

IN THE HIGH COURT OF NAMIBIA

Case Title: A J M V S C L S	Case No: HC-MD-CIV-MOT-GEN-2020/00044
Heard before: HONOURABLE LADY JUSTICE PRINSLOO, JUDGE	Division of Court: HIGH COURT(MAIN DIVISION) Date of hearing: 14 FEBRUARY 2020 Date of order: 21 FEBRUARY 2020 Reasons delivered on: 25 FEBRUARY 2020
Neutral citation: <i>A J M v C L S</i> (HC-MD-CIV-MOT-GEN-2020/00044) [2020] NAHCMD 63 (21 February)	
Results on merits: Merits were not considered	
The order: Having heard MARGARET MALAMBO , on behalf of the First Respondent (also standing in for Mr Engelbrecht) and SYLVIA KAHENGOMBE , on behalf of the Second to Fifth Respondents, and having read the documents filed of record: IT IS HEREBY ORDERED THAT: <u>Ruling on Part A of the Application:</u> <ol style="list-style-type: none"> 1. Applicant's non-compliance with the rule relating to the time periods, forms and service is condoned. 2. Prayer 2 is refused. The minor child (PM) to remain in the care of the First Respondent pending the determination of both the custody and guardianship applications under case number 14/1/3-203/2019 by the Children's Court, Windhoek. 3. The First Respondent is interdicted from removing the minor child (PM) from Namibia pending the determination of both the custody and guardianship applications under case number 14/1/3-203/2019 by the Children's Court, Windhoek. 4. The First Respondent is interdicted from removing the minor child (PM) from Namibia pending the 	

determination of Part B of the application.

5. Cost to stand over to the outcome of the Review Application.

Further Conduct of the Matter

6. The case is postponed to **28 February 2020** at **09h00** for Status hearing.
7. A status report **must** be filed on or before 27 February 2020 regarding the further conduct of the matter.

Reasons for orders:

[1] The applicant approached this court on an urgent basis on 13 February 2020. In her notice of motion the applicant prayed for the following relief:

'Part A:

- (1) Condoning the applicant's non-compliance with the rules relating to the time periods, form and service and directing that the matter be heard as one of urgency.
- (2) The First Respondent be directed to return the minor child (PM) who is in the temporal care of the First Respondent, to the care of the Applicant.
- (3) That the First Respondent be interdicted from removing the minor child (PM) from Namibia pending the determination of both the Application for Custody under case number and the Application for Guardianship under case number 14/1/3-203/2019 in the Magistrate court for the district of Windhoek; alternatively
- (4) That the Respondent be interdicted from removing the minor child (PM) from Namibia pending the determination of Part B of this application
- (5) Ordering the Respondents to pay the costs of the application in the event they elect to oppose the said application.
- (6) Further and alternative relief.

Part B:

- (7) Reviewing and setting aside the warrant of removal in respect of removal of the minor child (PM) into the temporal care of the First Respondent.
- (8) Ordering the Respondent to pay the cost of the application in the event they elect to oppose the said application.
- (9) Further and or alternative relief.'

Background

[2] The application *in casu* goes hand in hand with another application that was also brought on an urgent basis on 24/25 November 2019¹. In order to bring the current application in perspective it is necessary to briefly refer to the November 2019 application.

[3] Centre to both these applications is a young three (3) old boy, PM, who was born on 3 May 2015 out of wedlock from a relationship between Mr JM² and Ms LS³. JM and LS were involved in a 7 year relationship and intended to get married, however during August/September 2019 things went wrong for the couple after LS returned from Angola and apparently informed JM that she no longer wished to get married. It would appear that the relationship between the parties was strained to the extent that LS obtained an interim protection order on 11 September 2019 against JM and a final protection order on 4 February 2020.

[4] It should be noted that LS is an Angolan citizen and was in Namibia on a study permit during the time of her relationship with JM. It however appears that LS's mother and some of her siblings are permanently residing in Namibia.

[5] After LS returned from Angola in 2019 the issue of the custody and guardianship of the minor child became a very contentious issue between the parties and JM's legal practitioners acting on his behalf at the time filed an application for custody and guardianship with the Children's Court, Windhoek.

[6] On 25 November 2019 JM was arrested on a charge of kidnapping PM (the minor child) and he was detained. The arrest and detention gave rise to an urgent application brought before this court later that evening on an *ex parte* basis wherein JM prayed for his immediate release from custody as well as for the interim custody of the minor child to be awarded to the paternal grandmother AM⁴. During the proceedings held on 25 November 2019 the court directed that the applicant effect service on the respondents and the matter was postponed to later that same day⁵.

[7] On 25 November 2019 at 12h00 p.m. when the court reconvened the papers were duly served on the respondents and LS was in person before court as her counsel of record was not available at the time.

¹ HC-MD-CIV-MOT-EXP-2019/00466.

² Biological father of the minor child and the applicant in case HC-MD-CIV-MOT-EXP-2019/00466.

³ First respondent in the current matter.

⁴ The applicant in the current matter.

⁵ Order was made at 02h15 on 25 November 2019.

[8] The application by JM was settled to the extent that he would make an appearance before the Katutura Magistrate's Court that same day and that bail would be set. This court proceeded to make the following order:

1. The Respondents file their answering affidavits on or before the 29th of November 2019;
2. The Applicant to reply to the answering affidavit on or before the 02 of December 2019, if so advised;
3. The minor child, P B M, is to remain in the care of his paternal grandmother, A J M, until the 4th December 2019 for further determination;
4. The case is postponed to 04/12/2019 at 08:30 for Status hearing (Reason: Documents Exchange and further direction regarding the custody of the minor child).'

[9] Although the order of 25 November 2019 lapsed on 4 December 2019 the minor child remained in the care of the applicant in casu until 31 January 2020 when the Children's Court under the hand of the Commissioner of Child Welfare, Magistrate Cosmos Endjala, issued a warrant of removal of the child from the care of JM in terms of s 135(1) (a) of the Child Care and Protection Act 3 of 2015⁶.

[10] At this stage I must interpose and point out that there is a pending matter between JM and LS in the Children's Court for custody and guardianship of the minor child and that matter has not been resolved to date and is in fact scheduled for hearing on 24 February 2020.

[11] The applicant was contacted on 31 January 2020 by JM and instructed to bring the minor child to a service station in Hochland Park, Windhoek, where she then handed the minor child over to the second respondent, who was accompanied by the Namibian Police. PM was then placed by the second respondent in the temporary safe care⁷ of the first respondent, LS.

Urgency

[12] The first respondent was due to leave Namibia on the night of 13 February 2020. The applicant expressed her concern that upon expiry of the first respondent's visa on 13 February 2020 there is a risk that she would remove the minor child from Namibia as he was placed in her care on temporal care.

⁶ 135. (1) If, on evidence given by any person on oath or affirmation before a children's commissioner it appears that the safety or well-being of a child who resides in his or her area of jurisdiction is at imminent risk, the children's commissioner may issue a warrant Republic of Namibia 91 Annotated Statutes Child Care and Protection Act 3 of 2015 authorising a member of the police, a designated social worker or any other person authorised by the children's commissioner – (a) to search for and remove a child and place the child in a place of safety or other temporary safe care if the children's commissioner is satisfied that the removal of the child is necessary for the safety and well-being of the child;

⁷ "temporary safe care", in relation to a child, means care of a child in a residential child care facility or by a person approved as a foster parent in terms of section 155 or by a family member of the child where the child can safely be accommodated pending a decision or court order concerning the placement of the child, but excludes care of a child in a prison or police cell

[13] At the hearing of the application the court was however informed that the first respondent managed to extend her visa for a month until 13 March 2020 and therefor the urgency of the matter to some extent fell away.

[14] This court was of the opinion that the matter remains inherently urgent as it related to the interest of a minor child.

Hearing of the application

[15] At the commencement of the hearing of the application the parties agreed that they will only argue the relief sought in Part A of the application as the prayers in the notice of motion was changed when the applicant's counsel uploaded an amended notice of motion, after the first respondent already filed her opposing papers. The original notice of motion only sought the relief as set out in part A of the amended notice of motion. In the amended notice of motion the applicant also sought to review and set aside the warrant of removal issued by the Commissioner of Child Welfare, Windhoek.

Argument on behalf of the applicant

[16] Ms Shifotoka, acting on behalf of the applicant, argued that PM was from 25 November 2019 until 31 January 2020 in her care when he was removed. She argued that there is no evidence or allegations that the paternal grandparents home was not a safe place or that the applicant did not properly care for the minor child. Ms Shifotoka conceded that the order of this court lapsed on 4 December 2019 but argued that this court could not have intended for the child to be in limbo as from 5 December 2019 and that it would not be in the minor child's best interest to be in limbo.

[17] Ms Shifotoka further maintained that the minor child was not in the care of his father, JM, but indeed in the care of the applicant and that the child should be returned to her custody accordingly. Counsel further submitted that there was no reason to remove PM from the care of the applicant.

Argument on behalf of the first respondent

[18] Ms Malambo, on behalf of the first respondent, argued that the court order of 25 November 2019 is clear in that the interim order lapsed on 4 December 2019 and the applicant did not apply for an extension of the said period. The *status quo* was merely maintained pending the determination of the Children's Court

regarding the custody and guardianship of the minor child.

[19] Ms Malambo argued that there is an issue regarding the safety of the minor child and the second respondent was of the opinion that the minor child was at risk and had to be removed from the circumstances wherein he found himself.

[20] Ms Malambo further argued that it is unattainable for the applicant to argue that it is not in the best interest of the minor child to be with his biological mother. She reasoned that there was no court order placing the minor child in the care or custody of the applicant and that the applicant's rights to the minor child is secondary to that of the child's parents, therefore the biological father of the minor child should have brought the application and not the paternal grandmother. Counsel further argued that there are no averments by the applicant that the minor child will be at risk should he remain with his mother or that her abilities as a mother is doubted.

[21] Ms Malambo directed the court's attention to WhatsApp messages that were sent by JM to LS wherein he made certain threats in respect of the minor child and argued that it evinces that the minor child is in danger if he is returned to the applicant's home, where JM is also staying on a permanent basis. Counsel maintains that there is no guarantee as to the safety of the child whilst residing in the same house as his biological father.

[22] In conclusion Ms Malambo argued that there is a case pending before the Children's Court and that the issue of custody and guardianship of PM should be adjudicated in that court as court of first instance and not in the High Court.

Argument on behalf of the second to fifth respondents

[23] No arguments were advanced on behalf of the second to fifth respondents as the court only heard argument in respect of the relief sought under Part A of the Notice of Motion.

Discussion

[24] 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 interests of the minor child. The best interests of the minor child must be considered in light of the specific circumstances of each case.

[25] Nugent, J in *Godbeer v Godbeer*⁸ expressed the following sentiment regarding the roll of the court as the upper guardian of minors:

‘While this Court is the upper guardian of all minors and may insist in appropriate cases upon limiting the freedom of choice of the custodian, I do not think that should be translated into this Court imposing its own subjective whims upon the children of the parties concerned. In Bailey's case at 136 the Court quoted the following extract from the judgment of the Court in *Du Preez v Du Preez* 1969 (3) SA 529 (D) at 532E - F, apparently with approval:

“This is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside, indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it.”
(my emphasis)

[26] It is common cause that PM was residing in the same house as his paternal grandparents and his father, from 25 November 2019 until such time that the Children's Court issued a warrant of removal of the child and the placement into temporary safe care with his mother.

[27] The reason why the Children's Court was approached can be found in the WhatsApp text that JM sent to LS on 25 January 2020, which reads as follows:

‘Since you have decided to push me away 80% because of the things what you have done and refused to listen to me then I do not see a need for us to have any connections between us. Since you have decided to harden your heard so will I and you know who will suffer. I will not do any to help save him I will just let him die. And his blood will be on your hands. I told you before I'm not the same person of empty words, but you have pushed me to become so cold and heartless and I don't care who dies around me. You can go and tell the whole world about what I'm but nothing and no one will help you because no one can against me. I will make sure I will get Tich and crush him and his family. This is what you wanted fine now it's on 100%.

‘This child should just die so that this whole fucking story can get done and over with. I want it done with.’

[28] It is undisputed that this WhatsApp message relates to the minor child in question and that it was sent by JM to LS. When the court confronted the applicant's counsel with question as to how the applicant can maintain that the minor child is not at risk the court was informed that it was proposed to the applicant that JM should move out of the house and have supervised access thereafter. This is however not contained in the applicant's papers nor is there confirmation that JM already moved out of applicant's home.

⁸ 2000 (3) SA 976 (W) at 982D - F.

[29] Basson J, in a South African case of *Nel v Byliefeldt and Another*⁹ citing an article¹⁰ said that ‘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 and safety of the minor child is the primary concern to this court and must be considered in light of the specific circumstances of each case. Having regard to the threats to the life of the minor child contained in the WhatsApp message such text cannot in any way be disregarded and it is clear that he cannot be returned to applicant’s home where his life might be at risk from his father.

[30] The applicant in her papers makes unsubstantiated allegations regarding the health of the minor child and stated that if the child is not returned to her care then there might be a risk to the health of the minor child. Unfortunately the applicant did not take the court into her confidence by filing the relevant reports in this regard. The state of health of the child will however be considered by the Children’s Court during the upcoming hearing.

Conclusion

[31] I cannot find that it would be in the best interest of the minor child, PM to be returned to the care of the applicant. The biological parents of the minor child must pursue their respective applications in the Children’s Court and exhaust the remedies available to them in that court. In order to do so the first respondent cannot however be allowed to leave the country with the minor child pending the determination of the case before the Children’s Court.

[32] My order is therefore as set out above.

Judge’s signature	Note to the parties:
	Not applicable.
Counsel:	

⁹ (27748/2015) [2015] ZAGPPHC 386 (11 May 2015).

¹⁰ 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.

Applicant	Respondents
Adv Shifotoka Instructed by Williams Legal Practitioners	Ms Malambo (First Respondent) Of Sibeya & Partners And Ms Kahengombe (Second – Fifth Respondents) Of Government Attorney