THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1011/2022

In the matter between:

Z D E **APPLICANT**

and

C E **RESPONDENT**

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

Coram: MABINDLA-BOQWANA, MOLEFE and KEIGHTLEY JJA and BAARTMAN and DOLAMO AJJA

Heard: 2 September 2024

Delivered: 18 November 2024

Summary: Family law – divorce proceedings – primary residence, care and contact of a minor child provided in settlement agreement – duty of the court to interfere as upper guardian of minor children – best interests of a minor child paramount – application for leave to appeal – referral for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Haupt AJ, sitting as court of first instance):

The application for leave to appeal is refused.

JUDGMENT

Molefe JA (Mabindla-Boqwana and Keightley JJA and Baartman and Dolamo AJJA concurring):

[1] This is an application for leave to appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court), which refused to endorse the divorce settlement agreement concluded by the applicant, Mr E and the respondent, Mrs E, awarding primary residence and care of their minor child (A) to Mr E. The court granted the primary residence and care of A to Mrs E. It further awarded costs against Mr E, to be paid from his share of the communal estate.

[2] Mr E applied for leave to appeal against the order of the high court which was refused. On petition to this Court, his application for leave to appeal was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013, upon the terms that the parties should be prepared to address the merits of the appeal if required. Mrs E did not oppose the application for leave to appeal.

[3] The facts pertaining to this matter are as follows. Mr and Mrs E became romantically involved in 2018 and moved in together. At that stage they were both employed. Soon thereafter they got engaged. On 19 July 2019, a girl child was born to them in Lephalale, Limpopo Province. The parties subsequently got married in community of property on 30 January 2020. They resided with A in Lephalale as Mr E was employed at Medupi Power Station. They agreed that Mrs E would be a full-time stay-at-home mother to look after A whom she breastfed. A started attending the creche in the mornings from the age of 15 months.

[4] During September 2021, the marriage relationship between the parties irretrievably broke down. This was after 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 A from the common home to his parental home in Vanderbijlpark, Gauteng Province without Mrs E's consent. He permanently relocated to Vanderbijlpark at the beginning of November 2021, leaving Mrs E who remained in Lephalale.

[5] On 7 October 2021, Mr E instituted divorce proceedings against Mrs E. Amongst other prayers, he sought forfeiture of Mrs E's right to share in the communal estate. This, he alleged was due to substantial misconduct by Mrs E which gave rise to the breakdown in their marriage. He also prayed for the primary residence and care of A to be awarded in his favour. At the time of the issuing of the summons, Mrs E was employed as a waitress at Mike's Sports Bar.

[6] On 4 November 2021, the parties signed a settlement agreement, providing, amongst other things, that the primary residence and care of A would vest with Mr E. This was made subject to Mrs E's contact rights including

removal of A every alternative Friday until Sunday. Mr E was, at that time, permanently residing with A and his parents in Vanderbijlpark, since he removed her from the common home. While noting some reservations that the contact was not age appropriate, the Family Advocate did not endorse the settlement agreement.

[7] The matter served in the unopposed divorce court on 13 June 2022. On that day Mrs E protested against the settlement agreement and informed the high court that she was coerced into signing it without any legal representation. After hearing short oral evidence from both parties, the high court referred the matter to a special trial, which was set down to commence on 12 July 2022, for the purpose of determining A's best interests. The office of the Family Advocate was requested to assist the high court with an urgent investigation and report.

[8] Mrs E filed a plea and counterclaim on 29 June 2020. She admitted the breakdown of the marriage but denied that she was the cause of it. She sought, inter alia, primary residence and care of A to be granted to her.

[9] On 14 July 2022, the high court gave an order that, pending the finalisation of the matter, A would remain in Mr E's care at the parental grandparents' residence and Mrs E would exercise contact visits every weekend from Friday to Monday. Mr E was to transport A for the contact visits with Mrs E.

[10] The special trial ran for seven days. Both parties gave evidence and called witnesses. In summary, Mr E testified that he resided at his parental home in Vanderbijlpark but worked at Medupi Power Station, approximately 450 kilometres away from his residence. His mother assisted in looking after A when the child was not at the crèche. He further testified that he was the primary

breadwinner and took care of all A's needs and did not need any financial contribution from Mrs E towards A's maintenance. In addition, Mrs E was not interested in A as she wanted to pursue 'her young life'. She also could not provide safety and stability for her. He accused Mrs E of having been addicted to online gambling of a violent nature, while she lived with A and of neglecting the child and the household. He also alleged that Mrs E had a younger boyfriend with whom she was expecting a child. According to him, Mrs E was not fit to care for A.

[11] Mrs E's summarised testimony was that she had always been the primary caregiver of A since her birth. She was a stay-at-home mother until Mr E took away her financial resources after she informed him that she wanted a divorce. Mr E relocated with A without her consent. He frustrated her contact visits with A. Due to her financial constraint and being far from Vanderbijlpark, she could not exercise contact rights frequently. She further testified that she did not have legal advice and/or representation when she signed the settlement agreement. She was coerced to sign it by Mr E, who threatened that she would not have any contact rights with A if she failed to sign the settlement agreement.

[12] The interim and final reports received from the office of the Family Advocate indicated that A had strong relationships with both parents and a recommendation was made that the status quo be maintained and that A remain in the care of Mr E with Mrs E exercising contact rights. The Family Advocate, after consulting with the parties on two occasions and observing A for a brief period, concluded that Mrs E's circumstances were too uncertain and unpredictable for the primary care of A to be awarded to her.

[13] The high court rejected the Family Advocate's recommendation and found that, on the facts before it, Mr E was not A's primary caregiver in the past

and was not her primary caregiver at the time the matter was heard. On the other hand, the facts and probabilities supported Mrs E's version that she was A's primary caregiver from birth, until the child was removed from her care and residence by Mr E. The court also found that the evidence revealed that Mr E had purchased expensive gaming equipment. He was the author of Mrs E's financial 'instability' as he had cut her off financially.

[14] The high court further found that A took two to three months before becoming comfortable at school in Vanderbijlpark. She also took longer than other children to adjust. Mr E never attended A's functions at the crèche or activities alone. He always did so with his mother. The court further found that Mrs E had testified that when she was allowed contact for the first time in November 2021, A wanted to be breastfed. At that stage she was two years and four months. The high court 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.

[15] This Court must decide whether there are reasonable prospects of success on appeal. In doing so it must consider whether the high court was correct in refusing to endorse the settlement agreement. At the hearing of the appeal, Mr E's counsel did not quarrel with the fact that high court had the power to determine whether the arrangement made by the parties, pertaining to the custody of the child served the best interests of the child. She submitted that there was no justification emanating from the evidence to remove the child from Mr E. Accordingly, she argued, the high court should have been satisfied with the terms of the settlement agreement of 4 November 2021. Alternatively, it should have granted primary care of A to Mr E, with reasonable rights of contact to Mrs E. Mrs E should also have been ordered to contribute a fair and reasonable

amount of maintenance towards A. As to costs, counsel submitted that each party should have been ordered to pay his or her own.

[16] This Court in *P v P*[1] stated that the determination of the best interests of the child, 'in any particular case involves the [h]igh [c]ourt making a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children'.[2] In this regard the court is not looking for a perfect parent but to find "the least detrimental available alternative for safeguarding the child's growth and development."[3]

[17] Our Constitution echoes the importance of the concept of the best interests of the child. Section 28(2) of the Constitution provides that the child's best interests are of paramount importance in every matter concerning the child. The principle of the best interests of the child has also been incorporated in s 9 of the Children's Act 38 of 2005.[4]

[18] Whilst the parties' right to contract should be respected, in matters dealing with minor children, the court has a duty to enquire whether any arrangement by the parties would serve the best interests of A. Even though Mrs E had initially bound herself to the settlement agreement, the high court, as upper guardian of A, 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 court had to be satisfied that the provisions made for the welfare of A were satisfactory and in her interest.

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[1] *P v P* [2007] ZASCA 47; [2007] 3 All SA 9 (SCA); SCA 2007 (5) 94 (SCA).
[2] Ibid para 14.
[3] Ibid para 24.
[4] Section 9 of the Children's Act 38 of 2008 provides that the standard to apply to all matters concerning the care, protection and well-being of a child, is that of the child's best interests.

[19] In addition, Mrs E testified that the agreement was voidable since it was induced by duress. Her testimony is that Mr E told her that if she refused to sign the settlement agreement, he would not allow her access and contact with A. As the validity and the terms of the settlement agreement were in dispute, it was open to the high court to pronounce on it. It is unnecessary to make any determination on the allegation of duress, in view of my findings on the issue of the best interests of the child.

[20] Counsel for Mr E further submitted that the interim and final reports of the Family Advocate constituted important documents accessory to the evidence to determine A's best interests. Counsel for Mr E argued that the high court should have relied on the Family Advocate's report as they witnessed the interaction between A and each parent. The reports and recommendations of a Family Advocate are undoubtedly of great assistance to a court in determining the custody arrangements that will serve the best interests of the child. However, the court is not bound to follow the said recommendations and retains its own discretion.[5] The court sitting as upper guardian, may as in this case, call evidence *mero motu* to assist it in the judicial investigation to establish what is in the child's best interests.

[21] The high court concluded that the primary care of A be awarded to Mrs E, based, largely, on favourable credibility findings in her favour and adverse credibility findings against Mr E. The high court was mindful not to give one factor, that of maintaining the status quo of the past nine months, pre-eminence over other factors. In sum, the question whether the high court exercised its discretion judicially in rejecting the settlement agreement and the

[5] *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T) at 167A-B.

recommendations by the Family Advocate should be answered in the affirmative.

[22] In conclusion, the high court cannot be faulted in how it exercised its discretion by not following the arrangements made in the settlement agreement and making its own order that it deemed served the best interests of A. There is accordingly no misdirection warranting this Court's interference in that regard. Nor is there any misdirection in the high court's assessment of the evidence.

Costs

[23] Counsel for Mr E submitted that this Court should set aside the costs orders made by the high court that Mr E is to pay for the costs of the action, including the costs of the special trial out of his portion of the common estate. It was argued that Mr E was subjected to the special trial not due to any conduct of his own, but at the direction of the high court, and that the costs order is aimed at penalising him.

[24] The general rule is well-established that the award of costs is in the discretion of the court hearing the matter. The high court judgment clearly sets out the reasoning for the costs order. The order reflected the high court's displeasure in the way that Mr E approached the court. It found that he did not play open cards with the court and failed to provide a reasonable or plausible explanation for the contradictions between his pleadings, his affidavits and his oral evidence. The court was also unimpressed with the tone emanating from his correspondence with Mrs E and his testimony. The costs order should therefore not be interfered with. As Mrs E did not oppose the application for leave to appeal, no order would be made for costs in this Court.

[25] In the result, the application for leave to appeal is refused.

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D S MOLEFE
JUDGE OF APPEAL

Appearances

For the applicant:	B Bergenthuin
Instructed by:	Van Heerden & Kruger Attorneys, Pretoria
	Kramer Weihmann Attorneys, Bloemfontein.