

SOUTH AFRICA / JUDGMENT

# J.G and Others v M.S.L (4457/2024)

## [2024] ZAFSHC 292 (17 September 2024)

**[2024] ZAFSHC 292****COURT**

Free State High Court, Bloemfontein

**BEFORE**

Mhlambi

**CASE / FILE NUMBER**

4457/2024

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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: 4457/2024

In the matter between: J[...] G[...] (Biological Father) 1ST APPLICANT J[...] J[...] G[...] (Paternal Grandfather) 2ND APPLICANT J[...] A[...] G[...] (Paternal Grandmother) 3RD APPLICANT and M[...] S[...] L[...] (Biological Mother) RESPONDENT MINOR CHILD: A[...] G[...] (ID NR: 2[...])

**REASONS**

FOR JUDGMENT

DELIVERED BY: MHLAMBI, J

DELIVERED ON: 17 SEPTEMBER 2024

[1] On 19 August 2024, I granted the following order:

*“The application is dismissed with costs on a scale between attorney and client, including the costs of counsel on scale A, to be paid by the Applicant jointly and severally, the one paying the other to be absolved”.*

[2] On 20 August 2024, I was requested to furnish reasons for the facts I found to be proven and the reasons for the judgment. What follows are my reasons for the order and the judgment.

[3] The applicants approached the court on an urgent basis, seeking the following relief:

*“1. Permitting this Application to be heard as one of urgency in terms of Rule 6(12) (a) and dispensing with the ordinary forms and service provided for in the Rules, insofar as may be necessary, and disposing of this Application at such time and place and in such manner and in accordance with such procedure as to the Court deems fit;*

2. That the minor child, with immediate effect, be placed in the interim primary residence of the First Applicant, at 1[...] B[...] Street, Heidelberg in terms of Section 23(1) of the Children’s Act, and during the periods which he is abroad, with the Second and Third Applicants at, 2[...] U[...] Street, Heidelberg, who will provide interim primary care to the minor, which includes the right to enrol the minor in K[...] School in Heidelberg, and consent to medical care and any other needs of the minor child;

3. That, in the interim, the Respondent’s parental rights and responsibilities to have contact with the minor child, A[...] G[...] in terms of Section 28 of the Children’s Act, be restricted to:

3.1 Daily telephonic between 17h00 and 20h00;

3.2 Contact every Saturday and Sunday in Heidelberg from 08h00 until 17h00, the Respondent to collect and return the child to the Applicants’ residence;

3.3 Access and contact on any other agreed upon dates subject to the child’s health and well-being. The Respondent is to collect the child from the Applicants’ Residence and return the child to the Applicants’ residence”.

4. An order instructing the Office of the Family Advocate in Bloemfontein, (alternatively Johannesburg) and Ms. Teresa Scholtemeyer, a forensic and counselling (sic) psychologist, with HSPCA number PS0066907, (further alternatively Sarie Nell, a social worker in private practice) to urgently carry out an investigation in terms of Section 50 into the parties’ parental rights and responsibilities and to make recommendations for Parental Plan amendments, which includes holiday contact structures, and any other order which the Honourable Court may make in terms of any other provision of the Children’s Act in terms of Section 46(1)(j) and urgently investigate and report on the below mentioned issues identified in paragraphs 5.1 to 5.5;

5. That the abovementioned interim orders are pending finalization of an investigation and reports by the Office of the Family Advocate and an investigation and reports by Ms. Teresa Scholtemeyer (or the alternatively appointed qualified professional) (“the reports”), concerning the following:
  - 5.1 Whether it is in the best interest of the minor child to remain and be primary resident with the Respondent in Bloemfontein;
  - 5.2 Whether it is in the best interest of the child to live with the Respondent and the Respondent’s husband, Mr. J[...] G[...] L[...];
  - 5.3 Whether it is in the best interest of the child to primarily reside with the Respondent and that she should provide primary care to the minor child;
  - 5.4 Whether it is in the best interest of the child to permanently live with the First Applicant, and Second and Third Applicants during the periods that the First Applicant is abroad;
  - 5.5 Provide recommendations if it is in the child’s best interests that the First, Second and Third Applicants be the primary caregiver of the child.
6. That the Respondent’s consent as co-guardian of the minor child be dispensed with should she refuse or fail to sign the consent letter/s for the necessary professionals appointed to assess the minor child;
7. Either of the parties may approach this Court, on the same papers, as may be amplified through a Supplementary Affidavit, for a variation or supplication of this Order, once the reports become available;
8. A CHILD PROTECTION ORDER, which includes the following order(s):
  - a. That Ms. Teresa Scholtemeyer, alternatively Sarie Nell, (further alternatively a suitable qualified professional), conduct a psychosocial investigation of both parties, which includes the Respondent’s calculated attempts to alienate the minor child from the First Applicant and the Second and Third Applicants and such report be provided to the Honourable Court, alternatively that the parties be ordered to participate in a professional assessment/s with a clinical psychologist;
  - b. That Ms. Teresa Scholtemeyer, (alternatively Sarie Nell, further alternatively a suitable (sic) qualified professional), conduct urgent social emotional assessment of A[...] G[...], including interactional analysis with parents, and a report be provided to the above Honourable Court, alternatively that the child be ordered to participate in a professional assessment/s with a clinical psychologist;
  - c. That the parties be ordered to undergo specified skills development/training or treatment where this is necessary for the protection of well-being of the minor child, which includes parental skills training, with either FAMSA, a mediator appointed by SAAM, alternatively a suitably qualified professional person;

9. Amendment of the Parenting Plan in line with the above reports and recommendations;
  10. That the Respondent is held in contempt of court in terms of contravention of the Parenting Plan and in terms of Section 35 of the Children's Act;
  11. Costs of the Application;
  12. Any other order which the above Honourable Court may make as upper guardian of the minor child;
  13. Further and/or alternative relief."
- [4] On granting the order, I stated in my truncated reasons that it was based on the following:
- 4.1 The applicants failed to make a case for urgency for the drastic relief they sought.
- 4.2 The applicants failed to show or present facts that they acted in the best interests of the minor child, A[...] G[...].
- 4.3 What was clear from the evidence was the continuation of the acrimony between the parties that had less to do with advancing the interests of the minor child.
- [5] According to the respondent, the application was opposed because it lacked urgency, constituted a gross abuse of the court process, and was devoid of any merit as its sole purpose was to intimidate the respondent. The respondent was dissatisfied that the application was filed and served on 8 August 2024, the Thursday before the long weekend. She was to file her answering affidavit by 12h00 on 14 August 2024, and the matter was enrolled for hearing on 16 August 2024. Consequently, the respondent sought an order dismissing the application with costs on an attorney and client scale, including counsel's costs on scale A against all the applicants and their attorneys, Messrs De Klerk, Vermaak and Partners Incorporated de bonis propriis, jointly and severally, the one paying, the other to be absolved.
- [6] The first applicant is the biological father of the minor child, A[...] G[...]. Kampala Executive Aviation employs him in Uganda and frequently in different locations abroad. The second and third applicants are his parents, who have contact rights to the minor child in terms of a Parenting Plan that was made an order of the court when a decree of divorce was granted on 5 October 2023. Both reside at 2[...] U[...] Street, Heidelberg, Gauteng.
- [7] The first applicant and the respondent were married on 26 September 2020. A[...] was born on 2[...] D[...] 2020. The couple resided at 1[...] B[...] Street, Heidelberg. On divorce, the parties agreed, and the court awarded the respondent the minor child's physical placement and primary residency. The second and third applicants were allowed

contact with A[...] every alternative weekend when the first applicant was abroad, from Saturday at 09h00 until Sunday at 16h00.

[8] In May 2021, when A[...] was five months old, the first applicant was employed abroad as an aircraft

technician in Bangui (Africa), the Maldives, and Iraq. The applicant's prolonged absences while working abroad took their

toll on the family and did not foster a good relationship between him and A[...]. According to the respondent, the marriage broke down irretrievably in 2022, and she instituted divorce proceedings in May

2023. On 5 September 2023, the parties signed a deed of settlement and a Parenting Plan. The respondent had A[...]’s primary care subject to the terms of the parenting plan. The divorce, incorporating the deed of settlement and parenting plan, was granted on 5 October 2023.

[9] On 2 October 2023, the respondent started her new employment in Pretoria, where A[...] was enrolled in a nursery school. The first applicant was displeased that the respondent had travelled beyond a 50 km radius from Heidelberg with A[....] without his written permission, contrary to the parenting plan. He then approached the Heidelberg Children’s

Court on an ex parte basis to prevent the respondent from relocating until the matter was resolved. The relief granted reads as follows:

*“1. That the 1st Applicant’s non-compliance with the forms, time periods and service requirements of the Rules of the above Honourable Court be condoned, and that the Application be heard on an ex parte basis in terms of the Magistrate’s Court Rule 55(4)(b);*

2. That the Respondent be ordered to attend court proceedings on the return date to be determined by the presiding officer;
3. That the Respondent’s parental rights and responsibilities to have contact with A[...] G[...] be restricted to contact under supervision of any of the Applicant, alternatively unsupervised contact during weekends within the jurisdiction of the above Honourable Court, in terms of Section 28(1)(b), and in

compliance with the Parenting Plan which is made an order of Court;

4. An interim order in terms of Section 23(1) granting the 2nd and 3rd Applicants’ right of care and contact in respect of the minor child, applicable during period when the 1st Applicant is working abroad;

5. Issuing of an interim and auxiliary relief in this matter as contemplated in Section 45(1), prohibiting the Respondent or any other person from removing the minor child from the care of the 1st Applicant, alternatively 2nd and 3rd Applicants for the period while 1st Applicant is abroad, in terms of Section 48(1)(a), and prohibiting the Respondent or any other person from removing the minor child from the jurisdiction of the above Honourable Court;
  6. Issuing of an interdict and auxiliary relief in this matter as contemplated in Section 45(1) prohibiting contact between the minor child and Respondent's "life partner", Mr JG L[...], and his family members, in terms of Section 48(1)(a) and in terms of the Parenting Plan which is made an order of Court;
  7. Further alternative to prayer 3 supra, that an order be granted that the minor child remain in K[...] school in Heidelberg and resident inn Heidelberg until finalization of the matter, and the 2nd and 3rd Applicants be authorised to take the minor child to and from school, whereafter the Respondent is authorized to drop off and collect the minor child at the 2nd and 3rd Applicants' residence before and after travelling to Pretoria on a daily basis for her alleged new employment.
  8. A child protection order instructing the minor child, the 1st Applicant and Respondent to participate in a professional assessment/s with a clinical psychologist;
  9. A child protection order instructing the Respondent to undergo specific skills development, training, or treatment where this necessary for the protection or well-being of the minor child, which includes parental skills training and possible anger management training;
  10. An order instructing a person to carry out investigation in terms of Section 50 and any other order which a Children's Act in terms of Section 46(1)(j);
  11. An order to appoint a legal practitioner to represent the minor child at court proceedings in terms of Section 29(6)(a) in the event of the Application to be opposed by the Respondent;
  12. Service of all documents/pleadings/court orders to be served electronically on the Respondent at m[...]@gmail.com;
  13. Any other order which the Children's Court may in terms of any other provision of the Act in terms of Section 46(1)(k)."
- [10] The respondent approached the Johannesburg High Court on an urgent basis and, on 20 October 2024, the court granted the following order:
- "1. The application is heard as a matter of urgency in terms of rule 6(12).*
2. The operation of the court order granted in the Children's Court, Heidelberg, on 13 October 2023 by the Fourth respondent under case number 14/1/4-53/2023 is suspended in its entirety, pending the final determination of the relief sought in Part B of the notice of motion in this application.

3. The operation of clauses 2.19, 2.35.22, 4.1.5, 4.1.6, 6.2.6. 7.2, 7.5, 8.3, of the Parenting Plan dated 5 September 2023 and made an order of court by the Regional Court, Heidelberg, under case number GP/HBG/RC-64/2023 on 5 October 2023 is suspended, pending the final determination of the relief sought in Part B of the notice of motion in this application.
4. The orders granted in 2 and 3 above will operate as an interim order with immediate effect.
5. In respect of the first, second and third respondent's conditional counter-application and the lack of any urgency accompanying same, including the respondent's failure to incorporate a prayer and/or request that the conditional

counter-application be heard as one of urgency in terms of rule 6(12), the enrolment thereof as an urgent application is refused.

6. The first, second and third respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of Part A of the urgent application, as well as all costs pertaining to the hearing in the urgent court on 20 October 2023, on an attorney and client scale."

[11] Some of the clauses in the parenting plan that were set aside by the court related to the respondent not being allowed to relocate to Pretoria together with A[...], or even to travel beyond a radius of 50km from Heidelberg without the first applicant's prior consent. The respondent was not permitted to expose A[...] to her current husband, Mr L[...], let alone cohabitate with him unless such relationship had endured for at least four months and the first applicant had given his approval.

[12] The applicants opposed the respondent's urgent application and, in turn, instituted a conditional counter-application. The counter-application sought an order in the following terms:

*"1. The primary residence of the minor child, A[...] G[...] ("the child"), born on 2[...] D[...] 2020, with immediate effect, is awarded to Second and Third respondents, pending finalisation of an investigation and report by the office of the Family Advocate and an investigation and report by psychologist Ms Terrassa Scholtemeyer ("the reports") concerning the following:*

1.1.1 whether it is in the best interest of the child to move with the Applicant to Pretoria;

1.1.2 whether it is in the best interest of the child to live with the applicant and the applicant's boyfriend Mr J[...] G[...] L[...];

1.1.3 whether it is in the best interest of the child to live with the Applicant;

1.1.4 whether it is in the best interest of the child to permanently live with the Second and Third respondents;

1.1.5 who should be the primary care giver of the child, Second and Third Respondents or the Applicant.

1.2 Any party can approach this Court, on the same papers, as maybe amplified through a supplementary affidavit, for a variation of this order, once the reports become available.

1.3 The Office of the Family Advocate and Ms Teresa Scholtemeyer are ordered and directed to investigate and report on the above mentioned issues identified in paragraphs 1.1.1 to 1.1.5.

1.4 The Applicant is granted contact to the child, and as follows:

1.4.1 Daily telephonic between 17h00 and 20h00;

1.4.2 Physical contact every Saturday and Sunday between 8h00 and 17h00, in Heidelberg. The Applicant will collect and return the child;

1.4.3 Contact on any other agreed upon dates. The Applicant will collect and return the child;

2. Costs of the counter-application, alternatively costs are reserved, further alternatively costs in the cause.

3. Further and/or alternative relief.”

[13] The respondent correctly contended that the applicants sought to deny her the right to have A[...] sleep over with her and her new family as they did in October 2023. A[...] was barely four years of age and had only known the respondent as the mother and sole-care giver in her short life, an aspect which the applicants appeared to have no regard for. They still insisted on an order that the respondent exercise her contact with A[...] only in Heidelberg, conduct which was apparently facetious and demonstrative of malicious intent. The first applicant acknowledged the acrimonious relationship between himself and the respondent. The papers clearly show his attempt to control the respondent’s life and that the application is more about the acrimonious relationship between the parties than the minor child's best interests.

[14] The applicants aver that the relief sought in the Johannesburg High Court application was complied with, and the application was therefore moot. The respondent correctly pointed out that the applicants’ conditional counter-application remained pending in the High Court, Johannesburg, under case number 106547/2023. The court order declined to enroll the matter as an urgent application but remained extant. The parties in the counter-application were the same as in the present matter, and the relief sought in the counter-application is substantially the same as the present relief in paragraphs 2,3 and 4 of the notice of motion. As such, the matter remains *lis pendens*.

[15] In May 2024, the first applicant launched a Form 2 Children’s Court application in the Pretoria Children’s

Court, which was set down on 27 August 2024. The first applicant withdrew the application on 6 August 2024 and tendered no costs. A further appointment was scheduled by the Family Advocate, Johannesburg, on 13 November 2024.

[16] Towards the end of May 2023, the respondent started a relationship with JG L[...] from Pretoria, and the parties engaged with each other in December 2023 before their marriage on 19 July 2024. She gave birth to a baby boy on 2[...]

A[...] 2024. His employer promoted her husband, which necessitated their relocation to Bloemfontein. On 30 July 2024, she

caused a letter to be addressed to the first applicant's attorneys, informing them that her husband was transferred to the

company's Bloemfontein branch to commence employment on 1 August 2024. Furthermore, the respondent, due to the applicant's

previous attempts of assault, would only disclose her current address to the Family Advocate's offices until their investigation was complete for fear of exposing her family to the applicant's erratic behavior. However, the applicants would have access to A[...].

[17] On Friday, 2 August 2024, the first applicant collected A[...] from the K[...] e[...] B[...]

Kampus in Bloemfontein for the weekend. He was aggrieved that his contact with the minor child was delayed and that he now had to travel longer distances. On 5 August 2024, he instructed his attorneys to launch this application on an urgent basis.

[18] The grounds advanced for urgency are the respondent's sudden relocation to Bloemfontein, which created a scenario in which he had to start all over again. The "sudden further drastic change imposed on A[...] with the relocation is a major cause of concern for me." If he enrolled this matter on the ordinary roll, the first applicant opined, it would take considerable time before a hearing date is allocated, and A[...] would pay the price. He did not know where and with whom she stayed and her living conditions. He knew little about her school and implored the court to hear the matter as urgent as he verily believed that she needed treatment or therapy.

[19] The first applicant had, through the period until the granting of the divorce order, conceded and accepted that it was in the best interests of Av[...] that her primary residence be awarded to the respondent. Hardly a few days after the order was granted, the first applicant approached the children's court to have the right of care and contact of the minor child granted to the second and third applicants. The applicants wish to usurp the respondent's role as mother and primary caregiver of A[...] without concern for the latter's best interests. It is also clear that the first applicant wants to control the respondent despite the divorce having been finalised. It is also evident that this application and the applicants' other attempts at approaching the courts for the same relief constitute a gross abuse of the court processes. Their application is not urgent, nor have the applicants presented cogent evidence that they were acting in the best interests of the minor child, A[...]. What is clear is the acrimony between the parties, which has nothing to do with the advancement of A[...]s

best interests. The application was devoid of merit and stood to be dismissed.

[20] These are my reasons.

JJ MHLAMBI, J

APPEARANCES: On behalf of the Applicant Adv S. Kelly Instructed by: Shardelow Smith  
Attorneys 132 Walter Sisulu Road Gardenia Park BLOEMFONTEIN On behalf of the Respondent  
Adv HP West Instructed by: PH Attorneys 35 Magraaff Street Westdene BLOEMFONTEIN

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