THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

19 November 2010

STATUS: Immediate

S v J (695/10)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (SCA) today held that the appellant, a father of a child born out of marriage, is the holder of full parental responsibilities and rights in terms of s 18 of the Children's Act 38 of 2005 and that the child should permanently reside with him. The SCA further held that the child's grandparents may have contact with her on a regular basis.

The child's mother and the appellant were living together at the time of the child's birth and intended to marry. The child's mother died shortly after her birth. The first respondent is the child's maternal grandmother and is married to the second respondent. The parties have been engaged in a lengthy battle for the custody and guardianship of the child.

Numerous applications to court to have the child live with them have been made, over the nearly five years of the child's life, by the respective parties, with different results. These have been made in the Northern Cape and Western Cape High Courts. The appeal in the SCA was against three orders made by Kgomo JP in the Northern Cape High Court that care and guardianship of the child be awarded to the respondents, but that the appellant be given rights of contact – orders completely at odds with the other orders made by both the Northern Cape and Western Cape High Courts in previous litigation.

The SCA had to determine a number of issues: the best interests of the child; the rights of unmarried fathers; whether the Northern Cape and Western Cape High

Courts had concurrent jurisdiction at the times their respective orders were made; and the extent of grandparents' rights in respect of children.

The SCA first drew attention to the fact that the law governing the rights of an unmarried father changed during the course of the litigation. When the child was born the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 applied. It did not confer custody and guardianship on an unmarried father even on death or incapacity of the mother. The Children's Act 38 of 2005 now applies to these matters. In terms of the Act if the appellant had been living in 'a permanent life partnership' at the time of the child's birth, he would automatically have acquired parental rights and responsibilities when the section came into operation on 1 July 2007.

In so far as grandparents' rights and responsibilities are concerned, ss 23 and 24 of the Children's Act, which govern non-parental rights to care and guardianship respectively, came into operation on 1 April 2010. Before that date grandparents had no inherent rights or responsibilities and it was only a high court, as upper guardian of a child, which could confer access, custody or guardianship on a grandparent. This would be done only if it were in the best interests of a child – an assessment that must be made having regard to the rights of the biological parents.

The SCA stated that Kgomo JP's observation that the appellant had 'shacked up' with the child's mother and that they were not in a 'permanent love relationship' was contrary to all the evidence. The SCA found that Kgomo JP's finding that it would be in the best interests of the child that her care and guardianship be awarded to the respondents, subject to the appellant's rights of 'reasonable access', was not warranted. His finding was based on factual errors and a misunderstanding of the law. The appeal against it succeeded.

In considering the judgment of Louw J (considered by the SCA to be correct) in the Western Cape High Court, which had stayed the execution of the order in the Northern Cape High Court pending an appeal to that court, the SCA cautioned against a practice of forum shopping even in cases concerning disputes over parenting rights and responsibilities. High courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction. And as a rule, since one is entitled to assume that any order has been made in the best interests of a child, should those interests change over time the court that made the initial order should be approached for a variation. Much of the difficulty may now be resolved with the enactment of s 29 of the Children's Act, which came into operation only in 2010. It provides that an application under ss 23 and 24 may be brought in a high court within whose area of jurisdiction the child is ordinarily resident.

The SCA held that the appeal against Kgomo JP's second order (that the child be returned to the grandparents) must also succeed. The conclusions reached by Kgomo JP had no basis in fact or in law; evinced bias on his part; and failed to consider at all the only real issue: what was in the child's best interests. The order that the appellant pay costs on the attorney client scale was completely without justification.

The SCA further found that the appeal against the third order made by Kgomo JP (that the appellant was guilty of contempt of court in failing to return the child to her grandparents) must also succeed. Although citing a principle that a breach of an order must be deliberate and mala fide in order to constitute contempt of court, Kgomo JP did in fact not apply it. The appellant was clearly acting bona fide, in accordance with an order of the Western Cape High Court and on legal advice. The order that the appellant and his attorney pay costs of the application on the attorney and client scale was without justification.

After considering extensive reports, the SCA held that the child's best interests would be served by placing her with the appellant and her stepmother. The SCA recognised, however, the important role that grandparents may play in the lives of their grandchildren.

Lastly, the SCA recorded that the litigation had not been in any of the parties' interests. The SCA endorsed the views expressed in *MB v NB* 2010 (3) SA 220 (GSJ) that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort.

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