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

JUDGMENT

Not Reportable
Case no: A79/2025

In the matter between:

R[...] F[...]

APPELLANT

and

J[...] S[...]

RESPONDENT

Neutral citation: *F[...]* v *S[...]* (Case no A79/202) [2025] ZAWCHC 308
(31-07-2025)

Coram: NUKU J and O'BRIEN AJ

Heard: 13 June 2025

Delivered: 31 July 2025

Summary: Practice and Procedure – appealability of an order postponing the application with directions regarding further evidence necessary for the consideration of the matter – order not appealable – appeal struck off the roll with costs

ORDER

The appeal is struck off the roll with costs

JUDGMENT

NUKU, J (O'BRIEN AJ concurring):

[1] This appeal concerns an application currently pending in the Children's Court, Cape Town (Children's Court). The appellant filed that application, and she describes the primary relief she seeks as 'an order for the respondent to be prevented from moving the parties' minor child, JFS, away from Cape Town to Paarl/Franschhoek and for JFS to be placed back in her primary care with immediate effect upon his return from an overseas trip on 12 January 2025.'

[2] The application was scheduled for a hearing on 24 January 2025. On that day, the Children's Court conducted preliminary enquiries, after which it postponed the application to 25 March 2025 and issued an interim order (January Order), in the following terms, namely, that:

- 2.1 The appellant is to provide the Court with the names and contact details of her treating psychologist and psychiatrist, as these medical professionals will prepare reports for the Court.

- 2.2 JFS is to attend Ms Pinder for the purpose of drafting a report for the Court, particularly concerning his views on the matter currently before the Court;
- 2.3 The appellant and the respondent are referred to the Office of the Family Advocate for the purpose of drafting an updated report for the Court.
- 2.4 The appellant and the respondent are referred to a social worker for a risk assessment, investigation and report; and
- 2.5 JFS is to remain in the primary care of the respondent, with the applicant authorised to make contact in accordance with an existing parenting plan.

[3] The reports referred to in the January Order were not available when the matter returned to Court on 25 March 2025. Instead, the social worker to whom the parties had been referred submitted a letter requesting a postponement of the application. Presumably, this was to enable her to finalise her investigation and report for the Court. The appellant, for her part, submitted reports by Doctors Coetzee and Chait. Ultimately, the application was postponed to 7 May 2025 to await reports from the family advocate, the social worker, and the appellant's response to a second application that the respondent had instituted (March Order).

[4] The appellant appeals against the January Order and the March Order. She initiated her appeal with a thirty-three-page notice of motion supported by an affidavit of about one hundred and six pages without annexures. She noted the appeal in April 2025, prior to the determination of the merits of the application she had filed in the Children's Court.

[5] The appellant's grounds of appeal span approximately fifty-eight pages and are somewhat difficult to understand. Nonetheless, it is evident that the appellant is seeking

an order to set aside the January Order and the March Order, mainly to substitute them with an order granting her primary care of JFS.

[6] The respondent disputes the appealability of the orders the appellant seeks to appeal. He argues that they are not appealable under Section 83 of the Magistrates' Court Act 32 of 1944 (Magistrates' Court Act), read together with the decision of the Appellate Division in **Zweni v Minister of Law and Order**¹ (Zweni), which outlines the characteristics of a judgment or order that can be appealed. The respondent also contends that the interests of justice weigh against considering the merits of the appeal.

[7] The appellant, for her part, argues that the rule against the appealability of interim orders is not absolute and must be balanced against the interests of justice. She asserts that, in any case, the failure by the Children's Court to issue an order for the return of the minor child is finally in effect. For this, she relied on the decisions of the Appellate Division in Zweni, **Phillip Morris Inc and Another v Marlboro Shirt Co SA Ltd and Another**²(Philip Morris Inc), as well as the decision of the Supreme Court of Appeal in **MEC for Economic Development, Gauteng and Another v Sibongile Vilakazi and Others**³ (Sibongile Vilakazi).

[8] The issue for this Court to resolve, is whether the Children's Court has issued decisions that are appealable under section 83 of the Magistrates' Court Act. This section addresses appeals from the Magistrates' Courts and states as follows:

'83 Appeal from the Magistrate's Court

Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal, against-

¹ 1993 (1) SA 523 (A).

² 1991 (2) SA 720 (A).

³ [2024] All SA 344 (SCA)

- (a) any judgment of the nature described in section 48;
- (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;
- (c) any decision overruling an exception, when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs.'

[9] Children's Courts are established under Chapter 4 of the Children's Act 38 of 2005 (Children's Act), and section 42(1) states that 'For the purposes of this Act, every magistrate's court, as defined in the Magistrates' Courts Act, 1944 (Act 32 of 1944), shall be a children's court and shall have jurisdiction over any matter arising from the application of this Act within its area of jurisdiction.' Therefore, the provisions of the Magistrates' Court Act apply to the Children's Court, with the necessary modifications. As a result, the appealability of a decision of the Children's Court must be determined in accordance with the provisions of the Magistrates' Court Act.

[10] Section 82 of the Magistrates' Court Act is not relevant to this matter because it concerns decisions that are not appealable when the parties have agreed that the court's decision shall be final.

[11] The appellant does not suggest that the January Order and the March Order are among those contemplated in subsections (a) and (c) of section 83 of the Magistrates' Court Act. The decisions referred to in these subsections are, in any case, those made after a trial (subsection (a)) and when overruling an exception (subsection (c)), and it is common cause that there was neither a trial nor consideration of an exception in the present matter.

[12] A close examination of the appellant's case shows that she objects to the Children's Court not granting the order she requested in her application. Instead, the

court issued certain directions regarding additional evidence it believed would help in deciding the best interests of the child. According to the appellant, the Children's Court should have decided the application in her favour, despite the court's view that it lacked enough evidence to make a decision. This much is clear from paragraphs 190 to 192 and paragraph 194 of the affidavit accompanying the notice of motion where the appellant states the following:

- '190. The respondent to immediately return the minor child, JFS, to Cape Town.
- 191. The minor child JFS is placed in the primary care of the Appellant, Ms R[...] F[...] with immediate effect.
- 192. The Appellant is awarded full parental responsibilities and rights in respect of the minor child, JFS, as referred to in section 18 (1) of the Act
- 194. The Appellant be declared the sole holder of responsibilities and rights of guardianship, as referred to in section 18 (2) (c) and section 18 (3), 18(4) and 18(5) of the Act.'

[13] In other words, the appellant requests this Court to consider the merits of her application even though the Children's Court has not yet decided on it. The fact that the Children's Court has not determined the merits of the application brought by the applicant prevents this Court from doing so under the guise of an appeal. This is because no decision has been made by the Children's Court in that regard, and therefore there is no decision to appeal.

[14] The authorities referred to by the appellant do not support her case because, in all of them, the issue was an actual order that had been made, not a failure to make an order. In the present matter, the appellant uses the January Order and the March Order to gain a foothold when what she seeks, in essence, is that this Court should assume the role of the Children's Court. And this is clearly impermissible.

[15] The appellant submitted further written submissions after the hearing of the appeal, in which she changed her approach and suggested that what she is seeking is the review of the failure of the Children's Court to grant her the order she seeks in that court. However, that is impermissible because she brought the matter as an appeal, and that is the case the respondent was called upon to answer.

[16] When all factors are considered, there is no doubt that the Children's Court made no order that can be appealed against. The January Order and the March Order lack any of the attributes described in Zweni. Moreover, it is not in the interest of justice to consider the merits of an application that the Children's Court has yet to determine. On the contrary, justice favours allowing the Children's Court to gather the evidence it deems necessary to conduct a proper enquiry into the best interests of the parties' minor child.

[17] Having regard to all of the above, the conclusion is that the appeal is not properly before the Court and should be struck off the roll.

[18] The respondent sought costs on an attorney-client basis. Reference was made to an application that the appellant had submitted to this Court in 2024, in which she is accused of making unsubstantiated false claims of abuse, alienation, and abduction by the respondent. Further reference was made to an urgent application that the appellant brought in May 2025 after initiating this appeal, which caused the respondent to incur legal costs in defending that application. Lastly, it was also noted that the papers filed by the appellant were prolix. For these reasons, it was submitted that a punitive costs order is warranted.

[19] The applications submitted by the appellant in 2024 and May 2025 were not before us, and I do not consider it appropriate to take them into account when deciding on the issue of costs in this application. In any event, the costs issue regarding each of these applications would have had to be considered by the judges handling those applications.

[20] It is a fact that the appellant submitted lengthy papers. As previously mentioned, what was meant to be a short notice of appeal of a few pages became a notice of motion spanning about thirty-three pages, supported by an affidavit of approximately one hundred and six pages without annexures. This was unnecessary and has undoubtedly caused the respondent to incur expenses that he did not need to incur.

[21] The appellant, however, is an unrepresented litigant who is not familiar with the rules and procedures of this Court, and that is one of the factors I consider when deciding against making a punitive costs order. The costs will therefore be awarded on a party and party scale.

Order

[22] Therefore, the following order shall be issued:

The appeal is struck off the roll with costs.

L G NUKU
JUDGE OF THE HIGH COURT

I agree

S O'BRIEN
ACTING JUDGE OF THE HIGH COURT

Appearances

For appellant:

In Person

For respondent:

Mr MC Coetzer

Instructed by:

Chris Fick and Associates, Cape Town