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

CASE NO: 20/40944

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

17/08/2021
DATE

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SIGNATURE

In the matter between:

REID, ROBERT CLIVE Excipient
(Identity No. 8309025026086)

and

GORFIL, CANDICE LYN Respondent
(Identity No. 8605270033085)

In re:

GORFIL, CANDICE LYN Plaintiff
(Identity No. 8605270033085)
and

REID, ROBERT CLIVE Defendant
(Identity No. 8309025026086

JUDGMENT

ENGELBRECHT, AJ:

Introduction and background

1. Ms Candice Lyn Gorfil (Ms Gorfil) has instituted action for the payment of amounts allegedly due to her under an agreement allegedly concluded with Mr Robert Clive Reid (Mr Reid). The agreement, which is attached to the Particulars of Claim (Particulars), purports to regulate certain parental rights and duties, including Mr Reid's obligation to pay maintenance and school fees for a minor child borne of a romantic relationship between the parties after their separation. The agreement is unsigned, and Ms Gorfil essentially pleads that the written agreement is a recordal of an oral agreement between the parties, which agreement was given effect to by reason of the implementation of its terms. Her claim is for payment of arrear maintenance and school fees as provided for in the agreement.

2. In this application, Mr Reid takes an exception against the Particulars on the basis that they do not disclose a cause of action. Mr Reid's case, as presented by Ms Georgiou, hinges on sections 33 and 34 of the Children's Act 33 of 2005 (Children's Act). The submission is that section 34(1)(a) of the Children's Act is peremptory, requiring a parenting plan to be in writing and that, where such a parenting plan is to be made an order of court, certain requirements must be met. The unsigned agreement, so says Mr Reid, does not comply with these requirements, although purporting to be a parenting plan as contemplated in section 33(3). In circumstances where the "*parenting plan"* does not comply with the formalities, it is his submission, through Ms Georgiou, that the agreement is not enforceable. For this reason it is submitted that the Particulars do not disclose a cause of action. He asks for the exception to be upheld, for the Particulars to be set aside and for Ms Gorfil

to be granted leave to deliver amended Particulars within 20 days of the grant of the order sought.

3. Ms Gorfil opposes the exception. Ms De Wet SC, who appeared for Ms Gorfil, called upon the Court to interpret and apply section 34 of the Children's Act in a manner that is consistent with the constitutionally enshrined rights of children as given expression to in the Children's Act, and to afford section 34 a meaning that is (i) constitutionally compliant, (ii) coherent with the remaining provisions of the Children's Act; and (iii) consistent with provisions in other statutes such as the Maintenance Act 1999 of 1998 (Maintenance Act). It is submitted that such an interpretation and application of section 34 will lead to the conclusion that Mr Reid is incorrect in his position that no cause of action can be sustained on the basis of the agreement on which Ms Gorfil relies.

4. The debate between the parties calls upon this Court to consider the relevant constitutional and statutory provisions in order to form a view whether Mr Reid is correct in his assertion that Ms Gorfil cannot sustain a cause of action on the agreement as pleaded. The starting point, as I see it, must be the provisions on which Mr Reid relies.

The Children's Act

5. Section 33(1) of the Children's Act allows co-holders of parental responsibilities and rights in respect of a child to agree on a "*parenting plan"* to determine "*the exercise of their respective responsibilities and rights in respect of the child".* The language of the provision is not peremptory.

6. Under section 33(2), such co-holders of parental responsibilities and rights must seek to come to agreement on a "*parenting plan"* before coming to Court,

in cases where they are experiencing difficulties in excercising their rights and responsibilities.

7. Section 33(3) provides that a parenting plan "*may determine any matter in connection with parental responsibilities and rights",* including (i) where and with whom the child is to live; (ii) the maintenance of the child; (iii) contact between the child and the parties and others; and (iv) schooling and religious upbringing of the child.

8. Sections 33(4) and (5) set as requirements for a parenting plan that (i) it should comply with the best interests of the child and (ii) the assistance of or mediation through certain qualified parties identified in the provision.

9. Section 34(1)(a) of the Children's Act, under the heading "*Formalities",* requires a parenting plan to be in writing. In accordance with section 34(1)(b), such a plan "*may be registered with a family advocate or made an order of court".* Section 34(2) prescribes the procedure for an application where a parenting plan is proposed to be made an order of court and section 34(3) sets out further requirements where such an application is made. The amendment or termination of a parenting plan that was made an order of court is regulated by section 34(5).

Discussion

10. In accordance with the guidance of the Supreme Court of Appeal (SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[1] section 34 of the Children's Act must be interpreted by way of an objective process that leads to a "*sensible"* meaning. Context must be borne in mind and the

[1] [2012] 2 All SA 262 (SCA) at paras 18 - 19.

provision must be read in light of the statute as a whole, and the circumstances attendant upon its coming into existence.[2]

11. When one reads sections 33 and 34 of the Children's Act, it is very clear that there is no duty placed on co-holders of parental rights and obligations to enter into a written agreement: this much is evident from section 33(1), which employs permissive language. Indeed, this conclusion is reinforced by section 33(2), which implores parties that are experiencing difficulties in arranging their parental rights and responsibilities to avoid an approach to court by coming to an agreement. In circumstances where the parties are so seeking to avid an approach to court, provision is made for intervention by a family advocate, social worker or psychologist, or another "*suitably qualified person"*. Section 33(2) presupposes that co-holders of parental rights and responsibilities may arrange such duties and responsibilities informally. It is when such informal arrangements break down that the need for a more formalised parenting plan arises, as a precursor to an approach to Court.

12. Section 34(1)(b) allows for a parenting plan to be registered with a family advocate or to be made an order of court. The provision is not peremptory, but it seems sensible that where disagreements between the co-holders of parental rights and responsibilities arose in the past, this approach is appropriately followed. The requirement in section 34(1) that a parenting plan be in writing forms part and parcel of the provisions regulating the registration of a parenting plan with a family advocate, or making the parenting plan an order of Court: the procedural requirements for such registration or application require the formality of a written agreement.

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[2] *Id*.

13. Does that mean that any oral agreement relating to maintenance (one of the matters that may competently be regulated in a parenting plan as envisaged in section 33(3) of the Children's Act) cannot be given effect to, and ought to be considered *ab initio* void and unenforceable because it was not reduced to writing? The answer must be no.

13.1. The first basis for such a conclusion is that section 33(1) is not peremptory, which means that matters such as maintenance and school fees may be regulated without the parties resorting to drawing up a parenting plan. And such arrangements must surely be capable of being enforced even if they are made orally (even though it may be desirable in the interests of certainty and avoiding litigation to reduce such arrangements to writing).

13.2. The second reason for such a conclusion is to be found in section 6(1)(c) of the Maintenance Act, which implicitly recognises as valid either a "*verbal or written agreement in respect of maintenance obligations"* as basis for complaints relating to maintenance under that statute. In other words, a verbal agreement in respect of maintenance can be given effect to by invoking the procedures of the Maintenance Act. The question begs: if an oral agreement that includes arrangements on maintenance can be given effect to in the Maintenance Court, how can it be held by this Court that maintenance arrangements must be in writing in order to be capable of being enforced, merely by virtue of the fact that such arrangements ostensibly form part of an agreement that more broadly arranges parental rights and responsibilities.

14. Ms Georgiou argued that, in the present case, the agreement attached to the Particulars recognises that the parties had engaged difficulties in arranging the parental rights and responsibilities, as envisaged in section 33(2), and for that reason, the requirement of a written parenting plan as envisaged in section 34(1)(a) had been activated.

15. I read section 33(2) differently. The reason for the legislature requiring the parties to seek to agreement on a parenting plan is to avoid an approach to court, or to allow for an approach to court on an agreed basis. That understanding is consistent with the general principle expressed in section 6(4)(a) of the Children's Act that "*an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided"*. As Goosen J pointed out in *PD v MD,*[3] *"Central to the concept [of a parenting plan] is the recognition that it is generally in the best interests of children that conflict and confrontation between parents regarding the care and parenting of children is to be avoided, and that, where disputes regarding the exercise of parental responsibilities arise, such disputes are to be resolved by mediation as far as may be possible, and that courts be resorted to only where such disputes cannot otherwise be resolved".*[4]

16. Now, if parties are experiencing such difficulties but they are able to resolve them without resorting to mediation or an approach to Court (for example by coming to an oral agreement that is then given effect to), why should they then proceed to come to an agreement on a parenting plan, formally so called? And if they have resolved their issues amicably without concluding a written

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[3] 2013 (1) SA 366 (ECP)

[4] At para 24.

agreement, why should one of the parties be entitled to say the agreement is void and unenforceable merely by reason of the fact that it was not reduced to writing or, as in the present case, not signed? If the plain reading of section 34(1) results in the conclusion that a parenting plan must be in writing, then the term "*parenting plan"*, which is undefined in the statute, must be more restrictively interpreted. But this Court need not reach there, for the reasons already explained.

17. I accept Ms Georgiou's argument that, as a general principle, reducing agreements to writing and signing them serve the purpose of certainty. It certainly avoids litigation. But that is a very different point from asserting that a party to an oral agreement is precluded from relying on such an agreement if there is no requirement in law that agreements of the type concerned be in writing and signed.

18. We are not here concerned with a contract for the disposal of immovable property; we are concerned with the payment of maintenance by a person who in terms of section 15(3) of the Maintenance Act has a maintenance duty. In the absence of a provision that demands that maintenance arrangements be reduced to writing in agreements that are duly signed and executed, the failure to reduce an agreement on maintenance to writing or to sign such an agreement cannot be considered to be an absolute bar to a party relying on such agreement. I find myself in agreement with Ms De Wet's submission that, if the intention of the legislature were to visit nullity in the case of non-compliance with section 34(1)(a), it would have said to in express terms. It did not.

19. Overall, this Court must be guided by the constitutional protection of the rights and best interests of the child in section 28 of the Constitution. The Children's

Act is the statute that was passed to give effect to that right, as its Long Title and the objects contained in section 2 make plain. To insist that a parenting plan that has been reduced to writing as contemplated in section 34(1) can be the only form of agreement on the rights and responsibilities of co-holders of such rights and responsibilities that can be enforced, would unduly restrict in the rights and interests of children who are the beneficiaries of oral agreements that include arrangements on maintenance. After all, upon a proper construction of the Children's Act as a whole, there is no limitation on how co-holders of parental rights and responsibilities may arrange their affairs. I am in agreement with the Court in *TC v SC*[5] that "when Courts are dealing with children care must be taken that the interests of minors are not '*held to ransom for the sake of legal niceties'* or '*mechanically sacrificed on the altar of jurisdictional formalism.'"*[6]

20. It is no answer to suggest that the solution for a party in the position of Ms Gorfil is to approach the Maintenance Court. The question in an exception such as this is not whether the plaintiff has an alternative remedy, it is whether, on any interpretation of the Particulars, the plaintiff would be unable to sustain a cause of action. That is not a finding that this Court can make, for the reasons I have set out hereinabove. It would not be in the interests of justice to foreclose reliance on an agreement.

21. I find that Mr Reid has not made out a case that, on any possible reading of the particulars, no cause of action can competently be made out.

22. In the circumstances, I make the following order:

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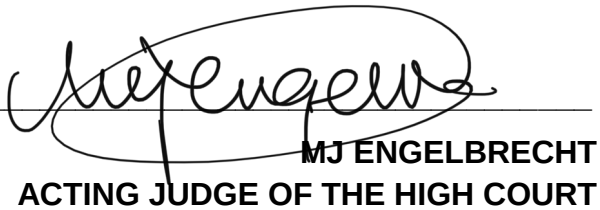
[5] 2018 (4) SA 530 (WCC).

[6] At para 25. Footnotes omitted.

"*The exception is dismissed with costs*".



MJ ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 AUGUST 2021.

Date of hearing:	13 August 2021
Date of judgment:	17 August 2021

Appearances

For the excipient:	Adv S Georgiou
Instructed by:	
For the respondents:	Adv A De Wet SC
Instructed by:	