

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE CIRCUIT LOCAL DIVISION, EAST LONDON)**

**Case no: EL 1107/2013
ECD2607/2013**

**Date heard: 5.9.2013
Date delivered: 10.9.2013**

In the matter between:

R SULLIVAN

Applicant

vs

A OLIVIER

Respondent

JUDGMENT

TSHIKI J:

A) INTRODUCTION

[1] Applicant herein has approached this Court by way of urgency for an order, *inter alia*, that:

[1.1] the Family Advocate institute an enquiry and furnish a report with regard to the issues herein to this Court;

[1.2] directing that, pending the finalisation of this application in respect of the minor child, A J O born on 31 March 2011:

[1.2.1] parental rights and responsibilities as defined in section 18(2)(c) of the Children's Court Act 38 of 2005 (the Children's Act) are conferred equally on the applicant and the respondent in that the parties are co-guardians of A;

- [1.2.2] the applicant shall remain the primary carer of A whose primary place of physical residence shall be with the applicant;
- [1.2.3] the respondent shall be entitled to reasonable contact with A at all reasonable times, which access shall include, but not be limited to:
- (a) every alternate weekend from a Saturday morning at 09h00 until 17h00 and from 09h00 until 17h00 on the Sunday;
 - (b) reasonable telephonic contact;
 - (c) special occasions such as Mother's Day, Father's Day and the parties relevant birthdays, shall be spent by A with the relevant parent, where possible;
 - (d) the parties shall negotiate in advance about contact arrangements in respect of A's birthday, so that both parties are able to spend time with him;
 - (e) Christmas and New Years shall alternate between the parties.
- [1.2.4] the respondent shall contribute to A's maintenance, by the payment of cash in the sum [of] R3 300.00 per month in advance on the first day of each and every month to the applicant, which payment shall be effected into applicant's banking account (R Sullivan, First National Bank, Account Number (Removed) branch code 210221); such maintenance to commence from 1 October 2013.

[1.3] That the orders in paragraphs 4 serve as an interim order with immediate effect, pending finalization of this application.

[1.4] Further and/or alternative relief.

B) FACTS

[2] Applicant is the mother of the minor child A J Olivier (A) born on 31 March 2011 and his biological father is the respondent Mr A Olivier.

[3] At the time of his birth A's parents were in a permanent life-partnership relationship and thus acquired full and equal parental responsibilities and rights in respect of A.

[4] The parties herein have now separated and the purpose of this application is therefore, *inter alia*, to confirm and to grant certain rights to both parents so that in the best interest of their minor child A, there is certainty in respect of his primary care contact with the child by both parents as well as maintenance to support his basic needs.

[5] In her papers applicant avers that the minor child and herself have been subjected to harm at the instance of the respondent who has threatened to remove the minor child from the care of the applicant. The parties are no longer staying together and that applicant is now staying with the minor child A.

[6] I must say though that I have granted leave to the applicant to move this application as a matter of urgency only on the basis of the averments contained in paragraph 5 above.

[7] The matter was argued before me after both parties had filed their founding and answering affidavits respectively.

[8] During argument Ms Marais appeared for the applicant and Mr Bester for the respondent.

[9] The main crux of Mr Bester's argument is that this matter is not urgent and that the Court cannot deal with the applicant's maintenance complainant in this Court more so by way of urgency.

[10] In the little time I have in preparing this judgment I will endeavour to address the important issues raised by the parties herein. Firstly I must emphasize that this Court is and has always been regarded as the upper guardian of all minors in all matters concerning children. Section 28(1) of the Constitution provides, *inter alia*, that every child has the right to family care or parental care when removed from the family environment. To basic nutrition, shelter, basic health care services and social services. To be protected from maltreatment neglect, abuse or degradation. It is also important to mention that a child's best interests are of paramount importance in every matter concerning the child.

[11] Ms Marais has submitted that the grounds of urgency herein are based solely on the basis that respondent threatened to remove A from applicant's care and from applicant's belief and concern that A would be subjected to exposure to harm when in the care of the respondent. However, she has submitted that if the Court finds that the matter is not urgent the Court will not be entitled to simply dismiss the application on the ground of lack of urgency alone because urgency is a matter of form and not substance. She relied on the judgment in **Commissioner, SA Revenue Services v Hawker Air Services** 2006(4) SA 292 (SCA).

[12] It is a common practice for some practitioners who appear in the High Court to apply for the dismissal of an application on the only ground that it is not urgent. In my view, if the Court is of the view that an application, although brought by way of urgency, is not urgent, there is no salutary practice that such an application has to be dismissed on the grounds of lack of urgency alone. In the **Revenue Services v Hawker Air Services** quoted above Cameron JA (as he then was) at page 299 para [9-11] remarked as follows:

"One of the grounds of which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit, the Rules of Court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)) ... Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the Court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."

[13] I am of the view that the present case was properly filed as an urgent matter based on the issue I have alluded to *supra*. However, it seems to me that the respondent disagrees with the averments made by the applicant relative to urgency in that respondent had threatened to remove A from appellant's care and custody. In my view, if the applicant still intends to pursue the issue the matter would have to be referred for oral evidence. However, the issue of the minor child's rights in terms of section 18(2) could best be addressed by the family advocate's report. It would suffice for this Court at this stage to grant an interim interdict pending the finalization of those issues in this application which relate to the child's rights in terms of section 18(2) of the Children's Act 38 of 2005.

[14] Relative to the issues in this case it is important to state that a co-holder of parental responsibilities has the right to apply to the High Court, divorce Court or to the Children's Court for an order suspending for a period or terminating any or all the parental responsibilities and rights which a specific person has in respect of a child. Or extending or circumscribing the exercise by that person of the parental responsibilities and rights that person has in respect of a child. Such application may be combined with an application in terms of section 23 of the Children's Act for the assignment of contact and care in respect of the child to the applicant in terms of that section. In other words the grounds of application by the applicant herein relative to the parental rights and responsibilities as well as guardianship of a minor child can be brought before this Court. I must also say though that this Court is not limited by any law in making any order relating to the interests of the children.

[15] In the present matter what is also important is the issue of the role of the Family Advocate relating to the institution of an enquiry on the child's rights in terms of section 18(2)(c), 19,20 and 21 of the Children's Act 38 of 2005. There is, therefore, no bar preventing this Court from dealing with those issues even those relating to maintenance for that matter. As I have alluded to above those issues have not been raised by way of urgency as the respondent has contended.

[16] Ms Marias has also argued that the parties to this application lived a permanent life partnership as though they were a married couple. In the event that they had instituted divorce proceedings, they would have been able to make use of Rule 43 proceedings, a mechanism, *inter alia*, for speedy and effective resolution of maintenance for minor children. Therefore, she argues that applicant should not be prevented from approaching the Court for the relief that relates to maintenance as she would be entitled had she had done in divorce proceedings. In her view, this therefore, amounts to unfair discrimination against children of unmarried parents.

[17] I do not deem it necessary to deal with the issues raised by Ms Marais in paragraph 16 above. I say so because, by reason of time constraints, I cannot apply my mind fully to the issue. I can only state that Rule 43 applies only to matrimonial proceedings instituted by spouses seeking relief in respect of one or more of the matters referred to in Rule 43. In this case there is no pending matrimonial action and therefore, in my view, the facts of the present case are distinguishable from a situation where the provisions of Rule 43 finds application.

[18] As already alluded to supra there is nothing preventing this Court from dealing with the maintenance issue even if it is a provisional order of maintenance pending the finalization of the maintenance court enquiry. My view is that in all maintenance matters involving children the court should endeavour to see to it that they are dealt with as expeditious as is practically possible. It would not be in the best interests of A if the maintenance issue would be referred back to the maintenance court especially when there is already an indication that it will only be dealt with sometime in October 2013. Therefore, as already intimated in his answer, respondent will have to file his supplementary affidavit indicating how much he can afford as a maintenance contribution towards the child in issue. Payment of that amount will have to be immediately implemented pending the outcome of the enquiry as to the appropriate amount.

[19] The finalization of issue relating to the parental rights and responsibilities of the child A will depend on the availability of the Family Advocate's report in line with paragraph 3 of the notice of motion. This is important especially when one has regard to the contents of annexure A5 annexed to the answering affidavit

[20] In the light of what I have said above I make the following order:

[20.1] That the applicant's non-compliance with the time limits and forms of service provided in terms of the Uniform Rules of Court in hearing para 1 of the certificate of urgency as a matter of urgency in terms of Rule 6(12) of the Uniform Rules is hereby condoned.

[20.2] That the Family Advocate is directed to institute an enquiry and furnish a report with regard to the issues herein to this Court relative to the interests of the minor child A, in terms of section 18(2) of the Children's Act 38 of 2005.

[20.3] That pending the finalization of this application and in the interests of the minor child, A J O:

[20.3.1] parental rights and responsibilities as defined in Section 18(2)(c) are conferred equally on the applicant and the respondent in that the parties are co-guardians of A;

[20.3.2] the applicant shall remain the primary carer of A whose primary place of physical residence shall be with the applicant;

[20.3.3] the respondent shall be entitled to reasonable contact with A at all reasonable times, which access shall include, but not be limited to:

[20.3.1] every alternate weekend from a Saturday morning at 09h00 until 17h00 and from 09h00 until 17h00 on the Sunday;

[20.3.2] reasonable telephonic contact;

[20.3.3] special occasions such as Mother's Day, Father's Day and the parties' relevant birthdays, shall be spent by A with the relevant parent, where possible;

[20.3.4] the parties shall negotiate in advance about contact arrangements in respect of A's birthday, so that both parties are able to spend time with him;

[20.3.5] Christmases and New Years shall alternate between the parties.

[20.4] The respondent shall contribute to A's maintenance by the payment to applicant in cash the sum which would be stated in his supplementary affidavit per month in advance on the first day of each and every month which payment shall be effected into the applicant's banking account (R Sullivan, First National Bank, Account number 62202818491, branch code 210221, such maintenance shall be paid not later than two weeks from date of delivery of this order hereof until the amount is substituted by a subsequent order of this Court relating to the maintenance of A.

[20.5] That respondent is hereby interdicted from threatening to remove A from the applicant.

[20.6] That paragraphs [20.5] of this order shall operate as an interim interdict with immediate effect pending the finalization of this application.

[20.7] That costs of this application including that of the argument on 5th September 2013 shall be costs in the cause.

[20.8] That all the remaining issues in this application are postponed to the 25th September 2013.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

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