

CENSORED DATA FOR PRIVACY

2024 SCJ 450

SCR No: FD 651/23 (M)

THE SUPREME COURT OF MAURITIUS
(FAMILY DIVISION)

In the matter of:-

CENSORED DATA FOR PRIVACY (born CENSORED DATA FOR PRIVACY)

Applicant

v

CENSORED DATA FOR PRIVACY

Respondent

In the presence of:

The Ministère Public

Co- Respondent

JUDGMENT

By way of motion paper supported by affidavit, the applicant is moving this Court to grant prayers A (i), (ii) and (iv) only (the other prayers having been dropped) and which read as follows:-

‘A.

- i. *Declaring that Respondent is incapable of exercising his parental authority (“l’autorité parentale”) or any attributes thereof over the minor child Mayur Singh CHOOLHYE, born on 17/08/2012;*
- ii. *Divesting and depriving Respondent of the right to exercise his parental authority (“l’autorité parentale”) or any attributes thereof over the minor child Mayur Singh CHOOLHYE, born on 17/08/2012;*
- iv. *Conferring the Applicant with the exclusive right to exercise parental authority (“l’autorité parentale”) over the minor child Mayur Singh CHOOLHYE, born on 17/08/2012.’*

The applicant has averred in her application that she civilly married the respondent under the legal system of community of goods on 26 December 2011. One child, namely Mayur Singh Choolhye, was born on 17 August 2012 from the said marriage, as evidenced by Birth Certificate bearing No. 164 of 2012. A provisional decree of divorce was pronounced on 04 November 2022 between the applicant and the respondent on the ground of respondent's *faute*. The custody of the minor child was entrusted to the applicant and the respondent was granted a right of visit on terms agreed between them. The said divorce was made permanent on 06 February 2023. The applicant has averred that the respondent had never tried to contact her or to meet the minor child since the latter had been two years old. The applicant also stated that the respondent had never cared for the child or showed any interest towards the applicant and the minor child. He also did not provide financially for the child's upbringing and wellbeing. The minor child did not recognise the respondent as his father. The applicant averred that she was the one to give the minor child both paternal and maternal love and as such, she was praying for the above- mentioned orders.

The respondent left default at the Court sitting of 06 June 2023 though personal service was effected upon him.

The applicant deposed under solemn affirmation to the effect that the minor child was currently eleven years old and the respondent had not met the minor child since he was two years old. She shouldered the sole responsibility of the child, who was mentally retarded and had educational difficulties. She stated that she tried to contact the respondent by telephone and even tried to meet him in person at his residential address but to no avail. She confirmed that the respondent had never contributed towards the financial needs of the child. She did not insist for any alimony from the respondent in the divorce case, as she knew that he would not contribute to same.

Under cross-examination, the applicant stated that the respondent did not bring any gift for the minor child for Christmas and never tried to meet the child for his birthdays. She laid emphasis upon the fact that the child had forgotten his father and had no feelings for him. She stated that she last met the respondent when he came for the divorce proceedings. On that day, when she tried to show him the pictures of their child, the respondent merely stated that he was not interested. He also stated that he did not care whether she was going to lodge the present application.

The *Ministère Public* has filed its conclusions, which are favorable ones.

I have duly considered the evidence on record, the affidavit, the motion paper and the favourable conclusions of the *Ministère Public*.

The prayers A(i), (ii) and (iv) of the motion paper mainly deal with the granting of the exclusive right to exercise parental authority to the applicant and depriving same to the respondent. The granting of '*l'exercice de l'autorité parentale*' to one parent is governed by Article 373 alinéa 1 and 389 of the *Code Civil Mauricien* which provide as follows:

"373. Perd l'exercice de l'autorité parentale ou en est provisoirement privé celui des père et mère qui se trouve dans l'un des cas suivants:

1. S'il est hors d'état de manifester sa volonté, en raison de son incapacité, de son absence, de son éloignement ou de toute autre cause.

389. Si l'autorité parentale est exercée en commun par les deux parents, ceux-ci sont administrateurs légaux. Dans les autres cas l'administration légale appartient à celui des parents qui exerce l'autorité parentale."

In the case of **Peerbaye v MJL & anor** [\[2022 SCJ 141\]](#), the Court held that the applicant's case fell squarely within one of the conditions provided in Article 373 alinéa 1 of the *Code Civil Mauricien* inasmuch as the father had cut all ties with the minor child to whom he no longer showed any paternal bond which was tantamount to estrangement and alienation and the following extract is of relevance:-

"The respondent's indifferent attitude towards the minor child, whom he suspects is not his biological son, indicates that there has been 'éloignement' on his part. He has not only geographically distanced himself as he has already left the country and his date of return is unknown but equally socially inasmuch as he has cut all ties with the minor child to whom he no longer shows any paternal bond as to be tantamount to estrangement and alienation. He is not present to assume his 'devoir de surveillance' and 'd'éducation' in respect of the child nor perform his obligations of a father to 'nourrir, entretenir et élever' the said child. He is therefore clearly in a situation where he is both unwilling and 'hors d'état de manifester sa volonté'".

Additionally, the *Ministère Public* in its favourable conclusions has referred to the following extract in the case **Salamun B. N. C. v Aumeeraully M. F. & Anor** [\[2023 SCJ 388\]](#), which stipulates that :

‘It stands un rebutted that the respondent never showed any affection for the minor child and did not assist the applicant financially. Such behaviour of the respondent established his ‘désintérêt’ towards his child and indicated an ‘éloignement’ on his part and he was as such ‘hors d’état de manifester sa volonté’.

The same reasoning applies to the facts and circumstances of the present case. The unchallenged evidence of the applicant demonstrates that the application falls on all fours under Article 373 alinéa 1 in that there has been ‘*éloignement*’ on the part of the respondent in view of his disinterest in his minor child for the last 9 years so that he is ‘*hors d’état de manifester sa volonté*’. Furthermore, the respondent has never financially contributed to the upbringing and well-being of the minor child. The applicant explained in a truthful manner that she met the respondent for the divorce proceedings and the latter did not show any interest for the child when she attempted to show to him the pictures of the child. She also explained in a convincing manner that the child did not remember his father and was not emotionally attached to him.

For all the reasons given above, I find that the applicant has established her case on a balance of probabilities. By virtue of Article 373 alinéa 1 of the *Code Civil Mauricien*, I grant prayer A(iv) of the motion paper and confer to the applicant the exclusive right to exercise parental authority (*‘l’autorité parentale’*) over the minor child, namely Mayur Singh Choolhye, born on 17 August 2012. Prayers A(i) and (ii) of the motion paper are also granted so that the respondent is declared incapable of exercising his parental authority (*‘l’autorité parentale’*) and is deprived of the right to exercise his parental authority (*‘l’autorité parentale’*) over the said minor child.

R. D. Dabee
Judge

25th September 2024

For Applicant : CENSORED DATA FOR PRIVACY , **Attorney at Law
of Counsel**

For Co-Respondent : CENSORED DATA FOR PRIVACY **State Attorney**
CENSORED DATA FOR PRIVACY , **Senior State Counsel**