

SOUTH AFRICA / JUDGMENT

Potgieter and Another v Welgemoed and Others (A275/2020) [2022] ZAGPPHC 532 (20 July 2022)

[2022] ZAGPPHC 532

COURT

North Gauteng High Court, Pretoria

BEFORE

DS Molefe, AC Basson, N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

A275/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No: A275/2020

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

20

July 2022

In

the matter between:

SCHALK
JACOBUS POTGIETER
FIRST APPLICANT
HELEN
ISABEL POTGIETER
SECOND APPLICANT
and
C[....]J[....]
W[....]
FIRST
RESPONDENT
B[....]
W[....]
SECOND
RESPONDENT
LESEGO
VILAKAZI N.O
THIRD RESPONDENT
(in
her capacity as nominee for ABSA Trust
Limited,
duly appointed trustee of Charles
James
W[....] Testamentary Trust)
ABSA
TRUST LIMITED N.O
FOURTH RESPONDENT
(In
its capacity as the appointed executor
in
the estate of the late Charles James W[....],
duly
represented by Mr Boy Visser)
ACA
EMPLOYEE BENEFITS (PTY) LTD
FIFTH
RESPONDENT
MASTER
OF THE HIGH COURT
SIXTH RESPONDENT

JUDGMENT

MOLEFE J

[1] This is an appeal brought by the appellants (the respondents in the main application) against the whole judgment and/or order of the court a quo granted on 17 March 2022 by Avvakoumides AJ. The appeal is with leave to appeal of the Supreme Court of Appeal (SCA).

[2] The order which is the subject of this appeal was granted in respect of Part A of the urgent interim application brought by the first and second respondents (the applicants in the main application), seeking

the appointment of a curator ad litem for the minor children, M[....] W[....] (M[....]) and R[....] W[....] (R[....]), and pending the investigation by the curator ad litem, the respondents sought contact with the minor children. For convenience, the parties shall be referred to as in the appeal.

[3] The court a quo's finding was that the main application (Part B of the urgent application) could not be ventilated without an investigation by the curator ad litem and granted the following relief:

“3.1 Condonation is hereby granted for any non-compliance with the Uniform Rules of the above Honourable Court, and specifically the time limits as stipulated in Rule 6 (12) thereof.

3.2 Advocate L C Haupt SC (and if she is unwilling or unable to accept the appointment, then a suitable Advocate with similar experience, nominated by Advocate S D Wagener SC) is hereby appointed as curator ad litem for two minor children M[....] W[....], born on 12 June 2009 and R[....] W[....], born on 07 May 2015.

3.3 The appointed curator ad litem shall have the following power and duties:

3.3.1 To investigate the best interest of the minor children concerned, specifically the parental responsibilities and rights to be exercised over them by the parties concerned, and report thereon to the above Honourable Court.

3.3.2 To represent the minor children in matters of a legal nature including but not limited to litigation.

3.3.3 The curator shall be entitled to, in the best interest of the minor children, in the interim and pending final adjudication of this matter, issue directives pertaining to parental responsibilities and rights to be exercised over the minor children.

3.3.4 To represent the best interest of the minor children by advancing all arguments for or on behalf of the minor children relevant to this matter as well as related matters.

3.3.5 To enquire and consult with whatever person necessary in the completion of his/her mandate.

3.3.6 To refer the parties or other relative persons to experts, for further and/or other assessments or therapy where the curator might find it necessary.

3.3.7 To bring out a report that contains all the facts and circumstances and make recommendations therein regarding the parental responsibilities and rights to be exercised over the minor children.

3.3.8 Pending the investigation, subject to any other directive to be issued in this regards by the curator ad litem, the applicants shall have the following rights of contact with the children:

3.3.8.1 Contact every alternative weekend from 17:00 until Saturday at 18:00.

3.3.8.2 Contact one afternoon every week as arranged between the parties, subject to school activities of the minor children.

3.3.8.3 Contact for half of all school holidays

3.3.8.4 Reasonable telephonic contact.

3.4 Part B of the notice of motion is to be postponed sine die and the applicants and respondents are given leave to supplement their papers for purposes of final adjudication of the application.

3.5 The costs of Part A are reserved for adjudication together with Part B.

3.6 The fees of the curator to be paid by the third respondent. The curator ad litem shall be entitled to make any recommendations in respect of costs to be the court hearing Part B of the application.”

- [4] The first and second respondents in Part B of the application sought full parental responsibility and rights, including guardianship over the minor children to the exclusion of any other party, and that the primary residence be vested with them with reasonable rights of contact to be exercised by the appellants.
- [5] The appellants submitted that the issues for determination in this appeal are (i) whether the extensive contact rights granted to the first and second respondents are in the best interest of the minor children; (ii) whether the best interest of the children necessitated the appointment of a curator ad litem; (iii) if so, who was to be appointed as curator ad litem and the powers and/or duties of the appointed curator ad litem.

FACTUAL

BACKGROUND

- [6] The appellants are the maternal grandparents to the minor children M[...], born on 12 June 2009, and R[...], born on 07 May 2015. The children’s mother, Christi W[...] was the appellants’

daughter. She passed away on 24 July 2017 from breast cancer when R[...] was 2 (two) years old. The children’s father,

Charles W[...], was the first respondent's brother and was a Financial Planner at Absa Wealth. The minor children were after the death of their mother, in the care of their father Charles who was their sole guardian. On 06 May 2019 Charles tragically passed away due to complications after brain surgery.

[7] Charles left a Will and Testament in which he nominated the appellants as the minor children's guardians, and if they were unable or unwilling to assume this position, he appointed his brother, the first respondent, as the guardian. The appellants accepted the appointment. The provisions of the Will granted the appellants the rights of habitation to dwell in Charles' residential property (the family home) until R[...] reached the age of 18 (eighteen). The third respondent, Ms. Lesego Vilakazi, is the nominated and appointed trustee of the Charles James W[...] Testamentary Trust (the trust). The fourth respondent Absa Trust Limited is the appointed executor in the late estate of Charles.

[8] After Christi's death, Charles employed the appellants to look after the minor children, and the appellants relocated to the family home. The appellants are in control of the monthly pension pay out funds from the fifth respondents, Aca Employee Benefits (Pty) Ltd, which funds are to be utilised for the benefit and maintenance

of the minor children. In the urgent application, the first and second respondents argued that it is unclear whether the trust is being administered by the third respondent for the benefit of the minor children or for the benefit of the appellants and their other daughter Marna Potgieter (the children's maternal aunt) who resides with them at the family home.

[9] The relationship between the appellants and the first and second respondents became strained when they questioned and expressed concern about the appellants' management of the trust funds. The appellants then frustrated the first and second respondents' contact with the minor children and prohibited the children from

visiting them. It was argued that the appellants' refusal to the minor children having contact with their paternal family is not serving the best interests of the children.

[10] The appellants' appeal against the interim court order granted by the court a quo in terms of Part A of the application is essentially on the ground that the matter was not addressed on merits.

APPEALABILITY OF THE INTERIM ORDER

[11] I now turn to the question of whether the interim order granted by the court a quo on 17 March 2022 is appealable. If we find that the order is not appealable, then it will not be necessary to deal with the merits of the appeal.

[12] As aforementioned, this appeal is with leave of the SCA. I am however alive to the fact that this court is under no obligation to entertain an appeal against an unappealable order merely because the SCA granted the appellant leave to appeal. The issue of the appealability of the order still stands to be decided by this court. This principle has been confirmed in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*.^[1]

[13] The crux of the matter is firstly, whether the order of the court a quo was ‘final in effect’ and was therefore appealable even if its stated character was interim. Secondly, whether the interest of justice warrants that the appeal against the order in issue should be determined. Our courts have established that an interim order may, if the interests of justice in a particular case so dictate, be appealable.^[2]

[14] Counsel for the first and second respondents submitted that the order granted in terms of Part A has no final effect as same is not definitive of the rights of the parties for inter alia the following reasons:

14.1 The issue relating to the award of parental responsibility and rights as well as guardianship have yet to be determined.

14.2 The right to exercise interim contact is not definitive and is made only ‘pending the investigation’ and is ‘subject to any other directive to be issued in this regard by the curator ad litem and pending final adjudication of this matter.’

14.3 The issue of costs in Part A of the application has yet to be adjudicated upon.

[15] In accordance with the general rules laid down in *Zweni v Minister of Law and Order*,^[3] a ‘decision’ contemplated in section 16(1) of the Superior Courts Act^[4] has three attributes:

(i) It must be final in effect and not susceptible to alteration by the court of first instance;

(ii) It must be definitive of the rights of the parties, i.e. it must grant definite and distinct relief; and

(iii) It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[16] I agree with the submission by the first and second respondents’ counsel that the appointment of a curator ad litem to investigate is evidence that the matter has not been finally adjudicated upon, and that the purpose of the curator ad litem’s report and recommendations is to provide the court with assistance in coming to a final determination. The duty of a curator ad litem is akin to that of a parental coordinator, an expert or Family Advocate, and is to assist the court with an objective investigation on behalf of the minor children, especially where adults are in conflict with regards to aspects surrounding their care. The curator ad litem will still have to report to the court, and only then would her findings and recommendations be considered and given final effect after judicial

consideration.

- [17] The appellants' argument that the orders so granted '...affords the curator extremely wide powers which has the potential to usurp the responsibility of the court...' is in my view without merit. The High Court as upper guardian of all minor children retains an inherent discretion and jurisdiction in respect of all matters pertaining to minor children. The appellants are incorrect in submitting that the appointment of a curator ad litem would give final effect to the court a quo's interim order as nothing that the curator ad litem would do or act upon in the execution of her duties as per her appointment, would whatsoever give any final effect to this matter.
- [18] Based on the general principles found in *Zweni*,^[5] I am of the view that the interim order granted by the court a quo is not susceptible to an appeal. The order is interim in nature and therefore not appealable.
- [19] The next question is whether the interest of justice warrants that the appeal against the order in issue should be determined. The constitutional standard for appealing an interim order when it best serves the interest of justice was reiterated by the Constitutional

Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another*. There the Constitutional Court emphasised that '[if] appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest.'^[6]

- [20] Whether or not an interim order is appealable is fact-specific. This was confirmed in *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and others*,^[7] where the Constitutional Court held that, when determining whether it is in the best interests of justice to appeal an interim order, the court must have regard to and carefully weigh all relevant circumstances. The factors that are relevant or decisive in a particular instance will vary from case to case.
- [21] The facts in this case are very tragic to say the least. The minor children suffered tremendous loss over the passing of both their parents in a short space of time. It is common cause that there is in both parties' versions, a dispute of facts specifically relating to the views, wishes, and the best interests of the minor children. The dispute about contact of the minor children, parental responsibility and rights including guardianship would remain to prejudice the minor children who have been through tremendous trauma in their short lives and there is desperate need for stability in their lives. The appointment of a curator ad litem to represent the interest of the minor children would assist the court in making a final determination, and there is no evidence that the interest of justice warrants that the appeal should be determined.

[22] Considering the evidence relating to background facts, it is clear that the court a quo's interim order was not final in effect, and it is not in the interest of justice to appeal this interim order. In such an instance, the appropriate order is that the appeal be struck from the roll.

ORDER

[23] In the circumstances, I make the following order:

1. The appeal is struck from the roll with costs.

DS MOLEFE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree

AC BASSON

N JANSE VAN NIEUWENHUIZEN

Delivered: This judgement was prepared and authorised by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be the 20 July 2022

APPEARANCES

Counsel for the Applicants:

ADV. H F GEYER

Instructed by: VDT

ATTORNEYS INC

Counsel for the Respondents:

ADV. R FERREIRA

Instructed by:

GROHOVAZ ATTORNEYS

Date heard: 18

May 2022

Date of

judgment:

20 July 2022

[1] United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others [2021] 2 All SA 90 (SCA).

[1] United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others

[2021] 2 All SA 90 (SCA).

[2] Philani-Ma-Afrika and Others v Mailula and Others 2010

(2) SA 573 (SCA) at para 20.

[3] Zweni v Minister of Law and Order of the Republic of South Africa 1993

(1) SA 523 (A).

[4] 10 of 2013.

[5] Zweni supra n 3.

[6] City of Tshwane Metropolitan Municipality v Afriforum and Another

[2016] ZACC 19; 2016 (9) BCRL 1133 (CC); 2016 (6) SA 279 (CC) at para 41.

[7] South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others

[2014] ZACC 8 (CC); 2014 (6) BCLR 726 CC; 2014 (4) SA 371 (CC) at para 20.

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