

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION - MTHATHA) CASE NO. 07/2018**

Heard on : 03 May 2018

Date delivered: 07 August 2018

In the matter between:

BAXOLELE ICHOLAS MBIKO

Applicant

And

N T

First Respondent

A T

Second Respondent

N T

Third Respondent

JUDGMENT

MAJIKI J:

INTRODUCTION:

[1] The best interests of the minor child are paramount, the minor child's parents herein ought to know better, by virtue of their legal backgrounds. As the Children's Act 38 of 2005 (the Act) dictates, as co-holders of parental responsibilities who profess to love and want the best for their minor child, they ought to put aside their differences characterised by need for individual triumph, instead make every attempt to agree on providing the minor child with a loving environment conducive to the provision to the minor child of a stable

functional upbringing characterised by exposure to best learning facilities, where the minor child can holistically grow to be the best he can be;

In this matter the applicant approached court by way of urgency seeking the following reliefs in the main;

1. Declaring respondents' conduct of denying the **O T**, the minor child the right to access to education unlawful, unconstitutional and violation of the minor child's Constitutional Rights as entrenched in both the Constitution of South Africa and the Children's Act;
2. Directing the respondents release the minor child to the applicant for the minor child start or resume with his schooling career or education at Holy Cross Education Centre where he was enrolled in 2016 before he was taken by the respondents;
3. In the event the first respondent or any of the respondents have moved the minor child to another place, town and or province for any reasons known to them, such respondent/s be directed to fetch the minor child immediately and have him released to the applicant from wherever he is placed and only for schooling purposes;
4. The respondents be restrained and directed not to interfere with the minor child in any manner whatsoever during his stay with the applicant, during the period enrolled for his schooling or education period at Holy Cross Education Centre or any school chosen by the applicant;
5. The respondents be directed to release and hand over to the applicant the minor child's birth certificate, clinic card, clothes and all the necessary documentation to enable the child to be enrolled or resume his learning career at Holy Cross Education Centre;

6. The Family advocate be appointed to investigate and assess as to what will be in the best interest of the minor child as far as education, primary resident, contact, caregiver and all the other aspect of life as concerned.
7. The applicant be granted leave to bring application for full custody of the minor child after the Report of Family Advocate has been released or completed by the Family Advocate and other ancillary reliefs.

[2] The matter was enrolled for hearing for an interim order on 16 January 2018. The application is opposed by the respondents, who are the minor child's biological mother (first respondent), the father and mother of first respondent, (second and third respondents respectively).

[3] On the date of the hearing of the interim relief, the applicant was granted leave to file his replying affidavit within twenty (20) days from that date, which according to this court's directive was supposed to have been filed by 15 January 2018 already. The matter was removed from the roll for that purpose.

[4] After the applicant failed to file the replying affidavit, on 16 February 2018 the respondents applied for the hearing of the application and was duly allocated a date in the opposed court on 3 May 2018. On 10 April 2018, the applicant belatedly filed his replying affidavit.

[5] The issue central to the seeking of the orders on an urgent basis was that the minor child was at the time of the launching of the application out of school. The applicant wanted the minor child to be released or placed in his care so that he could resume schooling, when schools re-opened on 17 January 2018.

FACTS

[6] It is common cause that the applicant, an admitted advocate of this court, and the first respondent, an admitted attorney of the North Gauteng High Court, are biological parents of the minor child born on [...] July 2011. They are co-holders of parenting responsibilities and rights as defined in section 19 and 21 (b) of the Act. The minor child had been staying with the first respondent's parents, except for some brief stay the minor child had with his biological parents in 2014 and again with the applicant for sometime towards the end of the year in 2016.

[7] The circumstances relating to the maintenance, visits, residence of the minor child, amongst others are in dispute between the applicant and the first respondent, especially after the termination of their relationship towards the end of 2014 or 2015.

[8] The respondents raised points of law in the application by the applicant, two of those related to lack of urgency and no-compliance with section 33(2) and (5) of the Act.

URGENCY

[9] Urgency is still an issue in the application. The respondents had to file their answering affidavit within truncated time periods as directed by this court. It is therefore necessary to determine whether it was necessary for them to be brought to court on such truncated time frames. According to the applicant the matter was urgent because it involved the violation or infringement of a child's right to education. The schools were opening and the minor child had not been schooling in 2017. Even as at the date of hearing it was still urgent but not to the same degree as it was in January 2018. Further, there is a potential of violence, as on 4 January 2018 the first respondent bit him in his hand, during

an argument about his attempt to exercise his right of having access to the child for a few days.

[10] According to the respondents, the minor child was at Fairview primary school in 2017. They attached the certified copies of school reports reflecting the name, cycle term period, grade, number of days absent in that period, dates of closing and opening of schools and comments about the child progress by the educator and the principal.

The first report is for cycle term 1, dated 24 April 2017.

The second report is for cycle term 2 dated 30 June 2017.

The third report is for cycle term 3 dated 09 October 2017

The last report is for cycle term 4 dated 04 December 2017.

The first respondent in her main opposing affidavit stated that the minor child would have re-opened the schools in the same school on 17 January 2018.

[11] It is also in dispute as to how the first respondent ended up biting the applicant's finger on 4 January 2018. According to applicant he was bitten as he was being accompanied by the minor child. On his way out of respondent's gate, without altercation the first respondent grabbed and pulled the minor child and bit his finger. According to the first respondent she and the applicant had a disagreement about applicant taking the minor child away. She held the minor child as the minor child was about to board the applicant's vehicle. The applicant held her tight and she bit him in order to release herself from the applicant's grip. It is also in dispute as to how the applicant ended up having no contact with the minor child, during the year 2017.

[12] The applicant, in reply stated that the annexed copies of school reports were cover pages, with no name of the minor child. This is clearly incorrect, all relevant information regarding the minor child and his progress is contained in the annexures. The issue of the minor child not being at school is therefore put to rest. There was no reason for the applicant to believe that the child's right to education was being infringed. As for the quality of education and the issue of where the minor child would access better education, that could be part of a parental plan agreement between the parents. However, that is not the case the applicant brought to court. In the light of this and the dispute with regard as to whether there is a potential of violence, I have to agree with the respondents that the applicant failed to establish that the matter was urgent. As regards to any difficulties in reaching out to the minor child and intervening in any perceived unsatisfactory schooling, the applicant could have sought the assistance of the family advocate, psychologist or social workers as provided in section 33(5) of the Act, so that he and the first respondent could be assisted with agreeing to a parental plan.

COMPLIANCE WITH SECTION 33(2) AND 5

[13] With regard to the applicant's failure to first approach the family advocate before going to court, section 33(2) provides:

“If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights those persons before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.”

Section 33(5) provides:

“In preparing parenting plan as contemplated in subsection (2) the parties must seek –

(a) The assistance of a family advocate, social worker or psychologist or

(b) Mediation through a social worker or other suitably qualified person.”

[14] The respondents objected, correctly in my view, to the handing up of a letter during the hearing of the matter, seeking to confirm that the applicant has after the launch of the application, approached the office of the family advocate, for assistance. Furthermore, the applicant did not need to seek an order of court in order to invoke the involvement of the office of the family advocate, as he sought to do in his prayers in the notice of motion. The provisions of these sections clearly indicate that, should co-holders of parental rights experience difficulties, they must seek to agree on a parental plan before coming to court and must seek the assistance of the relevant officials.

[15] The reasoning behind this is not difficult to understand. The court, is indeed the upper Guardian of all minors, however court procedures in their nature are costly, cumbersome and are usually lengthy and may be emotionally draining, in particular, to children who have reached the understanding age. The Act wants them to be approached as a measure of last resort. Even if the applicant was of the view that the matter was urgent, the said offices could have been engaged and asked to expedite matters and only when that yielded no results within the desired timeframe, would such, perhaps, be a justification to approach court.

In the light of the success of these two points *in limine*, it is not necessary to deal with the rest of the issues herein.

In the result.

The application is hereby dismissed with costs.

B Majiki

Judge of the High Court

Applicant in person : Mr B N Mbiko
Kunene Location
MTHATHA

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