

Court: Western Cape Division, Cape Town

Case No: 5570/2020

Date heard: 8 and 9 April 2020

Delivered: 14 April 2020

Judge: J Meer

DESCRIPTION

Children's Rights – National Lockdown – Whether children who had visited their grandparents in another province could travel back home to their parents during the National Lockdown

SUMMARY

Notes: On 23 March 2020 the President of South Africa, Mr Cyril Ramaphosa declared a 21-day National Lockdown to curtail the spread of the novel-coronavirus (Covid-19). Certain people such as the applicants in this matter were caught off-guard by the announcement.

(Par 1 - 2) On 6 April 2020 the parents of two minor children (LD and MD) applied to the court to have the Regulations published in terms of Section 27(2) of the Disaster Management Act, 57 of 2002 prohibiting the movement of persons between provinces during Covid-19 Lockdown to be dispensed with. They sought to travel from Cape Town to Bloemfontein to fetch their children who had visited the grandparents when Lockdown was announced and was not able to travel back to Cape Town. The applicants were divorced and there was a parental agreement that regulated the movement of the children between the parents.

(Par 4) The court noted that while Regulations published on 30 March 2020 prohibited movement of children between co-holders of parents, amended Regulations published on 7 April 2020 did not prohibit movement if there is a court order or parental agreement that regulates the movement of the children between the parents. (Par 11) While the amended Regulations did not cater for movement of children between parents and caregivers the court found that an inclusion in the exception of movement between a parent and a caregiver would be in line with Section 39(2) of the Constitution. Accordingly, the parents were allowed to travel to Bloemfontein to fetch their children.

Summarised by: Tshepo Munene (Admitted Attorney of the High Court of South Africa)



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THE REPUBLIC OF SOUTH AFRICA

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

Case No: **5570/2020**

Before the Honourable Ms Justice Meer
Hearing: 08 and 09 April 2020
Judgment Delivered: 14 April 2020

In the matter between:

C D

First Applicant

M D

Second Applicant

and

DEPARTMENT OF SOCIAL DEVELOPMENT

Third Defendant

JUDGMENT

MEER J.

[1] On 6 April 2020 the Applicants applied on an urgent basis for the Regulations published by the Minister of Cooperative Governance and Traditional Affairs in terms of Section 27 (2) of the Disaster Management Act no 57 of 2002 (“the Act”) on 2

April 2020, prohibiting the movement of persons between provinces during the Lockdown, to be dispensed with. The purpose of the application was to enable the First or the Second Applicant to travel from Cape Town to Bloemfontein and back, to fetch their children L D aged 10 and M D aged 7 (“the children”) from their grandparents’ home.

[2] The children had travelled to Bloemfontein on 22 March 2020 during the school holidays for a brief visit and were expected to return to Cape Town before the start of the school term on 31 March 2020. The Lockdown intervened at midnight on 26 March 2020 and the children found themselves locked down with their grandparents in Bloemfontein. The Applicants are divorced. In terms of their divorce order incorporating a consent paper and parenting plan, arrangements are in place for the children to move between the Applicants.

[3] The applicable Regulations which the relief as framed in the notice of motion sought to “be dispensed with” are Regulations 3 (b) (i) and (iii) published in Government Gazette No 43199, which pertain to restrictions on movement of persons and goods between provinces and between metropolitan and district areas. The Regulations amend previous Regulations of 30 March 2020 and state in relevant part:

“3. Regulation 11B of the Regulations is hereby amended by-

(a)

(b) The substitution for paragraph (a) of subregulation (1) of the following paragraph:

“(a) For the period of lockdown-

(i) every person is confined to his or her place of residence, unless strictly for the purpose of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving or chronic medical attention.

(ii)

(iii) Movement between provinces and between metropolitan and district areas is prohibited except-

(aa) for essential workers who have to travel to and from work.

- (bb) for transportation of cargo from ports of entry to their intended destination, on condition that necessary precautions have been taken to sanitise and disinfect such cargo;
- (cc) for the transportation of the mortal remains; and
- (dd) for attendance of a funeral as provided for and on the conditions set out in subregulation (8)”

[4] The movement of children between holders of parental responsibilities during the Lockdown was specifically regulated by Directions in terms of the Act emanating from the Minister of Social Development. A first set of Directions issued on 30 March 2020 prohibited the movement of children between co – holders of parental responsibilities during the Lockdown period. The Directions were amended on 7 April 2020 to introduce an exception to the prohibition, which permits the movement of children in certain circumstances. The amended Direction 1 (c) (“the Amended Direction”) states:

“1. Paragraph 6 of the Directions is hereby amended by-

(c) the substitution in subparagraph (m) for items (i) and (ii) of the following items:

“(i) Movement of children between co-holders of parental responsibilities and rights or a caregiver as defined in Section 1 (i) of the Children’s Act is prohibited, except where arrangements are in place for a child to move from one parent to another in terms of,

(aa) a court order; or

(bb) where a parental responsibilities and rights agreement or parenting plan, registered with the family advocate is in existence,

provided that, in the household to which the child is to move, there is no person who is known to have come into contact with, or is reasonably suspected to have come into contact with, a person known to have contracted, or reasonably suspected to have contracted, COVID -19;

(ii) the parent or caregiver transporting the child concerned must have in his possession, the court order or the agreement referred to in sub-items (aa) and (bb), respectively, or a certified copy thereof”

The Regulations and Directions above are thus the legal context applicable to this matter.

[5] The Respondent opposed the application in an affidavit by Mr Dladla its Chief Director, Legal Services on the basis *inter alia* that the Amended Direction does not create an exception relating to movement of children from a parent to a caregiver or vice versa. He also took issue with the fact that between 23 and 27 March 2020, no arrangements were made to move the children, and that the application was only launched on 6 April.

[6] On 8 April 2020 I heard the application. I found that there was no prohibition on the movement of the children as they fell within the exception of the Amended Direction, given that there is a court order with arrangements in place for their movement, as per the decree of divorce referred to above. I granted the following order in terms of the exception authorising *inter alia* the First Applicant to travel to Bloemfontein to fetch his children and return to Cape Town with them:

1. “The First-and Second Applicant are co-holders of Parental Responsibilities and Rights in respect of their minor children, L D and M D, (hereinafter “*the children*”), as referred to in Sections 18(2)(a) and 18(2)(b) of the Children Act.
2. An order in terms of the exception contained in Direction 1 (c) (i) of the Directions issued by the Minister of Social Development dated 7 April 2020, (No. R. 455 Government Gazette No. 43213), in terms of Regulation 10 (8) of the Regulations made under Section 27 (2) of the Disaster Management Act 57 of 2002, is granted as follows:
 - 2.1 The First Applicant is authorised and directed to travel between provinces and between district areas, from his residence situated in the Western Cape to the First Applicant’s parents’ residence at[...], Heuwelsig, Bloemfontein for the sole purpose of the movement of the children;
 - 2.2 The First Applicant is authorised and directed to fetch the children at[...], Heuwelsig, Bloemfontein, and to travel back with them to the Western Cape, to the residence of the First Applicant;

- 2.3 The First Applicant is permitted to sleep over for 1 (one) night after travelling to Bloemfontein at the paternal grandparents' home at the above mentioned address, after which the First Applicant and the children shall return to the First Applicant's address;
- 2.4 The First Applicant shall travel to Bloemfontein in the First Applicant's 7-seater Land Rover Discovery vehicle and the First Applicant and the children shall return to Cape Town in the said vehicle;
- 2.5 The children will subsequently only be allowed to travel from the First Applicant's address to the Second Applicant in the event that the Second Applicant is in possession of a certificate by an independent medical practitioner indicating that she has tested negative for the Covid-19 virus.
3. The Applicants shall comply with the current provisions of the current Regulations and Directions that have been issued by the Minister of Transport (as authorized in terms of Regulations issued in terms of ss27 (2) of the Disaster Management Act) pertaining to the transportation of persons in private vehicles and shall comply with the provisions of any Regulations and/or Directions that may be issued by the Minister of Transport during the period of the lockdown.
4. The Applicants shall cooperate fully with each other to give effect to the transport arrangements that comply with the relevant Regulations and all Directions in order for contact arrangements to be implemented.
5. The Applicants shall, in the best interests of the children, provide their full cooperation during this period to ensure that effect is given to the provisions of this Court order and the Regulations;
6. The Applicants undertake to ensure the safety of the children at all times and to ensure, in the event of either of them working at any time, to follow the relevant health guidelines upon their return home to minimize the risk of exposing the children to the COVID-19 virus.

7. This order dispenses with any further need for permit(s) to travel.
8. The Respondent shall pay the costs of this application”.

The reasons for my order appear from what is set out below.

[7] The Applicants are the biological parents of the children, and pursuant to a divorce order, as aforementioned, arrangements and a parenting plan are in place as envisaged in the Amended Direction, for the children to move between the Applicants. The Applicants and their children reside in Cape Town. The First Applicant’s parents, the grandparents who feature in this application, reside in Bloemfontein as aforementioned.

[8] In his founding affidavit the First Applicant states that his father, I D (“grandfather”) aged 72 and his mother N D (“grandmother”) aged 68 are willing for the children to visit for short periods, but are not equipped and able to look after them for long periods. Grandmother suffers from arthritis and having the children for an extended period is putting a strain on her ability to care for them. The situation has become strenuous to his parents’ overall personal well-being and affects their ability to properly care for the children and themselves, he adds. Should the grandparents fall ill of Covid-19 they will not be able to look after the children. The situation will worsen if the lockdown continues. He also expresses concerns that the grandparents will not be able to supervise homework. The First Applicant is a medical doctor and he states that the childrens’ health and well-being are being put at risk. He points out that he is equipped to deal with the childrens’ needs. Finally, he explains that even though the Applicants heard of the Lockdown travel ban, they were under the impression that they would be permitted to travel to Bloemfontein to fetch the children and were not aware of the strict extent to which the travel ban would be enforced.

[9] A memorandum by the Family Advocate of 7 April 2020, which supports the moving of the children, points out that there is no mention whether the grandparents are employing the Covid-19 precautionary measures, and states that the children require consistent management to ensure that they are abiding by the precautionary requirements of Covid-19 relating to good hygiene, regular sanitising and social distancing. Further to the memorandum, on 8 April 2020 a video conference interview was conducted by the Family Advocate at the request of the Respondent. A report by Laura Baartman who conducted the interview also urges that the children be returned to Cape Town.

- 9.1 From the interview with the grandmother, Ms Baartman's report states that the grandmother has chronic ailments of arthritis and backpain necessitating a schedule 3 medical prescription. The Lockdown has prevented grandmother's daily house help from coming in and grandmother has to attend to everything for the household and children. She is currently physically exhausted and her ailments are deteriorating as a result. She is normally accustomed to taking care of the children for shorter intervals and cannot cope in the current circumstances. This is going to impact negatively on her care for the children. They are quite active and she cannot manage them. The grandfather provides limited support. The children are going through different emotions and get heartbroken for not being with their parents.
- 9.2 An interview with the grandfather confirmed his wife's exhausted state as recorded in the report. He assists in playing with the children.
- 9.3 Interviews with the children revealed their desire to return home. Ms Baartman could not confirm whether the children are at risk in terms of hygiene or that their levels of hygiene are optimal as required.

Discussion**Is the movement of the children permitted in terms of the Amended Direction 1 (c) (i)?**

[10] It was common cause that the grandparents with whom the children are visiting temporarily, are caregivers as defined in Section (1) (i) of the Children's Act No 38 of 2005. They factually care for the children with the express consent of the parents. In terms of the Amended Direction movement of the children between their caregiver grandparents and parents is prohibited except where arrangements are in place for them to move from one parent to another in terms of a court order or parenting plan. There is currently precisely such an order, being a final order of divorce dated 8 July 2019 incorporating a consent paper and parenting plan registered with the Family Advocate, in terms of which arrangements are in place for the movement of the children from one parent to another. The movement of the children thus falls within the ambit of the exception as contained in the Amended Direction and Mr Nacerodien for the Respondent conceded as such. The Respondent's opposition on the basis that the Amended Direction does not provide for movement between parent and caregiver, cannot in the circumstances of this case succeed.

[11] There was some discussion as to whether movement from a caregiver without a pre-existing court order, (which was ultimately accepted as not being the circumstance in the instant case), fell within the ambit of the exception. Mr Smit, for the Applicants submitted that such movement of the children did fall within the ambit of the exception and that absent a pre-existing order this Court would be permitted to grant an order for the movement of the children. It is, I think apposite that I comment briefly on these aspects.

11.1 It would seem to me that the omission in the exception to cater for movement from a caregiver, appears to be at odds with the preceding reference to movement of children "between co holders...or a caregiver". An inclusion in the exception of movement between parent and caregiver would be an interpretation in line with Section 39 (2) of the Constitution, exhorting as it

does for legislation to be interpreted to promote the spirit and purport of the Bill of Rights , in this case Section 28 (2) of the Constitution and Bill. That section states that a child's best interests are of paramount importance in every matter concerning a child.

11.2 The Amended Direction does not specify that movement of children can only take place in terms of a pre-existing court order as alluded to by the Respondent. My reading of the direction does not prevent a court from making an order as required, presumably in circumstances of urgency, and for movement of children to take place in accordance with arrangements put in place by such order.

[12] Finally, *appropo* the Amended Direction it is to be noted that proviso to the exception is catered for in paragraph 2.5 of the order I granted. The children will only be permitted to travel to the Second Applicant on proof being provided that she has tested negative for COVID-19.

The Evidence

[13] The unrefuted evidence makes clear that the task of caring for the children by the grandparents is already proving not to be sustainable and this will only continue and be exacerbated over a further prolonged period. The well-being and physical health of the children in these turbulent times are being placed at risk. The situation is clearly an urgent and troubling one, and the issues raised by the Respondent pertaining to the failure to move the children before the lockdown or the fact that the application was brought on 6 April, does not detract from the urgency. The best interests of the children would undoubtedly be served if permission were to be granted for them to be fetched to travel from Bloemfontein to Cape Town.

Costs

[14] Whilst the notice of motion omitted a prayer for costs, the founding affidavit clearly sought costs, in the event of the application being opposed. Mr Nacerodien's

submission that costs should not follow the cause on account of the omission in the notice of motion, cannot prevail. Relevant to the question of costs also, is the Respondent's curious refusal to enter into a settlement agreement notwithstanding the concession that the circumstances of this case fell within the ambit of the exception contained in the Amended Direction which permitted the movement of the children, and notwithstanding the unrefuted evidence. The question of a settlement was raised on more than one occasion during telephone conferences.

[15] In view of all of the above I granted the order as set out in Paragraph 6 above.

Y S MEER
Judge of the High Court