THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 506/2021

In the matter between:

N S **APPELLANT**

and

J N **RESPONDENT**

Neutral citation: *N S v J N* (506/2021) [2022] ZASCA 122 (19 September 2022)

Coram Ponnan, Hughes and Mabindla-Boqwana JJA and Musi and Goosen AJJA

Heard: 18 August 2022

Delivered: 19 September 2022

Summary: Superior Courts Act 10 of 2013 - s 16(2)*(a)*(i) – parental rights and responsibilities in respect of a minor child - decision sought would have no practical effect or result.

ORDER

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

The appeal is dismissed with costs, including the costs of two counsel to be paid on the attorney and client scale.

JUDGMENT

Musi AJA (Ponnan, Hughes and Mabindla-Boquana JJA and Goosen AJA concurring):

[1] This is an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (per Lamprecht AJ), arising from one of many applications brought by both parties against each other concerning their minor child.

[2] The facts are the following. The appellant (the father) and the respondent (the mother) are the unmarried biological parents of their minor child, D, born on 4 May 2018. The respondent, is a South African citizen and permanent resident of Malaysia. Since his birth the child resided with the respondent in Malaysia. The parents had functional arrangements relating to parental rights and responsibilities in respect of the child until the imposition of lockdown travelling restrictions in March 2020 by both South Africa and Malaysia. Prior to this, by arrangement, the appellant visited the child in Malaysia and, on occasion, brought him to South Africa to visit his extended family and thereafter returned him to Malaysia.

[3] During March 2020 the respondent, who was then in South Africa, travelled to Cape Town with the child. On 7 March 2020, a day before she returned to Malaysia, the appellant fetched the child with the understanding that he would return the child to

Malaysia on 21 March 2020. As a result of the COVID-19 pandemic, Malaysia went into lockdown thus prohibiting commercial air travel from 18 March 2020. South Africa followed suit on 26 March 2020. When the air travel restrictions were lifted, the appellant refused to take the child back to Malaysia. This necessitated the respondent having to travel to South Africa to fetch the child. The once functional relationship between the parties, took a turn and quickly became acrimonious.

[4] The appellant urgently approached the Pretoria High Court, on 17 September 2020, for an order in Part A that: (a) the Office of the Family Advocate as well as a social worker or psychologist conduct an urgent investigation into the best interests of the child with specific reference to parental rights and responsibilities; (b) the respondent be ordered not to remove the child from his care or South Africa pending the adjudication of Part B; (c) the primary residence of the child remain with him until the finalisation of Part B and (d) Part B be postponed sine die pending the investigation by the Office of the Family Advocate.[1] In Part B he sought orders relating to him being awarded full parental rights and responsibilities in respect of the child and that the recommendations of the Family Advocate regarding primary residence and contact be implemented, alternatively that those be determined by the court.

[5] The respondent launched a counter application for the return of the child and that it be declared that child's primary residence is in Malaysia. The applications were heard by Mosopa J who issued an order on 1 October 2020, *inter alia,* ordering the appellant: (a) to restore the care and primary residence of the child to the respondent; (b) permitting the respondent to return to Malaysia with the child; (c) to handover to the respondent the child's passport, birth certificate, immunisation card and baby book containing the child's medical records and (d) to exercise contact with the child in Malaysia by way of telephone calls and Face Time. (e) Part B was postponed *sine die* and the parties were granted permission to supplement their papers if so advised.

[1] On the same day the respondent launched an application in the High Court Johannesburg, inter alia, for the return of the child. On 22 September 2020, the application was dismissed with costs. The respondent immediately thereafter launched a counter application in the Pretoria High Court, on 22 September 2020. The counter application was struck from the roll and the costs reserved for determination in the main application.

[6] On 3 October 2020, the appellant launched an urgent application that was heard by Sardiwalla J, who ordered the respondent not to remove the child from Gauteng Province or South Africa. Contrary to Mosopa J's order, he ordered that the appellant retain the child's passport and birth certificate. He postponed the case to 6 October 2020. In the meantime, on 2 October 2020, the appellant filed an application for leave to appeal against Mosopa J's order.

[7] On 7 October 2020, Sardiwalla J, issued the following order:

'1. The status quo to remain the same that Judge Mosopa['s] order remains in effect.

2. The matter to be investigated by the Family Advocate and that the issue of the minor child and all the issues around the minor child [and] the parental rights be discussed and that the applicant (father) and the respondent (mother) make themselves available to the Family Advocate and the Family Advocate is directed to deliver a report on its recommendation and findings based on the papers before Court.

3. Costs reserved.'

[8] On 12 October 2020, the respondent launched an urgent application wherein she sought an order that: (a) the orders of Sardiwalla J be declared *pro non scripto* and of no legal force and effect; (b) the appellant and others, including his attorneys, be held in contempt of court for refusing to hand over the child's documents as per Mosopa J's order; and (c) costs. The appellant launched a counter application wherein he sought an order: (a) for the confirmation of his paternity of the child; (b) declaring that he is the holder of full parental rights and responsibilities in respect of the child; (c) directing that pending the urgent investigation by the Family Advocate, as ordered by Sardiwalla J, he be allowed to exercise contact with the child including removing the child every alternative weekend when the child is in South Africa and removing the child for agreed upon periods when the child is in Malaysia; (d) directing the respondent to cooperate in rectifying the child's birth certificate and passport to indicate that he is the child's father; and (e) costs on a punitive scale.

[9] The last application and counter application, the subject of the present appeal, came before Lamprecht AJ. On 11 November 2020, Lamprecht AJ issued an order: (a) declaring all the orders issued by Sardiwalla J to be of no force and effect and consequently set them aside; (b) declaring that the application for leave to appeal

against Mosopa J's order did not suspend that order (c) postponing the contempt of court application (d) dismissing the appellant's application with regard to contact in South Africa and in Malaysia; (e) postponing the rest of the relief sought sine die to be determined with the relief sought in Part B of the main application; (f) directing the appellant to pay the costs of the 12 October 2020 application on the attorney and client scale; and (g) reserving the costs of the counter application for determination during the hearing of Part B of the main application.

[10] Aggrieved by Lamprecht AJ's order, the appellant unsuccessfully applied for leave to appeal. He thereafter successfully petitioned this Court for leave to appeal.

[11] Before the hearing, the Registrar of this Court was requested by the Presiding Judge to transmit the following note to the parties:

'1. Inasmuch as an appeal lies against the substantive order of a court and not its reasoning, on what basis is it contended that paragraphs 2 and 3 of the order of Lamprecht AJ are:

(1.1) dispositive of any of the real issues between the parties;

(1.2) determinative of the rights of the parties;

(1.3) final in effect

and thus appealable?

2. Given the various other applications between the parties that are yet to be finalised, will entertaining an appeal at this stage not give rise to a proliferation of piecemeal appeals and hearings?

3. Given the recordal in the judgment on the application for leave to appeal (record page 291 para 2) that 'the respondent and the minor child have in the interim left the country and are now back in Malaysia', has the appeal not been rendered academic?

. . . .'

[12] The parties were invited to file supplementary heads of argument, if so advised. Both filed supplementary heads of argument.

[13] Section 16(2)*(a)*(i) of the Superior Courts Act[2] provides:

[2] Superior Courts Act 10 of 2013.

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

Courts are loath to grant orders that have no practical effect or result. It is self-evident that futile orders lead to a waste of overstretched judicial resources. In *SA Metal Group v The International Trade Administration Commission*[3] this Court stated that:

'After all, courts of appeal often have to deal with congested rolls. And, as Innes CJ observed in *Geldenhuys & Neethling v Beuthin*, they exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. . . .'[4]

[14] This principle was underscored by the Constitutional Court in *Normandien Farms v South African Agency for Promotion of Petroleum Exportation and Exploitation*[5] when it pronounced that:

'Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical.'[6]

[15] Courts may, however, entertain appeals even when there are no live controversies to settle, if it is in the interests of justice to do so. The factors to consider in order to determine whether it is in the interests of justice to hear a moot matter, include:

'(a) whether any order which it may make will have some practical effect either on the parties or on others;

(b) the nature and extent of the practical effect that any possible order might have;

(c) the importance of the issues;

(d) the complexity of the issues;

(e) the fullness or otherwise of the arguments advanced; and

(f) resolving the disputes between different courts.'[7]

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[3] *SA Metal Group (Proprietary) Limited v The International Trade Administration Commission* (267/2016) [2017] ZASCA 14 (17 March 2017).

[4] Ibid para 20. Footnote omitted.

[5] *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC).

[6] Ibid para 47.

[7] Ibid para 50.

[16] Lamprecht AJ's order was issued on 11 November 2020. The application for leave to appeal was filed on 30 November 2020. During the hearing of the application for leave to appeal, Lamprecht AJ was informed that by that stage the respondent and the child had already returned to Malaysia.

[17] We were informed from the Bar, in this Court, that the respondent and the child were currently in Singapore, where they now reside together with the respondent's husband and another child born of that marriage. The appellant, however, contended that notwithstanding their absence the appeal ought to be determined because Part B was still pending. He argued that it would be impossible to enrol Part B without the Family Advocate's report relating to parental rights, responsibilities, primary residency, contact and paternity.

[18] The appellant was constrained to concede that Part B can be re-enrolled at any time. He also conceded that the fact that he can still apply for an order that the Family Advocate investigate the matter and report thereon was and still is an option. Additionally, he conceded that he could have sought an order for a referral of the matter to the Office of the Family Advocate via a case management Judge, in terms of the practice in the Gauteng Division of the High Court. What counsel for the appellant had some difficulty with, however, is how the Family Advocate could be expected to investigate and report to the Court whilst the respondent and minor child are outside the borders of this country. This clearly demonstrates the futility of this exercise.

[19] Thus, even if the appeal were to succeed and Sardiwalla J's order that the respondent should not leave Gauteng or South Africa with the child revived, it will have no practical effect because they have left already. The outcome of this appeal will also not have any effect on the relief that was postponed for determination together with Part B of the main application. The appellant correctly did not submit that, notwithstanding its mootness, it would otherwise be in the interests of justice to determine the appeal. It follows that the appeal ought to be dismissed in terms of s 16(2)*(a)*(i) of the Superior Courts Act.

[20] Turning to costs: Lamprecht AJ made a punitive costs order against the appellant because he was of the view that the appellant wilfully disobeyed Mosopa J's order and abused the court process. There was sufficient time after receipt of the note from the Presiding Judge for reflection and reconsideration. Undeterred, the appellant persisted with the appeal. Aside from this appeal, the appellant launched multiple applications, putting the respondent to considerable expense. The respondent accordingly sought punitive costs. The appellant implored us not to make a punitive costs order because he endeavoured to do what is in the best interests of the child. The litigation he embarked upon indicates that he lost sight of the best interest of the child and focused on his own interest.

[21] In re: *Alluvial Creek Ltd*[8] it was said that:

'. . .There are people who enter into litigation with the most upright of purpose and a most firm belief in the justice of their cause, and yet [t]hose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. . .'[9]

These proceedings were vexatious in the sense set out above and must attract a punitive costs order.

[22] I accordingly make the following order:

The appeal is dismissed with costs, including the costs of two counsel to be paid on the attorney and client scale.

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C MUSI

Acting Judge of Appeal

[8] In re: *Alluvial Creek Ltd* 1929 CPD 532.
[9] Ibid at 535.

APPEARANCES:

For Appellant:	D B Du Preez SC (with him E de Lange)
Instructed by:	Muthray & Associates Inc., Pretoria
	Symington De Kok Attorneys, Bloemfontein
For Respondent:	ML Haskins SC (with L Segal SC)
Instructed by:	Tanya Brenner Attorneys, Pretoria
	Honey Attorneys, Bloemfontein