

CENTRE FOR CHILD NOTES THE CONSTITUTIONAL COURT JUDGMENT PROTECTING BEST INTERESTS OF THE CHILD IN DIVORCE MATTERS

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On 27 June 2019, the Constitutional Court handed down a judgment in a case dealing with the constitutionality of a court rule that does not allow parties in a divorce matter to appeal an interim order given while the divorce is being finalised (main divorce matter). The interim orders affect issues like the payment of maintenance as well as care and contact with children involved, while a divorce matter is still ongoing and is not yet finalised.

The Centre for Child Law entered the matter as *amicus curiae* to argue that it is unconstitutional that a decision made *pendente lite* (*pending the finalisation of the main case*), is not appealable, when that same decision adversely affects the best interests of the children concerned as well as other constitutional rights. For example: the child's right to family care or parental care; right to be protected from maltreatment, neglect or abuse; right to dignity and privacy to the extent that it protects the right to family life. The fact that a party, who believes that the best interests of their child is infringed by the order, has no recourse is not in line with the notion of best interests.

The applicant in the case argued that the inability for him to appeal an interim order amounts to an unconstitutional denial of his right of access to court.

The Constitutional Court found that the applicant's argument that he is denied his constitutional right of access to court cannot be sustained. The courts' ability to make an interim order is not designed to resolve issues between divorce litigants – this will be done by the main divorce matter. Interim orders only provide for certain measures to be put in place until all issues are properly ventilated at the main trial. The Constitutional Court said the following:

“The purpose of [the rule] is to provide a speedy and inexpensive remedy, primarily for the benefit of women and children. The rationale for the non-appeal ability is to prevent delays and curtail costs. To allow an appeal process would contradict the objective [of the rule].”

The Constitutional Court was of the view that the fact that interim orders may be enforceable for longer periods than was initially anticipated is the fault of the way divorces are handled, often by litigants and practitioners, rather than a deficiency in the rule itself. According to the court, the obvious solution is to ensure that divorces are given preferential court dates to minimise the duration of any interim order. Some high courts are already doing this and the Constitutional Court encouraged those who are not to adopt practice directives implementing this approach.

The Constitutional Court found that if there are serious concerns or challenges with interim orders; then the current law provides options to address them. Rule 43(6) of the Rules of Court state that parties in court matters can approach a court for a variation of its decision if there is “material change occurring in the circumstances of either party or a child, or the contribution towards costs proving inadequate”. For example incorrect maintenance orders (given while waiting for main divorce matter to be finalised) can be rectified by this process.

There may be exceptional cases where there is a need to remedy a patently unjust and erroneous order and no changed circumstances exist. In those instances, where strict adherence to the rules clashes with the interests of justice, a court may exercise its inherent power in terms of section 173 of the Constitution to regulate its own process in the interests of justice.

High Courts can also hear cases on an urgent basis if an allegation is made that an interim order is contrary to or threatens the best interests of a child.

The Centre for Child Law is disappointed with the judgement’s interpretation of the application of the best interests of the child principle in case before it. The judgment of the Constitutional Court however provides guidance to parties aggrieved by interim orders, in that it provides clarity on mechanisms in law that are available to challenge the interim orders if they fit certain requirements.

Ends.

For more information, please contact:

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