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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

CASE NO : 5829/2017

In the matter between :

J M

1st Applicant

D K

2nd Applicant

and

FREE STATE CARE IN ACTION

1st Respondent

ONALERONE MADIGOANE

2nd Respondent

CARMEN PARKS N.O

3rd Respondent

**FREE STATE DEPARTMENT OF SOCIAL
DEVELOPMENT**

4th Respondent

HEAD OF DEPARTMENT: FREE STATE

DEPARTMENT OF SOCIAL DEVELOPMENT

5th Respondent

MEMBER OF EXECUTIVE COUNCIL: FREE STATE

DEPARTMENT OF SOCIAL DEVELOPMENT

6th Respondent

[2] The Applicants brought an urgent application to set aside an order of the Children's Court for the district of Brandfort granted on 9 March 2018 together with an order that the Family Advocate be requested to conduct a thorough investigation on urgent basis in respect of the best interests of the Applicants' minor child, born on

2 June 2017, in respect of whether the Applicants should attend to her primary care and residence. The Notice of Motion further made provision that pending the Family Advocate's investigation and recommendation, the Applicants to retain full parental rights and responsibilities in respect of their minor child subject to primary care by the maternal grandparents, that parental rights and responsibilities in respect of contact be awarded in accordance with the provisions of Section 18(2)(b) of the Children's Act regarding reasonable telephonic contact and unrestricted contact visits under supervision of the maternal grandparents. A *Rule Nisi* would then have issued calling upon all interested persons to show cause on 26 April 2018 why the above orders should not be made final.

Background:

- [3] The succinct background is that the minor (born 2 June 2017), had by the end of September 2017 been three times admitted to the Life Rosepark Hospital in Bloemfontein, for respectively bronchitis, gastritis and gastro-like symptoms. According to an email dated 28 September 2017 attached to the papers, the Unit Manager Padiatric at the Life Rosepark Hospital, on request of a specialist

peadiatrician attached to the hospital, referred the matter to a welfare organisation operating in Brandfort (First and Second Respondents) amongst others because of what they observed relating to the Applicants and also to the child. It was apparently referred to Brandfort because of the addresses of the Applicants that the Unit Manager had, and because the Applicants, according to her, the previous two occasions arrived with the minor by ambulance from Brandfort. What can be garnered from the averments in the founding affidavit and attachments thereto (the full record of the proceedings of the Children's Court under the circumstances of the type of application not being available to Court) is that the minor was then removed (out of the care of the Applicants) in terms of Section 152 of the Children's Act, and placed in temporary safe care pending further investigation, and orders of the Children's Court, in terms of Chapter 9 of that Act. Between October 2017 and 9 March 2018 the matter on different dates served before the Children's Court in Brandfort. On 9 November 2017 the Applicants issued a previous urgent application for restoration of the *status quo ante* forthwith (that full parental responsibilities and rights be restored to them) "pending the lodging and finalisation of the review application and/or appeal to be lodged within 20 days of this order". That application served before Phalatsi,

AJ, in November 2017 but was remanded as the matter was still pending before the Children's Court. After a further postponement that previous application was removed from the roll (after the final order in the matter by the Children's Court on 9 March 2018) "for this application to be instituted".

- [4] On 9 March 2018 the Children's Court of Brandfort in terms of Section 156 of the Act, ordered that the minor be placed in temporary safe care, but at certain dates in March to August 2018 the minor is to stay at her maternal grandparents, where the Applicants will assist with caring of the child. The further details of that order are not relevant for current purposes.
- [5] On 27 March 2018 the Applicants issued the current application for the reviewing and setting aside of the 9 March 2018 Children's Court order with a *Rule Nisi* with immediate effect, returnable on 26 April 2018.
- [6] There are three categories of difficulties with the current application, namely the type of "service" of the application on the Respondents, the prayer for an investigation by the Family Advocate, and the attempt to review the lower court by way of

application to set aside (in other words, not following the route of appeal, or the route of a Rule 53 review procedure).

Service:

[7] The application was issued against six Respondents on 27 March 2018. On the Notice of Motion an email address for each of the six Respondents is indicated, for service “per email”. In the citation in the founding affidavit the correctness of those email addresses are not confirmed, nor where and how those email addresses were obtained. Actually there are no references to (or confirmation of) the email addresses, or mention that service would only be by email. Upon enquiry about the email addresses, the Court was informed, from the Bar, that it was obtained from the Respondents sometime ago during the previous application, and that during that application the Respondents agreed that papers may be sent to them by email.

[8] Needless to say, that previous application has been removed from the roll and this new application (albeit under the same case number) was issued. There is under the circumstances no agreement from the Respondents that the new application may be “served” by email.

- [9] Accordingly there were no returns of service from a Sheriff available when the urgent application was called on the time set in the Notice of Motion, namely 08h30 on 28 March 2018. There was also no appearance for any of the Respondents. The only “returns” available were five email printouts (handed up to me from the Bar), apparently from the secretary of the Applicants’ attorneys sent to each of the aforementioned email addresses, with the application papers attached, and the message: “Kindly find attached hereto Notice of Motion as well as the Founding affidavit of J M for your attention”.
- [10] They were sent between 16h12 and 16h15 on 27 March 2018 – whilst the application was set down and called at 08h30 on 28 March 2018.
- [11] Upon further enquiry about the possible availability of any “read reports”, or telephonic (or cell phone) confirmation that each of the Respondents did receive the application papers, I was provided with four “delivery notifications” sent by “Mail Delivery Subsystem” to the secretary of the Applicants’ attorney on 27 March 2018 between 16h13 and 16h49. No further confirmation of receipt was available, nor provided.

[12] Section 44(1)(a) of the Superior Courts Act, 2013 (Act No 10 of 2013) makes provision that service may take place by means of transmission by fax “or any other electronic medium as provided by the Rules”. At this stage no provision is yet made in the Rules for service by “other electronic medium” or by email. Service of a new application by way of email is thus not yet allowed.

[13] I was thus not surprised that there were no appearance for any of the Respondents and I was also not satisfied that proper service of the application occurred. There was no request for a postponement for proper service. There was also, in the papers, no case made out for an *ex parte* application.

Investigation by Family Advocate:

[14] In prayer 3 of the Notice of Motion provision was made that the Family Advocate “be requested to conduct a thorough investigation, on an urgent basis, in respect of the best interests of the minor child in respect of whether the Applicants should attend to the primary care and residence, and to submit a report and recommendation in this regard as soon as possible”.

[15] This is not a divorce matter. The powers and duties of Family Advocates are set out in Section 4 of the Mediation in certain Divorce Matters Act, 1987 (Act 24 of 1987). It pertains to enquiries, recommendations and reports to the Court after the institution of a divorce action, or regarding the variation, rescission or suspension of orders made in terms of the Divorce Act, 1979. I know of no provision and/or authority in terms of which this Court has the authority to instruct the investigation by the Family Advocate (who was also not cited as a Respondent) to make recommendations to this Court, after a Children's Court made an order that a child is found to be in need of care and protection. In terms of Chapter 9 of the Children's Act the Children's Court is assisted by designated social workers who conduct investigations and report to the Court. The Applicants in effect here want to review the proceedings of the Children's Court (as assisted by its social workers) through this Court (as assisted by the Family Advocate).

[16] It is well-known that the office of the Family Advocate are inundated with cases regarding divorces with the result that reports from the Family Advocate are awaited by this Court for months. The Family Advocate should thus not unnecessarily be loaded with further cases, from another area of the law, and furthermore

without statutory provision thereto. Courts are not free to do whatever they wish to resolve the cases that come before them.

[Morar v Akoo 2011 (6) SA 311 (SCA) at 319 D].

Review of Children's Court:

[17] According to the Notice of Motion an order is sought that the orders of the Children's Court are set aside. In argument the counsel for the Applicants submitted that it is not an application for an interdict but an application for setting aside the orders of the Children's Court.

[18] There is no record of the proceedings of the Children's Court provided in the application or attached as an attachment. What this Court knows of the proceedings of the Children's Court is what is contained in the founding affidavit and it is there basically dealt with in 3 pages from paragraphs 37 to 39.1. We do know that there was proceedings on 26 October 2017 as witnesses were subpoenaed and on that date "the proceedings commenced and the evidence of witnesses were led".

[19] This application to set aside is not a review [as envisaged in Section 22 (read with Rule 53) of the Superior Courts Act]. It is palpably also not an appeal as envisaged in Section 51 of the Children's Act. That section determines that an appeal against a decision of the Children's Court must be noted and prosecuted as if it were an appeal against a civil judgment of a Magistrate's Court.

[20] If the prescribed review procedures or appeal procedures were followed the record of the Children's Court would eventually have been before this Court.

[21] The Applicants aver (as primary ground for the setting aside of the Children's Court's order) that the Brandfort Children's Court did not have jurisdiction over the child. They allege that the child has at all times been ordinarily resident in Bloemfontein in the Free State Province. They then state as follows:

"I am at advised (sic) which advice I accept as correct, that in matters where an order that was granted for lack of jurisdiction is void ab origine, could be disregarded without an application for rescission of judgment. However, I deem it necessary, as this involves the life of my

child to bring this substantive second application to this Court, for the rescission of an order void of all logic, reason and justification.”

This is a startling statement. The Applicants have thus been advised that they actually could disregard the order of the Children’s Court without an application for rescission, as the Brandfort Court did not have jurisdiction. That is palpably incorrect. As was stated by Froneman, J (as he then was) in **Bezuidenhout v Pattensie Citrus Beherend Beperk 2001 (2) SA 224 (ECD) at 229 B – C:**

“An order of a Court of Law stands until set aside by a Court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 W at 494 A – C).”

- [22] In this case the Applicants contend that the Children’s Court did not have geographical jurisdiction over the minor. This should be distinguished from lack of legal capacity (“regsbevoegdheid”) as in **The Master of the High Court v Motala 2012 (3) SA 325 (SCA)**. The Court *a quo* was empowered by the Children’s Act to make a decision whether the minor was in need of care and protection (Section 155), and has jurisdiction over the minor if she is ordinarily resident within the jurisdiction, or where it is unclear

which Court has jurisdiction (Section 44). The Children's Court did not usurp for itself a power that it did not have. The Applicants thus could not resort to self-help by ignoring the order of the Children's Court. [Compare **The Master of the High Court v Motala, *supra*, at 333 C – D** as interpreted by **MEC for Health, EC v Kirland Investments 2014 (3) SA 481 (CC) at 512 I** and **Premier Foods v Manoim 2016 (1) SA 445 (SCA) at 461 G.**]

- [23] Furthermore, an order of a Magistrate's Court and/or Children's Court is not readily and easily set aside overnight by way of application to set aside before a single Judge. The correct procedure is by way of review or appeal in accordance with the Rules. The Free State Division's Rule 13 of the Rules Regulating the Conduct of the Proceedings of the Free State High Court determines that reviews of proceedings of a lower court are normally heard by two Judges. In terms of Section 13(2)(a) of the (now repealed) Supreme Court Act, 1959 (Act 59 of 1959) in any appeal against a judgment or order of an inferior Court, the High Court would be constituted before not less than two Judges. Section 14(3) of the Superior Courts Act, 2013 provides that appeals from inferior courts are heard by a Full Bench (of not fewer than two judges) of the High Court. Suffice to say that an

order of the Children's Court cannot simply be ignored on the ostensible ground that it lacked jurisdiction, as it stands until set aside by a Court of competent jurisdiction. Until that is done, the Children's Court order must be obeyed even if it might be wrong. The proper way to set aside an order of the Children's Court is by way of civil appeal, or review, in accordance with the Rules.

IN THE RESULT, I MAKE THE FOLLOWING ORDER:

1. The application is dismissed.

H J BENADE, AJ

On behalf of the Applicants: Adv L Collins
Assisted by Adv I Sander
Instructed by :
Lovius Block Attorneys
BLOEMFONTEIN

No appearance on behalf of the Respondents .