

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO: 45636/2007

DATE: 21 /07/2010

In the matter between:

CHILD WELFARE SOUTH AFRICA,

STILFONTEIN 1ST APPLICANT

CORNELIA PETRONELLA DAMIAO 2nd APPLICAN T

ANTONIO JOSE DEPINHO DAMIAO 3rd APPLICANT

And

COMMISSIONER OF CHILD WELFARE,

KLERKSDORP 1st RESPONDENT

DEPARTMENT OF SOCIAL

DEVELOPMENT WEST PROVINCE 2nd RESPONDENT

LUCILLE LANGENHOVEN 3rd RESPONDENT

EMMARENTIA VENTER 4th RESPONDENT

JUDGMENT

MAVUNDLA. J.;

[1] This judgment has been delayed as the result of circumstances beyond my control, which are not a subject of this matter. I can do no better than to apologise to the respective parties to the prejudice caused as the result of the delay.

[2] On the 2 October 2007 the applicants sought and obtained on urgent basis the following order that was granted by Rabie J: 3.1 That the variation of the detention over in respect of Baby Venter (born 6 July 2007) granted on or about 14 September 2007 under Reference no 14/1/1/4-506/07 in terms of which the detention of Baby Venter pending the finalization of the Children's Court proceedings in respect of her was granted to the Third Respondent in the place

of the Second and Third applicants, be and is hereby reviewed and set aside;

3.2 That the operation, execution and enforcement of the detention order granted by the First Respondent on 14 September 2007 be stayed pending the reconsideration thereof by the first respondent;

3.3 That the matter be remitted to the First Respondent to consider afresh the desirability of the variation of the original detention order in terms of which the aforesaid

Baby Venter was ordered to be detained by the Second and Third Respondents pending the finalization of the Children's Court proceedings in respect of her;

3.4 That the further detention of the aforesaid Baby Venter by the Second and Third Applicants be and is authorised and ordered pending the reconsideration of such variation of the original detention order;

3.5 That such Respondent(s) as may oppose this application be ordered to pay the costs thereof;

3.6 That the applicants be granted further and/ or alternative relief.

4. That a copy of this order together with the Notice of Motion and Founding affidavit forthwith be served upon each Respondent.

5 That pending the finalization of this application:

5.1 paragraph 3.1, 3.2 and 3.4 above operate as an interim order; and

5.2 the further detention by the Second and Third applicants of the aforesaid Baby Venter be and is hereby authorised."

[3] Indeed the order was dully served upon the respondents. The second respondent filed its opposing affidavit deposed to by Ms Mmakgantshe Ellen Masie who is a Social Worker by the second respondent at Potchefstroom.

[4] On the 30 November 2007 the matter served before my brother Ledwaba J who stood the matter down to Monday 3 December 2007. On the latter date Ledwaba J made the draft order presented to him an order of the Court, in the following terms:

"1. That a curator *ad litem* is appointed by this Honourable Court. Mr J HA Saunders is

appointed as curator *ad litem* for the minor child known as Baby Venter.

2. That Mr. Saunders will report to the Honourable Court on 13 December 2007, with regard to the interest of the minor child; Any report to be filled by Mr. Saunders on or before the 11 of December 2007.

3. That the applicants file their replying affidavit on or before the 5 of December 2007.

4. That the Respondents, if so advised, will supplement their papers on/ before the 7th December 2007.

5 That the matter be postponed to the urgent court of the 13 December 2007 for hearing 2007.

6. That the costs be reserved."

[5] The first applicant duly served its replying affidavit, together with confirmatory affidavits of the second and third respondents as well as of Van Rooyen, Waters and Van Staden. The matter subsequently served before me on 13 December 2007 when I reserved judgment.

[6] This matter centres on a custody order over a baby girl known as Baby Venter (also known as R and R) born to the fourth respondent at Kallie Haas Hospital at Potchefstroom on 6 July 2007. The child is presently with the second and third applicants since 7 July 2007.

[7] The first applicant is a duly registered and accredited non-profit organization dedicated to the protection of children and promotion of children's rights and welfare, providing social welfare services for children in the Stilfontein area.

[8] The first and second applicant are married to each other and are foster parents providing, *inter alia*, a place of safety for children and have been vetted and approved as such by the first applicant.

[9] The first respondent has offices at the Magistrate's Court in Klerksdorp. Several Magistrates act in turn in the capacity of the first respondent. Several magistrates dealt with this matter. The

third respondent is a major widow aged 62 years at the time of the institution of this action, resident in Stilfontein. The fourth respondent is a female aged about 22 years at the time of the institution of this action, natural and biological mother of the Baby Venter.

[10] On 7 July 2007 the first applicant, through one Marie Van Rooyen, removed the aforesaid baby from the fourth respondent to a place of safety, being the second and the third applicants. The removal was as the result of Form 4¹ completed in terms of Act 74 of 1983. This Form 4 was completed by one Van Staden. The essence of this report is, *inter alia*, that: "the concerned child has been abandoned or is without visible means of support; lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; the fourth respondent has severed the relationship between herself and the father of the concerned child; the father of the child is unable to assist with the maintenance of the child; the fourth applicant had only some baby milk but did not know what type of milk it was; the fourth respondent from time to time discharged herself from the hospital, was aggressive towards hospital staff and not cooperate with them".²

[11] On 10 July 2007 the first respondent reviewed and confirmed the detention of the said child and ordered her further detention by the third respondent until 3 September 2007 on which date an inquiry was to be finalized. The inquiry was however on 3 September 2007 not finalized but further adjourned to 5 September 2007.

[12] The first applicant further averred in her founding affidavit that it has since been furnished with copies of part of the second respondent's report filed with the first respondent. In terms of the said report the recommendation for the finalization of inquiry by the second respondent will be that the child be returned to the fourth respondent. The date of the finalization was to be 22 October 2007.

¹ Annexure B is the relevant form 4.

² Annexure A of B above, at paginated page 34-39.

[13] The first applicant then launched the urgent application for the order I have referred to in paragraph [2] herein above. The reasons advanced by the first applicant in bringing the urgent application was that it made no sense to uproot the child from the second and third respondents from the very outset, simply to place her for a period of 2 weeks only with someone, namely the third respondents who will have her for a short period and only hand over to the fourth respondent. She contended that this would simply traumatize the child.

[14] The first applicant further averred that the report³ by M.E Masie on which the variation of the initial detention order was premised did not responsibly justify the variation of the detention order by substituting the second and third applicants with the third respondent as there was no logical reason furnished for such dramatic change.

[15] The first applicant contended further that the applicants were interested parties and were denied an opportunity to make their respective input which would have been pertinent and useful in determining what is in the best interest of the child. It is further contended that the first respondent failed to apply its mind to the disruption and trauma the resultant short-term change will have to the child.

[16] The second respondent, in opposing the application filed its affidavit deposed to by Ms Mmakgantshe Ellen Masie. Masie does not dispute the date of birth of the child; that the child was removed from the fourth respondent and placed in the care of the second and fourth respondents.

[17] According to Masie the fourth respondent was discharged from the hospital the following day of her giving delivery to the child in issue. The fourth respondent proceeded to her father's place where she was met, *inter alia*, by the social worker Van Rooyen working for the first applicant. The fourth respondent was provided with form 4 processes in terms of s11 of the

³ Vide Para 26 at paginated page 16. However annexure J is a letter of Child Welfare Stilfontein from Van Rooyen to Malaka. The relevant report is in fact annexure K at paginated page 61-63.

Child Care Act 74 of 1983 read with Regulation 11 of the Child Care Act authorising Van Rooyen to remove the child from her to a place of safety without a warrant.

[18] Marie questions the involvement of the first applicant at the request of the Potchesfstroom hospital whereas the fourth respondent resides in Stelfontein. According to Masie, the fourth respondent was informed to be at court on the 10 July 2007. On the later date a detention order was confirmed and the matter was postponed to the 3 September 2007. Masie further avers that it does not seem that Van Rooyen prepared further reports as required for the final decision on the status of the child since the place of safety order is valid for a limited period of 14 days.

[19] According to Masie, the fourth respondent was referred to Clinical Psychologist Zillen Roos who concluded that the fourth respondent should be given custody of her daughter again on condition that she be involved in suitable support program over an extended period of time to assist her in improving her parental skills and to allow her to better her circumstances. Masie further pointed out that the applicants failed to attach a copy of this report in the urgent application. This report was then attached by the first respondent as annexure A1⁴.

[20] Further attached to Masie's affidavit is a copy of her report and recommendation which provides that the place of safety order of the child be varied and the child be transferred to the place of safety of the third respondent.⁵

[21] Masie further pointed out in her replying affidavit the cultural differences between the second and third applicants, the fourth respondent and the third respondents. The fourth respondent and the third respondents are Afrikaans speaking whereas the second and third applicants are either Greek or Portuguese⁶. She further pointed out that she initiated proceedings that would allow and facilitate the proximity of the child and the fourth respondent. She further averred that based on her report, the initial safety order was varied on 14

⁴ Paginated page 132-139.

⁵ Paginated pages 145-149 annexure MM3.

⁶ Paginated page 91 paragraph 5.3.

September 2007. She further averred that notwithstanding the order of the 14 September the applicants failed to hand over the child. When she eventually traced and spoke to the second applicant the latter indicated that she is not willing to hand over the child.⁷

[22] The applicant seeks to have the decision of the first respondent reviewed. I find it apposite to refer to the matter of *Ex Parte D 1958 (2) SA 91 at 93 (G.W.LD)* where Wessels J stated as follows:

"It seems to me that this Court would no doubt ordinarily have the power to review the proceedings of the children's court at the instance of an aggrieved party who could show that he has *locus standi* and that lawful grounds for review exist. Such power of review might also be exercised in the circumstances appearing from *R v C 1939 OPD 177*."

At page 93H -94 Wessels J said:

"I have considered whether it could be contended that this Court as the Upper Guardian of all minors has inherent jurisdiction to exercise powers of review at large in relation to proceedings before some other tribunal in which a minor's interest are involved whether *mero motu* or at the instance of a party who is not in law or authorised to initiate review proceeding on the minor's behalf and whose intervention flows solely from a desire to promote the minor's interest. It is to be doubted whether this Court has such wide powers as Upper Guardian. Normally this Court exercises its functions as Upper Guardian only when it is formally asked to do so or when the interest of the minor's child are pending before it." The Court held that the correct procedure is by way of appeal. I am similarly of the view that the applicants should have noted an appeal against the decision that raised their chagrin. However because an interim order was granted, I shall proceed to consider whether I should exercise the inherent review powers this Court has.

[23] It is trite that the applicant must make its case in its founding papers and not on the replying affidavit. It is also trite that in review proceedings the record of the proceedings from which the judgment sought to be review emanates must be placed before the reviewing court; vide

*Mkhatshwa v Mkhatshwa and Another*⁸.

⁷ Paragraph 5.14-5.17.

⁸ 2002 (3) SA 441 at 448 A-D Moseneke DCJ (as he then was) said:

[24] The applicant failed to place before this Court the record of the proceedings she seeks to have reviewed. She failed to place the reasons upon which the decision she seeks to have reviewed was arrived upon. Her failure to do so, in my view, flawed her application. Besides, according to the Mkhathshwa decision (*supra*) the application is fundamentally flawed. For this reason only the interim order should be discharged. Assuming that I am wrong in this conclusion, which I do not concede, I shall nonetheless proceed to further interrogate this matter, as I do herein below.

[25] It is trite that this Court is the upper guardian of minor children. The applicants are in no way related to the minor child. However, the interest of the first applicant in the matter, it would seem stems from having been alerted of the desperate situation of the fourth respondent⁹. The interest of the second and third applicant stem from the fact that the child was placed in their place of safety. However, the first respondent subsequently reviewed its initial order placing the child with the second and third applicants. The applicants must nonetheless show that there exists lawful grounds warranting this Court as the upper guardian to exercise its review powers and review the decision of the first respondent; vide *Ex Parte D (supra)* at 93.

[26] It is also trite that in review proceedings, the applicant must satisfy the Court that the tribunal whose decision is sought to be reviewed, failed to discharge its duties honestly and impartially and did so capriciously; vide *Turner v Jockey Club of South Africa*¹⁰.

[27] What I need to determine is whether there was evidence upon which a reasonable man would have arrived at the decision the first respondent reached, vide *Jordan v Evans N.O. and*

"The other difficulty the applicant has is that no reason whatsoever for the decision made by the Premier have been placed before Court. The Premier has not filed any affidavit resisting this application. This is so because, for reasons which remain unclear, the applicant chose to bring this motion in accordance with form 2(a) of the first schedule of the Uniform Rules of this Court and not under Rule 53. The consequence of this is that the applicant seeks to set aside two decisions of the second respondent. The latter has been cited but not called upon to furnish reasons for the decision in question. Clearly the applicant should have utilised the procedure contemplated in Rule 53. The applicant's failure to do so led to a fundamentally flawed application. The prayers the applicant seeks are incapable of proper adjudication."

⁹ Paginated page 8 paragraph 9 of the founding affidavit.

¹⁰ 1974 (3) SA 633 (A) at 646H.

[28] I deem it not necessary to chronicle the rest of the contents of the replying affidavit of the respondent. It suffices, in my view, to point out that the first respondent to her answering affidavit has also attached annexure MM7¹¹, which is a copy of the safety order of Commissioner of Child Welfare at Klerksdorp authorising the third respondent to admit and further detain Baby Venter in terms of s14 (3) of the Child Care Act, of the 11 October 2007.

[29] In her report, *annexure* M3¹², Masie sets out the reasons for her conclusion that it must be recommended that the child be transferred to the place of safety of the third respondent. She had regarded to, *inter alia*, (a) the fact that the child was removed from its natural parent a day following its birth; (b) there has been no contact between the fourth respondent and the child; (c) third and fourth respondent belong to the same cultural group, namely Afrikaans speaking, while the second and third applicants are Portuguese. It is in the best interest of the child that it be placed in the same language grouping as its mother. (I must hasten to state that the applicant concedes that the third applicant is Portuguese, although she alleges that the second applicant is Afrikaans speaking.); (d) the fact that the third respondent has a sound financial background and does not use alcohol; (e) the fact that the fourth respondent has since secured a place of her own and is now employed. I must remark that this is not disputed by the applicants; (f) the fact that the second and third applicants are in Klerksdorp and the fourth respondent has no transport to visit the child at Klerksdorp. The third respondent is at Stilfontein where the fourth respondent is also resident. Masie was of the opinion that it is in the best interest of the minor child that there should be regular contact between the fourth respondent and the minor child to foster bonding.

[30] The respondent has also placed before me annexure MM7¹³ which is Form 5. This is the Detention order by the Commissioner in terms of Regulation 9(2)(d) dated the 5 October 2007.

11 Paginated pages 155-163.

12 Paginated page 145-149.

13 Paginated pages 155-157.

It is clear from the reading of this order that the commissioner in arriving in his decision of 14 September 2007 took into account the recommendation of Masie¹⁴.

[31] I am of the view that with what was placed before the commissioner, it cannot be said that the commissioner did not apply his mind *bona fide* and honestly in arriving in the decision of the 14 September 2007. In the circumstances I find that a reasonable man would have arrived at the same decision as the commissioner did. I find it not necessary to temper with the said decision.

[32] I am further of the view and hold that the interim order of the 2 October 2007 should be discharged. The consequences of the discharge of the interim order are invariably that Baby Venter must immediately be placed in the detention of the third respondent. I am further of the view that it is in the best interest of Baby Venter that she must be in close proximity with its natural mother, the fourth respondent so to easily facilitate regular contact and bonding between the two.

[33] With regard to cost, it brooks no argument that the costs follow the event. The applicants being the unsuccessful parties must be mulcted with the costs of the first respondent in opposing the application.

[34] In the result I make the following order:

1. That the interim order granted on the 2 October 2007 is discharged.
2. That Baby Venter be immediately returned to the third respondent for detention in accordance with the detention order granted on or about 14 September 2007 under reference No 14/1/4-506/07 by the Commissioner of Child Care Klerksdorp.
3. That the first applicant, second applicant and third applicant are jointly and severally, the one paying the other be absolved, to pay the first respondent's party and party costs.

¹⁴ Vide paginated page 1 56 paragraph 2 thereof.

N M MAVUNDLA

JUDGE OF THE HIGH COURT

Date of delivery 21 July 2010

APPLICANTS' ATT : S.J. VAN DEN BERG ATTORNEYS

APPLICANTS' ADV : MR. M.G. BOONZAIR

2nd RESPONDENTS' ATT: STATE ATTORNEYS

2nd RESPONDENTS' ADV: MR. M. MOJAPALO