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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

APPEAL CASE NUMBER: HCAA 6/2025

COURT A QUO CASE NUMBER: 176/2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 20.08.2025

SIGNATURE:

In the matter between:

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

1ST APPELLANT

K[...] S[...] M[...]

2ND APPELLANT

-and-

T[...] V[...] M[...]3

RESPONDENT

Delivered : 20 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **20 August 2025** at **10:00 am**.

Date heard : 25 July 2025

Coram : Bresler AJ et al Naude-Odendaal J, Pillay AJ

JUDGMENT

BRESLER AJ:

Introduction:

[1] The Appellants appeal against the whole of the judgment and order of the Honourable Madam Justice Ngobeni J delivered on the 16 January 2025 in terms whereof:

- 1.1 The interim order granted on 14 January 2025 was confirmed; and
- 1.2 No order as to costs was made.

[2] Leave to Appeal to this Court was granted by the Supreme Court of Appeal on the 18th of March 2025.

Factual synopsis:

[3] The Appellants are the maternal grandparents of the minor children. The children involved are M...K...J...M, a son born on the 1st of May 2007 from a previous relationship of the Appellant's late daughter, M[...]2 L[...] M[...]3 (born M[...]2) (hereinafter 'M[...]2'), and the two minor children, O ... H...M, a son born on the 2nd of November 2012 and O...I...M, a daughter born on 9 September 2020 from the relationship between M[...]2 and the Respondent.

[4] The Respondent is thus the biological father of the O...H...M and O...I...M only. It is however common cause that M...K...J...M also stayed with them and that the Respondent was actively involved in his upbringing since the inception of his relationship with M[...]2 in 2010 when M...K...J...M was only three years old till 2024. M[...]2 and the Respondent were married both in accordance with customary law and civil law. During or about 2024, M[...]2 fell ill. She subsequently passed away during the first week of March 2024.

[5] The Respondent's version was that he retained full parental rights and responsibilities pertaining to the minor children. The Appellants were infringing these rights to the detriment of the minor children. Suffice to state that no pertinent allegations of abuse (either physical, emotional or otherwise) were raised against the Appellants although the Respondent complains about an acrimonious relationship between himself and Appellants.

[6] The actions of the Appellants resulted in the Respondent approaching the Court on an *ex parte* basis for an order for the return of the minor children to him. The *rule nisi* was anticipated by the Appellants who opposed the granting of a final order and simultaneously launched a counter application *inter alia* asking for the *interim* guardianship in respect of the minor children to be awarded to them.

[7] It is the case of both the Appellants and the Respondents that numerous communications and interactions ensued between the parties after the passing of M[...]2. Especially as their youngest granddaughter, O...I...M who was only 4 years old at that time. It is furthermore common cause that the Appellants enjoyed unhindered contact with the minor children.

[8] The Appellants testified that during or about July 2024, the Respondent was experiencing health issues, and requested assistance from the appellants to take care of the youngest child, who subsequently stayed with them. The other two children visited during the three school holidays in 2024. The Appellants alleged that during these periods, the Respondent had very little physical contact with the minor children and failed to ensure that their material needs were met.

[9] The Appellants, in support of their counter claim, alleged that the conditions prevailing in the home of the Respondent was not safe, healthy and conducive to the development of the minor children. The following specific allegations were made:

9.1 That the Respondent would bring home various women whilst the minor children were residing with him. This had a negative impact on the psychological and emotional wellbeing of the minor children;

9.2 The Respondent would verbally abuse the minor children, especially the eldest, M...K...J...M.

9.3 The Respondent would leave home for days without having left the children with a care giver or even a domestic assistant. This would result in the children calling their maternal aunt, Ms K[...] S[...] to assist with providing food and funding.

9.4 Upon visiting their home, their maternal aunt would find the children in the dire situation of having no food, and no adult supervision or assistance.

9.5 The older minor children expressly indicated that they wished to remain with the Appellants as the Respondent failed to take proper care of them and left them in an unhealthy environment.

9.6 The Respondent in possession of the Interim Court Order sought to remove the children with no success, amidst being assisted by officials from the South African Police Services (the 'SAPS'). During the interaction with the SAPS, the older two children again adamantly expressed their wish to remain with the Appellants.

9.7 The Appellants sought the services of a private social worker, Ms Tebogo Madiane Anna Segoo, as the state employed Social Worker indicated that she was on leave (and the matter was to be entertained in the residential area where the children resided). The children were interviewed by the private social worker who prepared a preliminary report. In the report, the social worker reiterated the children's wish to remain with the Appellants. She also confirmed that the elder children independently reported their experiences, the hunger, neglect and threats of violence and verbal vitriol suffered in the care of the Respondent.

9.8 Premised on the aforesaid information, the Appellants persisted in their prayer that the interim order should be dismissed. They also pursued their

counter application for *interim* guardianship pending the institution and finalisation of an application for the suspension and / or termination of the Respondent's guardianship over the minor children.

Judgment in the Court a quo:

[10] The Court *a quo* correctly stated that the best interest of the minor children is at stake. It is furthermore correctly noted that there is no court order granting any parental rights or responsibilities to the Appellants.

[11] The *crux* of the judgment and order of the Court *a quo* lied in the analysis of the term 'designated social worker' as referred to in Section 157 of the **Children's Act**, Act 38 of 2005 (hereinafter the '**Children's Act**'). It was opined that the private social worker did not fall within the definition of 'designated social worker' contemplated in the Children's Act.

[12] On this basis, the report of the private social worker was rejected *in toto*. As there was no admissible evidence before court, the Court consequently found in favour of the Respondent and granted the final order in favour of the respondent.

[13] Following upon that order the respondent attempted to enforce his rights to remove the children with no success. This resulted in the Respondent physically removing the youngest child O ...I... M from the care of the Appellants and the Respondents current whereabouts and that of the wellbeing of this four-year female child is unknown. This Court was informed that a criminal charge was laid against the Respondent and attempts to trace him was unsuccessful, the two older children were still residing with the Appellants.

Grounds of Appeal:

[14] The Appellants relied on the following grounds in their Appeal:

14.1 The Court failed to consider the well-established principle that failure to disclose material facts must lead to dismissal.

14.2 The Court failed to apply Section 29 of the Children's Act insofar as a Court may, for purposes of the hearing, order that a report and recommendation of the family advocate, social worker or suitably qualified person must be made available.

14.3 The Court erred in finding that the private social worker was not 'designated' and therefore her report was inadmissible.

14.4 The Court furthermore erred in not calling testimony by the minor children through the service of an intermediary as proposed by the Appellants for the older children's input in respect of the dispute, and where they wanted to stay.

14.5 The Court failed to determine what would serve the best interest of the minor children.

Issues that require determination:

[15] This Court was called upon to determine whether the granting of the final order was warranted in light of the conflicting evidence presented by the parties. At the heart of the matter is the determination concerning the best interests of the minor children and the need for the protection of same, amidst the various conflicting allegations.

The Applicable Legal Principles:

[16] The **Constitution**, 1996 makes it clear that decisions pertaining to children are paramount and regard to their best interests must be always considered. Section 28 provides as follows:

'(2) The best interests of the child are of paramount importance in every matter concerning the child.'

[17] The High Court sits as an upper guardian of all children whose best interest is at stake and is clothed with wide procedural powers in determining same. Accordingly, the court is not bound by procedural structures or by the limitations of

the evidence presented, or contentions advanced or not advanced, by respective parties.¹

[18] Section 45 of the **Children's Act** makes it clear that:

'(4) Nothing in this Act shall be construed as limiting the inherent Jurisdiction of the High Court as upper guardian of all children'.

[19] Section 7 of the **Children's Act** further provide that whenever a provision of the said Act requires the best interests of the child standard to be applied, the Court must take into consideration several factors that includes (but is not limited to) the need to protect the child from any physical or psychological harm that may be caused by subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour or exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person.

[20] The factors set out in Section 7 of the **Children's Act** constitute a non-exhaustive checklist of criteria which serve as guides when deciding upon what the best interest of a minor child are.

[21] In the matter of **Girdwood v Girdwood**² it was held that

'...as upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded'.

[22] Likewise, in **J v J**³ at paragraph 20 it was held:

¹ **Kotze v Kotze** 2003 (3) SA 628 (T) at 630

² 1995 (4) SA 698 (C)

³ 2008 (6) SA 30 (C)

'[20] As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. In Terblanche v Terblanche^[5] 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 Another⁴ 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 of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.

In AD and OD v OW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)⁵ 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' 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'.

[23] More recently the full bench of the Gauteng Division stated the following in **R.C v H.S.C**⁶

⁴ 2002 (6) SA 105 (N) at 110C-D

⁵ 2008 (3) SA 183 (CC) para 30 at 370A.

⁶ 2023 (4) SA 231 (GJ)

'A Court should, where a child's welfare is at stake, '...be very slow to determine facts by way of the usual opposed motion approach... That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child's welfare unresolved.' The best interests of the child principle is a flexible standard and should not be approached in a formalistic manner. We find that a sufficiently child-centred approach was not followed by the Court. This is apparent from the wording used by the Court. The Court was concerned with the Appellant being afforded legal rights and embarked upon a process whereby it compared 'The aspects of the case that inure to a finding that the applicant should be accorded rights of contact and care' and with the aspects militating against the relief sought.

The Supreme Court of Appeal has cautioned that this type of litigation is 'not of the ordinary civil kind. It is not adversarial'. The approach, in our view, was correctly summarised by Howie JA in *B v S* (supra) and has even more application now, having regard to the legislative changes which have been affected since *B v S* in 1995 and the section 7 considerations in terms of the Children's Act:

In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially determined for the first time - in other words where there is no existing Court order in place - there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation and the Court can call evidence mero motu...'

[24] Considering an application in terms of Section 23 of the **Children's Act**, which allows any person who has an interest in the care, wellbeing or development

of a child to apply to court for an order granting him or her contact with the child, or care of the child, it was stated by Smith J in the matter of **LH and Another v LA**⁷:

'The Act therefore recognises that a child is a social being, and that members of the extended family, more often than not, play an important part in a child's social and psychological development. Grandparents, more than other relatives, usually take a keen interest in the upbringing of their grandchildren and this relationship, provided that it is kept within reasonable bounds and does not interfere with parental duties and responsibilities, often assists and complements parental care. There can therefore be little doubt that it is usually in a child's best interests to maintain a close relationship with his or her grandparents.'

[25] Having regard to the authorities stated herein before, this Court is of the view that the Court *a quo* failed to fully appreciate its roll as upper guardian of the minor children. Moreover, in following the pedantic approach of disregarding viable, and potentially disturbing, evidence from a suitably qualified individual and the grandparents of the minor children purely on a technical ground, failed to adequately appreciate the pivotal duty to determine what is in the best interest of the minor children.

[26] Having been confronted with the information of abuse and neglect, the Court should not have '*mechanically sacrificed*' the best interest of the minor children '*on the altar of jurisdictional formalism*' but should have properly and diligently investigated all relevant factors prior to making the *interim* order final.

[27] On this basis alone, the Appeal must succeed, and the matter referred back to the Court *a quo* to be dealt with by another judge for the matter to be appropriately investigated in lieu of discharging its duty as upper guardian of the minor children, accountable with the duty to investigate their best interest.

⁷ 2012 (6) SA 41 (ECG) at para 13.

[28] In respect of the prayers sought by the Appellant concerning their counter claim, no order was granted by the Court *a quo* and no appeal can therefore lie against it.

Costs:

[29] The Appeal is unopposed and it is thus appropriate to make no order as to costs.

Order:

[30] In the result the following order is made:

30.1 The Appeal is upheld.

30.2 The order of the Court *a quo* is substituted with the following order:

30.2.1 The rule *nisi* is extended to 14 October 2025 at 10:00 to be heard by a different judge;

30.2.2 The Office of the Family Advocate, Polokwane alternatively Department of Social Development are ordered to investigate and report to the Court within 21 (twenty-one) days from the date of this order, concerning the best interests of the minor children in respect of their primary residence, care and contact;

30.2.3 The Office of the Family Advocate, Polokwane alternatively the Department of Social Development for purposes of conducting the contemplated investigation may obtain, make use of or consider the reports of any other suitably qualified person (including but not limited to Ms Tebogo Madiane Anna Segoo) to enable them to effectively comply with their obligations contemplated in this order.

30.2.4 Pending the outcome of the aforesaid investigation by the Office of the Family Advocate, alternatively the Department of Social Development:

- (a) The minor children's current primary place of residence shall remain with the Applicant (Respondent in the appeal);**
- (b) The Respondents (Appellants in the Appeal) shall be entitled to reasonable contact with the minor children which includes reasonable telephonic contact or contact via any other virtual aid;**

30.2.5 The Applicant (Respondent in Appeal) or the Respondents (Appellants in Appeal), as the case may be, shall be entitled to anticipate the return date hereof on an urgent basis and upon receipt of the report from the Family Advocate or the Department of Social Development.

30.2.6 The costs of the application shall be determined on the return date.

30.3 No order as to costs in the appeal.

**M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

I concur,

**M NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

I concur,

KL PILLAY AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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