
SOUTH AFRICA / JUDGMENT

M.W.M.G v Goosen and Another (4235/2017) [2017] ZAECGHC 114 (25 October 2017)

[2017] ZAECGHC 114

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, T Malusi

CASE / FILE NUMBER

4235/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 4235/2017

DATE HEARD: 12/10/2017

DATE DELIVERED: 17/10/2017

REASONS AVAILABLE: 25/10/2017

In the matter between

M. W. M. G.

APPLICANT

and

MAGISTRATE MR GOOSEN

1ST RESPONDENT

M. G.

2ND RESPONDENT

REASONS**FOR ORDER**

ROBERSON J:-

[1] On 17 October 2017 we made the following order:

“[1] The order of the first respondent dated 21 August 2017 is reviewed and set aside.

[2] The applicant and the second respondent shall act as co-guardians of the minor child L. M. (L.) as provided for in ss 18 (2) (c), 18 (3) and 18 (5) of the Children’s Act 38 of 2005 (the Children’s Act).

[3] The applicant and the second respondent shall be co-holders of parental responsibilities and rights in respect of L. as provided for in ss 18 (2) (a) and 18 (2)

(b) of the Children’s Act.

[4] Primary residence of L. shall be with the second respondent who shall be the primary caregiver of L..

[5] Contact between the applicant and L. shall be structured but not limited to:

[5.1] The applicant shall have reasonable access to L. whenever the applicant is in South Africa.

[5.2] Regular reasonable telephonic and Skype contact.

[6] Prior to contact between the applicant and L. taking place as envisaged in paragraph 5.1 of this order, they are to attend therapy together in South Africa with a psychologist or Family Counsellor appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 (Act 24 of 1987), for the purpose of restoring the relationship between the applicant and L.. The particular therapist is to provide guidance in respect of future contact between the applicant and L. taking place in Switzerland.

[7] L. is to receive therapy from a psychologist, to be arranged by the second respondent.

[8] The second respondent is to receive parental guidance from a Family Counsellor appointed in terms of Act 24 of 1987.

[9] The second respondent is to keep the applicant regularly informed of L.’s educational and therapeutic progress.

[10] No order is made as to costs.”

[2] We indicated that reasons for the order would follow which they now do.

[3] The applicant is the biological mother of the minor child L, a girl, who was born on [...] 2006 and is 11 years old. The applicant resides and works in Switzerland. She has South African and Swiss citizenship. The first respondent is a magistrate at the East London Magistrate's Court. The second respondent is the biological father of L. He resides in East London with his wife and other family members. He is self-employed as a consultant.

[4] It is common cause that L travelled from Switzerland to South Africa on 10 July 2017, in order to spend a holiday with the second

respondent. On 21 August 2017 the first respondent, sitting as a presiding officer in the Children's Court, granted the following order in respect of L:

"In terms of Sec 46 (h) (i) of [the Children's] Act 38/2005, it is ordered that the child remain in the care of her father (M. G.) pending the child's assessment by a Professional Psychologist."

[5] This order was granted on the ex parte application of the second respondent.

[6] The applicant launched an application in this court on an urgent basis, seeking an order that the first respondent's order be reviewed and set aside and that L be returned to her care. When the matter came before me and Beshe J on 11 September 2017, we decided that, particularly because of the contents of a report of a counselling psychologist which was annexed to the second respondent's answering affidavit, it would be in the best interests of the child to be separately legally represented. Even though we were of the prima facie view that the first respondent's order was reviewable, we did not want merely to set aside that order without additionally

exercising the court's role as upper guardian of minor children, in order to ensure that L's best interests were protected once the order was set aside. Ms Watt of the Grahamstown Bar availed herself at very short notice and the matter was postponed to 13 September 2017. We express our gratitude to the Eastern Cape Society of Advocates in swiftly assisting with legal representation for L, and to Ms Watt for her invaluable assistance to us in reaching a decision in this matter.

[7] The application was postponed by agreement to 12 October 2017 pending a report from the Family Advocate concerning L's best interests relating to primary care and primary residence. In the meanwhile L was to remain with the second respondent on certain conditions.

[8] On 12 October 2017 the reports of the Family Advocate and a Family Counsellor were available. We are grateful to the Family

Advocate and the Family Counsellor for their efforts in producing their reports in such a short time.

[9] The applicant and the second respondent were in a relationship from which L was born. Until she was almost two years old, L resided at times with the applicant and at times with the second respondent. In 2008 the applicant moved to Switzerland, where she presently resides and works. She is employed as an administrative consular clerk at the S. A. E. in

Switzerland. She has acquired Swiss citizenship. She has another child, a boy aged 15 years, who attends boarding school in Gauteng and who usually visits the applicant during the June/July holidays. L lived with the second respondent and his wife, whom he married in 2007, from 2008 until January 2015. During this time the applicant maintained contact with L. In January 2015 L moved to Switzerland to live with the applicant and her husband, apparently a Swiss national. L has acquired permanent residence in Switzerland and was enrolled at school there.

- [10] The applicant and the second respondent arranged for L to visit the second respondent in South Africa from 10 July 2017 to 11 August
2017. She travelled to South Africa but did not return as planned. The second respondent had become concerned about her emotional wellbeing and had arranged for L to attend three counselling sessions. He informed the applicant that L was to attend a fourth session and that her return to Switzerland would have to be delayed. The applicant's response was that she was against psychological intervention because she was of the view that there was nothing wrong with L.
- [11] Following the first respondent's order, L was assessed by a counselling psychologist, Ms Lize Basson. Her report was annexed to the second respondent's answering affidavit. Ms Basson was told by the second respondent that he was concerned about L's behaviour in that she had been reportedly caught shoplifting in Switzerland and had not received counselling, and further that as the time for her return to Switzerland came closer, she expressed her reluctance to return and was distressed at the prospect of returning. Ms Basson said that the second respondent never indicated that he wanted L to remain in South Africa indefinitely or that she should not live with the applicant. The impression Ms Basson gained was that the second respondent wanted to ensure that L's best interests were served and that she should receive psychological support. Attempts by Ms Basson to interview the applicant did not succeed.
- [12] Ms Basson had three consultations with L. She found her to be intelligent, articulate and consistent in her engagement. L told Ms Basson that she did not want to return to Switzerland and wanted to live with her father and the rest of her family in South Africa. When she was asked to draw her family, she drew her father, her stepmother, her stepmother's mother, her half brother (son of the second respondent and his wife) and her stepmother's niece, who lives with the family. She told Ms Basson that this was the family with whom she felt safe. She did not draw her mother or stepfather and told Ms Basson that she did not want them in her life. Ms Basson was of the opinion that L does not consider her mother or stepfather to be close to her and does not experience a sense of family or nurturing with them. According to Ms Basson L is desperate to achieve some integration of her two families.

[13] Ms Basson reported that L had told her of various matters involving her mother which reflected negatively on the applicant, amongst which was that the applicant, while still in South Africa, had left her with the second respondent and she had seen her perhaps three times a year. Another was that the applicant has not built a relationship with her but has treated her as though she is 18 years old, and yet another was that the applicant had beaten her three times in Switzerland. She perceived her mother's care as negative and negligent. She told Ms Basson that the applicant and her stepfather "do not really take care of me".

[14] Ms Basson stated:

"[L] is a child in crisis who lives in fear of not having her primary attachments respected and honoured. She is insecure about her future and is traumatised at the thought of going back to Switzerland with no guarantee of contact with her father and the rest of her family. Not respecting a young person's significant and primary attachments can have serious implications for their healthy emotional development, for their sense of self and for the development of healthy independence. In terms of parenting, the above does not constitute best interest practice or an acknowledgement of the child's rights."

[15] In prefacing her recommendations, Ms Basson stated:

"It is the opinion of the writer hereof that [L's] level of maturity, her intelligence, her understanding of her two families, her clear articulation of her views and her rational understanding about her emotional responses to her situation, means that her voice should be taken seriously and should be given weight when considering her future family life."

[16] Ms Basson stated that L is a child in crisis and the provision of emotional safety and security should be the priority of those caring for her. She recommended, inter alia, that: L should not be permitted to leave South Africa as this would be emotionally traumatising for her; that the court should order an extensive Best Interest of the Child evaluation by a suitably qualified professional; and that while the evaluation was in progress L should have only supervised contact with the applicant because the applicant might influence and manipulate L against the paternal family.

[17] The Family Advocate appointed Mrs J Pretorius, a duly appointed Family Counsellor, to assist in the enquiry into the best interests

of L. Mrs Pretorius is a registered and qualified social worker with nine years' experience. Mrs Pretorius

consulted with the applicant and the second respondent, conducted an individual assessment session with L, conducted a home visit to the second respondent's home, and had various telephonic and email consultations.

[18] Mrs Pretorius said that it was evident that L had insight into her position of having two families, could verbalise her views and emotions concerning her current situation, and that she had already entered the teenage stage of development. When Mrs Pretorius utilised the

“My World Board” to elicit a description from L of her “world”, she included her father, her stepmother, her half brother, her stepmother’s niece, another cousin, and her stepmother’s mother. She did not include her mother or her stepfather. Mrs Pretorius was of the opinion that L’s closest attachment is with her father and her stepmother. This attachment developed during the time that she was in their care because they provided the most continuous care.

- [19] It became clear to Mrs Pretorius that L does not want to go back to Switzerland. It appeared from information obtained from the applicant’s references that L was functioning well and was happy in Switzerland, and had a loving relationship with her mother. Mrs Pretorius was of the view that L’s resilience and emotional maturity helped her to cope during her time in Switzerland and that she did enjoy wonderful experiences while she was there. It bears mentioning that whereas L told Ms Basson that she walked alone to school, she told Mrs Pretorius that she walked to school with friends. However, according to Mrs Pretorius, L feels secure with her father and stepmother in East London. When Mrs Pretorius visited the family home, which she said was suitable to provide for the needs of the family, L was relaxed and comfortable and was spending time, apparently happily, with the young members of the family.
- [20] Mrs Pretorius is of the opinion that L will benefit from long-term therapy in order to assist her with reintegration into life in South Africa and to rebuild her relationship with the applicant. The second respondent has arranged for L to undergo a placement test at the school which she attended before she left for Switzerland. Her half brother and her stepmother’s niece attend this school.
- [21] In dealing with L’s parents’ parenting capacity, Mrs Pretorius referred to the lack of amicable communication between them and the absence of effective co-parenting. She also said that it was cause for concern that both parents had shared adult information with L and that L knew of the conflict between her parents. Mrs Pretorius said that the second respondent’s attitude towards the matter had been positive, that he said that his concerns were with L’s well-being and his intention was not to keep her away from her mother or Switzerland.
- [22] The applicant had expressed concern to Mrs Pretorius that the second respondent had been acquitted of the murder of his lawyer in 2000 on the basis of insanity and amnesia and questioned his ability to be a primary caregiver. Mrs Pretorius’ view is that the incident happened a long time ago and does not impact on the second respondent’s parenting capacity. The applicant’s referees alleged that the second respondent is a “narcissist, a psychopath and a very good manipulator”. However these referees have never met the second respondent.

[23] The second respondent expressed concern that the applicant did not attend to L's emotional needs when the shoplifting incidents occurred. L told Ms Basson and Mrs Pretorius that incidents of shoplifting had taken place. There is a dispute about how many times these incidents did take place but annexed to the second respondent's answering affidavit was a Whatsapp message from the applicant to the second respondent in which she said:

"..... I am taking her to the police station and the shop where she stole so as to embarrass her, in that way she will understand that stealing has repercussions and one can't just steal and get away with it."

[24] Mrs Pretorius said that L had told her that her mother had wanted to embarrass her. Mrs Pretorius regarded the fact that the applicant did not seek assistance for L's behavioural problem and merely reprimanded her as a weak aspect of the applicant's

parenting capacity.

[25] The second respondent further expressed concern that the applicant had frustrated contact between L and him for a year while she was in Switzerland. Mrs Pretorius viewed this as a negative factor in relation to the applicant's parenting capacity. Mrs Pretorius also referred to an incident where the applicant had tried to fetch L from the second respondent's home, accompanied by the police. This incident took place when the applicant returned to South Africa, after learning of the first respondent's

order. Mrs Pretorius was of the view that this incident damaged the relationship between L and her mother. After this incident L did not want to answer her mother's telephone calls and was afraid of her mother's reaction to her wish to remain in South Africa.

[26] Mrs Pretorius stated that the second respondent was heart-broken when L left for Switzerland and that this could have caused L to feel guilt and distress, which could have played a part in her wish to remain with her paternal family in South Africa.

[27] Section 7 of the Children's Act 38 of 2005 provides for factors which must be taken into account where relevant when applying the best interests of the child standard. Mrs Pretorius referred to a number of these factors in her evaluation.

[28] Section 7 (1) (a) (i) refers to the nature of the personal relationship between the child and the parents. Mrs Pretorius

was of the view that L's closest relationships are with her father and stepmother.

[29] Section 7 (1) (b) refers to the attitude of the parents towards the child and the exercise of their parental responsibilities. Mrs Pretorius referred to the applicant's wish for L to return to Switzerland as opposed to the second respondent's wish for L to receive professional help for her emotional wellbeing.

[30] Section 7 (1) (c) refers to the capacity of the parents to provide for the needs of the child, including emotional and intellectual

needs. Mrs Pretorius stated that both parents can provide for L's basic needs but that the capacity of the applicant to provide for L's emotional needs is questionable because she apparently did not do so in Switzerland, and that it appears that the second respondent is more sensitive to L's emotional needs.

- [31] Section 7 (1) (d) (i) refers to the likely effect on the child of any change in the child's circumstances, including the likely effect of any separation from either of their parents. Mrs Pretorius is of the view that L should never have left the care of her primary caregivers without a professional assessment and the separation caused her great distress. In considering this factor we took into account the likely effect on L if she were to return to Switzerland and be separated from her paternal family to whom she feels closest. The order provides for contact between the applicant and L and for a rebuilding of their relationship. L's separation from her mother would therefore not be absolute and her mother would still play a meaningful part in her life.
- [32] Section 7 (1) (g) (i) refers to the age, maturity and stage of development of the child. Mrs Pretorius said that L seems to be entering the teenage stage of development which may be accompanied by challenging behaviour, and that a secure environment will assist her through this stage. We were of the view that under this factor one must take into account Ms Basson's recommendation that L's views should be given weight for the reasons she stated (see para [15] above). Ms Basson's view was supported by Mrs Pretorius's reference to L's insight into her situation, her ability to articulate her views, and her emotional maturity. In other words L's own views were to be given due consideration as provided for in s 10 of the Children's Act.
- [33] Section 7 (1) (h) refers to the child's physical and emotional security and his or her intellectual, emotional, social and cultural development. Mrs Pretorius stated that it appeared that L did not always experience emotional security in Switzerland. Here we also took into account L's close relationship with her paternal family, their importance in her life, and her ease in their company noted by Mrs Pretorius.
- [34] Mrs Pretorius' recommendation was more or less in line with our order.
- [35] The Family Advocate shared the view of Mrs Pretorius and proposed an order in line with Mrs Pretorius' recommendation.
- [36] On 13 September 2017 Ms Watt placed on record her interaction with L and L's views. She met with L alone and was of the view that L was able to express herself and communicate her wishes. L told her that she wanted to remain in South Africa which she regards as her home. Although she likes Switzerland, she prefers South Africa. Two of her young family members are enrolled at the school which she used to attend in South Africa.

- [37] When the matter resumed on 12 October 2017, Ms Watt submitted that we should accept the recommendation of the Family Advocate. When I refer to the Family Advocate's report I refer to both her and Mrs Pretorius's reports. Ms Watt pointed out that the experts' recommendations coincided with L's instructions and submitted that there was no reason not to accept the recommendations.
- [38] Ms van der Merwe, who appeared for the applicant, submitted that the applicant was not an abusive parent and that L did not hate her mother. L had not indicated in Switzerland that she wanted to return to South Africa. Ms van der Merwe submitted that the Family Advocate's report did not address the breakdown of the relationship between L and the applicant while L was in Switzerland, that there was insufficient evidence to support such a breakdown, that the applicant's views were not considered, and that the report did not take into account how happy L had been in Switzerland. There was no reason, so it was submitted, why the status quo could not be restored and a decision on primary care could not be reached based only on a short stay in South Africa, which would have reminded L of her former life in South Africa. L's return to South Africa for the first time could have reminded her of her previous life in South Africa. Ms van der Merwe submitted in the main that the second respondent should not have primary care but if he was awarded primary care, she proposed certain conditions relating to contact and other matters.
- [39] In our view the circumstances in this matter had to be considered in their totality. As Ms Watt submitted, this was not a case of choosing sides and it was not being said that the applicant was a bad mother. The primary consideration was what was in the best interests of L. With regard to Ms van der Merwe's submissions concerning deficiencies in the Family Advocate's report, we were of the view that it was a fair and an objective report. Mrs Pretorius expressed concern about both parents having shared adult information with L and their co-parenting abilities, she took into account that L might have felt guilt at her father's sadness at her departure for Switzerland, and she recommended that the second respondent should receive parental guidance. She acknowledged that L had had positive experiences in Switzerland. She sought and considered the applicant's concerns about the second respondent.
- [40] As far as the breakdown in the relationship between L and the applicant was concerned, here what was important was L's

attitude towards her mother presently. The applicant stated that L has adapted to life in Switzerland and was happy with the applicant and her husband. She was doing well at school and the school did not inform the applicant of any problems. However it was clear that L does not feel close to her mother and feels closest to her paternal family. This was also not a case where a decision was based on L's short stay with her paternal family. L lived with her father and his wife from age two to nine, and her half brother and her stepmother's niece, who are a little younger than L, would have grown up with her. This was a long time, during which she was exposed to this particular family life and established bonds which still exist.

- [41] Of great importance in our view in this matter, on which the experts agreed, and which was also Ms Watt's opinion, is that L is mature enough to express her views which must be taken into consideration. Her views are supported by the experts, and the experts' opinions are based on cogent, objective and rational grounds. Mrs Pretorius' references to the factors contained in s 7 of the Children's Act were well considered. L's preference did not appear to be capricious. It could be accepted that she feels closest to her paternal family. Her emotional health had to be ensured and her wishes respected.
- [42] Her other interests will be taken into account. She will be hopefully be enrolled at the school where she will be with her younger family members and her home environment will be suitable. According to Ms Watt, L still has friends at the school which she attended. No concern was expressed by the applicant about L's upbringing while she lived with her paternal family from 2008 to 2015.
- [43] Another factor which it was submitted should be taken into account, was that if L is away from Switzerland for more than six months she will lose her permanent residence there. She will also be prevented from obtaining Swiss citizenship. In her draft order, the applicant proposed as one of the conditions, should the second respondent be awarded primary care, that L should return to Switzerland until January 2018 to enable her to obtain Swiss citizenship. She could then return to South Africa. This was a factor which required consideration. Ms Watt submitted that this proposal would be disruptive to L. She expressed her wish not to return to Switzerland and her relationship with the applicant needed to be restored through therapy. We agreed with Ms Watt. Whatever the advantage of obtaining a second citizenship might be, it was in our view overridden by L's need for emotional security and stability in her life.
- [44] We were therefore of the view that there were no grounds for rejecting the experts' opinions and recommendations. In the light of those opinions and recommendations, and also L's own wishes, which must be accorded weight in view of her maturity and insight, we decided that it would be in L's best interests that she should primarily reside with the second respondent and that he should be her primary caregiver, together with the other terms of the order concerning contact and therapy. It was proposed on behalf of the applicant that we should include in the order a provision that L visit the applicant in Switzerland for every June holiday. We were of the view that it was too early for such a provision but that hopefully, as Ms Watt mentioned, the parties could agree at some time in the future on this aspect.
- [45] Ms Watt submitted that the first respondent's order had lapsed and there was no need for it to be reviewed and set aside. It is so that the assessment by Ms Basson was carried out in terms of the order. However in our view the order contemplated a return to the Children's Court following the assessment. Ms Basson's assessment was carried out in terms of the order and her report was intended for the Children's Court. In his application to the Children's Court, the second respondent requested that L remain in his care until such time as the report was submitted to the Children's Court. We therefore dealt with the review. A

number of grounds of review were put forward but we considered only two. The first was that the order was granted ex parte without notice to and without hearing the applicant. This was a gross irregularity. The applicant was in Switzerland at the time and there was no danger that the purpose of the order would have been thwarted if notice was given. The second was a lack of jurisdiction. Section 44 of the Children's Act provides:

“Geographical area of jurisdiction of children's court.—

- (1) The children's court that has jurisdiction in a particular matter is—
 - (a) the court of the area in which the child involved in the matter is ordinarily resident; or
 - (b) if more than one child is involved in the matter, the court of the area in which any of those children is ordinarily resident.
- (2) Where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in that matter.”

At the time the order was granted L was ordinarily resident in Switzerland and according to the record of the proceedings L was not brought before the Children's Court. The order was therefore reviewed and set aside.

[46] These were our reasons.

J M ROBERSON

JUDGE OF THE HIGH COURT

MALUSI J:-

I agree

T MALUSI

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