

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE No. 7657/2017

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
.....	
.....	
DATE.....	SIGNATURE.....

9.5.2018

In the matter between:

AMORI VAN ZYL

1ST APPLICANT

CHRISTIAAN LODEWYK WENTZEL VAN ZYL

2ND APPLICANT

And

BRAAM RUDOLPH

1ST RESPONDENT

AMY RUDOLPH

2ND RESPONDENT

JUDGEMENT

SEMENYA J:

1. The first applicant is the cousin to the minor child (hereinafter referred to as CR) who is the subject matter of an application brought ex parte on an urgent basis on the 13 November 2017. She is married to the second applicant and are blessed with two minor daughters. The applicants are residing in Johannesburg.
2. The first respondent is the biological father of CR. He was married to CR's mother who passed away when CR was a year old. First respondent became the primary and sole care-giver of CR until he re-married shortly after the death of her mother, however, the second wife too died few years into the marriage. The second respondent is the first respondent's third wife. It is common cause that she, second respondent has been recently diagnosed with cancer.
3. The respondents were staying together with CR at Lephalale until the 13 November 2017, when the applicants were granted an interim order to remove CR from the care and primary residence of the respondents pending a report by the Family Advocate with regard to her best interests.
4. In view of the different Provinces in which the parties reside, Ms Moela, a family counselor from the Polokwane office of the Family Advocate, conducted an investigation and reported on the respondents. Ms Meniers, also a family counselor

from the Johannesburg office, conducted an investigation into the applicants and CR. This state of affairs led to an extension of the return date from the 6 February 2018 to 13 March 2018 and again to the 19 April 2018.

5. The application was prompted by a cell phone call conversation, which was made while the speaker was on and in the presence of CR, in which the first respondent was accusing the first applicant of giving certain information to CR about the abuse that the first respondent allegedly meted out on CR's late mother. The first applicant's denial of the allegations led to the first respondent forcing CR to apologize to the first applicant. The first applicant stated in her founding affidavit that it was evident that the first respondent was heavily intoxicated as he was swearing in an aggressive manner.
6. The applicants allege that their suspicion that the first respondent was physically and emotionally abusing CR were later confirmed by the second respondent, who informed her that the first respondent was indeed abusing her and CR. The allegations were further confirmed by Emma Lawrence who lived with the first respondent for several years in her confirmatory affidavit.
7. The following facts, which are either common cause or undisputed appear from the two reports compiled by the family counselors:

- i. all parties are both capable and willing to provide the physical needs in the form of adequate shelter, food, clothing and education for CR;
- ii. all parties have a close and loving relationship with CR and CR equally loves all parties in turn;
- iii. the applicants have been involved in the upbringing of CR ever since the passing of her mother in that she would visit them during school holidays and weekends;
- iv. the first respondent is an alcoholic who was once admitted in a rehab and later relapsed;
- v. the first respondent has occasionally given CR a hiding, which he regards as moderate and necessary disciplinary measure whenever CR obtained low grades at school or lied. The applicants on the other hand regard this as abuse;
- vi. the first respondent once attempted to commit suicide and was rescued by his step children;
- vii. CR has been enrolled at a new school where she has made new friends and appears to have adapted well to her new environment. She has a healthy relationship with the applicants' two daughters.
- viii. the applicants went an extra mile to help CR by engaging an educational psychologist and a tutor to help her cope with her school work;

- ix. CR has expressed her wish to return to the respondents who, according to her miss them. She too misses them; and
- x. The applicants have prevented contact between CR and the first respondent since her removal.

8. This court is called upon to determine the issue as to where the best interests of CR lie between the applicants and the respondents. All parties allege that they always acted in CR's interests.

9. In **P v P 2007 (5) SA 94 (SCA)** at 99 D it was stated that"

"Determining what custody arrangement will serve the best interests of the children in a particular case involves the High Court making a value judgement, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children."

10. The notion of the best interests of the children is entrenched in section 28 of the Constitution of the Republic of South Africa, 1996 which provides as follows:

"Section 28 – Bill of Child Rights

1. *Every child has the right –*

a. *To name and a nationality from birth*

b. *To family care or parental care, or to appropriate alternative care when removed from their family environment*

c. *To basic nutrition, shelter, basic health care services and social services*

d. *To be protected from malnutrition, neglect, abuse or degradation...*

2. *A child's best interests are of paramount importance in every matter concerning the child.*

11. Section 7 of the Children's Act 38 of 2005 ("the Act"), to which reference was made in the report of the family counselors, has been enacted to give effect to the rights of the children as provided for in section 28 of the Constitution.

12. Section 7 of the Act provides as follows:

"BEST INTERESTS OF CHILD STANDARD:

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely;

(a) the nature of the personal relationship between

(i) the child and the parents, or any specific parent; and

(ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child

(i) to remain in the care of his or her parent, family and extended family; and

(ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's

(i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section "parent" includes any person who has parental responsibilities and rights in respect of a child."

13. This case involves the removal of a child from her father with whom she has been living since birth after the passing of her mother. It appears from the facts that the first applicant considers herself as somebody who would be able to provide the love and care that the biological mother would have provided this child with. In his answering affidavit, the first respondent objected to the manner in which the applicants prevented him from seeing CR after she was removed from him.

14. It is evident that in arriving at a decision as to where the best interests of CR would be best catered for, I will have to have regard to the respondents' attitude towards CR and the exercise of their parental responsibilities and rights in respect of CR (s7(1)(b)(i) and (ii), CR's physical and emotional security (s7(1)(h) and the need for CR to remain in the care of the respondents (s7(1)(f)(i).

15. I take note of the fact that the first respondent is not disputing the allegations that he is aggressive and abusive both to the second respondent and CR whenever he is under the influence of alcohol. He admits that he starts to drink alcohol from Thursdays to Sundays. He also admits that he has administered corporal punishment on CR occasionally.

16. It was contended on behalf of the respondents that the court should not overemphasize the fact that the first respondent is an alcoholic. The submission made is that the court should take into consideration the fact that the first respondent is willing, with the support of his employer, to seek help and to go for rehabilitation. It was contended that the court should take into consideration the fact that the second respondent is the primary care-giver of CR who has been taking care of her after school and in the absence of the first respondent.

17. It is common cause that the second respondent is sickly and has just recently undergone an operation. According to Ms Meniers this situation contributes to CR's

feelings of guilt and inadequateness. It appears from this report that CR feels that she needs to protect the second respondent against the first respondent. Ms Meniers concludes that nature of the relationship between CR and the respondents is a factor that must be taken into consideration as provided for in section 7(1) (a) (i) and (ii) of the Act. Ms Meniers opines that the relationship between the second respondent and CR is not a healthy mother and child relationship. Ms Moela shares the same sentiment.

18. With regard to the first respondent, Ms Moela further opines that the bad things that happened in the first respondent's life might have turned him into what he is today and that that impacts negatively on CR. CR may feel obligated to take care of her. The first respondent stated in his answering affidavit that the cancer diagnoses, the operation and the removal of CR had impacted badly on him. I am however of the view that the removal of Cr was in the best interests of both CR and first respondent as it gave him the opportunity to be there for his sickly wife. I agree with the counselors that the first respondent has to deal first with the issues that turned him into the person he is today in the interests of CR.

19. According to Ms Moela, the first respondent informed her that the reason why he attempted to commit suicide was because he could not cope with another sickly wife after he had lost the first wife. He further stated that he was frustrated by the fact that he was not receiving any support from family. The first respondent stated in his

answering affidavit that he was devastated when his current wife was diagnosed with cancer and had to undergo an operation. I accept that the respondents' intentions of wanting to retain CR may be good; however it does not necessarily translate into being in the best interest.

20. Ms Miniers is of the opinion that the respondents neglected CR's emotional and intellectual needs, a factor which must be taken into consideration in terms of section 7 (1) (c) of the Act. According to her, CR lacks self-confidence because of the first respondent's erratic and aggressive behavior, more in particular when she does not perform well at school. Unlike the respondents, the applicants perform well on this aspect in the form of encouragement rather than punishment. Ms Moela concurs. She however adds that the applicants should assist the respondents and CR in rebuilding their relationship by allowing them more contact with CR. I agree. It is in any event common cause that CR considers him to be a good father, but for the abuse of alcohol.

21. With regard to the factor referred to in section 7(1) (d), I have noticed from the reports that CR is torn between the parties in this matter. The two family counselors were acting within the law, in line with the decision in **McCall v McCall 1994(1)(3) SA 201 (CPD) at 207**, to engage CR as it appears that she has the necessary intellectual and emotional maturity to can express her preference towards her relationship with the parties. However, it is the court, as the upper guardian of all

minors, which enjoined to make a value judgement as to what is best for her. Whilst she appreciate the fact that the applicants are good to her, she still feel the need to be with the respondents and regards her relationship with them as constituting a unit. I however have to take into consideration the sentiments raised by the applicants and the counselors that the relationship between the second respondent and CR is not a healthy relationship. I am of the view that her desire to go back to the respondents is indeed motivated by guilt feeling more than anything else. I further agree that it is natural for the child of CR's age to feel this guilty, more so in that she has already suffered loss in the past.

22. I have a duty to protect CR from any physical and psychological harm as envisaged in section 7(1) (i) of the Act. It appears that the first respondent is unable to appreciate the fact CR may not be intellectually gifted and to accept this fact. His smacking is damaging to her confidence. It appears that her poor academic performance will always be a source of strife between them. She needs to be protected from the physical abuse meted out to her on the basis of her.

23. I find that the probabilities favour the removal of CR from the care and primary residence of the respondents and that this should be awarded to the applicants. The two family counselors' views are endorsed by the Family Advocate. Having said that, I take note of the issue raised by the applicants for the first time on the return date, being that the court should order the first respondent to provide the applicants with

the medical aid card of CR so that they can be able to provide for her medical care. CR remains the first respondent's responsibility. He is by law obliged to maintain her irrespective of where she lives.

24. With regard to costs I am of the view that this is a case where the respondents genuinely believed that they have the right to retain care and primary residence of CR. It cannot be disputed that the first respondent was also a victim of his own circumstances, having lost two spouses within a short period of time. His erratic behaviour is understandable, albeit harmful to CR. The apposite order will be the one where each party is ordered to his or her own costs.

25. In the event I make the following order:

1. *Rule nisi* dated 13 November is hereby confirmed.
2. The applicants are awarded the care and primary residence of CR;
3. The first respondent remains the holders of full parental responsibilities and rights which shall include the right:
 - 3.1. to care for CR;
 - 3.2. to maintain telephonic and physical contact with her, but only when the first respondent is sober;
 - 3.3. to act as her guardian; and
 - 3.4. to contribute towards her maintenance.

4. The first respondent is ordered to provide the applicants with CR's medical aid card.
5. Each party is to pay own costs.



SEMENYA M.V
JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE PLAINTIFF : ADV. MARISKA BOUWER
INSTRUCTED BY : VAN ZYL ATTORNEYS
FOR THE DEFENDANT : MRS. M.C DE KLERK
INSTRUCTED BY : DDKK ATTORNEYS
DATE OF HEARING : 19 APRIL 2018
DATE OF JUDGEMENT : 11 MAY 2018