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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2425/2016
Dates heard: 5 & 12 December 2017
Date delivered: 14 December 2017

In the matter between

N. A. N.

First Applicant

C. N.

Second Applicant

In re: J. N. (minor child)

JUDGMENT

GOOSEN, J.

[1] This is an application for the variation of a deed of settlement made an order of court upon the divorce of the applicants. The first applicant is the erstwhile husband of the second applicant. The applicants were married to each other on 3 July 2004. One child was born of the marriage, a son who is presently 10 years old. The applicants were divorced by order of this court on 10 August 2016.

- [2] The second applicant and the minor child relocated to New Zealand at the end of 2016. They are permanently resident in New Zealand. What the first applicant seeks in the present application is an order deleting paragraphs 2 – 16 of the deed of settlement and its replacement with an amended deed of settlement. The effect of the order will be to terminate the first applicant's guardianship of and parental rights and responsibilities in respect of the minor child. The first applicant will nevertheless continue to make payment of maintenance for the minor child.
- [3] The application came before this court as an unopposed application on 5 December 2017. I raised with counsel certain concerns about the competence of the order sought, and, in particular, the best interests of the child. Following argument I indicated that I would give consideration to the matter and that I would make an order or give judgment on 7 December. I thereafter addressed a letter to the applicants' attorney, indicating that I had concerns, given the basis upon which the relief was sought in terms of section 28 of the Children's Act, 38 of 2005 (hereinafter the 'Children's Act'), about jurisdiction in addition to those relating to the best interests of the child. Since these may cause me to dismiss the application I invited the applicants to make further written submissions by 12 December so that judgment could be delivered on 14 December.
- [4] Submissions were filed on behalf of the second applicant. In these submissions. Counsel refers to certain correspondence which has passed between the applicants pursuant to my letter. Although this correspondence is not adduced by way of a supplementary affidavit I have nevertheless had regard thereto. The submissions also now propose a different order to be made, namely one declaring the second applicant to be the sole bearer of parental rights and responsibilities and an order

declaring that the consent of the first applicant is not required in relation to the minor child's travel to or from the Republic or in respect of an application for a passport. For reasons which will be set out more fully hereunder, neither the original relief sought nor that sought by way of further or alternative relief can be granted.

[5] It is necessary to begin with a brief outline of the basis upon which the application is brought. In the founding affidavit the first applicant states that the parties concluded a Deed of Settlement on 18 July 2016. That Deed of Settlement records that the applicants would continue to exercise shared parental responsibilities and rights in respect of the minor child in that they would act as co-guardians as provided for in section 18 of the Children's Act and that they would be responsible for the minor child's care and well-being and for making decisions relating to all aspects of his day to day care when he is in their respective care. The parties agreed that the primary care of the minor child was to be awarded to the second applicant, subject to the first applicant's rights of contact with and access to him. It is also recorded that the applicants agreed and the first applicant specifically consented to the second applicant and the minor emigrating to New Zealand at the end of 2016.

[6] It is common cause that the second applicant and the minor child have indeed emigrated to New Zealand. The first applicant states that on 11 April 2017 he informed the second applicant that he wanted to terminate his parental rights and responsibilities in respect of the minor child as "I do not want any further involvement in his life". It appears that consequent upon this the parties concluded an amended deed of settlement, on 19 May 2017, in terms of which they agreed to confer all of the first applicant's parental responsibilities and rights as well as guardianship in respect of the minor child on the second applicant. It is this amended Deed of

Settlement that the parties wish to have substituted by varying the order made upon divorce.

- [7] In regard to the minor child's best interests the first applicant states that during 2017 he has had no contact with the minor child and that this is a consequence of his decision. He states that he has no relationship with the minor child and that he is absent from his life. Apart from a monthly contribution in the sum of R5000-00 the second applicant provides financially for the minor child's maintenance and upbringing and that the second applicant is solely responsible for all decisions relating to the minor child. He states that he has no influence or involvement in the minor child's life and he has no intention of becoming involved. He accordingly states that it is his decision that the second applicant be declared as the minor child's sole guardian and that all of his parental rights and responsibilities be terminated with immediate effect.
- [8] The second applicant supports the application and has deposed to a supporting affidavit. She confirms that the first applicant informed her that he wanted to terminate his parental rights and responsibilities. She states that as a result she approached a law firm in New Zealand to assist her in obtaining an order to terminate all the first applicant's parental responsibilities and rights. She was advised that a New Zealand court would only support removing a guardian in extreme circumstances and since no such extreme circumstances exist it was not possible to obtain such relief in a New Zealand court. She states that the minor child is in her care, and that she has always been his primary care giver. She further states that she is financially able to meet all of the minor child's needs and that she earns a sufficient income to provide for his daily needs, including future schooling and any medical needs, as supplemented with the first applicant's monthly contribution.

[9] Significantly, the second applicant states that she is experiencing difficulties in obtaining consent from the first applicant when his consent is required in respect of the minor child, such as when she wants to travel with him outside the borders of New Zealand.

[10] The exchange of correspondence submitted with the written submissions made by counsel pursuant to this court's invitation to do so, paints an unfortunate picture. In an email dated 8 December first applicant writes:

Please inform the judge I withdraw this request. I too do not believe this is in the best interest of Joss. I only want them to be able to live their lives freely without any constraint obligation to me or requiring my involvement.

It is not my intent to shirk my father responsibilities, however, I have realised that given the current reality, it is impossible for me to be a father to Josh.

All that is left is a meaningless, empty shell of what should have been a full, rich relationship. In short, I would merely be a placebo in Josh's life. This, I cannot accept, and hence I buried my son last year. (sic)

[11] In a subsequent email dated 10 December in which the first applicant responds to the second applicant, he writes:

Send me his invoice in the effort in regards to bringing this to the South African court and I will reimburse you half of that.

I did not ask for loss of guardianship, I said give you full custody.

Is that the same thing?

Does full custody give Josh the freedom to travel?

Reading the affidavit and NZ's reaction, and the unorthodox methods of trying to work around the jurisdiction, it was clearly a long shot.

[12] When the second applicant responds hereto she states:

I did procrastinate to submit this as I do feel the full guardianship was not ideal. However, I would like to come to RSA

And yes, Josh would like to see you. As such we will require an affidavit from you that would be valid for six months.

- [13] The second applicant then deals with a few other aspects and concludes the email by stating:

I do agree and have also asked that the application be withdrawn.

- [14] This email was followed by a further email from the second applicant, in which she states:

Sorry, I meant to answer, the full guardianship allows me to travel with Joshua across RSA borders without obtaining consent from you. The clauses where you have rights and access to Joshua (whether or not you use it) is very important. And these were removed. But as long as you don't mind doing the affidavit when we visit, all is good.

- [15] This email elicited the following response from the first applicant:

Sorry to be the bearer of bad news. You seem to have jumped to a number of conclusions. Nothings Changed.
I'm not signing any affidavit.
You need to be honest with Josh and stop giving him false hope.
I don't care any more, I will never be a part of his life again.
I will never go down that road again. It's just not worth it. (sic)

- [16] It should of course immediately be stated that the email correspondence was not adduced by way of an affidavit and therefore may not represent the full circumstances in which the email exchange occurred. I have nevertheless considered it appropriate to have regard thereto, given the peculiar circumstances of this matter. As I have said the email correspondence paints a sorry picture of a poor relationship between the applicants which has a direct bearing on the best interests of the minor child.

- [17] What is apparent from the affidavits filed and this is supported by the correspondence, is that the sole rationale for the application is to address the difficulty experienced by the second applicant in obtaining the necessary consent from the first applicant to allow the minor child to travel to and from the Republic. The

first applicant adopts the stance that he wants nothing to do with the minor child or the second applicant for that matter. Although he states that he will continue to pay maintenance for the child he wants no involvement in the child's life. He goes on to say that he will not have any further contact and that he will not sign any affidavit which may be required to enable the child to travel to and from South Africa.

[18] A court cannot compel a parent to maintain a relationship with his or her minor child. Whilst it is generally in the child's best interest to maintain the relationship with a parent the positive enforcement of the child's rights in circumstances where the parent refuses to maintain the relationship is difficult to achieve. That is not to say that a court cannot, and indeed must, protect the child's rights to maintain that relationship. Generally it will do so by enforcing the legal obligations and responsibilities which are imposed upon parents and by refusing to countenance non-compliance with such responsibilities. When it does so the court acts having regard to the best interests of the minor child which are of paramount consideration.

[19] In this matter the first applicant is clearly not motivated by a consideration of the child's best interests. The entire rationale for the application is the first applicant's interests and not those of the child. Since this court is enjoined to consider the child's interests as paramount, the absence of any evidence to demonstrate that the amendment or variation order as is sought is in fact in the child's best interests necessarily precludes the granting of the relief.

[20] Alive to this fundamental difficulty, the second applicant now wishes to persuade the court to grant alternative relief in the form of an order in terms of section 18 (5) of the Children's Act, read with section 28, to terminate the first applicant's parental right and responsibility to consent to the minor's departure or removal from the Republic

of South Africa and to consent to his application for a passport. In the further alternative the second applicant seeks an order that the first applicant be ordered to sign all documentation necessary to enable the minor child to travel internationally upon request by the second applicant.

[21] As indicated at the outset, the application has its genesis in a desire to amend or vary an order granted by this court, upon the divorce granted on 10 August 2016. It is of course trite that a court which granted a decree of divorce, incorporating the terms of a deed of settlement entered into by the parties, retains the jurisdiction to subsequently amend or vary that order. The jurisdiction of that court is not affected by the fact that the applicant or a minor child affected thereby, is not ordinarily resident within the area of jurisdiction of the court. However, if the application falls outside of the ambit of the variation of an order granted upon decree of divorce, then in that event the provisions of section 29 must be considered. That section provides as follows:

(1) An application in terms of section 22 (4) (b), 23, 24, 26 (1) (b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.

[22] The terms of section 29 are clear and unambiguous and, in my view, serve as an overriding determinant of jurisdiction in circumstances where a court is called upon to terminate, suspend or circumscribe the parental rights and responsibilities of a parent. The requirement is that the minor child must be ordinarily resident within the area of jurisdiction of the court. This is a territorial limitation of jurisdiction.

[23] In the founding affidavit the first applicant states that the jurisdiction is to be determined on the basis that he has a right to apply to terminate his parental rights and responsibilities, albeit by way of varying a deed of settlement, notwithstanding

that the minor child is not ordinarily resident in the area of jurisdiction of this court. He suggests that to hold otherwise would render his right to apply nugatory since there is no South African court which would have jurisdiction to deal with the application.

[24] It may be that this is so. The termination of parental rights and responsibilities is a matter that fundamentally impacts the best interests of a minor child and since the best interests of the minor child are of paramount consideration, the investigation and determination of those interests can best be achieved by the court with in whose area of jurisdiction the child is ordinarily resident.

[25] I need not however make any firm determination of this issue. That is so because as I have already indicated the main relief sought cannot be granted for want of compliance with a fundamental requirement, namely establishing that the best interests of the minor child will be served by granting the order sought.

[26] Insofar as the alternative relief is concerned, this is also framed as a termination of parental rights and responsibilities.

[27] Section 18 provides that:

(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must –

- (a) administer and safeguard the child's property and property interests;
- (b) assist or represent the child in administrative, contractual and other legal matters; or
- (c) give or refuse any consent required by law in respect of the child, including –
 - (i) consent to the child's marriage;
 - (ii) consent to the child's adoption;
 - (iii) consent to the child's departure or removal from the Republic;
 - (iv) consent to the child's application for a passport; and
 - (v) consent to the alienation or encumbrance of any immovable property of the child.

(4) Whenever more than one person has guardianship of a child, each of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.

(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3).

- [28] In terms of section 45 (3), pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the specified matters. These include the guardianship of a child and the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child.
- [29] Where it is sought to permanently terminate the right and obligation to give or refuse consent for any matter spelt out in section 18 (3) the provisions of section 28 must necessarily apply. In such circumstances, the territorial jurisdiction provided by section 29 will determine whether the particular High Court is a competent court as envisaged by section 18 (5).
- [30] Section 18 (5), it should be stated, provides a mechanism to overcome the difficulty posed by a co-guardian who is obliged to give or refuse consent envisaged by section 18 (3) and who refuses to do so. In that instance, having regard to the particular facts and the best interests of the child concerned, a court may act in terms of section 18 (5) and may order that the consent of the co-guardian is not required. When a court grants such an order it does not necessarily permanently terminate the co-guardians rights and obligations as is provided for by section 18 (2) (c) namely to act as guardian of the child.

- [31] It follows from what is set out above that the jurisdictional difficulties attach also to the alternative relief that the second applicant now seeks.
- [32] This court can undoubtedly consider an application made pursuant to section 18 (5) to dispense with the consent of a co-guardian in circumstances where that co-guardian refuses to consent. Its jurisdiction is not limited by section 29 since section 18 is not one of the sections referred to. In such a case the jurisdiction is to be founded on the basis that the non-consenting co-guardian is within the jurisdiction and authority of the court. But the present matter is not an application brought in relation to a particular act of refusal to consent. Even if it were to be treated as such an application the further difficulty is that the envisaged relief goes beyond that which would be contemplated by section 18 (5).
- [33] It follows from what I have set out above that the application cannot succeed. I am mindful that the consequence of a dismissal of the application is that the second applicant may be forced to bring a separate substantive application in due course to compel the first applicant to take steps to signify his consent to enable the minor child to travel to and from the Republic or to obtain an order in terms of section 18 (5). This may well result in further legal costs. It is however to be hoped that the first applicant will take heed of the following remarks.
- [34] The exercise of co-parental rights and responsibilities and co-guardianship is specifically provided for in the legislation precisely because it is in the best interests of minor children that both parents maintain their parental rights and obligations in relation to the child. This is so even in circumstances where the relationship between the parents has ended and even where they may live in separate cities or even

countries. The fact of the separation does not and cannot, without more, absolve the parents of their respective responsibilities and rights. This extends to the exercise of guardianship which is the expression of a broad and overarching legal responsibility for the child.

[35] Guardianship is a power which is to be exercised in the best interests of the child. Parents, no less than any organ of state or official or employee representative of state or any other natural or juristic person, are bound by the provisions of the Constitution and the provisions of the Children's Act to promote and to act in accordance with the best interests of a minor child (cf. section 8 of the Children's Act read with the Constitution). It is accordingly not open to a guardian, in this instance the first applicant, to refrain from exercising the responsibilities of guardianship solely because of his interests. Where this is found to occur a court, acting as the upper guardian of all minor children, may intervene. It is to be hoped that this will not become necessary. Should the first applicant persist with the attitude displayed in the correspondence the second applicant is not without a remedy. However, the remedy sought by the applicants in the present matter is not available.

[36] In the result the application is dismissed.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances: For the Applicants
Adv. L. Gagliano
Instructed by Van Wyk Attorneys