

SOUTH AFRICA / JUDGMENT

# L.B.N v K.N - Ex Tempore (108047/2023)

## [2023] ZAGPJHC 1320 (25 October 2023)

**[2023] ZAGPJHC 1320**

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

Wilson

## CASE / FILE NUMBER

108047/2023

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 108047/2023

DATE: 25-10-2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

In the ex parte application of – L[...] B[...] N[...] First Applicant K[...] N[...] Second Applicant

J U D G M E N T EX TEMPORE

WILSON, J: This is an urgent application for an order granting what is referred to in the notice of motion as “the applicant” guardianship of a minor child, L[...] N[...]. But there is more than one applicant in this case, and the notice of motion does not say which of the applicants is to be made L[...]’s guardian, or whether the intention is that they should both be L[...]’s guardians. I will assume for present purposes that the application is really only directed at granting the second applicant guardianship. The first applicant, Mr N[...], is L[...]’s biological father. L[...]’s biological mother is P[...] M[...] N[...]. L[...] has lived with Mr N[...] for many years and has been cared for by him and by his wife, K[...] N[...]. Mr and Mrs N[...], approached me ex parte, without having given notice to, or having cited, Ms. N[...] for relief that will allow them to permanently relocate with L[...] to Qatar to take up a job offer during the course of next week.

At the outset of the hearing, I raised with counsel for the applicants, the fact that Ms N[...] had not been cited or given notice in these proceedings. I also raised with counsel the fact that in her affidavit, which appears on the record as Annexure H to the founding papers, Ms. N[...] does not consent to the relief that the applicants seek. In those circumstances what I have before me is an application to remove a child from the jurisdiction in circumstances where the child's biological mother, who still has parental rights and responsibilities, (a) has no idea that the application is before me today and has not been served or cited, and

(b) has not in her affidavit, presented by the applicants, actually consented to L[...] leaving the jurisdiction, or to the second applicant becoming L[...]’s guardian.

In these circumstances, counsel for the applicants was unable to persuade me to grant any of the relief the applicants seek today.

The very least that would have to happen, in my view, is that Ms N[...], the child's biological mother, would have to be given notice of this application and an opportunity to give her views on the totality of it. On the face of her affidavit, it is not even clear to me that Ms N[...] knows that the N[...]’s wish to leave the jurisdiction or that they wish to do so within the next week. In those circumstances, no relief can be granted.

The question now is whether the matter should be struck from the roll, removed from the roll or dismissed. The ordinary order in a case where an ex parte application has been brought when notice should have been given to another interested party and that interested party should have been cited, is to dismiss the application. This does not mean that the application can never be brought again. It does not even mean that the application cannot be brought on an urgent basis. What it means is that an ex parte application cannot be brought again and that notice and proper citation of all interested parties must take place. The difficulty with striking or removing the matter from the roll is that the same application, which is fundamentally defective on its face, could in theory be brought back to court at a later stage whether on an urgent basis or otherwise. That would be inconsistent with the proper administration of justice, and wholly inappropriate.

For these reasons I must dismiss the application, but I emphasise that this does not mean that the applicants are without a remedy.

All that it means is that papers must be redrafted. Ms. N[...] must be cited, given notice and given a reasonable opportunity to say what she has to say in response to the application. Those fresh papers might even include a properly drafted affidavit in which Ms. N[...] gives the explicit consent both to the appointment of the second applicant as L[...]’s guardian, and to L[...] leaving the jurisdiction that is so lacking on the papers before me.

For all of those reasons, I make the following order:

- 1.The application is dismissed.
- 2.There is no order as to costs.

WILSON, J

JUDGE OF THE HIGH COURT

25 OCTOBER 2023

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