

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No:
2023/052634

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1.	(1) REPORTABLE: YES / NO
	(2) OF INTEREST TO OTHER JUDGES: YES/NO
	(3) REVISED.
2.	15 August 2023
.....
DATE	SIGNATURE

Applicant

Respondent

JUDGMENT

WENTZEL AJ:

***DELIVERED:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10:00 on 15 August 2023*

1. This matter was brought as an urgent application to revert to the previous custody arrangement (parenting plan) that had been agreed to by the parties at the time of their divorce on 14 February 2017, which had been made an Order of Court.
2. The matter involves the custody of a minor child, B Q F ("**B**"), an eight-year-old boy born on 10 February 2015. B has a serious kidney condition and is currently on dialysis and urgently requires a kidney transplant. Although the minor child's medical condition is certainly urgent, this

application was not urgent. This is readily apparent from the correspondence between the parties' respective attorneys preceding this application (which was not annexed to the papers by the applicant but was called for by me), as well as the responses by the social worker (appointed to deal with the transplant process) to the averments made concerning her which were relied upon by the applicant to substantiate the urgency of her application. These responses by the social worker were required by me in the absence of any confirmatory affidavit by the social worker supporting the applicant's averments.

Background to the application

3. In terms of the the settlement agreement between the parties which was made an Order of Court at the time of the parties' divorce it was agreed that the parties would have full parental responsibility and rights in respect of B, but that B's primary place of residence would be with the applicant ("**the settlement arrangement**").
4. In terms of the settlement arrangement, the respondent's access to B was regulated under one regime until he attained the age of three years, after which another access regime applied. It is this latter regime which the applicant now seeks to urgently enforce in this application. In terms of this regime, it was agreed that the respondent would be entitled to access to B as follows:
 - 4.1. Every alternate weekend;
 - 4.2. To fetch B from school every Wednesday and to return him to school the following morning;
 - 4.3. Alternate public holidays;
 - 4.4. Alternate easter holidays;
 - 4.5. Half of every short and long school holiday;
 - 4.6. Alternate end of the year holidays, ensuring that these are divided so that each party is able to spend alternate Christmas' with B;
 - 4.7. Daily telephonic access;
 - 4.8. Father's day;
 - 4.9. Alternate birthdays and birthday parties; and
 - 4.10. The respondent's birthday.
5. This arrangement applied until March 2020 when, in view of the COVID pandemic, the parties agreed to a shared residency arrangement to reduce the risk of B contracting COVID, as this would have been detrimental to his health in view of his kidney condition. In terms of this arrangement, it was agreed that B would spend one week with each parent ("**the shared residency arrangement**").
6. On 31 May 2021, the respondent proposed that the parties vary the settlement arrangement in line with that which had been in place since March 2020 in view of the COVID 19 pandemic.
7. The applicant was opposed to the respondent's proposal for many of the reasons set out by her in paragraph 19 of her founding affidavit. She also insisted that the joint residency arrangement had only been intended as a temporary arrangement during the COVID 19 pandemic and that she had never intended to agree to a permanent variation of the parenting plan agreed to at the time of the parties' divorce during 2017. The applicant, moreover, insisted that the dispute between the parties regarding the respondent's proposal be mediated in line with the terms of their divorce agreement. A dispute then ensued between the parties as to who should be appointed as a suitable mediator which was only resolved during May 2022.
8. Finally, on 17 May 2022, the parties reached a mediated agreement regarding B's residency. ("**the mediation agreement**") In terms of the mediation agreement, the parties agreed to extend the shared residency arrangement which had been in place since March 2020 for a period of six months, whereafter it was agreed that it would be reviewed by the parties.
9. Hereafter, and during the period of the mediation agreement, B's kidney condition deteriorated. On 9 September 2022, it became apparent that B would require a kidney transplant. The respondent was identified as a potential donor following which, B and the parties were assessed by a team of experts and were assigned a social worker to ascertain whether B was a suitable candidate for a transplant and whether the respondent was a suitable donor to provide a kidney to B. The Social Worker appointed to investigate this was Ms. Mbali Misimeki.
10. Following a virtual meeting between the parties and Ms. Mbali Misimeki during September 2022, the parties agreed to a post-operative residency plan for B. The terms of this plan were recorded in a supplementary report dated 30 December 2022 by Ms. Misimeki as follows:
 - 10.1. *"B F will be cared for and reside with S Q (his biological mother) for six weeks post operatively. This is applicable in an instance where his biological father is a donor or in an event where he receives a cadaveric donor"* [donor from a recently deceased person with the family's consent].

- 10.2. *"The six weeks post operative care period is calculated from the first day of transplantation. All parents are also additionally expected to assist relevantly during this period."*
- 10.3. *"After six weeks, the family will return to their mediation agreement unless advised otherwise by the patient's doctor."*
- 10.4. *"The patient is strictly expected to have one set of medication, which he will always travel with between the two households. The chronic medication will be covered by the patient's medical aid scheme."*
- 10.5. *"All parents are responsible to communicate any social circumstances changes, and treatment non-compliance/related issues to the transplant social worker, to obtain further assistance."*
- 10.6. *"Where applicable, the family will receive social work services and they may also be referred for further intervention when needed."
("the post-operative care plan")*
11. Despite the difficulties in the relationship between the parties, in her report Ms. Misimeki concluded:
"Based on the assessment conducted, the patient's biological parents have a very difficult relationship and [are] struggling with co-parenting however, the patient and his blended families have functional social support. Therefore, he may be listed for transplant."
12. It is clear that at this point, Ms. Misimeki was alive to the difficulties in the shared residency arrangement but did not see this as an impediment to B's eligibility for a transplant. She made no recommendation that the parties revert to the settlement arrangement and did not express any view that the then extant shared residency arrangement was contrary to B's best interests.
13. On 17 January 2023, the mediation agreement which had extended the shared residency arrangement became subject to review.
14. Approximately a week after this, the respondent was found not to be a suitable donor to provide a kidney to B after further evaluation. In an email to the applicant on 23 January 2023 he informed her that:
*"Quick update on the donor side of B's transplant.
Please note that I received info from Wits Donald Gordon transplant center that I have been placed on hold as a potential donor for B at this time.
Even though physically, all the tests have been a match so far, the hold has been implemented as result of the Psychosocial aspect of the families. This means that due to the ongoing legal matters regarding custody, the Psychologist is concerned that both the donor and recipient recovery will be hampered as a result.
They cannot proceed with me as a donor until the legal matters pertaining to B has been finalized and concluded.
This is a huge set back. As you know B is running out of time and dialysis is becoming a reality for him. Whether or not B will find an alternative suitable donor is not something that anyone can control and as you are aware he has not been listed on the donor list as we have not yet had confirmation of when the WDG donor panel will sit and finalize.
It is not good news and not easy to digest."*
15. On 6 February 2023, the respondent's attorney addressed correspondence to the applicant's attorney and proposed a joint parenting plan to formalise the shared residency arrangement which had been in place since March 2020. This was obviously because the respondent was alive to the fact that their shared residency arrangement was now up for review.
16. The applicant's attorney took until 20 February 2023 to respond, refusing to agree to the proposed joint parenting plan and insisting that the parties were obliged to mediate the terms of any further parenting plan. The applicant's attorney pointed out that the mediation agreement had expired and claimed the social worker (Ms. Misimeki) had advised the applicant that as circumstances had changed, it was no longer in the best interests of B that he reside one week with each parent due to his deteriorating health and his impending surgery, which was urgent. It is apparent from what is set out below that at this stage, no such view had been communicated by Ms. Misimeki to the applicant.
17. The respondent attorney responded on 27 February 2023 and requested the applicant's attorney to indicate what proposals the applicant wished to make regarding their parenting plan going forward.
18. The applicant's attorney replied the next day on 28 February 2023, reiterating that it was contemplated that the mediation agreement would be reviewed after six months and that it had therefore lapsed on 17 January 2023. It was repeated that *"the social worker"* had advised the

applicant that the shared parenting arrangement was no longer in the B's interest. The applicant's attorney expressed the view that the provisions of the "current order" (the settlement arrangement) was in B's best interests, which she insisted be adhered to with immediate effect. The applicant's attorney tendered on the applicant's behalf to mediate the matter of the respondent's access post-surgery. It is clear from the above that the attitude of the applicant's attorney was that after the expiry of the mediation agreement, the parties automatically reverted to the default position, which was the settlement arrangement.

19. In the same letter, the applicant's attorney accused the respondent of having manipulated his surgery and treatment to ensure that he was not declared a suitable donor, requiring that another donor be found against B's best interests. No basis was laid in the papers supporting this.
20. On 10 May 2023, the applicant's attorney addressed further correspondence to the respondent's attorney, demanding that the "current order" (the settlement arrangement) be implemented with immediate effect. It was stated that the *status quo* (the shared residency arrangement) could no longer be tolerated as it was detrimental to B both physically and emotionally. The respondent was accused of being incapable of acting in B's best interests and of being incapable of joint parenting. The applicant's attorney threatened to bring an application to court should the respondent not adhere to the current court order (the settlement arrangement) with immediate effect, and to seek costs against the respondent.
21. The respondent's attorney replied on 15 May 2023, pointing out that the current arrangement had been in operation for three years and that the applicant was now, without justification, insisting that the parties revert to the settlement arrangement. The applicant's attorney was warned that should the applicant bring the threatened application, it would be vehemently opposed, and a costs order would be sought against the applicant.
22. This was responded to by the applicant's attorney the next day (16 May 2023), insisting that the length of time that the *status quo* had persisted was irrelevant and accused the respondent of acting in breach of a Court Order and of being "a law unto himself". The applicant's attorney threatened to approach the court on an urgent basis to restore the terms of the Divorce Order and to seek costs against the respondent.
23. The respondent's attorney responded on 29 May 2023, referring to the sudden change in the applicant's attitude to the current routine (the shared residency arrangement) and stating that if the applicant persisted in disturbing the current arrangement, the respondent would bring an application to vary the Divorce Order on an urgent basis.
24. On 29 May 2023, the applicant's attorney addressed a letter to the respondent's attorney in which the applicant's attorney recorded:
 - "2. *We place on record that the writer hereof has made a request on numerous occasions via correspondence to your offices that the parties revert back to the current court order for reasons set out in great detail in said correspondence and that your client simply refuses to do so, presumably on the advice of Samantha van Zyl from your offices.*
 3. *We are further instructed to place the following on record:*
 - 3.1. *Our client was advised of the following by the transplant social worker, Ms Mbali Misimeki on Friday the 26th of May 2023:*
 - 3.1.1. *B's transplant is estimated to take place sometime in July 2023;*
 - 3.1.2. *that the parties will be both required to attend another urgent meeting with Ms Mbali Misimeki to agree on the post-operative contact and care of B; and*
 - 3.1.3. *in the event of the parties not being able to agree on a new post-operative care plan in respect of B and/or the contact and care arrangements in respect of B thereafter, that the following consequences may follow:*
 - 3.1.3.1. *that the transplant process will be halted completely and that B will not receive the transplant that he desperately requires; or*
 - 3.1.3.2. *that B will be removed from the care of both parents and in order to proceed with the transplant in the absence of both parties.*
 - 3.2. *Considering the gravity of the situation, we afford your client one last opportunity to agree to revert to the standing court order herein.*
 - 3.2.1. *In terms of the current court order, your client is to collect B after school on a Monday and return him to our client's home at 18h00.*
 - 3.2.2. *Our client made the exact same proposal to your client on Monday the 15th of May 2023 and instead of adhering to the court order, your client*

simply kept the minor child with him for the rest of the week.

4. *In conclusion, we require the following written undertaking by the end of business today:*
- 4.1. *that your client will return B to our client's home at 18h00 today;*
- 4.2. *that your client agrees to adhere to the current court order from hereon until such time as B has his transplant;*
- 4.3. *that B will spend his 6 weeks of recovery at our client's residence with ample visitation extended to your client during that time (the details of which shall be agreed upon in the meeting with Ms Mbali Misimeki); and*
- 4.4. *that the terms of the current court order will fully resume once B has been cleared to do so by his treating medical specialists."*
25. On 30 May 2023, the applicant's attorney reiterated that the requested undertakings were required. She also noted that the respondent had finally acceded to the applicant's request and had returned the minor child to the applicant the previous evening at 6pm but insisted on the remaining undertakings being provided.
26. The respondent's attorney responded on 31 May 2023. She objected to being put under time constraints and indicated that the respondent's application for variation of the court order (the settlement arrangement) was being finalised. It was stated that:
- "5. *Our client will not be bullied into making undertakings, which run contrary to the best interest of the minor child, against the mediation order and which will almost certainly be in conflict with the relief sought in the variation application.*
6. *As has been indicated above, and in light of your client's high handed demands and clear unwillingness to find an amicable resolution, which is in the minor child's best interest, we re-iterate that a variation application will be served and filed in due course."*
27. The applicant's attorneys letter dated 29 May 2023 and the respondent's attorney's response thereto dated 30 May 2023 was the only correspondence annexed to the applicant's application. The correspondence preceding this was requested by me to provide further context to the application and was produced by the parties. That correspondence has been dealt with above.
28. On 1 June 2023, the applicant launched the current application.
29. The applicant stated in her founding affidavit that:
- "10.9.7 ***On 26 May 2023**, I received confirmation in a telephone call from the Social Worker at Donald Gordon Hospital that the minor child's transplant is estimated to take place in July 2023. I was informed that as part of the process, both the respondent and I would need to meet with the Social Worker on an urgent basis to agree on the post-operative care for the minor child.*
- 10.9.8. *Furthermore, I was informed by the Social Worker that should the respondent and I disagree on the post-operative care of the minor child during this period then:*
- 10.9.8.1 *the transplant process will be halted completely, and B will not receive the transplant that he desperately requires; or*
- 10.9.8.2. *that B will be removed from the care of both parents in order to proceed with the transplant in the absence of both parties.*
- 10.9.9. *In consideration of the urgency and the gravity of the situation, I instructed my attorneys, Van Rooyen Attorneys to address urgent correspondence to the respondent's attorney notifying her of my telephone call with the Social Worker and in particular the concerns raised by the Social Worker that should there be no agreement regarding B's post-operative care it will **be fatal to his urgent transplant needs.***
- 10.9.10. *I also instructed my attorney to seek an urgent undertaking from the respondent that he would continue to adhere to the court order in place between us which would remain in place post operatively. I further requested the respondent to agree to adhere to the current divorce court order from hereon until B receives his transplant. I annex my correspondence dated 29 May 2023 marked annexure "SJQ2".*
- 10.9.11. *In response thereto, the respondent's attorney indicated that the respondent intends to launch a variation of the existing divorce*

agreement. The respondent confirmed this in correspondence annexed hereto marked annexure "SJQ3" from his attorney of record dated 31 May 2023.

- 10.10. For the above reasons, this matter has become extremely urgent, and I require this Honourable Court's intervention.
- 10.11. Given that there is a divorce agreement and order in place and given that B has been given a second chance at a transplant in July 2023, it is imperative that the respondent be compelled to agree to the original divorce agreement and court order remaining in place until such time as B is fully recovered and his post-operative care has been finalised.
- 10.12. I am extremely concerned that if the respondent launches a variation application, the Social Worker will recommend to the transplant panel of Donald Gordon Hospital that B is no longer a viable candidate for a transplant, and he will be removed from the listing. This will be devastating to his health.
- 10.13. The Social Worker has made it abundantly clear to me that as parents to B the respondent and I must agree on his residency and there must not be any debate or disagreement therewith as it has an extremely negative impact on B's urgent health care needs."
30. To bolster her case, the applicant also added that:
- "14. The Social Worker has also made it clear that a shared residency regime will not work after B has received his transplant and he will need to have one primary residence during the post-operative period.
15. Furthermore, I am also concerned that the respondent's decision to seek an imminent variation of the existing divorce order will destroy all hope that B has to finally get his transplant.
16. I submit that it would be highly prejudicial to B for his transplant operation to be jeopardised again as a result of the respondent's refusal to adhere to a court order. The impact on B health should the respondent and I not agree on the post-operative care has been made clear by the Social Worker and cannot be ignored.
17. In the circumstances, I submit that this matter is urgent and needs to be dealt with as urgently as possible. It would make little to no sense for me to wait until closer to the operation time to bring this application, especially considering that the respondent made it clear on 31 May 2023 that he intends to vary the order. This will endanger the entire transplant operation."
31. The applicant supported her stance in insisting that the parties revert to their original parenting arrangement (the settlement arrangement) in her founding affidavit as follows:
- "32. It is not my intention to be difficult or act contrary to B's needs. I want to ensure that I cater for B's needs but within the confines of what is good and bad for him and that which will not affect his health. It is clear that B cannot have a shared residency arrangement going into a serious transplant operation and the Social Worker herself has made it clear that the shared residency arrangement will not work post-operatively."
32. It was on this basis that the applicant brought the present application as a matter of urgency and sought an Order:
- 32.1. "Compelling the respondent to comply with the Divorce Court Order and Settlement Agreement incorporating a Parenting Plan which was made an order of court by the Roodepoort Regional Court on 14 February 2017 (**"the Divorce Court Order"**)".
- 32.2. "That the Divorce Court Order will remain in place throughout the period of the minor child's post-operative care and entire recovery period subsequent to his transplant operation";
- 32.3. "Post-operatively, the Divorce Court Order will remain in place until such time as there is an investigation and recommendation as to the best interests of the minor child by a qualified expert, if necessary";
- 32.4. "Any investigations and recommendations made in terms of paragraph 4 shall consider the best interests of the minor child's primary residence, care, contact and his health and condition post operatively, and any recommendations made shall be in conjunction and discussion with the necessary health care professionals involved in the minor child's transplant operation".
33. Costs were only sought in the event of opposition.
34. As will become apparent hereunder, the basis upon which the application was brought was not

true and the social worker had no knowledge of the current application and was under the impression that the post operative parenting plan agreed to by the parties remained in place. What is more, Ms. Misibali made no recommendation that whilst awaiting his operation, the shared residency arrangement was not in B's best interests.

35. Apparently in response to the allegations made by the applicant concerning Ms. Misimeki in her papers and in the correspondence which preceded this application, on 2 June 2023 the respondent addressed an email to Ms. Misimeki stating:

"In our last communication late 2022 we agreed upon a post operative care plan for B in the event that I am a successful donor and if not. Rumor has it that we need to have another meeting to change this agreed care plan and that failure thereof will result in B being removed from both parent's care. Mention has also been made that a transplant date has been set, that I am not aware of. Apparently the date is set for end of June 2023. Kindly advise as this is severely concerning and needs urgent attention."

36. Ms. Misimeki's response makes it clear that she was not aware of the issues raised by the applicant in her attorney's letter and in her founding affidavit. In her response dated 6 June 2023, Ms. Misimeki stated:

"Trust you are well. My apologies for the delayed response.

1. Transplant date issue

To my knowledge, the designated transplant coordinator has provided clarity regarding B's transplantation progress. I am not aware of an allocated transplant date as the donor workup is not yet finalised. Therefore, the donor is yet to be confirmed as suitable or unsuitable.

2. Post Operative Care Plan

Indeed, the previous plan is still functional unless both families (parents) decide to change it based on different social circumstances.

3. Rumour issue

I am afraid I cannot provide feedback based on rumours, as it may be out of context or misinterpreted. I prefer addressing concerns directly with factual and clear information."

37. On receipt of this email from the respondent, Ms. Misimeki obviously became concerned that the post-operative care plan was no longer agreed to by the parties. Ms. Misimeki, accordingly, requested an urgent meeting with the parties to discuss B's post operative parenting plan on 6 June 2023. In this email she proposed a meeting between the parties to resolve the issues:

"Trust you are well. I would like to set up an urgent combined virtual family meeting, to ensure that we are all in agreement regarding B's Post-Operative Care Plan. I am proposing that we possibly meet on Wednesday (07 June 2023) at 10:30am or Friday (09 June 2023) at 12:30pm. May you possibly indicate your availability? Below is the meeting agenda. You are welcome to add any additional issues of concern or discussion relevant to B' Transplant Plan. Thanks.

Meeting Agenda

1. Transplant date and Donor Workup Update

2. B's Transplant Coordinator

3. B's Transplant Post-Operative Care Plan

4. Communication with parents and limitation

5. Family legal issues concerning B

5. Other" (sic)

38. The respondent responded to the meeting request on the same date (6 June 2023 as follows:

"Unfortunately, Sinead and I are engaged in a legal matter in the High Court scheduled to be heard on the 13th of June 2023. I suggest that we postpone this meeting requested until the case has been heard and finalized and new instruction has been received.

I will my do my utmost to be present after said hearing took place to discuss further."

39. The applicant criticised the respondent's response in her replying affidavit, claiming that the respondent was intent on renegeing on the post-operative care agreement. However, the respondent's response was reasonable; he did not refuse to co-operate with Ms Misimeki or to adhere to the post operative care plan but sought only that the meeting be postponed until after

the outcome of the applicant's application concerning same. As far as the respondent was concerned, the post operative care plan had been agreed as recorded by Ms. Misimeki. It was the applicant's attorney and/or the applicant who sought to add further riders to this arrangement as to when and under what circumstances it would expire.

40. Due to my concern that Ms Misimeki did not appear to have any knowledge of the fact that the post operative care plan regarding B was now in dispute and had made no reference to her alleged recommendation that the shared residency plan hitherto in place was no longer in B's best interest in view of his deteriorating health (as alleged by the applicant), I requested that the parties ask Ms. Misimeke to confirm this.
41. In response to my request, Ms. Misimeke made it plain in an email responding to the respondent's attorney dated 19 June 2023 that she was not engaged to make any recommendations as to the long-term parenting plans of the parties and was only concerned with B's post operative care. As far as she was concerned, after the six-week post operative period, the parties would revert to their original parenting plan (which at the time that she engaged with the parties was the shared residency arrangement) or "a functional plan as mutually agreed". She did not recommend that either prior to or after the period of the post operative care plan, that the parties cease the shared residency arrangement and revert to the settlement arrangement.
42. Ms. Misimeke stated in her email dated 19 June 2023 that:

"To my knowledge, there are no changes to B F's current Transplant Post-Operative Care Plan. If so, the parents have not yet communicated any changes with me. Therefore, B F will be under the care of S Q for six weeks post-operatively thereafter, the parents may revert to their original parenting plan or a functional plan as mutually agreed."

43. A reasonable inference may be drawn from Ms. Misimeki's emails dated 6 June 2023 and 19 June 2023 that she had not made any threats that should the parties not agree a new post-operative parenting plan this would jeopardise B's transplant prospects and had made no recommendation as to what parenting plan would be in B's best interests going forward until he received his transplant. Had she expressed the views ascribed to her by the applicant in the founding affidavit and in her attorney's correspondence, one would have expected her to have addressed this.
44. It is significant that in response to the email from Ms. Misimeke dated 6 June 2023 annexed to the respondent's answering affidavit, the applicant did not deal with the contents of this email and its obvious implications, but rather simply said:

"4.9. I am horrified and mortified at the respondent's complete lack of empathy for his child and the need to set aside our differences and put B before himself in this matter. This is the not only clear from the respondent's submissions in the answering affidavit, but even when one looks at how the respondent goes about addressing correspondence to the Social Worker involved in the matter. From his communication with the Social Worker, it is my opinion that the respondent is unnecessarily conflict driven, stubborn and obstructive."

45. As the inferences which appeared could reasonably be drawn from Ms. Misimeke's 6 June 2023 email were serious as it meant that the applicant may have committed perjury, I requested that the parties require Ms. Misimeki to confirm the allegations made by the applicant concerning her in the founding affidavit under oath in an affidavit. This was necessary as Ms. Misimeki had not provided any confirmatory affidavit to support the applicant's allegations concerning her alleged recommendations, notwithstanding that such recommendations were cardinal to the applicant's application.
46. In response to my further request that Ms. Misimeki clarify whether she admits the allegations made in the founding affidavit concerning her, she stated:

"2.

This is to confirm that a telephone conversation occurred between myself and Ms S Q on 26 May 2023 however, the statements reflected on point 10.9.7, 10.9.8, 10.9.8.1 and 10.9.8.2 are inaccurate and not a true reflection of our telephone conversation. Just to clarify, I phoned back Ms S Q on 26 May 2023 in response to her email sent to me and my colleague on 25 May 2023. On her email, Ms S Q was seeking clarity on a way forward regarding the patient's post-operative care arrangements since Mr P F is unsuitable to donate. The contents of the call are as follows:

- I (Ms Misimeki) told Ms S Q that, there is no need to change the current Transplant-Post-Operative Care Plan unless, both parents decide to alter it based on different social circumstances.*
- The parenting plan should also include or consider B's health/Medical needs.*

- *B will not be unreasonably removed from home unless he is declared as a child in need of Care and Protection (an incident needs to be formally reported thereafter, further investigations will need to be conducted before a decision may be reached and authorised by Court). Furthermore, removal of a child is a last resort, as family preservation takes priority. I made an example of the above-mentioned to help Ms S Q to understand the severity of B's condition and the potential negative implications of unresolved issues/ conflict amongst the two families. If an amicable solution is not attained, B may always be at risk and compromised in various ways e.g. health related, socially, emotionally and psychologically etc. Hence, both parents always need to act in the best interest of the minor patient (by taking responsibility and protecting the patient).*
- *I (Ms Misimeki) advised Ms S Q to approach the Office of the Family Advocate for further assistance in dealing with statutory and custody issues, as I cannot assist in this regard (it is not within my current scope of practice).*
- *I (Ms Misimeki) referred Ms S Q to her transplant coordinator pertaining issues of donation, updates and transplantation process. No transplant date was confirmed as the donor workup was still ongoing at the time of our conversation. Transplantation is dependent on a confirmed suitability of a donor and patient/recipient.*

3.

- *B F is currently listed on Top 50 for cadaveric kidney donation.*
- *Suitability of a living donor has not yet been confirmed therefore, the transplantation date is not yet available.*
- *To my knowledge, the current Transplant Post-operative Care Plan is still valid as both parents are still in agreement with the plan. Furthermore, the transplant process is independent from the current Court process and no instruction was given by the social worker (Ms Misimeki) to B's parents for their court case to be finalised prior to transplantation. Therefore, the current Court process presently has no bearing on B transplantation, and the already agreed upon post-operative care arrangements.*
- *in Chapter 9, Section 150 of the Children's Act 38 of 2000"*

47. *B F will not be removed from his home by the transplant social worker, and there is no transplant process that will be completely halted. A child is only removed from his/her home when proven to be vulnerable, compromised and in need of care and protection as outlined Ms Misimake's responses indicate that the entire basis upon which the applicant's application was premised was false. It had absolutely nothing to do with B's best interests, his impending kidney transplant or his health. It had everything to do with the applicant pre-empting the respondent's intended application to seek a variation of their settlement arrangement which the applicant had sought to enforce.*

48. *I might point out that it was the clear intention of the mediation agreement that after the expiry of the further six-month period (during which the shared residency plan was extended), the arrangement would be reviewed, and not that it would in the absence of agreement, automatically revert back to the settlement arrangement. It was thus incumbent on the parties to meaningfully engage regarding the terms of the parenting plan and if necessary, undergo mediation to absolve their differences, having regard to B's best interests.*

49. *Although the applicant's attorney did tender to do this after the expiry of B's post-operative care period, he nevertheless insisted that the respondent immediately revert to the terms of the settlement arrangement. This was repeated by the applicant in her founding affidavit. The stance taken by the applicant and her attorney was based on two premises: The first was that this was based on the advice of Ms. Misimake; the second was that B's transplant was imminent and due to take place at the end of July 2023.*

50. *I have already indicated that the first premise was not true; neither was the second. It is apparent both from Ms. Misimake's response dated 6 June 2023 to the respondent she stated:*

51. *"I am not aware of an allocated transplant date as the donor workup is not yet finalised.*

Therefore, the donor is yet to be confirmed as suitable or unsuitable.

Moreover, from the email dated 25 May 2023 from the applicant to Ms. Ms. Monicaa Lepaaku, copying Ms. Misimeki annexed by the applicant to her replying affidavit, it is clear that it was the applicant who sought clarity regarding the post-operative arrangement for B, now that it had been determined that the respondent was not a suitable donor. In this email the applicant stated:

"@Monicca, I was hoping to get some clarity on the progress of B's transplant. I believe we are moving forward with the donor and transplant date is looking to be closer to July, is this accurate? Also, @Mbali I would just like to confirm arrangements for the post recovery process, we did agree for B to recover at home with me, I just need to fully understand the circumstances of the new donor considering Paul is no longer the donor. Are we required to sign a new document?"

I would also like to confirm our discussion based on the split times between myself and Paul (mostly concerning the 1 week alternating arrangement), we had agreed that this was not going to work for B post transplant and moving forward would need to find another solution, could I please have your recommendation on this and what would be in the best interest of B concerning his recovery."

Ms. Lepakuu responded on 25 May 2023 making it clear that the transplant process was nowhere near complete and that B's transplant was not imminent and did not confirm that it was anticipated that it would take place at the end of July 2023: "B is on the Top 50 list and he is currently not required to update any work up tests until the donor is ready or suitable to donate.

Penny is the donor's coordinator and has given an estimate of when they might be done with the tests.

The transplant will depend on the suitability of both the donor and the recipient.

I will keep you and Paul updated as soon as I know the status of the donor."

The applicant states that her sister's fiancé has been identified as a suitable donor. It is clear that as at 25 May 2023, less than a week before the application was launched, there was no assurance that B's transplant would take place in July 2023. It is unclear why this correspondence was not annexed to the founding affidavit.

To advance her case for urgency, the applicant submitted a letter on the day of final argument from B's nephrologist, Dr. Errol Gottlich, dated 13 June 2023. He reported that:

"B is currently stable on dialysis. However, it is strongly recommended that if his current potential donor is approved by the transplant centre and department of health, he should proceed to transplantation as soon as possible.

Delaying transplant can lead to a greater risk of cardiac, vascular, bone, metabolic & psychological complications."

This does not support the urgency of the application, but rather supports the urgent need for B to receive a transplant. When I asked that Ms. Misimeki confirm under oath the allegations concerning her in the founding affidavit, her attorney requested to submit a further letter from Dr. Gottlich. I indicated I would receive it should the respondent not object. The respondent had no objection. No further letter, was however submitted.

I again repeat that B's deteriorating health and urgent need for a transplant does not justify the bringing of this urgent application.

No doubt aware that the fact that the joint parenting plan had been in place for three years would undermine the applicant's opposition to its continuance, the applicant falsely claimed that Ms. Misimeke had recommended that it was in B's best interests the parties terminate their shared residency arrangement and return to the settlement arrangement in view of B's deteriorating health situation. Ms Misimeki had recommended no such thing. She had also not stated that should the parties not agree to B's post-operative care, B would no longer be eligible for a transplant or would be removed from both parents; on the contrary, she was of the view that the post-operative agreement reached by the parties was still in place.

The allegations set out by the applicant in paragraph 19 of the applicant's founding affidavit indicate the real reason for the applicant wishing to cancel the shared residency arrangement and to revert to the settlement arrangement; this has nothing whatsoever to do with B's deteriorating health or his best interests and has everything to do with the applicant's perceived difficulties with the shared residency arrangement. Her complaints are, *inter alia* that:

1. B has exhibited aggressive behaviour, which it is assumed the applicant attributes to the respondent;
2. The respondent took the applicant on a hunting trip and witnessed him shooting a giraffe which traumatised him;
3. The respondent has changed B general practitioner without her consent;
4. The respondent baptised himself and B in the applicant's absence;
5. The applicant is only allowed to call B at 5pm when he is residing with the respondent and sometimes the respondent does not answer;
6. The respondent has caused B to disrespect the applicant;
7. The respondent has multiple firearms at home, works for the police and has a bulletproof vest and fears his father being shot in the head;
8. B has been exposed to a lot of killing, hunting and weapons, which has impacted on his emotional state; B drew a picture of the applicant's home with the words "KILL" over it;
9. B believes he has to kill animals to provide food for his family;
10. The respondent allows B to sleep in his bed, which has caused B to question why he can't sleep in the applicant's bed;
11. B feels he has to show the applicant that he is tough and strong;
12. Before play therapy, B had terrible nightmares and cried in his sleep;
13. B behaviour has to be corrected when he returns from the respondent grumpy and disrespectful towards the applicant; and
14. The extended time that B has spent with the respondent has altered his emotional stability.

The respondent points out that many of these complaints were raised by the applicant prior to the mediation process. That this is so appears from the applicant's attorney's letter dated 12 July 2021 in which many of these complaints were raised. On 16 July 2021, the respondent's attorney undertook on behalf of the respondent that:

1. he would not expose B to the shooting of animals on any future hunts he and his family attended; and
2. he would allow the applicant telephonic contact with B on a daily basis during the period he resided with the respondent. The respondent's attorney also assured the applicant's attorney that all of the respondent's firearms were safely locked up and were unloaded.

In her replying affidavit, the applicant alleged that the respondent's opposition served his self-interests and failed to have regard to the best interests of B. She noted that the respondent had finally agreed to allow B to reside with her for six to eight weeks post-operatively; this however, had already been agreed to by the parties at the end of December 2023 and the respondent had not indicated that he did not intend to comply therewith.

This notwithstanding, the applicant alleges in her replying affidavit that the parties are unable to agree where B is to recover post-operatively and whilst B is recovering and recuperating after his transplant. This is not correct. The respondent not only agreed that B would reside with the applicant for six weeks post-operatively, but also that, as recommended by Ms.

Misimeki, that after six weeks the parties will return to the current arrangement (which I have already indicated meant their shared residency arrangement) unless advised otherwise by B's doctor. As the respondent had already agreed to this, there was no need to bring an urgent application to secure this.

In her replying affidavit the applicant insists that the respondent's threats to bring a variation application render her application urgent. This makes no sense: Should the respondent bring a variation application, the court seized with that application would consider the merits of the application and the best interests of B in the circumstances then facing B. That court, depending on the available evidence may delay the reimplementation of the shared residency plan until after B's transplant, may extend the period during which B recovers at his mother's residence before returning to a shared residency arrangement or may find on the facts before it that the shared residency plan is not in B's best interests even after he has recovered from his transplant. The applicant cannot pre-empt this inquiry under the guise of urgency.

The applicant also criticises the respondent for failing to indicate the basis for the variation application. I reject this contention. It is clear from the prior correspondence between the parties' attorneys that what the respondent sought was to vary the settlement arrangement in line with the status quo - ie the shared residency arrangement that has been in place since March 2020 in view of the COVID 19 pandemic and it which it has been agreed would continue for a further period of six months following the mediation agreement until 17 January 2023, when it was agreed it would be reviewed.

There is also no basis for the suggestion made by the applicant in her replying affidavit that the respondent will launch his variation application when B is at his weakest. When and if that application is brought, it will be assessed on its merits and on what is in B's best interest having regard to his then prevailing medical condition. It is assumed that in bringing such an application the respondent will not seek to interfere with B's agreed post-operative arrangements and that he will heed any medical advice as to whether this arrangement should persist for a period of beyond 6-8 weeks in light of B's post-operative medical condition. However, once B has recovered and has resumed his schooling and the risk of infection has diminished, I can see no impediment to the respondent bringing an application to vary the settlement arrangement.

I thus reject the applicant's submission that:

I accordingly submit that the respondent's threats to launch a variation application do render the matter urgent because it will harm B directly. It will have an impact on his life which is not something that B needs to be faced with at the moment. The respondent if successful with his variation application will change B's residency without consideration of his medical needs."

The applicant both insists that the respondent comply with the settlement arrangement (which she alleges is the default position since the lapsing of the mediation agreement) and criticises him for threatening to bring a variation agreement in view of B's serious medical condition. The respondent did no such thing: The respondent merely sought the applicant's co-operation during February 2023 after the shared residency arrangement became open to review to agree to formalise their shared residency arrangement (which had been in place for almost 3 years) and make it permanent. He sought to engage the applicant on their future parenting arrangement and asked what proposals she wished to make as to their parenting plan going forward; he never threatened not to abide by their post-operative agreement that B reside with the applicant.

On 30 September 2022 the parties held a recorded meeting with Ms. Misimeki which was uploaded onto case lines, which the parties requested I listen to. From this recording, it would appear that at this stage it was proposed by Ms. Misimeki that should the respondent be the donor, it would make sense for B to recover post-operatively at the applicant's residence for a period of six to eight weeks (and not four months as had initially been contemplated). However, should he not be the donor and that the donor be a family member of the applicant, then it was suggested that it would be more appropriate that B recover post-operatively with the respondent. This was particularly so as the applicant had obtained a restraining order against the respondent and he would be precluded from visiting B at the applicant's home. The applicant, however, stated that she would not object to the respondent visiting B at her residence during his post-operative recovery period.

During the meeting, Ms. Misimeke warned the parties that the most important aspect of B's post-operative care was the provision of his medication which was cardinal to the success of his transplant operation. As I understand this, this medication is required to suppress B's immune system and is crucial to ensure that B's immune system does not reject his new kidney. So crucial is this aspect to B's recovery and the success of his transplant that Ms. Misimeke warned that parties that should they not take the provision of B's medication seriously, there was a risk that B would be removed from their care. This, however, in no way supported the allegations made by the applicant in her founding affidavit.

Although I have no application for variation of the Court Order before me, I can see no reason why prior to B's transplant the shared residency arrangement should not persist, provided that this is not detrimental to B's health. I do not see it as

automatic that after the expiry of the mediation agreement, the automatic consequence was that the settlement arrangement was reinstated. As I have said, the mediation agreement required further engagement, having regard to B's best interests. In this application, the applicant sought to manufacture grounds to support her contention that it was not in B's best interest that the status quo (the shared residency arrangement) continue.

The applicant has accused the respondent of being a law unto himself; I am afraid that the applicant's insistence that on expiry of the mediation agreement the parties resume the settlement arrangement without any true examination of B's best interests through further mediation or after having obtained expert advice (truly given), lacks proper judgment. B had by this time clearly become accustomed to the shared residency arrangement and the time he was able to spend with his siblings in both the applicant and respondent's families.

Instead, the applicant brought this application on the basis of manufactured urgency regarding the advice she had been given of as to the date of B's transplant and a pure fabrication as to the advice she had been given as to the suitability of the parties' shared residency arrangement. This constitutes a serious abuse of the process of this court. In both respects the applicant committed perjury.

I thus have no hesitation in dismissing the applicant's application for lack of urgency with costs. However, in view of the fact that the grounds of urgency were manufactured by the applicant as well as the advice given by Ms. Misimeki, it is appropriate that the displeasure of this court is expressed in an order of costs.

Both the mediator and Ms. Msimeke have impressed upon the parties to seek professional assistance and therapy to assist them in managing their differences and ensure that in parenting B they act in his self-interests. I admonished the parties, who were in court, for failing to act in the sole interest of B, who was extremely sick and needed the support of both of his parents. I also indicated that it was my view that the arrangement made through the mediator that each parent alternate in taking B for his dialysis treatments was in his best interests.

It is the hope of this court that B receives his transplant as soon as possible and that the parties agree to the parenting arrangement concluded with the social worker on 30 December 2022 without incidence. It is further hoped that the parties can amicably resolve their parenting rights after B's transplant in the best interests of B through negotiation or mediation and without resort to the courts in the interests of B. It is my wish that they put their differences aside and co-operate with each other to ensure that B receives his transplant, that they both are meticulous in administering his post-operative medication and that they delight in their shared love of B and act in his best interests.

In the circumstances I make the following order:

1. Dismissing the applicant's application both for want of urgency and on the merits.
2. Directing the applicant to pay the costs of the application.

BY THE COURT

S.M. WENTZEL AJ

**Acting Judge of the High Court
Gauteng Local Division, Johannesburg**

Date of the hearing: 13 June 2023

Date of judgment: 15 August 2023

Appearances:

For the Applicant:

A Salduker

Instructed by:

Van Rooyen Attorneys

For the respondent:

L. Matsiela

Instructed by:

Schuler Heerschop Pienaar Attorneys