



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 7147/2024

In the matter between:

JHG

Applicant

and

GWH

First Respondent

WG

Second Respondent

Neutral citation: JHG v GWH and Another (7147/2024)

Coram: Van Zyl, J

Heard: 16 December 2024

Delivered: 7 May 2025

Summary:

Judgment on costs. Application for extended right of access to minor child previously dismissed. Pending application in children's court. Application not in the best interest of the minor child. Applicant ordered to pay the costs of the application.

ORDER

1. The applicant is ordered to pay the costs of the application, with counsel's fees to be taxed on Scale A.
-

JUDGMENT

Van Zyl, J

[1] This matter served before me on an urgent basis, in which the applicant sought the following relief:

- ‘1. That the Application is heard on an urgent basis and that condonation is granted for the non-compliance with the Court Rules pertaining to time limits and services.
2. That temporary safe care of the Minor Child . . . is awarded to his biological father . . . for the period 16 December 2024 to 6 January 2025.
3. That the First Respondent pays the costs of this application.’

[2] The application was argued before me by Mr Berry, on behalf of the applicant, and by Mr Sander, on behalf of the first respondent. There was no appearance on behalf of the second respondent. After I entertained the arguments, I dismissed the application and reserved judgment on the issue of costs.

[3] The citation of the judgment and the contents are written in a manner so as to protect the identity of the minor child.

[4] The minor child was born in June 2019 out of wedlock from a relationship between the applicant and the biological mother. Shortly after his birth his biological mother decided that the minor child should reside with the maternal grandparents in Petrusburg. The applicant resides in Vereeniging. According to the applicant his relationship with the grandparents was strained and he could never exercise his access rights to the minor child. The minor child's grandmother passed away on 23 October 2023 and his grandfather on 27 March 2024.

[5] The children's court then placed the minor child under the temporary foster care of the first respondent on 18 April 2024. The first respondent resides in Petrusburg.

[6] On 16 August 2024 the children's court issued the following order, which order is attached to the founding affidavit as annexure 'G2':

1. Designated social worker must be appointed for a background report on the biological father. Mr Leeuw, the social worker from Petrusburg, will do the necessary arrangement.
2. Mr Leeuw and the designated social worker in Vereeniging to arranged (*sic*) for re-unification services.
3. Interim arrangement for contact between biological father and [minor child]:
 - 3.1 Physical contact once every month on a Saturday or Sunday between 09:00 and 16:00 in the afternoon. This is to be arranged at least the previous Wednesday. If it is not possible for the biological father to come to Petrusburg, the temporary safe-care parent, Mrs . . . , can take the child to Vereeniging.
 - 3.2 Telephone calls every Monday and Wednesday between 17:00 and 19:00, if possible.
 - 3.3 The physical contact will only be between the biological father and not with extended family.
4. Both parties must not contaminate the child during the re-unification.
5. The temporary safe-care order dated 15 July 2024 is extended for 30 (THIRTY) days.
6. The matter remanded to 22/11/2024.
7. All the parties are excused from the extension proceedings that will follow as from today.

[7] The applicant visited the minor child on 31 August 2024 and they booked into a local game lodge. The applicant's mother accompanied them. There was then an unfortunate situation which involved the police.

.....

[8] On 2 September 2024 the applicant's attorney wrote a letter to the presiding magistrate requesting that the matter be placed back on the roll due to following reasons, as set out in annexure 'G3' to the founding affidavit:

“Met verwysing na die hofbevel van 16 Augustus 2024 is dit ons instruksies dat voormelde hofbevel te veel ruimte laat vir interpretasie.

As gevolg daarvan gee dit vir Mev . . . die geleentheid om die situasie te misbruik, en gebruik sy dit inderdaad om ons kliënt se toegang tot [die minderjarige kind] te beperk en te frustreer.

Ons versoek derhalwe Landdros van der Westhuizen om die aangeleentheid so spoedig moontlik weer op die rol te plaas. Ons kliënt kan nie tot 22 November 2024 onder hierdie omstandighede sy kind besoek nie.”

On face value of the letter it appears that the first respondent's attorney was not copied in the letter.

[9] The applicant visited his son on 5 October 2024 and spent the day with him from 09:00 in the morning until 16:00 in the afternoon.

[10] The matter served again before the children's court on 17 October 2024, when the first respondent's attorney also attended the court proceedings. It was decided not to pursue the incident of 31 August 2024. It was agreed between all the relevant parties that the matter be postponed to the original date of 22 November 2024.

[11] On 22 November 2024, during the court proceedings, it transpired that the first respondent appointed a new attorney. The matter was postponed to 20 January 2025 for the attorney of the first respondent to familiarize himself with the content of the court file. Attached to the answering affidavit as annexure 'AA3', is a copy of the notes made by the Magistrate on the said date. From a reading of the notes it is evident that the applicant nor his legal representative, mentioned or raised a request that the applicant seeks to take the minor child with him for the period of 14 December 2024 to 6 January 2025. It was indicated that both parties had no objection for the matter to be remanded to 20 January 2025 for the biological mother of the minor child to come on record.

[12] The following averments are made at paragraph 5 of the founding affidavit:

- 5.1 Mrs Elsie Labuschagne from NGW Welfare, Vereeniging sent a request for a Section 168, Children's Act, 38 of 2005, leave of absence for [the minor child] on 25 November 2024. I attach a copy of the request marked annexure "G5".
- 5.2 The request was sent to the social worker dealing with the matter in Koffiefontein. Even though the matter was discussed with the social worker of Koffiefontein, we had no assistance in this regard from Mr Leeuw.
- 5.3 On Wednesday 4 December 2024 the social worker, Mrs Elsie Labuschagne, realising she can expect no assistance from the social worker from Koffiefontein, sent through a request for an order in terms of section 46(2) of the Children's Act to place [the minor child] under my temporary safe-care from 14 December to 5 January 2025. I attach the request marked annexure "G6".
- 5.4 My attorney filed the request at Court on 5 December 2024.
- 5.5 Magistrate van der Westhuizen advised on 11 December 2024 that he no longer deals with children's court matters and that the matter would be referred to another Magistrate.'

[13] Under the heading 'urgency' the applicant states, *inter alia*, the following:

- 6.1 Ms Labuschagne requested Mr Leeuw to approve that [the minor child] visit me from 14 December 2024 to 6 January 2025 on 5 November 2024. I refer the Honourable Court to Annexure "G4".
- 6.2 I communicated with the First Respondent on 14 December 2024 advising that I paid the maintenance early this month as I was paid early this month.
- 6.3 The First Respondent replied on the same date that she was taking [the minor child] on holiday on Monday, 16 December 2024 and that she will only be back on 8 January 2025.
- 6.4 It dawned on me that despite the requests from Mrs Labuschagne, I would not see [the minor child] over the festive period.

6.5 I refer the Honourable Court to the report of Mrs Elsie Labuschagne wherein she recommends that [the minor child] be placed in my care, Annexure “G3”.

6.6 I respectfully aver that the First Respondent created the urgency in that she must have known about the holiday arrangements a long time ago, and elected to advise me on Saturday, 14 December 2024, that she will be leaving on holiday on Monday, 16 December 2024, which is a public holiday.’

[14] The report filed by Ms Labuschagne, annexure ‘G4’ to the founding affidavit, dated 29 October 2024, was very favourable in support of the circumstances at the applicant and the placement of the minor child at the applicant. However, paragraph 9 of the report contains the following (restricted) recommendation:

‘In view of the above, it is recommended that the reunification of [the applicant] with his son . . . can be considered in terms of Section 187(1) of the Children’s Act, Act 38 of 2005:

“(1) if a children’s court placing a child in foster care is of the view that reunification between the child and the child’s biological parent is possible and in the best interest of the child, the court must issue the placement order subject to conditions providing for a designated social worker to facilitate such re-unification 1as contemplated in Section 156(3)(a).” (My emphasis)

[15] When the aforesaid section 187(1) of the Act is considered, also in conjunction with the mentioned section 156(3)(a), it is evident that it is the children’s court who has the jurisdiction to order such reunification and that such an order should be subject to conditions providing for a designated social worker to facilitate the reunification.

[16] In section 1 of the Act ‘children’s court’ is defined as ‘a children’s court referred to in section 42’. Section 42(1) of the Act determines as follows:

‘For the purposes of this Act, every magistrate’s court as defined in the Magistrates’ Courts Act, 1944 (Act 32 of 1944) shall be a children’s court and shall have jurisdiction on any matter arising from the application of this Act for the area of its jurisdiction.”

[17] The applicant further relied on a request from Ms Labuschagne from Vereeniging for a leave of absence in terms of section 168 of the Act for [the minor child] on 25 November 2024. The said document is attached to the founding affidavit as annexure 'G5'. However, the requested leave of absence was indeed not granted by the provincial head of social development in the relevant province as determined in section 168(1)(e) of the Act. In the said request Ms Labuschagne stated, *inter alia*, the following:

‘The child’s rights has (*sic*) also been infringed on, as he did not have the opportunity to spend Christmas with his biological father, brother and extended family.’

gt

However, that would have been in direct conflict with the court order issued by the children’s court on 16 August 2024 in which it was specifically determined that physical contact will only be with the biological father and not with the extended family.

[18] On 4 December 2024 Ms Labuschagne sent a request for an order in terms of section 46(2) of the Act to place the minor child under the temporary safe-care of the applicant from 14 December 2024 to 5 January 2025. The said document is attached to the founding affidavit as annexure 'G6'. The said request was filed by the applicant’s attorney at the children’s court on 5 December 2024, but was not served upon the legal representative of the first respondent or on the first respondent herself. It was subsequent thereto that the relevant magistrate advised on 11 December 2024 that he no longer deals with children’s court matters and that the matter would be referred to another magistrate.

[19] Section 46 of the Act provides for the orders a children’s court may make and section 46(2) determines as follows:

‘A children’s court may withdraw, suspend or amend an order made in terms of subsection (1) or replace such an order with a new order.’

[20] From the totality of the above it is evident that all the relief the applicant attempted, with the assistance of Ms Labuschagne, to obtain from the children’s court, were forms of relief which fell squarely within the jurisdiction of the children’s

act. By approaching the High Court, the applicant in essence attempted to obtain an amended order, which order is part of pending children's court proceedings.

[21] Mr Berry submitted that the applicant is not attempting to amend the children's court order, but is requesting the High Court as upper guardian of children to prevent the first respondent from continuing to keep the minor child away from the applicant, especially so for Christmas. I cannot agree with this submission. I agree with the submission by Mr Sander that what the applicant is seeking is a variation of the children's court order, which ought to or should be done in the children's court. See *D.G.S.F v M.F and Another* (3427/2024) [2024] ZAFSHC 207 (2 July 2024) at paras 61 – 62.

[22] I have to add that the applicant attempted to make out a case that the first respondent is frustrating his rights of access to the minor child and that she deliberately only told him on 14 December 2024 about her planned holiday with the minor child. However, in terms of the present court order the applicant is only allowed to take the minor child with him for one day at a time and nowhere does the applicant allege that there was a previous arrangement between the applicant and the first respondent that the minor child would spend Christmas day with him.

[23] Furthermore, it is trite that reunification is a process which develops over a period of time and not something that happens overnight. Up to now, the minor child has only spent one day at a time with the applicant. In the present instance the process is even more complicated, considering that it is evident from the report of Dr. Strauss, attached to the answering affidavit as annexure 'AA1', read with the report of Dr. Naser attached to the founding papers, that the minor child suffers from certain emotional, psychological and physical problems. These circumstances make it all the more necessary that the reunification process be implemented gradually. It would be completely irresponsible for me to grant an order as requested by the applicant. It is not in the best interest of the minor child. For the aforesaid reasons I dismissed the application.

Costs:

[24] The totality of the abovementioned facts and circumstances are also applicable in determining what the fair and reasonable order as to costs would be.

[25] In the text book of AC Cilliers, *Law of Costs*, AC Cilliers, March 2024 SI 49, at paragraph 12.11A the following applicable principles are stated:

'Costs orders in custody and access and similar cases

The court is nowadays inclined to regard matters involving children as different from ordinary civil matters. Accordingly, it appears that in applications for variation of custody orders (and similar cases), the usual rule (or, at any rate, the tendency) is to make no order as to costs; the court is reluctant to make costs orders in such cases.

On the other hand, it has been held that in custody and access cases there is no general "rule" that no order as to costs should be made. . . '

[26] In the application papers matter the applicant sought an order that the first respondent be ordered to pay the costs of the application on a party and party scale, whilst the first respondent sought an order that the applicant be ordered to pay the costs of the application on a party and own client scale. As the arguments developed in Court, Mr Berry submitted that should the application not be successful, each party should pay its own costs, but Mr Sander persisted that should the application not be successful, the first respondent should not be out of pocket by having to pay her own costs.

[27] I have already found that the applicant did not act in best interest of the minor child in by having instituted this application. The first respondent, on the other hand, had no other option but to have opposed the application in the best interest of the minor child. In addition, no letter of demand even preceded the application. The first respondent had no option but to oppose the matter in court.

[28] In the circumstances and in exercising my discretion, I deem it fair and reasonable that the applicant be ordered to pay the costs of the application, but not on a punitive scale. I further deem Scale A appropriate for the taxing of counsel's fees.

Order:

[25] The following order is made in addition to the order I already made on 16 December 2024:

1. The applicant is ordered to pay the costs of the application, with counsel's fees to be taxed on Scale A.

C. VAN ZYL, J

Appearances:

For the Applicant:

Instructed by:

Adv A Berry
Eugene Attorneys
BLOEMFONTEIN

For the First Respondent:

Adv A Sander
Lovius Block Attorneys
BLOEMFONTEIN
e-mail: keenanels3315@gmail.com

For the Second Respondent: No appearance

e-mail: willemq@legal-aid.co.za