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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA**

CASE NO: 27748/2015

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

.....
SIGNATURE

.....
DATE

In the matter between:

ESTER NEL

APPLICANT

(Applicant in the application for leave to appeal)

and

VALERIE DEODOT BYLIEFELDT

FIRST RESPONDENT

CORRIE BYLIEFELDT

SECOND RESPONDENT

(Respondents in the application for leave to appeal)

JUDGMENT

BASSON, J

- [1] This is an application for leave to appeal against an order granted by this Court on Friday 8 May 2015. Because this dispute involves two minor children I have decided to hear the application for leave to appeal on an expedited basis. The application for leave to appeal was argued on Monday 11 May 2015. In light of the urgency of this matter, I intend to give only brief reasons for my decision refusing the application for leave to appeal.
- [2] This matter initially served before Baqwa, J in urgent proceedings on 17 April 2015. When the matter served before the Court the respondents have not yet had an opportunity to file their answering affidavit. The Court issued a *Rule Nisi* returnable on 5 May 2015 in terms of which the two minor children Z. C. L. G. ("Z." - born [...] M... 2...) and P. K. W. G. ("P." - born [...] D...2...) were placed in the care of the applicant who is their natural mother. The salient parts of this order reads as follows:

"That a *rule nisi*, returnable on 5 May 2015, calling on the respondent to show cause why the following should not be made an order of court:

2.1 The Family Advocate is requested to investigate the best interest of the minor children, Z. C. L. G. (born [...] M.... 2....) and P. K. W. G. (born [...] D.... 2.....), with specific reference to the care, contact and residency and to make recommendations in regards;

2.2 Pending the recommendations of the Family Advocate, the said minor children are removed forthwith from the care of the respondent and placed immediately in the care of the applicant, who is awarded the primary care and residence;"

- [3] It is common cause that the applicant fetched the minor children from the respondents' residence on the same day.
- [4] On 5 May 2015 (the return day) this Court directed that the matter stand down to Thursday, 7 May 2015 to afford the parties an opportunity to deliver supplementary affidavits to address some of the concerns raised by the Court regarding the medical treatment of the minor child Z.. After having heard argument in the matter the Court directed counsel to prepare a draft order that would be in line with the Court's views.
- [5] A draft order was presented to the Court on Friday 8 May 2015 and was made an order of Court. Counsel on behalf of the applicant placed on record that he did not agree with the order. This order, *inter alia*, discharged the *Rule Nisi* granted on 17 April 2015 and ordered the return of the children in the care of the respondents by 16:00 hours on Sunday, 10 May 2015.
- [6] At approximately 15:50 on Friday, 8 May 2015, the applicant gave notice of her intention to bring an application for Leave to Appeal. As already pointed out, due to the urgency of the matter the application for Leave to Appeal was heard on an expedited basis on Monday, 11 May 2015. (I will return to the merits of this application hereinbelow.)
- [7] The draft order made an order of Court on 8 May 2015 reads as follows. I deem it necessary to quote the order in full in light of the submissions advanced on behalf of the applicant in the application for Leave to Appeal:
- "1. The rule nisi granted on 17 April 2015 is discharged.
 2. The primary care and residence of the minor children Z. C. L. G. (born [...] M... 2.....) and P. K. W. G. ("the children") will revert to the Respondents pending the return date of 31 July 2015, on which date the parties shall report to this Court on the decision reached by the Magistrates' Court, Makopane in respect of the children's care and residence.

3. The Applicant is ordered to return the children to the Respondents residence at [...] B. Street, M. by no later than 16H00 on 10 May 2015.
4. The Magistrates' Court for the District of Makopane is requested to expedite proceedings under case number 14/1/4-61/2013 with a view of finalising the process being conducted in terms of section 155 of the Children's Act, pertaining to the care and primary residence of the children, and to issue its order by no later than 10 July 2015, to enable the Applicant and the Respondents to report back to this court on 31 July 2015, on the decision reached by the Magistrates' Court and of any order(s) granted in this regard.
5. Pending the return date, the Applicant is entitled to unrestricted contact with and access to the minor children but not the right to remove the children from the care of the Respondents, save for pre-arranged medical and psychological consultations, and consultations with the office of the Family Advocate and save for her right to have her children with her every alternative weekend, the children to be returned to the respondents by 16:00 on Sunday afternoon.
6. The Office of the Family Advocate is requested to investigate, as a matter of urgency, the best interests of the children with specific reference to their care, contact and residence and to make recommendations in these regards, and to provide such recommendations to the Magistrates' Court, Makopane timeously to enable the Magistrates' Court to consider the recommendations of the office of the Family Advocate before issuing any orders in regard to the children.
7. The Applicant and the Respondents are (sic) granted permission to each, at the own costs, [to] obtain such independent medical and/or psychological reports as they deem fit in order to facilitate the determination of the best interest of the minor children.
8. There is no order as to costs."

Brief exposition of the background facts

- [8] In her founding affidavit, the applicant levels serious allegations of ill-treatment of the children against the two respondents. I have already pointed out that, at the time of issuing the *Rule Nisi*, the respondents have not yet had an opportunity to file an answering affidavit and consequently the Court did not have the benefit of the respondents' papers when issuing the *Rule Nisi*. The respondents subsequently filed their answering affidavit.
- [9] It is common cause that the applicant is the biological mother of the two minor children. The father is Mr P. Grobbelaar ("P. (sr)") to whom the applicant was engaged to be married. On 25 September 2009 P. (sr) was shot and killed in an incident at work. The first respondent is the sister of the children's father (P. (sr)). The second respondent is the husband of the first respondent.
- [10] At the time of his death, P. (sr) and the applicant were not married and P. (the minor child) was not yet born. Z. was [.....] years old at the time of her father's death.
- [11] During her pregnancy the applicant resided with her then prospective parents-in-law: Mr and Mrs Grobbelaar. (I will refer to the parents of the deceased P. (sr) as "the paternal grandparents").
- [12] Shortly before the birth of P. , the applicant left to stay with her mother and step-father until after the birth of P. . The applicant, however, again moved back to the paternal grandparents and lived with them for some time.
- [13] During 2012 the applicant moved with her new fiancé to Kuruman. She explains in her affidavit that she was unable to properly care for her children in Kuruman and therefore requested the paternal grandparents to take care of the children. According to the applicant she maintained regular contact with the children. This is denied by the respondents who state in their answering affidavit that, at most, the applicant had seen the children twice over the past two years. According to the respondents the paternal

grandparents thereafter requested them to take the children and look after them.

- [14] In March/ April 2012 the paternal grandparents made an application to legally adopt Z. and P. . Attached to the answering affidavit are two forms: The first is “Form 80” which is the “*Application for the Adoption of a Child*”. The second is “Form 81” which is the “*Consent by Parent to the Adoption of Child*”. It appears *ex facie* from Form 81 that the applicant had voluntarily consented to the adoption of the two minors by the paternal grandparents. This “*Consent by Parent to the Adoption of Child*” is signed by the applicant as well as the Presiding Officer of the Children’s Court and is dated 16 September 2013. However, before the adoption process had been finalised the applicant left for Kuruman leaving the two minor children with the paternal grandparents.
- [15] Later in 2012 the two minor children were placed in the care of the two respondents. According to the first respondent Z. has subsequently been diagnosed with an attention deficit disorder and is currently under the care of a psychologist for treatment. She is currently taking the prescription medication identified as “Concerta”. In this regard the respondents attached to their supplementary affidavit a report by Ms Van der Westhuizen - a registered psychologist - who has been treating Z. since January 2013. In a fairly detailed report Ms Van der Westhuizen sets out her diagnosis of Z. and motivates her recommendation that Z. be treated with Concerta. She also notes in her report that that the mother of Z. “*hardly ever made contact and rarely ever visited*”. The psychologist also recommended that Z.’s environment should be kept stable as far as possible as she struggles to adapt to change. Also attached to the papers is a prescription issued by Dr V Els a medical doctor prescribing “Concerta” to Z..
- [16] According to Annexures B1 – B3 and Annexure C (attached to the answering affidavit), the children were placed in the temporary safe care of the respondents by the Children’s Court on 16 August 2013. A further order to the same effect was made by the Children’s Court on 7 November 2014.

- [17] Also attached to the papers is an earlier report by Ms Van der Westhuizen (the registered psychologist dated 5 February 2015) in terms whereof it was recommended that the two minor children be permanently placed in the care of the two respondents.
- [18] At this juncture it must be pointed out that Mr Coetsee (counsel on behalf of the applicant) expressly disputed that any court orders placing the children in the care of the respondents existed. In fact, he was adamant that the applicant as the natural mother had the right to remove her children. When reference was made by Mr Mollentz (counsel on behalf of the respondents) to a letter dated 21 April 2015 confirming that the children were placed in the care of the two respondents in terms of two court orders, Mr Coetsee dismissed the letter stating that a letter from an attorney meant nothing and that there are no evidence of any court orders placing the children in the care of the respondents.
- [19] I have already referred to the fact that the two court orders are indeed attached to the answering affidavit and the question arises as to why Mr Coetsee did not seem it fit to draw the Court's attention to these two court orders which are clearly of crucial importance in these proceedings. Be it as it may, it is clear that the children have been placed by the Children's Court in the temporary safe care of the respondents. In this regard the Court has also been assured by Mr Mollentz that this process is an on-going process hence a request that this Court return the two minor children to the respondents and order the Magistrates' Court for the District of Mokopane to expedite proceedings under case number 14 /1/4-16/2013 with a view of finalising the process currently pending in terms of section 155 of the Children's Act.

The application for leave to appeal

- [20] What is before the Court in this Application for Leave to Appeal? The applicant first seeks leave to appeal against the discharge of the *Rule Nisi* granted on 17 April 2015. The applicant further seeks leave to appeal

against the further orders, returnable on 31 July 2015, contained in paragraphs 2 – 8 of the order dated 8 May 2015.

Discharge of the Rule Nisi

- [21] I will first deal with the discharge of the *Rule Nisi*. I have already pointed out that, at the time of the granting of the *Rule Nisi*, the Court did not have the benefit of considering the answering affidavit which was subsequently filed on 23 April 2015. It is trite that, in deciding whether to confirm or discharge a Rule, the primary consideration is and should always be what is in the best interest of the two minor children.
- [22] The Court has taken note of the serious allegations which are levelled against the respondents in the founding affidavit. Most of these allegations refer to the alleged ill-treatment of the minor children. These allegations are strenuously denied by the respondents in the answering affidavit. The Court has also taken note of the fact that the applicant's lengthy separation from her children goes largely unexplained.
- [23] In considering whether to confirm or discharge the Rule in light of the facts placed before the Court, the Court had regard, *inter alia*, to the fact that there is an on-going process in terms of section 155 of the Children's Act and that this process is currently serving before the Magistrates Court for the District of Makopane. The Court also considered the report by a registered psychologist (Ms Van der Westhuizen) who recommended that two minor children be placed in the permanent care of the two respondents. In addition hereto, the Court also considered the two reports compiled by teachers of the two minors: "*Skoolverslag: Suid Afrikaanse Vrouefederasie*". Both teachers reported positively on the well-being of the two children and both teachers pointed out in what respects the children experienced some difficulties at school.
- [24] The Court has also taken consideration of the circumstances under which the children were left in the care of the grandparents and the fact that a change in the environment of the children will be particularly disruptive of

Z.'s schooling. If regard is had to the school reports of Z. it appears that she has adapted well and that she has shown remarkable improvement.

[25] In order to assist the Court in making a finding in respect of what is in the best interest of the two minor children, the Court requested further supplementary affidavits which were filed during the course of last week. The Court also had regard to the contents of these affidavits.

[26] It is trite that the overriding consideration a Court must take into account in deciding a matter involving minor children is what is in the best interests of the minor child:

“The standard of the child's best interest has been described as “[a] golden thread which runs throughout the whole fabric of our law relating to children”. The best interest of the child is established as the determining factor in decisions relating to guardianship, access and custody of children in our private law and the rule is entrenched in the Constitution. It also forms one of the foundation stones of the Convention on the Rights of the Child. In terms of the Convention, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child must be a primary consideration. A child is defined in the Convention on the Rights of the Child and in the South African Constitution as every human being under the age of eighteen years, unless under the law applicable to the child, majority is attained earlier. The Constitution of South Africa in its Bill of Rights provides for the paramountcy of the best interest of the child standard.”¹

[27] The best interests of the minor child must be considered in light of the specific circumstances of each case. In considering this important question the Court is not imposing “*its own subjective whims upon the children*”. In this regard I am in full agreement with the following sentiments expressed by Nugent, J in *Godbeer v Godbeer*²

¹ Brigitte Clark A “golden thread”? Some aspects of the application of the standard of the best interest of the child in South African family law 2000 Stellenbosch Law Review 3. Footnotes omitted.

² 2000 (3) SA 976 (W) at 982D – F.

“While this Court is the upper guardian of all minors and may insist in appropriate cases upon limiting the freedom of choice of the custodian, I do not think that should be translated into this Court imposing its own subjective whims upon the children of the parties concerned. In *Bailey's* case at 136 the Court quoted the following extract from the judgment of the Court in *Du Preez v Du Preez* 1969 (3) SA 529 (D) at 532E - F, apparently with approval:

'This is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside, indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it.'"

[28] I am also in agreement with the following comments made by the Constitutional Court regarding the “*paramountcy principle*” in matters dealing with the best interests of the child:

“[23] Once more one notes that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus, the concept of 'the best interests' has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it. Van Heerden in *Boberg* states that:

(T)he South African Constitution, as also the 1989 United Nations Convention on the Rights of the Child and the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women, enshrine the 'best interests of the child' standard as 'paramount' or 'primary' consideration in all matters concerning children. It has, however, been argued that the 'best interests' standard is problematic in that, *inter alia*: (i) it is 'indeterminate'; (ii) members of the various professions dealing with matters concerning children (such as the legal, social work and mental health professions) have quite different perspectives on the concept 'best interests of the child'; and (iii) the way in which the 'best interests' criterion is interpreted and applied by different countries (and indeed, by different

courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker. (Footnotes omitted.)

[24] These problems cannot be denied. Yet this court has recognised that it is precisely the contextual nature and inherent flexibility of s 28 that constitutes the source of its strength. Thus, in *Fitzpatrick* this court held that the best-interests principle has 'never been given exhaustive content', but that '(i)t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child'. Furthermore '(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation'. Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”³

[29] Having regard to all the facts that have been placed before the Court in this application, this Court is of the view that it is not in the best interest of the children to confirm the *Rule Nisi*. By discharging the *Rule Nisi* the necessary consequence would be for the children to return to the two respondents despite a submission on behalf of the applicant that the applicant as the natural mother has a right to keep the children in her care. I do not agree. The children have been placed in the temporary care of the respondents by the Children’s Court which process is on-going. (I will revert to this issue hereinbelow.)

[30] I am accordingly not persuaded that in light of the facts that were placed before this Court that the applicant has reasonable prospects of success. In

³ Footnotes omitted.

the event as far as order discharging the *Rule Nisi* is concerned, the application for leave to appeal is dismissed.

Further order dated 8 May 2015 and returnable on 31 July 2015

- [31] I have already referred to the fact that the applicant also takes issue with the further order made by this Court which order is returnable on 31 July 2015. This order seeks to provide for the interim care of the minor children pending the outcome of the section 155 proceedings currently pending before the Children's Court and to provide for ancillary matters thereto which would expedite the proceedings before the Children's Court.
- [32] Having read the papers, this Court is of the view that, in light of the facts that have been placed before this Court, there is an urgent need to normalise and bring to finality the pending section 155 proceedings which are aimed at determining what is in the best interests of the children. The pending proceedings before the Children's Court have effectively been interrupted by the application by the applicant to remove the children from the care of the respondents. A letter from the designated social worker Mrs Jannasch confirms that she is currently in the process of finalising her investigation and report and that she was appointed by the Children's Court as the designated social worker for the two minor children. She also confirms that she has been seized with the matter since 2013.
- [33] The Court also ordered that, pending the outcome of these proceedings the applicant is entitled to unrestricted contact and access to the minor children. Unrestricted access to the children was ordered in the best interests of the minor children to ensure that the relationship between them and their mother be normalised as a matter of urgency. Furthermore, granting unrestricted access to the minor children will ensure that the applicant be granted a measure of control over the day to day care and wellbeing of the minor children which is in their best interest at this stage. It should further be pointed out that the respondents proposed that the applicant be granted unrestricted access to the children pending the outcome of the section 155 process.

[34] The applicant took strong issue with this order and submitted that the effect of this order is that this Court has divested itself of its powers as the upper guardian of all minor children. This can, of course, never be the case. No Court will ever shrink away from this important duty and no Court will relinquish its powers as the upper guardian of the minor children. In this regard I am, particularly, in agreement with the following statement by the Constitutional Court in *H v Fetal Assessment Centre*:

“[64] In South Africa, in addition to section 28(2) of the Constitution, the common law principle that the High Court is the upper guardian of children obliges courts to act in the best interests of the child in all matters involving the child. As upper guardian of all dependent and minor children, courts have a duty and authority to establish what is in the best interests of children. Notably, in *Mpofu* this Court endorsed the approach in *Kotze v Kotze*:

“[T]he High Court sits as upper guardian in matters involving the best interests of the child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties.”⁴

[35] The Court in *H v Fetal Assessment*⁵ stressed the importance of this Court not being bound by “*procedural strictures or by the limitations of the evidence presented, or contentions advanced or not advanced, by respective parents*” Having read the papers and having taken cognisance of the particular circumstances that prevail in this particular case, the Court has again been reminded of the importance of its role as the upper guardian of the minor children. In granting this particular order the Court was mindful of the on-going and pending proceedings before the Children’s Court and the need for these proceedings to be completed on an expedited basis. In the

⁴ 2014 JDR 2720 (CC). Footnotes omitted.

⁵ *Ibid.*

interests of the minor children this Court deemed it fit to make an order pertaining to the future conduct of proceedings that will be in the best interest of both minor children. Furthermore, in order for these proceedings to be brought to finality, an order had to be made to return the children to the respondents. Further in the interests of the minor children and to assist the Children's Court to make an informed decision regarding the two minor children, it was necessary to make an order to allow for independent medical and psychological investigations to be conducted. The order to obtain an independent medical assessment of Z. was made in light of the current dispute between the applicant and the respondents regarding the necessity of Z. taking medication.

- [36] It was further submitted on behalf of the applicant that the order dated 8 May 2015 is a final order in effect. I do not agree. It is clear from the order that this is not so.
- [37] Although it is accepted that an interim order is ordinarily not appealable, I also accept that this is not an inflexible rule and that all circumstances must be taken into account in deciding whether an application for leave to appeal should be granted in respect of an interim order.⁶ Although the interim order provides that the two minor children be returned in the care of the respondents, unlimited access to the children is granted to the applicant pending the outcome of the on-going proceedings before the Children's Court. In order to ensure that the children's wellbeing and best interests are properly assessed, the Court not only ordered the intervention of the Family Advocate on an expedited basis, but ordered the parties to appoint various medical experts and other professional experts of their choosing to assess the children.

⁶ See: *National Treasury & others v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) "[24] 'It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule. In each case, what best serves the interests of justice dictates whether an appeal against an interim order should be entertained. That accords well with developments in case law dealing with when an appeal against an interim order may be permitted.'"

[38] In these circumstances, I am of the view that it is not in the interest of justice to grant leave to appeal against the interim order granted on 8 May 2015. In the event the application for leave to appeal against this order is dismissed with costs.

[39] Order:

The application for leave to appeal is dismissed with costs.

A C BASSON
JUDGE OF THE NORTH GAUTENG HIGH COURT

Case no: 27748/15

HEARD ON: 11 May 2015

FOR THE APPELLANT: Adv. M Coetzee
INSTRUCTED BY: ML Schoeman Attorneys Incorporated

FOR THE RESPONDENT: Adv J. Mollentz
INSTRUCTED BY: Schalk Pienaar Attorneys