



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 56370 / 2015

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

19 AUGUST 2015

DATE

SIGNATURE

In the matter between:

A. J. V. R.

APPLICANT

And

D. H.

RESPONDENT

JUDGMENT

MAVUNDLA J;

- [1] At the centre stage in this matter, in my view, lies the question of what is in the best interest of a little girl, born on [.....], 2 years five months old, out of wedlock between her now warring parents, her biological father who is the applicant and her biological mother who is the respondent. Typical of a situation where the rose-tinted glasses fall and break, the owners thereof, become like two fighting bull elephants charging at each other, with no quarters given, seeing nothing but an enemy, destroy everything around them. *In casu*, the victim will invariably be the innocent child. The High Court is enjoined to protect the innocent child at all times. The adjudication of this matter, invariably, must be geared towards upholding that protection imperative towards the child.
- [2] The parties have been previously involved in one or other legal duel against each other, all centred on the minor child. Those legal skirmishes, I shall refer to as and when it becomes necessary. The present duel unfolded when the applicant obtained, on an *ex parte* urgent application, an order by Mabuse J on the 20 July 2015, premised on oral evidence of the applicant. The order, in terms of Part A of the notice of application, requested the family advocate to conduct an urgent investigation into the best interest of the minor child and compile a report containing recommendations regarding the parties' parental responsibilities and rights; ordered that the minor child remains with the applicant pending the final adjudication of Part B. The respondent was granted reasonable contact under supervision of the applicant every weekend on Saturday and Sunday from 10h00 until 1400 and reasonable daily telephonic contact. Part B of the application was postponed sine die and the costs of the application were reserved for adjudication together with Part B.
- [3] The respondent anticipated the order of Mabuse J and filed a replying affidavit, seeking reconsideration and setting aside of the said. This drew the first salvo by the applicant, calling for a preliminary point to be decided, whether the respondent is properly before this Court. The order granted by Mabuse J did not provide a *rule nisi*, although its duration depends on the final adjudication of Part B, is to a certain extent final in nature. However, rule 6(12) (c) permits a person aggrieved by an order granted in his absence against him in an urgent application, as was the case *in casu*,

be it interim or final, to anticipate such order and set it down for reconsideration; vide *National Director of Public Prosecutions v Braun and Another*.¹ In my view, that the respondent was properly before the Court, brooks no further argument.

[4] Ms Viljoen who appeared on behalf of the respondent raised three points *in limine*, namely that:

4.1 This Court did not have jurisdiction because the respondent is the biological mother and guardian of the minor child. There was no Court order obtained by the applicant, in terms of s18 of the Children's Act, neither was the settlement agreement between the parties made an order of Court.

4.2 The matter is *lis pendens* before the Children's Court in Pretoria. In terms of s172 of the Children's Act, if the parties settled the matter, such settlement must be submitted to the clerk of the Court and be made an order of the Court, which is not the case *in casu*.

4.3 the applicant abused the Court process in that the *onus* rested on him. The applicants mislead the Court by alleging that a warrant of arrest was issued against him, whereas it had been held over. Further the applicant did not disclose to the Court that the child stayed in the jurisdiction of the Bloemfontein Court but merely alleged that the child stayed with him, the applicant. He also did not disclose the Court that he did not withdraw the matter in the Magistrate's court.

[5] In deciding the points *in limine* raised, it needs to be borne in mind that this Court is the upper guardian of all children,² be they resident or temporal sojourners, and has jurisdiction over issues pertaining to the best interest of such children that find themselves within its jurisdiction. It is enjoined to protect them and has wide powers to do so. The Court has wide powers to do so. The Court must take into account all relevant factors, be they in the past or present, that pertain to the matter, not only in deciding jurisdictional issues but any and or all, for the protection of the child. In the matter of FS v JJ³ the Supreme Court with regard to disputes over children held that: "*AD and DD v DW and Others (Centre for Child Law as Amicus Curiae;*

¹ 2007 (1) SA 189 (CPD) at 193 par[9] to [10].

² Vide J v J 2008 (6) SA 30 (CPD) at 37D

³ 2011 (3)SA 126 (SCA) at 136.

Department for Social Development as Intervening Party)⁴ the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be 'held to ransom for the sake of legal niceties'⁵ and held that in the case before it the best interests of the child 'should not be mechanically sacrificed on the altar of jurisdictional formalism'. In the matter of J v J⁶ it was decided that the interest of the child is paramount and should not be sacrificed on the altar of judicial formalism.

- [6] It is common cause that the parties reached an agreement that the child shall be with the respondent from Sunday afternoon to Thursday morning and with the applicant from Thursday afternoon to Sunday morning. It is common cause that the respondent resides in Sasolburg, which is outside this Court's jurisdiction, while the applicant resides in Vereeniging within this Court's jurisdiction. Section 44(2) of the *Children's Act 38 of 2005* provides that: "Where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in the matter. Section 45(4) of the Act provides that: "Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as the upper guardian of all children. In my view, ss44 (2) and 45(4), read together with the authorities cited herein above place it beyond doubt that this Court, as the upper guardian has jurisdiction over the minor child."
- [7] The matter of *lis*, it is common cause that it relates to the application which was brought by the applicant in the Pretoria Magistrate's court for purposes of asserting his rights as the biological father of the child, in terms of s18 of the Act. That matter was not further prosecuted. Section 45(4) of the *Children's Act* provides that "Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children". In my view, the jurisdiction of this Court cannot be thwarted on the basis of a matter which the parties have abandoned. I therefore find that there is also no merit on this point of *lis pendens* and stands to be dismissed.
- [8] When the matter came before Mabuse J, three photos were placed before the Court. The photo "A" at paginated page 64 shows the little girl, whose facial expression does not show radiance but rather an unhappy and stressed child. Photo "B" at paginated page 65 shows the face of the little girl's right face, with what seems to be blue eye (associated with blunt trauma injuries). Photo "C" at paginated page 66 shows three almost round marks at the back more or less along the spinal cord region and extending from the waist downwards. There is also a vertical dark mark just above the pants or underwear. The respondent, without disputing the other marks, said the latter mark is a birth mark. There is also annexure "E" at

⁴ 2008 (3) SA 183 (CC) para 30.

⁵ *De Gree and Another v Webb and Others (Centre for Child Law as Amicuriae)* 2007 (5) SA 184 (SCA) para 99.

⁶ 2008 (6) SA 30 (CPD) at 37H and referred to in *FS v JJ supra* at 137B.

paginated page 71 which is the report by a medical practitioner, Dr Du Plessis who examined the child, and is dated 17 July 2015. The clinical findings recorded are: "No physical obvious injuries. More emotional injuries, child was very distressed when I wanted to examine her. She didn't want to leave her dad and refused me to undress her. She was visibly distraught and crying. Child was crying + restless when I wanted to examine her."

- [9] For the applicant to approach the Court on urgent basis for the relief sought, in the light of the marks and the clinical findings of the doctor who examined the child, can never amount to an abuse of the court process. In my view, where there is an indication of abuse on a child, it is commendable for a concerned person to urgently approach the courts for the protection of the child. It would be irresponsible not to approach the Court when there are signs of trauma and abuse on the child.
- [10] It is common cause that the respondent obtained a protection order at the magistrate's court of Sasolburg with additional orders against the respondent for the return of the minor child, and a warrant for his arrest; on the 17 July 2015. It is common cause that the order of Mabuse J cancelled this warrant of arrest, which is in my view final.
- [11] In my view, faced with a situation of possible arrest and a child who showed all signs of abuse, the applicant approached the Court on ex parte urgent basis. I am of the view, that both these factors, justified that the applicant should approach the court as he did, and it cannot be said that he abused the court process. In the premises this Court finds that this last mentioned point *in limine*, also has no merit. In the premises all three points *in limine* are dismissed.
- [12] With the points *in limine* having been disposed of, the Court needs to deal with the reconsideration of the order of Mabuse J. The respondent has since filed her affidavit. The Court is to approach the matter on the basis that the versions of both respective parties are now before it, which was not the case when Mabuse J granted his order. The warrant of arrest has since been cancelled. This is final and cannot be reversed. The child has since been placed in the care of the applicant, pending the finalisation of Part B of the notice of motion. In reconsidering this latter order, the Court will consider the respective versions of the parties. In this regard *vide The Reclamation Group (Pty) Ltd v Smit and Others*.⁷
- [13] The version of the applicant tersely put was that: the parties met in Potchefstroom and went into a relationship about March, April May 2012 and ended the

⁷ 2004 (1) SA 215 (SECLD) at 218.

relationship in 2014. The child was born in [.....]. When the child was born he bathed her, changed her diapers, and spent most of the time with her. He and the child have a much knit bond. The child does not leave him, sees him as her protector and loving father. He has a support structure in the form of his mom and father who financially assists both him and the minor child financially. I must hasten to state that the respondent has not disputed these averments.

- [14] According to the applicant, when the child was born the respondent was not that much close to the child. He further averred that the respondent suffered manic depression or deep depression. When the relationship ended the respondent went to stay with her parents in Sasolburg. When the child visited him in November 2012 he noticed some changes on the child. She no longer played, laughed or run around and was emotionally distant. In December 2012 he noticed bruises on her left arm biceps, which to him looked like finger marks. The respondent informed him that the girl fell. In January he noticed deep swelling on her face and blue mark on her eye. The respondent told him that children get hurt all the time and it is not serious. The applicant said he has two photos to prove this. The respondent in regard to the injuries on the face of the child said that she walked into a wall.
- [15] The applicant and the respondent subsequently reached an agreement that the child would be with him from Thursday to Sunday and be with the respondent from Sunday to Thursday. The respondents' father is drinking most of the time. During December the child reacted differently on seeing the photos of her paternal grandparents remarking that "*oupa speel*", and to the maternal grandparents that "*oupa slaan*". On the latter remarks the child's demeanour changed and she started crying. In March 2015 when he tried to lift child's shirt she would not let him. It is then that he noticed finger marks on the child, similar to the earlier finger marks. On the 16 July he noticed marks at the back of the child. The mother told him that these could have been caused by the car seatbelt. On the 17 July he had the child examined by a doctor who completed a J88 form. The child refused that doctor should I lift her dress up. I have earlier, herein above referred to the exhibits "**A**", "**B**", "**C**" and "**E**"⁸ it is not necessary to repeat what is contained therein. I will, however, later revert to these exhibits.
- [16] The respondent contended that she is the sole guardian of the child and applicant only has contact rights. I must hasten to state that this submission may well have been correct prior to the advent of the *Children's Act*.⁹ The rights of the applicant, as the biological father of the child are now much broader than mere contact rights.¹⁰

⁸ Vide para[9] supra.

⁹ Vide *Ex Parte Kedar and another* 1993 (1) SA 242 (WLD) at 243I.

¹⁰ Vide ss 18, 23, 24, et 28 of the Act.

- [17] The respondent admits that the child had certain injuries although she ascribed them to an “unfortunate incident”. She however, contended that there are certain contradictions in this regard because in an earlier application in the Magistrate ‘Court, the applicant referred to other incidents in November 2014.
- [18] The respondent contends that the applicant never informed her that the child had emotional problem. She does not challenge the contents of the J88, save to state that the doctor could have through the assistance of the applicant lifted the child’s dress and examined her. She seems to be disputing that the child had these marks referred to in photo “C” alternatively that the photo is not recent but relates to injuries of March 2015. In respect of the report of Ms Van Schalkwyk, the respondent’s chagrin against it was that the former examined the child without her consent, and has instructed her attorneys to report Ms Van Schalkwyk to the Health Professional Council. She however pointed out that according to Van Schalwyk, the child needs more time with the primer parent as she is in her development stage and might be adversely affected the longer she is not. She opined that the interim order will be detrimental to the child.
- [19] The respondent further denied that there were ever any bruises on the child and further stated that these would have been noticed by the personnel at the crèche where the child attends. She further denied that she or her parents ever abused the child and blends as lies the allegations of the applicant regarding any emotional or physical abuse on the child.
- [20] The applicant alleged that there were visible marks on the child. In this regard he placed photos before the Court. The respondent admits that there were certain injuries or marks on the child, but gives her own explanation as regards the course thereof. The applicant’s averments of certain behavioural changes on the child, her withdrawal and refusal that her dress be lifted, finds confirmation in report of Ms Van Schalkwyk which was placed before Mabuse J as annexure “D” and reads as follows:

“OBSERVATIONS OF PHYSICAL DISCOMFORT

During the session of March 2015 L’s behaviour was surprisingly withdrawn. She wanted to keep her dummy in her mouth, which normally she does not. She scrambled away when her father wanted to lift her jersey and started crying.”

- [21] In the matter of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹¹ it was held that: “where, in proceedings of this nature, disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some form of relief, may be granted, if those facts averred in the applicant’s affidavit have been admitted by the respondents, and together with the facts alleged by respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant, may not be such as to raise a real, genuine or *bona fide* dispute of fact. See in this regard *Room Hire Company Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163–5.”
- [22] In my view, the facts placed before Mabuse J reveal, as shown in the exhibits that the child was at one or other stage abused. The denials of the respondent as to the cause of the marks does not negate an inference that the respondent is failing in ensuring the safety, protection and wellbeing of the child. On the admitted facts and the empirical evidence, Mabuse J was, in my view, correct in granting the order prayed for.
- [23] In the result the application for reconsideration of the order of the 20 July 2015 of Mabuse J is dismissed with costs.

N .M. MAVUNDLA

JUDGE OF THE COURT

DATE OF HEARING : 07 / 08 / 2015

DATE OF JUDGEMENT: 19 / 08 / 2015

APPLICANT’S ADV : ADV VAN SCHALKWYK (Ms)

INSTRUCTED BY : VENN MULLER ATTORNEYS

RESPONDENTS’ ADV : ADV. VILJOEN (Ms)

RESPONDENTS’ ATT : NOLTE INCORPORATED

¹¹ 1984 (3) SA 623 (A) at 634E–635C.

