

SOUTH AFRICA / JUDGMENT

O.M.L.M v K.K.C.M (27774/17) [2020] ZAGPPHC 615 (14 October 2020)

[2020] ZAGPPHC 615**COURT**

North Gauteng High Court, Pretoria

BEFORE

B Ceylon

CASE / FILE NUMBER

27774/17

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RIN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION,

PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

14 OCTOBER 2020

CASE NO: 27774/17

IN THE MATTER BETWEEN

O[....] M[....] L[....] M[....]

APPLICANT

ID No: [....]

AND

K[....] K[....] C[....] M[....]

RESPONDENT

JUDGMENT

Ceylon AJ

The Application:

- [1] This is an application wherein which the applicant seeks an order in the following terms:
 - (a) granting the termination of the parental rights and responsibilities of the respondent towards the minor child ;
 - (b) the respondent be ordered to pay the costs of this application should the respondent chose to oppose this application;
 - (c) granting the applicant further and/or alternative relief.
- [2] The application is opposed.

Background:

- [3] The applicant is the biological mother of the minor child, K[....] O[....] M[....]. The child resides with the applicant.
- [4] The Respondent is the biological father of the minor child.
- [5] The minor child was born on 17 October 2013 at Sandton, Gauteng Province, from the relationship between the parties.
- [6] It appears that the relationship started around 2012 and ended around July 2013. It seems that the main reasons for the breakup of the parties was the substance and drug abuse, unemployment and mental illness of the respondent.
- [7] According to the applicant, she received various lucrative employment offers from abroad, which she could not take due to the fact that she could not secure the requisite consent of the respondent to leave South Africa with the minor child. From the papers it appears that the respondent initially did provide the necessary consent for the child to leave the country with the applicant, but later changed his mind as he apparently discovered that the applicant intended to leave permanently with the minor child to pursue a romantic relationship in Kenya and to exclude the respondent completely from access and contact over the minor child.
- [8] It appears that the parties could not resolve their differences in respect of the above amicably and this caused the applicant to
proceed with this application.

The applicant's case:

- [9] The following are the main contentions by the applicant:

- The applicant seeks, as a purpose of the application , an order suspending all parental rights and responsibilities of the respondent

in respect of the minor child until such time as he (respondent) successfully completed the rehabilitation programme for drug and

alcohol dependency to the satisfaction of this court and is in a position to fully contribute , co-parent and be a part of the minor child's life consistently.

- She contends that she is entitled to the relief sought by virtue of section 28 of the Children's Act 38 of 2005.
- She submits that the respondent has proven to be an irresponsible person and parent, as he has not been physically present or financially or emotionally supportive towards the minor child from birth to date.
- She avers that the respondent has a history of drug and substance abuse, including abuse of cocaine, alcohol and heroine.
- She contends that the respondent is unstable, generally unable to keep permanent employment and irresponsible in his life. He even attempted to commit suicide and was dismissed from work due to absenteeism and poor work put out.
- She submits that the respondent drove under the influence of alcohol and caused a motor vehicle accident around November 2013.
- She further avers that he breached numerous agreements in respect of the payment of child maintenance and failed to provide payment timeously and/or sufficiently. The respondent also failed to honour the agreed visitation to the minor child or would attend whilst intoxicated. His visits to the child have been sporadic and mostly non-existent.
- Applicant avers that respondent, in February 2015, admitted himself to hospital seeking treatment for depression and bipolar disorder, but refused to enter into a long term treatment plan for these conditions and ailments.
- She contends that she enjoys a strong and stable relationship with the minor child and is the primary caregiver of the child since birth.
- The applicant submits that the respondent initially consented to have a passport issued for the minor child to accompany the applicant

abroad, but after the passport was issued, the respondent changed his mind to consent thereto that the child be allowed to leave for abroad, as he was of the view that the applicant was leaving the country permanently to pursue a romantic relationship. The respondent apparently stated that he would not let his child be raised in a foreign country by a stepfather, and therefore refused consent for the minor child to leave the country. The applicant denied this, stating that she never intended to leave the country permanently or to deprive the respondent any contact rights.

- The respondent even refused such consent when the applicant wanted to take the child to the USA during August 2017 to visit Disneyland.
- The respondent contends that the best interest of the child is of paramount importance in every matter concerning the child and refers to section 28(2) of the Constitution in this regard.
- She avers that it would be in the best interest of the child that the respondent's parental rights be suspended until he completes

the rehabilitation programme for drug and/or alcohol dependency, and also that he must satisfy a social worker and the Family Advocate

that he is fit and proper to exercise such rights and responsibilities properly – this is because the respondent behaved irresponsibly, self destructive and also failed to honour arrangements with regards to visitation to the minor child, thereby preventing a healthy relationship with the minor child, and also the fact that the respondent failed to support the child financially or in any other way.

The applicant submits further that:

- the child cannot travel outside the country with the applicant, whether for work or holiday due to the respondent's refusal to consent thereto.
- the child does not receive interest from the respondent as he shows little commitment towards the child's day to day life. He does not care about the well-being, health, schooling and other needs of the child.
- this application is necessary because if the respondent still co-holds the parental responsibilities and rights, the applicant will be prevented from taking major decisions relating to the child's life. The applicant's inability to take decisions without the respondent's consent in respect of the minor child is deeply debilitating for the minor child and the applicant. This is unfair to the applicant she submits.
- In her supplementary founding affidavit the applicant basically deals with her attorney's interaction with the office of the Family Advocate and the report of the Family Advocate. These will be dealt with in a separate part of this judgement due to the importance of the content thereof. The applicant also deals with the prejudice she has suffered as a result of the alleged conduct of the respondent, including the loss of very lucrative overseas opportunities, litigation costs, travel opportunities for the minor child and the applicant, and the long duration of the legal process.
- In the last paragraph, the applicant requests this court to admit her supplementary founding affidavit and provide her reasons for same. This issue will be also dealt with later, here-in below.

The respondent's case:

- [10] From the respondent's answering affidavit, he denies certain of the allegations made by the applicant. He does not raise proper grounds or provide input with regards to the interest of the minor child and why his parental rights and responsibilities should not be terminated or suspended. These are only raised pertinently in his Heads of Argument and Practice Note. This court will consider these for purposes of the respondent's case.
- [11] According to the respondent's Heads of Arguments and Practice Note, he was initially not opposed to the applicant removing the minor child out of the country for work purposes and only opposed it when he realised that the applicant intended to leave the country to pursue a relationship and permanently reside in Kenya and to exclude him from the life of his minor daughter.
- [12] He avers that the relationship between the parties have always been strained as the applicant made it difficult for the respondent to have proper contact with the child, especially considering that the applicant and the child resided in KwaZulu Natal. The means of contact was mainly telephonic and by WhatsApp, which was continuously blocked, making it almost impossible for the respondent to have contact with the child.
- [13] The respondent refers to section 6(2) of the Children's Act and enumerate the criteria that are applicable to all proceedings concerning a child. He also refers to section 6(3) and (4) of said Act and disputes whether said provisions have been complied with.
- [14] The respondent submits that the fact that the applicant and the child stayed in KwaZulu-Natal made a difficult for him to maintain a good relationship with the child. This was further complicated by the strained relationship between the parties. However, when the applicant relocated to Johannesburg in 2019, gains were made in establishing a relationship, but this was made difficult due to a lot of interference and blockage by the applicant in an attempt to make the respondent appear non-committal and useless to the relationship.

The respondent then avers that the application be dismissed with costs, particularly for the following reasons:

- The approach followed by the applicant completely disregards the most important person in the application, the minor child who legally needed to be heard and her views respected.
- The views of the families of the parties should have been heard as interested parties, as this concerns the minor child.
- Social services should have been engaged to help document a report on all allegations in order to assist the Family Advocate to reach a fair outcome instead of an outcome that simply dealt with a case of common access in order to achieve the above.

- [15] In her replying affidavit, the applicant refers mainly to the following:

- That the respondent failed to address the following in that he did not deny any thereof:
 - (a) that he has been diagnosed with serious mental conditions by various psychiatric and other health institutions;
 - (b) he spent a lot of time getting help for his psychiatric illness;
 - (c) He blatantly refused to cooperate with applicant to provide consent to take the minor child out of the country;
 - (d) he cannot deny that he frustrated the process with the Family Advocate and that the family advocate had to close its file in the matter due to his lack of cooperation;
 - (e) he attempts to display the application for termination of parental rights as an attempt to disturb, frustrate or even terminate his relationship with the child whilst this was never the intention of the application;
 - (f) the purpose of the application is for the applicant to be freed from the respondent's parental rights and responsibilities in order to enable her to take important decisions without the respondent's consent;
 - (g) the applicant is tendering to this court to allow the respondent to contact the rights as proposed in the Family Advocate's interim report;
 - (h) the respondent chose not to respond to the applicant's founding affidavit, but only to the supplementary founding affidavit.

Therefore, the allegations contained in the said founding affidavit remained uncontested;

- (i) with regards to the admissions made by the respondent in respect of the multiple hospital admissions, suicide attempts, lack of contact with the minor child and lack of co-operation with the Family Advocate, the applicant noted these in the replying papers;
- (j) the applicant takes issue with the references the respondent makes regarding who she may or may not be involved romantically;
- (k) the applicant further points out instances of the lack of interest in the child's life, eg. that he is unaware of the details of the child's care taker, transporter, schooling, etc.
- the rest of the replying affidavit deals with the denials of issues already discussed above and need not to be repeated herein, and it would in any event not further any of the parties' cases.

The Family Advocate reports:

- [16] The applicant, through her attorneys requested the office of the family advocate to conduct an investigation in relation to the best interest of the minor child, with specific reference to the contact to the minor child and to make recommendations regarding same. This happened around May 2017.
- [17] The Family Advocate (by way of their letter dated the 27th of September 2017) invited the parties to attend a consultation, for purposes of the requested investigation, in October 2017.
- [18] Following the consultation with the parties on the 13th of October 2017, the Family Advocate issued an interim report dated 25 October
2017. The investigation was done by the Family Advocate SA Langeveldt-Goosen and registered social worker and family counsellor in the office of the Family Advocate, TJ Lethuba , who investigated the best interest of the child with reference to the application for termination of parental rights and responsibilities. The investigation took into account the dispute between the parties around the contact of the respondent with the minor child and the applicant's request that supervised contact the rights be considered, due to alcohol and substance abuse by the respondent, sporadic contact with the minor child and the lack of relationship between the child and the respondent. The investigation also took into consideration the respondent's mental health and treatment of same in mental and psychiatric institutions. The child was also interviewed for purposes of the investigation.
- [19] According to the report, the parties, with the assistance of the office of the Family Advocate, reached an agreement that contact for one weekend per month, under supervision of the applicant, for six
- (6) hours on the Saturday and Sunday each be instituted.
- [20] The interim report noted that the child's school report, monitor of contact and the report Dr Royds (regarding the medication of the respondent) is required to do a final report.
- [21] The school report was furnished to the Family Advocate around February 2018.
- [22] The Family Advocate furnished the final report dated 7 June 2018, wherein which the school report was duly considered and it was noted that the report from Dr Royds could not be obtained. Around May 2018, a memorandum from said Dr Royds were received, which confirmed that the respondent suffered from bipolar mood disorder from 2008 and that he was hospitalized in March and April 2007. The report further noted that the respondent did not make contact with the minor child despite the agreement of October 2017.
- [23] The report states that, in light of the insufficient information regarding the respondent's emotional functioning and lack of cooperation regarding contact with the minor child, the Family Advocate was not in a position to make a final
- recommendation, and that a full psychological evaluation of the respondent by a clinical psychologist is required to determine the best interest of the child.

[24] After the applicant managed to secure the medical records of the respondent from Dr Royds and provided these to the Family Advocate. The Family Advocate indicated that due to the unsuccessful attempts to secure appointments with the parties, they are unable to take the matter any further and will proceed close the file. The Family Advocate did note in this report that the applicant was willing to attend the interviews but the respondent was unable to participate in the investigation.

The supplementary founding affidavit of the applicant:

[25] Applicant filed her supplementary founding affidavit dated 26 November 2019.

[26] In paragraph 30 of this affidavit, the applicant correctly states that she does not have, as of right, permission to file the affidavit and that it is in the discretion of the court to admit such affidavit.

[27] The grounds which the applicant advance for this court to admit her affidavit is that she is of the view that it is important to set out all facts before this court prior to it making its decisions and because the office of the Family Advocate has withdrawn its participation in the matter.

[28] As far as this court could ascertain, the respondent did not take issue with the filing of the applicant supplementary founding affidavit in his answering affidavit or anywhere else.

[29] It appears that the respondent did receive service of the supplementary papers as he responded to the allegations

contained therein in his answering papers. The respondent appears only to have responded to the

supplementary founding affidavit and not the founding affidavit itself in his answering affidavit.

[30] It is trite that there are normally three sets of affidavits allowed in motion proceedings, and, in terms of Rule 6(5)(e), a court may in its discretion allow the filing of further affidavits.

[31] In *Meropa Communications (Pty) Ltd v Verb Media (Pty) Ltd* (29646/16) ZA GPJHC at para 9, it was held that "a court has a wide discretion to permit or refuse the filing of additional affidavits, and that a litigant who seeks to serve additional affidavit must provide an explanation that negatives mala fides or culpable remissness, and must furnish a proper and satisfactory explanation as to why the information contained has not been put up earlier. The court must also be satisfied that no prejudice is caused to the opposite party that cannot be remedied by the appropriate order as to costs."

[32] In *Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 64H 65A it was held that:

"... The court has discretion, in a proper case to admit further affidavits. Various attempts have been made to formulate some rule, or to define the circumstances in which such affidavit will be permitted. Some decisions speak about 'exceptional circumstances'. Others speak of 'substantial grounds' - as to which see *Civil Practice of the Superior Courts* by Herbstein and Van Winsen page

459. In my view it is neither necessary nor desirable to say more than the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that basically it is a question of fairness to both parties".

[33] In *James Brown and Hamer (Pty) Ltd (previously named Gilbert Hamer and Co Ltd) v Simmons* NO it was held that:

"it is in the interest of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That it is not to say that those general rules must be always be rigidly applied: some flexibility, controlled by the presiding judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted" [1963(4)SA 656(A) at 660 D-H].

[34] In the view of this court, the applicant's grounds could have been set out more clearly and with more substance as required by the aforementioned case law. However, there could not have been much prejudice to the respondent as the supplementary affidavit was filed before the respondent could file his answering affidavit. Indeed, the respondent had sufficient opportunity to respond to the allegations made by the applicant in both her initial founding affidavit and supplementary founding affidavit, and in fact, did respond to the said supplementary affidavit. The supplementary affidavit was also done long before the matter was before this court. Although the

application by the applicant to have the supplementary affidavit admitted,

was defective, as it was not brought by way of a substantial motion application thereto, and was only raised at the end of the supplementary affidavit, it is nonetheless an application of sorts.

[35] In the opinion of this court, no mala fides on the part of the applicant could be found and a reasonable explanation has been given for the necessity of filing the supplementary affidavit.

[36] In the view of this court, the applicant has complied with the requirements set out in the *Milne NO v Fabric House, Meropa Communication (Pty) Ltd*

and the *James Brown and Hamer* decisions *supra*.

[37] In addition, it is the view of this court that it would be in the best interest of

the child and the administration of justice that it exercises its discretion in

favour of the applicant. This approach would be in line with the principles contained in the *Nel v Byliefeldt* (27748/2015)

[2015] ZAGPPHC 386 and *H v Fetal Assessment* (CCT 74/14)

[2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015

- (2) SA 193 (CC), where the paramountcy of the best interest of the child was emphasized and it was held that the procedural strictures or limitations of the evidence presented or the contentions of the parties

does not bind the court in the investigation and assessment into the best interest of the child.

[38] Accordingly, the court is inclined to permit to the filing of the applicant's supplementary affidavit.

[39] The applicant's replying affidavit is signed but not commissioned. This is regrettable and should be discouraged. Parties

are encouraged to comply with the legal requirements in respect of proper affidavits. It is a pity that the

applicant did not take the trouble to advise this court as to the reasons why the affidavit was not commissioned or to request the indulgence of the court to have the defective affidavit admitted. This conduct is totally unacceptable and this court wish to express its displeasure at this kind of conduct. What is further concerning is that even the respondent did not point this defect out to court in his Heads of Argument.

[40] It was held that an uncommissioned affidavit is not an affidavit and should

not be taken into account by the court when deciding a matter, [Maphukatha v Alfred Nzo District Municipality (2654/16)[2018] ZAEMHC 25 (20 March 2018): Goodwood Municipality v Rabie 1954 (2) SA 404 (C) at 406 C].

[41] Further, the annexures to the founding, answering and replying affidavits were also not initialed or co-initialed. This is equally unacceptable conduct on the part of the parties and especially their legal representatives. The legal representatives have to ensure compliance with the rules in respect of papers before having it filed. This court takes strong exception to such practices. It is discouraged and parties and practitioners should desist from such conduct.

[42] However, and much as this court is opposed to the manner in which the parties and their legal representatives have filed defective papers and failed to adhere to the court rules in certain aspects, it has a duty to focus on the importance of the matter at hand and the paramountcy of the best interests of the child principle as set out in the Jackson v Jackson 2002

(2) SA 303

SCA at para 5; M v M (15986/2016)

[2018] ZAGPJHC 4 (22 January 2018) at para 24, H v Fetal Assessment and Nel v Blyliefeldt decisions, *supra*. It is for these reasons that this court is reluctantly prepared to admit and accept these defective affidavits.

Legal principles:

[43] We will start with the legal sources that the legal representatives of the parties refer this court to. It is a pity that said representatives did not make the effort to refer the court to applicable publications/textbooks or case law to substantiate their arguments.

[44] The applicant relies on the Children's Act and states that section 28(1) and (3) grant the applicant as co-holder of parental rights and responsibilities the right to apply to the court for an order granting, on such conditions as the court may deem necessary, the termination of all the parental responsibilities and rights which the respondent has in respect of the minor child.

[45] The applicant contends that section 28(4) of the said Children's Act, when considering this application, this court is mandated to take into account the following factors:

- a) The best interest of the child;
- b) The relationship between the child and the respondent;
- c) The degree of commitment that the respondent has shown towards the minor child; and
- d) Any other factor that should, in the opinion of the court, be taken into account.

[46] The respondent refers this court to the provisions of section 6 and 7 of the Children's Act [heads of argument, respondent, para 2]. According to the respondent, section 6(2) in all proceedings, actions and decisions by the State in any matter concerning a child must:

“(a) respect, protect and fulfill the child's interest as set out in the Bill

of Rights, best interest of the child standard set out in section 7;

- (b) respect the dignity of the child;
- (c) treat the child fairly and equitably;
- (d) protect the child from unfair discrimination on the grounds of health, status or disability of the child or that of family members of the child.

(3) if it is in the best interest of the child, the child's family should be given an opportunity to express their views in any matter concerning the child.

(4)(a) In a matter concerning the child an approach which is conducive for

conciliation and problem-solving should be followed and a confrontational approach should be avoided.

(b) The delay in any action or decision should be avoided”.

[47] The applicant also referred this court to section 28(2) of the Constitution, wherein which the best interest of the child is regarded to be of paramount importance in every matter concerning the child.

[48] In *P v P* it was held that:

" Determining what custody arrangement will serve the best interest of the children in any particular case involves the High Court making a value judgement based on its finding of facts in the exercise of its inherent jurisdiction as the upper guardian of minor children "[2007 (5) SA 94 (SCA) at para 14]

[49] In *M v M* 1973 (2) All ER 81 (Fam Div) 85 , the court held that:

" where the parents have separated and one has the care of the child, access by the other often result in some upset in the child. Those upsets are usually minor and superficial: They are heavily outweighed by the long-term advantages to the child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turns against the parents who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent by its companionship and otherwise would make".

[50] What is in the best interest of a particular child or children is a question of fact in each specific case [Lubbe v Du Plessis 2001(4) SA 57 (C) at para 66 E].

[51] This matter concerns the rights and responsibilities of the parties to care for, maintain contact with and contribute towards the maintenance of the minor child, as envisaged in section 18(2) of the Children's Act. Section 7 of the latter Act requires the best interest of the child standard to be applied, the factors set out there in must be taken into consideration where relevant [B v B (CA & R 60/2017) [2018] ZAECGHC 74 (28 August 2018) at para 7].

[52] In *Jackson v Jackson* the SCA held that where the interest of the minor children are involved the litigation amounts to a judicial investigation of what is in their best interests. The court is not bound by the contentions of the parties. That slavish adherence to technical procedural requirements may result in a court not being able to decide an issue in the best interest of a child [2002

(2) SA 303 (SCA) at para 5; *M v M* (15986/ 2016) [2018] ZAGPJHC 4 (22 January 2018) at para 24].

[53] In *M v M*, supra, it was further held that this judicial investigation involves the application of law to the facts of the case. This, in turn, requires a holistic, case specific analyses. The court must acquire and overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed and a balanced fashion and the court must render are finding mixed of fact and opinion, in a final analysis a structural value judgement

about what is considered will be in the best interest of the minor child [at para 25; *Cunningham v Pretorius* (31187/ 08) [2008] ZAGPGC 258 (21 August 2008) at para 9].

[54] The best interest of the child principle is enshrined in section 28 of the Constitution and as a right in and of itself and has been described as a benchmark for the treatment and protection of children [Centre for Child Law and Others v Media 24 Ltd and Others (CCT 261 / 18)[2019]ZA CC 46; 2020(3) BCLR 245 (CC); 2020 (1) SACR 469 (CC); 2020(3)BCLR 245(CC) (4 December 2019 at para 37; *DPP Transvaal v Minister of Justice and*

Constitutional Development

(2009) ZACC 8; 2009(4) SA 222 (CC); 2009(7)BCLR 637(CC) at para 72. Article 3(1) of the Convention on the Rights of the Child, 2 September 1990 , ratified by South Africa, and which captures the significance of the best interest of the child as a primary consideration and all actions concerning children; *Fletcher v Flechter* 1948 (1) SA 130 (A)].

[55] It is trite that the overriding consideration a Court must take into account in deciding a matter involving minor children is what is in the best interest of the minor child:

" the standard of the child's best interest has been described as " a golden thread which runs throughout the whole fabric of our law relating to children". The best interest of the child is established as the determining factor in decisions relating to guardianship, access and custody of children in our private law and the rule is entrenched in the Constitution. It also forms one of the foundation stones of the Convention of the Rights of the Child. In terms of the Convention, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child must be a primary consideration. A child is defined in the Convention and in the South African constitution as every human being under the age of 18 years, unless under the law applicable to the child majority is attained earlier. The Constitution of South Africa in its Bill of Rights provides for the paramountcy of the best interest of the child" [*Nel v Byliefeldt and Another* 27748/15 [2015] ZAGPPHC 386 (May 2015) at para 26; *Brigitte Clark; A golden thread ? Some aspects of the application of the standard of the best interest of the child in South African family law* 2000 Stellenbosch law review 3].

[56] In *H v Fetal Assessment* , the court stressed the importance of the court not being bound by " procedural strictures or by the limitations of the evidence presented, or by the contentions advanced or not advanced, by the respective parents" [2014 JDR 2720 (CC) ; *Nel v Byliefeldt*, supra, at para 35].

[57] The input and views of the parties are also important factors that a court can take into consideration when determining the best interest of the child. The input of the minor child is also important when the investigation is done. [M v M and Cunningham v Pretorius decisions, *supra*.]

Evaluation:

[58] There can be no doubt that the applicant has the necessary standing to launch this application. As the biological mother of the minor child and co - holder of parental rights and responsibilities the applicant is competent to bring this application in terms of section 28(3)(a) of the Children's Act. This is not disputed by the respondent or anyone else.

[59] The applicant is further competent to apply for the termination of the parental rights and responsibilities of the respondent, which application for

termination is authorised by section 28(1)(a) of the Act and which reads that:

"(i) a person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-

(a) suspending for a period or terminating any or all of the parental rights and responsibilities which a specific person has in respect of a child; or..." This aspect too is undisputed.

[60] With regards to section 28 (4), which deals with the factors that the court must take into account when considering this application, the applicant contended as follows:

(a) The best interest of the child:

The applicant stated that in terms of section 28(2) of the Constitution of the Republic of South Africa, the child's best interests are of paramount importance in every matter. She also relies on section 28 of the Children's Act in relation to this factor. The respondent in his papers also recognises the importance of the subject when he relies on section 6 and 7 of the Children's Act. There is therefore no dispute with regards to the fact that the interest of the child is a crucial factor that the court must consider in deciding this application [Applicants heads, para 6, 8 and 19-24; respondent's heads para 2].

(b) the relationship between the child and the respondent:

The different position of the parties on the above item has been fully detailed above. This court accepts the applicant's version on this point. The finding of this court is that there is not a strong and stable relationship between the respondent and his minor child. This is also evident from the respondent's own version. The respondent, however, indicated that he is prepared and willing to do his best to improve his involvement in the child's life.

(c) the degree of commitment that the respondent has shown towards the minor child:

This court is not convinced that the respondent showed sufficient commitment towards the minor child in respect of her well being, schooling and maintenance. This is evident from the reports of the Family Advocate stating that the respondent failed to honour the agreed visitation rights as well as his lack of co-operation to assist the Family Advocate to complete their investigations and make the necessary recommendations in the best interest of the child. In addition, the respondent's health and psychiatric problems, unemployment and general instability further complicates his ability to commit properly and consistently towards the minor child. This court again accepts the applicant's version in this regard, that the respondent has not shown sufficient commitment towards the minor child.

(d) any other factors should be taken into account:

This court will express its concerns in relation to the conduct and attitude of the respondent (refer to para [65] of this judgment). These are serious concerns and cannot be ignored when considering the best interest of the child and the relief sought in this application. These factors, in view of this court, do draw a negative inference on the case of the respondent.

With regards to the legislation the respondent refers this court to above, this court is of the view that all these factors have been considered in the sense of the best interest of the child, the case law referred to and provisions of the Constitution and the Children's Act. All of these considerations have been properly addressed.

This court is not persuaded by the respondent's contentions that the views of the family of the child was not taken into account. The applicant indicated that the respondent's mother and sister are involved in the child's life and supports the applicant. The respondent did not take issue with these averments. Therefore, it is the respondent who fails to co-operate with the applicant, their relatives and the Family Advocate and to do the necessary to be positively involved in the life of the child.

It is the respondent who does not approach the matter on a conducive manner which focus on conciliation and problem solving and to avoid confrontation. It is the court's view that the respondent's conduct is in conflict with the relevant parts of the provisions of section 6 and 7 of the Children's Act and he has been delaying the finalization of this matter unduly, as pointed out by the applicant herein-above. The respondent is the author of his own misfortunes in respect of this point.

[61] The applicant contends that it would be in the best interest that the

respondent's rights and responsibility towards the minor child be terminated (except for contact rights). She provides the following reasons for same:

(a) The respondent behaved in a manner that is irresponsible and self-destructive;

(b) He has not honoured visitation arrangements, thereby preventing a

healthy relationship with the minor child;

(c) he has not been supportive of the minor child, except for the R1000-00

that he occasionally contribute since 2019 towards the child's

maintenance;

(d) he makes repetitive reference to the applicant's relationships and who

she may or may not be involved with romantically- he is more

obsessed and fixated with this latter aspect then on the interest of the

minor child;

(e) the respondent is extremely troubled and traumatised by the events in

his childhood and applies the same lens to the applicant and a minor

child;

(f) the respondent does not show concern or interest into the child's everyday life such as school events, care of the child, well-being or welfare, yet he claims to be excluded from same.

(g) he has been diagnosed with serious psychiatric conditions and hospitalized in psychiatric institutions over the years;

(h) he has attempted suicide and several occasions;

(i) he has drug and general substance abuse problems;

(j) for the above reasons the applicant wants to be present and supervise when the respondent exercise contact rights over the minor child(as per the report of the family advocate).

It seems to this court that factors (g),(h),(i) and (j) above uncontested factors. The respondent disputes the rest of the factors

(a) to (f). But, as pointed out above, the respondent's contentions are not convincing.

[62] It is trite that the best interest of the child principle is central and paramount when a court has to deal with all matters concerning and involving minor children [Nel v Byliefeldt, Centre for Child Law v Media 24 Ltd; M v M ; Cunningham v Pretorius and Jackson v Jackson decisions, supra]. This is common cause between the parties. Parties agreed and considered that this

principle is crucial to the relief sought by each of them in their papers.

[63] It is evident that both parties love the minor child and none of them are prepared to have a life without the minor child in it. It is also clear that each of the parties are prepared to have the other actively involved in the life of the minor child. There is no indication that one of the parties requires the other to be totally excluded from the child's life. The applicant, in the alternative prayer, Notice of Motion, offered that the respondent be allowed contact right once every month. From the report of the Family Advocate, it appears that the parties are not intending on excluding each other totally from the child's life. The above factors, are in this court's view positive and constructive and definitely in the best interest of the child.

[64] The only issue that appears to be in dispute is the extent of the contact right the applicant is prepared to allow and that the respondent is willing to accept.

[65] What concerns this court most are the following factors, which are difficult to reconcile with the best interest of the child:

- the substance and drug abuse of the respondent;
- his unwillingness and/or inability to contribute towards the maintenance

of the minor child ;

- his lack of commitment to get medical and psychiatric treatment;
- his tendency to attempt suicide;
- his obsession with the applicant's private and romantic life;
- his lack of interest in contact with the minor child and his failure to

honour visitation rights;

- his lack of interest in the child's well-being, schooling and life in general;
- his lack of co-operation in allowing the applicant to take the minor child

out of the country for travel (eg Disneyland) and employment of the applicant.

[66] However, even in view of the above concerns, this court is not convinced that a total deprivation of the contact drive of the respondent will be in the best interest of the child, neither will a total granting of the contact rights to the respondent be in the best interest of the child. The court is therefore of the view that a restricted form of contact rights, as outlined in the order hereto, be allowed, as this would be in the best interest of the child- such an approach will allow the minor child to be afforded the involvement, care, love and support of both parents

on the one hand , and on the other protecting the child from the respondent's issues mentioned above and the applicant having to raise the child all alone.

[67] As indicated above, the applicant seeks an order to terminate the parental rights and responsibilities of the respondent in respect of the minor child.(Notice of Motion, prayer 1) but in her founding affidavit thereto, she seeks the suspension of same on condition that the respondent successfully completes the drug and/or alcohol dependence rehabilitation program to the satisfaction of this court and until he is in a position to fully contribute, co-parent and be a part of the minor child's life consistently (paragraph 7 thereof) .These are two different remedies in the court's view.

However, from the papers of the applicant, it appears that she has forgone on the termination and prefers and prays for the suspension of such rights and responsibilities. Suspension is mentioned and sought in paragraphs 7, 8, 10, 17 and in paras 18 -26 of her founding affidavit, where she deals with what she refers to as " the necessity for suspension of parental rights and responsibilities". In paras 28, 41 and 43 she also refers to the suspension as opposed to termination.

[68] In her supplementary affidavit, the difference between these two remedies is not canvassed and it is merely referred to by way of reference to the founding affidavit and the Family Advocate reports. The supplementary affidavit does not take the debate on the subject any further.

[69] It is for the above reasons that this court is of the view that it is the applicant's intention and position not to pursue the termination but rather the suspension of the respondent's parental rights and responsibilities.

[70] The proposal made by the Family Advocate, after consulting with the parties and the minor child, in their interim report, also seems to support an inclusive, rather than exclusive approach. The recommendations made by the Family Advocate seem to carry the approval of the applicant and have been initially supported and accepted by the respondent. The

respondent, in his papers, appear not to be adverse to an approach that limits his parental rights as long as it includes certain contact rights over the minor child. In this regard, the parties seem not to be too far apart with what they request from this court.

[71] Having had regard to the record, the arguments advanced by each of the parties and the legal principles detailed above, the court is of the view that the applicant made out a proper case for the relief sought and that the applicant satisfied the requirements set out in section 28 of the Children's Act and other relevant legislation and authorities regarding this provision.

Accordingly, the court finds that it is in the best interest of the minor child that the application succeeds.

Costs:

[72] The general rule is that costs follow the result and this rule should not be deviated from except where they are good grounds for doing so[*Meyers v Abrahamson* 1951 (3) SA 347 (C) at 455]. Due to the acrimonious nature of the relationship between the parties, the financial position of the respondent, his mental health issues and the costly nature of litigation, this court is of the view that it would serve no purpose to award any cost order in this matter.

Order:

In the result, the following order is made:

1. that the affidavits of the parties are admitted.
2. that the suspension of the parental rights and responsibilities of the respondent is granted and effective as follows:

2.1 until such time as application is made by the respondent to court to prove that he has been fully rehabilitated from any drug, substance and alcohol abuse, and the respondent contributes to the monthly maintenance (to be agreed between the parties, and if not, then as determined by the maintenance court) of the minor child, and that the respondent fully cooperate with the office of the Family Advocate to complete and finalise their investigation and recommendation and reports and which report should be filed with any application the respondent may launch and for the

lifting of the suspension of his parental rights and responsibilities granted in terms of a court order.

2.2 that the applicant will be the sole guardian of the minor child during the suspension of the respondent's parental rights and responsibilities, which will include:

- (a) to administer and safeguard the child's property and interest;
- (b) to apply for or to renew the passport of the minor child at the relevant state authorities and for the necessary visas from any international or foreign authority without the consent, permission or signature of the respondent and his family or relatives;

(c) to remove or consent to the removal or departure of the minor child from the Republic of South Africa without the consent, permission or signature of the respondent and his family and relatives;

2.3 that the respondent be entitled to have contact rights to the minor child on alternative Saturdays from 12h00 to 15h00, under the supervision of a registered social worker in the employment of the State, which arrangement should be reviewed every six months by such social worker and office of the Family Advocate;

2.4 If the minor child is out of the country for a period of longer than one year , the respondent will be entitled to contact with the child for one week per every 6 months, under the supervision of a registered social worker in the employment of the state and /or an adult family member of any of the parties. The travel expenses of the child will be shared in equal parts by the parties when the child has to travel between the residences of the parties;

2.5 In addition to the above, the respondent will be entitled to telephonic or WhatsApp contact with the minor child, twice per week for a maximum of 30 minutes per session, in the evenings between 19h00 and 19h30 or as the parties may otherwise agree;

3. No order as to costs.

B CEYLON

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH GAUTENG DIVISION,

Appearances:

Matter adjudicated on papers.

Representation:

For the Applicant

: Adv B Lekokotla

Instructed by

: Maliseha Attorneys, Hatfield, Pretoria.

For first Respondent

: Adv N Shude

Instructed by

: Legal Aid SA, Germiston.

Date of hearing

: 05 August 2020

Date of Judgment

: 14 October 2020

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