

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

Case number: 28072/2016

Date of hearing: 24 October 2020

Date delivered: 4 December 2020

In the matter between:

GRIMAUDO, BENITO

Applicant

and

DINWOODIE, TARYN LEE

Respondent

JUDGMENT

SWANEPOEL AJ:

[1] This is an application for leave to appeal against my judgment dated 26 March 2020, in which I dismissed the applicant's urgent application with costs, including costs of senior counsel. This application is unopposed. I heard the application virtually, whilst sitting as acting judge in the Gauteng Division.

[2] The facts of the application are a matter of record, but may briefly be summed up as follows:

[2.1] The parties are the biological parents of a minor child, a boy aged 5 years. The parties are the holders of joint

parental rights and responsibilities in respect of the minor child. Applicant has specific rights of contact arising from orders granted by Goedhardt AJ on 9 October and 2 November 2018 respectively.

[2.2] Applicant was due to have contact with the minor child from 14h00 on Wednesday 25 March 2020 until 08h00 on Friday 27 March 2020.

[2.3] On 18 March 2020, whilst the country was in the early phases of the Covid-19 pandemic, the Minister of Cooperative Governance and Traditional Affairs published regulations in terms of the Disaster Management Act, 2002. The regulations implemented a complete lockdown (save for certain essential services) with effect from midnight on 26 March 2020 until 16 April 2020. Movement between residences was prohibited for non-essential persons, which had the effect of also prohibiting the movement of children between separated parents.

[2.4] When applicant tried to collect his son on 25 March 2020 respondent was nowhere to be found. She refused to allow the child to go to the applicant, citing the pending lockdown as a reason for her refusal. All attempts to find respondent were fruitless.

[3] It was in the aforesaid circumstances that applicant launched an urgent application on less than two hours' notice, seeking essentially the following relief:

[3.1] That respondent be ordered to hand over the child to respondent for purposes of exercising contact in accordance with the Goedhardt AJ orders;

[3.2] A direction that for the period of the lockdown the parties must comply with the provisions of the Goedhardt AJ orders.

[4] I dismissed the application with costs, including the costs of senior counsel, and I gave reasons subsequently.

[5] In this application, the following grounds of appeal are raised (I paraphrase):

[5.1] That I misdirected myself as to the best interests of the minor child;

[5.2] That I did not have proper regard to the fact that applicant was entitled to contact in terms of the Goedhardt AJ order;

[5.3] Respondent had again made a unilateral decision without proper consultation and had willfully, unreasonably and

contemptuously denied applicant the exercise of his rights;

[5.4] Respondent was withholding the child from applicant until 16 April 2020 without a proper basis;

[5.5] The bond between applicant and the minor child was being prejudiced by respondent's conduct, and I had no regard thereto;

[5.6] I failed to have regard to respondent's obstructive conduct;

[5.5] The lockdown regulations would only come into operation at midnight on 26 March 2020, a fact to which I had no regard;

[5.6] The respondent was allowed to "reap the rewards" of acting contrary to the Goedhardt AJ orders.

[6] At the outset I must agree with applicant that respondent no doubt used the lockdown as an excuse to prevent applicant from exercising his contact rights on 25 and 26 March 2020. However, when this application came before me on the morning of 26 March 2020 the country was faced with a lockdown which would take effect some 13 hours later.

[7] Had the minor child been in respondent's care at midnight on 26 March 2020, he would have been unable to return the child to the respondent's care. The lockdown regulations made it an offence to travel in breach of the regulations, and had I granted applicant's order, he would either have had to keep the child in his care until 16 April 2020, or he would have exposed himself to criminal prosecution.

[8] It was clearly untenable for me to grant an order that the contact provisions of the Goedhardt AJ order should continue during the lockdown. It would be improper for a Court to sanction, or attempt to sanction, criminal behaviour.

[9] It would also not have been proper to make an order that the child should remain with respondent for the duration of the lockdown, as counsel for applicant, Ms. Rosenberg SC argued before me. Firstly, applicant did not seek such an order. He simply sought an order that the contact arrangements should continue notwithstanding that he knew that there was a prohibition against travelling between parents' homes during the lockdown.

[10] Secondly, I took into account that respondent was the primary caregiver, and that the child was still of a relatively tender age. It was, in my view, more appropriate for the child to be with the primary caregiver during the lockdown.

[11] The dire situation in which the country found itself required many sacrifices and accommodations to be made. Unfortunately, a brief break in physical contact between the applicant and his son was one of them.

[12] A further aspect that I must have regard to is that the relief sought has become academic. The only effect that an appeal might have is in respect of costs. Ms. Rosenberg also submitted that it was inappropriate to grant costs against applicant, more specifically, the costs of senior counsel.

[13] I note that in the previous matters the applicant had been represented by senior counsel, as he was in this application. The matter is obviously of great importance to applicant as it was to respondent. I cannot see why she should not be entitled to brief senior counsel, especially given the unusual circumstances in the case.

[14] Furthermore, I take into account that applicant sought to enforce contact for a period of some two days against the backdrop of a dire health crisis, and launching his application on the utmost urgency, giving respondent less than two hours' notice. The order that he sought for further contact during the lockdown was simply ill advised, and would have resulted in the Covid-19 regulations being simply ignored. I believe that it was appropriate to grant costs against applicant.

[15] Section 17 of the Superior Courts Act, 2013 enjoins me only to grant leave to appeal should I believe that the appeal would have a reasonable prospect of success, or should there be another compelling

reason why the appeal should be heard. In my view, there is no prospect of success on appeal. Ms. Rosenberg argued that there were public interests at stake in the matter. I disagree.

[16] Consequently, I make the following order:

[16] The appeal is dismissed.

C SWANEPOEL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Acting 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 4 December 2020.

Applicants' counsel: Adv. R Rosenberg SC

Applicant's attorneys: Cuthbertson & Palmeira Attorneys Inc.