IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Gauteng North Case Number 19332/2017
SCA Case No: 067/18
SCA Case No: 292/18
Constitutional Court Case No: 147/18

In the matter between: -

S	Applicant
and	
S	First Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
CENTRE FOR CHILD LAW	*Amicus Curiae*

SUBMISSIONS OF THE CENTRE FOR CHILD LAW

INTRODUCTION

1. This matter concerns the constitutionality of section 16(3) of the Superior Court Act ("**the impugned provision**").[1] The impugned provision reads:

> *"Notwithstanding any other law, no appeal lies from <u>any judgment or order</u> in proceedings in connection with an application –*
>
> *(a) by one spouse against the other for <u>maintenance</u> pendente lite;*
>
> *(b) for contribution towards the costs of pending matrimonial action;*
>
> *(c) for the <u>interim custody</u> (sic) of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or*
>
> *(d) by one parent against the other for <u>interim access</u> (sic) to a child when a matrimonial action between the parents is pending or about to be instituted."*[2]
>
> (own emphasis added)

2. There is (and can be) no debate that the provision absolutely proscribes appeals in all matters falling within one (or more) of the identified categories.[3] The statutory prohibition, moreover, applies

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1 Superior Court Act 10 of 2013 ("**Superior Court Act**").

2 Sec. 16(3) of the Superior Court Act. The terms "custody" and "access" no longer form part of our law and have, in terms of the Children's Act 38 of 2005 ("**Children's Act**") been replaced, respectively, by the term "care" and "contact".

3 This parties appear to be *ad idem* on this issue; see for example, "Applicant's

regardless of whether the resultant order is considered to be interim (in the strict sense) or not.[4]

3. The crux of the debate, and the primary issue these submissions will seek to address, is accordingly whether (or not) the statutory prohibition against appeals in matrimonial matters is unconstitutional.[5]

Heads of Argument" dated 17 November 2018 ("**App. Submissions #1**"), para 3.3, pg.4; "Heads of Argument of First Respondent" dated September 2018 ("**1st Resp. Submissions**"), para 2.10, pgs. 4 & 5; "Written Submissions on Behalf of the Minister of Justice and Correctional Services" dated 27 September 2018 ("**Minister Submissions #1**"), para 35, pg. 14.

4 The respective parties make much and more of whether (or not) such an order is an interim order capable of being appealed. See, for example, App. Submissions #1, para 10, pgs. 18-23 and para 12.8, pg. 27; 1st Resp. Submissions, para 6, pgs. 14-8 and para 11.1, pgs. 30-1; Minister Submissions #1, para 35-6, pgs. 14-5; and "Written Argument on behalf of the Second Respondent" dated 6 February 2019 ("**Minister Submissions #2**), paras 58-62, pgs. 21-3. The debate is, with respect, and in our view, misplaced.

It is misplaced, in the <u>first instance</u>, in that the impugned provision makes it plain that it applies to *"any judgment or order"* and, accordingly, it matters not whether it is considered interim (in the strict sense) or final as it would preclude an appeal regardless of categorisation. A complete discussion of the term *"any judgment or order"* may be found in Harms 'Civil Procedure in the Superior Courts', Service Issue 63 at C1.17 and the authorities cited.

It is misplaced, in the <u>second instance</u>, in that (and even if it is considered interim in the strict sense) an interim order is nevertheless, and in certain circumstances, appealable. This was made plain by this court in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 25. See, also, and regards to the nature of rule 43 orders, *TS v TS* 2018 (3) SA 572 (GJ) at pars 5-7.

5 The impugned provision relates, exclusively, to orders granted in rule 43 proceedings. The procedure provided for in rule 43 applies (<u>and must be utilised</u>) whenever a spouse seeks relief in respect of one or more of the listed matters (*Leppan v Leppan* 1988 (4) SA 455 (W)).

4. The test regarding unconstitutionality is well known and was articulated in the matter of *South African National Defence Union* as follows:

> *"The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well-tailored to that purpose."*[6]
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> (own emphasis added)

5. The *amicus* will demonstrate, during the course of these submissions, that: -

5.1. the impugned provision plainly infringes on the rights of children involved in "rule 43 proceedings";

5.2. the second respondent is obliged to create conditions that allow for the proper ventilation of disputes regarding children and that the blanket prohibition against appeals does not accord with this obligation;

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6 *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 18.

5.3. the justifications offered by the second respondent, namely: that an aggrieved party has an alternative remedy and that, in any event, introducing appeals will render the object of the rule superfluous are without merit; and

5.4. there are reasonable alternatives that can nevertheless ensures speedy, effective and inexpensive routes to ensuring that justice is done.

6. In what follows we will address these issues under the following headings:

6.1. The Constitutionality of the Impugned Provision: This section will focus on exploring the impact (and potential impact) decisions in rule 43 proceedings have on children and likewise the impact the impugned provisions have as a consequence.

6.2. The Justification: Speedy and Inexpensive Relief: This section will seek to debunk the idea that the introduction of an appeal mechanism would somehow increase, unjustifiably, the costs of an appeal.

6.3. The Appropriate Remedy. The final section will deal with the appropriate remedy to cure the defects identified elsewhere in the submissions.

7. These issues are addressed below, separately and in turn.

THE CONSTITUTIONALITY OF THE IMPUGNED PROVISION

8. There can be no debate that an order granted in terms of rule 43 will materially affect the rights of a child involved in those proceedings.[7] The rights implicated, include: -

8.1. the right of a child to family care or parental care;[8]

8.2. the right of a child to be protected from maltreatment, neglect, abuse or degradation;[9]

8.3. the right of a child to have his/her best interests considered to be of paramount importance;[10] and

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7 *TS* (above n 4) at para 7.

8 Sec. 28(1)(b) of the Constitution.

9 Sec. 28(1)(d) of the Constitution.

10 Sec. 28(2) of the Constitution.

8.4. the child's right to dignity and privacy to the extent that it includes and protects the right to family life.[11]

9. A party, aggrieved by a decision, and of the view that it adversely affects any of these identified rights, is precluded from appealing the decision; rather such parent must abide the decision of the court *a quo* even though in doing so it may have serious, immediate, ongoing and irreparable consequence for the child concerned.[12] This, it is submitted, violates inter alia the "best interest" principle.

10. The second respondent implicitly accepts this but offers an alternative. It suggests a party, aggrieved by such a decision, may approach –

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11 See, *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as amicus curiae)* 2003 (2) SA 198 (CC); and *Booysen v Minister of Home Affairs* 2001 (4) SA 485 (CC).

12 It is trite law that an order, once granted, is binding unless or until it is set-aside by a court having competent jurisdiction. A part who fails to abide may render themselves guilty of competent (or execution). It is useful to also consider: *Matjhabeng Local Municipality v Eskom Holdings Ltd: Mkhonto v Compensation Solutions (Pty) Ltd* 2017 (11) BCLR 1408 (CC) at paras 47-8; *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 6; and *SS v VVS* 2018 (6) BCLR 671 (CC) paras 24-7.

10.1. the same court, using the same procedure, in terms of rule 43(6) to vary the court's decision;[13] or

10.2. the maintenance court, in terms of section 16(1)(b) of the Maintenance Act, to substitute or discharge the order.[14]

11. The problem with both these supposed solutions is that they require a party to demonstrate a *"material change in circumstances"* before they are entitled to approach either court. The following is apposite:

> *"The question to be posed is what does a party have to do if the other party has obtained relief from a court based on false information. There are ordinary motion proceedings. Mr Weavind, for the applicant,*

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13 See, for example, Minister Submissions #1, pars 35-9, pgs. 14-6 and Minister Submission #2, para 62, pg. 23. Rule 43(6) provides –

> *"The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.*
>
> (own emphasis added)

14 Minister Submissions #1, pars 43-4, pgs. 16-7. The provision reads:

> *"After consideration of the evidence adduced at the enquiry, the maintenance court may –*
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> *…*
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> *(b) in the case where a maintenance order is in force-*
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> *(i) make a maintenance order contemplated in paragraph (a)(i) in substitution of such maintenance order;*
>
> *(ii) discharge such maintenance order; or*
>
> *(iii) make no order."*

See also, *De Witt v De Witt* 1995 (3) SA 700 (T) and *Thompson v Thompson* 1998 (4) SA 463 (T).

in his reply to the preliminary point, said that the only way open was to utilise Rule 43(6).

I am not certain that it is so. If that is the case, the court will be faced in any number of Rule 43 application with virtually a review of a previous decision, based on the existing facts, but now having been given time to deal with the matter in more detail, having been able to utilise more information, another slant being given to those very same facts, or one or two additional facts might be discovered, which puts a different complexion on matters.

After all, this is merely to assist parties in resolving their differences, and if one makes of Rule 43 procedure a procedure whereby acrimony is engendered and further issues are brought forward, which only complicate the divorce instead of simplifying it, Rule 43 misses its point.

In my view, Rule 43 (6) should be strictly interpreted to deal with matters which it says has to be dealt with, that is, a material change taking place in the circumstances of either party or child. That relates to a change subsequent to the hearing of the original Rule 43 application. That has not shown to be the case in this particular application, and I am satisfied that this is not the proper method to deal with the information brought forward."[15]

(own emphasis)

12. The *dictum* makes it plain that a party is not entitled simply to a rehearing of the matter. They must, and as is clear from the wording, demonstrate that there has been a **material change** in

15 *Grauman v Grauman* 1984 (3) SA 477 (WLD) at 480A-C. See also, *Micklem v Micklem* 1988 (3) SA 259 (C) at 262E where the court reiterated that a rehearing of the application on new facts (let alone the same facts) is not permitted. The new application must be based on a material change in circumstances subsequent to the first application.

circumstances.[16] This applies equally in both the maintenance court and the children's court.[17]

13. The inescapable conclusion is that there a party, who believes that an order violates his/her child's rights and is not in his/her best interests, has no recourse.[18] That party will simply have to abide by the order and hope (or pray) that something monumental goes awry post- the granting of the order. This does violence to the notion of best interests.

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16 On the issue of interpretation generally see: *Natal Joint Municipal Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at paras 18 & 24.

17 In respect of the maintenance court, see: *Thompson* (above n 14) where the court held that a maintenance court has to display caution in such circumstances and not lightly interfere in an order made in terms of rule 43.

In respect of the children's court, see *Afrikander v Arendse* (KZNP 79/14) (unreported) where the court considered whether, in light of sec. 1(4) of the Children's Act, it is competent for a children's court to make an order relating to care and contact where this is different from an earlier order granted by the High Court at the time of divorce, or whether only that court has jurisdiction. The court noted that a more restrictive interpretation of sec. 1(4) of the Children's Act would mean that a children's court would only be able to deal with a limited range of cases such as where a child is in need of care, or a case where the parents were never married. The court held that the correct interpretation of the law is one which gives recognition to the need for a children's court to make appropriate orders, without offending against its enabling provisions. This approach would promote access to a less costly form of justice. The court this found that the children's court does have jurisdiction to issue an order which will have the effect of varying an order relating to the care of- or contact with- a child issued by another court, where there has been a change in circumstances and the best interests of the child demands it. A copy of this order will be made available at the hearing of the matter.

18 Cf. Minister Submissions #2 para 75, pg. 27.

14. The fact that there is no recourse for a parent in these circumstances is further at odds with the jurisprudence espoused by this court:

14.1. In *AD* this court held that:

> *"Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. … It also means that unduly rigid adherence to technical matters such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling disputes between litigants."*[19]

14.2. In *M* this court also held that:

> *"No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can."*[20]
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> (own emphasis added)

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19 *AD v DW* 2008 (3) SA 183 (CC) at para 55.

20 *S v M* 2008 (3) SA 232 (CC) at para 20.

15. It is similarly at odds with the States obligations to respect and promote the right of the child to have his or best interests taken as a primary consideration.[21] In this regard, General Comment 14 provides that:

> *"States should establish mechanisms within their legal systems to appeal or revise decisions concerning children when a decision seems not to be in accordance with the appropriate procedure of assessing and determining the child's or children's best interests. There should always be the possibility to request a review or to appeal such a decision at the national level. Mechanisms should be made known to the child and be accessible by him or her directly or by his or her legal representative, if it is considered that the procedural safeguards had not been respected, the facts are wrong, the best-interests assessment had not been adequately carried out or that competing considerations had been given to much weight. The reviewing body must look into all these aspects."*[22]
>
> (own emphasis)

16. It follows that the impugned provision is plainly unconstitutional as it does not protect and promote the best interests of children involved in rule 43 proceedings.

THE JUSTIFICATION: SPEEDY AND INEXPENSIVE RELIEF

17. The rule prescribes a simplified, streamlined and relatively inexpensive procedure to obtain the same interim relief as provided

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21 Art. 3 of the United Nations Convention on the Rights of the Child ("**UNCRC**").

22 Art. 98 of General Comment no. 14 (2013) (CRC/C/GC/14) on the rights of the child to have his or her best interests taken as a primary consideration.

for by the common law in matrimonial litigation.[23] The procedure, together with the stipulated time frames, were designed to enable courts to deal expeditiously and inexpensively with these types of applications.[24]

18. In an attempt to shore up its argument regarding why the impugned provision justifiably prohibits appeals, the second respond latches onto this purpose and contends that the introduction of an appeal process would invariably *"cumbersome, protracted and an expensive process, totally negating the procedural advantages of rule 43 that is expedient and inexpensive"*.[25]

19. There are several problems with this statement (and the submissions that emanate from it):

    19.1. First, it is at odds with its early submissions regarding alternatives to correct erroneous decisions emanating from rule 43 proceedings.

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23 Harms (supra n 4) at B43.1.

24 *Ibid*.

25 Minister Submissions #1, para 9, pgs. 3 & 4. See also, Minister Submissions #2, para 51, pg. 20 and para 74 & 77pgs. 27-8.

19.1.1. If the submission by the second respondent is correct that an aggrieved person may, without more, approach the court *a quo* in terms of rule 43(6) in every instance that they are not satisfied with the content of the order then there would be no limit on the number of such applications s/he may bring to "correct" the erroneous order.

19.1.2. Similarly, instituting proceedings in the maintenance court is neither speedy nor inexpensive. The matter will first be referred for a maintenance enquiry before a maintenance officer and thereafter to an enquiry by the maintenance court.[26] A party, not satisfied with the outcome of the trial, could thereafter appeal the decision to the High Court and thereafter to the Supreme Court of Appeal or even this court.[27]

19.1.3. The same flaws in the logic of the second respondent regarding referrals to the maintenance

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26 See, sec. 6 and 10 of the Maintenance Act. It is worth noting that this process can take months or even years to reach fruition.

27 See, sec. 25 of the Maintenance Act.

court apply equally to matters referred to the children's court.[28]

19.2. These "alternatives" are likely to be more expensive and less expeditious then allowing an appeal in defined instances.

19.3. Second, procedural advantages and the need for expeditious relief can never trump the "right to appeal" in matters involving children.

19.4. Third, the statement fails to properly deal with (or articulate) the fact that there are less restrictive means to achieve the stated purpose other than a blanket prohibition. There may, for instance, be a qualified right of appeal or simply a right to appeal, as in most matters, that a party believed a court erred. These processes will not be as cumbersome as those suggested by the second respondent nor will they be as expensive.

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28 See, sec. 51 of the Children's Act.

20. The justification proffered by the second respondent is, with respect, without merit. It fails to appreciate that –

20.1. an aggrieved party has no recourse to correct an erroneous rule 43 order;

20.2. a blanket prohibition on appeals does not protect and promote the rights of children caught up in such proceedings; and

20.3. there are several viable alternatives that may be considered that would achieve the stated purpose of the rule.

21. The provision, in our view, is not constitutionally defensible and ought to be declared unconstitutional.

THE APPROPRIATE REMEDY

22. The applicant, and first respondent, both suggest that to cure the unconstitutionality of the impugned provision a provision should be included that empowers a court to: -

22.1. hear an application for leave to appeal within ten days;

22.2. if leave to appeal is granted, a full court should be constituted within 60 days; and

22.3. in cases where leave is granted, the court should make appropriate interim enforcement orders pending the hearing of the appeal, including further orders as to a contribution towards costs.[29]

23. It is not immediately apparent to us where the applicant, or respondent, believes this appeal mechanism should be located in the legislative scheme. That said, we are in principal in agreement with the remedy proposed. There must be a process that allows for an appeal process.

24. In this regard, we propose that it would be just and equitable for this court to employ both severance and reading-in certain. The proposed constitutionally compliant provision would read:

> *"(3)* ***[That save in exceptional circumstances]*** ~~*Notwithstanding any other law,*~~ *no appeal lies from any judgment or order in proceedings in connection with an application –*

[29] App. Submissions #2, para 21.1, pg. 55 and 1st Resp. Submissions, para 16, pgs. 37-8.

(a) by one spouse against the other for maintenance pendente lite;

(b) for contribution towards the costs of pending matrimonial action;

(c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or

(d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted."[30]

[(3A) That notwithstanding any other law an order granted in connection with any matter referred to in subsection (3)(a)-(d) shall not be suspended by virtue of any application for leave to appeal or of an appeal."

25. The remedy, framed as such, we believe will adequately cure the constitutional defect. We say this as a consequence of at least the following:

25.1. The inclusion of the term "exceptional circumstances" would place an additional duty on the aggrieved party to motivate why it is that an appeal should be allowed. This, in turn, would deter frivolous and vexatious appeals that are aimed at merely delaying proceedings.

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30 Sec. 16(3) of the Superior Court Act. The terms "custody" and "access" no longer form part of our law and have, in terms of the Children's Act 38 of 2005 ("**Children's Act**") been replaced, respectively, by the term "care" and "contact".

25.2. The inclusion of sub-paragraph 3A would ensure that there is a measure of certainty for all involved pending the outcome of an appeal. It must be kept in mind that prior to obtaining an order the parties' arrangement with regards to finance and care and contact are, at best, done *ad hoc*.

26. We do not believe that the provision should extend itself to fixing timeframes for the hearing of either the application for leave to appeal or actual appeals. A litigant should approach the appeal like any other; if they litigant believes it is urgent then s/he must justify it as being urgent and bring it on truncated timeframes as provided for in the various divisions Practice Manuals. This we believe will act as a further deterrent to those litigants seeking to abuse the process.

27. The remedy suggested is carefully, sensitively and done in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential.[31] The legislature, in any event, would be entitled to amend the reading in proposed

[31] *S v Manamela* 2000 (3) SA 1 (CC) at para 57; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at pars 67-8; *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

at a later stage should it wanted to craft a different legislative solution.[32]

CONCLUSION

28. In the premise, we support the applicant's contention that an order of constitutional invalidity ought to be made on the grounds advanced in these submissions.

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R M Courtenay
Counsel for the Amicus Curiae

14 February 2019

[32] *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC) at para 45.