



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

CASE NUMBER: 34758/2014

REPORTABLE: YES/NO
OF INTEREST TO OTHERS JUDGES: YES/NO
REVISED

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DATE SIGNATURE

In the matter between:

LIFE HEALTHCARE GROUP (PTY) LTD

FIRST APPLICANT

DR T MOODLEY

SECOND APPLICANT

And

JMS (as parent and guardian of

the infant child MT)

FIRST RESPONDENT

BS (as parent and guardian of

the infant child MT)

SECOND RESPONDENT

Date heard: 30 September 2014

Date order granted: 30 September 2014

Date reasons furnished: 20 October 2014

REASONS FOR JUDGMENT

MODIBA AJ:

- [1] This was an application for an order authorising the second applicant to administer blood transfusion to the respondents' infant boy child MT¹ (the child) as and when in the opinion of the second applicant, the infant child required blood transfusion.
- [2] The application came before me in urgent court on 30 September 2014. After reading the papers and hearing counsel, I granted the order that appears at the end of this judgment on the same day and deferred my reasons for judgment. The reasons are set out below.
- [3] The application was brought by notice of motion unsupported by affidavits. Due to the urgent nature of the application, the applicants requested leave, which I granted, to furnish evidence orally under oath. The respondents opposed the relief sought by the applicants. However, they did not present oral evidence.

THE PARTIES

- [4] The first applicant is Life Healthcare Group (Pty) Ltd, a company registered under the laws of the Republic of South Africa. The second applicant is Dr T Moodley (Dr Moodley). She is a paediatric lung specialist. The respondents are JMS and BS (the parents). They are parents and guardians of the child. The child was admitted to a hospital operated by the first applicant. Dr Moodley is one of the medical professionals treating the child.
- [5] Dr Moodley is the only witness who testified. Consequently, her evidence is common cause. She testified that she started treating the child at birth. The child was born by emergency caesarean section on 8 September 2014 at 29 weeks gestation, weighed 1.3kg at birth and was three weeks old when the application was heard. He presented with respiratory distress and was immediately admitted into the neonatal ICU. Dr Moodley gave a detailed account of the child's condition, treatment administered, the child's poor

¹ I have given the child and his parents pseudo names to protect the identity of the child.

response to treatment, and further complications experienced as a result of the child's poor response to the treatment. The child is facing imminent respiratory and cardiac failure and is in urgent need of blood transfusion. While transfusing the child will not guarantee his improvement, it is highly likely that if he is not transfused, he will suffer a fatal episode.

[6] Dr Moodley further testified that from the time she started treating the child, she kept the parents informed of the child's condition, the treatment she was administering, his poor response to treatment and the complications he was experiencing as a result. She also discussed with them the child's need for blood transfusion. They objected to the child being transfused citing religious reasons. They expressed their desire for all alternatives to blood transfusion to be explored. She consulted with the parents' alternative to blood transfusion counsellor and explored all available medical alternatives. The child's condition still did not improve, hence the applicants brought this application.

[7] Counsel for the respondents submitted that the parents' desire is that the child should not be transfused for religious reasons.

ISSUE TO BE DECIDED

[8] The issue to be decided is whether the court should authorise medical treatment for the child as a measure to preserve the child's life, despite the parents' objection to treatment for religious reasons.

THE APPLICABLE LEGAL PRINCIPLES

[9] In terms of section 129 (4) (a) of the Children's Act 38 of 2005 (the Act), the parents of a child under the age of 12 are authorised to consent to the child's medical treatment. In terms of section 129 (10), no parent may withhold consent for the medical treatment of a child by reason only of religious or other beliefs, unless the parent can show that there is a medically accepted alternative choice to medical treatment. Section 126 (9) gives the High Court

or the Children's Court jurisdiction to consent to the medical treatment of a child in any instance where a person authorised by the Act to consent refuses or is unable to give consent.

- [10] This case presents several conflicting rights namely, the parents' right to freedom of religion against the child's right to life as well as the right to have the best interests of the child inform any decision concerning the child. Under the South African Bill of Rights, everyone has the right to freedom of conscience, religion, thought, belief and opinion.² Everyone has the right to life.³ A child's best interests are of paramount importance in every matter concerning the child.⁴
- [11] Although the rights in the Bill of Rights are entrenched, they are not unfettered. They may be limited by a law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.⁵
- [12] Counsel for the applicants referred me to *Department of Health v Sepeng*, an unreported judgment delivered by Seriti J in the Transvaal Provincial Division of the High Court of South Africa on 4 November 2005 and *Hay v B and Others* 2003 (3) SA 492 (W). The court in these two cases dealt with similar facts. Although the judgments were delivered before the Act came into operation and as a result do not deal with the interpretation of section 129,⁶ I am persuaded by the dicta in both cases because in my view, they uphold the spirit and letter of section 129 (10).

² Section 15(1) Republic of the South Africa Constitution, 1996 (the Constitution).

³ Section 11 of the Constitution.

⁴ Section 28 (2) of the Constitution.

⁵ Section 36 (1) of the Constitution.

⁶ The Children's Act 38 of 2005 was enacted on 8 June 2006 and came into effect on 29 June 2007 (Proc 13/ GG 30030/ 20070629).

[13] In the *Sepeng* and *Hay* decisions, the court weighed the conflicting rights set out in paragraph 9 of this judgment. The court held that the parents' right to religion is not unfettered, that the right to life is an inviolable right and to the extent that the parents' right potentially violates the child's right to life, it is in the best interest of the child that the child's right to life is protected. The content of the child's right to life includes the right to receive medical treatment, especially where such treatment would preserve the child's life.

[14] In my view, the limitation imposed by section 129 (10) on the parent's right to object to the medical treatment of a child for religious reasons reflects a balancing of the child's right to life and to have his best interests inform all decisions concerning the child against the parents' right to religion. In *S v Makwanyane*⁷, the Constitutional Court held that the right to life is the most basic constitutionally protected value. In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), the Constitutional Court held that

'Courts throughout the world have shown special solitude for protecting children from what they have regarded as the potentially injurious consequences of their parents religious practices. It is now widely accepted that in every matter concerning the child, the child's best interest must be of paramount importance.'⁸

[15] It is in the child's best interests that his life is preserved. Dr Moodley has done all she could to preserve the child's life without compromising the parents' right to religion, by exploring all available medically accepted alternatives to blood transfusion without success. From her testimony although not guaranteed, blood transfusion is the only best medical treatment available that could preserve the child's life. The Act is a law of general application. The limitation it imposes on the parents' right to religion is justified by section 36 of the Constitution.

[16] The parents' objection falls squarely within the ambit of the prohibition in section 129 (10). Their refusal to consent to blood transfusion for the child is

⁷ 1995 (3) SA 391 (CC) at para 144.

⁸ Para 41 and cited with approval in *Hay v B* (*supra*).

unlawful. In the premises, the applicants have made a proper case for the court to exercise its powers in terms of 129 (9).

THE ORDER

[17] I therefore confirm the order granted on 30 September 2014. For convenience, I have set out the order below.

1. The forms and service provided for in the Uniform Rules of Court is dispensed with and this application is heard on an urgent basis.
2. The applicant is granted leave to furnish evidence in these proceedings by means of oral evidence under oath.
3. The applicants are authorised to administer blood transfusion to the child as and when required by the child in the opinion of the second applicant.

MODIBA AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Counsel for the applicant: Advocate A Govender

Instructed by: Norton Rose Fulbright South Africa (incorporated as
Deneys Reitz Inc)

Counsel for the respondents: Advocate AF Bodill

Instructed by: Farnsworth-Hughes Attorneys