

SOUTH AFRICA / JUDGMENT

W.B v J.J.B (Leave to Appeal) (2021-43697) [2024] ZAGPPHC 1312 (19 December 2024)

[2024] ZAGPPHC 1312

COURT

North Gauteng High Court, Pretoria

BEFORE

Haupt AJ

CASE / FILE NUMBER

2021-43697

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 2021-43697

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED: YES

DATE: 19 December 2024

SIGNATURE OF JUDGE:

In the matter between:

W[...] B[]

PLAINTIFF

(Identity Number: 6[...]) (RESPONDENT IN LEAVE TO APPEAL)

and

J[...] J[...] B[]

DEFENDANT

(Identity Number: 6[...])

(APPLICANT IN LEAVE TO APPEAL)

CORAM: HAUPT AJ

Heard virtually on: 18 December 2024

Delivered: 19 December 2024 – This Judgment was handed down electronically by circulation to the parties' and or parties'

representatives by email, by being uploaded to the CaseLines system and by release to SAFLII. The date and time for hand down is deemed to be 10h00 on 19 December 2024

JUDGMENT: LEAVE TO APPEAL

HAUPT AJ

- [1] The Applicant who is the Defendant in a divorce action that became settled, applies for leave to appeal against the judgement and order granted on 4 November 2024 by this court sitting as the Family Court and hearing unopposed divorces. A copy of the transcript of the proceedings reflecting the oral evidence of the Plaintiff on 4 November 2024 is attached to the application for leave to appeal dated 18 November 2024.
- [2] No judgement was given by this court in the unopposed divorce. Only an order was granted. The order provides for a decree of divorce incorporating the settlement agreement dated 30 June 2024 and subject to certain of the clauses in the settlement that affect the interests of the two minor children being amplified or replaced as follows:

"2. The Deed of Settlement dated 30 June 2024 and Marked "X" is hereby made order of court, subject to the following:

2.1 Clause 3.1.to read "R2 500-00" per month per child.

2.2 The parties are liable on a 50/50 basis for the children's costs in relation to school clothes, stationary, school tours and excursions, and other school-related expenses. In the event of the Plaintiff paying such costs the Defendant shall reimburse Plaintiff within a week from receiving proof of such expenses by WhatsApp or email.

2.3 Clause 2.4.2 is deleted.

2.4 It is recorded that the Defendant is liable for the children's school fees in terms of clause 3.2. of the Settlement Agreement as from the date of signature. The Defendant is to reimburse the plaintiff for such school fees as paid from 30 June 2024 being the date on which he signed the Settlement Agreement."

- [3] The divorce action involved the interests of two minor children, a daughter born on 26 May 2007 and a son born on 11 November 2010. When the matter came before the court, the minor daughter was 17 and the son 14 years of age.

- [4] As reflected in the transcript, the court had the benefit on 4 November 2024 of hearing oral evidence and considering the pleadings exchanged between the parties including the Annexure “A” form deposed to under oath by the Plaintiff on 24 August 2021.[1] In the Annexure “A” form the Plaintiff, inter alia, confirmed that she is supporting the minor children completely on her own as the Defendant refuses to pay maintenance.
- [5] In the Defendant’s counterclaim he requested an investigation by the Family Advocate and tendered to make payment of maintenance in respect of each minor child in the amount of R2,500.00 pending the report of the Family Advocate.[2] All the papers filed and the notice of set down for the hearing on 4 November 2024 were served on the Defendant.
- [6] In essence, the leave to appeal is based on the argument that the court is not entitled to amend the settlement agreement as it violates established legal principles in relation to settlement agreements reached between parties in civil litigation and the principle of res judicata and that the court could not have granted prayer 2 of the order in the absence of one of the parties. During argument counsel for the Defendant could not provide any authorities in support of this contention. In addition, none of the authorities cited in the application for leave to appeal refer to settlement agreements involving the interests of minor children or the responsibility of a court sitting as upper guardian.[3]
- [7] The duty, discretion and powers of the court sitting as upper guardian is well-recognised. As upper guardian the court must not look at a set of circumstances in isolation and the interest of minor children should not be “held to ransom for the sake of the legal niceties”. [4] The duty of the court, sitting as upper guardian, may include that the court need not consider itself bound by the contentions of the parties and may in suitable cases, depart from the usual procedure and act mero motu in calling evidence.[5]
- [8] When the court sits as upper guardian in divorce matters, the court’s duties are further amplified by the provisions of Section 6 of the Divorce Act, 70 of 1979. The provisions of Section 6 are clear. When the interests of minor and major dependent children are involved in divorce proceedings, irrespective of whether such proceedings are opposed or unopposed, a court must satisfy itself that the order sought indeed serves the interests of the children involved. This not only refers to care, contact and guardianship arrangements, but also to the maintenance contribution towards the minor and/or dependent major children. If the court is not satisfied that the arrangement serves the interests of the minor and/or dependent major children involved, then the court may not grant a decree of divorce. The provisions of Section 6 do not provide the court with a discretion.[6]
- [9] In addition, the provisions of the Children's Act, 38 of 2005,[7] calls upon the court to consider various factors when considering the best interest of minor children. Section 9 of the Children's Act mirrors the constitutional imperative of the best interest of the child that is of paramount importance in all matters concerning a child and which must be applied.[8]

[10] It is settled law that the High Court sitting as upper guardian of minor children, is not a mere rubberstamp where the interests of minor children are involved and the parties have reached a settlement agreement. When establishing the best interests of minor children, the Court as upper guardian has a wide and unfettered discretion.

[11] The SCA in *ZDE v CE* confirmed the duty of the High Court as upper guardian of minor children to interrogate the facts and the arrangements made in

settlement agreements insofar as it relates to the best interest of the child involved and that the court is not bound to follow the recommendations of the Family Advocate and retains its own discretion. [9]

[12] Consequently, the grounds for leave to appeal have no merit as the argument underlying the grounds are not supported by the applicable authorities and legislation.

[13] There is no merit in the grounds of appeal that the court found that the settlement agreement does not contain and provide a full and final recordal of all disputes which ensued between the parties pursuant to their marriage on 6 January 1996, as the court made no such finding. Similarly, the grounds based on the argument that it was not competent for this court to make an order in terms of which the parties' agreement regarding joint decision-making in clause 2.4.2 of the settlement was deleted, and that the amount of maintenance agreed upon in clause 3 was insufficient and that same should be increased, has no merit and is not supported by the relevant legislation and authorities.

[14] The Children's Act does not require joint decision making in respect of decisions in respect of a child except in very specific

circumstances such as for example when the child is removed from the borders of the Republic.

[10] In addition Section 30 of the Children's Act, provides that co-holders of parental rights and responsibilities may act without the consent of the other co-holder except where the Act, any other law or a court order provides otherwise.

[15] Section 31 only requires that due consideration be given to the views and wishes expressed by the other co-holder of parental rights and responsibilities and the child before a major decision is taken that affects the child or has an adverse effect on the exercise of parental responsibilities of rights by the other co-holder.[11] Although Section 31 does not provide for joint decision-making the holders of parental rights and responsibilities in respect of minor children may agree to joint decision-making, subject thereto that such agreement serves the interests of the minor children involved.

- [16] Having regard to the evidence before the court including the reasons for the breakdown of the marriage due to a lack of communication, the oral evidence that the parties do not directly communicate other than by SMS messages, and the ages and stage of development of the minor children, the court exercised its discretion as upper guardian and was not satisfied that clause 2.4.2 of the settlement served the interests of the minor children concerned.[12]
- [17] The same discretion applies regarding the Defendant's maintenance contribution, having regard to the provisions of Section 6 of the Divorce Act and paragraphs 2.1 and 2.2 of the order. It is settled law that each parent has an obligation to contribute towards the maintenance of children pro-rata their respective incomes and that minor children, and major dependent children are entitled to reasonable maintenance.[13] The Legislature acknowledges the importance of pro rata maintenance contributions as financial information is required in the Annexure "A" form that must be completed in all divorce actions.[14]
- [18] The transcript reflects that this court further considered the evidence that the Defendant is still residing in the former matrimonial home, which in terms of the settlement agreement has to be sold and the proceeds thereof divided equally between the parties. In addition, the evidence before this court was that the mortgage bond over this property is low, that the Plaintiff has the additional expense of rental to provide suitable accommodation for the minor children and that the maternal grandmother is financially assisting the Plaintiff.[15]
- [19] The ground in respect of paragraph 2.4 of the order recording that the Defendant is to reimburse Plaintiff for the school fees that were payable as from the date of signing of the settlement agreement (i.e. 30 June 2024), is without merit. The order merely confirms the agreement reached between the parties. Clause 3.2 of the settlement clearly provides that the Defendant shall be responsible for the school and after care fees as from date of signing of the settlement. Consequently, if the Defendant has complied with clause 3.2 of the settlement, paragraph 2.4 of the order is of no further consequence. This does not place an additional financial burden on the Defendant as argued.
- [20] The order also does not affect clause 3.8 of the settlement. Clause 3.8 provides that both parties reserve the right to immediately after the granting of the decree of divorce approach the Maintenance Court to have the maintenance properly determined, if necessary.[16] In addition, the grounds in respect of paragraphs 2.1, 2.2 and 2.4 of the order regarding the Defendant's maintenance contributions,

ignores the duty on the court in terms of the Divorce Act. The Divorce Act does not provide the court with the discretion to ignore the evidence provided and simply grant a decree of divorce and defer outstanding maintenance issues for determination to the Maintenance Court. Such an approach would be a dereliction of the court's duties as upper guardian and in terms of the Divorce Act.

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- [1] Transcript page 1, line 16-17; page 9, line 18-21; page 10, line 23-25
- [2] The counterclaim is dated 14 December 2021. See further Transcript page 10
- [3] Leave to appeal paragraph 1.7 and the references in footnotes 6 to 12
- [4] See the reference to the relevant authorities as cited in J v J 2008
- [6] SA (C) para 20 and FS v JJ 2011 (3) SA 126 (SCA) at 136 G-H
- [5] Shawzin v Laufer 1968 (4) SA 657 (A) at 662H-663A
- [6] AR v BMR (2023) ZAGPPHC (2035) 2023 at para 1
- [7] Section 7(1)
- [8] Section 28(2) of the Constitution of the Republic of South Africa, 108 of 1996
- [9] (10112022) 2024 ZASCA 159 (18 November 2024), at para 18 and 20
- [10] Section 18(3). See further Transcript page 9, line 8 - 12
- [11] Bearing in mind the child's age, maturity and stage of development
- [12] Transcript page 1, line 10- 20; page 8, line17 – page 9, line 17
- [13] Transcript page 1, line 10-20. See also Van Zyl L: Handbook of the South African Law of Maintenance (4th Edition) LexisNexis, and the discussion in para 1.2.4 and 1.2,7.
- [14] See Regulations in terms of Section 5 of the Mediation in Certain Divorce Matters Act, 24 of 1987
- [15] Transcript page 13, line 9 – page 14, line 3
- [16] Transcript page 11 and 12
- [17] Section 17(1)(a)(ii)

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Prepared on 10 October 2026 · Esheria