

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

CASE NO: 2017/33235

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
16/3/2022

In the matter between:

B[....], W[....]

Applicant

and

B[....], J[....]

Respondent

JUDGMENT

MOORCROFT AJ:

Order

[1] In this matter argued on 8 and 9 March 2022 I handed down the following order on 14 March 2022:

“1. The application is removed from the roll.

2. The applicant and respondent are granted leave to supplement their papers to place evidence before the Courts, including reports that may become available from

the Family Advocate or Badisa Stilbaai, or from any expert appointed by either or both of the parties.

3. *The Family Advocate in the Western Cape Division of the High Court is requested to investigate and report to this Court on the best interests of the place of residence of the minor child E[....] W[....] B[....].*

4. *Costs are reserved."*

[2] The reasons for the order follow below.

Introduction

[3] This application dates from 2017 when the applicant brought an application for interim relief as Part A and permanent relief as Part B. The application concerned the care and residence of a minor child who was born in 2013 and who is now 8 years old.

[4] The interim order granted on 12 September 2017,¹ provided for the primary residence of the child with the applicant subject to rights of reasonable access. Part B of the application was postponed *sine die* and the matter was never enrolled again until now. After a report by the Family Advocate in September 2018 in support of the minor child residing with the respondent, the applicant agreed that the child live with the respondent who had by then already relocated to Stilbaai in the Western Cape. The child retained contact with the applicant and his wife.

[5] This court retains jurisdiction because it had jurisdiction in 2017 and the matter has not been finalised yet.

[6] The application was enrolled for 1 March 2022 in the Urgent Court when it was removed from the roll as certain confirmatory 'affidavits' were questioned by the Presiding Judge, a subject dealt with below, and it was then re-enrolled for 8 March 2022.

¹ Caselines page 002-31.

[7] The respondent divorced in 2020 and the applicant states that he became concerned about the child's circumstances during 2021. He made contact with the respondent's former mother-in-law who was also concerned for the child's well-being and who took photographs of the child standing on the street corner with certain adults. The respondent's former mother-in-law identified these persons as well-known criminals who use children to steal from shops, and rumour has it that the child was recently caught stealing.

[8] These allegations are baldly made without any substantiation. In her confirmatory 'affidavit' she confirms the contents of the founding affidavit but does not deal in any detail with her knowledge of the identity and alleged activities of the people in the photographs she took.

[9] The applicant also attached a newsletter from an employer of the respondent stating that the Financial Officer (the respondent) was dismissed for dishonesty and that charges of fraud have been preferred.

[10] The applicant attached 'affidavits' by the respondent's previous husbands. Her first husband was concerned about the fact that his child with the respondent, a 15-year old girl, had tested positive for illegal substances and is in a relationship with a 28-year old man with the ostensible approval of the respondent. He had been falsely accused of molesting his daughter, which accusation was later admitted to be false. Her second husband confirmed that in his opinion the children are often left to their own devices. Similar allegations of molestation were made against him, and are denied by him.

[11] The applicant's attorney approached the school attended by the child and was referred to a social worker. The social worker responded by email on 2 February 2022.²

11.1 The social worker felt that she was not permitted provide detailed information because of the provisions of the Protection of Personal Information legislation.

² Caselines 002-105.

11.2 The social worker suggested that the applicant submit a so-called Form 2 to the Children's Court in Riversdale. The Children's Court proceedings would then be commenced with and she would be able to report to the Court.

11.3 No such form was submitted.

[12] On 8 March 2022 I made an order that the social worker be authorised to urgently provide a report to the applicant's attorney by close of business on 9 March 2022 and to provide any information at the disposal of the social worker relating to the child. The matter was then allowed to stand down until 9 March 2022.

[13] The social worker immediately made a letter available under the letterhead of Badisa Stilbaai. She recorded the following:

"We received a referral from the school social worker during November 2021 regarding E[...]'s school attendance. They also confirmed that they spoke to both parents about their concerns.

Badisa Still Bay received a phone call at the same time from a woman, claiming she's the partner/wife of Mr. B[...] the biological father of E[...]. Undersigned requested her to send an e-mail to us about all their concerns and we will investigate the matter. Till date we did not receive any e-mail or correspondence.

We were concerned about the allegations and asked a few community members, known to the family if they were willing to give us any information regarding concerned child.

Nobody was willing to give us any information - even with the promise they can stay anonymous.

During Februarie 2022 we received a phone call from Mr. B[...] attorney. We asked that they file a Form 2 at the Children's court for the court to send

Badisa an order to investigate. Then a Children's Court investigation will be opened and a format investigation to the matter could start. We heard nothing from them , till 4 March when Mrs. B[....] attorney phoned me about giving the High court a letter.

In the mean time we follow up with the school and it seems that E[....]'s school attendance approved [sic] rapidly in the new year.”

[14] The respondent's answering affidavit³ is unsatisfactory. She raises a number of legal issues but fails to pertinently address the factual allegations and accusations raised by the applicant. She fails to do so even though she was assisted by attorneys in preparing her affidavit.

[15] In particular, her failure to deal with the allegations of false sexual molestation charges against her previous husbands, the allegations of dismissal for fraud, and her daughter's drug use and relationship with a 28-year adult man are serious and specific accusations that require an answer.

[16] She does state that the child is attending the Bertie Barnard School in Stilbaai and would have to relocate to a Gauteng school should the order now be granted on an urgent basis.

[17] The respondent complains that the application was defective in that it was not served on her, but it is obvious from her affidavit that she did have sight of the papers and it appears also that the respondent's attorney were invited to request copies of documents that might not be in their possession. No such request was received.

[18] The question then is whether an order for the relocation of the child from Stilbaai to Gauteng would be appropriate at this stage, with no current reports available. I am of the view that the relocation of the child from Stilbaai to Gauteng must be taken only after proper deliberation and with proper reports before the Court.

³ Caselines page 008-1.

[19] The minor child has been living with the respondent since the Family Advocate first reported on the matter in 2018 pursuant to the order granted in 2017. There are reasons for concern but the quality of the evidence in the founding affidavit is not such that an order is merited that the child be uprooted in Stilbaai where he is attending school, immediately and relocated to Gauteng on an urgent basis.

[20] It has been years since proper investigations were carried out and the applicant did not react to the invitation that the Children's Court be approached so that Badisa could carry out an investigation. There is no explanation as to why the invitation by the social worker of Badisa that was already extended on 2 February 2022 was not acted upon.

[21] The Family Advocate's report in September of 2018 was to the effect that both parties continue as co-holders of parental responsibilities and rights, that the child reside with the mother strictly subject to her sobriety, and that he has contact with his father. Circumstances have changed since the report was made.

[22] For these reasons I made the order set out above.

The defective affidavits

[23] When the matter was called on 1 March 2022 the Presiding Judge pointed out that three of the confirmatory affidavits⁴ were ostensibly signed before a commissioner of oaths in Gauteng while the deponents were in the Western Cape.

[24] The matter was removed from the roll and properly commissioned affidavits were filed on 3 March 2022 together with an affidavit from the instructing attorney.

24.1 It is alleged that neither the administrative assistant in the office of the attorney, nor the commissioner of oath whose names appears on the affidavits were aware of the requirement that the witness had to be present before the commissioner of oaths when signing, despite the documents saying so in express terms.

⁴ Caselines 002-98 to 002-103.

24.2 These are astounding averments and hopefully they have now been informed of the requirements so that this grave error would never be repeated.

24.3 I accept that the applicant's attorney were completely bona fide as she tells⁵ the Court in her affidavit that she had personally asked the witnesses to have the affidavits commissioned in the Western Cape, and could not be aware of what actually transpired.

24.4 I therefore did have regard to the properly commissioned affidavits in my judgment.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **16 March 2022**

COUNSEL FOR THE APPLICANT:

C. SWANEPOEL

INSTRUCTED BY:

ALICE SWANEPOEL ATTORNEYS

APPEARANCE FOR RESPONDENT:

IN PERSON

⁵ Caselines 006-2.

INSTRUCTED BY:

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DATE OF THE HEARING:

8 & 9 MARCH 2022

DATE OF JUDGMENT:

16 MARCH 2022