REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

30/9/16

CASE NO: 72839/2016

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

SIGNATURE DATE 30/09/2016

T. L. S. **APPLICANT**

AND

V. M. L. **RESPONDENT**

JUDGMENT

THOBANE AJ,

[1] The applicant has brought an application on an urgent basis in which, for a start, he seeks an order that the requirements relating to service and time periods be dispensed with. The application has two parts to it. In Part A the applicant seeks the following relief;

1. That this application be heard as an urgent application in accordance with the provisions of Rule 6(12) and that the requirements pertaining to service and time periods be dispensed with.
2. That pending the finalization of the relief applied for in Part B hereof;
   2.1. both parties (the Applicant and the Respondent) retain full parental responsibilities in respect of the minor child, namely KS, born on [....] 2015 (hereinafter referred to as "the minor child") as provided for in sections 18 and 21 of the Children's Act No. 38 of 2005 (hereinafter referred to as "the Act");
   2.2. the Family Advocate be requested to conduct a thorough and comprehensive investigation into the affairs and the best interest of the minor child and to provide this Court with a report and recommendation regarding both parties' parental responsibilities and rights in respect of the minor child's primary care and the manner in which the non-custodian parent should exercise reasonable contact and access in respect of the minor child;
   2.3. both parties be liable and responsible to attend to the minor child's primary care, to be exercised in the following manner:

2.3.1. the minor child will reside every Thursday, Friday and Saturday with the Applicant; and

2.3.2. the minor child will reside every Sunday, Monday, Tuesday and Wednesday with the Respondent;

2.4. Both parties be responsible and liable to maintain the minor child on an equal basis; and

2.5. both parties retain guardianship in respect of the minor child.

3. That Part B of the application be postponed *sine die,* on condition that both parties are entitled to re-enroll this application for hearing after the Family Advocate has conducted an investigation envisaged in paragraph 2.2. *supra,* and permission is granted to the parties to supplement their affidavits, if necessary;

4. That the respondent be ordered to pay the costs of this application, including the costs consequent upon the employment of senior counsel, only in the event of opposition, alternatively that the costs of Part A be reserved for final determination in respect of Part B hereof; and

5. That such further and/or alternative relief be granted to the applicant which this court deems reasonable and appropriate under the prevailing circumstances.

[2] The application is opposed by the respondent. I refrain from repeating Part B of the notice of motion in that its relevance for purposes hereof is limited.

Background

[3] The following brief background is necessary;

3.1. The applicant and the respondent became romantically involved in 2014;

3.2. During the same year, the respondent fell pregnant and the parties took a decision to move in together;

3.3. I pause to indicate that the respondent also has an 8 years old son from a previous relationship and that during the period when the parties moved in together, he was staying with them. It is not in dispute that the relationship between the applicant and the respondent's son was a good one;

3.5. On [....] 2015 KS was born. The parties assisted each other in rearing him. Later a nanny was employed to take care of KS while the parties were in between going on with their lives and attending their respective workplaces.

3.6. On 21 August 2016 the parties had a serious fallout and their tumultuous relationship was terminated. Subsequently, KS was enrolled at a school.

3.7. The relationship deteriorated even more when the applicant and his mother obtained protection orders in the Domestic Violence Court against the respondent, albeit interim in nature, following an incident in which it is alleged the respondent burst into the parental home of the applicant, abused all and sundry and violently removed KS.

3.8. The respondent also obtained a protection order against the applicant.

3.9. Soon thereafter the parties started communicating through their respective legal representatives. By this time the situation between them had deteriorated even further to a point where, according to the applicant, he has not been allowed access to KS since 31 August 2016. This application was therefore launched against that backdrop.

Points *in limine*

[5] The respondent has raised the following points *in limine;*

5.1. that the applicant has failed to comply with the peremptory provisions of section 33 of the Children's Act 38 of 2005;

5.2. that having made an undertaking to explore possible mediation, in proceeding with this application subsequent to that undertaking, the applicant was abusing the court process;

5.3. that this matter is not urgent.

Applicant's submissions

[6] The applicant submits that he has been present in KS's life since birth. He submits that he supported the respondent throughout her pregnancy and that the birth of KS was a pleasurable experience for him. He submits further, that the respondent has not given KS unconditional love, affection and attention since birth. This is so *inter alia* because the respondent was keen to return to work and to also do gym work as soon as was possible. He states that he is the one who has offered comfort to KS and has always given him attention. The fact that KS is, as at the hearing of this application, only 20 months old, and that he was permitted to have him sleep over at his place three nights of the week, is testimony to the fact that a unique bond exists between the two of them. This bond, he submits was abruptly brought to an end by the respondent who suddenly terminated all contact between the applicant and KS. The applicant is of the view that the circumstances of the access to KS be investigated by the Family Advocate and that a report be filed to court. In his view, it is not in the best interest KS that the parenting rights which he enjoyed, be tempered with and curtailed. The applicant is seeking to have the *"status quo"* restored.

Respondent's submissions

[7] The respondent disputes that there is any *"status quo".* Respondent submits that for the life time of KS, being 20 months, there has not been a

pattern of parenting to speak of which can be characterized as stable. The respondent while disputing that there was a pattern of access by the applicant, states that there was a "flexible" arrangement in terms of which the applicant would at times have the minor child sleep over at his place. The respondent is further of the view that a structured contact arrangement between KS and the applicant was in the best interest of KS. The respondent submits that the contact arrangement suggested by the applicant is not age appropriate and that it should not be permitted. That such contact would be disruptive to KS's stability. His schooling and home environment will also be disrupted and thus, is not in KS's best interests. If KS were to be allowed to be away for three days in a week, his relationship with his brother will be affected. It is submitted lastly that the parties have different parenting styles and for that reason, that KS should remain in the primary care of the respondent. The respondent is further of the view that the Family Advocate is better placed to investigate the circumstances under which parenting can occur and to report to court.

Issues for determination

[8] The following issues are for determination;

8.1. Whether the matter is urgent;

8.2. The balance of points in limine raised;

8.3. Whether the applicant has made out a case for interim relief.

Is the matter urgent?

[9] A litigant that approaches court for relief on an urgent basis must comply with rule 6(12)(b) of the uniform rules of court. The rule reads as follows;

> *"In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the* reasons *why he claims that he could not be afforded substantial redress at* a *hearing in due course."*

[10] From the above it is clear that the rule has two legs to it, namely;

10.1. Circumstances which render a matter urgent;

10.2. Reasons why substantial relief can not be achieved in due course.

The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ in ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11133767) [2011] ZAGPJHC 196*** (23 September 2011) in paras 6 and 7 put it as follows:

> *"[6] The import thereof* is *that the procedure set out in rule 6(12)* is *not there for 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. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[11] The applicant relies on the following in seeking to show that the matter is urgent;

- that as from 31 August 2016, he has been denied access to the minor child KS;
- that before the above date he was able to interact with and see KS, with whom he shared a special bond, every single day;

- that KS has been placed at a school and that such an arrangement was without his consent.
- that the sudden change in environment is badly affecting KS and therefore that it is not in his best interest to deprive him access to him;
- that he provided a safe parenting environment for KS, prior the intervention by the respondent.

[12] In dismissing the applicant's reasons for urgency, while admitting that the bond between KS and the applicant is indisputable, the respondent states that;

- the environment that prevailed was not safe for the development of KS;
- the applicant can be allowed contact but as proposed by her;
- it is not in the best interest of KS that he should sleep in different homes on different days, nevertheless she is prepared to subject herself to an investigation by the Family Advocate;

[13] The respondent contends that the matter is not urgent in that she had from the onset stated that she was amenable to the proposal of mediation. On the papers and in argument before me I could find nothing to suggest that urgency as sketched by the applicant and refuted by the respondent, is self created or lacks candor. The applicant has outlined, explicitly, circumstances that render the matter urgent. The dispute involves a minor child and from the picture painted by both parties it seems his life was in a matter of days turned

topsy-turvy. I am accordingly of the view that this matter is urgent based on the first leg of rule 6(12)(b).

[14] Notshe AJ continued, in dealing with the requirement of substantial redress in ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others,*** supra, and said the following;

> *"[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application."*

I am of the view that if the matter were to be enrolled in the normal cause applicant would not be afforded substantial redress. Therefore, even on the the second leg of the test, urgency is established.

Section 33 of the Children's Act

[15] The respondent contends that the applicant was under obligation to first resort to mediation before approaching court. In her view the provisions of section 33 are peremptory. Section 33 reads as follows;

> *"33* ***Contents of parenting plans***
>
> *(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.*
>
> *(2) 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.*
>
> *(3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including-*
>
> *(a) where and with whom the child is to live;*

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(b) the maintenance of the child;

(c) contact between the child and-

(i) any of the parties; and

(ii) any other person; and

(d) the schooling and religious upbringing of the child.

(4) A parenting plan must comply with the best interests of the child standard as set out in section 7.

(5) In preparing a *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."*

[16] The provisions of the aforementioned section should not be read in isolation and the reading must account for the context and special circumstances of this case. In *casu* the applicant enjoyed parenting rights which the parties, although there was no formal or written parenting plan, seemed to abide by. It is not disputed by the respondent, that there was interference with the "parenting plan" that prevailed. According to the respondent the interference was necessary and was aimed at stabilizing the parenting environment in the interest of KS. The general approach in respect

of of all matters affecting children is contained in section 6 of the Children's Act, subsection 4 thereof provides that;

> *(4) In any matter concerning* a *child-*
>
> *(a) an approach which is conducive to conciliation and problem-solving should be followed and* a *confrontational approach should be avoided; and*
>
> *(b)* a *delay in any action or decision to be taken must be avoided as far as possible.*

[17] The approach that the parties take must have due regard to the provisions of section 6. I do not believe that in circumstances of this case where the parties had already deadlocked, parenting rights had been interfered with and allegations and counter allegation of domestic violence were being flung back and forth, it would have been prudent to resort to mediation. It is sufficient for current purposes, if the proceedings that followed were conducted in line with the provisions of section 6 (2), insulating from and not exposing KS to any potential harm. Counsel for the respondent referred this court to a *dicta* in ***S v J 2011 (3) SA 126 (SCA) [54},*** in terms of which the . Supreme Court of Appeal affirms the principle that mediation in family matters is to be preferred and that litigation should not be the first resort. I agree with that dicta. I hasten to add that the two matters are however distinguishable. In ***S v J ,*** supra, the parties were involved in acrimonious litigation for nearly five years. The parties had litigated extensively in both the Northern Cape and

Western Cape High Courts and still did not seem to find closure. The extent of the litigation was *vast* and this prompted the court to comment *inter alia* as follows;

> *[38] That said, I would caution against* a *practice of forum shopping even in cases concerning disputes over parenting rights and responsibilities. High courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction. And as* a *rule, since one is entitled to assume that any order has been made in the best interests of* a *child, should those interests change over time the court that made the initial order should be approached for* a *variation."*

[18] Not only that, the Family Advocate had been involved and had submitted reports to court. The expert reports were however challenged even orders that were made by consent were not spared. What compounded matters and regrettably, the Judge that handled the matter was found to have been biased. The warning therefore while well deserved and salutary, is case specific and is not a general rule.

Was there an abuse of the process of the court?

[19] The contention that the applicant has abused process of court stems from the fact the the respondent is of the view that the approach to court by

the applicant was premature in that there was noncompliance with section 33 and also because the respondent is of the view that the matter is not urgent. I do not deem it necessary to deal with this contention as I have above and in detail dealt with both urgency as well as section 33. Suffice to say, I do not agree that there was an abuse of the process of court.

Conclusion

[20] The overarching principle in matters involving children is always, what would be in the interest of the child. At times facts speak for themselves and in such circumstances it is easy for the court to determine what it deems to be in the interest of the child. In this matter interim intervention is sought while the family advocate investigates and prepares a report. There are serious disputes about what would be in the interest of KS. There are further . contestations about what situation prevailed with regard to sleeping over of KS at the applicant's place. The respondent disputes the contention that there is a *status quo.* This *status quo* is said by the applicant to have been having KS over at his place for three nights. I have stated above that the respondent disputes that there was any formal arrangement. On the same breath however the respondent states that she had to bring some structure to the access by the applicant to KS. She goes further to say that the arrangement that prevailed, which she does not characterize as an arrangement, was not

age appropriate for KS and that she had to intervene, because inter alia, the parties have different approaches to parenting. It is clear from the afore going, despite the respondent contending otherwise, that there was a system of parenting in place. It is this system that the respondent has interfered with, purportedly, in the interest of the KS.

[21] The guidance as to what would be in the interest of KS is better left in the hands of the Family Advocate. Once the court finds that the matter is urgent, it is inevitable that there should be an interim arrangement and that the Family Advocate should be brought in to establish the true state of affairs and to report to court. In the interim however, it is my view that it would be in the interest of KS to, mindful of the fact that he is only 20 months old, give an order that is as close as possible to what prevailed before the parties had a fall out and went for each other's throats. I take it as firmly established that when the parties were staying together the applicant was fairly involved in looking after KS. Even after moving out of the common home he continued to be available to take care of him. The attention he gave him was in my view more than average. I say this without casting aspersions on the parenting or the attention the respondent gave to KS. It is with that in mind that I hold the view that there should be a more than average interim arrangement, commensurate with the attention given while the parties were not engaged in fights. It might appear generous or even disproportionate to an outsider, it is

however an attempt by this court, in the interest of KS, to be as close as possible to the environment that prevailed before 21 August 2016.

[22] The following dicta, though said in a different context, is apt about how society of which parents are a part, should at all times guard what is said or even done under the pretext of protecting children. In ***Centre for Child Law and Others v MEC for Education, Gauteng and Others 2008 (1) SA 223 (T),*** Murphy J held that;

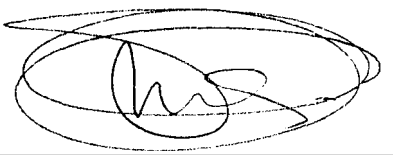
> **"**As a *society we wish to be judged by the humane and caring manner in which we treat our children. Our Constitution imposes* a *duty upon us to aim for the highest standard, and not to shirk from our responsibility. ...What message do we send to the children when we tell them that they are to be removed from their parents because they deserve better care, and then neglect wholly to provide that care? We betray them, and we teach them that neither the law nor State institutions can be trusted to protect them. In the process we are in danger of relegating them to* a *class of outcasts, and in the final analysis we hypocritically renege on the constitutional promise of protection."*

[23] I therefore make the following order;

1. That the application is urgent;
2. That pending the final determination of the application in Part B of the Notice of Motion dated 15th September 2016;
   2.1. both parties shall retain full parental rights and responsibilities in respect of the minor child KS, as provided for in sections 18 and 21 of the Children's Act, 38 of 2005;
   2.2. the Family Advocate is requested to conduct a thorough and comprehensive investigation into the best interest of KS and to provide this court with a report and recommendation regarding both parties parental rights and responsibilities with specific reference KS's primary care and the manner in which the non-custodian parent should exercise reasonable contact and access in respect of KS;
   2.3. both parties are liable and responsible to attend to KS's primary care as follows;
      2.3.1. he will reside with the respondent every Sunday, Monday, Tuesday and Wednesday; and
      2.3.2. he will reside with the applicant every Thursday, Friday and Saturday.
   2.4. both parties are responsible and liable for the maintenance of KS, each according to his/her own means;
   2.5. both parties retain guardianship in respect of KS.

3. Part B of the application is postponed *sine die,* and either party is entitled to re-enroll the application for hearing after the Family Advocate has conducted the investigation contemplated in this order, and the parties are granted leave to supplement their affidavits, if necessary; and

4. The costs of this application are reserved for determination with Part B of the application.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING	27th SEPTEMBER 2016
DATE OF JUDGMENT	30th SEPTEMBER 2016
APPLICANT'S COUNSEL	ADV: F.W. BOTES, SC
RESPONDENT'S COUNSEL:	ADV. C. WOODROW