IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 12300/2020

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

10 February 2021 *Gavin Rome*

DATE SIGNATURE

In the matter between:

NAKASOTE: ETHEL MULENGA Applicant

and

MULENGA: YANDE NAKASOTE First Respondent

MULENGA: DELUX LENORD SIMPUNGWE Second Respondent

WESTMINSTER CITY COUNCIL CHILDREN AND FAMILY SERVICES, UNITED KINGDOM Third Respondent

In re the minor child Leon Ndanji Bellwood

JUDGMENT

ROME, AJ:

Introduction

1. This matter concerns the hoped for rehabilitation of the relationship between a mother and her twelve-year-old son.

2. Most of the issues pertaining to that rehabilitation and specifically the process to be followed to facilitate it are now common cause. Nevertheless, there are certain aspects of that process which remain in dispute.

Parties and Background

3. The basic facts are the following.

4. The applicant, Ethel Mulenga Nakasote is a 43-year-old businesswoman residing both in Zambia and the United Kingdom (she states that she splits her time between the two respective homes in Zambia and in the United Kingdom.

5. The applicant is the mother of four children. Two of these children are minors aged 4 and 1½ years old respectively. The father of these two minor children is the applicant's husband, Alexander Brdar ("Alex"). The applicant has been married to Alex for approximately 3½ years. The applicant's eldest child is a major female of 25 years of age.

6. This matter concerns the applicant's relationship with her second eldest child Ndanjji Bellwood ("Leon"). Leon is a 13-year-old boy who was born during August 2007 in London. Leon's father, one Steven Jeffrey Bellwood passed away during 2009. Leon lives in South Africa. His residence in the Republic is as a result of the circumstances dealt with further below.

7. The first respondent is Yande Nakasote Mulenga. The first respondent is the applicant's younger sister.

8. The second respondent is Delux Lenord Simpungwe Mulenga. The second respondent is the husband of the first respondent (and hence the applicant's brother-in-law).

9. Leon resides with the first and second respondent at a residence situated in Roodepoort, together their two minor children .

10. The third respondent is Westminster City Council Children and Family Services United Kingdom ("Westminster Family Services"). They are cited as a respondent in this matter because they appear to have been instrumental in procuring a Special Guardianship Order in terms of section 14 of the Children Act 1989 in the United Kingdom. Pursuant to this order guardianship of Leon has been given over to the first and second respondents. For convenience the term "the respondents" as used hereafter refers to the first and second respondents and not to the third respondent.

11. On 10 December 2013, this Court (per Moshidi J) granted an order declaring that the UK Special Guardianship order was recognised and accordingly that the first and second respondents have been appointed as the special guardians of Leon.

12. The UK Special Guardianship Order (and the mirror order of Moshidi J) regulates the applicant's rights to have regular contact with Leon. It authorises the respondents to remove Leon from the Republic of South Africa for temporary periods of time in order to travel to the United Kingdom in order to facilitate his contact with the applicant and his extended family.

13. Sadly, the contact between the applicant and Leon post 2013 did not take place in the manner that might have ideally been envisaged by the Special Guardianship Order. I do not need to deal in any detail with the reasons for the breakdown of that process, save to note that regular visitations, as envisioned by the order, did not occur as between the applicant and Leon.

14. Accordingly by August 2018 the applicant through her attorneys was proposing therapy in order to facilitate the resumption of regular and meaningful contact between the applicant and Leon.

15. By November 2018 the parties then discussed the possibility of an investigation by a clinical psychologist in order to prepare a report providing guidance as to what sort of process should be followed in order for the relationship between applicant and Leon to be rehabilitated.

16. The commencing of the psychological investigation was then somewhat delayed. Nevertheless by May 2019 the parties were in agreement that one Nellie Prinsloo ("Prinsloo"), a Clinical Psychologist should meet with all relevant parties, including the applicant, Leon and the respondents and prepare a comprehensive clinical psychological report ("the Prinsloo Report") as to how the process of restoring a relationship between the applicant and Leon could proceed.

17. Prinsloo published her report on 14 May 2019. By June 2019 the applicant had confirmed that she would abide by Prinsloo's recommendations and communicated this fact to the Respondents.

18. The implementation of Prinsloo's recommendations and hence the process of renewed contact between the applicant and Leon then once again stalled. During December 2019, the applicant's attorneys communicated with the first and second respondent's attorneys and told them the applicant was seeking the implementation of the Prinsloo Report. The process of implementing the recommendations in the Prinsloo Report then once again stalled. This appears to have been partly as result of the fact that in January 2020 the respondents' attorneys of record had at that time withdrawn as their attorneys. At that stage neither the respondents' attorneys, nor the respondents themselves had responded to the applicant's requests to implement the recommendations of the Prinsloo Report and for renewed physical contact between herself and Leon.

19. By June 2020, the applicant having had no further confirmation as to the implementation of the Prinsloo Report and not having received a direct substantive response to her request for resumption of physical contact with Leon, launched this application. (the notice of motion is dated 26 May but service appears to have occurred some time later and in June 2020)

20. The application is per the Notice of Motion divided into two parts.

21. Part A of the Notice of Motion contains prayers for the following relief. These paraphrase the relevant section of the Report.

    21.1. That the applicant be entitled to exercise contact with Leon in accordance with the Prinsloo Report, and the recommendations contained in paragraph 25 of the Report.

    21.2. That the applicant and the respondents would jointly appoint a case manager in order to assist them with any issues that may arise in respect of the contact arrangements and so as to ensure that Leon's best interests remain paramount throughout.

    21.3. that the costs of the case manager be borne equally between the applicant and the respondents.

    21.4. Part A of the Notice of Motion then provides for the process of contact between the applicant and Leon for a first period of two months and a second period of a subsequent two months. Thereafter the notice provides that after further periods of increasing contact and after a

seven month period the applicant and Leon would consult with Prinsloo so that she could make further specific recommendations to the Court as to Leon's best interests, further continued contact between the applicant and Leon and as to the place of Leon's future primary place of residence.

22. Part B of the Notice of Motion provides for application to be made at a future date at which the applicant would seek the following further orders:

22.1. That the further recommendations made by Prinsloo would be made an order of Court.

22.2. That the order of Moshidi J would be set aside.

22.3. That the applicant would be declared to be the sole holder of full parental responsibilities and rights in respect of Leon as provided for in sections 18(1) and 18(2) of the Children's Act, 38 of 2005.

23. Since part B of the Notice of Motion envisages the ultimate setting aside of the order of Moshidi, J (and hence the effective setting aside of the UK Guardianship Order) the Westminster Family Services Department were served with this application by way of edictal citation. No relief was however sought against the Westminster Family Services Department and they have not entered an appearance to defend nor have they sought to oppose the relief sought by the applicant.

24. The papers in the application are voluminous. The founding affidavit alone sans annexures amounts to some pages 95 and with annexures to some 460 pages and the answering affidavit with annexures amounts to some 175 pages. Much of the founding affidavit deals with the background to the UK Special Guardianship Order and the applicant's difficult personal circumstances which resulted in the granting of that order. The founding affidavit then goes on to set out, with supporting evidence, the applicant's progress in rehabilitating her personal life and her path to becoming a responsible citizen and mother. The affidavit contains the applicant's allegations of instances where the access envisioned in the UK Special Guardianship Order did not proceed as envisioned and of how she had lost meaningful contact with Leon. She alleges that the blame for not facilitating proper access, lies with the respondents and that to an extent she feels betrayed by them.

25. Unfortunately, the answering affidavit deals in comprehensive detail with the attempt to rebut these allegations. I use the appellation "unfortunate" because there is, in this matter, an agreed report of a professional appointed by both parties, which sets out the process of rehabilitation that is to be embarked upon. At this stage the Court hearing this application is only considering processes to be followed in the rehabilitation of the relationship between the applicant and Leon and is in no way presently required to assess the ultimate issue of guardianship and the setting aside of the Special Guardianship Order.

26. Much of the detail in the parties' respective affidavits was, in any event

rendered irrelevant by the fact that by the time Part A of the application was set down for argument the issues for adjudication at this hearing were winnowed down.

Issues

27. As the parties have indicated in their joint Practice Note dated 18 January 2021, there were a maximum of three issues in dispute.

    27.1. Whether the cost of the Case Manager, referred to in Part A of the Notice of Motion, are to be jointly borne by the parties, or should be borne solely by the applicant;

    27.2. Whether the respondents are liable for of the costs of this application or whether the applicant should bear the costs of the application.

    27.3. The respondents indicated that there is a further issue in dispute with regard to the precise wording of the order to be granted under Part A of the Notice of Motion and their disagreement that the applicant's draft order in all respects accurately accorded with the wording of the Prinsloo report.

28. Given the narrowness of the issues when contrasted with the wide breadth of the record, it is a pity that the parties were not able to reach further agreement directing this Court as to what sections of the record did not need to be read. I deal now with the above three issues.

Costs of the Case Manager

29. As to the costs of the Case Manager, this Court is mindful of the fact that we are dealing with the best interests of a minor child. It is axiomatically in the best interests of the minor child that the best, efficient and professional process and best practices be followed to achieve the desired outcome of a rehabilitation of the relationship between Leon and his mother.

30. The Prinsloo Report, accordingly, after stating that "*both mother and son has [sic] expressed a need to have more contact and there is no longer a need to keep Leon from having more regular contact with his mother*" recommends in the very next paragraph of the report that a Case Manager must be appointed.

31. I emphasise the fact that the parties are respectively a minor child's biological mother and his aunt and uncle in their capacity as his court appointed Special Guardians. In principle each should be promoting the best interests of Leon and seeking to ensure that the recommendations of their joint expert be implemented as far as possible. For this reason, it is desirable that each of the parties be responsible for the costs of the Case Manager.

32. In argument, the respondents contended that one of the reasons why they should not be required to contribute to the costs of the Case Manager is that "*there is no reason why the respondents are to be punished when they have taken care of and raised the child on their own, to the exclusion of any assistance from the applicant, for the past seven years*".

33. This contention is not persuasive and is somewhat misguided. It is not a question of punishment which is in issue, rather it is the principle that both parties should be interested in ensuring the promotion of Leon's best interests.

34. The respondents also contend that their financial circumstances are such that they are unable to pay for shared costs of a Case Manager. The totality of their allegations in this regard are that the first respondent has only recently obtained employment as a nurse, that her salary is nominal and that the second respondent who is self-employed has seen his income decline due to the Covid pandemic. However, the respondents adduced no extraneous or documentary evidence to establish that their financial circumstances are so constrained that they are unable to share the costs of the Case Manager. Even more tellingly they failed to set out what the cost of the Case Manager are likely to be. Moreover, it is common cause that pursuant to the UK Special Guardianship order they receive a payment from UK Social Services amounting to some R14 100.00 per month. Apart from that there is no evidence of the monthly amount of the respondents income and what their monthly expenses are. The respondents have therefore failed to establish had level of impecuniosity which would preclude them from sharing in the costs of the Case Manager. Had the question of the respondents' relative impecuniosity impacted on their ability to contribute to the costs of the Case Manager, more evidence of the respondents' financial circumstances was required to effectively exempt them from their shared financial responsibility to promote and advance Leon's best interests.

35. The respondents' objection to sharing the costs of the Case Manager in short was not well founded. I therefore conclude that the applicant is entitled an order that the costs of the Case Manager be shared equally between the applicant and the respondents.

The wording of the order under Part A

36. Dealing with the terms of the draft orders that each of the parties proposed, there are minor differences between the draft order proposed by the applicant and the draft order proposed by the respondents. None of these differences are particularly material. As was pointed out by counsel for the respondents the changes which the respondents seek in their version of the draft order (when compared to the applicant's draft order and contents of the Notice of Motion) simply seek to incorporate certain wording from the Prinsloo report which was omitted. However, it is clear that the tenor of both draft orders, and indeed the draft orders when compared with the contents of Part A of the Notice of Motion are, in essence, the same both in form and in substance. It is therefore not necessary to deal with any of the differences between the two. The order which I intend making in any event includes certain of the respondents' suggested amendments to the draft order, none of which were particularly material and none of which were the subject of any serious contestation.

Costs

37. That brings me finally to the question of costs. In general, it is trite that costs follow the event. The matter however prior to the hearing, was partially settled in the sense that the issues were narrowed down between the parties, save for minor quibbling as to the contents of the draft orders and the dispute about the shared costs of the Case Manager.

38. In these circumstances it is necessary to take into account that the founding affidavit itself is extremely lengthy. No doubt the applicant felt that it was necessary to adopt a cautious approach and put in as much material as possible into her founding affidavit, to cater for the possibility that the application might ultimately be opposed. I am also mindful of the fact that some parts of the material covered by the founding affidavit may be germane to the issues that will be dealt when the relief sought at Part B of the Notice of Motion is ultimately heard.

39. The applicant's counsel, Ms M Feinstein, contended that the entire costs of the opposed application should be borne by the respondents. She contended in this regard inter alia that the respondents failed properly to respond to the mediation notice that accompanied service of the Notice of Motion and Founding Affidavit.

40. The respondents, who were represented by Ms L Grobler contended that there had been an in principle agreement to implement and adopt the Prinsloo

recommendations or to mediate as is envisioned by a Rule 41A notice but that process broke down and hence they only "accepted" a willingness to mediate (under the aegis of the Rule 41A notice) after they had filed their notice to oppose.

41. The applicant in turn contended that the in-principle agreement to implement the Report or to mediate was still inchoate and had not been finalized, she was compelled to launch the application. The applicant argues that after notice of opposition had been served it was then too late to accept the offer to mediate.

42. I take account of the fact that prior to the service of the application the parties appeared to have all but agreed that the provisions of the Prinsloo Report would be implemented and followed. It is not entirely clear on the record why the terms of this in principle type agreement could not have been incorporated in the notice for mediation and what steps if any were taken to flesh out the terms thereof, before the application was launched.

43. Nonetheless the respondents, in my view, somewhat unreasonably persisted with their objection to the shared costs of the Case Manager, thus making the hearing of an opposed motion all but inevitable.

44. Therefore, it is in my view fair that the costs occasioned by the hearing of this opposed application be borne by the respondents. The applicant in respect of the one substantive issue in dispute has been successful. The award of costs will exclude the costs occasioned in the preparation of the affidavits. The answering affidavit was very lengthy, but then again so was the founding affidavit. Moreover despite the filing of the answering affidavit, the respondents, as already noted, cooperated in the winnowing down of the

issues and by agreeing to the implementation of the recommendations contained in the Prinsloo Report. In these circumstances and particularly given that the only real issue in dispute at this hearing was the question of the costs of the Case Manager, I do not consider it appropriate to award to the applicant the costs associated with the preparation of all the voluminous and somewhat prolix affidavits.

45. I accordingly make the following order.

1) The applicant shall exercise contact with the minor child, Leon Ndanji Bellwood ("the minor child"), in accordance with the recommendations of Nellie Prinsloo ("Prinsloo"), a clinical psychologist, as set out in part 25 of her report dated 14 May 2019 (a copy of which report is at annexure "FA6" to the applicant's founding affidavit).

2) The applicant and the first and second respondents shall, within 3 (three) weeks of the granting of this order, jointly appoint Leonie Henig, as case manager in order that she may assist the applicant and the first and second respondents with any issues that may arise in respect of the contact arrangements and in order to ensure that the minor child's best interests remain paramount. The costs of the case manager to be borne equally by the applicant and the respondents.

3) The applicant shall exercise contact with the minor child for an initial

two-month period following the date of the granting of this order, as follows:

a. three weekly contact visits of four hours each to be supervised (as set out hereunder in subparagraph c.) by a social worker, Ms Talita Filmer ("Filmer");

b. the aforesaid visits to occur over a weekend on the Friday, Saturday and Sunday at Filmer's practice;

c. the first two hours of each visit to be supervised by Filmer and the second two hours to be unsupervised;

d. the Friday and Saturday visits are to be between the minor child and the applicant;

e. in addition to the applicant, the Sunday visits may the applicant's husband (Alexander Brdar) and their minor children, Noah and George, as well as the applicant's major daughter Amra

4) Contact after the initial two-month period and for a second two-month period, subject to Filmer's recommendation, to be unsupervised on the Friday, Saturday and Sunday and to include two nights of sleepover contact.

5) Subsequent to the contact as set out above in the second two-month period and after further sessions with Filmer, the minor child shall spend a weekend in Zambia with the applicant and her family.

6) Thereafter and for a period of three months ("the third period"), and subsequent to Filmer first having consulted with the minor child in regard thereto, the minor child shall have contact with the applicant for one weekend every three weeks, which contact will be from the Friday afternoon until the Sunday evening, and which weekend contact shall alternate between Zambia and South Africa.

7) Thereafter, the minor child shall spend a period of two weeks, during a school holiday period, with the applicant and her family in either Zambia or South Africa.

8) Insofar as it practical (given Covid travel restrictions) during the aforesaid total seven month period the minor child and the applicant shall attend bonding therapy with an educational or clinical psychologist. The relevant therapy session/s is/are not to be included as contact hours falling within the contact schedule set out above.

9) Thereafter and subsequent to the total of seven months constituting the three periods provided for herein, the minor child, and the applicant and the first and second respondents, if required by Prinsloo, are to consult with Prinsloo in order that she shall make

further recommendations to this Honourable Court as to *inter alia* the minor child's best interests, his continued contact with the applicant and his primary place of residence.

10) The first and second respondents shall facilitate the aforesaid contact and ensure that the minor child is available to attend the contact sessions as set out above.

11) The applicant shall provide the respondents with at least 10 days written notice of any proposed visit to South Africa in order that she may exercise the physical contact as aforesaid.

12) The applicant shall be entitled to attend at any of the minor child's sporting, social or educational activities that may take place during the applicant's contact weekends referred to in paragraphs 4 to 6 above.

13) During each of the three periods referred to above and also thereafter, regular electronic contact, and communication between the applicant and the minor child, including the use of one or more of the following communication applications: skype, WhatsApp, facetime, zoom, teams and the like, is hereby authorised.

14) The first and second respondents are directed to make available to the minor child the necessary electronic device, be it a smart phone, or an iPad, or a tablet or a laptop, in order to allow for the above

contact and communication to take place.

15) The first respondent and the second respondent shall subject to what is set out below, pay the costs of this application jointly and severally, the one paying, the other to be absolved.

16) The costs shall include the costs of the opposed hearing of 27 January 2021, the preparation of written argument and the presentation of oral argument in respect thereof, but shall not include the applicant's costs incurred in the preparation of her founding and replying affidavits.

17) In respect of the further relief sought by the applicant in her notice of motion and subsequent to the further final recommendations of Prinsloo as referred to in paragraph 9 above, the applicant is given leave to approach this Court on the same papers, duly supplemented, for an order as set out in Part B of this Notice of Motion.

10 February 2021

Gavin Rome

GB ROME
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

For the applicant:	Ms M Feinstein
Instructed by:	Clarks Attorneys
For the respondents:	Ms L Grobler
Instructed by:	Alan Jose Attorneys
Date of hearing:	27 January 2021