

SOUTH AFRICA / JUDGMENT

R[....] v R[....] (44169/2019) [2020] ZAGPJHC 379 (2 December 2020)

[2020] ZAGPJHC 379**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Segal AJ

CASE / FILE NUMBER

44169/2019

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG**

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED**CASE****NO: 44169/2019****In**

the matter between:

K[....]

R[....]

Applicant

and

K[....]

M[....] R[....]

Respondent

In

re the ex parte application of: K[....]
R[....]
Applicant
C[....]
P[....]
First
Respondent
K[....]
M[....] R[....]
Second Respondent
R[....]
M[....] B[....]
Third Respondent
(in
re: N[....] M[....] A[....] R[....])

JUDGEMENT

SEGAL AJ

1. This matter concerns the interests of a 7-year-old boy, N[....] R[....]. N[....]’s grandmother K[....] R[....] and his mother K[....] R[....] are the main parties to the litigation.
2. Consequent upon hearing the opposed urgent application which was allocated to me during the week of 12 October 2020, I delivered judgment in this matter on 3 November 2020.
3. In that judgment there are two important features that have a bearing on this matter. In the first instance I found that the matter was urgent. Secondly, I made an interim order in terms of Part A of the Notice of Motion, pending the finalisation of Part B.
4. Given the manifest urgency of the matter, I made provisions in my order for the hearing of Part B to be accelerated and for priority to be given to its conclusion via oral evidence.
5. On 4 November 2020, the Applicant in the Appeal, K[....] M[....] R[....] (hereinafter referred to as “K[....]”) delivered an Application for Leave to Appeal which was set down for hearing on 18 November 2020.
6. The Application for Leave to Appeal was opposed by the Respondent in the Application for Leave to Appeal, K[....] R[....] (hereinafter referred to as “K[....]”). In addition to the Application for Leave to Appeal, four other applications were brought before me as follows:-
 - 6.1 K[....] R[....] brought:
 - 6.1.1 an Application to adduce further evidence brought on 17 November 2020;

6.1.2 an Application in terms of Section 18 of the Superior Courts Act (which Application incorporated an Application for the appointment of a curator ad litem) for an order declaring the order of 4 November 2020 to be final and dispositive in effect and thus suspending the operation and/or execution of the order pending the outcome of an Appeal, alternatively suspending the operation of the order pending the outcome of the Appeal process in terms of Section 18 (2) and/or 18

(3) of the Superior Courts Act of 2013.

7. The Applicant sought an order that the Application for Leave to Appeal be postponed to enable K[...] to file papers in the Application in terms of Section 18 of the Superior Courts Act and in the Application to adduce further evidence. Counsel for K[...], Ms De Wet SC, requested that all three matters to be dealt with on an alternative date in December 2020.
8. The biological father of N[...], Mr R[...] M[...] B[...] (hereinafter referred to as “Mr B[...]”) brought an Application for Leave to intervene in the Application and I was advised that at the hearing, Mr B[...] sought a postponement of the Application for Leave to Appeal to enable him to join Part A and file papers in this regard.
9. In my judgment of 3 November 2020, I ordered K[...] to serve a copy of the order on Mr B[...] and provided an opportunity for him to apply for Leave to intervene in Part B within 20 court days of service of the order upon him.
10. K[...] did not oppose Mr B[...] being joined and counsel for her, Advocate Bishop in fact contended that he had already been joined. I accordingly joined him to the proceedings as the Second Respondent by agreement between the parties.
11. Mr B[...]’s Counsel, Ms Hartford SC, proposed that the matter be postponed to December 2020 alternatively to mid-January 2021 to allow Mr B[...] to file papers in respect of Part A of the application. Her contention was that my making an order in terms of part A in the absence of Mr B[...], severely infringed upon his rights as N[...]’s father. What remains unexplained is why Mr B[...] now seeks to join the Appeal after having taken no steps whatsoever in the matter since December 2019.
12. Insofar as the Application to admit new evidence is concerned, I am of the view that I am functus officio and that given the fact that my acting appointment has come to an end, it is beyond my competence to deal with this application.
13. The most important consideration from the perspective of the court is the protection of N[...]. His rights trump those of either of his parents or those of his grandmother. The matter is urgent and having already found Part A to be urgent, nothing persuades me to the contrary. The considerations for N[...]’s welfare and emotional stability outweigh such other considerations as may be advanced to delay the implementation of the order.

14. I consider the Application for Leave to Appeal to be urgent and contrary to N[...]'s best interests to postpone. I now turn to what I consider to be the fundamental issue in the Application for Leave to Appeal namely, whether my order in terms of Part A is Appealable. As a general rule, for a decision to be Appealable, it has to have three attributes. It has to be final in effect, has to be definitive of the rights of the parties and has to have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. [1] The order that I made in terms of Part A has none of these features.
15. As a general rule, interdicts granted pending final relief are not Appealable. Interlocutory orders despite being interim in form might qualify as being "final in effect". "Final in effect" means that an issue in the suit had been effected by the order such that the issue could not be revisited either by the court of first instance or the court hearing the Appeal. The order made in respect of part A has none of these attributes.
16. In *Cronshaw & Another v Coin Security Group (Pty) Ltd* [2] Schutz JA stated the position as follows:-

"From a practical point of view it seems preferable that the merits of the interdict be left for final determination at the trial and that the interim relief to which the balance of convenience is relevant, be considered only once. The net effect of a contrary rule, allowing an Appeal against the grant of interim orders, could be the undermining of necessarily imperfect procedure which is none the less usually best designed to achieve justice."
17. Counsel for K[...] contended that the matter should not be postponed and that the Leave to Appeal application be proceeded with urgently. He contended that Mr B[...] had been made aware of the December 2019 Application and the order issued in consequence thereof and that Mr B[...] had also been made well aware of the September 2020 application. In that regard, on 6 October 2020, he deposed to a self-standing substantive affidavit in support of K[...]. Mr B[...]’s affidavit was attached to K[...]'s answering affidavit as "AA6 and AA7".
18. Notwithstanding the fact that Mr B[...] knew of:-
 - 18.1 the December 2019 Application and order;
 - 18.2 the fact that Dr Robyn Fasser was to be appointed to conduct a full forensic investigation;
 - 18.3 the existence of the September 2020 Application;
 - 18.4 the nature and effect thereof and despite having participated in part A of the application by filing an Affidavit, he took no other steps whatsoever to participate in Part A or in the investigation conducted by Dr Fasser.
19. Counsel for K[...] argued that Mr B[...] will not be prejudiced by participating only in Part B of the Application particularly in light of the fact that he chose not to participate in Part A. He argued that the tactics being employed by K[...] and Mr B[...] are completely contrary to N[...]'s best interests. Of further concern is the fact that Advocate Bishop indicated that the order of 3 November had been obstructed by K[...] who went to great lengths to impede its

execution by inter alia going into hiding with N[...]. The crux of his argument was that the application for postponement by both K[...] and Mr B[...] was not bona fide and that it is a stratagem to obstruct the operation of the order.

20. I cannot help but form the distinct impression that the applications brought by K[...] are an undisguised attempt to stultify my order of 3 November 2020. It is plain that the 3 November 2020 order is interim in nature, unappealable and that its operation would not be suspended by an application for Leave to Appeal (even were Leave to Appeal to have been granted). The vast majority of the issues in dispute remain open for determination in part B of the application which neither party appears to have taken any steps to advance.
21. Given that the Application for Leave to Appeal must fail, it follows axiomatically that so to must the Application in terms of Section 18(2) and 18 (3) of the Superior Courts Act.>
22. Mr B[...], now joined to the application will have an opportunity to deal with the matter in Part B. The effect of what he seeks me to order at this stage (that he file papers in respect of part A and that I essentially rehear part A) is nothing short of an appeal of my own order in respect of part A. I am not persuaded that this is an appropriate course of action to follow.
23. K[...] seeks the appointment of Advocate Rose as a curator ad -litem to represent N[...] in these proceedings. I was also informed that Advocate Rose had interviewed N[...] and that she had filed a report for court although her appointment had not been court ordered. Counsel for K[...] contended that K[...] would agree to Advocate Rose's appointment but only for the application for leave to appeal and not thereafter. Furthermore, the issue of payment of the curator ad litem's fees and the powers to be furnished to the curator ad litem are also in dispute.
24. There is no reason why this issue should be dealt with in this court (being a court sitting for the limited purpose of hearing an application for Leave to Appeal). This court is functus officio other than in respect of the question of Leave to Appeal. My acting appointment is at an end and it is accordingly beyond my competence to grant this order. In any event, there are clear disputes between the parties, the filing of papers is not yet complete and there is every reason for the parties to refer the determination of this matter to the ordinary motion court if they are unable to come to terms. I do not intend to make any order in respect of the appointment of the curator ad litem.

In the circumstances I make the following order: -

1. Mr B[...] is, by agreement between the parties, joined to the main Application as the Second Respondent.
2. The Application for Leave to Appeal is dismissed with costs.
3. The Application in terms of Section 18 (2) and (3) of the superior Courts Act is dismissed with costs.

Acting Judge of the High Court: Gauteng Local Division Johannesburg

Date of hearing:

18/11/2020

Date of delivery:

02/12/2020

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[1] Cipla Agrimed (Pty) Ltd v Merk Sharp Dohme Corporation 2018 (6) SA 440 SCA and Zweni v Minister of Law and Order 1993 (1) SA 523 (A)

[2]

[1996] ZASCA 38; 1996 (3) SA 686 (A)

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