

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 11719/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
17 June 2022

In the matter between:

R[....] N[....] C[....] O[....]

APPLICANT

and

L[....]1 O[....]

FIRST RESPONDENT

L[....]1 O[....]

SECOND RESPONDENT

L[....]2 O[....]

THIRD RESPONDENT

In re:

L[....]1 O[....]

FIRST APPLICANT

L[....]1 O[....]

SECOND APPLICANT

L[....]2 O[....]

THIRD APPLICANT

and

R[....] N[....] C[....] O[....]

FIRST RESPONDENT

MAGISTRATE TRUTTER

SECOND RESPONDENT

ANLEA WESSELS

THIRD RESPONDENT

BRONWYN MARSHALL

FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The parties before this court have been in protracted litigation regarding the residency and care of their minor children and the applicant's contact rights. The applicant is the biological mother of two minor children. The children were removed from her care by members of the South African Police Service on 18 May 2021 and placed in the care of their paternal grandparents, the second and third respondents. On 22 May 2021, the Children's Court found that the children were in need of care and protection. They were placed in a place of safety.

[2] The paternal grandparents subsequently launched an urgent application to have the children placed in their care pending the finalisation of a review application launched by them and the children's father against the order granted by the Children's Court.

[3] On 20 May 2021, Makgobe J granted an order in terms whereof:

- i. The order granted by the Children's Court was suspended until the

review application in terms of Part B of the urgent court application was adjudicated;

- ii. Pending the finalisation of the review application, the children are to reside primarily with their paternal grandparents;
- iii. The Magistrate presiding in the Children's Court was ordered to provide reasons for the order;
- iv. The review application was to be launched by June 2021;
- v. The third respondent is to case manage the matter.

[4] Ms. Wessels, the case manager, and social worker, continued with her investigation. Several reports, referred to hereinafter, were filed by social workers and the office of the Family Advocate, respectively.

[5] The children's biological mother filed an application for the reconsideration of the orders granted by Makhoba J and the Children's Court on 29 July 2021. This application was heard before the receipt of a socio-emotional assessment conducted by Ms. Daleen Van Biljon. Lukaimane AJ granted an order on 11 August 2021 that the order dated 20 May 2021 be varied in the following respects:

- i. An independent social worker be appointed by the office of the Family Advocate to conduct a socio-economical assessment into the best interest of the minor children as far as care and contact is concerned;
- ii. The children's biological mother is awarded contact with the minor children to phone them daily and to have unsupervised sleepover contact with them every alternative weekend;
- iii. That the review of the Children's Court Order be postponed sine die pending the receipt of the independent social worker's report;
- iv. The counter-counter application was dismissed;
- v. The costs of the reconsideration application, counter-application, and counter-counter application be paid on an attorney and client scale by the applicants (the respondents in this application).

[6] The applicants issued an application for leave to appeal the Lukhaimane order. The application was abandoned after the applicants received legal advice that

the Lukhaimane order is an interim order and thus not appealable.

[7] The minor children did not want to have contact with their biological mother when she attempted to exercise her contact rights. The parties' minor son agreed to have contact with his mother on a subsequent weekend, but the minor daughter refused even to greet her mother. The children's biological mother subsequently issued a contempt of court application. The application was heard by Van der Westhuizen J, and he granted an order on 16 September 2021 to, *inter alia*, the following effect:

- i. The orders of Makhoba J and Lukhaimane AJ were amended and supplemented;
- ii. The offices of the Family Advocate in Pretoria and Gqeberha were requested to investigate and compile a joint report containing their recommendations in the best interest of the minor children;
- iii. A curatrix ad litem was to be appointed for the minor children to investigate their best interests;
- iv. Adv. Marinda Veldsman was appointed as curatrix ad litem;
- v. The children's biological mother is to submit herself to random blood-alcohol testing within 48 hours of being requested by the curatrix ad litem;
- vi. I was designated as the case manager, and my appointment was to be confirmed by the office of the Deputy Judge President.

[8] The curatrix ad litem filed a report, but due to a dispute between the curatrix and the minor children's father, the paternal grandparents, and their legal representative, she requested to be relieved from the appointment. Subsequent to my inquiry to the Gqeberha office of Legal Aid South Africa, Advocate N. Naidoo availed himself to be appointed as the children's curator ad litem. During a case management meeting that was conducted virtually on 19 May 2022, it became apparent that the children's biological mother, who was now represented by Ms. C Schulze from Legal Aid, Pretoria, had regard to the recommendations made in the report of the Family Advocate and that very few issues pertaining to the children's residency and care and her contact rights remained in dispute. On this basis, it was agreed that it was not necessary to appoint a curator ad litem.

[9] Despite the parties seemingly being able to find common ground in the children's best interest, they could not agree on the issue of costs and an issue that I raised during the case management meeting, namely a contribution to the children's mother's traveling costs. These two aspects are the only aspects that remain to be adjudicated since the parties agreed that the primary care and residence of the children be awarded to their father, the first applicant in the initial urgent court application, with supervised monthly weekend and long weekend day-contact rights being awarded to the children's biological mother, under the supervision of their father or Ms. Nunn.

[10] I do not find it necessary to deal with the reports filed in detail, suffice to say that the common theme that resonates throughout is that it is not currently in the children's best interest to reside with their mother

[11] Mr. Lazarus, who acts on behalf of the children's father and the paternal grandparents, submitted that the applicant, the children's biological mother, should bear the costs of the contempt of court application. He stated that her conduct initially led to the paternal grandparents' involvement and the subsequent urgent court application. Mr. Lazarus emphasised that the parties attempted to settle certain aspects *inter partes* when the applicant launched the urgent court application. As for his clients contributing to the applicant's travel costs, he submitted that this is not an aspect raised by the parties themselves and that his clients should not be ordered to contribute to the applicant's travel costs since she is not contributing to the children's maintenance.

[12] Ms. Schultz, who represents the children's biological mother, submitted that the applicant is unemployed and has no legal means to pay any legal costs. In addition, she submitted that the court has to consider that the contact between her client and the minor children was frustrated and that it was in her rights to approach the court for assistance.

Discussion

[13] I am not inclined to deal with Ms. Schultz's grievance that she was offended by how Mr. Lazarus approached the finalisation of this matter. However, I find it apposite to reiterate that proceedings revolving around the best interests of minor children are not truly adversarial in nature. Legal representatives must remind their clients that the best interests of minor children trump any personal disputes between the adults involved. Section 6(4) of the Children's Act 38 of 2005 prescribes that an approach conducive to conciliation and problem-solving should be followed, and a confrontational approach should be avoided.

[14] Where the minor children involved are very young, regular contact with both parents must actively be promoted. Supervised contact must be facilitated when a child is hesitant to meet a parent. Makhoba J's order did not provide for contact between the minor children and their biological mother. However, it did not prohibit contact, and it did not limit contact. Lukhaimane AJ expressed her view that both the applicant and the first respondent have to some extent, lost sight of the best interests of the minor children in their fight for custody. She found that the minor children were being alienated from their mother. These reasons prompted her to grant a costs order against the father and paternal grandparents. Despite the Lukhaimane-order, the children's father and paternal grandparents failed to facilitate contact between the minor children and their biological mother. I cannot fathom how the minor children's father, paternal grandparents, and uncle reasoned that the minor children would be willing to visit with their mother if she was not even allowed on their property and had to call in the police for assistance. The impact these incidents in themselves must have had on the children's psyche is of great concern to the court. The children's mother, who is not a woman of means, had to incur financial expenses to travel from Pretoria to Gqeberha to visit her children, and all her efforts to see them were thwarted. Having said that, the children's biological mother should not for even a moment believe that I am of the view that she is absolved of any blame for the anxiety caused to two innocent young children. The minor children's parental grandparents should be commended that they took in the children when they needed to and for their role in assisting the children in feeling loved, safe, and cared for. Ms. Harris's report is a testimony to their positive involvement.

[15] I am relieved that the minor children's parents seem to be able to put their

own disputes aside in an attempt to provide the minor children with the opportunity to commence healing the rift that developed between themselves and their mother.

[16] In the circumstances, I am of the view that all the parties concerned are, to some extent, responsible for the continued litigation that culminated in the contempt of court application. It is just for each party to pay their own legal costs.

[17] As for contributing to the children's mother's travel costs, I agree that their father carries the full brunt of the children's maintenance and that it would not be fair to him to require that he contributes to the applicant's travel costs. He is obliged, however, to facilitate meaningful telephonic contact between the children and their mother and to ensure that he or Ms. Nunn, or a person identified by Ms. Nunn, can supervise any contact that the children's mother can attend to following the order that is granted today. Once the trust between the applicant and her children is restored, she can approach the court where the children reside for an order to phase in extended contact.

[18] For the sake of finality, it is necessary to refer to Part B of the first urgent court application instituted by the children's father and paternal grandparents, wherein the applicants in that application sought that the order granted by the Children's Court on 20 May 2021 be reviewed and set aside. I am always hesitant to interfere in matters before the Children's Court, and if this matter had not taken the course it did, I would have referred it back to the Children's Court for finalisation. However, I am of the view that the subsequent orders granted by this court and the agreement the parties came to founded on the Family Advocate's recommendations rendered the proceedings instituted in the Children's Court moot. This court benefited from considering, amongst others, the report filed by the social worker as ordered by the Children's Court. The Family Advocate recommends that the children reside primarily with their father, and the children's parents agree that this is in the children's best interest. It is in the children's best interest that the matter is finally disposed of.

[19] For clarity, the children's biological mother is referred to as the applicant, and the biological father as the first respondent, in the order below.

ORDER

In the result, the following order is granted:

1. The applicant and the first respondent are to retain full parental rights and responsibilities in accordance with section 18(2) of the Children's Act 38 of 2005;
2. The residency and primary care of the minor children is awarded to the first respondent;
3. The applicant is granted specific parental responsibilities and rights regarding contact as contemplated in section 18(2)(b) of the Children's Act 38 of 2005 with the minor children as follows:
 - 3.1. Monthly weekend and long weekend day-contact under the supervision of the first respondent, or Ms. Wendy Nunn or a person designated by her, from 9h00 in the morning until 17h00, unless otherwise arranged between the parties;
 - 3.2. The applicant is to consult the first respondent and arrange the contact weekend timeously, with at least ten days' notice before an intended visit;
 - 3.3. Telephonic or video calling contact with the minors between 18h00 and 19h00 every Monday, Wednesday, and no-contact-Sunday, unless otherwise arranged between the parties;
4. The first respondent is to provide the applicant with regular school reports and updates regarding the children's academic progress;
5. Ms. Nunn, or any other social worker or psychologist appointed by the first respondent, is to continue therapy with the children and to assess their readiness for more extended phased-in contact with the applicant;
6. The parties are to pay their own legal costs.

E van der Schyff
Judge of the High Court

Delivered: This judgment 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.

For the applicant:	Ms. C. Schultz
Instructed by:	Legal Aid South-Africa
For the respondents:	Mr. J. Lazarus
Instructed by:	Shapiro & Ledwaba Inc.
Date of the hearing:	14 June 2022
Date of judgment:	17 June 2022