In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 3358/2024

In the matter between:

DR	**Applicant**
and	
N M	**First Respondent**
R L	**Second Respondent**

Heard: 15 May 2024

Delivered electronically on 07 June 2024

JUDGMENT ON LEAVE TO APPEAL

LEKHULENI J

Introduction

[1] For the sake of convenience, the parties are cited as in the main application. This is an application for leave to appeal launched by the first respondent to the full

bench of the Western Cape High Court against part of the judgment of this court, which was delivered on 05 March 2024**.** In that judgment, this court ordered that the office of the family advocate be directed to conduct a care and contact assessment with respect to the minor children to determine their best interests. The first respondent wants to challenge this order and seeks leave to appeal against it. The second respondent did not formally file an application for leave to appeal but, in substance, aligns and supports the first respondent's application.

Grounds of Appeal

[2] The grounds for leave to appeal asserted by the first respondents are that this court erred in ordering a care assessment by the office of the family advocate in circumstances where the applicant had not sought such an assessment and had withdrawn the application for a care assessment in respect of the minor children prior to the hearing of the application. Secondly, the respondents assert that this court had not found on the facts that a care assessment was required; alternatively, the applicant had failed to establish that such care assessment was required.

Facts germane to this Application

[3] To give context to this application and to the order I make herein below, it is necessary to briefly set out the facts which are dealt with in detail in the main judgment. The first respondent who seeks leave to appeal is a biological father of two minors (WML and LM) and their primary carer. The first respondent is married to the applicant in terms of the Civil Union Act 17 of 2006 *('the Civil Union Act')*. Their

marriage is still in subsistence. The first respondent was previously married to the second respondent in terms of the Civil Union Act, and their marriage was dissolved by this court on 13 November 2020. A minor child, (WML) was born between them through a surrogate motherhood agreement, and the said child is currently in the care of the first respondent. The applicant and the first respondent have been living together, and their marriage broke down. Before they got married, the first respondent had another child (LM) through a surrogate motherhood agreement. At the hearing of the main application, the applicant and the first respondent were separated.

[4] On 19 February 2024, the applicant brought an urgent application in which he sought primary care of the two minor children (WML and LM) in terms of section 23(1)(b) of the Children's Act 38 of 2005 *('the Children's Act').* The application was divided into two parts, Part A and Part B. In Part A, the applicant sought an order that, pending the final determination of the relief sought in Part B, he shall be awarded the primary care of two minor children, namely, WML, a girl born on 09 October 2018 and LM a boy born on 12 April 2022 in terms of section 23(1)(b) of the Children's Act. The said minor children are currently in the care of the first respondent. In addition, the applicant sought an order that the minor children be returned to him forthwith and that the first respondent is to have contact with the minor children on Wednesdays and Fridays, from after school until 17h30 and on Sundays from 09h00 to 17h30.

[5] The applicant also sought an order that the contact referred to hereinabove, be supervised and that the supervision should be conducted by a registered social

worker in the employ of Child Assist; the cost associated therewith was to be shared by the applicant and the first respondent. The applicant also implored this court to direct that Leigh Pettigrew, an educational psychologist be appointed to urgently conduct a care and contact assessment and compile a report setting out her findings and recommendations regarding future care and contact arrangements between the parties and the minor children that would be in the best interest of the children.

[6] In the alternative to the above, the applicant sought an order that he be awarded reasonable contact to the two minor children as envisaged in section 23(1)(a) of the Children's Act every Tuesday from after school until 08h00 on Wednesday and every alternate weekend from after school on Friday until 08h00 on Monday. In Part B, which was not before me, the applicant seeks an order to implement Ms Pettigrew's recommendations pursuant to her assessment. This court was only enjoined in considering Part A of the applicant's application.

[7] The respondents opposed the application; however, at the hearing of the matter on 23 February 2024, the court was informed that the applicant was no longer seeking the care of the minor children but instead, access to the minor children as prayed for in the alternative. Mr Pincus SC, the applicant’s Counsel, informed the court that the applicant sought an order that the application be postponed *sine die* and that pending the final determination of the relief sought in Part B, the applicant shall exercise contact to the minor child LM on every alternative weekend from after school on Friday until 08h00 on Monday. Regarding the girl, WML, the applicant requested to contact her on such terms as the first and the second respondent may agree.

[8] After hearing argument, the court gave a written judgment on 05 March 2024. The court made an order, among others, directing two experts to urgently conduct an assessment and compile a report stating their findings and recommendations regarding future contact arrangements between the parties and the minor children that would be in the best interest of the minor children. In addition, the court ordered the office of the family advocate to investigate care and contact assessment concerning the minor children and to determine their best interests. It is the appointment of the family advocate to investigate the care that the respondents seek leave to appeal.

Principal Submissions by the parties

[9] At the hearing of the application for leave to appeal, both Ms Gassner SC and Ms McCurdie SC submitted that this court erred in not confining the family advocate's assessment to contact assessment in line with the scope of the assessment the psychologist experts were asked to conduct and broadening the scope of the family advocate's enquiry to include a care assessment. Ms Gassner SC particularly submitted that there is a reasonable prospect that the appeal court will hold that this court erred in broadening the scope of the family advocate's assessment to include care in that: *first,* at the beginning of the hearing of the main application, the applicant abandoned the relief sought for primary care of the minor children and for the assessment to be conducted by the psychologist expert to include care and limited assessment to contact. Without any considered finding

justifying a care assessment, so the contention proceeded; there was no valid or rational basis for including the aspect of care in the assessment order.

[10] *Secondly*, Counsel submitted that inasmuch as the final relief the applicant may now be granted in terms of Part B, being an implementation of Ms Pettigrew's contact recommendation, at best, is rights of contact in respect of the minor children. Ms Gassner SC further submitted that an order directing the family advocate to conduct a care assessment was not competent in terms of section 29(5)(a) as read with section 29(1) and 23(1)(a) of the Children's Act.

[11] Ms McCurdie SC, on the other hand, submitted that there is no suggestion in the court's judgment that any matter pertaining to WML, other than the applicant's contact with her, required investigation or consideration either by the experts of the office of the family advocate. According to Ms McCurdie SC, the investigations by the experts and the family advocate were anticipated to make findings and recommendations as to whether the applicant should see WLM, not whether he should care for her. In addition, Counsel contended that as it is the question of contact that will be considered at the hearing, an assessment by the family advocate in respect of the question of care would, firstly, extend beyond the purpose of the hearing, secondly, be superfluous, and thirdly, subject the parties and the children to unnecessary and unwarranted investigation.

[12] While Mr Pincus SC submitted on behalf of the applicant that in sitting as the upper guardian of children, this court had a discretion in the narrow sense, that is, it could follow a number of available options (equally permissible alternatives), and an

appeal court will not substitute its view even if it finds it preferable to do so. Counsel submitted that when a court sits as upper guardian of a child, it is not obliged to follow, for example, the parties' wishes or any agreement between them. Mr Pincus SC further submitted that if this court decided that it was in the children's best interests that the family advocate investigate the care and contact of the children, then that is the end of the matter. No appeal court can or could set aside such an order. In Counsel's view, the first respondent's application for leave to appeal is accordingly doomed to fail.

Relevant Legal Principles and analysis

[13] Section 17 of the Superior Courts Act 10 of 2013 *('the Superior Court's Act')*, regulates an application for leave to appeal a decision of a High Court. It provides as follows:

> '(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.'

[14] The applicant's application for leave to appeal is based squarely on section 17(1)(a) of the Superior Courts Act. Unlike the old Supreme Court Act 59 of 1959 *('the Supreme Court Act'),* section 17 of the Superior Courts Act imposes substantive

law provisions applicable to applications for leave to appeal. In terms of this section, leave to appeal may only be given if the court is satisfied that (i) the appeal would have reasonable prospects of success or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[15] Coupled with this discretionary power endowed to a court, the Supreme Court of Appeal has found that the use of the word *'would'* in subsection 17(1)(i)(a) Superior Courts Act imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act.[1] Similarly, in the *Mount Chevaux Trust [IT2012/28 v Tina Goosen and 18 Others*,[2] Bertelsmann J stated as follows:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion. See *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court would differ from the court whose judgment is sought to be appealed against".

[16] It is irrefutable that this case revolves around the best interest of the children. As correctly pointed out by Mr Pincus SC, in sitting as an upper guardian of children, this court must consider all relevant considerations, and in reaching its decision, it exercises its discretion in a narrow sense. Based on the issues raised in the affidavits of the parties, at the hearing of the main application, this court informed the

[1] See *S v Notshokovu* (157/15) [2016] ZASCA 112 (7 September 2016) at 2.
[2] (LCC14R/2014, an unreported judgment from the Land Claims Court).

parties that it would *mero motu* engage an expert to investigate the children's best interests. Pursuant thereto, the court directed that the office of the family advocate conducts a care and contact assessment regarding the two minor children.

[17] The argument that there was no case made for the investigation on care on the papers cannot be correct. The court ordered the family advocate to investigate care pursuant to the allegations that have been made in the affidavits of the parties. Those allegations are dealt with in the main judgment and were succinctly captured by Mr Pincus SC in his heads of argument. Crucially, the issue relating to the care and contact of the minor children is palpably unmistakable on the applicant's founding affidavit and the first respondent's answering affidavit. The entire affidavit of the applicant is replete with allegations that call into question the capacity of the first respondent to care for the children. The applicant challenged the first respondent's parenting and mental functioning.

[18] Amongst others, the main judgment specifically indicates that the applicant's case was that the first respondent was failing to look after the minor children. The applicant sought an order that care be awarded to him and that the first respondent must have contact with the minor children under the supervision of a social worker. The applicant asserted that the first respondent was unable to take the night shift with LM as he was taking sleeping pills, and not even a screaming baby would awaken him. The applicant also asserted that the first respondent's mental health declined in December 2022 and that his condition deteriorated, and he was admitted to a psychiatric ward. The applicant also stated that in February 2024, the first respondent was recently admitted to Ankers House, a rehabilitation facility. The

applicant took over all the responsibilities of LM and WLM. All these allegations are specifically dealt with in the main judgment. In response thereto, the first respondent filed various affidavits refuting the applicant's averments.

[19] The main judgment specifically found that the applicant was very hands-on with both children. The judgment found that the applicant has demonstrated love and care for both children. Additionally, it was found that the applicant cared for both children when he came home at night and that he has a strong bond with LM. The judgment also noted that the applicant cared for LM and WML, and frequently travelled with them far and wide. That the applicant's children have a close bond with LM and WML. The court essentially addressed the disputed issues in the main judgment between the parties, particularly the applicant's alternative prayer of contact. However, in the context of this court's common-law powers to safeguard the interests of minor children and keeping in mind the constitutional imperative contained in section 28(2) of the Constitution, the court found that an investigation had to be conducted, which included the two minor children to determine what is in their best interest.

[20] Notably, this court couldn't turn a blind eye to the first respondent's mental and parenting ability, which was impugned by the applicant. Hence, it ordered the family advocate to investigate the care and contact of the minor children. The investigation by the family advocate was intended to safeguard the best interest of the two minor children as specified in the order. In my view, the fact that the applicant withdrew his claim for care at the hearing of the main application is neither

here nor there. The fact that the applicant did not file a replying affidavit to the answering affidavit to rebut the allegations made therein is also inconsequential.

[21] This court is not constrained or limited by the parties' wishes when it comes to the children's best interests. In every matter involving minor children, the best interest of children is paramount. I agree with the views expressed in *Kotze v Kotze*,[3] that the High Court sits as upper guardian in matters involving the best interests of child (be it in custody matters or otherwise), and that it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented or by contentions advanced or not advanced by the respective parties.

[22] As an upper guardian of all dependent and minor children, this court has an inalienable right and authority to establish what is in the best interest of the children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority.[4] This principle applies with more force in the present matter. Perhaps it is important to remind ourselves that the applicant substantively sought care of the minor children as his primary relief in the present matter. His affidavit specifically addressed the care of the minor children and called into question the capability of the first respondent to care for the two children.

[23] I have noted the argument raised by the respondents that an investigation of the family advocate would be intrusive to the respondents and the children. In my

[3] *Kotze v Kotze* 2003 (3) SA 628 (T) at 630F- I.
[4] *Girdwood v Girdwood* 1995 (4) SA 696 (C) at 708J.

view, this argument offends the paramountcy of the child's best interest. In these specific circumstances, the best interest of the children must take precedence over the rights of the respondents. I am mindful that the second respondent and the first respondent have a parenting plan regarding WLM. In my view, that does not prevent an investigation by the office of the family advocate where one of the parent's parenting skills is being challenged. It must be borne in mind that WML is in the care of the first respondent. The first respondent's mental and parenting skills have been impugned.

[24] If the family advocate finds that it is in the best interest of the child, in this case, WLM, that she be placed in the care of the second respondent, that will be to the benefit of the child. The question of care and contact is not static. In my view, the fact that there is a parenting plan between the first respondent and the second respondent is not cast in stone. The overriding consideration is the best interest of the children. For this reason, in the main application, the second respondent filed a conditional counterapplication seeking the care of WML if the court found that the first respondent was incapable of caring for the minor child.

[25] As stated in the main judgment, the parenting abilities of the first respondent have been challenged. In cases involving minors, the child's best interests should always be the top priority. Therefore, the court has directed the family advocate to investigate and assess the care and contact of the minor children. The family advocate's investigation will not grant rights to any of the parties involved, nor will it take away or revoke any rights. Instead, it will ensure that the best interests of the minor children are jealously guarded. On a conspectus of all the facts, I believe there

are no prospects of success in the respondent's application for leave to appeal. Even if I err in this regard, to my mind, the order this court granted is in the best interest of the minor children.

[26] Finally, it is trite law that for an order to be appealable, it must be final in effect, definitive of the parties' rights, and dispose of a substantial portion of the relief claimed. The interests of justice and the potential for irreparable harm are also considered.[5] I am of the view that the order this court made appointing a family advocate to conduct a care and contact assessment is interlocutory in nature and not appealable. As correctly pointed out by Mr Pincus SC, it can hardly be argued that the relief granted in part A of the applicant's application is not interim in nature. The relief in Part A is intended only to be effective until such time as the investigations by the relevant experts are completed, and the recommendations are implemented, as contemplated in Part B of that application. The investigation by the office of the family advocate is only intended to make recommendations to determine what is in the children's best interest. A final determination of the matter will only arise at the hearing of Part B of the main application at which time the court will benefit from the expert's recommendation. On that score alone, the respondents' application for leave to appeal falls to be dismissed.

[27] To top it all, it is in the best interest of the minor children for the family advocate to conduct a care assessment. Thus, in my view, the paramountcy of the children's best interest must take precedence over any other right in this case.

[5] *Tshwane City v Afriforum* 2016 (6) SA 279 (CC).

Order

[28] For all these reasons, the following order is granted.

28.1 The respondents' application for leave to appeal is dismissed.

28.2 The respondents are ordered to pay the costs of this application jointly and severally, including the costs occasioned by the employment of two counsels.

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LEKHULENI JD

JUDGE OF THE HIGH COURT

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