



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

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

CASE NO.: 17885 / 2020

SIGNATURE

DATE OF THE ORDER 06/03/2024

B, MC

Applicant

and

G, N

Respondent

NEUTRAL CITATION:

JUDGMENT

1. The minor child ("Z") was born on 7 December 2017. He is currently 6 years of age. Z was born of the marriage that previously existed between the parties who were divorced, on 2 December 2022, by order of the above Honourable Court which order incorporated an agreement of settlement.

2. The agreement of settlement provides, *inter alia*, as far as Z is concerned, that his primary residence shall be with the Respondent and that the Applicant is to exercise reasonable rights of contact as defined.
3. Pursuant to a complaint laid with the appointed parenting co-ordinator, Dr Martin Strous ("Dr Strous") to the effect that Z had allegedly been sexually assaulted by one, Devonne Carey ("Mr Carey"), the Applicant's 19-year-old brother-in-law on 11 September 2023, Dr Strous referred Z for a psycho-legal assessment to determine whether there is a likelihood that Z may have been sexually abused.
4. Dr Strous referred the investigation to Ms Belinda de Villiers ("Ms de Villiers"), educational psychologist and expert in sexual abuse cases, who accepted this instruction.
5. On 30 November 2023, Ms de Villiers delivered a thorough report wherein she reiterates that giving due consideration to the principles enshrined in the Childrens Act No. 38 of 2005, she recommends, *inter alia*, that special consideration should be taken whether, in fact, it is in the best interests of Z that he remains in the Respondent's care.¹ De Villiers expressed grave concerns regarding the Respondent's ability to care for Z.
6. Due to the concerns raised in the report, an urgent mediation was held on 7 December 2023 by the parties with Dr Strous, who confirmed that the parties agreed and that he directed that an urgent new forensic assessment is to be undertaken in respect of Z's best interests regarding the minor child's residence, care and contact.²

¹ Caselines 092-94 para 14.1

² Caselines 092-106 to 107 para 2d and 5

7. Subsequently, despite communications from the Applicant's attorneys for a therapist to be agreed to and for the forensic assessment to commence, the Respondent delayed a response thereto from her attorneys, she disputed the report of Ms de Villiers and informed Dr Strous to the effect that she had laid criminal charges against Mr Carey (in January 2024), and due to the criminal investigation that was now taking place it is imperative that no additional psycho legal assessments are undertaken.³
8. In response, the Applicant's attorneys again reiterated the need for an urgent forensic assessment as directed by Dr Strous as aforesaid and made it clear that urgent proceedings would ensue. The Respondent refused to co-operate to commence the forensic assessment, claiming that the criminal matter needed to come to completion first.
9. In summary, the Applicant seeks:
 - 9.1 the appointment of a clinical forensic psychologist to investigate and assess the best interests of Z in respect of his primary residency, care and contact.
 - 9.2 that Dr Tania Holtz is appointed forensic psychologist.
 - 9.3 that the Respondent is to undergo psychotherapy.
 - 9.4 that the Respondent is to attend to parental guidance and parental skills classes.
 - 9.5 that the Respondent is ordered to provide the applicant with all documents relating to the criminal complaint.

³ Caselines 092-131 para 15. Annexure FA 16

- 9.6 that the Respondent is ordered to include the Applicant in all engagements related to Z's well-being and in particular any attendance at SAPS and/or doctors and/or health care professionals for the purposes of prosecuting any criminal and/or civil claims on Z's behalf.
- 9.7 that the parties are granted leave to supplement their papers in regard to the report of Dr Tania Holtz in respect of primary residency and contact of Z.
- 9.8 that the Respondent pays the costs of this application.
10. The urgent application is opposed by the Respondent, who simultaneously delivered her counter-application wherein she seeks:
- 10.1 that the Applicant be ordered to refrain from interfering in the criminal investigation under CAS Number 58/01/2024 and be ordered to comply with the investigation process as determined by SAPS.
- 10.2 that the Applicant be ordered and directed to ensure that he prevents Z from being in the presence of Mr Carey at his place of residence or otherwise, pending the outcome of the criminal investigation.
- 10.3 that the costs of the counter-application be costs on the attorney and client scale, inclusive of the costs of two counsel, where so employed.
11. Having had regard to the report of Ms De Villiers, I am gravely concerned by the contents thereof as to the Respondent's ability to care for Z and as such whether it is in the best interests of Z to remain in the care of the Respondent pending the outcome

of the forensic clinical investigation to be done. In this regard, what is of extremely worrying is that Ms de Villiers mentions to the effect that the Respondent:

- 11.1 was exposing Z to explicit and sexual conduct whilst he sleeps in the bed next to her (this may constitute a criminal offence in itself in terms of the Sexual Offences and Related Matters Amendment Act 32 of 2007);
- 11.2 she exposes Z to belly dancers dancing seductively for money whilst attending a third party's house;
- 11.3 had delegated her parental responsibilities and rights to Ms Makumbi, (Z's nanny – who is no longer in the Respondent's employ);
- 11.4 was not interested in the educational progress of Z;
- 11.5 did not feed Z nutritious food;
- 11.6 puts Z in her own bed at night to sleep, and then further keeps him awake until late into the night watching television and watching horror movies;
- 11.7 allows Z to watch and play games which are age inappropriate with sexual content and leads to violent thoughts and tendencies; and
- 11.8 relies on technology to parent Z child and has admitted that she gives into whatever he wants as it is the easiest course of action.

12. This urgent application was enrolled for hearing on Tuesday, 27 February 2024. Counsel for the Applicant and Adv Mitchell for the Respondent attended in chambers for their introductions where I, *mero motu* indicated that my *prima facie* views on the matter to the effect that pending the outcome of a report by the Family Advocate as well as the forensic assessment to be conducted – which should be commenced and concluded within a period of three months, that Z is to be placed in the primary care of the Applicant in the interim.
13. It goes without saying that when it comes to considerations as to what is in the best interests of a minor child, a court cannot have a “*wait and see*” attitude, particularly in the light of what is contained in the report of Ms de Villiers as aforesaid. As was stated in B v B⁴, “*The Court has inherent common law powers as upper guardian of all minors to make any order which it deems fit in the best interests of the minor child.*”
14. That the Applicant has not sought in his urgent application such interim relief for primary care of Z pending the outcome to the forensic clinical assessment to be conducted, it does not relieve nor prohibit a court from upholding its duty as the upper guardian of Z as enshrined in the provisions of Sections 6, 7 and 9 read with Section 28 of the Constitution to ensure that Z’s best interests are to be protected at all times.
15. What further entrenched this thought in my mind is that when wishing to travel to Australia with Z for the December 2023 holidays, Ms de Villiers confirmed that the assessment results did not indicate that the Applicant is a risk to Z’s well-being and recommended that the documentation for the child’s visa could be completed.⁵ If there were any concerns as to Z’s well-being in the care of the Applicant and his suitability to do so, Ms de Villiers would not have hesitated to say so.

⁴ 2008 (4) SA 535 (W) AT 541F - 543 E

⁵ Caselines 092-54

16. At the hearing on 27 February 2024, it was agreed that the Offices of the Family advocate is to be appointed to conduct an urgent assessment as to what is in the best interests of Z pertaining to primary residency, care and contact. It was furthermore agreed that forensic psychologist, Dr Tania Holtz is to be appointed with immediate effect to conduct a clinical forensic assessment as to what is in the best interests of Z pertaining to primary residency, care and contact.
17. With regards to the issue raised by me that Z be placed in the interim care of the Applicant with immediate effect pending the assessment aforesaid, the Respondent's counsel sought leave to deliver a supplementary affidavit pertaining to the issue of interim primary care and contact in respect of Z since it was argued, *inter alia*, that this was not the case that the Respondent was expected to meet.
18. Notwithstanding the fact that Z's primary care became an issue at least from the issue of the report of Ms de Villiers, the Respondent was afforded an opportunity to file a supplementary affidavit and the Applicant was afforded an opportunity to reply. The matter stood down until 29 February 2024 for argument.
19. At the hearing on 29 February 2024, it was argued by the Applicant, *inter alia*, that the court is permitted to grant such relief as per my *prima facie* view mentioned aforesaid even in the absence of such relief having been sought by the Applicant.
20. On the other hand, it was vehemently argued on behalf of the Respondent by senior counsel that since the Applicant had not made out its case for a vesting of primary care of Z with the Applicant at this juncture and neither had he sought to amend his notice of motion to this effect, that there cannot be such an order granted because the issues of primary residency, care and contact are not ripe for hearing and because the report of Ms De Villiers, which is disputed, was procured to address the question of sexual

abuse and not that of primary residence and as such, it is not a recommendation to change primary residence.

21. In the decision of J v J⁶ it was held as follows:

"[20] As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. In Terblanche v Terblanche 1992 (1) SA 501 (W) at 504 C, it was stated that when a court sits as upper guardian in custody matters.... It has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitation of the evidence presented or contentions advanced by the respective parties. It may have recourse to any source of information, of whatsoever nature, which may be able to assist it in resolving custody related disputes."

22. In P AND ANOTHER v P AND ANOTHER 2002 (6) SA 105 Hurt J at page 110 para C said:

"I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order."

23. In AD and DD v DW and Others⁷ (Centre of Child Law as Amicus Curiae; Department for Social Development as Intervening Party) the Constitutional Court endorsed the

⁶ 2008(6) SA 30 (C)

⁷ 2008 (3) SA 183 (CC) para 10

view of the minority in the Supreme Court of Appeal that the interests of minors should not be "*held to ransom for the sake of legal niceties*" and held that in the case before it the best interests of the child '*should not be mechanically sacrificed on the altar of jurisdictional formalism*'.

24. Accordingly, there can be no basis in law for the argument on behalf of the Respondent that I cannot competently grant the *mero motu* relief as mentioned aforesaid where such relief is not sought in the Applicant's Notice of Motion and/or where the reports of the Family Advocate and the clinical psychologist are still to be investigated and compiled. The relief which I intend to grant in these circumstances arises out of my duty to protect the best interests of Z based on what I have before me.
25. This order is to be made in the form of a *rule nisi* so that the parties can return to court as soon as the reports are to hand for the final determination and without delay. But for now, Z's best interests as enshrined in the Children's Act as well as the Constitution are not served in the *status quo*.
26. To the extent that the Applicant seeks to be provided with the documentation provided by the Respondent to the police pertaining to the criminal complaint and his insistence to be included in all engagements relating to the criminal case, it is trite that once the investigation is complete, the accused may seek this information from the State. In the interim, to make such an order in favour of the Applicant (who happens to be the brother-in-law of the suspect) may have the effect of interfering with the criminal investigation and accordingly, this relief is denied.
27. That the Applicant seeks an order that the Respondent be ordered to undergo psychotherapy and an order that she be ordered to attend parental guidance and parental skills classes, the Respondent contends that she is already attending

psychotherapy and parental guidance and parental skills classes. These will be issues for the forensic clinical psychologist to investigate and to make such further recommendations / directions in respect of.

28. As far as the Respondent's counter-application is concerned, there is no case made out to the effect that the Applicant is interfering in the criminal investigation under CAS Number: 58/01/24.
29. Further, in the best interests of Z, there is no reason why an order directing the Applicant to ensure that he prevents Z from being in the presence of Mr Carey pending the outcome of the criminal investigation / proceedings should not be granted.

Accordingly, in the light of the foregoing, I make the following order:

1. That the Applicant's non-compliance with the rules of this court relating to service and time be and is hereby condoned and that the application is dealt with as a matter of urgency.
2. That by agreement the matter is referred to the office of the Family Advocate for an urgent investigation in order to assess the best interests of Z, ("the minor child") in respect of his primary residence, care and contact, which assessment should be completed within three months from the date of this order or so soon thereafter as possible.

3. That by agreement Dr Tania Holz is appointed as the forensic psychologist to investigate and assess the best interests of the minor child in respect of his primary residency, care and contact on an urgent basis, which assessment should be completed within three months from the date of this order or so soon thereafter as possible.
4. That the Parties are granted leave to supplement their papers in regard to the reports of the Family Advocate and Dr Tania Holz in respect of the issue of primary residency, care and contact of the minor child.
5. That a *rule nisi* be issued calling upon the Applicant and Respondent to show just cause on MONDAY, 15 JULY 2024 at 10h00 or so soon thereafter as the matter may be heard as to what is in the best interests of the minor child with regards to his primary residence, care and contact.
6. That pending the return date and in the interim: -
 - 6.1 Primary residency of the minor child shall be with the Applicant forthwith. The Respondent is ordered to hand the minor child to the Applicant within forty-eight hours of this order.
 - 6.2 The Respondent shall be entitled to contact with the minor child, as follows: -
 - 6.2.1 Every Wednesday, commencing 13 March 2024, from 17h00 to Thursday morning, where the minor child shall be returned to school;

- 6.2.2 Every alternate weekend, commencing 22 March 2024, from Friday at 17h00 until Monday morning whereafter, the minor child is to be returned to school;
- 6.2.3 Daily telephonic contact with the minor child between the hours of 18h00 and 19h00 on the days that the Respondent does not exercise contact with the minor child.
- 6.3 The holiday contact that is to be exercised by the Respondent is to be determined by the Parenting Co-Ordinator, Dr Martin Strous.
- 6.4 That pending the outcome of the criminal investigation / criminal prosecution, if any, the Applicant is to ensure that he prevents Z from being in the presence of Mr Carey.
7. Costs of this application are reserved to be determined on the return date of the *rule nisi*.

KL MEIKLE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Electronically submitted

Delivered: This Order 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 6 March 2024.

Date of the hearing: **27 AND 29 FEBRUARY 2024**
Date of Judgement: **06 MARCH 2024**

APPEARANCES:

Counsel for the Applicant: Advocate N Strathern
Instructed by: Ulrich Roux and Associates

Counsels for the Respondent: Advocate L Segal SC
Advocate K Mitchell

Instructed by: BM Duchon Attorneys