

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

CASE NO:4349/24

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED: YES / NO

Date:4 September 2024

Signature

In the matter between:

M[...] P[...]

APPLICANT

and

MAGISTRATE MOSADI

FIRST RESPONDENT

P[...] M[...] H[...]

SECOND RESPONDENT

JUDGMENT

Mazibuko AJ

Introduction

1. The applicant, Ms M[...] P[...] (*'Ms P[...]*'), seeks relief on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court for an order that:

- a) A *rule nisi* be issued calling upon the respondents to show cause on a date to be determined by the court as to why a final order, setting aside the *ex parte* order, issued by the first respondent, the learned Magistrate Mosadi of Mbombela Children's Court on 2 August 2024 under case number 14/1/4-118/2023, should not be granted.
 - b) The minor children [*W.H. and M.H.*] shall primarily reside with her, and she be their primary caregiver, making decisions about all aspects of their lives after considering their views.
 - c) Paragraph b above to serve as an interdict with immediate effect pending the return date.
 - d) The Family Advocate's office be directed to conduct an investigation and compile a written report with their findings and recommendations on an urgent basis with regard to the best interest of the minor children in respect of their care and contact.
2. The application is opposed by Mr H[...], raising points *in limine* being the urgency of the matter and incomplete proceedings in the Magistrates Court, non-compliance with the Practice Directives of this court, abuse of Court process and the availability of alternative avenues and relief.

Common cause facts in brief

3. It is common cause between the parties that Ms P[...] and Mr H[...] are not married to each other. They have been periodically staying together since 2019 and have two minor children, [W.H., born in 2020 and M.H., born in 2022]. During their stay together, they would be with Mr H[...]’s family, living with his mother, father and the rest of the family. At some stage, they stayed with Mr H[...]’s aunt. At the time Ms P[...] left with the children for the Western Cape province on 25 July 2024, they were staying on their own together with their children in Mbombela. On 25 July 2024, Ms P[...] left with the children. At about 6 PM on the same day, she sent Mr H[...] a message informing him that she and the children were safe and at

the Cape and that she left due to the toxic environment unhealthy for them, especially for the children.

4. On 26 July 2024, Mr H[...] approached the Children's Court. He was granted an *ex parte* order directing that the minor children were to reside with him as a primary caregiver until the children's best interest has been determined, with Ms P[...] having supervised physical contact with the minor children at the house of Mr H[...] by prior arrangement with him. In summation, the *ex parte* order read.
5. During the parties' stay together, Mr H[...] verbally abused Ms P[...] by calling her stupid and other ugly and derogatory names. He physically abused her by slapping her whilst she was pregnant with W.H. He would threaten with suicide and that he would kill all of them.
6. Mr H[...]’s mother physically abused Ms P[...] by throwing her with a cup. In November 2023, she also threatened Ms P[...]’s erstwhile employer with death when they stayed with Ms P[...] and the minor children. It is also not in dispute that Mr H[...]’s brother, Mr C[...] v[...] d[...] M[...] (*‘Mr v[...] d[...] M[...]’*), sent a voice note to Ms P[...] demeaning her by calling her *‘a little girl’* and other ugly and derogatory names as well as threatening her that he would come to the Cape and shoot them all dead.
7. Ms P[...] removed the children from Mbombela without a Court order or Family Advocate’s report. On 5 August 2024, the Court issued a subpoena directing the Applicant to appear on 16 August 2024 regarding the primary care of the minor children. Ms P[...] did not appear on the said day.
8. On 23 August 2024, whilst W.H. and M.H. were at the creche in Hermanus, Western Cape province, Mr H[...], his father and his brother, Mr v[...] d[...] M[...], came to the creche fetched the minor children and left for Mbombela with them without the knowledge of Ms P[...].

Points *in limine*

9. I will first deal with the points *in limine*. The non-compliance with practice directives will be considered together with the one relating to the lack of urgency of the application as raised.

(i) Non-compliance with practice directives of court and urgency

10. Mr H[...], through his counsel, Mr Fourie, raised a point *in limine* that Ms P[...]’s application ought to be dismissed with costs alternatively struck from the roll due to the non-compliance by her with the Practice Directives of this Court. Further, the urgency is self-created as Ms P[...] failed to appear at the Children’s Court as subpoenaed by the learned magistrate.
11. The provisions of Rule 6(12) empower the court to, on application, dispense with the time periods, forms and services prescribed in the rules. Considering the fact that this matter involves minor children aged two years and four years old, respectively. Given that the best interest of minor children is of paramount importance and must always be considered, I consider the matter urgent, and the court rules and this court’s practice directives are justified to be dispensed with.
12. Regarding the fact that the urgency was self-created. The court accepts that had Ms P[...] appeared before the Children’s Court as ordered, perhaps the matter would have been dealt with differently. However, I find it crucial also to consider the circumstances under which the *ex parte* order was obtained and granted. I take into account the facts presented before the learned magistrate that could have persuaded her to grant the order as she did.
13. On reading the *ex parte* order granted by the learned magistrate and her considerations, I note that the said order reads: ‘*Whereas the biological father of the children fears for the safety of the children and is of the view that the mother of the children is not stable enough to take care of the children on her own.*’
14. Mr H[...] did not insist on this issue, nor did he substantiate these serious allegations in his answering affidavit, and his counsel did not make any submissions that Ms P[...] was not stable enough to take care of the children on

her own. In my view, it will not be unreasonable for this court to accept that this issue of Ms P[...]’s inability is one of the considerations that persuaded the learned magistrate to grant the *ex parte* order as she did. In my view, had all the facts been laid before her and persuaded differently, she might have considered the matter differently and not granted the impugned order.

15. It is trite that the applicant needs to be open and truthful with all reasonable and relevant facts known to them when they approach the court for relief, such as one granted in favour of Mr H[...] by the learned magistrate. The reasoning is that the court hearing such an application only knows and considers what the applicant avers before them.
16. In my view, under the circumstances, nothing precludes this court from reviewing the learned magistrate’s order and setting it aside since, in granting the impugned order, the learned magistrate relied on grounds raised by Mr H[...], which grounds are no more relied on by Mr H[...] in his opposition of Ms P[...]’s application. In his answering affidavit, Mr H[...] made no mention that he approached the Children’s court, relied on its order and travelled to Hermanus to fetch the children because Ms P[...] was not stable enough to take care of the minor children on her own.
17. The order goes on to state that Ms P[...] has to exercise her physical contact with the children under supervision in the house of Mr H[...]. With the historical background as ventilated by both parties in their affidavits, which serve as evidence before this court, I am persuaded to accept that had the learned judge presented with the same evidence; she would not have granted the order as she did. It is not contested that Ms P[...] suffered forms of verbal and physical abuse, among others, in the hands of Mr H[...] and his family. Now, for a learned magistrate to order that Ms P[...] exercise her contact rights with the minor children in Mr H[...]’s house in his presence can never be regarded as reasonable and competent.

(ii) Abuse of court process

18. It was argued on behalf of Mr H[...] that Ms P[...] is abusing the court process. No cogent evidence was shown to the court on what basis such contention was made. I have already found that only some relevant facts were placed before the learned magistrate when Mr H[...] was granted the impugned *ex parte* order. Consequently, this point *in limine* stands to fail.

(iii) Relief sought when an alternative avenue is available, and there is an incomplete judicial process

19. It was argued that Ms P[...] could only have proceeded in respect of Rule 55 of the Magistrates' Court Rules to anticipate the rule and the *ex parte* order granted to have same reviewed or set aside. The high court remains an upper guardian of the minor children. Therefore, approaching the high court where the interests of the children are in question cannot be viewed as an abuse of the court process. I should not be misconstrued, though, as promoting the disregard of the Children's court order by Ms P[...]. Every court order remains binding until it is set aside.
20. It was submitted on behalf of Ms P[...] that an interdict order be granted. I could not find any convincing evidence to grant such an order.
21. Regarding costs, Ms P[...] did not ask that costs be awarded in her favour, even when it was raised during the hearing. I therefore find no reason why I should award her costs.
22. For these reasons mentioned above, the application must succeed.
23. As a result, the following order is made,

Order:

1. The application is heard as urgent in accordance with Rule 6(12) of the Uniform Rules of this Court, and the applicant's failure to comply with the rules relating to forms, time periods and service and this court's practice directives is hereby condoned.

2. The points *in limine* are dismissed.
3. The *ex parte* order and other related ancillary orders granted by Magistrate Mosadi of the Mbombela Children's Court on 2 August 2024 and subsequent thereafter under case number 14/1/4 – 118/2023 are hereby set aside and replaced with the following:
 - a) The respondent will, within 72 (seventy-two) hours of this order, return the children to the applicant.
 - b) The respondent is called upon to show cause in the above Honourable court on the date to be arranged by the parties in consultation with the Registrar as to why a final order setting aside the *ex parte* order issued by the first respondent, the learned Magistrate Mosadi of Mbombela Children's Court on 2 August 2024 under case number 14/1/4-118/2023, should not be granted.
 - c) The minor children [*W.H. and M.H*] shall primarily reside with the applicant, and she will be their primary caregiver, making decisions about aspects of their lives pending the return date mentioned in paragraph b above.
 - d) The Family Advocate's office is directed to conduct further investigation and compile a written report with their findings and recommendations on an urgent basis concerning the best interest of the minor children regarding their care and contact.
 - e) No order as to costs.

N. Mazibuko
Acting Judge Of The High Court
Mpumalanga Division, Mbombela

Representation:

Counsel for the Applicant:

Mr A.A. Milazi

Attorneys for the Applicant:

T.K. Segodi Attorneys

Counsel for the First Respondent:

No appearance

Counsel for the Second Respondent:

Mr H.F.Fourie

Attorneys for the Second Respondent:

Michael van Rensburg Attorneys

Heard:

3 September 2024

Date of Judgment:

4 September 2024