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

CASE NUMBER: 2025-081159

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates NO

In the matter between:-

A[...] S[...]

Applicant

and

R[...] J[...] -L[...] E[...]

Respondent

JUDGMENT

REID J

Introduction

[1] This matter is brought on an urgent basis in the Family Court. The applicant and respondent are the biological father and mother of a 19-month-old baby girl (who will be referred to as “the minor child” or “M”) and have never been married. The dispute relates to the primary care and residence of M and the rights of access to M.

[2] The applicant (father) seeks an order that primary care and residence of M should vest in him, and that the respondent (mother) should be afforded supervised visitation to M. The order sought reads as follows:

- “1. That the Applicant's non-compliance with the rules and directives of this Honourable Court regarding time limits and service is condoned, and that the matter be heard as an urgent matter in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.*
- 2. That the Respondent is directed to return the minor child, M, who was born on 10 October 2023 from the relationship of the parties and having identity number 2[...] ("the minor child"), to the Applicant's care, within 24 hours of the granting of this order.*
- 3. That the minor child is placed in the Applicant's interim primary care and residence, pending the finalisation of a forensic assessment to be conducted by Claire O' Mahony, alternatively by an expert to be nominated by the Chairperson of the Gauteng Family Law Forum, and who will provide a report, including written recommendations, in respect of the minor child's best interests regarding primary residence, care and contact.*
- 4. That the Applicant pays the costs of expert and the forensic assessment to be conducted in terms of paragraph 3 above.*
- 5. That the parties be ordered to fully and timeously co-operate with the requirements of Claire O' Mahony, alternatively the expert to be nominated by the Chairperson of the Gauteng Family Law Forum, and the conduct of his/her forensic assessment to be conducted in terms of paragraph 3 above.*
- 6. The Office of the Family Advocate, Johannesburg be appointed*

to conduct an investigation of the parties, as well as the minor child, and to furnish a report with recommendations regarding the best interests of the minor child, with specific reference to the allocation of her primary residence, contact, care and guardianship.

7. Pending the finalisation of the forensic assessment to be conducted in paragraph 3 above and the issuing of the expert's report, and pending the finalisation of the investigation by the Family Advocate to be conducted in terms of paragraph 6 above and the issuing of the Family Advocate's Report, that the Respondent exercises the following rights of contact with the minor child, subject to such contact being supervised by the Respondent's sister, M[...] E[...], or an alternate person agreed upon by the parties:

7.1. Every Wednesday afternoon from 2:00 pm until 5:00 pm; and

7.2. Every alternate Saturday or Sunday from 9:00 am until 5:00 pm.”

[3] On **4 July 2024** an order was made in this Court under case number 2024-071796 by the hand of Strydom AJ (the July order). The order reads as follows:

- “1. The minor child's principal place of residence shall be with the Respondent at E[...] Estates 1[...], Cnr C[...] & C[...] Streets, Akasia, Pretoria.*
- 2. The Family Advocate of Johannesburg shall urgently investigate, and report back to this Court, on the best interest of the minor child, M, currently 8 months old, which investigation shall include the issues of care and contact as well as the issue of primary residency. The Family Advocate of Johannesburg shall urgently*

investigate, appoint an expert with the necessary experience to assist the Office of the Family Advocate in this regard.

3. *The Applicant (the biological father) shall have contact with the minor child as follows:*

3.1 *He shall collect or arrange for the collection of the minor child from the address set out in Clause 1 above on Wednesdays at 06h30 and return her at 18h00;*

3.2 *He shall collect or see to the collection of the minor child from the address set out in Clause 1 on Sundays at 07h00 and return her at 19h00.*

4 *The Respondent will provide weekly status updates to the Applicant via email regarding the minor child's health, development and any other related issues pertaining to her well-being and best interests.*

5 *The Respondent will give regard to and respond within a reasonable time to any reasonable enquiries by the Applicant into the minor child's well being and best interests.*

6 *The Applicant shall, within three (3) days of date hereof deliver the minor child's toys, clothes and similar items to the Respondent. The Applicant shall be entitled to retain the minor child's car seat, which is required to transport the minor child..."*

[4] The order was not served on the Office of the Family Advocate Johannesburg and consequently no investigation had been done.

[5] This order has not been varied, rescinded or set aside.

[6] After the July 2024 order was granted, the respondent primarily took care of M until **1 October 2024**, when the respondent handed M over to the applicant for primary care and residence. The applicant claims, and the respondent denies, that they verbally amended the court order that the applicant will have primary residence of M since 1 October 2024. The applicant, assisted by his mother, has taken care of M from 1 October 2024 to 22 May 2025 and had *de facto* primary care and residence of M.

[7] Adv Segal argues on behalf of the applicant that the action of the respondent by handing the baby to her father, indicates that the July order was varied by agreement between the parties. It is stated as follows in the applicant's heads of argument:

*"The applicant exercised his contact rights in terms of the 4 July 2024 court order until 1 October 2024, whereafter the Respondent consented to a **de facto** variation of the terms of this order."*

[8] On **22 May 2025** the respondent changed her mind and decided to exercise her rights in terms of the July 2024 court order and removed M from the applicant's care. It is common cause that, at that stage, M spent 163 nights of the 202 nights from 1 October 2024 until 22 May 2025 in the applicant's primary care and residence. The respondent infrequently exercised rights of contact with M whilst M was with the applicant for a period of more than 7 months.

[9] The applicant brings this application on the basis that the respondent is an alcoholic, is violent, has borderline personality disorder (called BPD, which is a mental disorder) and that M's safety is in danger whilst she is with the respondent. The applicant claims that the respondent arrived under the influence of alcohol at M's christening and also refers other instances of alcohol abuse as recorded by him.

[10] For the period that M was in his sole supervision, the applicant took notes of

the instances where he was assaulted by the respondent, where the respondent was under the influence of alcohol and where M was found to be neglected. The respondent at all times denies that she is aggressive or was drunk when receiving M. The notes taken by the applicant were done when M was handed over to her mother for visitation. The applicant stated that each of these incidents become violent, which has a traumatic effect on M.

- [11] The applicant claims that the respondent scratched him and bit him in “a drunken stupor”. He attaches photos of bite marks and scratch marks on his body. The applicant states:

“When she (sic-the mother) is drunk, she is volatile, aggressive and physically and verbally abusive towards me. This abusive conduct often takes place in front of our daughter, causing her great distress.”

- [12] The respondent denies the allegations of alcohol abuse, being violent, having BPD and being volatile. She volunteers to go for mental evaluations and alcohol testing. The applicant accepted the tender, and arrangements will be made between the attorneys. Adv Segal placed it on record on behalf of the applicant that the applicant tenders to be responsible for the costs of these tests.

- [13] The applicant opened a case of assault against the respondent on 10 May 2025. This resulted in the respondent being incarcerated from 13 May until 22 May 2025. During May 2025 the respondent opened a criminal case of rape against the applicant. The injuries captured in the J88 reflects that the respondent’s wrists were bruised, and both her knees had extensive bruising. Both parties thus have pending criminal proceedings against each other.

- [14] The respondent approached the Children's Court on **29 May 2025** to appoint a social worker to investigate the best interest of M. A Notice to Attend Proceedings of the Children’s Court in terms of Section 57 of the **Children’s Act**, 38 of 2005 has been issued on the applicant calling on the applicant to

appear before the Children's Court at Pretoria North on **16 July 2025** at 08:30 ("the Children's Court Order"). These proceedings should proceed in addition to the investigation of the Family Advocate.

- [15] The court date in the Children's Court is within a period of approximately one (1) month.

Variation of a court order

- [16] None of the parties deal with the High Court order dated 4 July 2024 or the Children's Court order dated 29 May 2025. It is noteworthy that both these orders place the primary care and residence of M at the respondent.

- [17] It is trite law that an order of a court of justice stands, until it has been set aside, varied or dismissed / changed on appeal. The High Court order dated 4 July 2024 and the Children's Court order dated 29 May 2025 both stands in law.

- [18] The applicant essentially seeks to have the current orders varied to reflect the *de facto* position of primary residence as it was from 1 October 2024 to 22 May 2025, thus placing primary residence of M with the applicant. The applicant argues that the order was varied mutually on 1 October 2024 when the respondent placed M in the care of the applicant.

- [19] However, the legal position is that parties cannot *inter partes* vary a court order. A court order can only be varied by another court order, under the following mechanisms: Uniform Rule 31, Rule 42 and the common law.

- [20] *In casu* the variation of the court orders is sought under the common law powers that this Court has on the basis that the High Court remain the upper guardian of all minor children. Should the current order(s) not be in the best interest of the minor child, this Court has the common law power to interfere with the order by amending, varying or setting it aside. The **Children's Act** 38 of 2002 also has the power, in terms of section 48 there-of, to vary or

amend a court order concerning a child.

- [21] In **Tom v Minister of Safety and Security [1998] 1 All SA 629 (E)** it was held that, in an enquiry under the common law as to the existence of sufficient cause for the variation of a judgment, the court must make a value judgment. It was required to consider all the facts and circumstances to decide whether an order should be rescinded as a matter of fairness and justice. It was held that:

“Rule 42 (1)(a) created a specific procedural step which enables the court, mero moto or upon application to rescind, or vary expeditiously any order or judgment obviously granted erroneously in the absence of the party affected thereby. By virtue of it's purpose such procedure was confined to the contents of the court file and the proceedings in the trial court which granted the order or judgment.”

- [22] In **J v J 2008 (6) SA 30 (C)** the full court of appeal 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 **De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae) 2007 (5) SA 184 (SCA) para 32 at 200E. In Terblanche v Terblanche 1992 (1) SA 501 (W) at 504 it was stated that when a court sits as upper guardian in a custody matter -***

. . . 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 limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.

*In **P and Another v P and Another 2002 (6) SA 105 (N) at 110C-D***

Hurt J stated that the court does not look at sets of circumstances in isolation:

‘I am bound, in considering what is in the best interests, 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.’

In AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC) (2008 (4) BCLR 359) para 30 at 370A, the Constitutional Court endorsed the 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' De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae) 2007 (5) SA 184 (SCA) para 99 at 220I 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'. AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC) (2008 (4) BCLR 359) para 30 at 370A.”

(some footnotes omitted)

[23] I interpret the above to mean that M’s best interest should be the pivotal point of this whole application. The fact that 2 court orders in 2 courts determined the primary care and residence of M to be with the applicant, is a factor taken into consideration, but not the determining factor that this Court is to be bound by. In addition, this Court should not bind itself to the formalities of variation/rescission/amendment of the existing court orders, but should remain focused on the best interests of M. Substance should take place over form and the interest of the minor child should never be compromised by the legalities of the variation/rescission/amendment of a court order dealing with M’s best interest.

[24] In the heads of argument filed on behalf of the respondent, the following is

argued:

“19. No allegations are made in the founding affidavit that the Applicant fears for the safety and wellbeing of the minor child, as such the best interest of the child is missing from the application.”

[25] I disagree that the absence of specific fears of the safety of M should be held against the applicant. Allegations of alcoholism and a volatile or instable personality would by implication affect the minor child's wellbeing. However, the veracity of the allegations cannot be tested in application proceedings, especially where it is vehemently denied as in this case.

Discussion

[26] This Court is called upon to determine, on a value judgment, whether the 2 existing court orders should be varied to amend the primary care of M from the respondent to the applicant.

[27] This is an extremely difficult, if not impossible, thing to do. As said by many other judges, it would be akin to having a look in a crystal ball to see the outcome retrospectively of what would have been in the best interest of the minor child. Judges are neither fortune tellers nor lie-detectors, especially in motion proceedings where evidence cannot be tested under cross-examination.

[28] To protract these proceedings and issue an order in terms of Rule 6(5)(g) that oral evidence should be led, would not be in the interest of the minor child due to the urgency of this matter.

[29] What stands out to this Court is that the respondent voluntarily, and without qualification, handed M to the applicant on 1 October 2024. Whatever her reasoning for the decision was, it remains an objective fact that M was handed over to the applicant's complete and primary care. This act indicates to me

that, for whatever reason, the respondent regarded the applicant as a safe place to have M stay and be taken care of. I choose to believe that every parent wants the best for their child and in that moment, I commend the respondent for handing M to the applicant for primary care.

[30] It is furthermore significant to this Court that the respondent states that he is assisted by his mother in taking care of M. This is also a factor I considered in determining which primary residence would be in the best interest of M. On the other hand, the High Court order of 4 July 2024 specified the address where the applicant was to reside and take care of M, which was where the respondent resided with her sister. This creates the impression that, irrespective of which party may have primary residence of M, they will need assistance.

[31] Having regard to the fact that the respondent willingly handed M to the applicant on 1 October 2024, and having regard thereto that the applicant stays with his mother who assists him with taking care of M, I hold the view that it would be in the best interests of M that the applicant receive primary care and residence of M, pending the investigations of the Family Advocate and other experts.

[32] The respondent seeks that the applicant exercises supervised contact with M pending the investigations, and tenders supervised contact with M every Wednesday (afternoon from 14h00 until 17h00) and every alternate Saturday (from 9h00 until 17h00).

[33] I hold the view that supervised contact is not necessary at this stage. From 25 May 2025 the respondent had primary care of M in terms of the 2 court orders which, by the very nature of it, the care of M occurred unsupervised. I am satisfied that that measures of control can be put in place, as set out in paragraph [34], to protect the best interests of M.

[34] Considering the applicant's tender of alcohol and mental tests, and the

respondent's willingness to pay for such tests, I hold the view that the best interest of M would be that she should have unsupervised and unrestricted contact with M on the condition that the alcohol tests indicate a lack of alcohol/substance abuse. Should the tests, at any time pending the investigation, indicate alcohol/substance abuse, the contact with M should take place under supervision.

[35] Despite the existence of the High Court order (4 July 2024) in terms of which the respondent was granted interim primary care of M, M has primarily resided with the applicant and his mother and has been in the applicant's primary care and primary residence for the majority of her life.

[36] For the above reasons, I find that it would be in the best interest of M that primary care and residence rests with the applicant and that the respondent has unsupervised rights of access to M.

Costs

[37] The general principle is that the successful party is entitled to his/her costs.

[38] In this matter there exists much speculation during the pending investigations and ongoing supervision in the form of alcohol and mental testing.

[39] The results of the pending investigations and alcohol testing may convince the court making the final determination, that a cost order would have been warranted against a specific party.

[40] I therefore deem it in the interest of justice that the cost of this application be reserved.

Order

As a result of the above, the following order is hereby made:

- (i) The court order dated 4 July 2024 is amended to change primary care

and residence as well as contact, as stipulated herein.

- (ii) The Office of the Family Advocate is to urgently investigate the primary residence and primary care of M, as well as rights of access, would be to the best interest of M. The Family Advocate should urgently issue a report in this regard.
- (iii) The Children's Court proceedings and investigation is to continue **16 July 2025** at 08:30 in cooperation with the Office of the Family Advocate.
- (iv) The applicant (through his attorney) is to serve this order with the request for investigation on the Office of the Family Advocate.
- (v) Pending the outcome of the investigation by the Family Advocate and other specialists as requested by the Family Advocate, **primary care and residence** and **rights of access** to M is to be vested in the applicant.
- (vi) The applicant is to be assisted by his mother in exercising primary care and residence of M.
- (vii) Pending the outcome of the investigation by the Family Advocate and other specialists as requested by the Family Advocate, the respondent is to have unsupervised contact with M every alternative weekend from Friday 17h00 to Sunday 17h00.
- (viii) The respondent is to collect M from the applicant's residence and deliver her at the applicant's residence on the aforementioned days and times.
- (ix) The parties may, by agreement in writing, amend the times and place as mentioned in (vi) and (vii) above.

- (x) The respondent is ordered to submit herself to alcohol/substance and/or mental tests, as and when prescribed by the Office of the Family Advocate, or a professional mandated by the Office of the Family Advocate, and the access right accordingly be adjusted by the Office of the Family Advocate depending on the results of the tests.
- (xi) Costs of the application is reserved.

FMM REID
JUDGE OF THE HIGH COURT
NORTH GAUTENG DIVISION, JOHANNESBURG

DATE OF ARGUMENT: 10 JUNE 2025
DATE OF JUDGMENT: 20 JUNE 2025

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