Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 4374/14

In the matter between

A[...] C[...] Applicant

and

R[...] C[...] Respondent

JUDGMENT

REVELAS J

[1] The parties hereto were previously married, but divorced on 12 August 2011, in the Regional Court. In terms of the decree of divorce, which incorporated a settlement agreement, the parties were co-holders of parental rights and responsibilities in respect of the two minor children born of their marriage, as envisaged in section 18 of the Children's Act No 38 of 2005, but primary care of the children was awarded to the applicant. In 2012, the respondent became the primary caregiver when the applicant moved from Port Elizabeth to Durban.

[2] The applicant now seeks an order, in urgent proceedings, to the effect she be granted primary care of her two children, who are presently in the care of the respondent, their present primary caregiver in terms of a second order of the Regional Court, obtained by the respondent in 2013.

[3] The children, a son K[…] (born on 2 […] 2004), and a daughter, S[…] (born on […] 2008) are as at date of this application respectively ten and six years old. When their parents were divorced, K[…] was seven and S[…] was three.

[4] The applicant left Port Elizabeth in January 2012 in pursuance of a better employment position at Lonza, South Africa in Durban. At that time the applicant did not have suitable accommodation for the children and the parties informally agreed that the children should remain in Port Elizabeth so as not to disrupt the children. K[…] had learning difficulties and was being treated for Attention Deficit Hyperactive Syndrome (ADHS). He also had to repeat grade 2.

[5] According to the applicant, the parties agreed that as soon as she was settled in Durban and found a suitable home to accommodate the children, they would be relocated to reside primarily with her in Durban. This assertion is disputed by the respondent who, on 6 December 2012, brought an urgent application in the Regional Court to prevent the applicant from removing the children to Durban pending the

determination of his application to amend the terms of the decree of divorce to the effect that he be awarded primary care of the children.

[6] On 7 December 2012 a *rule nisi* was granted in the respondent's favour and despite the applicant's opposition thereto, the rule was confirmed on 13 February 2013 and the children remained in the respondent's care, pending the outcome of the respondent's application to amend the terms of the decree of divorce, which in turn required (as per the order of the Regional Court) further investigation by the offices of the Family Advocate. This is the second order to which reference was made above.

[7] The main consideration which influenced the Family Advocate's recommendation that the respondent be awarded primary care those proceedings, was that it was in the best interests of the children not to be uprooted. The Family Advocate's report was obtained in 2013.

[8] Several affidavits of teachers and friends were filed in support of the respondent's contention that the children were settled and secure with a strong support system, (which the applicant had been lacking at that time, being a newcomer in Durban) with him in Port Elizabeth.

[9] In April 2012, the applicant purchased a house with four bedrooms in Durban and the children regularly visited her in the school holidays. The children have always had regular contact with the applicant by means

of skype and on the telephone. At that time the respondent was involved in a relationship with a woman named C[…] L[...] R[…] and the applicant was involved with a man named G[…] B[…]. Both L[…] R[…] and B[…] got on well with the children. B[…] moved with the applicant to Durban and being unemployed, he was able tot care for the children while the applicant was at work, during the day. The applicant is employed as a regional sales manager in Durban and works on week days from eight in the morning to four thirty in the afternoons. The respondent is a branch manager at Crane Aid in Port Elizabeth and has the same working hours as the applicant except for Fridays, when he works until two thirty in the afternoon. That was the situation in 2013 and in 2014.

[10] Pursuant to the Magistrate's order, the Family Advocate furnished a report of its investigations recommending that the respondent be granted primary care of the children in 2013. It was on the basis of this report that interim primary care was awarded to the respondent as stated above. The applicant sought to challenge the report. The hearing in respect of the final relief sought in the Regional Court was set down for 31 January 2014, but postponed *sine die* at the applicant's behest (to which the respondent agreed) to enable the applicant to engage the services of her own psychologist. On 12 December 2014, the applicant brought the present application on an urgent basis to be heard on 18 December 2014.

[11] The basis upon which the present order is sought is the following: The applicant instructed a clinical psychologist, Dr E de Witt to undertake a psychological assessment and to comment on the 2013 report of The Family Advocate. De Witt recommended in June 2014, that the applicant be appointed as the primary caregiver and the Family Advocate, in a further report released in August 2014, supports her recommendation. De Witt conducted an MMPI-2 Personality Profile on both the respondent and the applicant.

[12] De Witt also conducted a Millon Clinical Multiaxial Inventory (III) on the applicant, given that the latter had psychiatric difficulties. These were *inter alia,* that the applicant had been diagnosed with depression which is apparently in remission. De Witt reported that she found strong emotional bonds between the children and both their parents. However, the report suggests that both children expressed the wish to live with their mother. S[...] said she missed her mother terribly and would like to live with her. Yet none of the children stated that they did not want to live with their father for any reason. K[…] told De Witt that he wished that he could live with both parents on a fifty-fifty basis. It must be pointed out here that none of the children were unequivocal about leaving Port Elizabeth to live with their mother in Durban. They are not unhappy in their present home surroundings.

[13] The respondent opposes the relief sought, *inter alia,* on the basis that he also wants to instruct a second psychologist. The respondent disputed that the matter was urgent and raised two other points *in limine*, namely *lis pendens* and the applicant's alleged failure to follow proper court procedures. The respondent also brought an application to have certain allegations struck from the respondent's replying affidavit which I did not grant for reasons which are not relevant, in the light of the approach I adopt in this matter.

Urgency

[14] The main reason advanced for the urgency with which this matter was set down to be set down in the court recess, to be argued on 18 December, is that the applicant had after a desperate search, finally found a placement for the children in a school where she has enrolled them and which starts on 21 January 2015.

[15] Six other urgent applications were set down to be argued in the same week and the matter had to stand over to 22 December 2014 whereafter it was postponed to 29 December 2014 due to the respondent's counsel being unavailable as a result of an injury.

[16] When Dr Witt's report came to hand in June 2014, the applicant did not give any indication that she would proceed to the High Court to seek a variation of the Magistrate's order, nor in the many months thereafter.

According to the applicant, she approached the High Court when the second Family Advocates report came to hand on 25 November 2014. The respondent argued that if the applicant had indicated sooner that she was to bring this application he was prejudice and, in any event the urgency was self-created.

[17] The approach I adopted to this case was that even though the applicant had created a critical degree of the urgency herself, the matter should nonetheless be treated as urgent as it concerns the interests of children.

Lis Pendens

[18] The applicant argued that, as with the respondent's Regional Court application, her application in this court does not seek a final determination of the best interests of the minor children, or the rights of the applicant and the respondent, but is concerned with the interim arrangements for primary care. I do not agree. The Regional Court, at this point and in terms of its previous order, awaits the reports and further submissions of both parties in order to make a final determination regarding who is to be awarded primary care of the children. For that reason, the Family Advocate's second report is addressed to the Regional Court.

[19] Whereas in matters concerning children, there may be circumstances, in which it would be permissible for a High Court to entertain an application in relation to their care, where the same subject matter is still being adjudicated in another Court, it would still be the exception rather than the rule.

[20] The children in the present matter are not in any immediate danger. Their parents are both regarded competent parents by the psychologists who interviewed them. There are no exceptional circumstances warranting an intervention by this court in the *status quo* as a matter of urgency.

[21] The relief sought by the applicant is final in nature. She has sought to pre-empt the outcome of the proceedings in the Regional Court, which would also be final in nature, as it disposes of the primary care issue. The Family Advocate's second report, which favours the applicant as the primary caregiver and is addressed to the Regional Court, does not urge any court to proceed with the investigation as a matter of urgency.

Conclusion

[22] There are also other factors which precludes me from granting the relief sought by the applicant. In the Family Advocate's 2013 report, it was noted that the children are supervised by B[…] while the applicant is at work. B[…] was described as an *"integral part of the children's world".*

For all intents and purposes, B[…] was an important caregiver when the children visited their mother during the school holidays. The 2014 report, likewise refers to B[…] and specific mention is made of their stable relationship. The relationship between B[…] and the applicant ended in November 2014. There is presently no information as to how the termination of that relationship would impact on the applicant's ability to care for the children while she is at work. About the new school, there is also no information available, such as its proximity to the applicant's home and aftercare facilities and whether K[…]'s learning difficulties will be adequately addressed. K[…] receives medication for his ADHS condition on a daily basis. However, it is unrefuted that he has shown improvement and progress at school while in the respondent's care.

[23] The respondent has also raised the question of the applicant's financial position and has queried her ability to afford her new home with four bedrooms, a swimming pool and two dogs for the children, with B[…] leaving.

[24] At this point there are very important aspects in relation to the best interests of the children which, as I have outlined above, have not been properly investigated. More importantly, I am not convinced that the position with regard to the children's emotional needs have changed that much between 2013 and 2014. In 2013 the applicant also reported that the children cry for her in conversations and expressed a preference to

stay with her. Counsel for the respondent also referred to the fact that the contact between the children and the applicant lessened somewhat in 2014, which, as submitted, might explain why the children missed her more. These aspects can be fully ventilated in the Regional Court. If I were to grant the order sought now, and the Regional Court finds that the children should primary reside with their father, that would obviously cause another court application, more conflict and greater disruption to the children and would not serve their best interests well at all.

[25] In the circumstances, the application is dismissed with costs.

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E REVELAS
Judge of the High Court

Counsel for the Applicant, Adv de Vos, instructed by Anthony Incorporated.

Counsel for the Respondent, Adv Potgieter, instructed by Joyzel Obbes Attorneys.

Date Heard: *29 December 2014*

Date Delivered: *13 January2015*