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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 16138/24

In the application between:

E[...] **S[...]**

First Applicant

P[...] **C[...]** **S[...]**

Second Applicant

P[...] **C[...]** **S[...]**

Third Applicant

and

P[...] **P[...]** **S[...]**

First Respondent

THE FAMILY ADVOCATE

Second Respondent

Coram: Acting Justice A Montzinger

Heard: 08 August 2024

Delivered: 12 August 2024

JUDGEMENT ON URGENCY
(12 August 2024)

Montzinger AJ

Summary introduction

1. This matter concerns an urgent application brought before the Court by the first to third applicants (the “applicants”), who are members of the minor child’s paternal family.
2. The applicants approached this court urgently claiming that the need for the application arises from the respondent’s cessation of contact with the 4 year old minor child. The child was born from the marriage of the first and second applicants’ son and the first respondent, their daughter in law.
3. The first and second applicants’ son and husband of the first respondent tragically passed away on 29 January 2024. The third applicant is the sister of the first respondent’s late husband. The applicants contend that the first respondent, the biological mother of the minor child, unilaterally discontinued all contact between the 4 year old and her paternal relatives, despite their requests to maintain a relationship with the child.
4. The notice of motion presented in two partes.
5. Under part A the applicants seek an order that the matter be heard on an urgent basis. They also seek supervised contact with the minor child every Sunday from 09h00 to 12h00 at the residence of the first respondent alternatively at the applicants’ residences. This contact can be under supervision of the first respondent as envisaged in s 23 read with s 18 and 29 of the Children’s Act 38 of 2005 (the “Children’s Act”). This relief is asked pending the resolution of the relief sought under part B of the notice of motion.
6. Under part B the applicants requested that Ms Esna Bruwer, a social worker from Paarl, Western Cape conducts an investigation into the best interest of the minor child regarding the applicants future access to and/or contact with the minor child. Also, that Ms. Bruwer report back to this court within a period of 3 months from the relief in part A of the notice of motion. An interdict directing the first respondent to attend all meetings convened by Ms Bruwer for the purposes of preparing her report,

and that the first respondent shall co-operate fully with Ms Bruwer for the preparation of the report. Lastly, directing that the first respondent shall be liable for the costs of Ms Bruwer's assessment, investigation and report.

7. The applicants argue that the relief under part A is inherently urgent given the potential emotional and developmental harm arising from the abrupt and complete cessation of contact of the minor child with her paternal family.

8. The first respondent opposes the application on various grounds, including a challenge to the claimed urgency, arguing that the urgency is self-created and does not meet the necessary criteria for urgent relief under Rule 6(12) of the Uniform Rules of Court. The first respondent further asserts that the application is an abuse of the court process and should be struck from the roll due to a lack of urgency, or alternatively, dismissed on its merits.

9. The matter came before me in the urgent lane on 8 August 2024. I informed counsel, *Mr. Aswegen* for the applicants and *Mr. F A Ferreira* for the first respondent, that I intended to hear arguments solely on the issue of urgency. I informed counsel that I would reserve judgment on the question of urgency and that my decision would be handed down on Monday, 12 August 2024. Consequently, argument proceeded only on the issue of urgency, with the understanding that should I find the matter to be urgent, a new date and time would be arranged to hear the merits of the application.

10. I decided to strike the matter from the roll due to a lack of urgency.

11. While I am striking this matter from the roll for lack of urgency, it is my sincere hope that the parties involved will take this opportunity to seek an amicable resolution that serves the best interests of all concerned, particularly the well-being of the four-year-old child at the centre of this dispute. These matters, by their nature, have the unfortunate potential to escalate in acrimony, often to the detriment of the child. I hope that this matter will not follow that path, and that the applicants and the first respondent will instead prioritise an approach that fosters stability for the child.

The competing contentions on urgency

12. The applicants assert that the matter is inherently urgent due to the nature of the relief sought, which directly concerns the welfare of the minor child. They impressed on the court that the first respondent's unilateral decision to sever all contact between the 4 year old and her paternal family following the death of the father has caused significant emotional distress and potential long-term harm to the child.

13. The applicants emphasise that maintaining familial bonds, particularly in the wake of such a traumatic event, is crucial for the minor's child well-being.

14. The applicants further argue that delaying the matter would exacerbate the emotional and psychological harm to the child, who is already vulnerable due to the loss of her father. Thus, they seek urgent relief to appoint an expert to investigate the best interests of the child and to secure supervised contact with her pending the outcome of such an investigation.

15. On the other hand, the first respondent challenges the urgency of the application on several grounds. She in turn asserts that the alleged urgency is self-created, as the applicants had ample opportunity to approach the court earlier but delayed doing so.

16. The first respondent points out that the applicants first threatened to bring this application in May 2024 but only served the papers in late July 2024, without prior notice, on the eve of the anniversary of the first respondent's late husband's birthday, which she argues was a tactically confrontational move.

17. The first respondent also highlights several procedural deficiencies in the manner the application was launched. These omissions, it was argued on behalf of the first respondent, further undermine the applicants' claims of urgency.

18. Moreover, *Mr. Ferreira* argued on the first respondent's behalf that the application is not only procedurally flawed but also lacks merit, and that the

applicants have failed to demonstrate that they cannot obtain substantial redress at a hearing in due course. As such, the first respondent maintains that the application should be struck from the roll for lack of urgency with an appropriate costs order.

Evaluation

19. After careful consideration of the arguments presented by both parties, the relevant case law, and the various affidavits filed, I find that the matter is not urgent. A brief chronology of the events as they unfolded show the following:

19.1 **29 January 2024:** The applicants' son, who was the husband of the first respondent and the father of the minor child, tragically passed away.

19.2 **20 May 2024:** The applicants first threatened to bring an urgent application for contact with the minor child. This intention was communicated to the first respondent's attorneys of record.

19.3 **21 May 2024:** The first respondent's attorneys responded to the applicants' threat, expressing their view that the matter was not urgent. They advised that should the applicants choose to proceed with the application, they should serve the papers on the offices of Schuld Inc., the first respondent's attorneys.

19.4 **24 July 2024 (Evening):** Without prior notice or further communication, the Sheriff arrived at the first respondent's place of residence after hours, on the eve of the first respondent's late husband's birthday, to serve the urgent application.

19.5 **29 July 2024:** The application was forwarded to Schuld Inc.'s offices via email after they requested it from the applicants' attorney, Mr. Pienaar's offices. The first respondent was given only five court days to file her answering papers, despite the short notice and the timing of the service.

19.6 **30 July 2024:** Several requests for a postponement were made by the first respondent to allow sufficient time to consult with legal representatives and prepare answering papers.

19.7 **8 August 2024:** The matter came before the Court in the urgent lane.

20. In the context of the timeline, the court has to consider that while the potential right of grandparents and other family members to maintain a relationship with a minor child is recognised, this right does not grant them the privilege to bypass court procedures or to claim urgency without substantiating it.

21. It is well-established in our jurisprudence that matters involving the welfare of a child are often regarded as inherently urgent. However, it is equally clear that each case must be determined on its own specific facts, and the mere involvement of a child does not automatically confer urgency on an application¹. Rule 6(12) of the Uniform Rules of court mandates that a party seeking relief on an urgent basis must explicitly set forth the circumstances that render the matter urgent and must provide compelling reasons why they cannot be afforded substantial redress at a hearing in due course.

22. In the present case, the applicants first threatened to bring this urgent application in May 2024 but only proceeded to file and serve the papers in late July 2024. This delay, particularly given the applicants' own assertion of urgency, undermines their claim that immediate court intervention is necessary. The applicants failed to provide a satisfactory explanation for this delay, which suggests that any urgency in the matter is, to a significant degree, self-created.

23. The courts have consistently held that self-created urgency is not a basis for circumventing the normal rules and procedures of the court, as emphasised in the

¹ *MM v NM and Others* [2023] ZAKZPHC 117 (18 October 2023)

judgements I was referred to by *Mr. Ferreira*, i.e. including *East Rock Trading*² and *MM v NM*³.

24. While the Court acknowledges the emotional and familial dimensions of this case, including the potential benefits of maintaining contact between the minor child and her paternal relatives, these factors alone do not justify urgency to the degree with which the first respondent was required to come to court, and for the court to accommodate it, on its already heavy urgent roll⁴.

25. I decline to adopt the approach taken by Binns-Ward J, now retired, in *Xtraprops*⁵, where the Court, despite recognising a borderline case of urgency, proceeded to hear the matter due to the completeness of the papers and the readiness of counsel to argue the merits.

26. In the present case, however, the context is markedly different. My urgent court roll was heavy, with multiple urgent applications vying for the Court's limited time and resources. Moreover, the issues in this matter are highly contentious, involving serious and conflicting allegations between the parties. The factual complexity and the nature of the allegations require careful consideration, which is not conducive to the expedited and summary nature of urgent proceedings.

27. The facts and circumstances of this case simply do not warrant the accommodating approach adopted in *Xtraprops*, where it seems the Court had the luxury of a lighter roll.

28. While I am mindful that there may be instances where an urgent court elects to hear a matter despite concerns over the degree of urgency, depending on the capacity of its roll, I must emphasise that such an approach would be rare. Adopting

² *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [2011] ZAGPJHC 196 at par 6 ("*East Rock Trading*")

³ 1 *supra*

⁴ See the judgements of *LH v LA* 2012(6) SA 41 (ECG) at paras 13 and 16 and *LF v TV* 2020(2) SA 546 (GJ) at par 43 for the recognition that it would be in the interest of the child that her extended family play a role in her social and psychological development.

⁵ *Xtraprops 66 (Pty) Ltd v Phiopater Supplies (Pty) Ltd ("Xtraprops")* (20228/14) [2014] ZAWCHC 177 (25 November 2014) ("*Xtraprops*")

a more lenient stance risks creating avenues for abuse as parties will co-operate to prepare the matter to completion and present it to court ready to be heard with a request to suppress the lack of urgency having regard to the status of the papers and the readiness of counsel to argue.

29. It is crucial that the integrity of the urgent court process is maintained, ensuring that only genuinely urgent matters are heard. Accordingly, I declined *Mr. Van Aswegen's* request to take the path of accommodating the application only because the papers were filed and the parties ready to argue.

30. Furthermore, one of the main considerations for striking the matter is the nature of the relief sought in part B of the notice of motion. This relief, which hinges on the outcome of an investigation by and expert, an curiously not the family advocate, and the subsequent filing of a report, will be determined in due course. Given the age of the minor child, being just 4 years old, I am satisfied that she will not suffer any significant prejudice from the delay in spending time with the applicants for a few more months.

31. The applicants themselves waited a few months to initiate this application, which indicates that the situation was not perceived as urgently critical at that time. They can, therefore, afford to wait a little longer until part B is eventually heard.

32. Furthermore, in the nature of things, it is difficult to imagine that a 4-year-old child would be detrimentally prejudiced if an additional 2 or 3 months pass to allow the court to gather the necessary information to make an informed decision about the child's care. While the relief sought under part B of the application may have a basis, granting the relief in part A on an urgent basis would not serve the child's best interests in the context of this matter.

33. Lastly, it needs mentioning that I have serious reservations about the applicants' true intentions in requesting that the first respondent bear the costs of appointing an expert to determine the applicants' future access to the minor child.

34. This request does not reflect a resolute or compassionate approach to their desire for access to their grandchild or niece. One would expect that if the applicants were genuinely motivated by a sincere and urgent need to re-establish contact with the minor child, they would have offered to bear the costs themselves, or at the very least, proposed a shared approach. The absence of a unilateral and *bona fide* tender that they would cover the costs should the first respondent be unable to afford it casts doubt on their motives. It appears that the applicants are placing the financial burden on the first respondent, which is at odds with the urgency and sincerity they claim to have in seeking access and contact with the child.

Costs

35. In considering the issue of costs related to part A of the application, I have decided not to grant costs to the first respondent at this stage. This decision is made with due regard to the principles enshrined in ss 6(4)(a) of the Children's Act, which mandates that in any matter concerning a child, an approach conducive to conciliation and problem-solving should be followed, and that a confrontational approach should be avoided.

36. The imposition of costs at this stage of the proceedings would likely exacerbate tensions between the parties and could further entrench the adversarial nature of this dispute, which would be contrary to the spirit of the Children's Act.

37. In the case of *FS v JJ 2011 (3) SA 126 (SCA)*, the Supreme Court of Appeal emphasised the importance of mediation and conciliation in family matters, particularly those involving children. The Court endorsed the view that legal practitioners should heed ss 6(4) of the Children's Act, which advocates for an approach that avoids protracted and expensive legal battles.

38. By declining to make a costs order at this juncture, I hopefully promote the possibility that the parties are encouraged to focus on resolving their differences in a manner that prioritises the best interests of the minor child, rather than becoming further embroiled in costly and confrontational litigation.

39. Given the nature of the relief sought under part B of the notice of motion, which will involve an investigation into the best interests of the minor child and a report to be filed in due course, it is more appropriate that the issue of costs be reserved for determination at that stage.

Conclusion

40. In light of the foregoing, it is clear that the applicants have failed to establish urgency for this matter to be heard on an expedited basis.

41. In the circumstances the following order is made:

The application is struck from the roll.

The costs in respect of part A of the application will stand over for determination when part B is adjudicated.

A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicants' counsel: Mr. A van Aswegen

Applicants' attorney: Enderstein Malumbete Inc.

Counsel for first respondent: Mr. Fritz Ferreira

Attorneys for first respondent: Schuld Inc.