

SOUTH AFRICA / JUDGMENT

N.L v Fanayo N.O and Another (979/2020) [2020] ZANCHC 61 (28 August 2020)

[2020] ZANCHC 61**COURT**

Northern Cape High Court, Kimberley

BEFORE

Williams, Nxumalo

CASE / FILE NUMBER

979/2020

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Date delivered:	28-08-2020 In

the matter between:

N[...]
L[...]
Applicant
And
Magistrate NW Fanayo
N.O
1st Respondent
(in her capacity as a
Magistrate for the District of
Z.F Mgcawu)
L[...]-R[...]
L[...]
2nd
Respondent
CORAM: WILLIAMS

J et NXUMALO AJ:

JUDGMENT

WILLIAMS J:

1. This is an application which was brought on an urgent basis on 25 June 2020 for the following relief:

“2. Reviewing and setting aside the decision of the First Respondent taken on 3 June 2020, in her capacity as the presiding officer in the in camera application proceedings in the Magistrate’s Court for the District of Z.F Mgcawa held at Groblershoop, refusing to grant a permit in terms of Regulation 34(2) of the regulations published by the Minister of Cooperative Governance on 28 May 2020 in terms of the Disaster Management Act 57 of 2002 (the “Regulations”), for the movement of the minor child, E[...] C[...] L[...] (“E[...]”), from the farm Kleinbegin, located in the Northern Cape Province, to the home of the second Respondent located at 29 R[...] Street, W[...] D[...], Johannesburg, Gauteng Province (the “Permit”).
3. Granting a permit in terms of Regulation 34(2) of the regulations for the movement of E[...] from the farm K[...], located in the Northern Cape Province, to the home of the Second Respondent located at 29 R[...] Street, W[...], Johannesburg, Gauteng Province or such other place of residence in Johannesburg as the Second Respondent might return to with E[...].
4. In the alternative to the relief sought in prayer 3 above, ordering the Second Respondent to:
 - 4.1 immediately attend to whatever is required to enable her to confirm that the household to which she and E[...] will return is free of Covid-19;

4.2 within 2 (two) days following the granting of this order, make a fresh application for the Permit in compliance with the terms of the court order granted by His Lordship Mr Justice Vally in the Gauteng Local Division on 28 May 2020, a copy of which is attached to the founding affidavit as annexure FA1 (the “Court Order”), stating clearly that the reason why the Permit is sought is in order to comply with the terms of the Court Order;

4.3 provide the necessary confirmation in terms of regulation 34(3) of the Regulations that her home at 29 R[...] Street, W[...], Johannesburg, alternatively such other place of residence in Johannesburg to which she intends to return with E[...] is Covid-19 free for purposes of the application for the Permit as aforesaid; and

4.4 take all such steps and sign all documents as might be necessary and to use her best endeavours to obtain the Permit in accordance with the Court Order.

5. Authorising the Sheriff of the above Honourable Court to do all things necessary and sign all documents necessary to obtain the Permit in accordance with the Court Order should the Second Respondent fail or refuse to comply with the provisions of any order granted in terms of prayer 4 above.
6. Directing that there shall be no order as to costs save in the event of opposition to this application in which case ordering those parties who oppose the application to pay the costs thereof, jointly and severally, the one paying the other to be absolved.”
2. The applicant, Mr N[...] L[...] and the second respondent, Mrs L[...] - R[...] L[...], (who are herein either referred to as Mr and Mrs L[...] or applicant and second respondent respectively) are the parents of a 13 year old daughter who is currently a grade 7 learner enrolled at A[...] P[...] Preparatory School (the school).
3. Mr L[...] and Mrs L[...] are currently separated pending a divorce action instituted in the Gauteng Local Division, Johannesburg. Mrs L[...] is the primary caregiver pending the divorce.
4. On 20 March 2020 following the declaration of a national state of disaster, but before the President of the Republic declared a national lockdown, Mrs L[...] removed the minor child from Johannesburg and took her to her parents’ farm K[...], near Groblershoop in the Northern Cape, to avoid the effects of the Covid-19 pandemic and where they currently remain. There is some dispute whether the removal of the minor child from Gauteng took place with the permission of Mr L[...], but this dispute does not take the matter any further.
5. On 28 May 2020, in a Rule 43 application in which Mrs L[...] sought inter alia interim maintenance and to which Mr L[...] filed a counter-application for the return of the minor child to Johannesburg, Vally J made an order of which the relevant portion reads as follows:

“1. Both parties shall, pendent lite, retain full and equal parental responsibilities and rights in respect of the minor child born of the parties marriage, E[...] C[...] L[...] (“E[...]”), as envisaged by section 18(2) of the Children’s act 38 of 2005, as amended, which shall be the responsibilities and rights to care for E[...], have contact with E[...], act as guardian to E[...] and contribute towards E[...]’s maintenance.

2. That E[...]’s primary residence shall vest in the Applicant pending the applicable investigation by the Office of the Family Advocate and;

2.1 That the Applicant be ordered and authorised to return E[...] from the Northern Cape to Johannesburg within 5 (five) days following the date of the granting of this order;

2.2 That an order be granted compelling the Applicant to make application for the required permit to enable her and E[...] to return to Johannesburg from the Northern Cape, which application shall be made by the Applicant within 2 (two) days following the date

on which this order is granted,”

6. Mrs L[...], in accordance with the order made by Vally J, made application on 3 June 2020 for the requisite permit for the movement of a child between co-holders of parental responsibilities between provinces in terms of Regulation 34 of the Regulations issued on 28 May 2020 in terms of s 27(2) of the Disaster Management Act 57 of 2002, to the first respondent, henceforth referred to as “the magistrate” who presided in the children’s court in Groblershoop. On the same day the magistrate refused the application for a permit, which decision gave rise to the review application before us.
7. In his founding affidavit Mr L[...] avers that the provisions of Rule 53(1) (b) – calling upon the magistrate to dispatch to the registrar the record of the proceedings to be corrected or set aside, together with such reasons which he or she is by law required or desires to give – can be dispensed with due to the urgency of the matter and since he was already in possession of the record of the magistrate’s decision and her reasons therefore. He also had in his possession the permit application which the Magistrate considered in making the decision. The magistrate had in any event noted in the record of her decision that no further submissions had been made, therefore the contention was that all the relevant documents necessary for the review application were in possession of all the parties and before court. The abovementioned documents are attached to the founding affidavit.
8. When Mrs L[...]’s opposing affidavit was filed, it transpired that a mechanical recording had indeed been made of the proceedings which resulted in the matter being postponed to 27 July 2020 in order to comply with the provisions of Rule 53(1) (b) and the filing of supplementary affidavits, if necessary.
9. The applicant’s grounds of review which are based on gross irregularities in the proceedings, can be summarized as follows:

9.1 The magistrate’s refusal to grant the permit despite Vally J’s express order that the minor child be returned to Johannesburg.

9.2 The magistrate erroneously found that no reasons had been advanced for the movement of the minor child to Johannesburg.

9.3 The magistrate impermissibly and incorrectly considered and took into account factors in the affidavit deposed to by Mrs L[...] in support of the permit application.

9.4 The magistrate impermissibly and incorrectly engaged in her own assessment of the best interest of the minor child after such factors had already been considered by Vally J in the Rule 43 application.

9.5 The magistrate incorrectly found that there was no proof that the household to which the minor child was to be returned was Covid-19 free, whereas regulation 34(3) merely requires confirmation that the house to which a child is to be moved is Covid-19 free.

9.6 The magistrate failed to conduct an enquiry into why Mrs L[...] could not render the home in Johannesburg Covid-19 free; and

9.7 The magistrate erred in allowing and entertaining unfounded and unconfirmed submissions by Mrs L[...]’s attorney, Mr Husselmann.

10. This last ground above was added after the transcribed record of proceedings was received and it became obvious that there were in fact submissions made by Mrs L[...]’s attorney, contrary to what the initial note made by the magistrate had indicated.
11. There were various other grounds raised in the applicant’s supplementary papers, which mainly relate to minor inconsistencies in the documents initially attached to the founding affidavit and those in the record received from the magistrate. Mr Eillert who appeared for the applicant correctly did not waste time arguing these inconsistencies, which in no way contributed to the decision of the magistrate.
12. It is convenient at this stage to briefly refer to the assertions made by the parties in their affidavits.
13. Mr L[...] bemoans the fact that he had not seen the minor child for several months. As a parent he naturally craves more than just the telephonic contact which he has had with his daughter over the past few months, with the long distance of about 800 km between Grobblershoop and Johannesburg and the interprovincial travel restrictions which existed, having prevented him from having physical contact with the child since she has been with the maternal grandparents in the Northern Cape. I may at this stage mention that it appears from the supplementary papers filed that the applicant did enjoy one contact visit with the minor child in the Northern Cape during the period of the postponement.

14. Be that as it may, the applicant also alleges that the minor child is isolated on the farm where she is separated from her peers and have only the company of adults. He is also concerned that her fellow classmates and friends in grade 7 have returned to school on 1 June 2020 and that she may be prejudiced by not attending the school which has implemented all the necessary safety precautions against Covid-19 and is running smoothly.
15. Mrs L[...] contends on the other hand that it is not in the best interest of the minor child to return to Johannesburg, which has been classified as a hotspot for the Covid-19 in South Africa. That the minor child is well cared for and to a large extent isolated from the virus on the farm of her parents, where she is free to play and enjoy the open air and activities of farm life. She avers that the minor child receives her school lessons on-line, which service is provided by the school and has

attached a letter from the school confirming the participation and satisfactory progress of the minor child is this regard.

16. Mrs L[...] also states that as a caterer by trade, she cannot pursue her trade during the lockdown period and cannot afford to return to Johannesburg whilst the applicant neglects to pay maintenance for the minor child or service the mortgage loan and the municipal accounts of the parties' common home where she and the child reside in Johannesburg. In the meantime a housitter, who is a family friend, lives in the common home and she cannot, from where she currently resides outside of Groblershoop, confirm that the house to which the child is to be returned in Johannesburg is Covid-19 free.

The above circumstances have been set out in the affidavit which accompanied the application for a permit which served before the magistrate.

17. In her affidavit before court, Mrs L[...] states that she had complied with the order of Vally J by applying for a permit for the minor child but that it could not be expected of her to lie in the affidavit which accompanied the application to the magistrate.
18. In the reasons for her decision to refuse a permit, the magistrate found in short that the fact that Mrs L[...] could not provide written reasons, as required by Regulation 34(4)(b)(iv), why it was necessary for the minor child to be moved to Johannesburg, and the fact that she could not confirm that the house the child was to be moved to was free of the Covid-19 virus fell foul of the requirements under Regulation 34 for the granting of a permit for the removal of the minor child.
19. The relevant portions of Regulation 34 read as follows:

"Movement of children

- (1)

(2) The movement of children between co-holders of parental responsibilities and rights or a caregiver, as defined in section 1

(1) of at the Children's Act, between different metropolitan areas, district municipalities or provinces is allowed in the

co-holders of parental responsibilities and rights or a caregiver are or is in possession of a permit issued by a magistrate which

corresponds with Form 3 of Annexure A.

(3) A person applying for a permit contemplated in this regulation must confirm that the household to which the child has to move must be free of Covid-19.

(4) (a). . .

(b) Before a magistrate issues a permit referred to in subregulation (2) he or she must provided with

(i) a court order'

(ii) a parental responsibilities and rights agreement or parenting plan registered with the family advocate; or

(iii) a birth certificate or certified copy of birth certificate of the child or children to prove legitimate relationship between the co-holders of parental responsibilities and rights; and

(iv) written reasons why the movement of the child is necessary."

20. The alert level 3 Regulations were published in the Government Gazette on 28 May 2020, on the very day that Vally J made the order in the Rule 43 application, to be effective from 1 June 2020. The Rule 43 application had therefore not dealt with the requirements of Regulation 34 as to the movement of children across provincial borders, although it is clear that Vally J was aware that a permit for such movement had to be obtained.

21. The above factors are important in that one of the arguments made by Mr Eillert is that Vally J had already, at the hand of the facts placed before him in the Rule 43 application, exercised his discretion in favour of the minor child's return to Johannesburg and that the magistrate was thus bound to implement the terms of Vally J's order and grant the requisite permit. At risk of overstating the obvious, Regulation 34 which deals with the movement of children superceded Vally J's order and the

magistrate was bound, within the four corners of Regulation 34, to determine whether or not the relevant permit be granted.

22. That being said, all the arguments relating to the magistrate having exceeded her authority have no merit. I must add at this stage that the order of Vally J does in any event not compel the magistrate to issue a permit and has in my view been made subject to a permit being issued.
23. The review application should therefore be decided within the parameters of Regulations 34. It is clear from a reading of the Regulation that a magistrate does not have an unfettered discretion in the decision whether or not a permit should be issued for the movement of a child – except maybe as to the reason for the removal of the child.
24. Regulation 34(3) requires that an applicant for a permit must confirm that the household to which the child is to be moved is free of Covid-19. Mrs L[...] could not confirm that this was the case. Mr Eillert's argument that the magistrate should have taken a more pro-active stance and have enquired what steps, if any, Mrs L[...] had taken to ensure that her house was Covid-19 free, holds no water. There is no such requirement contained within the Regulations and the failure of the magistrate to do so would not in any way amount to a gross irregularity in the proceedings.
25. The ground that the magistrate erroneously found that there were no written reasons advanced for the movement of the minor child was argued on the basis that Vally J's order constituted the written reasons for the return of the minor child. This makes for an interesting argument and hinges on the interpretation of Regulation 34 (4) (b). Does the provision of written reasons as per Regulation 34 (4) (b) (iv) apply in the case where, a court order, is handed in in support of an application for a permit under the Regulation or does it only apply where, absent a court order, a parenting plan (Regulation 34(4) (b) (ii)) or birth certificate (Regulation 134 (4) (b) (iii)) is provided? The magistrate obviously interpreted the requirement of written

reasons

to apply to all three scenarios. Whilst I tend to agree with Mr Eillert that the court order of Vally J in itself provides the reasons why it would be necessary for the movement of the minor child, the interpretation of the Regulation by the magistrate cannot be said to be a gross irregularity in the proceedings as envisaged in s 22 (1) (c) of the Superior Courts Act 10 of 2013.

26. In any event, the failure of Mrs L[...] to be able to confirm that the child would be moved to a Covid-19 free household constituted sufficient reason to refuse the permit.
27. As alluded to herein, the submissions made to the magistrate by Mrs L[...]’s attorney elicited an added “ground of review” in that the magistrate should not have allowed the attorney to make certain unsubstantiated submissions with regard to specific high risk areas of Covid-19 the minor child would be exposed to in Johannesburg. This belated ground of review has no merit.

It is clear from the magistrate's order and the reasons for her decision that Mr Husselman's submissions had no influence on her decision, which was based entirely on the provisions of Regulation 34.

0cm; line-height: 200%">28. The application for review should in the circumstance be dismissed.

29. The remaining issue is that of costs. Mr Fletcher who appeared before us for Mrs L[...] argued that the applicant be ordered to pay the costs relating to the proceedings of 25 June 2020, when the matter was postponed, after hearing short arguments, for the record to be obtained.
30. The submission is that the matter was not of sufficient urgency for the applicant to neglect making proper enquiries as to whether the proceedings before the magistrate were mechanically recorded or even to neglect requesting the magistrate's reasons for the decision. This omission by the applicant was the sole cause for the delay in finalising the arguments on 25 June 2020 and in addition caused the unnecessary expenditure incurred in having to file supplementary affidavits. I agree with Mr Fletcher in this regard.

In the circumstances, the following order is made:

The application for review is dismissed with costs, inclusive of the costs of 25 June 2020.

CC WILLIAMS

JUDGE

I concur

S NXUMALO

ACTING JUDGE

For Applicant:

Adv. A Eillert

Brand Potgieter Inc

c/o Engelsman Magabane Inc

For Respondent: Mr Fletcher

Fletchers Attorneys

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Prepared on 12 October 2026 · Esheria