C v D (11120/2002) [2014] ZAGPJHC 286 (10 June 2014) – Not Reportable

Court: Gauteng Local Division, Johannesburg

Case No: 11120/2002

Date(s) heard: 14 May 2014

Delivered: 10 June 2014

Judge: Swartz, AJ

DESCRIPTION

Children's Rights – Contact to a minor child – where the woman showing paternal alienation and malicious mother syndrome – prevented the father to see the child for many years arguing that the he was violent – the court ordered the father to have contact with the child in public places - Point in limine on jurisdiction denied

SUMMARY

(Par 1 - 4) The applicant had relentlessly sought assistance from the court to gain contact with his minor daughter. After two court orders had been handed down the respondent persisted in frustrating the applicant's contact to the child. The respondent raised a point in *limine* and tried to argue that the High Court in Cape Town had jurisdiction as the respondent had moved to that city. The court refused as the matter had been instituted in Johannesburg before the respondent moved to Cape Town. The respondent justified her position by arguing that the applicant was violent. On the other hand, the applicant led evidence to show that he was going through anger management. Furthermore, he filed a report by a clinical psychologist who opined that there is no reason why he should not have access to the child. He was further assessed by another psychologist who also reached the same conclusion. The respondent refused to attend sessions with the psychologists and refused to be interviewed by the Family Advocate.

(Par 7 - 13) The applicant asked the court to assist him to gain supervised contact with the child so that a bond could be gradually built between him and the child. It was submitted that the respondent's conduct represented paternal alienation and malicious mother syndrome. However, the child had deposed to an affidavit in which she stated: *"I am now in my sixteenth year and have no wish to see my father, the Applicant, who has played no part in my life…"* On this issue, the court pointed out that whatever fear and anxiety the child had against her father had been put there by her mother. The applicant had tried to gain contact with the child from 2002 without any luck. It held that it was in the best interest of the child to at least attempt establishing meaningful contact with the applicant. Taking into account the circumstances of the matter and various experts reports, including one which recommended that supervised visits should commence as soon as possible, the court ordered that the applicant was entitled to reasonable unsupervised contact with the child in public places which was precisely defined. The respondent was ordered to pay the costs of the applicant on a party and party scale.

Summarised by: Tshepo Munene (Admitted Attorney of the High Court of South Africa)

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG SOUTH LOCAL DIVISION, JOHANNESBURG

CASE NO: 11120/2002

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

....
SIGNATURE **DATE**

In the matter between:

A R A C Applicant

and

A G D T Respondent

JUDGMENT

SWARTZ AJ:

[1] The dispute between the parties is principally about the contact that the applicant should enjoy to the minor child. This matter has been dragging on endlessly and has a 12-year-long history. Two separate court orders regarding the matter have been made on 21 November 2008 and 4 September 2009 respectively, and will be dealt with further below.

[2] It is evident that the applicant has relentlessly sought assistance from the court to gain access to his minor daughter and that the respondent has frustrated the applicant's every effort to gain such access to the child. The respondent's counsel raised a point in limine that this court does not have jurisdiction because the respondent and the child, D, no longer reside in the area of jurisdiction of this court. It was argued that because she now resides in Cape Town, that the Cape High Court has jurisdiction. There is no merit in this argument. It is not in dispute that the child is residing in Cape Town since 2006. Proceedings commenced in this court in 2002 and despite the fact that the respondent resides in Cape Town, two separate court orders relating to the applicant's rights of access to the child were made in 2008 and 2009 respectively. There is no reason why these proceedings must start de novo in the Cape High Court. This application is a continuation of the original application, started in 2002.

[3] Throughout the papers the respondent refers to the violent nature of the applicant in justification of her refusal to have the applicant gain access to the child. The applicant was comprehensively assessed by a clinical psychologist, Dr Burke, whose professional opinion was that no reason exists that he should not have access to D. The applicant also underwent anger management therapy at the Family Life Centre from December 2003 to 9 February 2004. From my perusal of the documents filed of record and argument by counsel it is clear that the applicant has attempted to do everything required from him to gain access to the child such as, by being assessed by psychiatrists, Dr Burke and Anna-marie Rencken-Wentzel, whose professional opinion was that no reason exists to refuse the applicant access to D. The respondent showed no desire to attend consultations with the psychologists and in 2007 the applicant again approached the court seeking an order to compel the respondent to attend assessments with a psychologist. The psychologists could not finalise their reports without having interviewed the respondent as well. Ms Wentzel in an interim report concluded that there is no support for the suggestion that the applicant has an aggressive and violent nature. She also concluded that there is no reason why the applicant should not have age appropriate access to his children. This report was dated 18 April 2006. The family advocates report is dated 8 June 2007. The family advocate, Ms Ingrid Eberlanz reported that the family advocate's office investigated the matter during 2003 and filed an interim report dated 29 August 2003. The recommendation by a psychologist, Dr Ronel Duchen (nee Engelbrecht) was that bonding therapy be done. No such bonding

therapy had been undergone in the four years since that recommendation was made. The family advocate's office could not secure an interview with the respondent. At first she informed them that her father passed away. Thereafter, she refused to take their calls or respond to messages left by the family advocate's office. The family advocate could not make recommendations because both parties were not interviewed. They specifically reported that the respondent had been uncooperative. Reference was made to a letter from the respondent attorneys to the applicant attorneys dated 9 February 2007 which clearly indicated that the respondent did not want the applicant to have access to the minor child as she felt it would be detrimental to the minor child.

[4] A constant theme throughout the papers is that the applicant attended therapy for anger management. The respondent was never interviewed because she did not cooperate with requests for interviews. When this matter was heard by the honourable Motloung AJ on 21 November 2008, the family advocate was directed to conduct an urgent investigation into the best interests of the minor child and specifically in relation to contact with the applicant. The family advocate’s office interviewed the applicant on 16 April 2009. One Thembekile Kwakweni , a registered social worker and family counsellor of the office of the family advocate in Cape Town interviewed the respondent and the minor child on 2 April 2009. The matter returned to court and Willis J (as he was then) made an order on 4 September 2009, which order was directly in

line with recommendations of the office of the family advocate of 17 July 2009.

[5] Subsequent to the court order of Willis J the psychologist, Ms Terry Wilke, filed a report from which it is clear that the respondent lacks enthusiasm to be supportive of the bonding process as ordered by the court on 4 September 2009. Wilke reported that the child has a deeply entrenched fear of contact with the applicant. She specifically reported that the fear factor was fuelled by the respondent and the maternal grandmother. The possibilities of creating a positive bond between applicant and his daughter with the constraints created by the respondent, was reported to be negligible. She reported that the child lives in fear of expressing her desire to see, to have contact with or to find out anything about the applicant due to the possibility of hurting and/or upsetting her mother in any way. She chooses the path of least resistance and would rather deny contact with her father than upset her mother.

[6] The last meaningful session between Wilke and the minor was on 21 April 2010. This is more than four years ago. The child was then 11 years and six months old. She is now 15 years and eight months old. Counsel for the applicant submitted that at the time of Wilke's revised report of 4 August 2012, the child was almost 13 years old and that, because she is now 15 years old, one cannot expect a remarkable difference between the child as she was then and the child as she is

now. It was submitted that, to re-evaluate the child and subject her to another psychometric evaluation, and also to subject the applicant to a psychometric evaluation, would serve no purpose at all, other than to delay the proceedings even further, which proceedings have a 12 year history. Counsel for the applicant contended that the child has an entrenched fear of her father that is fuelled by the respondent and her mother. Wilke reported in 2012 that the child is able to travel locally and abroad without her mother being present. She regularly commutes to Johannesburg. In earlier sessions with Wilke the child initially expressed fear. However, she concluded that the child was then better emotionally matured and intellectually better equipped to connect with her father. It was submitted that it is now a further two years later and the child is presumably now even better intellectually and emotionally equipped to connect with the applicant. Wilke recommended supervised visits which should begin as soon as possible with the support of a psychologist or social worker. It was specifically recommended that the child should not stay overnight with the applicant and that visits should be in a public place. Visits should be of short duration at first and build in length as time progresses.

[7] The experts consulted agreed that there is a strained relationship; there is no bond and there needs to be bonding therapy and supervised contact. There is no suggestion whatsoever that the child's security is at risk. All that the applicant requests from the court is to assist him in gaining supervised contact with the child, gradually phased in, so that

they can start building a bond between them. This is what the applicant has been trying to establish since 2002. He has been constantly frustrated in these attempts by the respondent's behaviour. Counsel for the applicant submitted that this was clear paternal alienation and malicious mother syndrome. The respondent has been displaying a flagrant disregard for any order and attempt of the applicant to establish contact with the child.

[8] On behalf of the respondent it was submitted that the Wilke's report is out-dated and that the child had in the meantime matured into a young adult. There is no current expert report on which reliance could be placed. Society had since moved on from the days when a 12-year-old daughter could be forced by a court order and in shackles, escorted by the deputy sheriff onto an aeroplane to accompany her father on an overseas trip in terms of his rights of access. I was further referred to the matter of McCall v McCall 1994 (3) SA 201, where King J consulted in his chambers with a 12-year-old to get input into the feelings of the child. Furthermore, we now have the Children's the Act of 2005 which came into effect in 2007 and the relevant sub-paragraphs 5 and 6 provide that a child, having regard to his or her age, maturity and stage of development, where appropriate, must be informed of any action and must take a part in that decision. The best interests of the child are paramount. All proceedings, actions or decisions concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights.

[9] As the best interests of the child is paramount, it is mandatory that due regard and due consideration be given to any views and wishes expressed by the child. D is nearly sixteen years old. She deposed to an affidavit dated 5 March 2014 in which she says, amongst others, the following: “I am now in my sixteenth year and have no wish to see my father, the Applicant, who has played no part in my life. The last straw for me was when my mother were struggling financially in 2013 to provide a roof over our heads to pay my school fees and my father, when requested, refused to contribute anything in order to ease my mother's financial woes, by at least paying a portion of my school fees. I have no desire to see him ever, and have determined to forge my own way through life, without contact from him”.

[10] Counsel for the respondent submitted that in the absence of additional expert reports and having regard to what he referred to as the out-dated report of Wilke, this is the only current evidence. Furthermore, I was referred to the various allegations of violence perpetrated by the applicant against the respondent, his former girlfriend and also against his own mother. It was submitted that a further difficulty for the applicant relates to the fact that the parties are now residing 1600 kilometers apart. It was submitted that the applicant could still approach Wilke for an updated report and for her to consult with the school psychologist.

[11] All these allegations of previous violent behaviour were before the court when the two previous orders by Motloung AJ and Willis J were made. This is nothing new. I am also mindful of the comments of Wilke that the respondent was making every effort to frustrate the conclusion of this matter. The impression gained is that the respondent has a flagrant disregard for the court order. I agree with the submissions on the behalf of applicant's counsel that the respondent is entrenching parental alienation syndrome. The reports of violent behaviour were before the psychologists and the office of the family advocate when recommendations were made for supervised visits. This was obviously also placed before Willis J. I agree with the submissions of Counsel for the applicant that whatever fear and anxiety the child has, has been put there by the mother. It would serve no purpose to involve Wilke again when regard is had to the reluctance of the respondent to cooperate with the experts from the very beginning. This matter has dragged on endlessly and must now come to an end.

[12] The court sits as upper guardian in the protection of the best interests of the minor child. It is in the best interests of the child to at least attempt establishing meaningful contact with the applicant, without the rights of the applicant in this regard being deliberately frustrated by the respondent. The applicant has attempted, since 2002, to establish

contact with a child. The applicant's rights in this regard were established by the 2009 court order. I accept the report of Terry Wilke and the recommendations made therein. I take note of the respondent's remarks, as reflected in this report, on 25 August 2009, that she was quite upset with the report of the family advocate that recommended that therapy was to begin in order to facilitate the bonding process between the child and the applicant. The efforts of the applicant to establish a bond with the minor have been thwarted by the respondent. This matter could have been resolved amongst the parties had the respondent co-operated. Miss Charlotte Hoffman (psychologist) in Cape Town, alternatively Ms Leonie Henig in Johannesburg must be appointed to facilitate the phasing in of contact.

[13] The following order is made:

1. The applicant is entitled to the following contact with D d T ("the minor child"):

   1.1 For a period of 6 months commencing from date of this order, the applicant shall be entitled to meet D for a period of 2 hours per month, at a restaurant, alternatively at the residence of G C;

   1.2 Reasonable telephonic contact;

   2 Upon the expiry of the 6 months, for a further 6 months thereafter;

2.1 Applicant shall have contact for a period of 4 hours in a public place;

2.2 Reasonable telephonic contact.

3. Thereafter:

3.1 From 08:00 to 17:00 on the first Saturday, alternatively Sunday of each month;

3.2 Reasonable telephonic contact.

4. The applicant will pay for the travelling costs in respect of contact.

5. The parties share the costs of the psychologist to be appointed to assist with the phasing in process.

6. The respondent is ordered to pay the applicant's costs on the party-and-party scale.

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SWARTZ AJ

ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Counsel for the Applicant: Adv A. Wilcock

Instructed by: Steve Merchack Attorneys

Counsel for the Defendant: Mr CE Bodern

Instructed by: JJ S Manton Attorneys

Date of Hearing: 14 May 2014

Date of Judgment: 10 June 2014