

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 000763/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: **26/01/2024**

SIGNATURE

In the matter between:

C[...] **S[...]** **S[...]**

Applicant

and

O[...] **R[...]**

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 January 2024.

JUDGMENT

PHOOKO AJ

Introduction

[1] This matter came as an urgent opposed application on 17 January 2024 wherein the Applicant sought relief to the effect that the Respondent *inter alia* be directed to return the two minor children to the care of the Applicant before the school term begins on 16 January 2024.

[2] After considering the written and oral submissions of the parties, I granted an interim order on 18 January 2024 in favour of the Respondent. These are the detailed reasons for my granting of the said order.

The Parties

[3] The Applicant is C[...] S[...] S[...] who resides in [...], Gauteng Province.

[4] The Respondent is O[...] R[...] who resides in Centurion, Gauteng Province.

Background And Facts

[5] The Applicant and the Respondent were in a romantic relationship between the years 2009 and 2020.

[6] Two children namely; A and B were born in the said relationship in the year 2010 and 2012 respectively. During the course of the relationship, the Applicant and the Respondent resided together.

[7] The Applicant's and the Respondent's relationship ended sometime in 2020. Consequently, the Respondent resided with the two minor children from 2020 until the year 2021.

[8] The two minor children left the Respondent and went to reside with the Applicant as of January 2022 because the Respondent had experienced financial difficulties. During the two minor children's stay with the Applicant, the Respondent had always had access to them. The parties had an understanding and the two minor children would alternate during weekends and school holidays to be with either of their parents.

[9] According to the Applicant, he is the sole provider for the two minor children. Furthermore, one of the children is about to attend N[...] High School when the schools re-open where his elder brother is also schooling.

[10] A dispute arose between the parties when the Respondent, on 18 December 2023 and in the absence of the Applicant opted to go to the Applicant's place of residence escorted by members of the South African Police Service, took the two minor children's belongings, and left with the children to her place of residence.

[11] The Applicant's concern amongst other things is that the Respondent has removed children from him without his consent and that he is worried about their schooling arrangements as the Respondent has not provided him with any plans of continuing with the school which re-opens on 17 January 2024.

The Issues

[12] The issues to be determined are:

[12.1] whether the matter should be heard on an urgent basis, and

[12.2] Where should the minor children's primary place of residence be?

Applicable Law

Urgency

[13] Rule 6(12) of the Uniform Rules deals with urgent applications. Wherein a case for urgency has been made out, a court may condone non-compliance of the forms and services provided for in the Rules and hear the matter without delay if the applicant would not be afforded substantial redress at a later hearing. Rule 6(12) also confers a general judicial discretion on a court to hear a matter urgently.¹

[14] The test for urgency was eloquently formulated in *East Rock Trading 7 (Pty)*

¹ *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63.

*Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*² where Notshe AJ (as he was then) held that:

‘The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course’.

[15] It can be deduced from precedent that the issue of urgency is interconnected with the aspect of substantial redress. In other words, urgency must be considered together with the issue of whether there will be substantial redress at a later hearing if the matter is not heard on an urgent basis.

[16] Considering the above legal framework, I proceed to consider the Applicant’s submissions to ascertain whether this matter ought to be heard on an urgent basis.

Applicant’s Submissions

[17] The Applicant *inter alia* averred that the schools were re-opening their doors on 17 January 2024 and that the Respondent was prejudicing the two minor children by how she took the two minor children from his care.

[18] In addition, the Applicant contended that the Respondent had not informed him whether she had found an alternative school for the two minor children or whether she would take over the payment of the school fees and that “*she has not done anything to ensure the well being of the children, but she has taken the children to reside with her*”.

[19] Furthermore, the Applicant submitted that the school was about 5km from his place of residence whereas it is approximately 22km from the Respondent’s residence, and that this “*would be a force to change their circumstances in attending school*”.

² (11133767) [2011] ZAGPJHC 196 at para 6.

[20] The Applicant contended that the two minor children will not be catered for while residing with the Respondent and therefore it was of “*utmost importance that they are returned to him before the school term on urgent basis*”.

Respondent's Submissions

[21] The Respondent, who appeared in person, spoke briefly and stated that she is capable of taking care of her two minor children.

[22] Furthermore, in what appears to be her notice of motion, she *inter alia* submitted that the two minor children were sent to the Applicant to reside with him temporarily, but the Applicant opted not to return the two minor children to the Respondent.

[23] Ultimately, the Respondent further submitted that when the two minor children visited her during the 2023 December holidays, one of the children had a breakdown and was taken to a social worker. According to the narration of the events, the said child said the following to the Respondent, “*Mommy, if you take us back to C[...]’s place, I am going to commit a suicide*”. Consequently, the Respondent averred that she had to protect her two minor children by *inter alia* taking them to reside with her and involving social workers.

Evaluation Of Evidence And Submissions

[24] Regarding urgency, in *Standard Bank of South Africa Ltd v Du Toit N.O and Others*³ it was held that:

in all matters concerning the care, protection, maintenance and **well-being of a child** the stand that the child’s best interest is of paramount importance, must be applied...

[25] Our Constitution,⁴1996 and the Children’s Act 38 of 2005⁵ are also clear in

³ [2022] ZAFSHC 51 at para 33.

⁴ See section 28(2) of the Constitution.

⁵ See section 6(2)(a) of the Children’s Act.

that the rights of the children must always be considered as a matter of priority in every matter involving children. Given the plight of the two minor children that are at stake including access to basic education, I am satisfied that the Applicant has made out a case for urgency.

[26] Concerning the relief sought by the Applicant that the two minor children be returned to reside with him, this Court is placed in a difficult position given the fact that the engagement of the Family Advocate has not been involved in investigating the best interests of the two minor children about residency, care, and contact among other things. Furthermore, the views of the children have not been considered.⁶ The role played by the office of the Family Advocate in matters such as this cannot be overlooked.⁷

[27] When counsel for the Applicant was asked about the involvement of the office of the Family Advocate, she unfortunately provided vague answers including that there was no time to seek such intervention from the office of the Family Advocate given the urgency of the matter. I am not persuaded. There is nothing in the pleadings that shows any attempt whatsoever to do so.

[28] In my view, the allegations regarding the safety of one of the two minor children including suicidal threats cannot be taken lightly, especially when weighed against the best interests of the child. I am fully aware that the Respondent has raised these issues in what appears to be a notice of intention to oppose wherein she has written down her submissions. I am also mindful that the Respondent is unrepresented but has stood up to act in the best interests of her two minor children. To ignore the Respondent's submissions based on technicalities would in my view be contrary to the best interest of the children. This Court has to allow everyone to state their case regardless of whether they are represented or not.

[29] In light of the above considerations, I am unable to fully grant the relief sought by the Applicant pending the investigation by the office of the Family Advocate into the best interests of the two minor children regarding residency, care, and contact.

⁶ *D v D* [2022] ZAGPJHC 1009 at para 20.

⁷ *A R v A T* [2023] ZAGP JHC 3380 at para 127.

These issues will be finalised at a future date when a report of the Family Advocate has been made available before the court. The matter can be enrolled in the Family Court.

[30] However, given the fact that both the parties have parental responsibilities and rights as they have always been present in the lives of their two minor children, this Court is inclined to grant the Applicant reasonable contact with his children pending a report from the Family Advocate under certain conditions.

[31] These provisional measures are not made for the benefit of the parties but only for the best interest of the two minor children. When parties are no longer together for one reason or another, they should try as far as possible not to use children to fight their battles. In *S.P v S.P*⁸, *albeit* in the context of a divorce, Mantame J cautioned that:

‘When the parties’ divorce, they somehow forget that it is the husband and wife that get divorced and not the children. The children must and should not be used as pawns to fight the battle of the parents and settle scores ...The children should not bear the brunt of the consequences of a divorce’ (own emphasis added).

[32] Consequently, this Court, as the upper guardian of all minors, will grant a remedy that puts the best interest of the two minor children at the forefront. Their well-being and safety are what matters at this moment.

Costs

[33] I do not understand why this matter ended up before this Court when there is an indication that the matter is “*with the social worker*” and that the Applicant was notified to avail himself to the social worker for a meeting. Recently, in *Z.G v J.G.C.G*⁹ Marumoagae AJ stated that:

⁸ [2023] ZAWCHC 158 at para 31.

⁹ 2024] ZAGPPHC 18 at para 93.

‘It cannot be doubted that financially weaker spouses are usually women who are confronted by financially stronger spouses, usually men, who use their financial muscle to financially disadvantage them in matrimonial litigation’.

[34] The Respondent alerted this Court that she has run out of pocket because of several cases that she has had to defend at the hands of the Applicant. The said cases involve children. Notwithstanding this observation, I do not think that it will be in the interest of justice or the parties’ concerned to award costs.

Order

[35] I, therefore, make the following order:

- (a) The provisions of the Uniform Rules of Court relating to time and service are dispensed with and the matter is disposed of as one of urgency in accordance with the provisions of Uniform Rule 6(12).
- (b) That the office of the Family Advocate is appointed to urgently investigate the best interests of the two minor children namely; A and B, compile a report for this Court within 3 months and make recommendations with specific reference to the primary residence of the two minor children, as well as the contact towards the minor children by the other parent.
- (c) That pending the report of the Family Advocate, the two minor children be placed in the care of the Respondent subject to the Applicant’s right of contact which contact shall be exercised as follows:
 - (i) The party who is not exercising contact with the two minor children shall have daily telephonic contact and WhatsApp contact with the children between 17h00 and 18h00.
- (d) Pending the investigation by the Family Advocate, the Respondent shall not be entitled to remove the minor children from Gauteng without the Applicant’s prior written consent which consent shall not be unreasonably withheld.

(e) Both parties are given leave to supplement their papers within 15 days after the report as contemplated in paragraph b herein above is made available.

(f) There is no order as to costs.

M R PHOOKO
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Attorney for the Applicant: NA Dubazana

Instructed by: Dubazana Attorneys INC

Counsel for the Respondent: In person

Instructed by: n/a

Date of Hearing: 17 January 2024

Date of Judgment: 26 January 2024