

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 16859/22

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED: NO  
Date: 29 April 2022

In the matter between:

L[....] K[....] M[....]

FIRST APPLICANT

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

SECOND APPLICANT

and

N[....] F[....] M[....]<sup>2</sup>

FIRST RESPONDENT

S[....] M[....]<sup>3</sup> M[....]<sup>4</sup>

SECOND RESPONDENT

THE FAMILY ADVOCATE

THIRD RESPONDENT

JUDGMENT

Van der Schyff J

[1] The applicants approached the court on the basis of extreme urgency. They seek, *inter alia*, an order suspending the operation and execution of an interim order

granted by the Presiding Officer, Mr. RM Rosenberg sitting in the Children's Court for the district of the City of Johannesburg dated 25 April 2022, granted under case number 40/2022.

[2] The applicants simultaneously seek an order that the Family Advocate be ordered to report on the best interest of the minor child, O, on the aspects of guardianship, primary care and residence and contact. In part B of the application the applicants seek that they be assigned the guardianship of the minor child with full parental rights and responsibilities as contemplated in section 18 of the Children's Act 38 of 2005, with reasonable contact awarded to the first and second respondents. In Part B they also ask that the order granted by RM Rosenberg in the Children's Court be set aside.

[3] The applicants were represented by counsel, but the first respondent appeared in person. I put it to counsel from the onset, that I am extremely uncomfortable with the idea of suspending an order granted by another court. A cursory reading of the Children's Act 38 OF 2005 (the CA), provides the following relevant background:

- i. For purposes of the CA every magistrate's court shall be a children's court and shall have jurisdiction on any matter arising from the application of the CA for the area of its jurisdiction;
- ii. A children's court may, inter alia, adjudicate any matter involving the protection and well-being of a child, the care of, and contact with a child;
- iii. High Courts and divorce courts have exclusive jurisdiction over matters relating to the guardianship of a child;
- iv. A children's court may withdraw, suspend or amend an order made in terms of s 46(1), or replace such an order with a new order;
- v. A children's court may extend, withdraw, suspend, vary or monitor any of its orders,<sup>1</sup> impose or vary time deadlines with respect to any of its orders;<sup>2</sup>
- vi. Section 51(1) of the CA provides that any party involved in a matter before a children's court may appeal against **any** order made or any refusal to make

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<sup>1</sup> Section 48(b).

<sup>2</sup> Section 48(c).

an order, or against the variation, suspension or rescission of such order to the High Court having jurisdiction;

- vii. Except as otherwise provided in the CA, the provisions of the Magistrate's Court Act 32 of 1944, and the rules in terms thereof, as well as the rules made under the Rules Board for Courts of Law Act 107 of 1985 apply insofar they relate to, amongst others, the issue and service of process, and the execution of court orders.<sup>3</sup>

[4] It is apposite to mention at this stage that Rule 55(5) of the Magistrate's Court Rules pertinently provide for applications to be brought on an urgent basis. Regulation 8 of the Regulations Relating to Children's Court and International Child Abduction<sup>4</sup> provides for the deviation of time periods prescribed in the CA regulations.

[5] The minor child was born from a relationship that existed between the first and second respondents. The relationship between the applicants and the minor child is not clearly set out in the founding affidavit. In paragraph 4.3 it is stated: 'The Second Respondent is the paternal grandfather [of] O'. The applicants' marriage certificate indicates that the first applicant's maiden name corresponds with the second respondent's surname. In paragraph 6.4 of the founding affidavit it is stated that subsequent to the first and second respondents concluding a traditional marriage, the first respondent moved to the residence of the second respondent's biological grandmother, Anna Matjele. When the minor was two weeks old the first respondent left to seek employment and during that time the minor was cared for either by the second respondent or his grandmother. When the minor was approximately four months old, the first and second respondents moved to their own place of residence and left the minor in the care of the first's respondent's grandmother. Thereafter and by agreement the minor was delivered into the care of the applicants. The second respondent obtained gainful employment and the first respondent continued seeking employment. The minor was left in the applicants' care for extended periods. An agreement was reached between the applicants, the

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<sup>3</sup> Section 52 (1).

<sup>4</sup> GNR. 250 of 31 March 201 GG No. 33067

second respondent's grandmother and the first respondent that the minor would be placed in their care and that they would absorb all her care responsibilities and act as the minor's guardian. The applicants aver that the agreement provided for the minor to remain in their primary care. They provided in her maintenance needs. The respondents had to inform them when they wanted to exercise contact with the minor, which contact depended on the applicant's availability and discretion. As a result, the minor has been in their care since she was four months old for a period exceeding three years. She accepted the applicants as her parents. Neither of the respondents has financially contributed to the minor's care. The applicants were on the verge of issuing an application seeking guardianship of the minor.

[6] During January 2022 the first respondent indicated that she wanted to remove the minor from the applicants' care. On 22 January 2022 the applicants and the second respondent again agreed that the *status quo* would remain and that the applicants would provide the minor's primary residence and care. The first respondent would inform the applicants whenever she was free from work in order to arrange visitation and contact between herself and the minor. On or about 26 January 2022 the applicants' were served with children's court documents. From these proceedings it is clear that the first respondent was now seeking to be awarded primary residence of the minor child. Children's court proceedings were scheduled for 22 March 2022. The proceedings were postponed to 25 April 2022 for the first respondent to obtain legal representation.

[7] The applicants expected the proceedings of 25 April 2022 to be a further postponement. However, during the proceedings the first respondent raised the issue of interim contact with the Presiding Officer. The applicants relate that an argument ensued between their legal representatives, the first respondent's legal representatives and the Presiding Officer of the Brits Magistrate's Court. On their version, the Presiding Officer then became 'bullish' and did not ask the parties what they wanted. He only informed them what he was going to do. The Presiding Officer intermittently engaged the first applicant, the applicants' legal representative and the first respondent's legal representative. It quickly became apparent that the Presiding Officer made up his mind. The Presiding Officer granted an order to the effect that the first respondent would be allowed sleepover contact with the child on two

occasions, the first on 28 April 2022 from 12h00 until 30 April 2022 at 17h00, the second from 23 May 2022 to 28 May 2022.

[8] The respondent, who did not file an answering affidavit but gave *viva voce* evidence, contests the fact that she never had any contact with her child since the child was in the applicants' care. She explained that when she was off-duty she would phone the applicants and they would bring the child to her. She stated that the child stayed with the applicants but until November 2021 she had regular contact with the minor and the minor also slept over with her and her mother. The position changed, however, inexplicably after the minor's birthday in November. The applicants, without reason, denied her access to the child. This is what prompted her to approach the children's court.

[9] As stated above, I expressed my reservation to suspend an order made by another court without that order being appealed on brought on review, when the matter commenced before me. The applicants aver that this court, as the upper guardian of all minor children in its area of jurisdiction, has the necessary jurisdiction to hear this application. The fact that the children's court whose order the applicants seek to suspend is situated within this court's area of jurisdiction, also vests this court with jurisdiction to hear this application according to the applicants. In addition, the High Court has exclusive jurisdiction in guardianship matters. The applicants further submit that the court has the inherent power to suspend or stay the execution and operation of the Brits Magistrate's Court order under the auspices of s 173 of the Constitution. Section 28 of the CA declares that the best minor's interest is of paramount importance and Rule 45(A) of the Uniform Rules of Court provides that the court may, on application suspend the operation and execution of any order. The applicant, erroneously, avers that the Magistrate's Court is not geared for urgent applications.

[10] I agree that the High Court has jurisdiction to deal with this matter as the upper guardian of all minor children. I am, however, also of the view that it would be inappropriate to interfere in any proceedings that are currently ongoing in the children's court, more so in the absence of any notice given to the Presiding Officer. To suspend the order granted by the Presiding Officer would effectively amount to

the order being set aside. The applicants did not indicate that the Presiding Officer was requested to refer the matter to the family advocate for investigation. They aver that they were caught off guard by the first respondent's request for interim relief, and yet the letter sent to them by the first respondent's attorneys dated 21 April 2022 clearly indicates the first respondent's intention to obtain interim contact with her child.

[11] In light of the fact that a party may approach the children's court with a request to vary or suspend its order, and the fact that regulation 8 of the Children's Court Regulations provides for the deviation of prescribed time periods, I am of the view that it is in the minor child's best interest if the children's court, a special court that deals with issues affecting children, is approached with an application to vary or suspend the order granted by it on 25 April 2022. The applicants can apply to the children's court for an order that the family advocate be requested to investigate and report on the best interest of the child. In the event that an application to that effect is refused, the applicants can approach this court to review and set aside the order of the children's court. It is not in the interest of justice to allow forum hopping whenever a party is unhappy with a particular court's order. As for the issue of guardianship of the minor, the applicants correctly contended that it is not urgent. An application to that effect can in due course be issued in accordance with the processes and time periods prescribed in Rule 6(5).

[12] I am supported in this approach by the judgment of Meyer J in *E v M*.<sup>5</sup> In this matter the applicant sought an order that the family advocate be directed to investigate and report to the High Court on the issue of contact between the respondent and his minor child, and pending the investigation, for contact to be exercised between them as stipulated in the notice of motion. Proceedings were instituted in the children's court, Randburg, and the court granted an interim order. An application was then issued in the High Court wherein the applicant stated that the:

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<sup>5</sup> (38571/2013) [2014] ZAGPJHC 143 (20 June 2014).

‘Randburg Children’s Court, despite my request that the current circumstances be investigated by a social worker, confirmed the terms of the parenting plan dated 3 August 2011, with an amendment to the contact time period .... I seek in this application that the respondent and my parental rights and responsibilities be fully investigated and resolved.’

There was no allegation on the papers that an application was made to the children’s court for a variation of the court’s order relating to contact. Meyer J gave a cursory exposition of the establishment and powers of a children’s court. Meyer J stated:

‘There can be no question that the high court, as upper guardian of all minors, has the inherent jurisdiction to grant an order for care of and contact to a child, also as a court of first instance. The question that arises in this case, however, is *how* this court’s jurisdiction should be exercised upon a consideration of the best interests of E.’ (Footnotes omitted).

Meyer J held the view that the best interests of the minor lie in the dispute over parental rights and responsibilities to be decided by the children’s court. He said that in the event that the children’s court, in violation of the minor’s best interest, indeed refused a request that the family advocate investigate and report on the issue of contact the appropriate remedy would be to take the matter on review to the High Court.

[13] This is, however not the end of the matter before me. The practical reality is even if the applicants are compelled to issue an application in the children’s court for the suspension of the order granted on 25 April 2022, the immediate question is whether the order as it relates to the first respondent’s contact with her child for 29 and 30 April 2022 should proceed as ordered by the children’s court. Although the applicants’ did not make out a case that the first respondent poses any threat to the minor, I have to consider that, be it because of the first respondent’s voluntary absence or the applicants denying her contact, the last contact that the first respondent had with her child was during November 2021. It would, however, be in the minor child’s best interest to resume having contact with her biological mother as

soon as possible. This being said, it would be in the best interest of the child to ensure that the first contact is not overwhelming but gradually phased in.

[14] Since the first respondent represented herself, no costs order will be granted.

## **ORDER**

### **In the result, the following order is granted:**

1. The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court any non-compliance with form, service and time periods in terms of the Uniform Rules of Court is condoned so far as the application relates to the suspension of the order granted by the children's court in the district of Brits on 25 April 2022 under case number 40/2022;
2. The order granted by the Presiding Officer of the Children's Court for the district Brits dated 25 April 2022, under case number 40/22 is suspended only in so far as it relates to the first respondent's contact with her minor child, OMM (identity number [...]) for the period 28 April 2022 to 30 April 2022;
3. The first respondent is awarded contact with the minor child on Friday 29 April 2022 from 10h00 to 14h00, and on Saturday 30 April 2022 from 10h00 to 16h00. The applicants and first respondent are to agree on the appropriate mode of transport to transport the minor child and first respondent to a venue identified by the first respondent for the contact scheduled for Friday 29 April 2022 and to transport the minor child to a venue identified by the first respondent for the contact scheduled for Saturday and to collect her from a venue arranged between the parties. The first respondent is to be accompanied by a family member, or if no family member is available an individual nominated by the applicants to whom the first respondent agrees, when she exercises the contact.
4. In the event that the applicants seek the whole of the order granted by the children's court in the district of Brits on 25 April 2022 under case number 40/2022 to be varied or suspended, they should timeously approach the children's court in the district Brits for appropriate relief.



E van der Schyff  
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:

Instructed by:	WALDICK JANSEN VAN RENSBURG INC.
For the first respondent:	In Person
Date of the hearing:	28 Aril 2022
Date of judgment:	29 April 2022