

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A2023/055189

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

21 FEBRUARY 2024

Judge Dippenaar

In the matter between:

KA

APPELLANT

and

KN

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the

electronic case file system. The date and time for hand-down is deemed to be 10h00 on the 21st of FEBRUARY 2024.

Summary: Appeal from a contact order granted by the Children's Court – condonation sought – two applications to lead further evidence on appeal – s19 (b) of the Superior Courts Act 2013 – condonation application – pending litigation in High Court – mootness of appeal as subsequent events overtook appeal and appeal will have no practical effect – not in minor child's best interests to remit matter back to Children's Court for hearing *de novo* – exercise of true discretion by Children's Court – no cogent basis to interfere with exercise of discretion or order granted - appeal dismissed with costs

DIPPENAAR J (et GOODMAN AJ CONCURRING):

[1] This appeal concerns a contact order granted on 16 May 2023 in the Children's Court, Randburg (“the court *a quo*”), relating to the respondent's contact with the parties' minor son, K who is presently two years old. At the time of the proceedings before the court *a quo* he was some seventeen months of age. The parties are the biological parents of K, respectively his mother and father, who were never married and whose relationship has terminated.

[2] The court *a quo* had regard to the recommendations of the Family Advocate who, after conducting investigations, produced a report dated 20 April 2023. Reliance was placed by the Family Advocate on the investigations and report by a duly appointed Family Counsellor. *Inter alia*, a measured phased-in contact regime was recommended introducing sleep-over contact on certain terms. At the hearing before the court *a quo*, the appellant made certain submissions expressing her dissatisfaction with the Family Advocate's report and recommendations.

[3] The court *a quo* accepted those recommendations with certain time modifications granted at the behest of the respondent. In her reasons for judgment, the court *a quo* stated:

“The court took into account the comprehensive Family Advocate’s Report, and found no cogent nor compelling reasons to deviate from the recommendations”.

[4] The appellant’s case is that the nub of the appeal is that the Children’s Court did not exercise its discretion appropriately under s 7 of the Children’s Act, 2005, did not apply a child centric approach in considering the matter and did not take proper account of the facts placed before it by the appellant, but rather rubber-stamped the recommendations of the Family Advocate.

[5] The appellant sought the setting aside of the court *a quo*’s order and a remittal of the matter back to the Children’s Court for a hearing *de novo*. At the hearing, the appellant further sought an interim contact order pending the outcome of those remitted proceedings, first raised in the parties’ joint practice note delivered shortly before the hearing.

[6] The respondent’s case is that events subsequent to the appeal and pending litigation in the High Court have rendered the appeal moot, thus justifying its dismissal in terms of s16 (2)(a)(i) of the Superior Courts Act¹ (“the Act”), as the order would have no practical effect. It is argued that the court *a quo* exercised its discretion as upper guardian in the best interests of the minor child and did not err and that there is no legitimate basis to interfere with the exercise of that discretion. The respondent further contends that the office of the Family Advocate conducted a thorough investigation and took all relevant information provided by both parties into account before a recommendation was made and that the court *a quo* discharged its statutory duty in carefully considering those recommendations and the submissions of the parties without mere rubber-stamping.

¹ 10 of 2013

[7] The present appeal is somewhat unusual, considering the events which transpired after the proceedings before the court *a quo*. Since the lodging of the appeal by the appellant, the parties have been involved in extensive litigation in the High Court.

[8] It was undisputed that after the lodging of the present appeal and during July 2023, the respondent launched an application under case number 2023-059941 aimed at enforcement of the court *a quo*'s order, which ultimately resulted in an interim contact order being granted by Carrim AJ pending the determination of the appeal ("the Carrim order").

[9] It was further undisputed that pursuant to the appellant launching an application for leave to appeal against the Carrim order, the respondent launched a further application under case number 2023 – 055941, in which contempt relief, a declaratory order and enforcement of the interim contact order was sought. That application resulted in a consent order being granted by Liebenberg AJ on 12 October 2023 ("the Liebenberg order") pertaining *inter alia* to an interim contact arrangement pending the finalisation of the pending appeal or the provision of a forensic report, whichever occurred first. In terms of the Liebenberg order, a forensic psychologist was appointed to conduct a forensic assessment of the minor child and to provide a written report and recommendations to the court pertaining to care and contact in the best interests of the minor child. Those proceedings remain pending.

[10] There are various preliminary issues which should conveniently be dealt with first.

[11] First, the appellant sought condonation for the failure to timeously lodge the appeal record and reinstatement of the appeal. That application was not opposed. The explanation proffered was that there were issues in procuring the full record from the Children's Court occasioned by circumstances beyond the appellant's control. Considering the facts, condonation is to be granted, with costs to be costs in the appeal.

[12] Second, the appellant launched two applications to adduce further evidence on appeal in terms of s19(b) of the Act. The first, to introduce an affidavit dealing with the submissions placed before the Children's Court by the appellant during the hearing on 16 May 2023. The respondent abides the decision of the Court. Considering the facts, it is in the interests of justice to allow the introduction of the affidavit, given that it simply deals with the information placed before the court *a quo* which was considered by it in granting the order that forms the subject matter of the appeal.

[13] The second application is more contentious and is opposed by the respondent. It relates to events which occurred on 6 December 2023, well after the lodging of the appeal on 8 June 2023, thus well after the hearing before the court *a quo*. The respondent delivered an answering affidavit in response, particularising his version of those events. There are numerous disputes on the papers. The appellant elected not to deliver a replying affidavit. In argument, it was contended that, given that the respondent admitted the occurrence of the events of 6 December 2023, it was not necessary to do so.

[14] Considering the affidavits filed by the respective parties, it cannot be concluded that there are special circumstances justifying the introduction of the relevant evidence on appeal under s19(b) of the Act. The requirements are trite and do not have to be repeated herein.²

[15] The averments now sought to be introduced were not placed before the court *a quo* and it did not take such averments into consideration in exercising its discretion as the events had not yet occurred.

[16] Materially, what is to be made of the events which transpired on 6 December 2023 is in dispute between the parties. It cannot be concluded in the circumstances that the evidence sought to be presented by the appellant is such, that if adduced, would be

² Putco (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Others [2023] 2 All SA 601 (SCA) para [14]

practically conclusive³, nor that the evidence is materially relevant to the outcome of the appeal, albeit that such evidence may be relevant to whatever is ultimately determined by a court to be in the minor child's best interests.

[17] Those subsequent events are matters which will undoubtedly be considered and dealt with by the forensic psychologist in her report and the parties in the pending litigation in the High Court to which the Liebenberg order relates.

[18] The affidavit does not materially contribute to answering the question whether the Children's Court on 16 May 2023 properly exercised its discretion and applied the relevant principles in s 7 of the Children's Act, as contended by the appellant.

[19] In the result, the second application to introduce evidence on appeal, dated 23 January 2024, falls to be dismissed. There is no reason to deviate from the normal principle that costs follow the result.

[20] Third, as a point *in limine*, the respondent raised the issue that the notice of appeal is fatally defective as it is generic in nature, does not specify whether the appeal is on a point of law, or fact, or both and does not state what order the court a quo should have granted. It was argued that the notice of appeal did not comply with r 50 (2) or with r 51(7) of the Magistrates Court Rules and thus, that the notice of appeal and therefore the appeal was invalid⁴ as those requirements are peremptory⁵.

[21] Although there is merit in these contentions, we are not persuaded to dismiss the appeal on this basis alone. The merits of the appeal must be considered against the backdrop of these defects.

³ Colam v Dunbar 1933 AD 141 at 162

⁴ Scott-King (Pty) Ltd v Cohen 1999 (1) SA 806 (W) at 810F

⁵ Leeuw v First National Bank Ltd 2010 (3) SA 410 (SCA) 413D-E

[22] The basis for the appellant's complaint is that the court *a quo* did not take into consideration the issues raised by her and failed to properly weigh up and consider her concerns, but rather blindly followed the recommendations by the Family Advocate and did not take the real life experience of the minor child into account. It is argued that the minor child's tender age, his attachment to the appellant as primary caregiver and the need for stability and routine should have been taken into account. According to the appellant, the court *a quo* adopted an approach which favoured the respondent and failed to consider her objections and concerns adequately and that the imbalance produced a result which was not in the minor child's best interests.

[23] To support this conclusion, reliance was *inter alia* placed on (i) the failure in the order of the court *a quo* to make provision for the appellant to have contact with the minor child on Christian holidays and Mother's Days whereas the respondent was afforded contact on Hindu holidays and Father's Days and (ii) the fact the respondent was awarded contact on every public holiday despite the appellant's objection that this precludes her from ever sharing public holidays with the child.

[24] It appears that the appellant's primary complaint is aimed at the commencement of sleepover contact when the child was two years old. This is to commence during March 2024 in terms of the order of the court *a quo*⁶. The appellant's complaint regarding the recommendation made when the child was seventeen months old, was that he was a co-sleeper (with the appellant) and still breastfeeds.

[25] It was not disputed that the court *a quo* was exercising a discretion in the true sense in granting the impugned order. The relevant principles pertaining to discretions are well established⁷ and do not require repetition. It is not disputed that the court *a quo* was exercising a discretion in the true sense where it had a range of equally permissible options open to it.

⁶ Based on the recommendations in the report of the Family Counsellor paragraphs

⁷ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC) par [85]

[26] It is trite that an appellate court will only interfere with the exercise of a true discretion in circumscribed circumstances⁸. The circumstances in which such interference will be justified are cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably could have made the order in question.⁹

[27] On a contextual, purposive and grammatical interpretation of the order of the court *a quo*, it did not disregard the appellant's parity of rights as contended by her and did not preclude the appellant from exercising contact to the minor child on Christian holidays or Mother's day, given that the order expressly regulated the specific occasions on which the respondent could exercise access to the minor child, rather than delineate the parties' respective contact rights.

[28] From the Family Advocate's report it is clear that the emails from the appellant providing her input regarding the contact and care issues, were considered by the Family Advocate. The correspondence received from the parties were summarised in and attached to the Family Advocate's report, and placed before the court *a quo*. The fact that the appellant's concerns were not all expressly dealt with in the report does not equate to a conclusion that they were not taken into consideration. It can also not be concluded that the court *a quo* did not take all the information placed before her into account, including the submissions of the appellant made at the hearing, in making her determination. From the available evidence, it can further not be concluded that the court *a quo* favoured the respondent, as contended by the appellant.

[29] Given the present facts, it cannot be concluded that the court *a quo* did not judicially exercise its discretion, nor that it was influenced by wrong principles or

⁸ Public Protector v Commissioner for the South African Revenue Service and Others [2020] ZACC 28 paras [31]-[33]; Biowatch Trust v Registrar Genetic Resources & Others 2009 (6) SA 232 (CC) paras [29]-[30] with reference to the principle in Attorney-General, Eastern Cape v Blom & Others 1988 (4) SA 645 A at 670 D-F

⁹ Biowatch Trust v Registrar Genetic Resources & Others 2009 (6) SA 232 (CC) paras [29]-[30] with reference to the principle in Attorney-General, Eastern Cape v Blom & Others 1988 (4) SA 645 A at 670 D-F

material misdirections of fact. As such there is no basis to interfere with the exercise of the court *a quo*'s discretion.

[30] Moreover, given the history of the litigation, there is merit in the respondent's contention that the appeal would have no practical effect or result as envisaged by s 16(2)(a)(i) of the Act as the appeal has been overtaken by the subsequent events already referred to, which culminated in the Liebenberg order, justifying the dismissal of the appeal.

[31] Considering the present pending forensic investigation of the minor child, a referral back to the Children's Court for a *de novo* investigation would cause unnecessary delays and a duplication of process, given that the High Court is seized with receipt of the forensic report pertaining to the issue of care and contact with the minor child and his best interests.

[32] The appellant's contentions that the appeal has not been rendered moot and that the High Court is not seized with the issue of care and contact, given that the proceedings before Liebenberg J related to contempt and the interim contact order was granted only pending the appeal, do not pass muster. Although the papers in that application were not placed before this Court, the respondent's contention that that application included declaratory and other relief in addition to contempt relief, was not disputed.

[33] The Family Advocate's report was produced during April 2023, when the minor child was some seventeen months old. The investigation into his best interests, which will be undertaken by the psychologist, is due to commence during April 2024, a year later. It is inevitable that the circumstances will have changed, given that the child is older and that a determination must be made based on the present circumstances and best interests of the minor child.

[34] In the parties' joint practice note, this Court was notified that the appellant would seek certain interim relief pertaining to the respondent's contact to the minor child. The proposed relief would grant the respondent less contact to the minor child than that ordered by the court *a quo* and less relief than agreed to in terms of the Liebenberg consent order.

[35] On a proper contextual and purposive interpretation of the Liebenberg order, the appointment of the forensic psychologist and the provision of a report to the High Court containing findings and recommendations regarding the issue of care and contact is a final order. The only order of an interim nature is the contact regime agreed to in paragraph 9 of that order.

[36] It was argued that there is no other court seized with the care and contact of K and that a court has inherent jurisdiction as the upper guardian of minor children to grant such relief. Reliance was placed on *AD*¹⁰, in arguing that an overly technical approach should not be adopted. I am not persuaded that *AD* avails the appellant in the present context or affords an appeal court such broad powers to simply make interim orders pertaining to matters which are not the subject matter of an appeal.

[37] This Court is constituted as an appeal court and not as a court of first instance and has the powers prescribed in s 19 of the Act. The interim relief sought by the appellant does not fall within the ambit of those powers. It was not raised on the papers, but for the first time in the joint practice note.

[38] Moreover, it cannot be correct, as the appellant argues, that the issue of care and contact is not presently pending before the High Court in other proceedings. The parties have remedies at their disposal to have those issues finally determined by the High Court in the current pending proceedings, for example by way of an amendment to the relief sought and supplementation of the papers filed of record, if deemed necessary.

¹⁰ *AD and Another v DW and Others* 2008 (3) SA 183 (CC) par [55]

[39] The granting of any interim relief as proposed by the appellant would not be competent or appropriate.

[40] For all these reasons, the appeal is doomed to failure.

[41] Considering all the facts, there is no reason to deviate from the normal principle that costs follow the result. Although it is open to this court to direct each party to pay its own costs, given that it is a minor child's best interests at stake, what tips the scales in favour of the granting of a costs order is the appellant's persistence with the appeal, despite the subsequent developments and pending litigation already referred to.

[42] In the result, the following order is granted:

[1] The applicant's condonation application for the late delivery of the appeal record is granted, costs to be costs in the appeal;

[2] The appellant's application to introduce the appellant's written statement into evidence dated 16 October 2023 is granted, costs to be costs in the appeal;

[3] The appellant's application to introduce further evidence on appeal dated 23 January 2024 is dismissed with costs;

[4] The appeal is dismissed with costs.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 01 FEBRUARY 2024

DATE OF JUDGMENT : 21 FEBRUARY 2024

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