

SOUTH AFRICA / JUDGMENT

## L.E.N v S.T.N (2025/021458) [2025] ZAGPJHC 220 (28 February 2025) [2025] ZAGPJHC 220

COURT

South Gauteng High Court, Johannesburg

BEFORE

Du Plessis

CASE / FILE NUMBER

2025/021458

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2025-021458

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

28

February 2025

In

the matter between: N[...],  
L[...] E[...] (born  
S[...])  
(IDENTITY  
NUMBER: 7[...])  
Applicant  
and  
[1]  
N[...], S[...] T[...]  
(IDENTITY  
NUMBER: 7[...])  
Respondent

## JUDGMENT

### DU PLESSIS J

- [1] This is an urgent application in which the applicant, the mother of the minor children, seeks an order granting her primary residence of the minor children, a 5-year-old boy and a 10-year-old girl, pending the completion of a forensic psychological assessment and the resolution of a criminal investigation against the respondent, their father.
- [2] The application arises from an alleged incident of physical chastisement by the respondent on the 5 year old boy on or about 30 January 2025. The applicant contends that the respondent's conduct amounts to abuse, that the child fears returning to the respondent's care, and that the continued separation of the siblings is detrimental to their well-being.

## Background

### and Litigation History

- [3] The parties were previously married and are currently undergoing contested divorce proceedings. Interim residence of the minor children was awarded to the respondent in terms of an order granted by this Court on 15 March 2022, pending the finalisation of Rule 58 proceedings in the Regional Court. The applicant has since withdrawn those proceedings, and a divorce action is now pending before this Court. It is thus doubtful if the 15 March 2022 Court order is still enforceable. Notwithstanding, the parties' arrangements the past three years were based on the court order. This changed following the 30 January 2025 incident, when the child expressed fear of returning to his father and has since been residing with the applicant.
- [4] On 7 February 2025, a week after the incident, the applicant's attorneys wrote to the respondent, placing on record that the applicant, during a video call with the boy, was told that the father forcefully struck him on his buttocks. It is stated in the letter that this was not agreed upon disciplinary measures and that both children were in tears when they told her about the incident. Additionally, when the boy was to be returned to his father on the

Sunday afternoon, he refused to return, expressing fear of his father. The boy laid a criminal charge against his father on the Tuesday. The attorneys then expressed that the child should remain with the applicant pending an investigation into the incident. The applicant also asked for an urgent appointment with an independent psychologist to conduct a forensic assessment of the minor child and make written recommendations regarding the primary residence. It was stated that an urgent application will be launched if there is no response.

[5] An email reply from the attorneys stated the following:

*“Thus, I see no benefit in engaging in meaningless correspondence and/or misrepresentatipicalmed at further obfuscating facts and reason as they relate to the parties and interim care and custody arrangements of the minor children.*

At best, my client regards your client's latest irrational, diabolic and baseless gimmick of opening a case of "Assault" on account of his minor child (Leruo) as just another one of her numerous attempts at gaslighting her way through every quandry in which she places herself, Were It not for the perversity and extremely malicious intent underlying this latest lie, it would actually qualify as a work of genius.

Our client will no longer be drawn into any such nonsense. So, you go ahead and do whatever you want, you need not Inform me further. My client will simply enforce the existing court order in terms of the provisions of the law.”

[6] There was no engagement with any of the allegations. It was an apparent refusal of further engagement and contrary to the duty of legal practitioners to engage meaningfully in disputes, especially disputes involving children.

[7] The applicant then responded to the threat and launched this urgent application. The matter was set down on the urgent roll for Tuesday 25 February 2025 at 10:00. By Tuesday at 10:00, there was no notice of intention to defend or answering affidavit filed. Instead, counsel for the respondent attended court asking for the matter to stand down so that the respondent could at least file an answering affidavit. I made an interim order on the day that both children are to stay with the applicant pending the hearing and finalisation of this matter.

[8] The respondent then filed his answering affidavit. His answer to the 30 January 2025 incident was as follows:

"I deny that I assaulted our son as set described by the Applicant".

[9] It was described by the applicant as follows:

*“On Thursday, 30 January 2025 during my video call with the minor children, they informed me that the Respondent had forcefully struck Leruo on the buttocks apparently as a form of chastisement”*

[10] It is unclear whether he denies that any form of chastisement happened or if it did not happen in the matter described. When asked for clarity during the hearing, counsel for the respondent attributed it to his drafting, stating that the respondent denies any chastisement.

[11] The problem, however, is that apart from this denial, the only other version that we have of what happened on the day is a statement made by the nanny, which, translated by an officer of the South African Police Services, stated that after hearing the children arguing in the sitting room and trying to stop them by separating them

"[t]heir father [...] was in his room and he got out when he heard the noise. He then picked [the boy] up while he was crying and took him to his room and [the girl] when to her room and I then went to my room."

[12] This does not assist the Court much because nothing is said about what happened when the respondent took the boy to his room. The respondent could have easily explained this, but he did not.

[13] The only other paragraph that speaks to the assault states:

"The allegation of 'Assault' against my minor child is an absolute absurdity and is a fabrication, but it is not without design or intention. It is done with only one goal in mind; which is to wrest control of the minor children from me by circumventing a legitimate court order that currently regulates our primary care and custody regime, albeit via the back door. She wants primary custody of the children before we sit down to discuss the divorce, nothing more."

[14] The respondent's failure to provide a clear, unequivocal version of what transpired on 30 January 2025 leaves the Court with only one direct account of the incident—that of the applicant. While the respondent now unequivocally denies any form of chastisement, his affidavit does not explicitly state this, nor does it offer an alternative explanation. The nanny's statement does not clarify what occurred behind closed doors. When the respondent had the opportunity to explain his actions but failed to do so, the Court is left with an evidentiary gap that raises concerns. The unexplained absence of a clear version from the respondent invites the inference that his denial is not entirely credible and that his reluctance to account for what occurred may be telling in itself.

[15] The respondent submitted that there is no evidence of any injuries sustained by the child, for instance, in the form of a J88. As to the trauma, the respondent avers that we only have the applicant's version that there was trauma, and that is not enough to warrant such a drastic intervention. Moreover, he states that this is the first time such an incident has occurred on the applicant's own version. He attributes the fact that there was an organised roundtable discussion and that this was a strategic move on the applicant's part.

[16] It should be noted that this might be the first incident of violence reported by the children, but not the first incident of family violence. Without going into too much detail, suffice it to say that the applicant sets out various violent behaviours by the respondent, including an interim protection order which ordered him not to enter the former matrimonial home or damage the applicant's property.

## Legal Framework

[17] The Constitution provides in s 28(2) that the child's best interests are paramount in every matter concerning the child. This is the overarching framework applicable when considering this case.

[18] The best interest of the child should also be considered in the context of chastisement. In *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,<sup>[1]</sup> where the Constitutional Court held that the common law defence of reasonable chastisement is unconstitutional, rendering all forms of physical chastisement unlawful.

*"The objective is always to cause displeasure, discomfort, fear or hurt. The actionable difference all along lay in the extent to which that outcome is intended to be or is actually achieved. Since punishment by the application of force to the body of a child by a parent is always intended to hurt to some degree, moderate and reasonable chastisement indubitably amounts to legally excusable assault. And there cannot be assault, as defined, without meeting the requirements of "all forms of violence" envisaged in section 12(1)(c) of the Constitution."*

[19] I agree with the Constitutional Court. It should also be noted that "physical injuries" are not a requirement – any form of corporal punishment by a parent involves some degree of pain. It thus matters not if there are marks that can be indicated on a J88 form or not. The psychological injuries can only be assessed by a person who specialises in psychological injuries: a psychologist.

[20] There was a concession made during the hearing that there must be some form of report for the next Court to make a final order. The respondents suggested a family advocate due to the lower cost implications. The applicant tendered to pay the costs of a forensic psychologist appointed by agreement or by the Chairperson of the Gauteng Family Law Forum.

[21] In light of the continuous acrimonious relation between the party and the unclarity surrounding the custody arrangement of the children, I deem it of utmost importance that the issue of care and contact be finalised insofar as it is possible pending the divorces and/or annulment proceedings, and possibly thereafter. In that sense, a forensic psychologist is a professional person who should do the necessary investigations to inform the Court of the children's feelings, wishes and fears.

[22] This Court is only asked to create a "holding position" pending a report that reflects the children's voices in these proceedings. For that, the issue of residency comes into play. In determining primary residence and parental responsibilities, the Children's Act,<sup>[2]</sup> particularly s 7, mandates the Court to consider various factors, including the child's safety, the effect of separation from either

parent and any indications of harm or neglect. The issue of continued stability is also a factor that the Court had to consider in this case.

- [23] The Court cannot ignore the clear indication of fear expressed by the minor child towards his father. It is a well-established principle that where there are credible allegations of harm to a child, a court must act with caution and prioritise the child's welfare.
- [24] The child's best interests require that the boy should not be forced to return to an environment where he feels unsafe. Furthermore, separating the siblings is undesirable and contrary to established psychological research, which underscores the importance of maintaining sibling bonds in times of familial conflict.
- [25] The respondent contends that this application is an overreaction and that no immediate harm has been proven. However, waiting for absolute proof of harm before taking protective measures would be contrary to the proactive duty imposed on courts as the upper guardian of all minor children. The best interim arrangement, pending the outcome of an investigation by a psychologist, is for the children to remain with the applicant, with reasonable contact by the respondent.
- [26] The applicant initially asked for contact under the supervision of a social worker. The respondent indicated that this would be prohibitively expensive. During the argument, it was suggested that the respondent's nanny supervise the contact, but the applicant asked that the contact be supervised by both the respondent and the applicant's nannies. It should be noted that what emerges from the papers is that these women seem to be caught in the crossfire of spousal anger, and yet they stand as the pillars of constant and continuous support for the children. This is commendable. Thus, having both nannies present during contact with the respondent is an adequate solution.
- [27] As to costs, there seems to be agreement that the costs of this application should be included in the final application. I agree.

## Order

[28] The following order is made:

1. Pending an assessment and written recommendations by a forensic psychologist and pending any other order this Court may make, the primary residence of the minor children, i[...] B[...] K[...] N[...] and L[...] I[...] M[...] T[...] B[...] N[...], shall vest with the applicant, subject to the respondent's reasonable rights of supervised contact. Such contact shall be supervised by the nanny in the employ of the applicant namely, Ms Anna Motjatji Ragedi and the nanny in the employ of the respondent, namely Ms Malebaka Alinah Makateng: -
  - 1.1. every alternate weekend, from Friday after school until Monday morning;
  - 1.2. every Wednesday afternoon, returning them to the applicant's care by 18h00 on the same day;
  - 1.3. telephonic/Face Time/Whatsapp video call contact with the minor children every day of the week from 18h00 to 20h00.

2. The parties shall ensure the attendance of the minor children at their respective schools, only when the minor children are in their care as provided for in this order.
3. The parties shall attempt to agree, within 5 (five) days from date of this order, to the appointment of a joint forensic psychologist, which psychologist must have specific expertise in child abuse. In the event that the parties are unable to agree to a forensic psychologist, either or both parties jointly may approach the Chairperson of the Gauteng Family Law Forum to nominate a suitable psychologist.
4. The costs occasioned by the assessment and written recommendation shall be borne by the applicant.
5. Upon receipt of the written recommendation by the forensic psychologist, the applicant shall supplement her founding papers, within 10 (ten) days from receipt of the written recommendations and the respondent shall supplement his answering papers within 10 (ten) days of receipt of the applicant's supplementary founding papers. Within 10 (ten) days of receipt of the respondent's supplementary answering papers, the applicant shall supplement her replying papers, if necessary.
6. Upon compliance with the directives of this Court, either party may re-enrol the application for hearing.
7. The costs occasioned by the hearing of the 25th and 27th of February 2025, shall be reserved for final determination when the application is re-enrolled.

WJ DU PLESSIS

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION,

JOHANNESBURG

Date of hearing: 25 & 27 February 2025 Date of judgment: 28 February 2025 For the applicant: F Bezuidenhout instructed by BDK attorneys For the respondent: D Pool instructed by PI Uriesi Attorneys

[1] 2020 (1) SA 1 (CC) para 41.

[2] 38 of 2005.

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