

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: **1575/2021**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

C[...] **L[...]**

Applicant

and

N[...] **V[...]** **V[...]**

Respondent

JUDGMENT BY: REINDERS, J

HEARD ON: 28 JULY 2023

DELIVERED ON: 04 AUGUST 2023

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

[1] This matter came before me on the urgent roll on Friday 28 July 2023. It was issued two days before and opposing papers were filed on 27 July 2023. The replying affidavit was filed shortly before hearing of the application.

[2] When the matter was called the papers were not paginated as required by the Practise Rules of this Division. Had this matter not concerned the interest of a minor

girl aged four, I would have struck the matter for non-compliance with rule 7.4. Not only was the entire court file disorganised, but part of the record that I deemed must be considered for an understanding of the urgent relief prayed for, was absent in the court file. As the interest of minor child is paramount, I was prepared to take the matter on my urgent roll.

[3] The history of this matter paints a sad picture of the acrimonious disputes between the parties regarding the care, primary residency and contact of the minor (hereafter the care and contact).

[4] On 20 May 2021 this court issued an interim order, pending finalisation of an application (the main application), which made provision for the parties' rights of care and contact of the minor (per Mathebula J). At the time the respondent was residing in Bethlehem, whilst the applicant resided in Port Elizabeth. This is currently still the position. In terms of the interim order, the parties were to exercise their rights of contact on the basis of rotating the residency of the minor every fortnight between them, commencing with the respondent having the minor with him from 5 June 2021 and returning her to the applicant in Port Elizabeth on 20 June 2021. This arrangement of the respondent collecting the minor from the applicant on a Saturday and returning her after two weeks on a Sunday (at his costs), was in place for a period of more than two years until a dispute arose between the parties resulting therein that the respondent did not return the minor to the applicant when he had, according to the applicant, to do so on 23 July 2023.

[5] On 21 October 2021 the main application was ultimately and finally disposed of by Chesiwe J who granted the respondent the primary residency of the minor and amended the present applicant's rights of contact. Not satisfied with the order the applicant properly obtained leave to appeal from the court a quo and filed a notice of appeal. The appeal record was prepared and filed on 14 June 2023, however according to the respondent there was no application for a date for hearing of the appeal. This was only done on 23 June 2023. In terms of High Court Rule 49(6)(a), the applicant should have made written application for an appeal date on or before 15 June 2023. The respondent complains that no notice containing applicant's particulars as required by Rule 49(6)(a) has been filed, and of more importance no

power of attorney has been filed as is provided for in Uniform Rule 7(2). The end result therefore of the complaint by the respondent, is that the proposed appeal has lapsed.

[6] It is the applicant's contention and request herein that I should make an order that the order granted by Mathebula J remains in full force and effect, resulting therein that the noting of the appeal herein suspended the operation of the order dated 21 October 2023. The applicant also prayed that I should order the respondent to return the minor to her in accordance with the interim order.

[7] I wish to stress that I am not to consider the contact rights or primary place of residence of the minor child – that has already been adjudicated by Chesiwe J on 21 October 2022. I am simply to make a conclusion whether the order of Chesiwe J is suspended pending the appeal. Applying the relevant legal principles (and obviously without an attempt to bind the court hearing the appeal), I am of the view that the appeal has lapsed in various respects. The request to allocate an appeal date should have been filed at the latest on or before the 16 June 2023 failure whereof the appeal lapsed *ipse iure* until condonation is granted. Although such condonation might still be requested even at the time of the hearing of the appeal, there is no such application at present. My understanding of the Rule is that a power of attorney should similarly be filed at least simultaneously with the record. In applicant's replying affidavit it is alleged that same had now been filed.

[8] There is in my view another unassailable obstacle that the applicant has. The order of Mathebula J on 20 May 2021 was an interim order pending finalisation of the main application. In my view it lapsed when the matter was finally adjudicated on 21 October 2022 and could not be revived by an appeal against the final order.

See: ***MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd*** 2000 (4) SA 746 (SCA).

[9] This being so I have to conclude that the application cannot succeed. As the matter concerns the interest of a minor child and having noticed applicant's ostensible constrained financial position compared to that of the respondent, I find it appropriate in exercising my discretion that each party should pay its own costs.

[10] I would be remiss in my task if I fail to make some remarks in this matter. From a perusal of the papers it seems to me that the continuous bad blood between the parties extend to their instructing attorneys. In fact, I get the distinct impression that the animosity might even be fuelled by such legal representatives. In my view in doing so none of those involved truly considers the best interests of the minor but rather engage in a “winner takes all” attitude. It is evident to me that the applicant still intends to pursue the appeal. Despite my findings in paragraphs 7 and 8 herein above, I do not find any indication in the respondent’s answering affidavit that he had genuine and serious concerns about the wellbeing of the minor up until the time that the dispute about the lapsing of the appeal arose, nor in the past two years. If he indeed had such concerns, I would have expected it to be raised in his answering affidavit. Should the respondent wish to demonstrate his bona fides in this matter, it would in my view be a good opportunity for him to continue with the fortnight arrangements, or to take the minor to the applicant for at least a week per month, until finalisation of the appeal.

[11] I make the following order:

11.1 The application is dismissed.

11.2 Each party to pay its own costs.

C. REINDERS, J

For the Applicant: Adv S Boonzaaier
Instructed by: Van Dyk Attorneys
BLOEMFONTEIN

For the Respondent: Adv Van Rooyen
Instructed by: Greyling Orchard Attorneys
c/o McIntyre & Van der Post
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