] ZAGPPHC 610 (8 August 2022)

[2022] ZAGPPHC 610

COURT

North Gauteng High Court, Pretoria

BEFORE

N.P. Mali

CASE / FILE NUMBER

007450/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE

NO: 007450/2022

DOH:

4 AUGUST 2022

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

8

August 2022

R[...]

J[...] D[...]

APPLICANT

and

M[...]

D[...]

RESPONDENT

JUDGMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 08 AUGUST 2022

MALI J

1. This application was brought on urgent basis. It concerns the return of the three (3) minor children ("children") by the respondent, the mother of the minors to the care of the applicant their father. The application is brought in two parts. Part A concerns which party should be entrusted with the minor children's interim primary residence until such time Part B has been adjudicated. Part B deals with final issues of co- guardian- ship, full parental responsibilities and rights with regards to the minor children and the appropriate relief for the applicant to be recommended by the expert and the Family Advocate in respect of the minor children.
2. The minor children are 7, 5 and 3 years of age respectively. The applicant resides in Pretoria, Gauteng Province also where the respondent uses to stay in the parties' common home. It is common cause that on 24 June 2022 the respondent travelled with the children to her parental home in M[....]2 in the Province of Western Cape for holiday visit.
3. On 3 July 2022 the respondent returned with the youngest child X, a baby boy with the understanding that the two minor girls will return to Pretoria on 18 July 2022 to commence with school on 19 July 2022. Upon the respondent's return, the applicant relayed his intention to dissolve their bonds of marriage. Between 3 and 5 July 2022 the parties entered into discussions with the purpose to resolve the issues amicably, but to no avail.
4. On 6 July 2022 the respondent approached her attorneys who addressed the correspondence to the applicant communicating the respondent's willingness to resolve the issues of dispute in amicable manner. Subsequently various correspondence continued between the legal representatives of the parties. In the letter dated 12 July 2022 by the respondent's attorneys the following is of significance:

"4. Since it is common cause between the parties that primary care and residence in respect of the minor children will vest with our client, it is obvious that the minor children will also be relocating to M[....]2

In response to the abovementioned correspondence, applicant's attorneys in their letter dated 15 July 2022, amongst others made it clear that there was no agreement that the primary care and residence of the minor children should vest with the respondent. At paragraph 4.5 the following bears:

"We furthermore wish to reiterate that there is nothing obvious about geographically relocating to M[....]2 with the minor children at this point in time, as your client fails to indicate how the relocation would be in the best interest of the minor children."

5. On 16 July 2022 the respondent returned to M[....]2 with the baby boy X. Amongst the reasons for the respondent to take away the baby boy is the applicant's temper and that he keeps a firearm with him next to his bedside and that made it unbearable to live with him. It became apparent that the parties could not resolve the issues in particular the return of the minor children, hence this application.
6. This court is seized with Part A; to wit whether the minor children should return to the applicant's home and the interim award of primary care and residence to the applicant. It is trite law that the court is the upper guardian of minor children and is therefore enjoined to look at the best interests of the minor children. Section 7 of the Children' Act 38 of 2005 ("the Children's Act') deals with best interests of child standard. Section 7(1) of the Children Act provides that whenever a provision of the Act requires the best interests of the child standard to be applied, the following factors amongst others;

"(a) the nature of the personal relationship between-

- (i) the child and the parents, or any specific parent; and
- (ii) the child an any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, to- wards-
- (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 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 effect on the child of any separation from-
- (i) both or either of the parents; or
- (ii) any brother or sister or the other child, or any other care- giver or person, with whom the child has been living;
- (e)
- .
- (m) any family violence involving the child or
a family member of the child "

7. The allegations levelled against the respondent by the applicant are as follows: The minor children who were supposedly going on holiday are currently enrolled in M[....]2 at the English School despite having attended Afrikaans medium school in Pretoria. The respondent's view is that the minor children are still young and they will be able to adapt. There is no evidence that this issue was discussed between the parties and that they sought professional assistance and or evaluation of the children to prepare them from the change of circumstances. As gleaned from the facts above there is no agreement pertaining the children's interim primary residence and their care.
8. The applicant's mother has been a resident in their matrimonial home and has played integral part in the daily lives of the minor children in particular, the baby boy X. The respondent in her answering affidavit placed this submission in dispute; however, in the replying affidavit, the applicant attached his mother's comprehensive affidavit putting in question the respondent's parental skills in general. This issue was not comprehensively canvassed by the respondent's representative

during the hearing.

9. There is also an issue of a third party in the form of respondent's father who refused to inform the applicant of the whereabouts of the respondent when the applicant wanted to visit baby boy X, on or about 16 July 2022. Respondent's father further stated that if the applicant wants to see the child he must go through him. In fact, the applicant has attached WhatsApp messages from the parents of the respondent. In one of the messages the father of the respondent states that the children think they are still on holiday. This tells how much the children are confused with their

state of affairs. Furthermore, there is no legal basis for the involvement of the respondent's father to the extent of being the "go to man" pertaining the children's visits by their father.

10. Another issue of significance is the reason for the respondent's relocation, that she needs her parent's emotional support for the divorce. Whilst in paragraph 3.15 of her affidavit she states that for practical purposes they had been separated with the applicant for the past two years, in paragraph 2.2 she states the divorce shocked her. All this does not address how it will be in the best interests of the minor children to relocate.
11. Furthermore, it has been submitted on behalf of the applicant that the respondent had stated that her employer will provide her with two tickets a month to fly to Gauteng. The applicant decries the expenses of visiting the children in M[....]2 or the expenses involved if the minor children are left in M[....]2 and they had to travel to him to Gauteng.
12. The applicant submitted that it should be in the best interests of the minor children to return to their parental home or stay with him. Amongst others he had demonstrated how the exercise to move the children in general and from Afrikaans medium to English school has not been well thought. That the girls will miss their friends and their environment. He explains how the girls differ that the other one is an introvert when the respondent said he

denies the girls to go out. The applicant describes the respondent as not the primary caregiver at all as she does not cook for the family, she is always out due to work commitments. In the event she is at home she is always busy on the phone. This is confirmed in the applicant's mother's affidavit, which goes further to describe the relationship she has built with the girls and the alleged special bond she has with the baby boy. The applicant and his mother do not dispute that there is also a helper because the respondent's submission is that the applicant and his mother do not necessarily take care of the children. Nevertheless, the overwhelming evidence by the applicant's mother as to the role she plays /played in assisting the respondent has not been disputed.

13. The environment of the minor children pertaining to the extended family is one of the legal considerations in terms of section 7(1) (f) of the Children's Act. All the above has not been gainsaid by the respondent, the major issue raised by the respondent is applicant's use of firearm and short temper; as well as the emotional support she needs. She is silent about the children's emotional support. The applicant denies having been irresponsible with his firearm and states that he recently renewed his license without any problems.
14. The evidence points to issues needing to be investigated by the experts pertaining both parties. In conclusion I am satisfied that the applicant should be the interim primary caregiver of the minor children. (own emphasis). It is therefore it is imminent that the children be returned to the applicant. In the result the following order is granted;

ORDER:

1. That the Respondent return the minor children to the care of the Applicant forthwith and that their interim primary residency would vest with the Applicant until such time as Part B hereof has been adjudicated, subject to the Respondent's contact rights with the children as follows:
 - 1.1 Every alternative weekend from after school until 17:00 on a Sunday afternoon;
 - 1.2 Every Wednesday afternoon from after school until 18:00;
 - 1.3 Telephonic and/or electronic contact between 17:00 and 18:00 on a Tuesday and Thursday;
 - 1.4 Short holidays to be rotated between the parties and long holidays to be shared equally between the parties;
 - 1.5 The Applicant to have contact with the children on Father's Day between 9:00 and 18:00, and the Respondent to have contact with the children on Mother's Day at the same hours;
 - 1.6 Contact on Applicant's birthday between 15:00 and 19:00 if it falls on a week day, and between 9:00 and 18:00 if it falls on a weekend, and the same contact to be had by the Respondent on her birthday;
 - 1.7

Contact on the minor children's birthdays for half of the day if it falls on a weekend, and for 2 hours if it falls on a weekday.

2. That a psychologist be appointed to conduct a forensic assessment and/or investigation to investigate the best interests of the minor children, and in doing so, recommending in a written report on the following aspects:

2.1 on which person should have primary care of the children;

2.2 a contact structure for the non-primary caring parent;

2.3 any other steps necessary in the best interests of the children.

3. That the Applicant and the Respondent be ordered to cooperate and participate in the assessment by the appointed psychologist in order to give effect to prayer 3 supra;
4. That the parties are responsible for the payment of the account of the appointed expert equally;
5. That the Family Advocate's Offices are requested to urgently conduct an investigation into the best interests of the minor children and the relief sought herein, and to report to this Court upon concluding such investigation;
6. The parties are granted leave to supplement these papers, if necessary, for purposes of final adjudication of Part B of the Notice of Motion;
7. That the Respondent pay costs of the application on a punitive scale;
8. That Part B be postponed sine die.

N.P. MALI

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:

Adv. L Keijser

Instructed by Pistorius-Scheepers

Attorneys

For the Respondent:

Adv. SM Stadler

Instructed by Rudman

and Associates

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