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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION HELD AT JOHANNESBURG**

CASE NO: 005318/2025

DATE: 2025-01-30

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

SIGNATURE:

In the matter between

C[...] J[...] V[...] C[...]

Applicant

and

M[...] V[...]

Respondent

JUDGMENT

ABRO, AJ:

[1] This application came before me on the urgent family court roll. The applicant and the respondent were both represented by

attorneys and counsel. Ms Lipshitz appeared for the applicant and Ms Naidoo for the respondent.

[2] I informed the parties at the outset that I considered the matter, which concerned the best interests and safety of a three-year-old child, a girl, to be urgent.

[3] The applicant is the biological father of the minor born on 29 November 2021 and currently three years old. The respondent is
10 her mother. The parties were never married to one another.

[4] It is common cause on the papers that the parties were in a relationship with one another from about 2017 until during or about July 2024, when the relationship came to an end as a consequence of the respondent's severe abuse of alcohol and alcoholism. This is admitted by the respondent in her answering affidavit, where she refers to herself as a 'recovering addict'.

[5] As such, I did not require submission on urgency from Ms
20 Lipshitz but invited Ms Naidoo to make submissions on her two points *in limine*, being urgency and *lis pendens*.

[6] Ms Naidoo submitted that the matter is not urgent, as the parties are to appear in Children's Court on 10 February 2025. Having heard Ms Naidoo's submissions on urgency and having had regard to her submissions made in the practice note filed this morning, it appears that these were, *inter alia*, the respondent's grounds for her objection to the urgency of the matter:

30 6.1 The respondent contended that she is the biological mother of the minor child, and that whilst the first applicant is the biological father, they are unmarried;

6.2 Further that the applicant has failed to show imminent or potential risk of harm to the minor child;

6.3 Further that the matter is pending in the Children's Court at Randburg and enrolled on 10 February where the respondent will seek an interim order regarding primary care and residence, pending the outcome of the investigations and finalisation of the parenting plan; and that

10 6.4 The respondent was informed that the minor child remains with her, pending the finalisation of her application in the Children's Court.

[7] The respondent sought an order that the application be dismissed with punitive costs.

[8] The lack of urgency as submitted by Ms Naidoo leads into the *lis pendens* point, which was the respondent's second point *in limine*.

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[9] Having regard to the annexures attached to the respondent's answering affidavit in respect of the Children's Court proceedings ("MV6"), the following the following is clear:

9.1 The respondent approached the Children's Court on the 19th of December 2024 in terms of section 53 of the Children's Act, which is the section which talks to bringing a matter before a Children's Court;

30 9.2 The form 2 refers to an affidavit with the words: 'See attached affidavit.' However, none was provided to this court and was not attached to the answering affidavit. It is thus impossible for this court to see what is in fact before the

Children's Court;

9.3 There is a note is made therein which reads - , 'Interim regarding primary residence until or pending finalisation of outcome, or parental plan.'

10 9.4 The next document that was provided in respect of the Children's Court, is a Form 9 to carry out an investigation in terms of section 50 of the Children's Act. This is directed to the Department of Social Development in Johannesburg, who are to carry out an investigation, and submit a report on or before the 10th of February 2025. From the face of this document, it is clear that this was only submitted to DSD Johannesburg on the 23rd of January 2025. I was informed by both Ms Lipshitz and Ms Naidoo that neither party had been contacted by a social worker;

20 9.5 The next document that was provided which emanated from the Children's Court is a Form 5, which is a referral of the matter to the office of the Family Advocate, Johannesburg. This document similarly seems to have only been received by the Office of the Family Advocate on the 23rd of January 2025. The reasons for the referral as evident from this document are recorded as being to 'assist the parties with a parenting plan, or any other investigations you may deem fit'. It is recorded that the matter is postponed for the 10th of February 2025.

30 [10] On or about 30/31 December 2024, the applicant received service of a notice to attend the Children's Court for the district of Randburg on 10 February 2025.

[11] I was again informed by both counsel that neither party had been contacted by anyone from the Office of the Family Advocate as of 30 January 2025.

[12] As indicated above, the affidavit deposed to by the respondent in the Children's Court was not provided to this court. It is thus unclear as what relief the respondent is seeking in that court, why she had approached the court or what the respondent had advised the clerk of the court the position was.

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[13] What is however clear from the respondent's affidavit in this court is that the respondent would have advised that in her opinion, the applicant has no parental responsibilities and rights and she and the applicant were never married.

[14] Ms Naidoo conceded that the matter in the Children's Court on 10 February 2025 would in all likelihood simply be postponed.

[15] It was also confirmed that neither party had appeared
20 before a Magistrate in the Children's Court and further that no order had been made in the Children's Court. This is contrary to the respondent's assertions in her answering affidavit, particularly at paragraph 142 thereof, at page 26, where she alleges:

"That the applicant was also aware that the matter is pending in the Children's Court, and that B was authorized to be with me until at least the next court date, which is 10 February 2025."

30 [16] The respondent reiterates this at paragraph 292 of the at page 53, alleging that she was informed by the Children's Court that the matter is enrolled for 10 February 2025 and that B will remain with her until then.

[17] It is unclear who at the court informed the respondent of this. Possibly a clerk of the court. There is, however, no order placing B in the respondent's care.

[18] I am in the circumstances, satisfied that nothing has yet transpired in the Children's Court. No substantive orders have been made. The parties have in fact not yet appeared before a Magistrate. It is also unclear as to what is in fact before the
10 Children's Court.

[19] The Form 2 attached to the answering affidavit is simply to bring a matter to court in terms of section 53 of the Children's Court which section sets out who may approach a Children's Court by bringing a matter which falls within the jurisdiction of a Children's Court to a clerk of the court. It would seem that that is all that has occurred.

[20] As such, I am satisfied that, as the minor child's upper
20 guardian, I must, in the circumstances before me, deal with this matter in order to protect the minor child and ensure her best interest remain paramount.

[21] The Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) confirmed the position at paragraph 64 thus:

30 "The High Court sits as upper guardian in matters involving the best interests of the child (be it 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 limitation of evidence presented, or contentions advanced or not advanced, by respective

parties.”

[22] Notably, the respondent who is adamant throughout her answering affidavit that the applicant is not vested with parental responsibilities and rights, approached the Children’s Court to enter into a parenting plan with the applicant, who she contends in the same breath has no parental responsibilities and rights.

10 [23] Section 33(1) of the Children’s Act 38 of 2005 specifically provides in respect of parenting plans that it is co-holders of parental responsibilities and rights in respect of a child, who enter into a parenting plan in order to determine the exercise by them of their respective responsibilities and rights in respect of the child.

[24] The respondent’s persistent allegations in this regard, coupled with Ms Naidoo’s submissions, are thus baseless and without merit.

20 [25] The applicant seeks to confirm his parental responsibilities and rights. Section 21 of the Children’s Act, which section deals with the parental responsibilities and rights of unmarried fathers, provides as follows, 21(1):

“The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

- 30 a) If at the time of the child’s birth he is living with the mother in a permanent life partnership; or
b) If he, regardless of whether he has lived or is living with the mother –
i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father...

- ii) contributes or has attempted in good faith to contribute to the upbringing for a reasonable period; and
- iii) contributes or has attempted in good faith to contribute towards expenses in connections with the child's maintenance for a reasonable period."

[26] It is common cause that the parties were living together at the time of B's birth. It is further common cause that the applicant is listed as the minor child's father on the birth certificate. It is further common cause that the relationship between the parties only broke down finally in July of 2024. The parties thus resided with one another, both prior to the birth, at the time of conception, and after the birth until B was almost three years old.

[27] I invited Ms Naidoo to address me on this issue and make submissions as to why in the circumstances, the respondent contends the applicant is not vested with parental responsibilities and rights. The submissions made included that the parties were not in a permanent life partnership at the time of B's birth in November 2021, as the relationship was constantly in turmoil and the applicant ended the relationship. The applicant did not care and was not present as he worked three jobs and was not as involved in her upbringing. He was as such an absent father for the first two years of her life, and he was not instrumental in her upbringing.

[28] On a reading of the affidavits, it is clear that the applicant has contributed in good faith to B's upbringing since birth, and that includes contributing to her maintenance. He was the only employed parent in the relationship. It is also clear that the parties were living in a permanent life partnership, albeit that same was tumultuous as a consequence of the respondent's

alcohol abuse and persistent admission into hospital and/or rehabilitation clinics.

[29] The minor child, B, had been in the applicant's uninterrupted care from at least June/July 2024 during which period the respondent was twice admitted into an ICU and twice into rehabilitation centres.

[30] As such, B was in the applicant's primary care at the very
10 least from the beginning of June 2024 until 27 December 2024, when the respondent, without his knowledge or consent, removed her.

[31] In the premises, I am satisfied that the applicant is in fact vested with full parental responsibilities and rights in respect of B and as such same will be recorded in my order.

[32] As indicated above, the respondent's alcohol abuse, which is extreme, has persisted for some years. It flared up again
20 on the 7th of June 2024, which resulted in the respondent being admitted to the ICU at the Sandton Mediclinic. On this occasion her blood alcohol level was 0.4, which a Dr Williamson informed the applicant, was the highest she had ever seen in the emergency room. The respondent was literally clinging to life and fighting for her life at that stage. After a brief stay in hospital, the respondent was then admitted to Crossroads Recovery Centre, an alcoholic and drug rehabilitation centre where she spent a month. On being discharged in July, it appeared that she began drinking again.

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[33] Things came to an end at the beginning of August 2024. The respondent was again admitted into a rehabilitation centre on the 16th of August, the Sana Recovery Centre, where she

remained until mid-November of 2024.

[34] B remained in the applicant's care during this period and had contact visits with her mother, the respondent, at the rehabilitation centre.

10 [35] The applicant, during October 2024 and prior to the respondent's discharge from Sana, through his attorneys, addressed correspondence and provided the respondent with a proposed parenting plan/plans in order to ensure the safety and protection of B, and to regulate what the position would be subsequent to the respondent's discharge from the rehabilitation centre.

[36] This appears to have angered the respondent, who alleged that the parenting plan was draconian in nature, and further that she had been bullied and forced into sign the parenting plan, which in any event she did not sign.

20 [37] The respondent was discharged during the middle of November 2024, and it would appear that the applicant permitted contact between the respondent and B, albeit supervised and whilst monitoring the respondent's sobriety with the use of breathalysers and/or urine tests in order to ensure that when she exercised contact with B and visited B, she was indeed sober.

30 [38] In response to the proposed parenting plan/s and on the 10th of December 2024, the respondent provided the applicant with a document dated the 10th of December 2024, which she called a 'vital legal declaration'. The respondent did not attach this document to her answering affidavit, which was curious to say the least. She personally addressed the document to the applicant, and I was advised that she was not legally represented

at the time. To my mind that is irrelevant. She had just come out of a three month stay in rehabilitation and was clearly well aware of her vulnerabilities and her propensity to relapse at the time and which she has unfortunately done many times over the years. She was also clearly well aware for the need for B to be protected.

[39] Briefly, the respondent, in this document agreed that the applicant and herself were to share joint custody of B. She also referred therein to the iSober device which she contends she had
10 no objection to utilising, as long as the first applicant purchased it, as she did not have the funds to do so. She says she did so as she felt that it would provide a safe environment for B. She also refers therein to exercising supervised contact in order to facilitate her rehabilitation process and for B's protection, and lists numerous individuals who she contended could supervise the contact between her and B. She recorded further, that the appointment of supervisors would ensure that her contact with B was not only monitored and safe, but it would also facilitate her rehabilitation process. She set out a schedule of supervised
20 contact for the first three months following her rehabilitation, and she recorded that this structured visitation plan provides consistency for B and would support her reintegration into B's life.

[40] The inclusion of supervised overnight visits would allow for progressive bonding whilst maintaining safeguards to supervision and iSober monitoring. She went as far as setting out supervised contact on Mother's Day, her birthdays, school holidays, so, she in fact went further than the three months.

30 [41] I referred Ms Naidoo to this document and more particularly the contents thereof and queried whether the contents of this document penned by the respondent negated the allegations that she now made in her answering affidavit. Ms

Naidoo repeatedly submitted that I must take into account that the respondent was not legally represented at the time. As indicated, that is of no import.

[42] The respondent was clearly well aware of the fact that she had just come out of rehabilitation and that B needed to be protected because she could relapse at any time. This was then confirmed, interestingly enough, by the respondent in a WhatsApp marriage, which she forwarded to the applicant on Sunday the 10 26th of January, being the same day that she deposed to her answering affidavit and being but four days before the parties were to appear before me in court.

[43] This WhatsApp message is attached as annexure 'RA2' to the replying affidavit and essentially what is contained therein is that the respondent, who has made spurious allegations against the applicant in her answering affidavit and who has only allowed two visits between the applicant and B on the 11th of January for two hours and on the 26th of January for two hours. This further 20 negated the allegations made by the respondent in her answering affidavit.

[44] The WhatsApp referred to also contained the respondent requesting the applicant to settle. She recorded that this application was going to cost a fortune, and they could withdraw the proceedings or stop the proceedings instead of going from court to court. The most disturbing part of this WhatsApp is where she tells him that he must not worry, because should she relapse, B would go back to him. 30

[45] I asked Ms Naidoo what B, in the event that she was in the respondent's care and needed assistance, if the respondent had become intoxicated and passed out, who is a three-year-old

little girl, was supposed to do then? How was she supposed to get help? Who would know? Who would find her? Ms Naidoo could obviously not answer the question.

[46] Ms Naidoo submitted that perhaps the best thing would be to place B in foster care and remove her from both parents. I found that submission to be untenable, in that I find there is no reason for B not to reside with the applicant, primarily in his care, as she had done for at the very least the entire half of 2024, keeping in mind that she had also lived with the applicant since birth.

[47] Notably, subsequent to coming out of rehabilitation and on the 10th of December was the respondent approached the Children's Court with the district of Randburg, as I have already indicated.

[48] At the time, the applicant afforded the respondent supervised contact during November and December 2024. The respondent was further afforded contact on the 27th of December in order that she could celebrate Christmas with B and open presents and what not. Thereafter, the respondent refused to return B to the first applicant and drove with her to Klerksdorp to her mother. The respondent indicated to the first respondent on 31 December that she would return B to him on the 8th of January 2025.

[49] The applicant approached the Children's Court for assistance. He was advised by a clerk that he would not be assisted unless B was in imminent danger.

[50] The respondent returned B to the applicant's care at two o'clock on the 8th of January 2025, whereafter, at about quarter to

six that very same evening she returned to the applicant's home accompanied by an armed member of the South African Police Services ('SAPS') and the respondent's attorney. The respondent demanded that the minor child be handed over to her.

[51] As indicated during the hearing, I take a dim view of this conduct in involving members of SAPS to remove a three-year-old child. The respondent's attorney's conduct in aiding and abetting her in such conduct was similarly not appropriate. The applicant
10 handed B over. Whilst he was criticised by Ms Naidoo for doing so, I disagree. The applicant acted as a parent, confronted by a member of SAPS standing in front of him whilst he is holding his three-year-old, should act. He handed the child over and avoided any confrontation with an armed member of SAPS.

[52] I take a very dim view of this whole incident. I was not provided with the statement that the respondent made to SAPS, but reading between the lines in the respondent's affidavit, it is clear that she would have told them that she is the mother and
20 that she is the primary caregiver. That the applicant is abusive and had committed some sort of gender-based violence. That he had abused the minor child, and that he would not give the child back to her. That they were never married and further such allegations. Members of SAPS will obviously react which is precisely why their services were utilised by the respondent and her attorney.

[53] Thereafter, correspondence was exchanged between the applicant and the respondent's attorneys. A round table was
30 proposed. The applicant asked for contact. He was informed that he would be permitted supervised contact. As indicated he was afforded limited contact for two hours on the 11th of January, and for two hours on the 26th of January.

[54] In the circumstances, the applicant approached this Honourable Court for interim relief in order to ensure B's safety and security. To my mind the respondent does not appreciate the effect of her conduct and alcohol abuse on B. This is apparent when has regard to paragraph 139 of her answering affidavit at page 26 where she states:

"B was in my total care 24 hours a day, drunk or sober."

10 [55] The allegation is jarring. The submission that the applicant knew about this and was in her presence in light of the facts of this matter, is simply nonsensical. It is clear that the respondent does not appreciate that she has a long road to go. In this regard, her answering affidavit is silent as to what she is doing to ensure her sobriety. There is no mention of Alcoholics Anonymous or any other programs which she attends to maintain her sobriety.

20 [56] The applicant, in his replying affidavit, states that the respondent appears to be white knuckling her recovery namely when a recovering alcoholic thinks they can do it alone, without any assistance.

[57] Whilst it is not for this court to advise the respondent as to what she ought to do or ought not to, it can protect and ensure that the minor child is not placed in any danger were she to be placed in the respondent's care and the respondent were to relapse and become intoxicated.

30 [58] In this regard I refer to the judgment of Bezuidenhout AJ in *JVS v LVS*¹:

¹ *JVS v LVS* (29720/2020) [2021] ZAGPJHC 458 3 September 2021 [61] – [63]

“In my view it is a misconception harboured by many parents who misuse alcohol that their drinking is not affecting anyone else. In fact, children of parents who misuse alcohol, can be among those most impacted. Parents struggling with alcoholism or the misuse of alcohol for whatever reason, may be surprised to learn how their addiction can impact on their children now and throughout their adulthood.

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“The effects of growing up around the misuse of alcohol are sometimes so profound that they last a lifetime, affecting the way children see themselves and others and interact in relationships. Because they may not have a good example to follow from their childhood and potentially never experienced traditional or harmonious family relationships, adult children of alcoholics or parents who misuse alcohol may have to ultimately guess what a normal relationship looks like. Most of the time these children will end up feeling conflicted, confused and self-conscious when they realise that continuous drinking (or even periodic binge drinking as is the case in this matter) is not considered normal in other families.

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Although it is comforting to observe the efforts that have been made by the applicant to address his drinking problem, I am not entirely convinced that he has completely come to terms with the impact that his drinking may have had on the well-being of his children.”

30

[59] Similarly in this matter, and where one has regard to the respondent’s conduct, since the end of December 2024 to date, I am also not entirely convinced that the respondent has come to terms with her addiction, her recovery, or the effect that her conduct of the past month, which is unacceptable and untenable,

has had on her minor daughter. Removing B from her father shows a complete disregard for B's rights to family.

10 [60] Insofar as the issue of costs is concerned, the respondent's conduct was clearly contrived. She approached the Children's Court on the 19th of December whereafter she removed B from the applicant's care from the 27th of December to the 8th of January. Then later and on the very same day, removed B from his care with the assistance of a member SAPS and her attorney in a very threatening manner. Her conduct is not in B's best interests and is not in accordance with the spirit of co-parenting or in the spirit of protecting and ensuring that children's best interests, especially one so small, and especially in such circumstances which the respondent knows she finds herself in.

20 [61] Ms Lipshitz for the applicant argued that the respondent had not conducted herself in B's best interests in taking matters into her own hands in the manner that she had, and further that she had made matters worse by then imposing a self-imposed supervised contact regime upon the applicant whereby she seeks to isolate him as the parent and the person that B had been living with for the past six months.

[62] The applicant thus sought costs of the urgent application on a party-and-party scale at scale B.

30 [63] Ms Naidoo submitted that both parties did what they believed to be in B's best interests. She further submitted that the respondent is in a vulnerable position right now.

[64] It is unclear as to exactly what that means. The respondent was in a vulnerable position when she came out of rehabilitation and removed B from the applicant's care. She

further submitted that the respondent has been amenable to finalising a parenting plan and that one could have been finalised, but that it was in fact the applicant who had prevented this from happening.

[65] This argument holds no water. As I indicated previously, the respondent was adamant in her contention that the applicant does not have parental responsibilities and rights and in the circumstances, it is curious that she is insistent on entering a parenting plan with him.

[66] Ms Naidoo submitted that it is in the interests of B that I make an order that each party pay their own costs. The respondent however sought the dismissal of the application with punitive costs. She did not seek an order that each party pay their own costs. Costs is a discretion, and in exercising my discretion, I am of the view that costs should follow the result.

[67] I am in agreement with Ms Lipshitz that but for the respondent's conduct, which conduct was unilateral and contrary to B's best interest, the applicant would not have found himself in a position where he had no choice but to approach an urgent court in order to ensure B's safety, protection, and best interests.

[68] In the circumstances, I will include in the order that the respondent is to pay the costs of the application on a party-and-party scale, on scale B.

The order is as follows:

ORDER

[1] The applicant's failure to comply with the Uniform Rules of

Court is condoned.

[2] The applicant and the respondent are vested with full parental responsibilities and rights as provided in sections 18(2)(a) to (d) and section 18(3) of the Children's Act 38 of 2005.

[3] Pending the outcome of the application launched by the respondent against the first applicant out of the Randburg Children's Court, under case number 14/1/4/2–753/2024:

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3.1The minor child, B, is to be returned to the applicant's care forthwith, and by way of the applicant collecting the minor child from her school today, being Thursday, 30 January 2025, at 16:00. The minor child shall remain primarily resident with the applicant and in his care.

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3.2The respondent shall exercise the following contact with the minor child under the supervision of either party's family member and/or Bridget Matebele, which contact will take place at the respondent's home, or a place within a ten-kilometre radius from the respondent's home - as follows:

3.2.1 Every Monday and Wednesday from 15:30 to 18:30 at the respondent's home;

3.2.2 Every alternative weekend, Saturday and Sunday, from 09:00 to 17:00; and

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3.2.3 Every intervening weekend, Saturday from 09:00 to 17:00.

[4] In order to ensure that the respondent has not consumed any alcohol prior to or during her contact with the minor child, the

parties shall procure, at a shared cost, a device described as an iSoberS Pro BLE Premium Breathalyser, which operates in conjunction with an iSober application (hereinafter “the Device”) which allows random alcohol testing at all times and the publication of the results of such testing by WhatsApp message in real time.

10 [5] On such days when the respondent has contact with the minor child, as inter alia referred to in 3.2 and the subparagraphs above, she shall transmit by way of data message (WhatsApp) the test results of the alcohol test by means of the device at a minimum of 20 (twenty) minutes before the minor child being in her care.

[6] The respondent shall also be required to transmit, by way of data message (WhatsApp), to the applicant the test results of the alcohol test through the device at two-hour intervals during her contact with the minor child, which must be done in the presence of the party supervising the contact sessions.

20 [7] In the event that the test result as published and sent to the applicant indicates that the respondent has consumed any alcohol whatsoever, the applicant shall be entitled to withhold her from exercising contact with the minor child until such time as she has presented him with a negative breathalyser test.

[8] In the event that the applicant takes the minor child away for a weekend, then the contact as set out in paragraphs 3.2.2 and 3.2.3 above, shall not apply. The applicant shall arrange for the respondent to make up her contact time.

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[9] The respondent shall be sober when exercising contact with the minor child as envisaged in paragraph 3.2 (and subparagraphs) above, and should she arrive intoxicated, she will

not be permitted to have contact with the minor child

[10] The respondent will be subjected to random alcohol tests, including but not limited to urine, blood, and/or hair follicle tests at the applicant's instance and demand if she presents with a positive breathalyser test.

[11] The respondent is to pay the applicant's costs on Scale B.

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ABRO, AJ

ACTING JUDGE OF THE HIGH COURT

DATE:

- - - - -

For the Applicant:

T Lipshitz

Instructed by:

Chiba Attorneys

20 For the Respondent:

N Naidoo

Instructed by:

Otrebski Attorneys