



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF**  
**APPEAL**

**From:** The Registrar, Supreme Court of Appeal

**Date:** 18 November 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Z D E v C E* (1011/2022) [2024] ZASCA 159 (18 November 2024)

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Today the Supreme Court of Appeal (SCA) dismissed an application for leave to appeal against a decision of the Gauteng Division of the High Court, Pretoria (the high court), referred to oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

Mr and Mrs E became romantically involved in 2018 and soon thereafter got engaged. On 19 July 2019, a girl child A was born to them and they subsequently got married in community of property on 30 January 2020. They resided with A in Lephalale where Mr E was employed while they agreed that Mrs E would be a full-time stay-at-home. During September 2021, Mrs E informed Mr E that she no longer wished to continue with the marriage and wanted a divorce. On 1 October 2021, Mr E removed the minor child from the common home to his parental home in Vanderbijlpark, without Mrs E's consent. He permanently relocated to Vanderbijlpark, at the beginning of November 2021, while Mrs E remained in Lephalale. On 7 October 2021, Mr E instituted divorce proceedings against Mrs E and amongst other prayers, applied for the primary residence and care of A. The parties signed a settlement agreement which provided amongst other things, that the primary residence and care of A would vest with Mr E while Mrs E would enjoy contact rights including removal of A every alternative Friday until Sunday.

On 13 June 2022, the matter came before the unopposed divorce court and Mrs E protested against the settlement agreement and informed the high court that she was coerced into signing it without any legal representation and the high court referred the matter to a special trial. The high court further requested the Office of the Family Advocate to assist the with an urgent investigation and report. The interim and final reports from the Office of the Family Advocate recommended that A remain in the care of Mr E with Mrs E exercising contact rights. The high court rejected the Family Advocate's recommendation and found that, on the facts before it, Mr E was not the minor child's primary caregiver in the past and was not her primary caregiver when the matter was heard. The high court held that the facts and probabilities supported Mrs E's version that she was the minor child's primary caregiver from birth, until the child was removed from her care and residence by Mr E. The high court accordingly granted primary care of A to Mrs E with specific contact rights granted to Mr E. It refused to endorse the settlement agreement. An order of costs was also made against Mr E, ordering him to pay the costs from his half undivided share.

The issues before the SCA were whether there were reasonable prospects of success on appeal and whether the high court was correct in rejecting the settlement agreement.

The SCA held that in determining whether the high court was correct in rejecting the settlement agreement, the high court had a duty to enquire whether any arrangement by the parties would serve the best interests of the minor child. The SCA found that as upper guardian of A, the high court had a duty to interrogate the facts and the arrangements made in the agreement insofar as they related to the best interests of A. The SCA held further that while the reports and recommendations of a Family Advocate were of great assistance in determining the custody arrangements that would best serve the best interests of the child, the court was not bound to follow the said recommendations and retained its own discretion.

The SCA found that it was unable to fault the high court for the manner in which it exercised its discretion in awarding the primary care of the minor child to Mrs E as it did so based on favourable credibility findings in her favour and adverse credibility findings against Mr E. The SCA observed that the high court was mindful not to give one factor, that of maintaining the status quo pre-eminence over other factors and therefore exercised its discretion judicially in rejecting the settlement agreement and the recommendations by the Family Advocate. The SCA therefore found no misdirection warranting interference nor was there any misdirection made by the high court in its assessment of the evidence.

Finally, the SCA found that the award of costs was in the discretion of the court hearing the matter. The high court clearly set out its reasoning for the costs order, being to express its displeasure with the manner in which Mr E approached the court and conducted the matter. As a result, the SCA dismissed the application for leave to appeal.

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