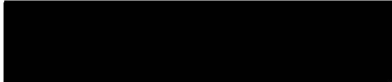




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **041452/2024**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
2/5/2024	
DATE	SIGNATURE

In the matter between:

MM

Applicant

and

WCK

Respondent

Minor child – suffers from Autism Spectrum Disorder and Severe Intellectual Disability and will require life-long, full-time care - best interest of.

Applicant in arrears with the fees of the care facility and child faces discharge from the facility.

Whether to order divorced parents to contribute equally to the continued residency and care of the child in the care facility where he has been resident for the past 3 years, pending the finalisation of proceedings in the Maintenance Court.

Application decided solely on the best interests principle and the court not conducting an interim maintenance enquiry.

Given the condition of the minor child prior to him taking up residency at the care facility and his progress in the three years he has lived there, prima facie it would be detrimental to his physical, emotional and mental well-being to remove him. The principles applied by the court in determining the best interests are of a general nature. How and whether to apply them is fact driven and a court, as Upper Guardian, will always retain the ultimate discretion whether to grant or refuse an application of this nature

ORDER

1. Pending the finalisation of the proceedings referred to in paragraph 2 below:
 - 1.1 The Respondent is ordered to pay 50% of the arrear amount owed to Woodside Sanctuary on or before 30 April 2024.
 - 1.2 The Respondent is ordered to pay 50% of the monthly fees payable to Woodside Sanctuary on or before the 1st day of each and every month minus R1 000.
 2. The Applicant shall lodge an application in the Maintenance Court within 14 court days of the date of this order, failing which the order in paragraph 2 above shall lapse.
 3. The parties are to attend mediation vis-à-vis all maintenance issues. In the event of parties not resolving issues, the mediator is requested to issue a certificate stating this.
 4. The parties shall each be liable for their own costs.
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REASONS

NEUKIRCHER J:

[1] *“Children occupy a special place in the social, cultural and legal arrangements of most societies. That this is so is understandable in recognition of both the vulnerability of children and the almost instinctive need to advance their wellbeing and ensure their protection, as well as the compelling human and social imperative to pursue and further their path of developing their full potential and taking their rightful place as full and responsible citizens of society.”¹*

[2] The imperative of the High Court, sitting as Upper Guardian of all minor children, to ensure that the best interests of a child is at the forefront of every application in which their best interests is considered, is all the more important when viewed against the backdrop of s28(2) of the Constitution² and s9 of the Children’s Act 38 of 2005 (the Act).³

[3] In this matter, this court was faced with Solomon’s choice: either to order that both parents share equally in the costs of keeping their 11-year old, severely disabled son (MC) in a care facility pending the finalisation of the Maintenance Court proceedings, or make no order on these papers. The latter would have the consequence that MC would be discharged from the facility on 1 May 2024 into the applicant’s care, with possibly disastrous consequence not just for MC but also for the applicant and her other children.

¹ *Ex parte WH and Others* 2011 (6) SA 514 (GNP) para 4

² *“(2) A child’s best interests are of paramount importance in every matter concerning the child.”*

³ *In all matters concerning the care, protection and well-being of a child the standard that the child’s best interests is of paramount importance, must be applied.”*

[4] Given the urgency of the matter, I handed down an order on 24 April 2024 and I informed the parties that I would provide reasons in due course. These are those reasons.

Background

[5] The parties were previously married.⁴ Two children were born of that marriage: MC was born on 9 April 2013 and is presently 11 years old, and C was born on 23 May 2017 and is almost 7 years old. The parties were divorced in the Regional Divorce Court, Springs on 12 February 2020. In terms of that order, the parties' Settlement Agreement was made an order of court. In terms thereof, *inter alia*:

- a) the parties would each have full rights and responsibilities and guardianship of the two minor children;
- b) the applicant was awarded primary care and residence of the two minor children subject to the respondent's specified contact;
- c) the respondent would pay maintenance for the two minor children in the amount of R1 000 per month per child, which would increase annually in accordance with CPI, and he would retain C on his medical aid fund and pay any shortfalls;
- d) all other maintenance needs and obligations in respect of both minor children would be borne by the applicant.

[6] Unfortunately, as it turns out, during approximately 2014⁵ MC was diagnosed with Autism Spectrum Disorder and Severe Intellectual Disability. His disability is such

⁴ On 24 March 2012 out of community of property with the inclusion of the accrual system

⁵ He was approximately 1-year old

that he will require full-time care for the rest of his life.

[7] As a result of this, during January 2021, MC was placed in Woodside Sanctuary (Woodside), a registered PBO and NPO licensed under the Mental Health Care Act 17 of 2002. It provides full-time residential and day care services to individuals⁶ with severe disabilities. At present, MC requires medication, constant input from a doctor and psychiatrist, occupational therapy, physiotherapy and remedial therapy. Woodside provides all these services. In fact, Woodside states:

“ MC needs total nursing care with his ADLS. He can go to the bathroom by himself but needs supervision. He can eat independently, but he displays a poor appetite and needs to be encouraged to eat. He needs to be monitored closely in terms of his behaviour.

When MC was admitted to Woodside Sanctuary three years ago, he was unable to talk or respond to orders. He displayed silent aggression towards the other children. He struggled to adapt to the structure that was in place; he had little ability to focus and roamed around aimlessly. He displayed no insight or comprehension.

With time, he adjusted to the routine and the stimulation programme of Occupational therapy, Physiotherapy, Remedial school. He is now able to talk, and you can understand what he is saying. He needs continuous stimulation as he is growing up, and he functions very well in group activities. He also gets assessed by the Government Education department, which is assisting the Remedial school. He is getting assessed by the GP every 4-6 months and by the Psychiatrist annual[ly].

MC requires continuous stimulation at Woodside Sanctuary or a facility similar to Woodside. The aim is to improve his condition through various stimulation activities and to be able to see the progress achieved.”

⁶ Adults and children

[8] In return it costs the applicant R14 755 per month for MC's care. I say "the applicant" as the respondent's sole maintenance obligation towards MC at present is the R1 000 per month maintenance he pays.⁷ Unsurprisingly, the applicant simply cannot sustain the Woodside payments on her own any longer, and she is presently R82 278 in arrears – and lest one forget, with each passing month, those arrears escalate even further.

[9] Also unsurprisingly, Woodside have demanded that the applicant make good the arrears. They notified the applicant on 1 March 2024 that should she fail to pay in full by 31 March 2024, MC would be discharged from the facility – this deadline was extended to 30 April 2024.

[10] The applicant managed to raise R18 293 in a so-called "Back-a-Buddy" fundraiser on Facebook, but this is nowhere near enough to satisfy Woodside. The prospect of MC's discharge into the applicant's care would mean that the applicant would have to resign her position as a teacher⁸ in order to take full-time care of MC. This would place an intolerable burden on her family⁹. It would also mean the loss of her income of R20 000 per month. This, in my view, would place a terrible financial burden on her family. One must also not lose sight of the fact that since these parties were divorced, the applicant has supported herself, MC and C on her nett salary of R20 000 per month. Given that Woodside costs R14 755 per month, this leaves very little for the rest of her family's needs.

⁷ Plus CPI escalation

⁸ At a primary school in Witbank

⁹ Being MC's brother, C as well as her 4-year old daughter and husband (she was remarried in 2018)

[11] But lest one may think that this court intends to conduct a maintenance enquiry – I do not. I take note of the fact that, on these papers, the respondent informs me that he earns a nett salary of R25 314 and his expenses are R28 827, and he pleads that he simply cannot afford any contribution above the R2 000 per month he pays.

[12] The respondent has also taken various points in his answering affidavit:

- a) that the applicant has known for 10 months that she was falling into arrears with the Woodside payment and yet did not approach him until they demanded payment in March 2024. Thus, any urgency is of her own making;
- b) that:

“3.10 The applicant, on her own, without discussing the situation with me or obtaining my consent and or my input in the matter decided to enrol MC at Woodside on the 4th of January 2021. The applicant’s daughter was born at the end of that month being 31 January 2021 and in my opinion the Applicant wanted MC in an institution before her daughter was born and that it was a decision she and her new husband made unilaterally.”;
- c) that the applicant has yet to approach a Maintenance Court;
- d) that the maintenance in the Settlement Agreement is what the parties agreed to and that, as he is not in arrears with his payments, this application is an abuse of process;
- e) that he “was forced” to borrow money to oppose this application and the R20 000 raised was instead tendered to applicant to pay towards the arrears, but she refused this offer.

Urgency

[13] I am of the view that this application is urgent for the simple reason that I am dealing with a severely disabled child who requires full-time care. Since his admission to Woodside in 2021, he has shown progress¹⁰ and, as stated by the applicant:

“Every time I visit MC he is extremely well kept, neatly dressed, nails clipped, hair combed, and his hands would flap happily as he jumped up and down with excitement. We started to bring MC home for weekend visits however after a day or two MC becomes agitated and stands at the gate wanting to go “home”.”

[14] The applicant simply cannot take care of MC on her own any longer, and she has already tried. Until January 2021 she – and on occasion her parents¹¹ - took care of MC. The uncontroverted facts before this court are the following:

- a) that after he turned 1 year old, MC’s physical, emotional and intellectual abilities started to notably regress: he would constantly bang his head against any available surface¹²; he made no eye contact; he would not respond when spoken to; he slept four to eight hours in a 48-hour cycle; he refused to stand still, sit still or lie down;
- b) although he originally attended a school for learners with autism in Alberton, in 2019 the respondent stopped taking him to school and the applicant was unable to do so because of her work commitments. The applicant’s father then cared for MC. But the result of this was that he was isolated from other children;

¹⁰ See par 7 supra

¹¹ Her father has Alzheimer’s Disease

¹² A car door, car seat, a wall etc

- c) during COVID-19, MC's condition "regressed drastically" and so the applicant looked for a school or facility to care for him, and found Woodside. She states:

"I took MC to visit Woodside Sanctuary, to be assessed and to determine whether he was fit for Woodside. This was the first time that MC was filled with joy and excitement and did not want to go home after his one-day visit to Woodside."

[15] I have already set out the progress that MC has made since he is being cared for by Woodside, and I have also set out the effect his discharge would have on the applicant and her family.

[16] The applicant has informed this court that there is no State facility available for MC. The respondent argued, in furtherance of the argument that the matter is not urgent, that the applicant has not placed any evidence before this court that this is so – but this is not an obligation that rests solely on the applicant. The respondent is MC's father; the parties were awarded joint rights and responsibilities of both their children. The respondent cannot simply abdicate his parental responsibilities to the applicant. At this stage, I must accept the applicant's version that there is no other State facility to care for MC.

[17] The respondent has, in any event, disavowed caring for MC. He states in his answering affidavit:

“...it is very hard for me as a single parent to manage MC with his special needs and my other 2 children¹³ at the same time.”

And yet, this is precisely what he expects the applicant to do.

[18] Given MC's condition prior to his admission to Woodside and the progress he has made there, it is clearly in his best interests to remain there and therefore his discharge would not serve those interests. This discharge is imminent. Were the application to follow the normal course, even with the short periods within which matters are set down for hearing in the Family Court, the applicant would not be afforded substantial redress as MC would have been discharged from Woodside by the time the matter was heard.¹⁴ It is for this reason that I find that this application is urgent.

The consent to enrol MC in Woodside

[19] S31(2)(a)9 of the Act states:

“ (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.”

[20] It would seem that the respondent's argument is that, because the applicant unilaterally decided to place MC in Woodside, and because he had no input into this decision and because of the terms of the Settlement Agreement, the financial burden is for the applicant to bear. But this argument simply cannot be sustained: parents

¹³ He has another child and these words were said in relation to the affordability aspect of the order sought

¹⁴ *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) para 7 - 9

share an equal responsibility in taking responsibility for their children whether emotionally, scholastically and/or financially. There is no escaping that responsibility. In my view, the respondent's stance is concerning as it seems to be rather egocentric, instead of being focused on how to best serve the interests of his severely disabled son.

[21] Whatever the situation, MC has been residing at Woodside since January 2021 – his presence there is a *fait accompli*. This, however, must not be interpreted to mean that a court would turn a blind eye to non-compliance with s31 of the Act: the circumstances of a case will determine how the court's discretion will be exercised.

The Maintenance Court

[22] I have already emphasised that this is NOT a maintenance enquiry – that is left to the Maintenance Court to conduct. The applicant is a layperson who only received legal advice after her attorney saw her Back-a-Buddy campaign on Facebook. It was then that her right to approach a Maintenance Court was explained. The order granted makes provision for that to be done within 14 days, failing which the order will lapse.

[23] I have also referred the parties to mediation on this issue. This was done with the consent of both parties and in the hope that mediation will obviate the necessity of an expensive and protracted maintenance trial.¹⁵

The R20 000

[24] Although the respondent states that he offered the applicant R20 000 towards

¹⁵ Which the applicant states can take anywhere from 6 months to 2 years to finalise

the payment of the arrear fees of Woodside, he does not make this tender in his papers. I was also informed from the bar, upon my enquiry, that he has not paid the R20 000 to Woodside of his own account. At the very least, he could have done so.

[25] The respondent states that he simply does not have the means to pay the orders sought. But he fails to respond at all to the applicant's positive assertion that his parents are "*extremely wealthy*". This is important as our law is grounded in the principle that the maternal and paternal grandparents of a child are obliged to support the child in circumstances where his his/her parents are unable to do so.¹⁶ Given that the paternal grandparents were not joined in this application, it would not be appropriate for me to make any concrete finding vis-à-vis their duty to support MC in the present circumstances, and I decline to do so.

The Children's Act

[26] I have already stated that before me was not a maintenance enquiry – the applicant stated as much. Even had I been urgent to conduct one, I would have declined: all I have is the parties' respective income and expenditure, and that is insufficient to determine the true extent of the parties' *pro rata* obligations towards MC.

[27] But the approach must at this stage not be confined to the narrow limits of a maintenance enquiry. I approach this matter by taking into account MC's best interests and, in doing so, the Act provides guidance:

- a) According to s1 of the Act:

"care", in relation to a child, includes, where appropriate—

¹⁶ *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 (2) SA 56 (C); *SS v Presiding Officer, Children's Court, Krugersdorp and Others* 2012 (6) SA 45 (GSJ) para 33

- (a) *within available means, providing the child with—*
- (i) *a suitable place to live;*
 - (ii) *living conditions that are conducive to the child's health, wellbeing and development; and*
 - (iii) *the necessary financial support;...*
- (i) *accommodating any special needs that the child may have; and*
- (j) *generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;”*

b) s6(2)(f) states:

“All proceedings, actions or decisions in a matter concerning a child must—

...

- (f) *recognise a child's disability and create an enabling environment to respond to the special needs that the child has.*

c) s7(1)(i) states:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

...

- (i) *any disability that a child may have;”*

d) s11(1)(a) states:

“(1) In any matter concerning a child with a disability due consideration must be given to—

- (a) *providing the child with parental care, family care or special care as and when appropriate;”*

[28] There is no doubt that the applicant has, at least since 2019, made enormous personal and financial sacrifices in order to ensure that MC receives the proper care and stimulation.¹⁷ Being a parent is not an issue of convenience. Sacrifices are required in order to ensure that a child grows into a well-adjusted, well-rounded, educated and responsible adult who can (hopefully) contribute meaningfully to society and raise the next generation. This responsibility is even more onerous when the child suffers disabilities of the kind set out in this application and becomes a continued life-long responsibility of his parents simply because there is no possibility of him being able to take responsibility for himself. And whilst I take note of the respondent's allegation that he cannot afford to take further responsibility for MC - either physically or financially¹⁸ – it is a fact that he expects the applicant to do so: this where the parties' personal and financial circumstances are virtually on par.

[29] In my view, in order for the provisions of the Act to hold any true meaning, both parents are required to share equally in the responsibility of ensuring that they prioritise the needs of their children, and this even more so in circumstances such as the present. This goes far beyond financial sacrifices that parents make every day: every day in this country thousands of parents, grandparents and family members sacrifice their own comforts to ensure a better future for the children entrusted to their care – so much more in a situation such as this. In my view, this is the only way that the provisions of the Children's Act hold any true meaning.

¹⁷ See pars 5, 8, 10 and 14 supra

¹⁸ Par 17 supra

[30] Given all the circumstances set out supra, I am of the view that MC's best interests are best served by his continued residency at Woodside. In my view, given his condition prior to him taking up residency there and his progress in the three years he has lived there, *prima facie* it would be detrimental to his physical, emotional and mental well-being to remove him from Woodside. It is on this basis that the order must be granted until such time as the Maintenance Court can review the parties' maintenance obligations and make an order.

[31] I must emphasize that the principles stated above are of a general nature. How and whether to apply them is fact driven and a court, as Upper Guardian, will always retain the ultimate discretion whether to grant or refuse an application of this nature.

[32] As the applicant has not sought any order for costs, none will be made.

[33] The order made in respect of the payment of Woodside's monthly fee is that the respondent is to pay 50% thereof less the amount of R1 000. This is because the respondent pays maintenance of R1 000 per month per child to the applicant. As MC receives full-time care at Woodside, and the respondent continues to pay R2 000 per month maintenance, R1 000 must be deducted from his 50%. To suspend the R1 000 per month maintenance obligation would be to usurp the function of the Maintenance Court which I am not in a position to do.

[34] In this case, and on these facts, the application was granted in terms of the order handed down on 23 April 2024.



**B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA**

Date of hearing: 23 April 2024

Date of order: 24 April 2024

Reasons for judgment: 2 May 2024

Delivered: This Judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 2 May 2024.

Appearances:

For the Appellant : Adv. S Stadler
Instructed by : Adams & Adams Attorneys
For the Respondent : Adv N Breytenbach
Instructed by : Salome le Roux Attorneys