

SOUTH AFRICA / JUDGMENT

Warner v Hoesslin (2023/120036)

[2024] ZAGPJHC 642 (12 July 2024)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

C Todd

CASE / FILE NUMBER

2023/120036

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-120036

1. REPORTABLE:
2. OF INTEREST TO OTHER JUDGES:
3. REVISED:

In the matter between:

GARETH PEACHEY WARNER

Applicant

and

MARISSA VON HOESSLIN Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 12 July 2024.

Order: Para [12] of this

judgment

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

TODD, AJ:

- [1] This is an application for leave to appeal against the costs order that I made in a judgment handed down on 17 May 2024.
- [2] The judgment dealt with part A of an application concerning the parental rights and responsibilities of the parties in relation to their minor child. At the conclusion of the judgment I granted interim relief pending further order in the proceedings, in part B. The only final part of that order concerned costs, and I ordered the Applicant to pay 50% of the Respondent's costs of the application incurred up to that date, on the party and party scale B.
- [3] Regarding the test for granting leave to appeal, Ms Manning, who appeared for the Applicant, referred to the decision of the Supreme Court of Appeal in *Ramakatsa and others v African National Congress*[1], and I follow the approach described there. Since the Applicant seeks leave to appeal on costs only, however, Ms Manning accepted that further considerations arise as well.
- [4] This Court has a wide discretion in relation to the award of costs. An appeal court will not ordinarily reverse the decision of a lower court on costs unless the discretion has not been exercised judicially, a wrong principle has been applied or the decision is one that could not reasonably have been made by a court properly directing itself to all relevant facts and principles. In short,

there would have to be a compelling reason for an appeal court to interfere. Where the only issue in the appeal is costs, leave to appeal will usually be granted in exceptional circumstances only.

[2]

- [5] Ms Manning submitted that from the limited reasoning set out in paragraph [23] of the judgment, which dealt with costs, it is clear that the decision on costs was unreasonable to an extent that warranted the interference of a higher court. She submitted, further, that the conclusion in that paragraph of the judgment that the application was “pre-emptive” introduced a procedural barrier to relief in circumstances of this kind that does not exist in law, and that this establishes a harmful precedent. On these grounds, she submitted, there are exceptional circumstances that would warrant an appeal on costs only.
- [6] Mr Courtenay, who appeared for the Respondent, submitted that the part of the judgment to which objection was taken, in paragraph [23], clearly dealt with the allocation of responsibility for costs only, was based on an assessment of the evidence in this matter, and did not purport to or in fact establish any broader procedural or substantive principle. He

submitted that the attempt to appeal a costs order in circumstances in which the costs of appeal would be likely to exceed the amount of the costs awarded in the underlying judgment was indicative of an abuse of process. For that reason he submitted that this application should be dismissed with costs on a punitive scale.

- [7] Ms Manning was not able to answer the question whether the costs of prosecuting an appeal would exceed the quantum of the costs appealed against, but submitted that if the appeal were unopposed those costs would be significantly reduced. In reply, she reiterated the earlier submission that an important principle was at stake in the appeal.
- [8] I have carefully considered the submissions of Ms Manning regarding prospects of success on appeal and whether or not the circumstances warrant an appeal on costs only. I am not persuaded either that any circumstances exist that would warrant leave to appeal being granted on a question of costs only, or that an appeal would have reasonable prospects of success. I am similarly unpersuaded that the issues raised by the Applicant are compelling or that the description of the application as pre-emptive, in paragraph [23] of the judgment, could reasonably be understood to establish any broader procedural principle of law beyond the purpose for which it was mentioned, which is that it was relevant to the exercise of a discretion in the award of costs in the matter.
- [9] Seen in proper context the point is simply that the parties had agreed that an expert would investigate and make recommendations, including on the central issue in dispute between them, and with that process pending it was, in my view, on the facts of this matter, premature to expect this court to make a determination, without evidence of that kind, on whether or to what extent sleepover contact was in the best interests of the child concerned. That was a relevant consideration which influenced the decision to make a partial award of costs in favour of the Respondent. There are in my view no grounds to contend that this conclusion establishes a broader principle that expert evidence is a necessary procedural requirement for an approach to this court in applications of this kind. It would, however, be surprising if this court were to completely disregard considerations of that sort when it exercised its discretion on an award of costs.
- [10] The apparent disregard by the Applicant of the possibility or risk that the costs of an appeal would exceed the quantum of costs being appealed against does raise a genuine concern that this application was pursued for an ulterior motive or to exert economic pressure on the Respondent. Further litigation of this kind would certainly place the Applicant at risk of that conclusion being reached, and might well warrant a punitive costs order. For the present, however, I intend to award party and party costs only, and remain of the view that the appropriate scale, in the circumstances, is scale B.
- [11] Insofar as Mr Courtenay submitted that costs should be awarded on the attorney and client scale, at scale B, I point out that the scales A, B and C apply to awards of party and party costs only, and not to costs on the attorney and client scale. Scale B is not a punitive scale. In my view, however, the seriousness of the issues raised between the parties in the underlying

opposed application involving the interests of their minor child justified the employment of experienced specialist counsel and in all of the circumstances warranted the application of scale B. The same applies to this application.

[12] For those reasons, the application for leave to appeal is dismissed, with cost on the party and party scale B.

C TODD

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:

11 July 2024

Date of

Judgment:

12 July 2024

APPEARANCES

Counsel for the Appellant: B Manning

Instructed by:

Fullard Mayer Morrison Inc.

Counsel for the Respondents: M Courtenay

Instructed by:

Clarks Attorneys

[1] [2021] ZA SCA 31 at paragraph [10]

[2] Tsosane v Minister of Prisons 1982

[3] SA 1075 (C) at 1076E – 1077B; Logistics Technologies (Pty) Ltd v Coetzee 1998 (3) SA 1071 (W) at 1075I – 1076B.

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