IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE 20/8/2019 SIGNATURE

CASE No : 57215/2017

In the application for leave to appeal of

ADV CHANEL VAN SCHALKWYK

and

In the application for leave to intervene and leave to appeal of:

SUSSARAH MARIA ELIZABETH NELL (Intervening Applicant)

In re:

D[redacted] M[redacted] Applicant

And

O[redacted] M[redacted] Respondent

JUDGMENT FOR LEAVE TO APPEAL AND LEAVE TO INTERVENE FOR PURPOSES OF APPLICATION FOR LEAVE TO APPEAL

[1] The application for leave to appeal pertains to an urgent application that was heard by this court over two days on 15 November and 13 December 2018 (*"the main application"*). The matter concerned the interests of four minor children between the ages of 3 and 12 years. One of the children, who was just about to turn 5 years of age at the hearing of the main application, is a child with a disability as envisaged by section 11 of the **Children's Act**[1] in that he has Down's Syndrome.

[2] The main application was preceded by an *ex parte* urgent application that was brought by the *curatrix ad litem*, Adv. Chanel van Schalkwyk, on 27 September 2018 (*"the ex parte application"*). As a result of the order obtained in the *ex parte* application, the children were removed from the care of their mother, Ms M[redacted], and the siblings were split up and placed with different family members. The eldest child was placed with the maternal grandparents in Germiston and the three younger siblings were placed with the paternal aunt and her husband in Pretoria.

[3] The father, Mr M[redacted], then approached this court for urgent relief pertaining to the primary residence of the children and termination and/or suspension of Ms M[redacted]'s parental rights and responsibilities. Other ancillary relief was requested which, *inter alia*, included participation in a program called "*Family Bridges: A Workshop for Troubled and Alienated Parent – Child*

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1 38 of 2005

Relationships", originating from the United States of America and yet untested in our South African legal system.

[4] The costs of this program was R85,000.00, which Mr M[redacted], the applicant in the main application, tendered to pay. The relief requested in the main application was premised on a draft order that set out the steps to be performed in terms of the Family Bridges program, which *inter alia* required a 90 day no-contact period of the children with their mother, Ms M[redacted], and during which she could also not be provided with the details of the children's' whereabouts.

[5] In paragraph 94 of the judgment delivered on 13 March 2019 the court referred to the relief requested in the main application as follows:

> *"[94] … The draconian and dictatorial Court orders these programs require for the program to be effectively implemented, not only infringe on constitutionally entrenched rights but also in essence usurp the function of the court in the monitoring and enforcing of its orders. In my view the repressive nature of such orders in itself is parental alienation just from the opposite view."*

[6] A further issue that the court had to deal with in the main application was the controversial issue of *"parental alienation"* and the weight that should be attached to expert reports identifying alleged parental alienation without an evaluation process and where a recommendation is made on such an identification without a formal diagnosis.

[7] The papers filed in the *ex parte* application where costs were reserved, formed part of the papers in the main application.

[8] The court regarded both the *ex parte* and the main application as applications in terms of Rule 43 as it pertained to matters *pendente lite* in the pending divorce action between Mr and Ms M[redacted].

[9] On 21 December 2018 an order was granted in the main application and the reasons for the order were delivered on 13 March 2019.

[10] The order granted remedied the removal and separation of the children from their mother that happened as a result of the *ex parte* application, and *inter alia* provided for the return of all four children to their mother, and the restoration of certain parental responsibilities and rights for both parents.

[11] The order further provided for:

[11.1] the discharge of Adv van Schalkwyk as the children's *curatrix*;

[11.2] the disallowance of the *curatrix* as well as the two social workers' fees as far as it relates to the reserved costs of the *ex parte* application in prayer 19.1 thereof. (It is important to note that it was only the *curatrix*'s fees for the *ex parte* application that were disallowed and not all of her fees incurred in her investigation and in the executing of her duties as *curatrix*);

[11.3] referring the two social workers in prayer 14 thereof, to their professional body, the South African Council for Social Services Professions ("*SACSSP*") for investigation regarding concerns raised in the Family Advocate's report and by this court, relating to whether they violated their ethical and/or professional code; and

[11.4] in prayer 15 thereof requesting the Office of the Family Advocate to provide the court with feedback regarding the SACSSP's investigation and report.

[12] Adv Van Schalkwyk and one of the two social workers, Sussarah Maria Elizabeth Nell have now approached the court for leave to appeal.[2] For the sake of convenience and in order to avoid confusion, Adv Van Schalkwyk is referred to as *"the curatrix"* and the applicant in the application for intervention as *"Ms Nell"*.

[13] The *curatrix* and Ms Nell are both appealing prayer 19.1 of the order which disallows their fees. Ms Nell is also appealing prayer 14 of the order regarding her referral to the SACSSP.

[14] Mr Lamey appeared on behalf of the *curatrix* and Ms Ferreira appeared on behalf of Ms Nell. It is important to note that, insofar as the application for leave to appeal is concerned, both counsel are agreed that the application for leave to appeal affects only their clients' personal, professional and financial interests – the relief does not impact on the parties to the main application or the minor children.

[15] Extensive heads of argument, authorities' bundles and the transcript of the proceedings of 13 December 2018 were provided to the court. Mr Lamey indicated that the transcription of the proceedings of 15 November 2018 was incomplete. Subsequent to the arguments in the leave to appeal and the application for intervention, my registrar was able to obtain the complete transcript of the proceedings of 15 November 2018. Therefore when reference is made to certain of the grounds for leave to appeal, I take into account that the applicants' legal representatives did not have the benefit of the complete transcript of 15 November 2018 when the applications were drafted.

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2 Ms Nell is also the intervening applicant and request leave to intervene for purposes of an application for leave to appeal and that the application be heard simultaneously with the curatrix's application for leave to appeal

LEAVE TO INTERVENE:

[16] It is trite that any party to proceedings must have a direct and substantial interest in the proceedings in order to have *locus standi*. This is determined by the factual and legal circumstances of the case.[3]

[17] Ms Ferreira's argument is that leave to intervene should be granted as, by virtue of the adverse costs order and referral to SACSSP, Ms Nell was automatically made a party to these proceedings and that not to allow her joinder would be to repeat the perceived injustice.

[18] I have considered the arguments presented, the reference to authorities and the judgment of this court. The authorities referred to in support of the application for intervention and the subsequent application for leave to appeal in the event of the intervention application being granted are factually, procedurally and legally distinguishable from the matter that was before this court. Save for the reference to **T v M**[4], none of the authorities referred to involved the subject matter before this court, being the interests of children.

[19] Uniform Rule 12 deals with the intervention of a person as a plaintiff or defendant in any action at any stage of the proceedings. When regard is had to the formulation of Ms Nell's Notion of Motion, she does not seek to be joined as an applicant or respondent in the main application, but requests leave to intervene for purposes of being able to apply for leave to appeal. Ms Nell as the party seeking to intervene must show that she is specifically concerned in the issue, that the matter is of common interest to

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[3] See: Harms, Civil Procedure in the Superior Courts (LexisNexis) at A-55 and the authorities cited in footnote 12

[4] 1997 (1) SA 54 (A)

her and the party she desires to join and the issues are the same.[5] Therefore a mere allegation that a party has an interest is insufficient and there must be *prima facie* proof of the interest and the right to intervene. The direct and substantial interest in the subject matter and the action should be more than merely a financial interest which is only an indirect interest in the litigation. One of the main arguments of Ms Ferreira is that Ms Nell, as an expert, is entitled to her costs.

[20] The arguments relating to her professional conduct have been considered and dealt with by this court. Ms Nell will have recourse by addressing the issues raised with her professional body, the SACSSP. It follows that if her conduct met the professional standards to which she is to adhere, it will be reflected in the outcome of any investigation and report by the SACSSP.

[21] The *curatrix* placed strong reliance on Ms Nell's report in obtaining the *ex parte* relief. At the hearing of the main application the *curatrix* and the respective legal representatives had an opportunity to address the court about the concerns raised by the court and the Office of the Family Advocate regarding Ms Nell, and the removal of the children from their mother and primary caregiver and the subsequent separation of the siblings.

[22] It was common cause at the hearing of the main application that Ms Nell did not conduct an investigation regarding the effects of the removal and separation of the children, and more specifically in circumstances where one of the children has special needs. It is further common cause (as also confirmed by Ms Nell in paragraph 15.11 of her report) that a diagnosis of parental alienation falls outside her scope of practice as social worker. Ms Nell nevertheless proceeded to make recommendations premised on alleged alienation and ascribed some form of guilt for the alleged alienation

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5 Harms, Civil Procedure in the Superior Courts at B-112(5) and the authorities cited at footnote 3 on B-112(6)

to the eldest child. This was the reason, according to Ms Nell, why the eldest child had to be separated from her siblings.

[23] It was argued that Ms Nell should have been afforded the opportunity to explain herself to the court and the matter should have been referred to oral evidence. I do not agree with this argument. It is unthinkable that in motion proceedings and more particular where the interests of minor children are concerned, the matter should be referred to oral evidence every time an expert's recommendation or the probative evidentiary value thereof is questioned.

[24] This would defeat the purpose of motion proceedings and would lead to an undesirable result, by effectively turning most disputes relating to the interests of children into mini trials the moment the court or a party questions the expert's recommendations. Referral to oral evidence is appropriate where the court is faced with a material factual dispute between the parties which cannot be resolved on the papers, or the court, as upper guardian, has insufficient facts to come to a finding. This was not the factual position before this court.

[25] As already indicated, it is not disputed that Ms Nell could not make a diagnosis of parental alienation. It follows that if a diagnosis of parental alienation cannot be made, a recommendation based on such a diagnoses would be inappropriate.

[26] In Ms Nell's application for leave to appeal, she states that her findings were made on "*manifestations and indications of parental alienation*" and in her report she expresses her "*concerns regarding the symptoms of parental alienation that have been identified*". These findings by Ms Nell were followed by her recommendations.

[27] To paraphrase Shakespeare: "*A rose by any other name would smell as sweet*". The findings by Ms Nell which lead to her recommendations,

amount to nothing less than a diagnosis. A recommendation for the removal and separation of siblings presupposes a diagnosis that justifies such a drastic recommendation.

[28] The parties, including the *curatrix*, elected to follow motion procedure and more particular for *pendente lite* relief. An expert providing a report to a court in motion proceedings should be prepared to stand and fall by the content thereof. The expert cannot bargain on elaborating on the findings and recommendations by way of oral evidence.

[29] It is the expert who owes a duty to the court[6] more so in my view, where the interests of minor children are involved. When such an expert makes recommendations for the removal of the children and the separation of the siblings from each other on a finding that falls outside of that expert's field of expertise, or without a proper investigation, she fails in her duty towards the court. It is the expert's obligation to ensure that the findings and recommendations are based on sound, logical and scientifically based reasoning.[7] The court owes no duty to an expert to come and clarify, justify or explain his/her findings.

[30] The relief in the applications before this court in the *ex parte* and the main applications dealt with the protection of the interests of the four minor children. The relief now sought by Ms Nell has no bearing on the children's interests but pertains to her own interests. Furthermore, none of the parties have an interest in Ms Nell's fees or the referral to her professional body. Accordingly, Ms Nell does not meet the criteria for intervention.

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6 **Schneider NO and Other v AA and another** 2010 (5) SA 203 (WCC) at 211 J to 212B

7 See: Southwood's Essential Judicial Reasoning in Practice and Procedure and the Assessment of Evidence (LexisNexis) at 7 to 8

LEAVE TO APPEAL:

[31] The essence of the argument on the *curatrix*'s behalf is that:

[31.1] it is exceptional to deprive a curator of her fees;

[31.2] the findings of the court by implication indicates that there was a lack of *bona fides*;

[31.3] the disallowance of her costs is similar to a punitive cost order and a *de bonis propriis* order;

[31.4] before a curator is deprived of her costs, a court must give her the opportunity to make submissions in this regard; and

[31.5] the order affects the *curatrix* in two aspects, in that

a) the disallowance of her fees directly affects her; and

b) that the findings that were made by the court to substantiate the disallowance of the fees, directly impacts on her professional integrity, as the public would interpret the judgment as the *curatrix* having been *mala fides* and/or having lacked utmost good faith.

[32] I do not agree with the argument that disallowance of fees is a punitive order similar to an order *de bonis propriis*. In **Minister of Environmental Affairs & Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism and others v Bhato Star Fishing (Pty) Ltd**[8] the SCA dealt with a defective appeal record, where firstly, certain parts of the *a quo* record were not included but where the final state of the record bore the agreement of all the parties, and secondly, where the

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8 2003 (6) SA 407 (SCA) at 439, paras 77 to 79

record contained unnecessary documents that was described as a *"sloppy, cost-inflating practice not do be endured"*. The court was of the view that a punitive cost order was not warranted for the breach of the Rules insofar as the record was incomplete. However, for the "sloppiness" of the record, a portion of the costs of the attorney responsible for the preparation thereof was disallowed by the court to show its displeasure. In my view, this draws a distinction between the awarding of punitive costs and the mere disallowance of fees in that the latter amounts to a lesser penalty.

[33] The disallowance of fees is to show the displeasure of a court with the manner in which the litigation was conducted and/or the disregard for the Rules of court. Cilliers[9] also refers to the court's discretion to disallow the costs of an attorney where a record is burdened with a substantially larger quantity of paper than is reasonably required. This in my view, is the court's way of showing its displeasure with professional conduct without requiring the practitioner to pay anything from his/her own pocket. There is no reason why the disallowance of the *curatrix*'s fees would be treated otherwise.

[34] Mr Lamey further submitted that the *ex parte* application was *sui generis* and did not fall within the ambit of Rule 43 and therefore the provisions of Section 16(3) of the **Superior Courts Act**[10], are not applicable.

[35] Whether an application falls within the ambit of Rule 43 is to be determined by the nature of the relief claimed. The relief claimed by the *curatrix* was pending the finalisation of the divorce and related to the care and the contact of the minor children. The *ex parte* order furthermore provided that the aspect of maintenance be postponed for determination on the return date.

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[9] See: Cilliers, Law of Costs (LexisNexis), para 3.16

[10] 10 of 2013

[36] I therefore do not agree that the application was *sui generis*. I have not been referred to any authorities that indicate that a party irrespective whether it is a curator ad litem or not who approaches the court in terms of Rule 6(5) on an *ex parte* basis, is to be held to a different standard.

[37] The authorities referred to by Mr Lamey are distinguishable from the present matter on a factual, procedural and legal basis. The *ex parte* application and the reports filed by the *curatrix* formed part of the main application. The *curatrix* made herself a litigant party by approaching the court for *ex parte pendente lite* relief and deposing to an affidavit in this regard. I do not agree with the argument that merely because a *curatrix* approaches the court in this capacity, that her application is *sui generis* and that it places her in a different position to any other litigant.

[38] The *curatrix* in her application lists over 100 grounds of appeal contained in the 30 page notice for leave to appeal. In my view the listing of so many grounds for appeal amounted to an attempt to build a case on a foundation which was not laid before the court when the matter was argued. Furthermore, new issues were raised in the present application and heads of argument filed on behalf of the *curatrix* which were not originally raised and argued and which this court was not given at the hearing of the main application an opportunity to consider. The transcription reflects that the *curatrix* at no stage during the proceedings in the main application indicated that she was not in agreement with the reserved costs of the *ex parte* application being considered as part of the main application. Furthermore, that at no stage during the extensive arguments that took up two court days, did the *curatrix* indicate that she was unaware of the Family Advocate's 2018 report at the time of brining the *ex parte* application despite the court's inquiries into why the Family Advocate was not contacted prior to her having approached the court on an *ex parte* basis.

[39] It is trite that a party is bound by factual concessions made before a court. It is also trite that a party may not present argument in conflict with those

facts which were common cause in the court *a quo* or with the party's common intentions of the issues before the court *a quo.*[11] An appeal involves a re-hearing of the evidence and is based upon the record of the proceedings in the court *a quo* and the appellant is bound by it. An appellant cannot rely on any circumstances that do not appear or cannot be deduced from the record. If the *curatrix* wanted to place new evidence before the court, such an application should have been made. No such application was before me.

[40] The application for leave to appeal is sought in terms of the provisions of Section 17(1)(a)(i) and (ii) of the **Superior Courts Act**. The *curatrix* contends that the appeal would have a reasonable prospect of success and that there is compelling reason why the appeal should be heard.

[41] The provisions of Section 16(3) of the **Superior Courts Act** are clear that notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application for the interim custody of a child when the matrimonial action between his/her parents is pending or is about to be instituted. In my view the *ex parte* application falls squarely within the provisions of Section 16(3)(c) and (d).

[42] In any event, even if I am not correct in interpreting the *ex parte* application as falling within the ambit of Section 16(3) of the **Superior Courts Act** it is evident that the threshold for the granting of leave to appeal has been raised and that the use of the word "*would*" in the new Act is indicative of a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.[12] Both the *curatrix* and Ms Nell's appeals do not relate to the children's' interests or wellbeing but only

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[11] See: Erasmus, Superior Court Practice at D1-668 and the authorities cited in footnote 5

[12] See: **The Mount Chevaoux Trust v Tina Goosen and 18 others** 2014 (JDR) 2325 (LLC) at para 6; **MEC Health, Eastern Cape v Mkhitha** [2016] ZASCA 176 at para 17

to the disallowance of their costs and in Ms Nell's case, the referral to her professional body.

[43] It is a well-established principle that the award of costs unless expressly, otherwise enacted, is in the discretion of the presiding judicial officer.[13] It is not required of a court to call for an explanation every time it exercises its discretion to disallow costs.

[44] Before a court of appeal will interfere with an order as to costs, it must be satisfied that there has not been a judicial exercise of the court's discretion. In other words, to justify interference on appeal, there must have been an improper exercise of judicial discretion.[14] In my view no such special circumstances are present in the application before me to warrant an interference by a court of appeal in the exercise of this court's discretion to disallow costs.

[45] In determining whether there is a reasonable prospect of success that another court would grant a different order, I considered the judgment of 13 March 2019, the applications, the transcript of proceedings and the notices and argument of both parties in the applications for leave to appeal.

[46] A court in considering an application for leave to appeal must be persuaded with a measure of certainty that another court will differ from the court's judgments to be appealed against. Given the above, I am not persuaded that the appeal would have a reasonable prospect of success.

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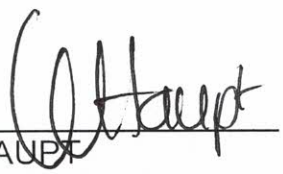
[13] See: **Ferreira v Levin, Vryenhoek v Powell NO and Others** 1996 (2) SA 621 (CC) at 624 par 3

14 **Beinash v Wixley** 1997 (3) SA 721 (SCA) at 739 G-H; **Logistic Technologies (Pty) Ltd v Coetzee and others** 1998 (3) SA 107 J (WLD) at 1075I – 1076D

[47] In the result, the following order is made:

1. The application for leave to intervene by the social worker, Sussarah Elizabeth Nell, is refused.

2. The application for leave to appeal by Adv Chanel Van Schalkwyk is refused.



L C HAUPT
ACTING JUDGE
(GAUTENG DIVISION, PRETORIA)

DATE OF HEARING:	24 MAY 2018
DATE OF JUDGMENT:	21 AUGUST 2019
APPEARING FOR THE APPELLANT:	ADV A LAMEY
INSTRUCTED BY:	BERNARD VAN DER HOVEN ATTORNEYS
FOR THE INTERVENING PARTY:	ADV R FERREIRA
INSTRUCTED BY:	RIETTE OOSTHUIZEN ATTORNEYS