

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case no: HC-MD-CIV-APP-ATL-2023/00020

In the matter between:

M E

APPELLANT

and

A G

1ST RESPONDENT

R G

2ND RESPONDENT

Neutral Citation: *E v G* (HC-MD-CIV-APP-ATL-2023/00020) [2023]
NAHCMD 166 (10 April 2024)

Coram: MASUKU J *et* PRINSLOO J

Order: 2 and 6 February 2024

Reasons: 10 April 2024

Flynote: Legislation – Child Care and Protection Act No 3 of 2015 ('the Act') – Withdrawal of placement order made in terms of s 136 of the Act – Whether children's court is *functus officio* once it makes a placement order in terms of the Act – Civil Procedure – Application for condonation – Requirements to be met by applicant discussed – Appealability of judgments and orders – Was the ruling of the children's court appealable as of right? - Costs – Circumstances in which attorney and client costs are granted –

General – The need for judicial officers presiding over matters involving the interests of children to familiarise themselves with the provisions of the Act.

Summary: The appellant brought an appeal against a decision of the Grootfontein Children’s Court in which the court refused to entertain an application for the withdrawal of a placement order it had made. It reasoned that once it had made that order, it could not in law be competent to review its own order and thus dismissed the appellant’s application. The application arose as a result of the appellant’s paramour inflicting a serious neck wound on the appellant as a result of which he was hospitalised. The said paramour was arrested for attempted murder and violation of the Combating of Domestic Violence Act 4 of 2004. As a result both the appellant and his paramour were unavailable to take care of their son. The respondents, who are the maternal grandparents of the child born to the relationship made an application to the children’s court for the placement of the child in their care. This application was made without the appellant being notified or informed of it. He claims that he would have objected to the granting of the application for the reason that the child was not in distress and that the respondents obtained the order on the basis of facts or allegations, which were false or inaccurate. He applied for the child to be returned to his care, as had been the position before the arrest of the mother and his hospitalisation. He complained that he had been denied access to the child, considering that the child was living more than 1100 kilometres away from his home.

Held: That applications for condonation require the applicant to make a full explanation of the circumstances giving rise to the delay and also to satisfy the court that the applicant has good prospects of success on appeal.

Held further: That in the instant case, the appellant had not made all the necessary allegations but considering that the matter involves the interests of a minor child, the court will relax the requirements to ensure that justice for the child is done. This is however not a licence to legal practitioners to be slovenly in their approach to applications for condonation. They are still required to comply with the settled requirements.

Held further that: The appeal, although it related to a temporary order, does not require leave to appeal to be granted. This is because the order issued by the court *a quo* met (AD) at 532, namely, that the order must be final in effect and not be susceptible of alteration by the court of first instance; must be definitive of the rights of the parties and must have the effect of disposing of at least a substantial portion of the relief claimed.

Held that: In terms of s 47(2) of the Act, the Children's Court is at large to extend, withdraw, suspend, vary and/or monitor its orders. This is a pointer that the court has a right to revisit its orders, especially in circumstances such as this where the appellant was not afforded an opportunity to deal with the application before the order was made.

Held further that: In any event, the placement order had been issued on an *ex parte* basis, without the appellant being afforded an opportunity to deal with the said application. In those cases, the court would not generally be averse to reconsidering an application brought by a person who has a right and interest to protect appertaining the order granted *ex parte*.

Held further that: The provisions of s 138 of the Act require that the court *a quo* must, not later than five days after the placement order, have reviewed the placement order and subject it to either to confirmation or alteration, as the case may be.

Held that: Matters involving the care and protection of children normally take place in highly charged circumstances, with emotions at time running amok. In such cases, some information may be misstated to the court or not divulged at all. It is thus necessary that such matters do serve before the children's court for review, in terms of s 138, with more information being placed before the court to enable it to consider whether to stand by its previous order or not.

Held that: Where a party seeks costs on the attorney and client scale, a prayer therefor must be included. If not, the court should ordinarily postpone the matter for the issue of costs to be properly addressed.

Held further that: In terms of s 47 of the Act, the court may make appropriate orders as to costs in the papers. Attorney and client costs are not lightly granted. They are reserved and are appropriate in cases where there is some specious, frivolous, cantankerous or dishonourable behaviour by the said party.

Held that: The court was required to give reasons for it to grant costs on the punitive scale. Reasons are necessary because courts are accountable institutions and they do not act arbitrarily. A person dissatisfied with an order or ruling, is entitled to know the reasons in order to decide on further remedies available.

The appeal was granted as prayed and the respondents were ordered to pay the costs of the appeal on the ordinary scale.

REASONS FOR JUDGMENT

MASUKU J (PRINSLOO J CONCURRING):

Introduction

[1] Having listened to arguments presented to the court by the parties' legal practitioners on 2 February 2024, we issued an order dated 6 February 2024, setting aside a decision of the magistrate for the Grootfontein District, sitting as a children's court. We intimated that reasons therefor, would be issued on 24 May 2024. The reasons follow below, albeit delivered earlier than the date mentioned in the order.

[2] The order reads as follows:

- '1. The appellant's appeal succeeds.
2. The order issued by the Children's Court for the District of Grootfontein dated 8 September 2023, is hereby set aside.
3. The Children's Court for the District of Grootfontein is ordered to re-enrol the appellant's application not later than a period of ten (10) days from the date of this order.
4. The respondents are ordered to pay the costs of the appeal jointly and severally the one paying and the other being absolved, consequent upon the employment of one instructing and one instructed legal practitioner.
5. Reasons for the order granted herein shall be delivered on 24 May 2024 at 10h00.'

The parties and their representation

[3] The appellant is Mr M E, a Namibian adult male, who is in the employ of Tulela Mining and Construction (Pty) Ltd. He resides in Tsumeb. The first and second respondents are Mr and Mrs G and reside in Rosh Pinah. The reason why they have been cited and the relationship they have with the appellant, will become apparent as the judgment unfolds.

[4] The appellant was represented by Ms Lewies, whereas Ms Kishi, appeared for the respondents. The court records its appreciation to both counsel for performing their duty to court in a most admirable fashion. The court expected no less.

Background

[5] The instant case has at its heart, the interests of a minor child. It is for that reason that considering the relief sought and the nature of the allegations and submissions made, we decided to issue an order to be followed by reasons therefor, as indicated above.

[6] Briefly stated, the appellant was involved in an amorous relationship with one Ms R. A daughter, D, who is at the centre of these proceedings, was sired from this relationship. It is a fair assessment, to state that the relationship between the appellant and Ms R, has, to put it mildly, been tempestuous and violent at times.

[7] The precursor to the present proceedings, was the arrest of Ms R, by the Namibian Police for the crime of attempted murder and a violation of the Combating of Domestic Violence Act 4 of 2003. It is alleged that she attempted to kill the appellant by causing serious incisions on his neck, using the instrumentality of a sharp instrument. The appellant, who sustained a serious neck injury, was hospitalised resultantly. At the time of the arrest, the minor child resided with both parents, together with an older child mothered by Ms R. The latter child, is not the subject of these proceedings and does not otherwise feature at all.

[8] In light of the fact that the parents of D were not at home, the appellant being hospitalised and Ms R, in police custody, the children would possibly be in jeopardy of being left alone and unattended. In order to deal with that situation, the respondents, as grandparents, applied to the court *a quo* for the children to be placed in their custody in Rosh Pinah.

[9] In consequence of the respondents' application, the court *a quo*, issued an order removing the children from the biological parents' place of abode in terms of s 138(2)(d) of the Child Care and Protection Act 3 of 2015, ('the Act'). They were placed in the alternative care and custody of the respondents by order of the court *a quo*, dated 29 June 2023, for a period of six months. The court *a quo*, in its order, indicated that the placement order was issued pending investigations in terms of s 139 of the Act.

[10] The appellant, who had been released from hospital in the interregnum, filed an application to the court *a quo* dated 15 August 2023, for the 'withdrawal of the Court order made in terms of section 139 of the Child

Care Protection Act 3 of 2015.’ This application was accompanied by an affidavit deposed to by the appellant.

[11] In his application, the appellant deposed that he is the biological father of the child D and that he and Ms R were in a relationship for approximately three years. He outlined the events that led to his hospitalisation that have been captured above. He deposed further that Ms R had been admitted to bail for the offence in question but that he had had no contact with the child since 26 June 2023. He expressed his concern regarding the well-being and stability of the child and fear for his and the child’s life, after the commission of the offence for which Ms R was on bail for.

[12] The appellant further deposed that the placement of the child was done by the court without any consultation with him nor was he afforded any hearing or opportunity to consent or refuse the placement. It was his case that had he been consulted, he would not have consented to the placement. Furthermore, he deposed that the information, on the basis of which the placement order was granted, was false, incorrect or fabricated.

[13] It was the appellant’s further case that the respondents had, what I can call, a moral duty and responsibility to take care of the child whilst he was incapacitated and hospitalised but his was not a permanent disability, he retorted. He averred that he was not informed of the removal of the child within 24 hours as required by s 135 (5)(a) and s 136(2)(a) of the Act. Lastly, it was his deposition that the child was never at risk with him and as such, it was not in the best interest of the child to be removed from him and his paramour, to live with someone else. In this case, he further deposed, the child lives about 1186 kilometres away from him, which limits interaction and communication with the child. He decried the alienation from the child against his will.

[14] The application for withdrawal, was opposed by the respondents. They, through their legal practitioners of record, advised the court thereof.¹ The respondents further filed papers containing three special pleas,² without filing an affidavit dealing with each and every allegation deposed to on oath by the appellant. The special pleas were accompanied by an affidavit deposed to by the first respondent.³

[15] It is the appellant's case that the child was not in imminent danger and was actually in the care of the respondents as soon as they became aware of the incident between their daughter and the appellant. It is his case that the respondents had a duty to take care of their grandchildren in the circumstances but maintains that the children were not in distress, so to speak for the invocation of s 138 of the Act.

[16] The matter served before the court *a quo* on 18 August 2023. Both parties, were duly represented. The court, during the hearing, raised a question of law, which it ordered the parties to address *in limine*, namely, whether the court had jurisdiction to re-hear the matter and whether that would not be tantamount to self-review? Arguments were presented to the court *a quo* by the parties.

The judgment of the court *a quo*

[17] In relation to the question that the court *a quo* had posed to the parties, it held that the order it had issued in terms of the Act, could be discharged in terms of s 150 of the Act if doing so is in the best interests of the child concerned. It held that the application before it was not an application in terms of the said section but rather 'an attack that the order granted by this court

¹ Letter dated 15 August 2023 to the Clerk of Court and copied to the appellant's legal practitioners,

² Page 64 of the record of proceedings. The special pleas were that the appellant's application was not accompanied by a notice of motion; that the application was not served on the respondents within the period set out in s 55 of the Magistrate Court's Act 32 of 1944 and that the appeal procedure set out in the Act had not been followed by the appellant.

³ Page 68-69 of the record of proceedings.

was wrong.⁴ It held that the order for placement, it issued, was temporary and was premised on evidence adduced and a social welfare report. It thus held that the order it issued was not issued erroneously, as alleged by the appellant.

[18] Forming the *ratio decidendi* (reason for the decision), the court reasoned as follows:

‘On the other hand, this court cannot, as a matter of law review its own decision and hence this application on this ground alone without addressing *points in limine* as they do not dispose of the case, stands to fall. In any event, if this court were to grant the relief claimed, it would then mean that the child will not be under the care of any person which would not be in the best interests of the child.

If any of the parents thinks that he or she is fit to have custody of the child, an application can be brought before court for determination and once such application is successful it would then automatically dispense off (*sic*) the temporary placement order.’

[19] Following the reasons stated above, the court *a quo* accordingly dismissed the application for withdrawal of the temporary placement order. It further ordered the appellant to pay the costs of the application on the scale between attorney and client. It is the said order that forms the basis of the present appeal. I proceed presently to narrate briefly, the grounds of appeal as may be gleaned from the appellant’s notice of appeal.

The grounds of appeal

[20] It is unnecessary for the court to cite the grounds of appeal verbatim. I will merely paraphrase the contentions of the appellant in so far as it is contended that the court *a quo* erred and thus warranting that this court should set aside the order issued by the learned Magistrate.

⁴ Page 91 of the record of proceedings.

[21] First, the appellant contends that the learned Magistrate erred in law and/or fact in not withdrawing the placement order of 29 June 2023. No particulars are furnished in respect of how it is alleged the court erred in fact and/or law, as alleged. Second, it is contended that the court *a quo* erred in holding that the application by the appellant before it 'attacks' the placement order. In this regard, it was contended that the court lost sight of the fact that the original application by the respondents, was *ex parte* and contained false, fabricated and/or misleading information.

[22] It was further contended by the appellant, that the court *a quo* erred in holding as it did, that it did not have the necessary jurisdiction to withdraw the placement order. This, it was contended, was an erroneous finding when proper regard is had to s 47 (2) of the Act. It was also contended in this regard that the holding that the application to withdraw the placement order, is akin to a review of the court *a quo*'s decision, was erroneous. Also attacked, is the finding by the court *a quo* that if it granted the application by the appellant, the effect would be that the child would not be under the care of any person.

[23] The appellant further contended that the Magistrate erred in holding as he did, that the application for placement was properly brought before him and was not granted in error. In this connection, the appellant contended that the child was not in imminent danger as he was in the care of the respondents, who are his maternal grandparents. It was contended that the reasons why the appellant could not take care of the child, were temporary and the appellant was not regarded as constituting an imminent risk to the child.

[24] It was further contended that the granting of the placement order, was procedurally flawed for the reason that the appellant was not informed of the placement order within 24 hours, as mandatorily required by s 135(5)(a) as read with s 136(2)(a) of the Act. The appellant further contended that the removal of the child from his primary residence, was not consistent with the provisions of s 135(7) and 136(6) of the Act and as such, this court was at liberty to set the placement order aside.

[25] The appellant further alleged that the placement of the child with the respondents, who reside more than 1000 km from the child's ordinary place of residence, is not practicable and is also inconsistent with the best interests of the child. It was further contended that the placement order had no regard for the social welfare order, which recommended that the child be returned to familiar surroundings and in the care of the appellant.

[26] Last, but by no means least, the appellant attacked the costs order. In this connection, it was contended that the learned Magistrate erred in holding the appellant liable to pay costs of the application before him on the attorney and client scale, which is punitive. In this regard, it was further contended, there were no reasons furnished in law and in fact for the punitive costs order.

The parties' contentions

[27] The appellant, as would be expected, argued that the court *a quo* erred in refusing his application. He contended in that regard, that there is a litany of reasons, which justify this court in setting aside the order of the court *a quo* and ordering that the child be returned to his familiar surroundings, to live with the appellant. The respondents argued contrariwise and submitted that the order by the learned Magistrate is unassailable and that in any event, the said order, is not appealable as of right. For that reason, this court should dismiss the appeal with both hands as it were and accordingly non-suit the appellant.

[28] It may not be necessary for the court to deal with the arguments presented by the parties blow by blow. What the court will do, is to consider the grounds of appeal that are potentially dispositive of the matter either way. In this connection, it is pertinent that the contention that the appeal should have been brought with leave of the court *a quo*, is accordingly dealt with first. Before doing so, it is fitting that I first deal with an application for condonation brought by the appellant.

Application for condonation

[29] The first issue that the court had to deal with, was an application for extension of time filed by the appellant for his inability to file his heads of argument on time. This application was opposed by the respondent. In the application, the appellant indicated that he was due to file the said heads of argument on 26 January 2024 but had, for reasons advanced in the application, failed to file his heads of argument on time. He thus moved the court to file the heads of argument on or before 9 February 2024.

[30] As indicated above, the respondent filed a notice to oppose the application. No affidavit was filed in support of the opposition. This is a significant feature of this case. There is thus no reason, tangible, or otherwise on the basis of which the application for extension of time, is opposed by the respondent. I am acutely aware that an application for condonation is, in essence and primarily an application made to the court. The court may, where appropriate, take into account the other party's view in deciding the said application. As such, it is thus fitting that the matter be decided on the basis of the papers filed by the appellant, the respondents not having filed any and I proceed to do so.

[31] The affidavit is deposed to by the appellant's legal practitioner, who appears *au fait* with the reasons behind the non-compliance with the rules of court. Counsel deposes that at the time the heads of argument were due, another urgent matter, involving two minor children landed on her desk and she attended to it. There was also another fraud matter that she was involved in and which affected two pensioners.

[32] It was only on 19 January 2024 that she realised that she would not be able to meet the deadline. This prompted her to reach out to the respondents' legal representative to explain the failure to comply. At this stage, the engagement of the appellant's counsel had not been confirmed because payment of the necessary funds to secure her attendance had not been made. Counsel was thus only able to attend to the brief on 24 January 2024. This accordingly resulted in the appellant only being able to file heads on 26

January 2024. That is the long and short of the grounds of the application for condonation.

[33] The principles governing applications for condonation have by now become trite. They have recently been repeated in *Kamushinda v Bruni & MacLaren*⁵. In restating the principles, Smuts JA, writing for the majority of the court reasoned as follows:

‘An applicant for condonation is firstly required to provide a reasonable explanation for the non-compliance. In the second instance, there must be reasonable prospects of success on appeal. These requirements are not considered in isolation in the exercise of the court’s discretion. Good prospects of success may result in granting condonation even in the face of an unsatisfactory explanation although an explanation found to be “glaring”, “flagrant” or “inexplicable” may result in the dismissal of the application without the need to consider the prospects of success of the appeal.’

[34] I have considered the affidavit filed on behalf of the appellant in the present matter. In my considered view, it does not provide a full explanation for the delay and more importantly, it does not deal at all with the prospects of success. All things being equal, the fate that should have met the application, even in spite of the respondents not filing grounds for opposition, is a dismissal of the application.

[35] It must be repeated that applications for condonation are not to be treated as perfunctory proceedings and thus to be approached with levity. Where this happens, the applicant for condonation becomes extremely chary in explaining the cause for delay and expects that he or she will get away with it, relying on the court’s maudlin sympathy, which the court must attach to the cause. Worse is the case where that party fails at all to engage the question of prospects of success, as the present appellant.

⁵ *Kamushinda v Liquidators Small and Medium Enterprises Bank Ltd (SME Bank ‘In Liquidation’)* (SA 101/2020) [2024] NASC (12 March 2024) para 45.

[36] I have however considered that at the end of the day, this is a matter that involves the interests of a minor child, who is about one year old. She is in blissful ignorance of the storm surrounding her care amongst her immediate relatives. She is oblivious to what is happening in this court and is reliant, for her care and wellbeing, on those who have authority over her.

[37] I am, for the reason that this application, if not granted, may negatively affect the interests of a minor child and serve to prolong the uncertainty regarding the contested terrain where her best interests lie, of the considered view that the application should be granted, the glaring deficiencies notwithstanding. This is in keeping with the court's duty as the upper guardian of children to act in the best interests of children at all times. To this end, procedural formalism may have to give way to the best manner of securing the best interests of children.

[38] Where a case such as the instant one, involves a vulnerable and helpless child, whose interests may well be placed in jeopardy, I am of the considered view that the court should approach these matters with less formality. In that event, the court should rather chart a course that takes into account the best interests of that child, thus eschewing a temptation to dismiss the application on the basis of strict legal formalism, possibly placing the best interests of the child on pause and uncertainty and thus in serious jeopardy. See *CJV v DG (Previously V)* HC-MD-CIV-MOT-GEN-2023/00462 [2023] NAHCMD 829 (19 December 2023) per Sibeya J at para 62 and 63.

[39] I also consider, in granting the condonation that the application is not in effect opposed by the respondents on any sustainable grounds. I do not lose sight of what has been mentioned before that essentially, such applications are normally between the defaulting party and the court. The best interests of the child, enshrined in the Act, would require courts, in my view, to deal with these matters sympathetically and avoid strict formalism that may, at the end of the day, endanger the future of children and their best interests, which the Act was designed to protect and hold dear and harmless.

[40] Having said this, I must not be understood to be preaching a gospel that encourages litigants and legal practitioners, in particular, to become slovenly and flippant in drafting court papers. The message has not changed regarding the requirements to be met in condonation applications. Where the application is for condonation, the law, as set out by the Supreme Court above, should be followed. The circumstances in this case are, as I have endeavoured to show, special but it must be clear that such cases do not ordinarily constitute a licence for non-compliance with the requirements of the rules of court. I now proceed to consider whether leave to appeal was necessary to be obtained by the appellant before lodging this appeal.

Does this appeal require leave from the court *a quo*?

[41] Ms Kishi, for the respondents argued, and quite strenuously that having regard to the entire matter, and particularly the order that is sought to be set aside on appeal, the appellant ought to have applied for and obtained leave from the court *a quo* to approach this court for the relief sought. The mainstay of Ms Kishi's argument, as I understand it, is based on the provisions of s 138, which appear to suggest that the placement order is interim in nature. For that reason, so Ms Kishi argued, the appellant ought to have sought and obtained leave from the lower court before noting an appeal against its judgment and order. Is that contention sustainable?

[42] Helpfully, Ms Kishi referred the court to some authorities, which deal with the question of appealability, both in this jurisdiction and beyond. In *Aussenkehr Farm (Pty) Ltd v Minister of Mines and Energy*⁶, the Supreme Court adopted the test set out in the South African case of *Zweni v Minister of Justice*⁷, where the attributes of a final judgment that is thus appealable without leave were set out.

[43] It was held as follows:

⁶ *Aussenkehr Farm (Pty) Ltd v Minister of Mines and Energy* 2005 NR 21 (SC) at p 29A-C.

⁷ *Zweni v Minister of Justice* 1993 (1) SA 523 (AD) at 532H- 533A.

‘A “judgment or order” is a decision which, as a general principle, has three attributes, first the decision must be final in effect and not susceptible to alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing at least of a substantial portion of the relief claimed in the main proceedings.’

[44] The question confronting this court, having regard to the above quotation in *Zweni*, which was accepted lock, stock and barrel by the Supreme Court, is whether these requirements are not met in the instant case. I am of the considered view that when proper regard is had to the question on appeal, it seems plain that the order sought to be set aside by this court, is final in effect and decisive of the parties’ rights. Furthermore, it disposes of the relief sought by the appellant from that court in its entirety.

[45] There is a proverbial trap that one should avoid falling into in this matter and Ms Kishi, in my view, does not seem to have been wary and may not have been alive to it. While it is true that the order that the court *a quo* issued was interlocutory in form and effect, once it refused to hear the appellant’s application and held that it did not have the jurisdiction to revisit its own judgment, the result was that the order it issued was definitive of the rights of the parties and was final in effect. It fully and in final fashion, disposed of the relief sought by the appellant in the court *a quo*.

[46] Once a court holds that it is bereft of jurisdiction to deal with a certain matter, its finding in that regard, is final in nature and effect and is thus appealable as of right. The party, who is thrown out by the court on the lack of jurisdiction, is denuded by that very finding of the right to approach that very court even to the limited extent of seeking leave to appeal. The remedy for such a party lies in a direct appeal to the appellate court.

[47] In the instant case, the court *a quo* held that it could not revisit its own judgment and was thus *functus officio*, so to speak. It was on that basis that it refused the appellant’s application. Once it did so, it washed its hands of the application in the proverbial Pontius Pilate style, leaving the appellant in a

position where he could not ask that court to reconsider its decision. His only remedy, was to approach this court on appeal. This is exactly what the appellant did.

[48] I am of the considered view that when one carefully considers the facts of the instant case, it becomes plain that the finding of the learned Magistrate that he did not have jurisdiction to review his own order, was tantamount to him saying that the court is bereft of the jurisdiction to adjudicate on the appellant's application to withdraw the placement order, which it is common cause, was interlocutory. That left the appellant with no basis on which to seek relief from the very court that had held it cannot by law afford him any remedy or redress regarding his complaint.

[49] In the circumstances, the appellant's only route and remedy was to appeal to this court as of right. I am accordingly of the considered view that this point *in limine* must fail. Where a court holds rightly or wrongly that it does not have jurisdiction, it would be folly to approach it even for leave to appeal on that very finding. An appellate court is the appropriate forum in my considered view. This point *in limine* must thus fail.

Was the court a quo correct in its finding that it could not review its own decision?

[50] The next question for this court to decide and on which the decision of the court a quo stands, is whether it is correct for the court a quo to hold as it did that it could not, as a matter of law, review its own judgment. In order to arrive at a conclusion on this issue, it is necessary that regard be had to the relief sought by the appellant and the grounds on which the application was predicated. The reasons why the learned Magistrate refused to adjudicate on the appellant's application have already been traversed above.

[51] It is clear that the appellant applied for what was termed an 'application for withdrawal of the court order made in terms of section 139 of the Child's

Protection Act, Act 3 of 2015.⁸ It came under the cover of a notice of motion dated 15 August 2023. In this notice of motion, the appellant prayed for 'Withdrawal of the Court Order made in which the minor child was removed from her biological parent and place (*sic*) under alternative care of the maternal grandparents'. The appellant further filed an affidavit in support of the application.

[52] In that affidavit, he narrates the history of the reasons why he seeks a withdrawal of the placement order. Briefly stated, he deposes that he is the biological father of the minor child he fathered with Ms R. He accuses her of having been possessive, obsessive and jealous, which behaviour he could no longer tolerate and was unwilling that his child be exposed to it. He accused Ms R. of being impatient and emotionally abusive and did not contribute to the household expenses. He also accused her of not trying to find employment, which would enable her to contribute to the family needs.

[53] He deposes further that on 26 June 2023, whilst in the arms of Morpheus (asleep), he was awakened at around 03:30 and realised that Ms R was in the process of slitting his throat with what he believed was a knife. He had been lying on his stomach at the time and woke up to defend himself from the assault. He deposed that he eventually wrestled the knife from her and called for assistance. He was assisted. Ms R fled from the scene, leaving the doors open and took the child with her.

[54] He was thereafter taken to Grootfontein Private Hospital and was treated for a 30-centimetre wound to his neck, which extended from the posterior to the anterior of his neck. It was 5 cm deep and caused muscle damage. He further deposed that he was taken to surgery and the wound was sutured, repairing the damaged vessels in the process. Pictures of his wound were attached to the application and they are a horror sight, to say the least.

[55] The appellant further deposed that as a result, Ms R was arrested and charged with attempted murder, as read with the Domestic Violence Act, as

⁸ Page 23 of the record of proceedings.

stated earlier in the judgment. She was eventually admitted to bail and alleged that she was being sexually abused by the appellant, which he denies in his papers and points out that he was not charged with any such offence to date. I need not delve too much in the accusations and counter-accusations made as another court is seized with dealing with these allegations. It is that court that will sift the chaff from the wheat in the course of that trial.

[56] The appellant stated further that he was concerned about Ms R's wellbeing and stability, not to mention her emotional and psychological stability. To make matters worse, he further states, he had not been in contact with their child since the fateful morning of 26 June 2023. The appellant stated that he had, since those events, begun to harbour fears for himself and the minor child, considering what Ms R had done to him.

[57] It was the appellant's further deposition that the child was placed at his maternal grandparents place in Rosh Pinah while the mother was in police custody and he, the appellant, was hospitalised. He states that the child was placed in the respondents' care without any consultation with him and/or request. He deposed further that he was not afforded an opportunity to consent to the placement, which consent he would not have given in any event. He states that although he was hospitalised with serious injuries, he was conscious at all times and was communicative. The allegations made by the Ms R that he abused drugs were false and he was not afforded an opportunity to deal with them in any event.

[58] He complains bitterly about the removal of the child to a place of safety by virtue of a court order, which was issued without his knowledge or participation. He contends further that the information, on which the application for the removal of the child was predicated, was false, incorrect or fabricated. It was his case that a place of safety as envisaged in s 64 of the Act, is a facility used temporarily for reception and care of children who have been removed in terms of ss 135 or 136 of the Act, pending their placement in terms of an order by the Children's Court. He reasons that the child was not in

imminent danger as he was in the care of the respondents, who are maternal grandparents to the child.

[59] It is the appellant's contention that the respondents had a duty and responsibility to take care of the child while their daughter was incarcerated and the appellant was hospitalised. He further deposed that it was not, in the circumstances, in the interests of the child to remove her from her ordinary and primary place of residence and to take her to another town more than 1000 kilometres away. It is his case that the requirements of ss 135(6), 136(3) and 136(c) were not met and this is an indication that the application for withdrawal of the previous order has merit.

[60] The appellant further contends that the removal of the child did not comply with the procedures set out in s 135(7) and s 136(6) as the child was not facing a substantial risk at the time of removal. The removal of the child from her ordinary place of residence and environment, he deposes further, was not the best way to secure the wellbeing of the child as required by s 136(1)(a) to (c) of the Act.

[61] The appellant lays blame at the door of the respondents and deposes that while he lay in hospital convalescing, they approached the social welfare department and placed incorrect and false information which led to the court issuing the placement order in circumstances where it would not have, had the correct and factual information been placed before it.

[62] The appellant emphasises that whereas the Act requires that he should be informed within 24 hours of the placement, he was never informed. Furthermore, he was never granted the opportunity 'to fight for my Child and am now being alienated from my Child against my will'. Last, the appellant states that he has requested the social worker to provide a recommendation after an investigation in support of his application.

[63] As a parting shot, the appellant states that he is a stable, established and hard working person who is in permanent employment. As such, he

receives sufficient income to take care of the needs and requirements of the minor child. It is his further case that he has the support of a safe and good family to assist him in taking care of the child.

[64] What is therefor plain, is that the respondents did not engage the version deposed to by the appellant in his affidavit. As indicated earlier, they filed special pleas, which appear to be foreign, in my considered view, to applications. Special pleas are normally reserved for action proceedings, which the present proceedings, are not. Not a lot however, turns on that when regard is had to the question that this court has to determine. The cogency of the allegations by the appellant may become of great moment when the application for withdrawal is considered and eventually decided on the merits.

[65] Ms Lewies, for the appellant argued that the application for withdrawal, which the appellant moved, is provided for in s 47(2) of the Act. It is necessary, in that connection, to have regard to what the said provision states. It reads as follows:

‘(2) A children’s court may, in addition to the orders it may make in terms of this Act –

- (a) grant interdicts and auxiliary relief in respect of any matter it may adjudicate on in terms of this Act;
- (b) extend, withdraw, suspend, vary or monitor any of its orders;
- (c) impose of vary time deadlines with respect to any of its orders;
- (d) make appropriate orders as to costs in matters before the court;
- (e) order the removal of a person from the court after noting the reason for the removal on the court record;
- (f) appoint a *curator ad litem* in respect of any particular child if the appointment would, in the opinion of the court, be in the best interests of the child, despite the fact that the child may have legal representation;
- (g) order a designated social worker, medical practitioner, psychologist, educational practitioner or any other person with appropriate expertise to carry out a further investigation into the circumstances of a child and compile a written report addressing such matters as the court may require; and

(h) order the ministry responsible for administration of matters relating to home affairs to issue a birth certificate in respect of a particular child despite any inability on the part of the child or his or her parent, guardian or care-giver to comply with any requirements of that ministry.'

[66] It is plain, from reading the above provision, that the Children's Court has been given wide amplitude by the legislature in dealing with the multifarious matters and questions that arise before it dealing with children. In this regard, it has been given powers to enlist the services of relevant professionals in areas where it may lack the expertise necessary to resolve a particular matter serving before it.

[67] The panoply of powers imbued upon it, includes the power to, in appropriate cases, extend, withdraw, suspend, vary or monitor any of its orders. It is plain, when that power is properly and closely considered, that this includes the power to revisit orders that the court may have issued previously. This is so because issues involved in matters relating to children may be very fluid and volatile, changing from one moment to the next. Very often, these matters are brought on urgent basis and emotions of the parties involved tend to cloud issues.

[68] More often than not, the persons involved are engaged in a close love relationship with all sorts of spillovers, possible, thus obfuscating the true issues in contention. Because of the emotive nature of these matters and heightened tensions at the time an order is made, there may be a need for the initial order to be revisited, as new information comes to light. I should add that in any event, in cases such as the present, where the order was issued in terms of s 135 or 136 of the Act, it is to be revisited in any event, in terms of s 138 of the Act.

[69] From the powers that the court may exercise in terms of s 47, it is clear that the court is not deprived of the power to revisit an order it has previously made. That in essence, in my view, is what an extension, withdrawal, suspension and variation may entail, namely, dealing with the matter afresh

depending on the factual and legal bases placed before court after the placement order. In this regard, it is accordingly clear that the court was not prevented by the law from reconsidering the previous order it had made.

[70] A cue that the placement order made is not final and is susceptible to being revisited by the court, is to be found in the provisions of s 138(1) and (2). These provide that a child, who is the subject of a placement order, must be brought before a children's court as soon as possible after removal but not later than five days after the removal. The court, it is stated, 'must when reviewing the placement of the child as contemplated in subsection (1), after consideration of the reasons for the placement of the child and such other information as may be provided, on oath or affirmation, by the parent, guardian or care-giver, the social welfare officer or member of the police and any other person with relevant information . . .' confirm the removal and placement or make an order for alternative placement, order the child to be restored to the custodial parent or care-giver or such other official.

[71] This, in my considered view, points inexorably to the conclusion that the court *a quo* was not absolved from dealing with the applicant's application as and when it was launched. If truth be told, the provisions of s 138(1) and (2), which appear to be mandatory, were not followed in this case. I say so because in terms of those provisions, the matter ought to have been brought back to the court *a quo* not more than five days after the initial placement order. Especial care must be taken by officials manning children's court that the provisions of the Act are followed and to the letter. There are clearly some policy reasons for these requirements. They must not be rendered nugatory by the children's court not following these mandatory provisions of the law.

[72] The question whether a withdrawal of the order was the appropriate relief the appellant sought from the court *a quo* and whether the necessary averments were made in the application for such an order, are not matters before us that we should decide in this appeal. All we observe and direct, having regard to the provisions cited above, is that it is clear that the court *a*

quo erred in finding as it did, that it could not review or reconsider the order it had issued.

[73] There are special compelling circumstances in this case, which in my considered view required the court *a quo* to revisit its order. In this connection, it must be remembered that the placement order was granted on an *ex parte* basis and was predicated on information placed before court by the respondents in the absence of and to the exclusion of the appellant, with whom the child resided. The appellant, it is on record, was never consulted before the order was issued. Faced with the appellant's application and the allegations made therein, it is odd, if not odious that the learned Magistrate would have found that he could not entertain the application. Less so in my view when one considered the provisions of s 47, referred to earlier.

[74] Besides the fact that the court *a quo* was not precluded by law from hearing the appellant's application, with the opposite being the case, namely, that the court could deal with the matter in terms of s 47, the very fact that an order that impinges on or affects the rights of another party is granted in that party's absence, is often a good reason to revisit that order, where and when the party so excluded, whether rightly or wrongly moves the court to reconsider the order it issued.

[75] In the instant case, it is not even necessary to refer to case law that is normally followed, including for instance the rules of this court, namely rule 72, which allows for *ex parte* applications to be brought in limited and specified circumstances. Subrule 72(6) allows the court in that event, to grant the party affected by the order, leave to anticipate the return date of the rule. This drives the point home how important it is for the court to hear parties affected by its orders. The debilitating effect of not doing so is manifest as it violates the right to be heard, ie, the *audi alteram partem* rule, which is protected by the Constitution.

[76] I mention the above in order to drive home the fact that there was no lawful basis to refuse to hear the appellant's application. The reference to the

rules of this court is just a manner of exemplifying the necessity to hear the appellant even before the order was made and at worst, immediately after the order was made but not more than five days thereafter. The court *a quo*, is a creature of statute and it is in duty bound to follow the prescripts of the applicable legislation. In this case it failed to do so, which is compounded by it holding wrongly in our view, that it could not revisit its order. The provisions of the Act cited above, point in the opposite direction of that finding.

[77] It is perhaps important, for completeness' sake, to refer to the Rules of the Magistrate Court. Rule 55(5) thereof deals with *ex parte* applications. More pointedly, rule 55(7) provides that 'Any person affected by an order made *ex parte* or by an interdict notice in a summons for rent under section 31 of the Act may apply to discharge it with costs on not less than 12 hours' notice.' As stated earlier, the placement order was granted *ex parte*. On a proper reading of rule 55(7), the court *a quo* had right to hear the appellant's application and to discharge the said order or set it aside. If satisfied that a proper case had been made out by the appellant, it could set the order aside or grant such other relief as may have been deemed appropriate.

[78] I should point out that the court *a quo* fell into a grievous error when it remarked that if it granted the appellant's application before it, that would have resulted in the child not being under any one's care. That is manifestly incorrect for the reason that had the court entertained the appellant's application, it would have had to consider the application afresh and take into account the case made by the applicant and the respondents, considering in the process, the opinions of the experts where necessary, including the social welfare officers. Having done so, the court would have been properly placed to the make an appropriate order, fully informed by the information before it.

[79] I am, in the premises, constrained, from whichever angle one views this case, to find that the decision and order of the court *a quo* were wrong in law. They collided head-on with the powers and responsibilities of the court *a quo*, granted in specific terms by the legislature, to reconsider its placement orders – this is so whether or not there is an application for consideration or

other relief. It is mandatory, as seen from s 138 for the court to revisit its order and where appropriate, alter or confirm it.

[80] I am, in the premises, of the considered view that the appellant's appeal ought to succeed. The issue raised *mero motu* by the court *a quo*, was wrongly decided. The court *a quo* should have entertained the application for withdrawal and made an order it considered appropriate, having listened to the parties and considered all relevant information it was entitled to take into account in terms of the Act.

Costs

[81] The only outstanding issue that remains for determination involves the question of costs. The appellant cried foul that the court *a quo* erred in mulcting him in costs on a punitive scale in the first place. The appellant further contends that no reasons are proffered in the judgment as to why the court held that such punitive costs were condign in the case. Does this contention have merit?

[82] The starting point, in my considered view, are the provisions of s 47(2) (e), which grant the Children's Court the right to 'make appropriate orders as to costs in matters before the court.' Appropriate can be defined as 'suitable, acceptable, correct for the particular circumstances'.⁹

[83] The question to answer is whether the punitive costs issued by the court *a quo* were suitable, acceptable, correct or condign for the particular circumstances of the case? The first problem one encounters, is that there is no reason proffered by the court *a quo* for granting costs on the punitive scale. Courts are accountable institutions. They, like all other bodies, are expected and required to give reasons for any orders they make. This is especially the case where the orders they issue, affect other people's rights and interests. They are not a law unto themselves and are thus not entitled to act in an arbitrary manner. In this connection, the court *a quo* was bound to

⁹ Oxford Advanced Learner's Dictionary, Oxford University Press, 8th edition, 2012.

furnish reasons why the particular circumstances of the case before it, warranted punitive costs. There is no indication that the respondents applied for costs on that scale.

[84] In order to decide the question whether the costs order was condign, given the circumstances of the case and considering the absence of reasons or a motivation for the stinging costs order, it is perhaps important to go to the basics. Under what circumstances are punitive costs visited on a party? This may assist this court in considering whether the instant case was one in which the punitive costs were fitting, all things considered.

[85] It is in this regard perhaps appropriate to refer to the learned author Cilliers,¹⁰ where he states as follows:

‘The court is, generally speaking, averse to make an order for attorney and client costs in the absence of a special prayer for it or notice of an application for it. Thus where such costs have had not been specifically claimed in the pleadings, the court postponed the hearing.’

[86] In the instant case, it is important to mention that the respondents, as mentioned earlier, did not file an opposing affidavit in the ordinary sense. They filed an affidavit supporting some special pleas the respondents had raised. The special pleas were that the application was not accompanied by a notice of motion; that the application was not served on the respondent in terms of the Magistrate Court Rules and lastly that the appellant should have filed a civil appeal in terms of s 46 of the Act but had not done so. The respondents would have hoped that the special pleas would be upheld and thus result in the appellant being non-suited, if any one of them was upheld. As indicated earlier, these special pleas were not considered and the court dealt with the matter and disposed of it on the basis of the question it had posed to the parties, namely whether it could in law review its own previous decision.

¹⁰ A C Cilliers, *Law of Costs*, LexisNexis, 2015, at p 4-10.

[87] Reference to the special pleas is made to drive the point home that when regard is had to these special pleas, there is no prayer for costs on the punitive scale therein. For that reason, it is plain that the issue raised by the learned author Cilliers, was not observed in this case. The appellant was not alerted to a prayer for costs at any stage nor was the matter postponed to allow the parties to deal with the costs that the court decided to award on the punitive scale. This is an initial sign that the granting of the costs on such a scale may have been problematic and inappropriate.

[88] I now move on to the next leg. The learned author says the following regarding the award of costs on such a scale:¹¹

‘The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs, and will grant such costs on “rare” occasions. It is clear that normally the court will not order a litigant to pay the costs of another litigant on the basis of attorney and client costs unless some special grounds are present. An award of attorney and client costs is granted by reason of some special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party. The list is not exhaustive.’

[89] Whereas it is clear that there is no prayer made for punitive costs in this matter, it is also plain that there is nothing that was stated or apparent from the record of proceedings, that would have warranted the costs on a higher and punitive scale. As stated above, there must be some special considerations apparent from the behaviour of the party mulcted in costs or in the conduct of the case, which suggests that the party in question, has behaved dishonourably, deceitfully, maliciously, vexatiously or such other kindred epithet.

[90] Having read the record of proceedings in the matter, the papers filed in support of the application by the appellant, the papers filed by the respondent

¹¹ *Ibid* at p 4-17.

and the judgment of the court *a quo*, there is no indication that there was any untoward behaviour by the appellant that would have even remotely merited an award of costs on the punitive scale. As recounted above, there are no reasons proffered by the court in its judgment for such a drastic order.

[91] In view of the observations made above, including the absence of a prayer for costs, there being no behaviour or conduct by the appellant meriting such a punitive costs order, it therefore seems to me that the requirements of the provisions of s 47(2)(e), mentioned above, have not been met. Resultantly, the costs issued by the court cannot be said to have been 'appropriate', as required by the said provision. In the circumstances, the prayer for costs on the punitive scale, is set aside.

[92] The reasons, advanced above, constitute the bases upon which the court order dated 9 February 2024, was issued.

T S MASUKU
Judge

I agree

J S PRINSLOO
Judge

APPEARANCES

APPELLANT: R Lewies

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