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REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-032929

In the matter between:

DT	First Applicant
SCT and	Second Applicant
MAMF	Respondent

Summary: *Sections 23 and 24 of the Children’s Act – uncles of a minor child have locus standi to seek right of contact and guardianship – Part A relief – appointment of a clinical psychologist and family advocate to investigate what is in the best interest of the minor child – limited contract pending final determination of the issue of guardianship under Part B.*

JUDGMENT

Nkutha-Nkontwana J:

Background

- [1] The first and second applicants are the brothers of the late T who died unexpectedly on 28 February 2023 and uncles of the minor child, S, T's son.
- [2] The respondent was previously married to T, a marriage that ended in divorce on 30 September 2015. S is the only child born out of the marriage. After the divorce, T lived together with the applicants at their home situated in Hyde Park, Johannesburg until he passed away.
- [3] It is common cause that T and the respondent had an affable co-parenting relationship and a sole concern was the best interests of S. They had agreed that S would live with T each week from Sunday morning until the following Thursday. The respondent lived with S from Thursday to Sunday. Since T was living with the applicants, they developed a close relationship with S as uncles. They travelled with T and S to Cyprus on many occasions for holiday.
- [4] S is presently 13 years of age. He attended P[...] Preparatory School (P[...]) in Melrose, Johannesburg from Grade 0 in 2016 until the end of the first term of his final year in 2023. The applicants contend that following T's death the respondent, without forewarning them, unilaterally removed S from P[...] and placed him at H[...] College, in Fourways (H[...]), where he is completing his Grade 8 year of study.
- [5] The applicants take issue with the respondent's decisions. They contend that S was removed from P[...] in the prime of his schooling and where he was thriving, had a very close circle of friends and was excelling in all that he was involved in. Further, that P[...] and the support structures which S had become accustomed to contributed to S's stability and success.
- [6] The applicants further contend that they enjoyed a very close relationship with S and he with each of them. He became the centre of their lives. They regarded S as their son and meaningfully contributed to S's upbringing, including financially as they paid for his school fees and extramural activities and participated in every facet of S's life. As a result, the applicants contend that the respondent's decisions remove S from P[...] is aimed at diluting S's relationship

with them because they had, over the many years that S attended P[...], become very involved in S's school life and developed a good relationship with many of the parents of S's friends at the school. By contrast, the respondent was non-participative in S's schooling and an unknown figure to the parents and teachers due to her lack of involvement in S's school life.

[7] In essence the applicants impugn is that following T's passing on 28 February 2023 the following happened:

- a. S was removed from P[...] by the respondent and placed in H[...] with effect from 2 May 2023. H[...] was not a school chosen by S;
- b. S stopped attending the Greek Orthodox Church, Greek language lessons, Greek dancing and cultural classes which he previously participated in each week without objection from the respondent. He no longer participates in the many additional sporting and cultural activities, including music, that he previously participated in; and
- c. S resides mainly with the respondent and her partner, D B (Mr B), and has had infrequent contact with the applicants.

[8] In this application the applicants seek a relief in two parts. In Part A of the notice of motion they seek an order in the following terms —

- a. an appointment with a clinical psychologist, Dr Robyn Fasser ("Dr Fasser"), to conduct an investigation into the best interest of S and to make written recommendations as to S's best interests in respect of the relief sought by the applicants in terms of Part B of the notice of motion;
- b. a reasonable defined contact with S pending the final determination of the relief sought in Part B;
- c. that the office of the Family Advocate convenes an enquiry and provide the Court and the parties with their recommendations in relation to the relief sought in Part B of the notice of motion;

- d. leave to both parties to supplement their affidavits after the receipt of the report of Dr Fasser; and
- e. the costs of Part A be reserved for determination by the Court hearing Part B.

[9] In Part B of the application the applicants seek to be assigned rights of contact and care of S in terms of section 23 of the Children's Act¹ (the Children's Act) In addition, the first applicant seeks guardianship of S in terms of section 24 of the Children's Act. What serves before this court is Part A of the application.

Points in limine

[10] The respondent is opposing the order sought by the applicants; and, in addition, raises three points *in limine*. First is *locus standi*. Even though the respondent initially took issue with the applicants' *locus standi*, she prudently abandoned it. As mentioned above, the applicants' *locus standi* is founded in sections 23 and 24 of the Children's Act. As such, it is well accepted the absence of a biological link with a child is not a bar to the application in terms of sections 23 and 24 of the Children's Act, subject to the best interests of the child yardstick.²

[11] Second is the application to strike out. The respondent seeks an order striking out of the several averments in the applicants' replying affidavit for various reasons. In response, the applicants proposed that this application be differed and dealt with under the Part B application. The respondent conceded that she will not suffer any prejudice consequent to the deferral of her application to strike out. Thus, the application to strike out is deferred for determination under the Part B application.

[12] Third pertains to the late filing of the applicants' replying affidavit. The respondent is opposing the grant of condonation. It is well accepted that where the interests of minor child are involved, the litigation takes a form of a judicial

¹ Act 38 of 2005.

² *QG v CS (Professor DW Thaldar Amicua Curiae)*, 2021 JDR 1212 (GP) at 39; *R.C v H.S.C* 2023 (4) SA 231 (GJ) at paras 32-33.

investigation of what was in his/her best interests and as such, the court is not bound by the contentions of the parties and is entitled *mero motu* to call evidence.³

[13] All the same, to determine whether good cause has been shown, one is guided by the well-known approach adopted in *Melane v Santam Insurance Co Ltd*,⁴ and pertinently, the further principle that “*without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused*”.⁵

[14] The delay in filing the replying affidavit is 11 days, which is negligible. The delay is also reasonably explained, as the applicants had to wait for the expert report by Dr Duchon, a clinical psychologist. The only prejudice alleged by the respondent relates to the averments that she seeks to strike out. As mentioned above, the application to strike out is deferred to Part B. Thus, I am satisfied that the applicants have shown good cause for the grant of condonation.

Opposition on Merits

[15] The respondent denies that her decision to move S from P[...] was informed by her own interest. She contends that following T's death, S experienced difficulties at P[...]. That is so because T passed away on the premises of P[...] whilst collecting S from school. This tragic incident was extremely upsetting and devastating to all the parties, especially S. Since T's death, S resides primarily with the respondent and her partner Donald.

[16] S experienced a very sad and traumatic couple of months subsequent to T's passing. The assessment by the school psychologist at P[...] indicated that school was a very sad place for S given the passing of his father in the school premises. According to the respondent that is the main reason for moving S to the new school, H[...], where he has obtained an academic scholarship until Grade 12.

³ See: *Jackson v Jackson* 2002 (2) SA 303 (SCA) at para 5.

⁴ 1962 (4) SA 531 (A) at 532C–D.

⁵ See: *Steenkamp and others v Edcon Limited* [2019] ZACC 17; (2019) 40 ILJ 1731 (CC) and *Grootboom v National Prosecuting Authority and another* [2013] ZACC 37; 2014 (2) SA 68 (CC).

[17] The respondent sourced the services of Dr Elsabe Bosch- Brits (Dr Bosch-Brits), a social worker, to conduct a voice of the child assessment on S in terms of Section 10 of the Childrens Act. In the report dated 13 April 2023, Dr Bosch-Brits made the following observation —

- a. S expressed his wish and his voice to live with the respondent only and only visit the applicants occasionally. S does not want a shared residence between the respondent and the applicants.
- b. S's strongest attachment figure is the applicant and wants to live with her. Although he has a good relationship the applicants, he does not seem them as a father figure.

[18] The respondent seems to suggest that Dr Bosch-Brits' report is sufficient and that S's voice must be respected. She contends that S is the one who should decide and initiate contact with the applicants. That is so because, previously, the applicants made unwelcomed and upsetting comments to S about his move from P[...]. Thus, the applicant opposes the application in Part A as well as the Part B on the strength of Dr Bosch- Brits' report.

Legal principles and application

[19] It is well accepted that in instances as typified in this matter, the enquiry turns on what is in the best interest of the child which is a constitutional imperative.⁶ 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.⁷ 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.⁸

[20] Recently, in *R.C v H.S.C*⁹, the full bench of this Division was confronted with a similar circumstance and made the following observations on the approach to

⁶ See: Section 28(2) of the Constitution and section 9 of the Children's Act.

⁷ See: *Kotze v Kotze* 2003 (3) SA 628 (T) at 630G and endorsed by the Constitutional Court in *Mpofu v Minister for Justice and Constitutional Development and Others* [2013] ZACC 15; 2013 (9) BCLR 1072 (CC) at para 21.

⁸ *Id*

⁹ [2023] ZAGPJHC 219; 2023 (4) SA 231 (GJ).

be followed when a when the best interest of a minor child is the subject of determination —

“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*...’(Own emphasis and footnotes omitted)

[21] Moreover, section 7 of the Children’s Act provides —

“7(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely —

(a) the nature of the personal relationship between —

- (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards –
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from —
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child —
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's —
 - (i) age, maturity and stage of development;

- (ii) gender;
- (iii) background; and
- (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by —
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

(2) In this section "parent" includes any person who has parental responsibilities and rights in respect of a child."

[22] Turning to the present instance, the respondent is adamant that this court must make a determination on what is in the best interest of S solely on the basis his views and wishes as contained in Dr Bosch-Brits' report. This contention is flawed. While it is correct that the child's views and wishes ought to be given

due consideration, this court does not have to defer to them. This court's duty is to establish what is in the best interests of S, an enquiry that may lead to a decision that is different from what S wishes.¹⁰

[23] As articulated in the authorities referred to above, the determination of what is in the best interests on a minor child involves a judicial investigation during which all issues must be properly ventilated and all of the available evidence must be fully presented. Dr Bosch-Brits' report is not comprehensive enough as her terms of investigation were limited to the enquiry in terms of section 10 of the Children's Act.

[24] Dr Duchon instructively opined that the best interests of a child, residency and contact arrangements require a complete and thorough investigation. There is obviously a need to expand the scope of investigation and to particularly interrogate all interested parties on the factors mentioned in section 7 of the Children's Act.

[25] The respondent's alternative contention is that if the court is inclined to grant an order for further investigation, the expert to be appointed should be mutually agreed to between the parties. There is no basis provided for this contention. The applicants have suggested Dr Fasser and tendered to cover for the costs of the investigation. It is inconceivable that the outcome would appease both parties. However, that is not a consideration as the investigation should assist the court to determine what is in the best interest of S. The respondent still has an option seek a second expert opinion to challenge the conclusions and recommendations that would have been reached by Dr Fasser in the event she disagrees with them. Better still, the parties are enjoined to avail themselves to mediation aimed at reaching amicable outcome.

[26] The respondent is also opposing the grant of interim right of contact on the terms proposed by the applicants. Even though she is not opposed to some form of communication between the applicants and S, she expects S to initiate same. Nevertheless, she is opposed to S spending time with the applicants unsupervised because in the past he was protected by T against their untoward

¹⁰ See: *B v B* (67576/2009) [2015] ZAGPPHC 1014 (27 November 2015).

behaviour. The applicants refute the respondent's allegations on their behaviour and contend that there is no reason to question their bona fides.

[27] It is common cause that the applicants and S enjoyed a constant contact and bond for almost 9 years before T's demise and some sporadic contact thereafter. The respondent is clearly not keen to assist S to maintain the bond he shares with applicants given the obvious tension between the parties. However, in terms of Dr Bosch-Brits' report, S himself views the relationship he has with applicants, particular the second applicant who is his godfather, as positive.

[28] Therefore, I am inclined to grant reasonable interim contact on the basis of the casual and sporadic arrangements the parties had before S changed schools. Obviously, it less than what the applicants requested as I have taken into account the opinion expressed by Dr Duchon that "*residency and contact can only be reached after a thorough assessment of all adults and the child*"¹¹.

Conclusion

[29] It follows that the applicants have made out case for the grant of the relief sought in Part A of this application which includes appointment of Dr Fasser and the family advocate, and interim right of contact pending final determination of the Part B application.

Order

I accordingly make the following order:

- a. The applicants' failure to timeously deliver their replying affidavit is condoned.
- b. The respondent's application to strike out shall be dealt with under Part B of the application.

¹¹ See: Caselines 001- 526-541.

- c. Dr Robyn Fasser ("Dr Fasser"), a clinical psychologist in private practice, is appointed to conduct an investigation into the best interests of the minor child S, and to provide the parties and the Court with her written report which is to include a report which sets out the views and wishes of S and whether it is in the best interests of S that the first applicant and the second applicant, or either one of them, be granted rights of contact and care in respect of S in terms of section 23 of the Children's Act, 38 of 2005 ("the Children's Act"), and if yes, what contact arrangements between the applicants or either one of them and S is in the best interests of S and whether the applicants or either one of them should be granted rights of guardianship in respect of S in terms of section 24 of the Children's Act.

- d. Dr Fasser is further to address in her report the relationship between S and second applicants, the attitude of the respondent towards the exercise care, contact and guardianship rights by the applicants or either one of them, the capacity of the applicants or either one of them to provide for the needs of S including emotional and intellectual needs, the effect of the changes brought about to the life of S by the death of his father, and the views and wishes of S and the parties regarding an appropriate secondary school for S to attend in 2024.

- e. The applicants shall jointly and severally, the one paying the other to be absolved, pay the costs of Dr Fasser directly to Dr Fasser on demand including any deposit required by Dr Fasser.

- f. The parties shall cooperate with the process of Dr Fasser to the full extent required by her and if required, shall attend all interviews, evaluations and assessments, complete all questionnaires or other forms provided by her as well as all information and documentation required by her and the respondent shall make S available for all such interviews, evaluations and assessments required by Dr Fasser in the timeframes required by her in order to enable her to provide her report.

- g. The parties shall complete and sign Dr Fasser's mandate upon receipt thereof.
- h. Pending the final determination of Part B of the application, the applicants shall be entitled to reasonable contact to S which shall include —
 - i. reasonable telephonic contact and contact by electronic and virtual on Monday, Wednesday and Friday between 17h00 and 19h00, commencing on Monday 29 October 2023;
 - ii. every alternate Saturday from 08h00 to 17h00, commencing on Saturday 4 November 2023, the applicants, or either one them, shall collect and return S from the Hobart Shopping Centre, Bryanston or such other place as agreed by the parties;
 - iii. on S's birthday from 12h00 until 18h00 and the collection and the return arrangements set out in paragraph 7.2 above shall apply;
- i. The office of the Family Advocate is requested to convene an enquiry and to urgently provide the parties and this Court with their recommendations in regard to the relief claimed by the applicants in Part B of this notice of motion.
- j. The applicants are granted leave to deliver a further affidavit which affidavit delivered not later than 10 (ten) days after receipt of the report of Dr Fasser.
- k. The respondent is granted leave to deliver a further affidavit which further affidavit shall be delivered not more than 10 (ten) days after receipt of the applicants' supplementary affidavit and if no supplementary affidavit is delivered by the applicants within 15 (fifteen) days after receipt of the report of Dr Fasser.
- l. Part B of the application is postponed sine die.

- m. The costs of this application are reserved for determination under Part B of the application.

**P NKUTHA-NKONTWANAN J
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Heard on: 06 October 2023

Judgment heard on: 24 October 2023

Appearances:

For the applicant: Advocate J A Woodward SC

Instructed by: Van Hulsteyns Attorneys

For the respondent: Advocate M Rodrigues:

Instructed by: K G Tserkezis Incorporated

