HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 64416/2009

REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 15 JUNE 2022

In the matter between:

N[....] E[....] K[....]	Applicant
and	
E[....] B[....] L[....]	First Respondent
ADVOCATE M W DLAMINI SC	Second Respondent

J U D G M E N T (In the interdict application)

DAVIS, J

[1] Introduction

The two parents of a minor child have been embroiled in litigation with each other ever since the finalisation of a medical negligence claim. The child is severely disabled and the settlement figure was in excess of R10 million. There is a dispute in the manner in which these funds should be managed and safeguarded.

[2] The parties

2.1 The father of the child is the applicant in an interdict application launched during the course of proceedings. As the parties each appeared as applicant or respondent in the various proceedings, he shall be referred to as Mr K[....].

2.2 The mother of the child shall, for the same reasons, be referred to as Ms L[....]. She is the first respondent in the interdict application.

2.3 Adv M. W. Dlamini SC was appointed as a *curator ad litem* by Van der Schyff J on 22 July 2021 in order to prepare a report regarding the safeguarding of the proceeds of the damages claim. The interdict application envisaged the prevention of "the execution" of this order.

2.4 The position of Mr K[....] and Ms L[....] have been summarized in the judgment of Van der Schyff J dated 22 July 2021 and need not be repeated. It is sufficient to state that the parents of the child were never married to each other, never lived together and are estranged.

2.5 The minor child is currently 16 years old, he is severely brain damaged, blind and deaf. Ms L[....] is a qualified nurse and the minor is in her primary care, assisted from time to time by her parents.

[3] <u>The litigation history relevant to the interdict application</u>

3.1 The interdict application was launched on 7 September 2021. By that time Mr K[....]'s application for leave to appeal the order of Van der Schyff J of 22 July 2021 had been heard and refused.

3.2 The curator had completed his report on 15 September 2021. On that date he and Ms L[....] indicated their intention to oppose the interdict application, in which Mr K[....] inter alia claimed costs against the curator.

3.3 On 1 October 2021 Mr K[....] belatedly delivered an application to the Supreme Court of Appeal. Apart from various arguments regarding the appealability of the order of Van der Schyff J and the prospects of success on appeal (or lack

thereof), the appealability had largely become moot as the order relating to the furnishing of a report had already been complied with by the curator.

3.4 On 7 October 2021 Mr K[....] and the curator delivered their answering affidavits to the interdict application, inter alia raising the issue of mootness.

3.5 Undeterred, Mr K[....] delivered a replying affidavit in the interdict application. This was delivered late and out of time. In the meantime, Mr K[....] had also delivered a belated application for condonation for the late delivery of his application to the Supreme Court of Appeal.

3.6 The application for leave to appeal to the Supreme Court of Appeal was refused on 11 February 2022 and the order was stamped on 14 February 2022. Unbeknown of this fact, at a case management meeting of 15 February 2022, dates for the exchange of heads argument (and the belated replying affidavit referred to in paragraph 3.5 above) were agreed on and directed. When it was subsequently discovered that the application for leave to appeal to the Supreme Court of Appeal had been refused, Mr K[....] (through his legal representative), was requested to indicate what the intention was with the interdict application and, should it not to be proceeded with, what the position was regarding costs occasioned by it. No response was received.

3.7 At a second case management meeting on 15 March 2022, Ms Mbanjwa, representing Mr K[....], indicated that the interdict application would indeed not be proceeded with. She undertook to deliver a formal notice of withdrawal by 22 March 2022. Dates were then arranged for the exchange of heads of argument on the issue of costs.

[4] Consideration of the issue of costs

4.1 Ordinarily, should a *dominus litis* not proceed with litigation initiated by him, he should bear the costs occasioned thereby. The reasoning for this is that such a party is in a position similar to that of an unsuccessful litigant and the general rule is that the other party (or parties in this case) is (are) entitled to costs. See *Germishuys v*

Douglas Besproeingsroad 1973 (3) SA 299 9NC), *Sentraboer Koöp Bpk v Mphaka* 1981 (2) SA 814 (O).

4.2 In heads of argument delivered on behalf of Mr K[....] it was argued that he should not be saddled with costs, primarily because he had the right to appeal the judgment and order of Van der Schyff J and that, premised thereon, he had been entitled to prevent the curator from performing his duties.

4.3 It is not necessary to debate again whether the applications for leave to appeal had been competent or had merits as they had both been dismissed.

4.4 What I do find strange though, is that at the case management meeting of 15 February 2022 already, I urged the parties to find a non-litigious solution to their litigation about control of the money intended to compensate their minor child for the damages suffered and to care for him in future. I suggested that such a solution might entail that they each become a trustee and that a third, independent trustee be appointed. The minute concluded on this point: "*The parties agreed with the recommendation of a trust, have no objection to the independent trustee, but expressed concerns about their own trusteeship*". I interject to state that at that stage the curator had already recommended the creation of a trust, managed by an independent trustee.

4.5 In her judgment dismissing the application for leave to appeal against the order of 22 July 2021, Van der Schyff found that Mr K[....] appeared not to be motivated by the best interest of the minor, but by his own. Where each party had been ordered to pay its own costs in the order of 22 July 2021, Mr K[....] had been ordered to pay the costs of his unsuccessful application for leave to appeal.

4.6 In similar view, I could find no reason why Mr K[....] had not simply opposed the implementation of the recommendations of the curator. There was no need for a separate interdict application. It appeared to be largely based on the premise that the status quo should be maintained pending a successful appeal. That premise has failed as already pointed out above.

4.7 Furthermore, once the curator had delivered his report, the interdict application could never succeed as it had largely become moot. Whatever objections Mr K[....] might have had regarding the recommendations made by the curator or whatever representations the curator may have made in respect of the best interest of the minor or on the minor's behalf, Mr K[....] had the alternate remedy of raising them in the main application or in what has subsequently become the "implementation application". This also includes any argument of whether the creation of a trust as recommended by the curator would encroach on Mr K[....]'s rights as a natural parent.

4.8 In a last-ditch attempt at avoiding a costs liability for the unnecessary interdict application, it was argued on behalf of Mr K[....] that the costs of the interdict application be paid from the funds of the child, in similar fashion as the curator's fees are paid. This argument is devoid of merit. There is a fundamental difference between Mr K[....] and the curator. The latter is an officer of the court appointed to investigate the best interests of the child regarding the management and protection of funds. He assists both the court and the minor child in this regard and it is appropriate that his costs be paid by the party on whose behalf he acts (the minor) from the funds in respect of which he makes recommendations. The position of Mr K[....] is different, he appeared to have been motivated by his own interests or by his own view of an entitlement to be in control of the funds.

4.9 In the circumstances of this case, I am of the view that there are no cogent reasons to depart from the general principle mentioned in paragraph 4.1 above. Mr K[....] as nominal unsuccessful party, should pay the costs thereof. These should include the costs of the curator for by the same reasoning why the child's funds should not be used to fund Mr K[....]'s own litigation, those funds should not be used to pay the curator's costs incurred in the interdict application which were solely caused by Mr K[....].

4.10 In exercising this court's discretion, I had regard to the fact that the interdict application amounted to a total waste of costs and time and, having regard to the way in which Mr K[....] had conducted the litigation in respect of the interdict application, including his motivation to do so and his unjustifiable persistence

therewith until 22 March 2022 and the costs arguments beyond that, I find it appropriate and fair that the other parties should not be out of pocket for any portion of their costs. A costs order on the scale as between attorney and client is therefore justified.

[5] Order

1. The withdrawal of the interdict application is noted.

2. The applicant therein (Mr K[....]) is ordered to pay the costs of the respondents (that is Ms L[....] and Adv M. W. Dlamini SC) on the scale as between attorney and client.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Judgment delivered: 15 June 2022

APPEARANCES:

For the Applicant:	Ms L Mbanjwa
Attorney for the Applicant:	L Mbanjwa incorporated Attorneys, Pretoria
For the First Respondent:	Adv R Bowles
Attorneys for the First Respondent:	Adams & Adams Attorneys, Pretoria
Curator ad Litem:	Adv M W Dlamini SC
Attorneys for the Curator ad Litem:	Ngengebule Attorneys, Johannesburg