

SOUTH AFRICA / JUDGMENT

JE v NM (38571/2013) [2014] ZAGPJHC 175 (20 June 2014) [2014] ZAGPJHC 175

COURT

South Gauteng High Court, Johannesburg

BEFORE

P.A. Meyer

CASE / FILE NUMBER

38571/2013

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REPUBLIC
OF SOUTH AFRICA
HIGH
COURT, SOUTH GAUTENG DIVISION
(JOHANNESBURG)
Case
No. 38571/2013

DATE: 20 JUNE 2014
In

the matter between: JE.....Applicant
And
NM.....Respondent
Case

summary: Jurisdiction – High Court – Dispute over
parental rights and responsibilities - Whether high court should
exercise its jurisdiction to determine issue of contact with a minor
child or whether children's court that made the initial
order
should be approached for a variation.

JUDGMENT

MEYER, J

[1] The applicant seeks an order that the family advocate be directed to investigate and report to this court on the issue of contact between the respondent and their minor son and, pending the outcome of that investigation, for contact to be exercised between them as stipulated in her notice of motion. She also seeks a final order that the respondent be interdicted from threatening, harassing and assaulting her. Finally, the applicant's notice of motion includes a prayer '[t]hat the respondent be ordered to contribute maintenance to the minor child in the amount of R3 500.00 per month', but the seeking of that relief in this court was abandoned at the commencement of the proceedings. The issue of the amount of the respondent's obligation to contribute to the maintenance for the child is being determined by the maintenance court, Randburg.

[2] The respondent seeks the dismissal of the applicant's application. He also instituted a counter application in which he

sought that the child's primary residency be shared between them, but the counter application was withdrawn in order for him to pursue that relief in the children's court, Randburg where proceedings for a variation of that court's order relating to the parental rights and responsibilities in respect of the child are pending.

[3] These are my reasons for having dismissed the applicant's application and ordering each party to pay his or her own costs.

[4] The child (E) was born on 14 October 2010. His mother is the applicant (J) and the respondent (N) is his father. N and J were

never married. They formed a relationship during March 2009 and were living together from April 2010 until May 2011 when J left the common home with E. The relationship between N and J became restored and the three of them again lived together as a family from August 2012 until 17 August 2013, when J finally left the common home with E.

[5] J avers that incidents of domestic violence occurred on a number of occasions during the two periods when she and N lived together.

During the first of such periods J laid a criminal charge of assault against N and she obtained an interim protection order against him. The criminal charge was subsequently withdrawn and the interim order not confirmed and made final due to J withdrawing the proceedings. J, also during the second period when they lived together, laid a criminal charge of assault against N on 17 August 2013 and she obtained an interim protection order against him, which interim order was made returnable on 3 September 2013. That criminal charge was withdrawn and the interim protection order not confirmed and made final on the return day thereof as a result of J withdrawing the proceedings. N, during the periods when they lived together, also laid criminal

charges of assault against J and he too obtained an interim protection order against her, which charges and order were also withdrawn and not proceeded with.

[6] N instituted proceedings for the restoration of his contact with E in the children's court, Randburg during the period of their first separation. That court granted an interim order pending N and J (who are co-holders of parental responsibilities and rights in respect of E) seeking to agree on a parenting plan. A parenting plan (inter alia determining that E was to live with J; stipulating in detail the contact between N and E; and providing for the contributions of J and N towards the maintenance of E and for them to approach the maintenance court to settle any dispute regarding maintenance that may arise in the future) was agreed upon and made an order of the children's court, Randburg on 3 Augustus 2011.

[7] Initially Saturdays and Sundays were to be alternated between J and N (so as to ensure that each parent has the child on a weekend day) with overnight contact commencing when E reaches the age of two years, whereafter he would spend every alternate weekend with his father from 6 pm on a Friday until 4 pm on the Sunday. The parenting plan also provides for contact twice during the week, on public holidays and other religious and special days, and during school holidays.

[8] After the parties had separated on the second occasion, N again sought the intervention of the children's court, Randburg for the restoration of contact between him and E and for a variation of its existing order relating to the primary residence of E. On 2 September 2013, the children's court 'confirmed' its previous order in terms of which the parenting plan agreed upon between J and N was made an order of that court subject to a variation in respect of the hours (11.30 am instead of 10 am until 6 pm) during which contact may be exercised between N and E on two days during the week. The matter was postponed to 26 November 2013 'for [the] outcome of [a] High Court application'. I was informed from the bar that the children's court again postponed the matter on that day to 27 May 2014.

[9] On 16 September 2013, N, through his attorneys, requested that the contact arrangements between him and E on the two weekdays be amended to 'Tuesdays and Thursdays from 18h00 to 19h00', due to N's workload having increased as a result of the resignation of a colleague of his subsequent to the adjournment of the children court's proceedings on 3 September

2013. J, through her attorneys, acceded to the request on 20 September 2013.

[10] J instituted the present application proceedings in this court on 15 October 2013. She states in her founding affidavit that-

'[o]n 2 September 2013 the Randburg Children's Court, despite my request that the current circumstances be investigated by a social worker, confirmed the terms of the parenting plan dated 3 August 2011, with an amendment to the contact time period in paragraph 2.1. The application was then postponed to 26 November 2013, pending the issuing of this application.'

Also-

‘I seek in this application that the Respondent and my parental responsibilities and rights in respect of [E] be fully investigated

and resolved in [E’s] best interests.’

And in conclusion-

‘I therefore ask this court to grant an order in terms of the notice of motion to which this affidavit is attached, firstly to request the Family Advocate to investigate the issue of the Respondent’s contact with [E], and thereafter to grant an appropriate order once the Family Advocate’s report has been delivered and the Respondent and I have supplemented this application as we may deem necessary.’

[11] In paragraph 7 of his answering affidavit N states the following:

‘7.1...

7.2 I wish to advise the above Honourable Court that there are currently proceedings pending before the Children’s Court, Randburg in respect of the parenting plan regulating the parental rights and responsibilities shared by the Applicant and I over the minor child. The Applicant herself has alleged same in her own papers.

7.3 The Applicant could have easily proceeded to make an application as per her Notice of Motion during the course of those proceedings

instead of approaching the above Honourable Court, incurring the costs of High Court litigation which far exceeds that of [the]

Children’s Court, and achieved the same result.

7.4 The Applicant led the Children’s Court to believe that the relief sought in terms of the application before the above Honourable Court is so vastly different that it cannot be obtained in the Children’s Court. However, all the prayers as contained in the Notice of Motion can be claimed in the Children’s Court.

7.5 As can be seen from annexure JE7 which is attached to the Applicant’s Founding Affidavit, the proceedings therein were postponed “for [the] outcome of [the] High Court application” as there was an understanding that relief which could not be sought in the Children’s Court was to (sic) going to be sought in the above Honourable Court by the Applicant. This, however, was not the case.’

[12] J’s reply to the above quoted averments of N is thus:

‘7. AD PARAGRAPHS 7.1 AND 7.2

The contents hereof are denied. The matter was postponed in the Randburg Children's Court to allow me to approach the South Gauteng High Court to have the matter referred to the Family Advocate.

8. AD PARAGRAPH 7.3

8.1 The Magistrate in the Children's Court refused to grant me leave to refer the matter to the Family Advocate and I was left with no alternative but to approach the above Honourable Court for the necessary relief.

8.2 The relief sought in this Application is to vary the terms of the parenting plan as it has proved to not be in the best interest of the minor child ... and which the Magistrate also found unnecessary to amend, alternatively to refer to the Family Advocate for a more detailed report as to the Respondent's rights of contact to [E].

8.3 My current application includes an interdict against the Respondent for which the Children's Court has no jurisdiction. I submit that the prayers in regard to maintenance is likewise not within the ambit of the Children's Court.'

[13] There is no express allegation on the papers that J made an application to the children's court, Randburg for a variation

of that court's order relating to contact between N and E nor does she state which of the provisions of the order relating to contact ought to have been varied. On the contrary, the record of the proceedings of the children's court that is annexed to her founding papers and upon which she relies in the present high court proceedings only refers to N's application for contact between him and his son to be restored and for E's primary residence to be with him. Also, the court order annexed to her founding papers and upon which she relies makes no reference to a refusal by the children's court, Randburg of a request by J that their 'current circumstances be investigated by a social worker' (J's allegation in her founding affidavit) or of a refusal to direct that the issue of contact be investigated and reported on by the family advocate (J's allegation in her replying affidavit).

[14] The contact arrangements between N and E which J in terms of her notice motion proposes pending an investigation by the family

advocate, are (except for the doing away with contact on the two weekdays) essentially identical to those contained in the parenting

plan that was made an order of the children's court. The essence of the case that J has made out in support of the relief

which she claims for this court to revisit the issue of contact between N and E once the family advocate had investigated and reported on the issue, is contained in the following paragraphs of her founding affidavit:

'80. Moreover, I do not think that the contact provisions as contained in the parenting plan are appropriate any longer. They were intended for another time and other very different circumstances. Circumstances that simply no longer prevail.

81. The respondent and I are no longer communicating meaningfully with each other, which is required for the parenting plan to operate in [E's] best interests.
82. The contact arrangements are disruptive to [E's] routine and cause unnecessary tension between the Respondent and me, which is not in [E's] best interests.
83. Already the Respondent has indicated via his attorney that he is not able to exercise contact as provided for in the parenting plan and has requested an alternative schedule.
84. What has been requested is three hour long midweek contact periods.
85. I have attempted to be accommodating in this regard but this arrangement is simply not in [E's] best interests.
86. The Respondent ought to exercise his contact rights in such a way that is not disruptive and not upsetting to [E]. The current

arrangement is very disruptive and not conducive to maintaining a healthy relationship between the Respondent and [E].

87. I do not wish to deny [E] his contact with the Respondent but the contact needs to be regularized in such a manner as not to interfere with [E's] wellbeing. Currently the contact arrangements do negatively interfere with [E's] wellbeing.'

[15] The contact arrangements provided for in the parenting plan that was made an order of the children's court, Randburg are not unusual. The case made out by J as to why the contact arrangements should be varied is founded on vague and unsubstantiated averments or on conclusions with the primary facts on which they depend omitted. The inability on the part of N to exercise contact with E from 11.30 am until 6 pm on two weekdays as was ordered by the children's court arose after the postponement of the children's court proceedings on 2 September 2013 and the arrangement for that contact to be exercised on Tuesdays and Thursdays from 6 to 7 pm was not ordered by the children's court, but agreed to between J and N. These contact arrangements could therefore have played no part in J's request for the matter to be postponed in the children's court in order to afford her the opportunity to launch an application to the high court.

[16] The day after the matter had been postponed in the children's court, J withdrew the proceedings in which an interim protection

order against N was issued in the magistrate's court, Randburg and the interim order was accordingly not confirmed and made final on its return day, which was 3 September 2013. In her replying affidavit, she states that her application to the high court '... includes an interdict against the Respondent for which the Children's Court has no jurisdiction' and that her application for a

domestic violence order against N had been withdrawn to allow her to proceed with this application in the high court against N. The ineluctable inference is that J, in launching the present high court proceedings, is forum-shopping.

[17] The children's court was established in terms of the Children's Act 38 of 2005 (the Act). It is a creature of statute and the powers accorded to it in terms of the Act include the powers to adjudicate any matter involving 'the protection and well-being of a child', 'the care of, or contact with, a child' and the 'support of a child'.^[1] The orders which a children's court may make are wide ranging and include orders relating to 'a shared care order' of a child, 'allowing a person to contact a child on the conditions specified in the court order', a 'contribution order' and 'an order instructing a person to carry out an investigation in terms of section 50 of the Act'.^[2] A children's court may withdraw, suspend or amend such order made or replace it with a new order.^[3] In addition to the orders already referred to, a children's court is empowered inter alia to 'grant interdicts and

auxiliary relief in respect of any matter contemplated in section 45(1)' of the Act,^[4] to 'extend, withdraw, suspend, vary or monitor^[5] any of its orders', 'impose or vary time deadlines with respect to any of its orders' and 'make appropriate

orders as to costs in matters before the court'.^[6] The proceedings of the children's courts are to be conducted in a child-friendly manner.^[7] 'Any party involved in a matter before a children's court may appeal against any order made or any refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction'.^[8] Proceedings of the children's court may also be reviewed by the high court.^[9]

[18] N argued that this court should not exercise its jurisdiction in determining the issue of contact between him and E. The children's

court, which is still to determine a variation of its order relating to E's residency, is, so it was argued, the appropriate forum to vary its contact order if the best interests of E require a variation thereof. There can be no question that the high court, as upper guardian of all minors, has the inherent jurisdiction to grant an order for care of and contact to a child,^[10] also as a court of first instance. The question that arises in this case, however, is how this court's jurisdiction should be exercised^[11] upon a consideration of the best interests of E.^[12]

[19] I am of the view that the best interests of E lie in the disputes over the parental rights and responsibilities of J and N in respect of E to be decided by the children's court, Randburg. In *FS v JJ* 2011

(3) SA 126 (SCA),^[13] Lewis JA said this:

'That said, I would caution against a practice of forum-shopping, even in cases concerning disputes over parental rights and responsibilities.

High Courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction.

And as a rule, since one is entitled to assume that any order has been made in the best interests of a child, should those interests

change over time, the court that made the initial order should be approached for a variation.'

[20] If the children's court, in violation of E's best interests, indeed refused a request by J to direct the family

advocate to investigate and report on the issue of contact between N and E, her remedy would have been to take the matter on review to the high court.[14] I, however, emphasise that J has not on the facts placed before me made out a case that the best interests of E required such an investigation and report by the family advocate.

[21] The appropriate route for the disputes over the parental rights and responsibilities of J and N in respect of E is for J to approach the children's court for a variation of its order in respect of contact. The children's court, Randburg made its initial order soon after the parties separated during May 2011 and since then it has been the forum that has decided on the disputes relating to the parental rights and responsibilities of J and N in respect of E. There is nothing before me to show that the interests of E would in any way be adversely affected if the high court does not assume its inherent jurisdiction and decide the issue of contact. The rule that '...the court that made the initial order should be approached for a variation' in matters concerning the parental rights and responsibilities in respect of a child finds application in this matter. It will be highly undesirable for the issue of contact to be determined by this court and that of residency by the children's court. Any order relating to contact between N and E which this court may make will have to be varied should the children's court find that it is in E's best interests that his primary residence be shared between J and N.

[22] I now return to the interdictory relief which J also seeks. The disputed issues of fact relating to the allegations of family

violence aside, J has not in these proceedings established a well-grounded apprehension that acts of violence will again be committed against her by N. The acts of violence upon which she relies have all been committed only during the periods when J and N lived together and there is no suggestion on the papers that there is any physical threat to J when they are not living together. There is nothing before me to show that there can be any apprehension that the alleged assaults upon J will be or are likely to be repeated. The following passage by Van Zyl, J in *Condé Nast Publications Ltd v Jaffe* 1951 (1) SA 81 (CPD) at 86 H is apposite:

'As stated in *Maeder v. Perm-Us (Pty.) Ltd.*, 1938 C.P.D. 208 and by van der Linde in his *Institutes* 3.4.7, an interdict is not the proper remedy where there is no fear that the wrong formerly committed will be repeated.'

[23] Finally, the matter of costs. The applicant is not successful in her application and the respondent's counter-application was withdrawn at the commencement of the hearing. I accordingly considered it appropriate for each party to pay his or her own costs.

P.A. MEYER

JUDGE OF THE HIGH COURT

20 June 2014

Date of hearing: 9 May 2014

Date of order: 26 May 2014

Date of judgment: 20 June 2014

Applicant's counsel: Adv KR Lavine

Applicant's attorneys: Sadlers Attorneys

Emmarentia, Johannesburg

Respondent's counsel Adv G Hardy

Respondent's attorneys: Clorinda Scalco Attorneys

Northcliff, Johannesburg

[1] Subsections 45(1)(a), (b), (d) and (h) of the Act.

[2] Subsections 46(1)(e), (h)(xi) and (i) of the Act. Section 50 of the Act inter alia empowers a children's court, 'before it decides a matter' to 'order any person- (a) to carry out an investigation or further investigation that may assist the court in deciding the matter and (b) to furnish the court with a report and recommendation thereon.' Also section 62(1) of the Act provides that '[a] children's court, for the purposes of deciding a matter before it or any issue in the matter, may order, if necessary, that a designated social worker, family advocate, psychologist, medical practitioner or other suitably qualified person carry out an investigation to establish the circumstances of-

(a) the child; (b) the parents or a parent of a child; (c) a person who has parental responsibilities and rights in respect of a child ...'

[3] Subsection 46(2) of the Act.

[4] Footnote 1 supra.

[5] The monitoring powers of the children's court are provided for in s 65 of the Act, which reads as follows: '(1) A children's court may monitor- (a) compliance with an order made by it in a matter; or (b) the circumstances of a child following an order made by it. (2) For purposes of monitoring compliance with an order made by a children's court or the circumstances of a child following an order, the court- (a) when making that order, may

order- (I) any person involved in the matter to appear before it at any future date; or (ii) that reports by a designated social worker be submitted to the court within a specified period or from time to time as specified in the order; (b) at any time after making an order or when a report of non-compliance mentioned in subsection (4) is referred to it, may call or recall any person involved in the matter to appear before it. (3) When a person appears before the court in terms of subsection (2) the court may- (a) inquire whether the order has been or is being complied with, and if not, why the order has not been complied with or is not being complied with; (b) confirm, vary or withdraw the order; or (c) enforce compliance with the order, if necessary through a criminal prosecution in a magistrate's court or in terms of section 45(2).

- (4) Any person may report any alleged non-compliance with an order of a children's court, or any alleged worsening of the circumstances of a child following a court order, to the clerk of the children's court, who must refer the matter to a presiding officer for a decision on possible further action.'

[5] The monitoring powers of the children's court are provided for in s 65 of the Act, which reads as follows:

'(1) A children's court may monitor-

- (a) compliance with an order made by it in a matter; or
- (b) the circumstances of a child following an order made by it.

(2) For purposes of monitoring compliance with an order made by a children's court or the circumstances of a child following an order, the court-

- (a) when making that order, may order-

(I) any person involved in the matter to appear before it at any future date; or

(ii) that reports by a designated social worker be submitted to the court within a specified period or from time to time as specified in the order;

- (b) at any time after making an order or when a report of non-compliance mentioned in subsection (4) is referred to it, may call or recall any person involved in the matter to appear before it.

(3) When a person appears before the court in terms of subsection (2) the court may-

- (a) inquire whether the order has been or is being complied with, and if not, why the order has not been complied with or is not being complied with;
- (b) confirm, vary or withdraw the order; or
- (c) enforce compliance with the order, if necessary through a criminal prosecution in a magistrate's court or in terms of section 45(2).

- (4) Any person may report any alleged non-compliance with an order of a children's court, or any alleged worsening of the circumstances of a child following a court order, to the clerk of the children's court, who must refer the matter to a presiding officer for a decision on possible further action.'
- [6] Subsections 48(1)(a), (b), (c) and (d) of the Act.
- [7] This is illustrated by inter alia the provisions of s 42(8) of the Act, which read as follows: 'The children's court hearings must, as far as is practicable, be held in a room which- (a) is furnished and designed in a manner aimed at putting children at ease; (b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court; (c) is not ordinarily used for the adjudication of criminal trials; and (d) is accessible to disabled persons and persons with special needs.'
- [7] This is illustrated by inter alia the provisions of s 42(8) of the Act, which read as follows: 'The children's court hearings must, as far as is practicable, be held in a room which-
- (a) is furnished and designed in a manner aimed at putting children at ease;
- (b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
- (c) is not ordinarily used for the adjudication of criminal trials; and
- (d) is accessible to disabled persons and persons with special needs.'
- [8] Subsection 51(1) of the Act.
- [9] Subsection 42(1) of the Act provides that '[f]or the purposes of this Act, every magistrate's court, as defined in the Magistrates' Courts Act, 1944 (Act 32 of 1944), shall be a children's court and shall have jurisdiction on any matter arising from the application of this Act for the area of its jurisdiction.' Subsection 21(1)(b) of the Superior Courts Act 10 of 2013 affords the high court with the power to review the proceedings of magistrates' courts.
- [10] Subsection 45 (4) of the Act also specifically provides that '[n]othing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children'. Section 23(1) of the Act also provides as follows: 'Any person having an interest in the care, well-being or development of of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary- (a) contact with the child; or (b) care of the child.'
- [10] Subsection 45 (4) of the Act also specifically provides that '[n]othing in this Act shall be construed as limiting the

inherent jurisdiction of the High Court as upper guardian of all children'. Section 23(1) of the Act also provides as follows:

'Any person having an interest in the care, well-being or development of of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary-

- (a) contact with the child; or
- (b) care of the child.'

[11] See: AD v DW(Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party

[2007] ZACC 27; 2008 (3) SA 183 (CC), at 194C-D.

[12] Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child.'

[13] At 135C-D.

[14] Compare: AD v DW(Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party

[2007] ZACC 27; 2008 (3) SA 183 (CC), para 29.

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Prepared on 12 October 2026 · Esheria