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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: 1512/2015

NOT REPORTABLE

[J.....] [M.....] [B.....]

Appellant

And

[J....] [R.....] [B.....]

Respondent

Coram: **Chetty J**

Heard: **22 April 2015**

Delivered: **23 April 2015**

Summary: **Rule 43** – *Assignment of primary care and residence pendent lite – Best interests of minors – Circumstances under which minors' removed from applicant's care – Affluence of one party not overriding consideration – Children to be returned to applicant – Contact circumscribed*

JUDGMENT

CHETTY J: -

[1] Two minor children, aged two (2) and four (4), ([S.....] and [S.....]), respectively, form the subject matter of this application. Quintessentially it relates to their interim primary care and residence pending the finalisation of divorce proceedings initiated by their father, the respondent, against their mother, the applicant. The children are presently residing with the respondent in Port Elizabeth whilst the applicant resides with her grandmother in [C.....], a residential area on the periphery of the city.

[2] The circumstances under which the children presently reside with the respondent, is, notwithstanding the apparent conflict with the applicant's version, easily resolvable. It is common cause that she left the common home on 27 March 2015 with [S.....] whilst [S.....] remained with the respondent. Whether she did so of her own volition or was summarily ejected again presents no difficulty. On the probabilities, she was ordered to leave. I accept that her efforts to take *Skyla* with her were thwarted by the respondent locking himself and the child in the room to prevent her from leaving with the latter. His disingenuity hereanent is evident when regard is had to the duality of his responses to the applicant's allegations.

[3] It is furthermore common cause that the respondent delivered [S.....] to the applicant at Colchester the following day. Her contentions that the children remained with her until Sunday, 5 April 2015, when, pursuant to a mutual agreement, she allowed the respondent to take the children with him are not disputed. The

applicant's further averments that the arrangement made express provision that she would collect the children from pre-school two days later is likewise not denied. It is furthermore not in dispute that the applicant informed the respondent that for reasons beyond her control she could not collect the children on the appointed date and time and would do so the following day. However, notwithstanding being appraised of the applicant's intent, the respondent had reneged on the arrangements made between them and had no intention of returning the children to her care.

[4] Instead, contemptuous of their arrangement, he consulted his attorney the next day to commence proceedings to have the children's primary care and residence assigned to him in due course. When regard is had to his Machiavellian machinations to ensure the children's residence with him as a prequel to instituting divorce proceedings, his protestations that he acted in good faith, are unconvincing. Furthermore, the insinuation that the applicant sought to cast aspersions on the character of his attorney of record is without foundation. One searches the founding affidavit in vain for any such imputation.

[5] There is not a tittle of evidence to suggest that the applicant is not a good mother. On the contrary, the respondent admits that the children have a close bond with the applicant, that she was devoted to them and attended to all their needs. The fundamental objection to them residing with her pending the finalisation of the divorce proceedings, although lavishly embroidered upon in the opposing affidavit, is succinctly encapsulated in the respondent's attorneys' letter to the applicant on 7 April 2015, to wit, paragraph 6, which reads –

- "6. Our client has concerns when the children are in your care at the home in [C.....]:
- a. The children, when in your care, are living in a little 60 square meter home next to a location. The property is in a huge state of disrepair and has only two rooms. Seven people live in this home, including goods which are stored in boxes all over the place.
 - b. The property has no fences or kept garden with uncut grass and is overgrown. [C.....] is rife with puff-adders which are a risk for the children. Further to the above, the house is situated near several shebeens.
 - c. The house has no form of security, no fences and no front door, the front door is loose and pushed into position to secure it.
 - d. The house is very damp inside and when it rains, water runs into the house. [S.....] is asthmatic and this has already impacted on his health. [S.....] is also now showing signs of coughing.
 - e. The children do not have a proper place to sleep and are confined to 60 square meters with seven other people.
 - f. The vehicle in which they are transported in between [C.....] and Port Elizabeth is un-roadworthy, the tyres are smooth and it has no spare wheel. The vehicle is in a state of disrepair.
 - g. The children are living out of boxes and get returned to our client in dirty clothes and in some instances put on back to front.
 - h. Drinking is taking place in the house while the children are in your care.
 - i. When the children are returned to our client they have on occasions been bitten on certain areas of their bodies."

[6] As corroborative evidence, the respondent has annexed a series of photographs of the home in which the applicant resides, its immediate surrounds, the environs and the motor vehicle she uses. In addition, the candidate attorney in the employ of the respondent's attorneys has deposed to an affidavit in which she denounces the applicant's present abode. The mere fact that she felt **"uncomfortable and overwhelmed"** is of no consequence whatsoever. The interior of the home may well have been "untidy" as it had as yet not been cleaned. The applicant's evidence that she was **"pedantic about cleanliness"** remains uncontroverted.

[7] It is disingenuous for the respondent to now capitalise on the applicant's misfortune to have sought refuge in her grandmother's humble home. The fact of the matter is that he is directly responsible for the situation which she currently finds herself in. Despite his denials, I accept that he ejected her from the communal home and, with the assistance of his father, rendered her unemployed.

[8] The overriding consideration in this and matters of similar ilk is the best interests of the minor children. There is nothing to suggest that by residing with the applicant their needs and well-being will be deleteriously affected. On the contrary, those interests will, given the applicant's uncontroverted evidence, best be served by being with her. Her interaction with them appears from the following –

"36.1 The children are of a very tender age being four and two years respectively. I share a very close bond with the

children, as it was always I that attended to the needs of the children on a daily basis, which included bathing them, making supper for them, doing daily school lunches for them. In the mornings I would normally arise between 04h30 and 05h00, to get myself and the children ready for school. In evenings I would attend to getting them ready for bed. There were occasions when the respondent would assist me to bath the children and putting them to sleep, but this was when he could clearly see that I needed assistance. This was on very few occasions. The duties I attended to were in addition to my normal duties of cooking, cleaning and washing basically taking care of the home. I pause to mention that we only had a domestic, for one day a week on a Saturday from 08h00 till 14h00, until recently my mother has been assisting me.”

[9] In the result the following orders will issue: -

- 1. The Respondent is ordered to return the minor children, [S.....] and [S.....] to the care and primary residence of the applicant forthwith.**
- 2. The parties are directed to formalise contact arrangements which, once done, will be incorporated in this order.**
- 3. The respondent is ordered to pay the costs of this application.**

D. CHETTY

JUDGE OF THE HIGH COURT

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