IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A186/2023

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE: 21 June 2024

SIGNATURE

In the matter between:

K[...] R[...] S[...] Appellant

and

C[...] L[...] Respondent

JUDGMENT

NEUKIRCHER J:

1] This appeal[1] has its origin in an order granted by the Children's Court for the District of Tshwane North, held at Soshanguve (the Children's Court) under case number 14/1/2-57/2019 on 24 August 2020. That order reads as follows:

> *"AGREEMENT IN TERMS OF SECTION 22 OF ACT NO. 38 OF 2005*
>
> *WHEREAS –*

[1] Which the respondent did not oppose

R[...] S[...] K[...] is the biological father who has parental responsibilities and rights in respect of the children, and

WHEREAS –

C[...] L[...] is the maternal grandmother of the children, who did not have parental responsibilities and rights in respect of the children.

WHEREAS –

BOTH PARTIES, held a consultation with Family Advocate, who compiled a report dated 2020/06/23; and they both confirm. They both have a mutual agreement before court, as follows;

1. *The recommendations of the Family Advocate report, be made an order of court (paragraph 13.1, 13.2(a)-(d)(i)-(iii) and 13.3 on page 12-13 of Annexure "A").*

2. *The primary residence of the minor children to be with the Father (Respondent).*

3. *The Applicant (Maternal Grandmother and mother) to further retain the rights of contact and care with the said children as follows:*

   (a) Rotate and or share the children's birthdays.

   (b) Children to be with each party on his (Father) / her (Mother) birthday and children to be with the respective party on Mother's day and or Father's day.

   (c) Regular and structural telephone contact to be maintained between the parties."

THEREFORE: Agreement made an order of court."

2] It is important to note that both the present appellant and respondent signed the Agreement on 24 August 2020. This does not appear to be disputed.

3] But on 25 April 2022 the appellant then brought an application under the same case number. That Notice of Motion reads as follows:

> *“1. An order rescinding and/or setting aside the Court Order issued by the above Honourable Court under ref no or case no: 14/1/2-57/2019 dated 24/08/2020.*
>
> *2. Alternatively, an order amending/varying the order mentioned at prayer 1 above by removing the wording “the grandmother” from paragraph 13.2 of the Family Counsellor’s report to read as follows-*
>
> *“(d) The mother to exercise contact with the minor children in the following manner but not limited to:”*
>
> *4. Ordering anyone who opposes this application to pay the costs of this application.*
>
> *5. Further and/or alternative relief the Honourable Court may deem just.”*

4] The facts upon which the appellant relies are set out in his founding affidavit and his supplementary founding affidavit.

THE FACTS

5] The applicant is the biological father of the 3 minor children who, at the time of that application were 14 years, 5 years and 3 years old. It appears that the eldest child resided with the respondent, whilst the youngest two resided with the appellant. It is common cause that the respondent is the maternal grandmother of the 3 children.

6] It is also common cause that:

a) the biological mother of the children was in a relationship with the appellant: the type of relationship is in dispute as appellant's version is that they had concluded a valid customary marriage; the respondent has denied this. The issue of whether there was or was not a valid customary marriage forms the subject matter of other proceedings under case number 6035/2022 in this Division. As this forms the subject matter of other proceedings, it is not for this court to express any view on those merits;

b) the appellant is the biological father of the 3 minor children and the respondent their grandmother;

c) that when she gave birth to their youngest child, complications occurred that caused the childrens' mother to become seriously ill.

7] It appears that during 2019 the respondent then brought an application seeking the primary residence of and/or contact to the two youngest children.

8] At the behest of the court, a report from the Family Advocate was filed. According to the Reports of the Family Advocate and Family Counsellor dated 12 June 2020, the Children's Court ordered the Family Advocate "*to conduct an enquiry [with] regard to the welfare and best interests with specific focus on the issues of residence and contact of the minor child LM and LBM."*

9] According to the report "*the Applicant is the maternal grandmother of the minor children*" and "*the respondent is the biological father of the minor children*" and the dispute "*is about the issues of the residence and contact of the minor children*."

10] The following is quite apparent from the Children's Court papers:

a) that the children's biological mother was very ill;

b) that she appeared to be residing with the present respondent;

c) that there were issues regarding the respondent and the mother's contact to the children;

d) according to the Family Counsellor:

"*The grandmother initially approached the court because she wanted contact between her, the biological mother and the maternal family with [LM] and [LBM] to be clarified and defined*.";

e) that the respondent alleged that the appellant and his mother "*often interfered and interrupted the mother to spend quality time with the children every time they brought the children for visits*"; and

f) that:

"*The parties on the second date of enquiry reported that the interim contact arrangement was reached and the biological mother is able to exercise contact with the minor children…*"

11] It appears that, after the initial investigation by the Family Advocate and an interim agreement reached between the parties, the Family Advocate conducted a follow-up investigation and reported that the arrangement was working well and in paragraph 12.1 of the Family Counsellor report the following is stated:

"The investigation and report stem from a dispute between the parties about parental responsibilities and rights regarding contact between the minor children and the grandmother. The grandmother is of the opinion that contact between her and L[...] and L[...] would afford the mother to bond with the children because she is staying with her."

12] The Family Advocate then made the following recommendations:

a) *“Parental responsibilities and rights with regards to care and maintenance should continue to be shared by the mother and the father.*

b) *The father to be vested with the responsibility to provide primary care and residence for L[...] and L[...].*

c) *The current contact arrangement from Friday 16h00 to Tuesday 16h00 must be maintained until L[...] is four (4) years and L[...] is two (2) years old respectively.*

d) *From there the grandmother and the mother to exercise contact with the minor children in the following manner but not limited to:*

   i. *Alternative weekends from Friday 17h00 to Sunday 17h00 in a way trial the children spend one weekend together with one parent.*

   ii. *The March/April and September/ October holidays to rotate between the parties year on year in such a way that the children spend the holiday with one parent together.*

   iii. *The June/July and December/January holidays to be shared and rotate between the parties in a way and sequence that the children do not spend the same holiday with one parent for two consecutive years.*

Regular and predictable telephone contact to be maintained.”

13] The parties then settled that application, based on the Family Advocate’s recommendations on the terms set out in paragraph 1 supra.

14] Unfortunately, the childrens' mother subsequently passed away on 9 May 2021. The right to bury her was also the subject matter of an unsuccessful application by the appellant.

15] According to the appellant his life has seen unforetold turmoil since the grant of the agreed order of 24 August 2020 and he says:

> *"However due to the defect and/or material error in the recommendation of the Family Advocate/Court Order I am unable to live a normal life and/or enjoy my life with my children like any other family."*

16] His grievances include that:

a) charges of assault were laid against him, for allegedly assaulting the respondent's niece in November 2021 when she came to fetch the children;

b) he has been harassed by members of the respondent's family demanding contact with the children during public holidays although the court order does not entitle them to this[2], and when he refuses he is then harassed by members of SAPS at the respondent's behest;

c) that the litigation between him and the respondent and her family is so prodigious that "*it will be prudent and in the interest of justice that I cut ties with them to avoid further vexatious and frivolous litigation*";

d) that the proceedings initiated by the respondent that resulted in the order of 24 August 2020 purported to be on behalf of the deceased but *"according to the report of the social worker it is clear that my wife was not happy with that application and she was happy that the children are staying with me.";*

[2] But see paragraph 13.2 (d)(ii) of the Family Court's report

e) *"it only became clear now that the reason the Respondent used the said Court Order to get me arrested despite knowing very well that I have not committed any offence is because they wanted to go to report the estate of my late wife and report it as if they are staying with the minor children. She wanted to make sure that when the social worker came to investigate, she finds the children with her.*

It is common cause that the Respondent is not staying with the minor children and I am the only one who have full parental responsibilities and rights over the minor children but surprisingly, the Respondent has managed to get a letter of authority.";

f) that he does not have permanent employment and the legal costs are draining funds that should be used to maintain his children;

g) that the respondent is not really interested in the welfare of the children and is only interested in whatever benefits the children will receive from the deceased;

h) that the respondent has attempted to claim the benefits of the deceased's provident fund;

i) that the children do not actually reside with the respondent, nor does she care for them; she and her family are unsuited to exercise primary care and residence or contact and she neglects the children when they are with her; and

j) he was under the impression that the order would only be valid whilst the deceased was recuperating.

17] Thus, says appellant, the order was void ab initio[3]. He also relies on Rule 49(8) which states:

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[3] Magistrates Court Section 36(1)(b) which provides:

"Where the rescission or variation of a judgment is sought on the ground that it is void ab origine or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake."

18] In his founding affidavit he also relies on **Gollach and Gomperts v Universal Mills and Produce Co (Pty) Ltd**[4] where he states "*it was held that reasonable mistake on part of the other party could be used as a valid reason for variation or rescission."*

19] The appellant then states:

"82. It is a settled practice that a court dealing with an application involving a minor child has the obligation to ensure that the best interest of the minor is served.

83. The presiding officer can set aside an order on the grounds of fraud.

84. According to legal dictionary, fraud is defined as a false representation of matter of facts-whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed-that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.

85. I am advised that the Court order must be unambiguous and precise."

20] And then, under a heading "Legal Issues" the appellant states:

The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*—
…
rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties…

[4] 1978 (1) SA 914 (A)

"86. Whether the Court can make an order in favour of or against a person who is not a party to the proceeding.

87. Whether the Court can make an order in favour of the third party as contemplated in Section 23 of the Children's Act without proper prerequisite application satisfying the Court that he/she met the requirements set out therein and thus it is on the best interest of the minor children that he/she be granted access to the minor child.

88. If any of the above mentioned legal issued can be answered negatively, it follows that the said Court Order is void ab origine and/or it was acquired by mistake and thus it need to be set aside, rescinded and/or amended."

21] His final salvo is that the Family Advocate admitted to him that, in actual fact, the respondent made an application on behalf of the deceased "*and thus the Respondent has never made an application for access for herself."* Thus, he argues that the order is void, ambiguous, fraudulent and falls to be rescinded.

22] Unsurprisingly, the respondents answering affidavit highlighted all the short-comings in the application including that no basis was laid out for the order of 24 August 2020 to be rescinded. Over and above the denials vis-à-vis the allegations highlighted in paragraph 16 supra, the point is made that no case was made out to found a rescission based on voidness or fraud or mistake.

23] On 14 June 2022 the appellant then deposed to a "Supplementary Affidavit". It is very clear from the content thereof that its purpose was to bolster what was lacking in the founding affidavit. In it the appellant states that:

a) the order of 24 August 2020 is void ab initio as it was granted in favour of the respondent without proper application as required by section 23 of the Children's Act 38 of 2005 (CA);

b) that it was obtained fraudulently as it failed to disclose material information necessary to guide the Family Advocate and Family Counsellor in making their recommendations;

c) that there was a patent error as respondent was given contact to the children without proper application in terms of s23 of the CA;

d) that it was obtained by mistake "*the Court Order was obtained by mistake as I agreed that the Family report be made an order of the Court. Had I known that the Respondent would want to hijack the Court Order and made it her own I would not have had agreed to the inclusion of her on paragraph 13.2 of the Family Counsellor's report which was made an order of the Court. I agreed on understanding that the Respondent was frequently at Block K nursing my wife and obviously, she will see the children when they are there to see their mother. I did not foresee a situation where the Respondent will unreasonably continue to enforce the Court Order after the passing away of my wife.*"

e) that it is ambiguous as "*the Court Order further need to be rescinded or varied for its ambiguity. I was arrested on the basis that I violated the provision of the Court Order which state that the March/April and September/October holidays to rotate between the parties year on year in such a way that the children spend the holiday with one parent together. I am advised that reference to March/April and September/October Holidays refers to school holidays not Public Holidays and the Respondent is very much alive to this fact as she had never come to fetch the children on other Public Holidays, for instance, on Human Rights Day which falls in March.*"

24] It is trite that a proper case must be made out in the founding affidavit[5], however, it appears that this was overlooked. The Replying Affidavit filed by the appellant on 2 August 2022 takes issue with the late filing of the answering affidavit

[5] Pearson v Magrep Investments Pty (Ltd) 1975 (1) SA 186 (D); Strauss v Strauss [1998] 4 All SA 137 (C)

and simply adds nothing further of value to the matter. The issue of condonation was not argued before us and therefore nothing more need be said on this issue. During argument, Counsel for the appellant also conceded that a case based on fraud had not been made out on these papers.

25] In reaching its decision the Children's Court took into account several important sections of the CA, including s7[6], s9[7], the fact that the grandmother had brought an application in terms of s23 and the fact that the it had a report by the Family Advocate and a Social Worker[8]. According to the Social Worker's Report the reason for the application was "*The maternal family seek contact of [LM] and [LBM]*" and the applicant was "*Ms C[...] L[...]*" and the respondent "*Mr R[...] K[...]*". The Social Worker also recommends contact between respondent and the children and then recommends:

> "*The Court Order can remain in place at least until Ms R[...] M[...] has fully recovered*."

26] All these recommendations dated December 2019 superceded the parties' settlement and the Children's Court carefully considered the entirety of the facts, the affidavits and the experts' reports and carefully applied the relevant sections of the CA and s72(2) which states:

> *"(2) The court must consider the settlement and, if it is in the best interests of the child, may—*
>
> *(a) confirm the settlement and make it an order of court;*
>
> *(b) before deciding the matter, refer the settlement back to the parties for reconsideration of any specific issues; or*

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[6] Which deals with the factors a court will take into account when applying the "best interest" standard

[7] *"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."*

[8] And in terms of s63 that written report "… on its mere production…[is] admissible as evidence of the facts stated in the report."

(c) reject the settlement."

27] As to whether there was a valid s23 application, it was stated:

"In the original record, in the request for assistance or application was found dated 25 February 2019 together with a form to indicate […] the respondent in this matter brought an application to see her grandchildren. Meaning care and contact. It is not indicated in the application … that the grandmother was applying on behalf of her daughter for visitation."

28] But importantly, and insofar as the Rescission application is concerned, the appellant vigorously and valiantly argued that:

a) the grandmother failed to bring a proper s23 application – the application was brought by her "*on behalf of the biological mother*";

b) now that the biological mother is deceased, the order must be set aside;

c) the Children's Court failed to consider the background of the grandmother and that she is not a suitable person to exercise contact to the children;

d) that the court order reflects the incorrect surnames of the children and therefore the order contains mistakes; and

e) that the appellant "*made a mistake by making a flawed agreement an order of court."*

29] But I disagree. In my view: the court a quo correctly took all the relevant issues into account:

a) that the appellant signed a settlement on 24 August 2020 and "*thus knew the [contents] thereof especially that in terms of section 23 of the*

[C]hilden's [A]ct that certain rights and responsibilities was confirmed to the respondent.";

b) that the reports of the Family Advocate and Family Counsellor had investigated the background of the dispute, the parties' personal circumstances and all the appellant's concerns and the reasons that were "well documented" in the court papers, and no evidence was presented to show that contact with the respondent was not in the interest of the children;

c) that the Social Worker had documented that there was a good relationship between respondent and the children and she took good care of them.

30] In fact, the court a quo was at pains to deal with all complaints of appellant and despite those, dismissed the rescission application and ordered each party to pay their own costs.

31] It is trite that a court of appeal will only interfere with the order of the court a quo if it materially misdirected itself:

> *"The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order."*[9]

32] As to whether the court order was void or tainted by a common mistake, as:[10]

a) there was no proper s23 application before the court in respect of which any settlement could be made an order of court;

[9] Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A) at 670 D-F
[10] It was conceded during argument that no fraud was present

b) insofar as there may have been an application, the respondent purported to act as the applicant "on behalf of" the deceased who had not given permission for the application;

c) in any event, the agreement was only valid until such time as the deceased recovered from her illness.

33] In my view the court did not err as:

a) the applicant argues that the application was brought on behalf of the mother and that the order cannot stand as there is no self-standing application by the respondent for contact for herself. But it is clear from all the reports, the judgments and the papers filed in the Children's Court that an application by respondent was issued out of the Children's Court under case number 14/1/2-57/2019. Thus proper proceedings were initiated. It is also clear that the reports filed by the Family Advocate and the Social Worker were at the behest of the court;

b) the point is further that the appellant admits that he and the respondent settled the matter under case number 14/1/2-57/2019 on the terms set out in the order of 24 August 2020 – it is difficult to conceive how this settlement could be reached and made an order of court in the Children's Court in the absence of a pending lis between the parties;

c) the fact that the order also outlines the rights of the childrens' biological mother, who was not an actual party, is neither here nor there and does not impact on the validity of the order at all. Now that she is deceased, the order retains its validity as between appellant and respondent.

34] The appellant then argues that the court a quo erred in law by dismissing the argument that the respondent was interfering with the exercise of appellant's parental rights and responsibilities - but this has no bearing on a rescission application.

35] The litany of complaints listed by appellant go to the heart of the merits of the matter that served before the Childrens Court that led to the order of 24 August 2020. I don't intend to list them as they are in my view not relevant to the crux of this appeal which is clearly the following:

a) the appellant was content with entering into the agreement of 24 August 2020 at the time;

b) he implemented the terms of that order until it no longer suited him to do so;

c) he complains now about the order because he feels the order was too restrictive and because he felt that he was "*unable to live a normal life and/or enjoy [his] life with [his] children like any other family*;

d) that he is of the view that he needs to cut ties with the respondent and her family to avoid frivolous and vexatious litigation.

36] But the above does not comply with the prerequisites for the rescission of an order, in fact, on these facts the appellant should have exercised a very different remedy.

37] In my view, it is very clear from the record that the order of 24 August 2020 was not simply a "rubber stamp" of the parties' agreement – the court took into account the background of the matter since inception of the proceedings in 2018 and the reports of the Family Advocate and Social Worker.

38] These facts were again thoroughly canvassed by the Court a quo during the adjudication of the rescission application and I can find no fault with the court's reasoning.

39] In my view, the appellant has failed to make out a case and the application was correctly dismissed. As there is no cross-appeal before us that pertains to the costs order, that will remain.

ORDER

40]	The order made is:

1. The appeal is dismissed.

NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

GWALA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be

For the appellant	:	Adv K Ntjana
Instructed by	:	LMK Attorneys
For the respondent	:	No appearance
Matter heard on	:	31 May 2024
Judgment date	:	21 June 2024