

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case Number: 011028/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. NO
DATE	SIGNATURE

A[...] H[...]

APPLICANT

AND

MAGISTRATE VC MOSE

FIRST RESPONDENT

J[...] M[...]

SECOND APPLICANT

JUDGMENT

MAKUME, J:

Introduction:

1. The applicant in this matter seeks an order reviewing and

setting aside the decision of the first respondent sitting as a magistrate in the Children's Court held at Johannesburg, in which decision the first respondent granted and awarded the second respondent rights in terms of section 21 of the Children's Act 38 of 2005.

2. The applicant is the biological mother of the minor child, J[...] G[...] H[...], born on 20 May 2016. The child was born out of a romantic relationship between the applicant and the second respondent. The minor child lives with the applicant at 5[...] A[...] Road, M[...].

Background facts:

3. It is common cause that on 7 December 2023 under case number 14/1/4-286/2/2023, Magistrate's Court Johannesburg, a parenting plan was made an order of court by the first respondent. The applicant now seeks an order that the order referred to above be reviewed and set aside.
4. Before dealing in detail with the merits of the review application, it is perhaps appropriate at this stage to set out a brief narrative of facts and circumstances that gave rise to the impugned order, which circumstances and facts have a bearing on the question to be decided in this review.
5. On 7 August 2023 the second respondent filed an application at the Children's Court in Johannesburg, asking the court to assist him in getting access and contact to his daughter, the minor child. He said in his affidavit, which was confirmed by his mother, that it has been four years that the applicant has been denying him access and contact with the minor child.
6. On 23 August 2023 the applicant and the second respondent appeared before magistrate Mose, the first respondent, in the Children's Court and in their presence the court made an order, requesting the family advocate to do the following:

- i. Investigate validity of allegations made by the second respondent to the effect that the appellant is denying him access to the minor child.
 - ii. Consult with minor child if the minor child is of a mature age and can understand the issue.
 - iii. Investigate the circumstances of the minor child as well as those of the biological parents, being the applicant and the second respondent.
 - iv. To assist the parties with mediation and should such mediation not be successful, then the family advocate should submit a report with recommendations.
 - v. The matter was postponed to 26 September 2023.
7. On 26 September 2023 both the applicant and the respondent were directed to have a consultation with the family advocate on 16 October 2023 and the matter then stood down to 17 October 2023.
8. On 17 October 2023 the parties appeared before Magistrate Mose in the Children's Court and the following note is made by the presiding officer:

"Parties before court and informed court that they attended at the office of the family advocate and not yet finalised the process. Social worker home visitation still to be done and the applicant has reached an agreement to visit the child with respondent every alternative Sunday of the month at the respondent's complex playing ground. Matter postponed to 20 November 2023 for possible finalisation and parties warned of next court date and penalties for non-compliance explained."
9. On 16 October 2023 the applicant and the second respondent

signed a detailed parenting plan before the family advocate. In the parenting plan it was agreed, amongst others, that the second respondent shall exercise contact with the minor child on alternative weekends, alternative Saturdays and Sundays from 10h00 until 13h00.

10. The parenting plan also made provision that the second respondent will pay 50 percent of the school fees and 50 percent for cost of clothing of importance is what the parties say in the agreement. They say the following:

“We agree to sign this parenting plan as a record of our intention to ensure the best interest of the minor child, with regard to his care, welfare and development, is catered for. We agree that the contents of this parenting plan will be reviewed if and when either one of or the other needs of the child changes. Review of the parenting plan will be done with the assistance of a mediator.”

11. Prior to the next court appearance, being 20 November 2023, the applicant sought the assistance of legal advice and consulted Albasini Attorneys, who on 13 November 2023 addressed a letter for the attention of “The Clerk of the Harassment Court, Johannesburg, re case A H[...] v J M[...], case number 1503/2018.”
12. That letter, which is attached as ANNEXURE FA8 to the applicant’s founding affidavit, quotes a different case number to what is involved in the Children’s Court matter. The attorney requests copies of contents of the file, presumably a matter involving harassment. However, it is the last two paragraphs of that letter which seemed to refer to this matter. In that letter the attorney tells the clerk of the Harassment Court that he is not available to attend court on 20 November 2023 and proposed 4 dates, being 7 and 12 December 2023 as well as 10 and 11 January 2024.

13. The attorney continues and says the following:

“We wish to take this opportunity to inform the honourable Court that our client has approached and appointed a private social worker as per the parenting plan in order to assist with the matter going forward. We have requested the social worker to prepare reports for the consideration of the honourable Court, which are to be taken into account with regards to the best interest of the minor child.”

14. On 20 November 2023 only the second respondent attended court as the applicant had to take the minor child to a doctor. However, the letter from the attorney was handed in and noted by the court. What then appears is that the next court date was initially written as 11 January 2024, then altered to 7 December 2023. The clerk of the court was instructed to inform the applicant about the date being 7 December 2023 and no longer 11 January 2024.

15. On 7 December 2023 only the second respondent attended court and the parenting plan that had been signed on 16 October 2023 by the parties was made an order of court.

16. On 18 December 2023 Albasini Attorneys addressed a Rule 51(1) notice to the magistrate, requesting reasons as to how the order was given without the applicant being present and being warned to appear and having been excused to appear on 11 January 2024.

17. On 10 January 2024 the magistrate complied with the notice and set out his reasons. In paragraph 4 of the response the magistrate says the following:

“Both parties had finalised their issues as at 16 October 2023 when they signed the parenting plan and the order should have been made on

17 October 2023 when they appeared in court.”

The applicant's case:

18. The applicant in paragraph 35 of her founding affidavit says that she came to know about the parenting plan having been made an order of court on 17 December 2023. She was informed by the second respondent during one of his contact services. Significantly, that date fell on a Saturday, which is in line with what is in the agreed parenting plan. It means that the parties were already abiding by the parenting plan.
19. It is applicant's case that the first respondent erred, by making the parenting plan an order of court when in fact the social worker still had to make home visit. As regards the signing of the parenting plan she says that the social worker told her not to dwell on the past issues and sign the agreement, which she did.
20. Lastly, it is applicant's case that the magistrate failed to comply with section 21 of the Children's Act 38 of 2005. That section and its subsections reads as follows:

Parental responsibilities and rights of unmarried fathers:

21. The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child:
 - a) If at the time of the child's birth he is living with the mother in a permanent life partnership, or
 - b) If he, regardless of whether he has lived or is living with the mother:
 - i. Consents to be identified or successfully applies in terms of section 26 to be identified as the child's father, or pays damage in terms of the customary law.

- ii. Contributes, or has attempted in good faith to contribute to the child's upbringing for a reasonable period, and
- iii. Contributes, or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
- iv. If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection 1(a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional, or other suitably qualified person.

The second respondent's case:

- 22. The second respondent says that he is the biological father of the minor child and that the parenting plan was signed freely and voluntarily by both him and the applicant in the presence of a social worker.
- 23. Attached to the second respondent's answering affidavit is the full report of the parenting plan which includes a confirmatory statement by the social worker that she satisfied herself that the parenting plan was in the best interest of the minor child.
- 24. In paragraphs 177 and 205 of the answering affidavit the second respondent says categorically that the parenting plan was signed freely and voluntarily by both of them and yet in her reply the applicant simply refers to what is in her founding affidavit. She does not deny having signed the parenting plan, neither does she allege any pressure being exerted on her to sign.
- 25. In paragraph 187 of his answering affidavit the second

respondent says the following:

“The applicant and I were living together from November 2015 until Good Friday in 2017, which was 14 April when the applicant vacated our common home while I was at church.”

In her reply at paragraph 260 the applicant does not deny or admit that and referred the court to what she has stated in her founding affidavit. She does not direct the court as to what she said in her affidavit, because she has alluded to so many instances, all that can be gleaned from her affidavit is her constant allegation that the second respondent abandoned the child for five years.

Evaluation of the evidence:

26. One of the grounds of review as pleaded by the applicant is that the applicant had no knowledge about the date of hearing being 7 December 2023, and therefore the first respondent committed an error by making the parenting plan an order of court in the absence of the applicant and her attorney.

27. This allegation is not true. In his answering affidavit at paragraph 116.2 and 116.3 the second respondent referred to a WhatsApp message that he sent to the applicant, informing her of the date of hearing being 7 December 2023. The applicant responded by saying the following:

“My attorney will address this with you further.
Thanks.”

28. Besides this and as further proof that both applicant and her attorney knew about the date as well as the existence of the parenting plan, her attorney in the letter dated 13 November 2023, which is a date after having been informed about the date of 7 December 2023, saying that their client, the applicant, has appointed a private social worker as per the parenting plan to assist with the matter going forward.

29. In my view this ground of review is misguided and falls to be

dismissed. The applicant and his attorney knew about the new date and decided to stay away. There is no indication that the attorney attempted to find out from the clerk of the court what date had been decided upon.

30. The next ground of review raised by the applicant is that the first respondent erred by making the parenting plan an order prior to the social worker's report. There is no where in the signed parenting plan where it is indicated that the parenting plan shall await a report from the social worker. Instead, what appears on ANNEXURE FA12, case line 01–54, under the heading: 'Dealing with the second respondent's contact and access process', is the following:
 - i. The father shall exercise contact with the child on alternate weekends, alternating Saturdays and Sundays, from 10h00 until 13h00. Contact will take place at the play area of the mother to residence for three months.
 - ii. Both parties will appoint a social worker in the private practice who will conduct home visits at the parties' residence and phase in contact. The social worker will monitor and structure the next phase of contact.
31. Clearly, the duty of the private social worker is defined in the parenting plan, has got nothing to do with having to await the report. What a social worker is mandated to do is to monitor the agreed contact and supervision and to make a report. It is worth mentioning that in fact the second respondent commenced exercising his rights in terms of the parenting plan immediately in October 2023, even before it was made an order of court. The applicant never told the second respondent to await a social worker's report.
32. The next ground of review which in my view is dispositive of this review application is that the magistrate erred in not first satisfying himself that the second respondent meets the

requirements of section 21 of the Children's Act 38 of 2005 to qualify him to be afforded parental rights and responsibilities.

33. The second respondent has in his affidavit said that he was in a live-in romantic relationship with the applicant from the year 2015 up to until the year 2019 when the applicant left the common home with the minor child. This was never disputed by the applicant, which means that the second respondent's acquired parental rights and responsibilities in terms of section 21(1)(a), secondly at various stages, both in correspondence to the teacher and in the applicant's application for a protection order against the second respondent, she refers to him as the father of the minor child. In the result this has also clothed the second respondent with parental rights, as prescribed in terms of section 21(1)(b).

34. This application, so says the applicant, is brought in terms of Rule 53(1) of the Uniform Rules of Court. This rule must accordingly be read in conjunction with section 22(1) of the Superior Courts Act 10 of 2013, which reads as follows:

"The grounds upon which the proceedings of any magistrate's court may be brought under review before a court of a division are:

- a) Absence of jurisdiction on the part of the court.
- b) Interest in the cause, bias, malice, or corruption on the part of the presiding judicial officer.
- c) Gross irregularity in the proceedings, and
- d) The admission of inadmissible or incompetent evidence, or the rejection of admissible or competent evidence."

35. It is therefore appropriate that in considering this review application, this court must have regard to section 22 of the Superior Courts Act. It is not in dispute that the Children's Court has the jurisdiction to deal with this matter, especially to give effect to the parenting plan in terms of section 45 and 46

of the Children's Act.

36. As regards interest in the cause, bias, or malice on the part of the presiding officer, there is no shred of evidence that the presiding officer is guilty of such. The only suspected impropriety which I have already dealt with earlier in this judgment is the changing of the dates of hearing from 11 January 2024 to 7 December 2023. The applicant was duly informed and it is expected that she did inform her attorney. She herself does not tell the Court why she did not attend court after having been notified by second respondent.
37. Lastly, there is no evidence that the presiding officer admitted inadmissible or incompetent evidence. The presiding officer does in fact say that he could have still made the parenting plan an order of court on 17 October 2023 when the parties appeared before him.
38. The parenting plan was agreed upon by both parties and was made an order of court. This was after the presiding officer has satisfied himself that the family advocate had adequately dealt with all the directives contained in his letter through the family advocate.
39. In making the parenting plan an order of court, the presiding officer confirmed same to be in the best interest of the minor child. In the result I make the following order

ORDER

1. The application to review the order by the first respondent in making the parenting plan signed on 16 October 2023 is dismissed.
2. The applicant is ordered to pay the second respondent's taxed party and party costs on scale C.

MAKUME J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearance

For the Applicant: :

Adv Nadia Smith

Instructed by :

Albasini Attorneys

For Respondent :

TJC Dunn Attorneys