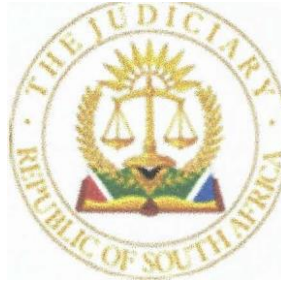


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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 3256/2018

In the matter between:

K, V

Applicant

and

**MAGISTRATE REID N.O: PRESIDING MAGISTRATE,
RANDBURG CHILDREN'S COURT**

First Respondent

D, M

Second Respondent

THE MAGISTRATES' COMMISSION

Third Respondent

**MAGISTRATE GCAWU N.O: PRESIDING MAGISTRATE
RANDBURG CHILDREN'S COURT**

Fourth Respondent

JUDGMENT

LEECH, A.J.:

1 This is a judgment in an application brought by Ms V K principally to obtain relief in relation to her custody and guardianship of her minor daughter J D (*J*).

2 It is common cause that J was born on 27 November 2009 out of the marriage between the applicant and the second respondent, Mr M D, and that their marriage was ended by decree of divorce issued by this Court on 20 February 2017.

2.1 In her judgment and order of 20 February 2017, the honourable presiding judge Fisher J dealt *inter alia* with residence, custody, and contact of J.

2.2 Paragraph 5 of the order reads that the issues of supervised contact and sole guardianship of J were postponed *sine die* pending the outcome of the family advocate's report and recommendation.

3 The application before me was brought in two parts. Part A was issued out of this Court at the instance of the applicant on 29 January 2018. The Part A aspect of the application, which was opposed by the second respondent, was heard by Francis J who, on 7 February 2018, granted an interim order. I deal with its contents below.

4 Part B of the application was set down and heard before me on 17 June 2020.

5 Ms Martin appeared on behalf of the applicant. There was no appearance on behalf of the second respondent, who also failed to file any answering affidavit in opposition to the application.

6 Although the application proceeded before me on an unopposed basis, given the nature of the relief sought and the circumstances of the case-in particular, in that it pertains to a minor child-I considered it prudent to issue a formal written judgment, as I hereby do.

7 The facts giving rise to the application are, briefly, as follows:

7.1 On 16 January 2018 the Randburg Magistrate's Court purported to hand down an order affecting *inter alia* the custody of and rights of contact of the second respondent to J (*the Magistrate's Court Order*). This Order varied the terms of Fisher

J's order of 20 February 2017.

7.2 The applicant was not served with any process prior to the Magistrate's Court ostensibly becoming seized of the matter and was not afforded procedural fairness prior to the issuing of the Magistrate's Court Order.

7.3 The second respondent thereafter proceeded to exercise these revised rights of contact afforded him under the Magistrate's Court Order, allegedly to the detriment of the emotional and psychological wellbeing of J.

7.4 The applicant launched her application seeking urgent interim relief under Part A and, under Part B, the grant of further relief including the review and setting aside of the Magistrate's Court Order.

7.5 As alluded to above, Francis J heard Part A of the application on an urgent basis, in the course of which he *inter alia* interviewed J. He granted an order in terms of which *inter alia*:

7.5.1 J's primary residence was to remain with the applicant;

7.5.2 Shared parental rights and responsibilities were awarded jointly to the Parties;

7.5.3 The second respondent was awarded weekly supervised contact as well as reasonable telephonic contact with J;

7.5.4 The Parties agreed to attend child-centred mediation; and

7.5.5 The Parties were afforded the right to supplement their papers in the Part B aspect of the application.

7.6 The applicant has supplemented her papers in the application before me. In the absence of an answer or any response at all from the second respondent, the allegations made by her are to be accepted for purposes of the determination of Part B by me.

7.7 In short, the thrust of these allegations is that the second respondent exercised his rights of contact with J on no more than five occasions between April and June 2018. The last of these occasions was a visit to J's school, during which he appeared to have no direct contact with J. Since June 2018 he has had no direct contact with J.

7.8 The second respondent has not honoured his maintenance obligations and is presently in arrears to the tune of hundreds of thousands of Rand's.

7.9 In January 2019 the second respondent, together with his then partner and her children, emigrated to Holland where he remains to date. He has made contact with the applicant only once since then, in June 2019 on the occasion of a return visit to

South Africa, but did not on that occasion accept the invitation she extended to him to visit J.

7.10 Although I make no finding in that regard, the evidence before me suggests that the second respondent has played no part in the day-to-day care of J, in decisions affecting her custody or wellbeing , or in any sense that would ordinarily be expected of a parent and natural guardian of a minor child .

8 Satisfactory evidence has been placed before me to show that the second respondent has been made aware of the proceedings before me , of the supplementary affidavits and documents filed in Court, of the relief being sought, and of the hearing conducted before me. I should add that, in accordance with the practice directives and regulations that presently obtain due to the state of National Disaster as declared by the President in response to the Covid-19 pandemic, the hearing before me was conducted via an online streaming platform. The second respondent was made aware of this and, via email, was sent an electronic invitation to participate in the proceedings. He did not do so.

9 Having read the papers before me and having considered the history of the matter, the orders of Judges Fisher and Francis, and the written and oral submissions advanced on behalf of the applicant , this is my judgment in relation to Part B of the application:

9.1 It is clear that the decision culminating in the Magistrate's Court Order is unlawful and falls to be reviewed and set aside. Leaving aside the obvious difficulty that the High Court was already seized of the very matters that the Magistrate's Court Order purports to deal with and that on the evidence presented in the papers before me the Rules of the Magistrate's Court were not adhered to and the proceedings before that Court were not properly implemented, it is clear that the applicant was not accorded procedural fairness.

9.2 It was argued that the Magistrate's Court Order was obviously a nullity and that it could safely be ignored . Whatever the strengths and weaknesses of that argument may be, the applicant has applied for the review and setting aside of that Order, jurisprudentially it is proper that the ostensible administrative action be reviewed and set aside, and the grant of an order to that effect by me would also provide the necessary certainty and assert the hegemony of this court and its Orders.

9.3 As far as concerns the relief pertaining to J, the overriding consideration in matters of this nature is- and must always be-what is in the best interests of the minor

child.

9.4 It is plain in this regard , that the primary interests of the minor child are that she continue to be cared for and her needs attended to by her mother. All of the evidence before me, including the reports filed by the family advocate , support this conclusion. It is also inherent in the Order of Francis J who, as I have stated above, had the benefit of interviewing J.

9.5 The change in circumstances that have occurred since February 2018, when Francis J made the order he did, militate strongly in favour of an extension of those rights and obligations of care in the hands of the applicant, rather than any curtailment thereof. Indeed, once it is to be accepted-as I must, on the strength of the unanswered allegations before me-that the second respondent is playing no ongoing part in the care and maintenance of or responsibility for J, it is appropriate and just that the legal position be altered to reflect that reality.

9.6 There is no evidence to gainsay the proposition that given this state of affairs it would be in the best interests of J for her mother to exercise in full the rights and responsibilities of a parent under section 18 of the Children's Act, 38 of 2005, including full and sole guardianship.

9.7 There is also no reason, at this stage, why the second respondent should not continue to exercise the rights and responsibilities of parent as provided for in the order of Fisher J and as varied by Francis J, save for guardianship. This would include, at least until circumstances change (if they change at all), the rights of contact provided for by Francis J.

9.8 In relation to contact, however, it has been two years since the second respondent last had any direct contact with J. Given that lapse of time-which is not inconsiderable in the life of a young child who was eight years and seven months when last she met with her father-I am not inclined to make that aspect of Francis J's order permanent.

9.9 It seems to me having regard to the history of the litigation between the Parties that it is more sensible that Francis J's order stands as an interim order and for the Parties to be allowed to approach the Court on the same papers duly supplemented for a variation to that order should the need arise.

10 I accordingly make the following order:

1. The purported Order handed down on 16 January 2018 in the Randburg Magistrate's

Court under file number 14/1/4/2-477/2017, a copy of which is attached to the founding papers as 'VK19", is hereby reviewed and set aside;

2. The applicant is to retain full parental rights and responsibilities in terms of Section 18 of the Children's Act 38 of 2005 of the minor child, J D (J), born 27 November 2009;
3. The applicant is awarded sole guardianship of the minor child, J;
4. The applicant is awarded primary residence of the minor child, J;
5. The second respondent is to retain full parental rights and responsibilities, save for guardianship in terms of Section 18 of the Children's Act 38 of 2005;
6. Paragraphs 3 to 3.6 of the *interim* Order of Judge Francis, handed down on 7 February 2018 under case number 3256/18, pertaining to care and contact, remains in place;
7. The Parties are granted leave to supplement these papers and to approach this court on the same papers duly supplemented for a variation of the order pertaining to care and contact, should it be necessary;
8. Each party is to pay their own costs arising from Part A and Part B of this application.



B.E. LEECH
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the applicant:	Ms SJ Martin
Instructed by:	NLA Legal Inc
Counsel for the respondent:	No appearance
Instructed by:	No appearance
Date of hearing:	17 June 2020
Date of judgment:	17 June 2020