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

CASE NO: CC60/2021

In the matter between

THE EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS WESTERN CAPE 1ST RESPONDENT

B[…] N[…] 2ND RESPONDENT

Date of Hearing: 19 October 2023
Date of Judgment: 13 November 2023 (to be delivered via email to the respective counsel

JUDGMENT ON APPLICATION FOR LEAVE TO INTERVENE AND LEAVE TO APPEAL

THULARE J

[1] Judges cannot ignore the eerie sound of their footsteps leaving the courtroom walking away from their responsibility towards vulnerable children. The suspenseful scene ambient for someone walking with dignity towards nothingness with an empty pride having achieved nothing for a child victim is simply too much for judicial robes. The

illusionary Eurocentric *paterfamilias* has gone beserk in South Africa. The lived reality in this matter was that B[...], a husband and a father of only one child, chose a quiet deserted Sunday evening to kill N[...] his wife over their RDP house by strangling her in their bedroom. He put her body in a wheelie bin and pushed it to the banks of a river near their RDP home, burnt the body and alone buried her in a waterlogged shallow grave on the river bank and returned home in the early hours of the Monday morning. B[...] was sentenced to life imprisonment. In mitigation of sentence, it came to light that B[...] was not a blood child of N[...] who raised him, and this discovery, perhaps including what he did to N[...] caused the N[...] family to distance themselves. On the eve of N[...]'s burial, an unknown family came from the Eastern Cape to claim her body from the T[...] family for her burial. This is how L[...], the only minor child of both B[...] and N[...], came to know that the people he knew as his maternal relatives, the T[...] family, were now alleged not to be his blood relatives. L[...]'s mother was buried in the Eastern Cape. His father was beginning imprisonment for life. South Africa has no programme that protects a child's rights to property to which minor children have a claim, when their parents are deceased, imprisoned or for any other reason unable to protect them. The result is that the property generally ends up with other blood relations who enjoy its benefits whilst the child-beneficiaries suffer, dumped to fend for themselves. The lucky ones often find the support of maternal relatives and in very rare cases some find the support from paternal relatives. The N[...] family stepped back, if not abandoned the child. Two unknown families are potential claimants to be the paternal family. They remain a mystery. The T[...] family yielded to another unknown family to claim the maternal family spot. That other family has already given a glimpse of its colours. They didn't care about the child, having taken her mother hundreds of kilometres away to bury her without him, and making no efforts for him to even know her grave. When the court adjourned at the end of the matter, the child did not know who his maternal and paternal blood relatives were. The risk of the child losing the benefits of a home was real, although he was the only child of parents who owned an RDP house. The wisdom of our ancestors in Africa, under these circumstances, before leaving the *imbizo/lekgotla* or family meeting where such information came to light, is to ask: "What about the child and its home?" The application is for leave to intervene

and to appeal the decision of the court on the answer to this question. Both respondents filed a notice to abide the decision of the court.

[2] The issue is whether leave to appeal should be granted.

[3] The relevant parts of the order sought to be appealed against reads as follows:

> "3. The Mayor of the City of Cape Town shall, without undue delay, ensure the establishment of a Trust for the benefit of the minor child, L[...] T[...], and assist in upholding the rights of the minor child of freehold ownership of the property referred to as 9[…] O[…] Street, Fisantekraal, Durbanville, in trust, as envisaged and in the spirit of Chapter 13: Upgrading of Informal Settlements, National Department of Housing, dated 14 October 2004, pages 18 to 29, and to take all steps necessary and ancillary for the full realization of this objective. …
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> 6. The State, the curator ad litem, the Mayor of the City of Cape Town, the Premier of the Province of the Eastern Cape and the Director-General, National Department of Social Development, are granted leave to approach the court on notice, should the need arise on the feasibility of the order.

The court had made certain orders in respect of the curator *ad litem*, the Premier of the Province of the Eastern Cape and the Director-General, National Department of Social Development. The three complied with the orders of the Court respectively. In the absence of countervailing evidence, the court accepted that the need did not arise for them to approach the court as envisaged in clause 6 of the order. I have no doubt that if the curator *ad litem* had been invited in these proceedings, he would have provided the necessary assistance and input as the relief sought is against an order in which the best interests of the minor child were of paramount importance.

[4] Section 17 (1) of the Superior Courts Act, 2013 (Act No. 10 of 2013) provides as follows:

"17 Leave to appeal

(1) Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[5] The court always appreciated the applicant's right to join the case, if needed, and this appreciation amongst others informed the wording of the order made. It is against this background that the court did not even expect his Counsel to argue for what he termed intervention. That was summarily granted in the introductory stage of the hearing of this application. In the result Counsel only argued the leave to appeal and its grounds. According to the Concise Oxford English Dictionary, tenth edition, revised, edited by Judy Pearsall, Oxford University Press, 2002, "need" is a verb which generally means to require something because it is essential or very important rather than just desirable. It expresses necessity. If I understood the applicant correctly, in his instance, there was a necessary obligation to approach the court. I have no doubt that this necessary obligation was covered in the word 'need" as envisaged in clause 6 of the order. "Arise" is defined as a verb and means to start to happen or to begin to exist, to come into being, to originate from a source or to start to become aware of. In my view, the circumstances under which the order was made, and perhaps the order itself, established the necessity to require an audience if the need arose. It was precisely because of the appreciation of this eventuality that the court made clause 6 of the order. "Feasibility" is a noun which refers to the possibility that can be made, done or achieved or is reasonable. A feasibility study is an assessment of the practicality of a proposed project plan or method. The feasibility analysis determines the viability of the project and includes an assessment of the technical, economic, legal, operational and time factors. The question to answer is: "is this feasible?" The considerations include whether what is proposed can be achieved

[Jennifer Bridges, What is a Feasibility Study? How to conduct one for your project, 19 April 2023, *Project Management*].

[6] This case has not reached a stage where it presents purely a legal issue. It seems to me that further development of the facts, in particular a feasibility analysis, will render the issue which the applicant seeks to have reconsidered, more concrete. In my view the case is not yet ripe for appeal. It would accord with sound process in these circumstances to insist that the applicant pursue the created procedure to observe his right of audience before his complaint can be considered ripe for higher relief. The nature of the issues in this matter require a case-specific inquiry as it tends to relate to the content of and the applicant's powers or what I would call a State-Law question in child protection as regards L[...]. The record submitted to the appeal court must be sufficient to allow the appeal court to decide all issues necessary to determine whether the applicant had the power and this court had jurisdiction. It seems to me that the applicant's reading of the order was that he was front-desked, in that his right of audience was blocked there and then by the order. Even in that understanding, it seems to me that the appropriate relief for him would be for the appeal court to remit the matter back to this court for new jurisdictional determinations and appropriate remedies. The appeal at this stage would therefore not lead to a just and prompt resolution of the real issues raised by the applicant.

[7] A child's right to shelter is expressly provided for in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution) in section 28(1)(c). Shelter or accommodation is part of the maintenance and support to a child (section 15(2) of the Maintenance Act, 1998 (Act No. 99 of 1998)). Section 28(2) of the Constitution enjoins a court to give paramountcy to the best interests of the child in every matter concerning the child. The Judiciary and the applicant are bound by the Bill of Rights (section 8(1) of the Constitution). One of the duties of a court are set out in *Fose v Minister of safety and Security* 1997 (3) SA 786 (CC) at para 69 where it was said:

> ",,, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights

> entrenched in it. In our context an appropriate remedy must mean an effective remedy for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools and shape innovative remedies, if needs be, to achieve this goal."

[8] In *Bannatyne v Bannatyne and Another* 2003 (2) SA 363 (CC) at para 24 it was said:

> "While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the State to create the necessary environment for parents to do so. This court has held that the State
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> "must provide legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28 [*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 78]"

Our country has committed itself to giving high priority to the constitutional rights of children [para 25 in *Bannatyne*]. The courts are there to ensure that the rights of all are protected. The judiciary must endeavor to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements [para 27 of *Bannatyne*]. Courts have a duty to ensure effective protection and enforcement of constitutional rights of children. Failure to do so amount to failure to protect children against those who take advantage of systematic failures, and this has a negative impact on the rule of law.

[9] Courts are constitutionally bound to give consideration to the effect their decisions will have on children's lives [Sloth-Nielsen "Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa" (1996) *Acta Juridica* 6 at 25; *S v M* 2008 (3) SA 232 (CC) at para 15]. At para 16 and 17 in *S v M* the court continued:

> "16. … What should be carried over, however, is a parallel change in mindset, one that takes appropriately equivalent account of the new constitutional vision.
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> 17. Regard accordingly has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC, which have become international currency and as such guide all policy in South Africa in relation to children are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care."

[10] The applicant elected to deal with this matter on a technical basis with a disposition in which the socio-economic rights of the child were but an irrelevant irritation which should have been ignored when his father was sentenced to life. The thinking seems to be that the court was supposed to treat the child "as a mere extension of his parents, umbilically destined to sink with them". This was to be the case even when the legal position was that the unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children [*S v M* para 18]. The appeal seems to be calculated to simply have the protection to the child's rights, resulting from the impact on him as a victim of crime, incised like a wart from the proceedings. In fact in his application and heads of arguments, including in oral argument until the court engaged with his Counsel at the end of his submissions, the applicant uttered no single syllable on what is essentially the protection of the child and in general attention to socio-economic rights of child victims of serious violent crimes that left such a child essentially without parental care and at risk of losing a home and being systematically reduced to being a street child even though such child had a claim to a house within the applicant's jurisdiction. This is the disposition of the Mayor of a City which is the murder capital of the country, including where parents are killed in mobs even when they are attending a family party. If I understood the submissions of the Mayor correctly, the socio-economic plight of the children whose parents are killed in violent crime is an irritation which courts must keep quiet about and just concentrate in filling up prisons in the City over which he presides.

His attitude is that the risk of children who are victims of crime losing the benefit of a home, whilst those not entitled to the houses owned by the children's deceased and/or imprisoned parents enjoy them, is none of his business and the courts must leave him alone. It may be so, but the case presents an opportunity to test that and he cannot run to the appeal court to cancel the whole examination.

[11] A substantial part of the applicant's founding affidavit has paragraphs commencing with the words "I am advised", "I have been advised", "I have also been advised", 'I am also advised" or "Legal advise received is that". This is then followed by a statement. The applicant and his legal advisors would know which factors were considered and accorded which weight, and what law was applied, to reach their decisions to position him to make the statements. The factors considered and the law relied upon are for now only known to them. A significant remainder of the founding affidavit is then used to introduce facts which seems to me to be an input on the feasibility of the order. The applicant cannot advance a case for the first time on appeal on the feasibility of the order, which case he did not put before this court when he had an avenue to explore and was invited in case of a need, to do so. It may well be that the applicant, for example, had a cogent argument on the meaning of feasibility contrary to what is set out in this judgment. It may also be that the applicant has a meritorious argument as to why the facts in this matter did not present an appropriate legal process to establish the risk to an entrenched right to warrant a court to have recourse to its responsibility and obligation to forge new tools and shape innovative remedies to achieve the goal of effectively vindicating the rights of the minor child and permanently quell any risk of the child losing a home under the circumstances. The simple truth is that through this appeal, before this court considers his case and pronounce itself, the applicant not only denies this court the benefit of his case, but denies the appeal court the benefit of a complete record including this court's decision on his case. The applicant challenges the obligation of the court to "forge new tools and shape innovative remedies, if needs be, to achieve this goal" to effectively vindicate a child's socio-economic rights when such child is a victim of serious violent crime. If I understand the law correctly, he cannot appeal on his own case when there is no judgment on that case, when he elected not to exhaust the opportunity to advance that case for an order

informed by his case. His case will not be proper before the appeal court. Its deficiency is a proper consideration by this court.

[12] At this stage, I am not of the opinion that the appeal would have a reasonable prospect of success. In my view it is premature. I am unable to find any compelling reason, at this stage, why the appeal should be heard. For these reasons I make the following order:

The application for leave to appeal is dismissed with costs.

DM THULARE
JUDGE OF THE HIGH COURT