THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 695/2010**

In the matter between:

S Appellant

and

Mrs J First Respondent

Mr J Second Respondent

Neutral citation: ***S v J*** **(695/10) [2010] ZASCA 139 (19 November 2010)**

Coram: LEWIS, BOSIELO JJA and R PILLAY, BERTELSMANN

and K PILLAY AJJA

Heard: 5 NOVEMBER 2010

Delivered 19 NOVEMBER 2010

Summary: Parental rights and responsibilities under the Children's Act 38 of 2005: unmarried father's responsibilities and rights; grandparents' responsibilities and rights; jurisdiction of high court to set aside or suspend operation of another high court's order.

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ORDER

On appeal from: High Court (Northern Cape) (Kgomo JP sitting as court of first instance in three applications):

The following orders are made.

A

1 The appeal against the whole of the order of the Northern Cape High Court made on 2 October 2009 succeeds, with costs.

2 That order is replaced with the following:

'(a) The first and second applicants' application is dismissed.

(b) It is declared that the first respondent is the holder of full parental responsibilities and rights in terms of s 18 of the Children's Act 38 of 2005.

(c) C shall reside permanently with the first respondent.

(d) The applicants may have contact with C on a regular basis, which should be arranged with Mrs A J, the mother of Mrs A S, and which should take place at the home of Mrs A J or at a place agreed by Mrs A J and the first applicant. All such arrangements should be discussed with the first respondent prior to contact taking place.

(e) In the event that the parties experience difficulty in arranging contact they must first attempt to resolve this through a mediator rather than through court proceedings.'

B

1 The appeal against paragraphs 2, 3 and 4 of the order made by the Northern Cape High Court on 30 October 2009 succeeds with costs.

2 The order is replaced with the following:

'The first and second applicants' application is dismissed.'

C

1 The appeal against the order made by the Northern Cape High Court on 21 May 2010 succeeds with costs.

2 The order is replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

LEWIS JA (BOSIELO JA AND R PILLAY, BERTELSMANN AND K PILLAY concurring)

[1] C S was born on 23 January 2006. Her father, Mr S, is the appellant in this matter. Her mother, Ms R, died two months after C's birth. She suffered from a congenital heart defect and was operated upon on the same day that C was born in an attempt to remedy the defect. Regrettably she did not recover. S and R were not married at the time of C's birth. But they were living together at the time and intended to marry.

[2] The first respondent, Mrs J, was the mother of R, and thus the maternal grandmother of C. She is married to the second respondent, Mr J, but the latter was not R's father. The parties have been engaged, virtually since C's birth, in a battle for the custody and guardianship of the child. (In terms of the Children's Act 38 of 2005, parts of which came into operation in 2007, and the balance in 2010, the term 'custody' is replaced with the obligation to care for a child, which is included in 'parental responsibilities and rights'. I shall discuss the Act and its implications later.)

[3] Numerous applications to court to have C live with them have been made over the nearly five years of C's life by the respective parties, with different results. These have been made both in the Northern Cape High Court and in the Western Cape High Court. This appeal is against three orders made by the Northern Cape High Court, all by Kgomo JP, with the

leave of this court. Each order will be dealt with separately. Suffice it to say for the moment that Kgomo JP ordered that care and guardianship of C be awarded to the Js, but that S be given rights of contact (access) – orders completely at odds with all other orders made by both the Northern Cape and Western Cape High Courts in previous litigation.

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[4] This court also asked Ms Ann Skelton, assisted by the Child Care Centre, University of Pretoria, to act as curator ad litem on behalf of C, and to present argument on her behalf. We are indebted to her and to the Child Care Centre for the extremely thorough and helpful report and argument presented.

[5] There are a number of issues that must be determined: the best interests of C; the rights of unmarried fathers; whether the Northern Cape and Western Cape High Courts had concurrent jurisdiction at the times their respective orders were made; and the extent of grandparents' rights in respect of children. I shall deal, first, however, with the history of the matter.

[6] As I have said, at the time of C's birth S and Ms R were living together in Paarl and had been for some 18 months prior to her birth. Although the Js dispute this, S alleged that he and Ms R intended to marry after the birth of C and there was other evidence that this was so.

[7] Currently C lives with S and his wife, A, in Paarl. They married in June 2007. She has a half-brother who was born about a year before this appeal. The Js live in Keimoes, on a farm. And C spent the first couple of years after her birth living in Keimoes with them. It is common cause that Mrs J went to Paarl to be with Ms R when she gave birth. It is also not disputed that S took a month's leave from work to be with Ms R over the birth and thereafter. Before

Ms R died she took C to Keimoes to visit her family. She fell gravely ill there and returned to Paarl with her mother and C, but died in hospital.

[8] A few days later Mrs J took C back to Keimoes with her. S alleged that this was done without his consent: he had left C with Mrs J while he went to do some errands and when he returned to his home C and her things were gone. Mrs J, in various proceedings, has alleged that she took C with S's permission. In the course of doing an investigation a family advocate concluded that S's version was more probable. This dispute has not been resolved, but in my view nothing turns on it at this stage.

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[9] Ms R was buried in Keimoes in April 2006. S was faced at the funeral with papers for a hearing in the Children's Court (served in the company of police officers whose presence was arranged by Mr J), the Js having asked for an investigation with a view to obtaining custody and guardianship of C. At the time the Child Care Act 74 of 1983 was in operation, as was the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. A hearing in the Children's Court commenced towards the end of April 2006. It took until February 2008 to conclude, at which stage C was already two, and had been living in Keimoes with the Js.

[10] Before the decision of the Children's Court was made, S brought an urgent application in the Northern Cape High Court for a declaratory order in terms of s 21 of the Children's Act, by then in force, confirming his full parental rights and responsibilities (I shall deal with the section later) and affording him access (now termed contact) to C. The application was postponed.

[11] On 26 February 2008 the Children's Court ordered that C be placed in

her father's care, and reside with him, following a process of reunification that was to take place from February until August of that year.

[12] But in August 2008 the Js brought an urgent application, heard by Olivier J, asking for a suspension of the reunification process; parental rights and responsibilities in respect of C; and that S's rights be limited to reasonable contact. Olivier J issued a rule nisi and referred the matter back to the Children's Court. S brought a counter application a month later for a declaratory order that he held full parental rights and responsibilities and that he be given contact with C pending the finalization of the Js' application.

[13] The rule nisi was extended on three occasions subsequently, in September and October 2008. In November 2008 Majiedt J extended it again, until 30 January 2009, and made orders as to the appointment of psychologists to facilitate contact between S and C. He also ordered that C spend one weekend a month with S in Paarl and one per month in Keimoes. The order required reports by experts to be filed indicating the progress made

in reuniting C with her father. That order too was extended, once by Majiedt J and once by Tlaletsi J in February 2009.

[14] On 19 February 2009 the family advocate, Mr Andries Nel, filed his report, stating that S had automatically acquired full parental rights and responsibilities by virtue of s 21 of the Children's Act, and recommending that C reside with her father, subject to a process of integration and to rights of contact being afforded to the Js. At that stage C was three. The rule nisi was extended yet again.

[15] On 27 February 2009 Lacock J in the Northern Cape High Court made

an agreement between the parties an order of court. It extended the rule nisi and ordered the reintegration process in accordance with the recommendation of Mr Nel. That was followed (on 6 March) by another order by agreement, extending the order of Lacock J for another month and ordering contact between S and C in Paarl in March. That took place for some two weeks, and the rule nisi was extended by Henriques AJ until 7 August 2009. In fact, C started living in Paarl with her father and stepmother without interruption from July 2009.

[16] Despite the recommendation of the family advocate and the orders made by agreement, and despite the fact that C had settled in Paarl – of which more later – the Js applied to the Northern Cape High Court in August 2009 for an order that the question of parental rights and responsibilities be referred to oral evidence. Kgomo JP heard the application, but the request for referral to oral evidence was abandoned. On 2 October 2009 he ordered that 'custody and guardianship' of C be awarded to the Js; that they be awarded full parental responsibilities in terms of s 18 of the Children's Act; that C live permanently with the Js and that S be given the 'right of reasonable access' to C to be determined in accordance with recommendations from the parties' respective psychologists. If they reached agreement it would be made an order of court on 20 October 2009. This is the first order appealed against.

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[17] A day after the order was made by Kgomo JP, S launched an urgent application in the Western Cape High Court asking for a stay of the order pending the filing of an application for leave to appeal. Bozalek J granted the order, effective until 9 October, or until the filing of the application for leave,

whichever was the earlier. On 9 October S filed the application for leave to appeal in the Northern Cape High Court.

[18] On 19 October 2009 the Js filed an urgent application to enforce the order of Kgomo JP, this despite the filing of the application for leave to appeal. In response S launched yet another urgent application in the Western Cape High Court for a 'variation' of the order of Kgomo JP. Yekiso J granted a rule nisi with a return date of 27 November 2009 and ordered that C should continue to live with S in the interim period.

[19] S also filed a supplementary affidavit in the Northern Cape High Court, prior to the date when Kgomo JP was to hear whether agreement had been reached on contact between himself and C, explaining that he had applied for leave to appeal. Kgomo JP, on 30 October, struck the application for leave to appeal from the roll (despite the fact that it had not yet been enrolled), citing non-appearance by S as the reason; ordered S to 'deliver' C to the Js within seven days; and ordered the enforcement of the order of 2 October. This is the second order appealed against.

[20] An application for leave to appeal against the second order of the judge president was filed on 2 November 2009. The Js immediately, on 12 November, filed an application for an order holding S and his attorney, Ms Odette Deysel, in contempt of court. On 21 May 2010 Kgomo JP found S in contempt of court ('disobedience' of the orders of 2 October and 30 October 2009 and the order of 25 March 2010) and ordered imprisonment of S for one month, suspended for ten days on condition that he 'delivers' C to the Js. The judge president also ordered each of S and Deysel to pay to the applicants 50 per cent of the taxed costs of the Js on the attorney and client scale. This is

the third order appealed against.

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[21] However, prior to the third judgment and order being handed down, Louw J in the Western Cape High Court heard the application of S for the confirmation of the rule nisi issued by Yekiso J earlier in the year and handed down judgment on 5 March 2010. He discharged the rule nisi but ordered that, pending S's appeal in the Northern Cape High Court, the execution of the order of Kgomo JP be stayed.

[22] On 9 June 2010 S applied for leave to appeal against the order of Kgomo JP made on 21 May 2010 in the Northern Cape High Court. Leave was refused on the basis that the application was brought only to frustrate the 'delivery' of C to the Js and that there were no reasonable prospects of success on appeal. As I have said, this court granted leave to appeal against the three orders of Kgomo JP in September 2010.

The legal framework

Unmarried fathers' rights and responsibilities

[23] As I have indicated the law governing the rights of an unmarried father changed during the course of the litigation. When C was born the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 applied. It did not confer custody and guardianship on an unmarried father even on the death or incapacity of the mother. And in the absence of a will directing otherwise grandparents also did not have these powers without an order of court.

[24] However, during the course of the disputes, the Children's Act 38 of 2005 came into operation, in part in 2007 and the balance in 2010. Section 21 of the Children's Act, which came into operation on 1 July 2007, is

fundamental in this matter. The relevant part reads:

‘21 Parental responsibilities and rights of unmarried fathers

(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; . . .

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Section 20 deals with the parental responsibilities and rights of married fathers. And s 21(4) states that s 20 applies ‘regardless of whether the child was born before or after the commencement of this Act’.

[25] If, therefore, S and R had been living in a ‘permanent life partnership’ at the time of C’s birth he would automatically have acquired parental rights and responsibilities when the section came into operation on 1 July 2007.

Grandparents’ rights and responsibilities

[26] Sections 23 and 24 of the Children’s Act, which govern non-parental rights to care and guardianship respectively, came into operation on 1 April 2010. Section 23 allows any person having an interest in the care, well-being or development of a child to apply to an appropriate court for rights of contact and care, subject to the best interests of the child. Section 24 deals with the assignment of guardianship. Before that date grandparents had no inherent rights or responsibilities. It was only a high court, as the upper guardian of a child, that could confer access, custody or guardianship on a grandparent. And of course that too would be done only if it were in the best interests of a child – an assessment that would have been made having regard to the rights

of the biological parents.[1]

The first judgment and order: 2 October 2009

[27] Ms Anderson, for S, contends that in reaching the conclusion that guardianship and care of C should be awarded to the Js, Kgomo JP made a number of factual errors. This is undoubtedly so. I mention but a few. They included that S had 'shacked up' with R and that they were not in a 'permanent love relationship'. This was contrary to all the evidence. They had lived together for at least a year prior to C's birth; they intended marrying afterwards; S had taken a months' leave from work to care for R and the baby after her birth, and did in fact do so, together with Mrs J.

[1] See in this regard *Townsend-Turner v Morrow* 2004 (2) SA 32 (C) at 42ff. The case dealt of course with the position before the Children's Act came into operation. It was followed in *Kleingeld v Heunis & another* 2007 (5) SA 559 (T) paras 6-10.

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[28] The permanence of the relationship, and the love that Ms R felt for S, are demonstrated in a diary that R kept before she gave birth, in which she wrote to her unborn child saying that they both had to 'hold on to life – so me, you and your dad can be together soon . . . . He loves us so much . . .'. Although Ms R's sister alleged that Ms R had confided to her before the birth that Mrs J should look after the baby should Ms R die, there was no evidence to support this and its seems improbable in the light of what was written in the diary, which was not contested.

[29] Kgomo JP found too that the Js had brought C up as their own child 'without any demur from any quarter'. In the light of the history of the litigation, and of the process of reunification, described earlier, this conclusion has no

foundation.

[30] Even more extraordinary is the judge president's conclusion that C should not be uprooted from the 'secure, familiar and warm environment that she finds herself in'. In fact, C was living with her father and stepmother in Paarl, in terms of the court order granted in the Northern Cape High Court, and after the process of reunification, when Kgomo JP made his order.

[31] Ms Anderson also contends that the judge president came to incorrect legal conclusions. I have set out the principles relating to care and guardianship above. By virtue of s 21 of the Children's Act, S, who was living in a permanent life-partnership with R at the time of C's birth, acquired full parental responsibilities and rights in respect of C before the Js themselves applied for such responsibilities and rights. At the time that they did so – in August 2008 – the sections of the Act that would have allowed for them to acquire such rights and responsibilities (ss 23 and 24, which permit a court to grant care, contact and guardianship to an interested person) were not in operation: they applied only from 1 April 2010. Of course, as I have said, the high court would have had jurisdiction, as the upper guardian of all children, to award such rights to grandparents.

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[32] But as S argues, his inherent right as a biological father had to be taken into account, subject, obviously, to whether it was in C's best interests. Note that s 7 of the Children's Act attempts a codification of what factors must be taken into account in determining what is in the best interest of a child. I shall not deal with it since there is no dispute between the various experts who have reported on C's best interests, to which I shall return. But it is

significant that section 9 of the Children's Act, in operation at the time when the first order was made, was also not referred to nor applied by Kgomo JP. It provides:

'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.'

Given the fact that reunification of C and S had taken place and that it was known to have been successful at the time of the first order, it could not have been thought by any court that it was in her best interest that she be moved from her family in Paarl and taken to the Js in Keimoes.

[33] Kgomo JP seemed to be oblivious of the law in this regard when he ordered that the Js be awarded care and guardianship of C, and continued to ignore the legislation (and the child's best interests) in subsequent judgments as well. He also ignored the orders of the Northern Cape High Court, made by agreement, which required the parties to follow an integration process, as well as the reports of psychologists that it had in fact run smoothly. The court also seemed oblivious of the fact that S had already acquired parental responsibilities and rights in respect of C, by virtue of s 21 of the Children's Act, and that it was in effect depriving him of those responsibilities and rights.

[34] The judge president's finding that it would be in the best interests of C that her care and guardianship be awarded to the Js, subject to S's rights of 'reasonable access', was thus not warranted. It was based on factual errors and a misunderstanding of the law. The appeal against it must succeed. I shall deal with the order that should be made after considering the other orders made by Kgomo JP. First, however, it is necessary to deal with the judgment and order of Louw J in the Western Cape High Court.

The judgment and order in the Western Cape High Court of 5 March 2010:

Jurisdiction in matters concerning a child

[35] It will be recalled that after Kgomo JP handed down the order discussed above, S sought an order that, pending the filing of a notice of appeal in the Northern Cape High Court, that order be stayed. He also obtained an opinion from a psychologist, Dr Bredenkamp, on the position then of C. She reported that C had settled into the S family happily and recommended that she remain with them in Paarl. (S has sought and been given leave to file an additional report of Bredenkamp on C and the family, and I shall deal with it briefly, together with the findings and recommendations of the curator ad litem in due course.) A rule nisi was issued and then extended to 10 February 2010.

[36] S's application for confirmation of the rule came before Louw J. He considered that the Western Cape High Court did have jurisdiction over C because she was resident in its area of jurisdiction. But the judge also concluded, correctly in my view, that the court did not have the jurisdiction to set aside or vary the order of another high court. Louw J nonetheless held that as upper guardian of minors within its jurisdiction, the Western Cape High Court had the power to make any order necessary for the protection of a child. He buttressed this conclusion with reference to s 28(2) of the Constitution which provides that 'A child's best interests are of paramount importance in every matter concerning the child'. As Ms Anderson argued, this was consonant with the decision of the full court in the Western Cape in *J v J*,[2] by which Louw J was bound, that a court is not only empowered, as upper

guardian of children within its jurisdiction, but also obliged to deal with all facts relevant to the best interests of a child.

[37] It was clear to Louw J that it was in C's best interests to continue living with her father in Paarl. That obliged the court, it considered, to order a stay of execution of the order of Kgomo JP pending the final resolution of the case in the Northern Cape High Court. It so ordered. In my view the Western Cape

2 2008 (6) SA 30 (C) para 20.

High Court did have the jurisdiction to make the order in respect of C, who was resident within its jurisdiction at the time. That order did not vary or set aside the first order made by Kgomo JP: it merely suspended its execution pending the appeal noted by S.

[38] That said, I would caution against a practice of forum shopping even in cases concerning disputes over parenting rights and responsibilities. High courts should not in general be faced with litigation requiring them in effect to set aside an order made in another jurisdiction. And as a rule, since one is entitled to assume that any order has been made in the best interests of a child, should those interests change over time the court that made the initial order should be approached for a variation. Much of the difficulty may now be resolved with the enactment of s 29 of the Children's Act, which came into operation only in 2010. It provides that an application under ss 23 and 24 (for parental responsibilities and rights by an interested party) may be brought in a high court within whose area of jurisdiction the child is ordinarily resident. Where that does not assist, however, reliance on formalism and a resort to inflexible rules is to be discouraged, a matter to which I shall revert when

dealing with the second judgment in the Northern Cape High Court.

The second judgment and order in the Northern Cape High Court: 30 October 2009

[39] On 9 October 2009 S filed an application for leave to appeal against the first order of 2 October. A week later the Js brought an urgent application seeking the immediate implementation of the first order. It was set down for hearing on 20 October. Mrs J, in her founding affidavit, asserted that S had applied for leave to appeal only in order to circumvent the order of Kgomo JP. In response, Deysel, on the instructions of S, explained why leave was being sought, and annexed the application that had first served before Bozalek J in the Western Cape High Court; a letter confirming that the Js had refused to accept service of the application and the first report of Dr Bredenkamp. She also attached a letter to the Js' attorney in which she had invited them to participate in a further assessment to be conducted by Dr Bredenkamp.

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[40] But after S had obtained the first interim order from Yekiso J in the Western Cape High Court – that C reside with him in Paarl – he decided not to continue with the opposition to the urgent application: the costs of instructing an attorney and counsel in the Northern Cape were beyond his means. He filed a supplementary affidavit to this effect. Deysel also filed another affidavit explaining that there would be no appearance for S on 20 October 2009 (the date determined by Kgomo JP in his first order for any agreement reached as to S's contact with C to be made an order of court) since the filing of the application for leave to appeal had suspended the operation of the order.

[41] Kgomo JP nonetheless struck the application for leave to appeal from the roll with costs, and handed down a further judgment and order on 30 October. He felt constrained to do so by S's 'forum-shopping or forumhopping with the singular motive of avoiding the consequences of the order of this Court . . .'. The judge president had clearly been offended by the attempt by S to act in his child's best interest. And he reacted indignantly to a statement by Deysel that one of the reasons for abandoning the opposition to the J's' urgent application for the implementation of the first order was that she had been advised that it was unlikely that the urgent application would be heard over a weekend, and that an advocate would not be available. The judge president said:

'This statement is preposterous, far-fetched and ridiculous. A party cannot create jurisdiction synthetically in another forum on some outlandish belief that counsel might not be available to argue his case.'

He accused her also of being 'mischievous'. And he continued:

'Ms Deysel's attitude and conduct is testimony to her utter ignorance of the Rules of Court and her abject discourtesy to this Court by agitating non-appearance.'

[42] The judge president ordered that S could apply for leave to appeal only with a 'substantive application being made and on good cause shown'. He ordered S to 'deliver' C to the home of the Js, and to pay the costs of the application on the attorney and client scale. He also – astonishingly – granted

the Js 'leave to bring an application for Contempt of Court . . . on the same papers suitably supplemented'.

[43] The judgment regrettably evinces a bias against S. The intemperate

language used, and the complete failure to consider C's interests, are to be deplored. S does not rely on bias as a ground on its own in seeking to overturn the order. But in my view, the argument that he stepped into the arena by inviting the Js to bring an application for an order that S was in contempt of court is sound. The invitation is explicable only on the basis that the judge president was more concerned about legal niceties than the child's best interests. This is precisely what the Constitutional Court enjoined parties in disputes concerning children not to do: *AD and DD v DW & others (Centre for Child Law as Amicus Curiae; Department of Social Development as intervening Party)*.[3] The court endorsed the view of the minority in this court that the interests of children should not be held to ransom for the sake of legal niceties.[4] As Sachs J said, in endorsing the approach of the minority, a child's best interests 'should not be mechanically sacrificed on the altar of jurisdictional formalism'.[5]

[44] The judge president erred also in not alluding to Dr Bredenkamp's first report which had been placed before him. Whatever C's best interests were when she lived with the Js, they had to be reconsidered after she had gone to live with S pursuant to the reintegration process. As Hurt J stated in *P v P*:[6]

'I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.'

See also *J v J*.[7]

3 2008 (3) SA 183 (CC) para 30.

4 *De Gree v Webb* 2007 (5) SCA 184 para 99.

5 Para 30.

6 2002 (6) SA 105 (N) at 110C-D.

7 Above para 20.

[45] The appeal against this judgment and order must also succeed. The conclusions reached by Kgomo JP have no basis in fact or in law; evince bias on his part; and fail to consider at all the only real issue: what was in C's best interests. The order that S pay costs on the attorney client scale was completely without justification: he had acted in what he considered was his child's interest. S filed an application for leave to appeal against this order on 6 November 2009.

The third judgment and order of the Northern Cape High Court: 21 May 2010

[46] On 10 November the Js accepted the invitation of Kgomo JP to apply for an order that S be found guilty of contempt of court. They added Deysel in as a respondent for good measure. By the time it was heard Louw J in the Western Cape High Court had ordered that C remain with her father in the Western Cape pending the appeal against the first order.

[47] Kgomo JP considered the conclusion of Louw J, that he had jurisdiction to determine where C should reside pending the appeal, to be incorrect. It was the judge president's view that once he had made the first order he was functus officio: the custody issue, he said, was not pending. It had been decided. That the judge president had struck the application for leave to appeal from the roll because of S's non-appearance (the fact that it had not been set down apparently did not occur to him) seemed to be of no consequence. Nor did the fact that C was resident in Paarl when the first

order was made – and that the Western Cape High Court had jurisdiction as the upper guardian – feature in his judgment. And of course the judge president did not appreciate the fact that in making the first order he was depriving S of his parental rights and responsibilities.

[48] Nonetheless Kgomo JP found that S was in contempt of his various orders: 'guilty of disobedience'. Although citing the principle that a breach of an order must be deliberate and mala fide in order to constitute contempt of court, Kgomo JP did not in fact apply it. S was clearly acting bona fide, in accordance with an order of the Western Cape High Court and on legal advice. He did not, however, find Deysel guilty of contempt of court. But the

order that S and Deysel pay the costs of the application (the latter de bonis propriis) on the attorney client scale was without any justification. Indeed, Mr Schreuder for the Js conceded that the orders were ill-founded. The appeal against the third order must also succeed.

The best interests of C

[49] Ultimately this case is about C's best interests. They have not been served thus far by the Northern Cape High Court. It is clear now from the extensive reports of Dr Bredenkamp and Ms Skelton that C is best off living with her father and stepmother, A. She has settled comfortably in her home, with her younger half-brother, and has developed a very strong bond with A and her half-brother. She has also developed a warm and loving relationship with her paternal grandparents and A's parents.

[50] Dr Bredenkamp has conducted extensive psychological tests all of which show C to be a happy child, apparently unscathed by the legal disputes

over her. Ms Skelton has interviewed many people associated with C, and made recommendations about contact with the Js. S is quite willing to allow them contact in the circumstances recommended by Ms Skelton, which I shall make part of the order. C herself indicated that she wished to live with the S family and did not want to go back to Keimoes, although she did want to see the Js in Paarl.

[51] It should be mentioned that Ms Skelton formed the view that the Js were more concerned about their interests than those of C. Mr J (who, it will be recalled is not in fact C's grandfather) has firm religious views on the importance of C living with them. And Mrs J believes (contrary to the evidence in R's diary) that R wanted C to live with her in the event of her death. None of this is of importance since it is not in the child's interest to live with the Js.

[52] I referred earlier to grandparents' rights and responsibilities in respect of their grandchildren, and to *Townsend-Turner v Morrow* in which Knoll J referred to recent research on the important role that grandparents may play in the lives of their grandchildren. That role is recognized in this matter and

discussed by Ms Skelton. But as she points out, C has formed a bond with her paternal grandparents and with the parents of A. Indeed, she recommends that contact between C and the Js be facilitated through A's mother, Mrs A J, and Ms Anderson agrees that this should be the case.

[53] Mr Schreuder for the Js did not attempt to argue that it was in C's best interest to live with the J's. He accepted the soundness of the Bredenkamp and Skelton recommendations. He did, however, submit that the Js should not be ordered to pay the costs of the appeal. They had opposed it in the genuine

belief that C was best off living with them. I do not accept the argument. In the face of all evidence to the contrary they have refused to accept that C is best off living with her father, stepmother and half-brother. S has had to go to extraordinary lengths to exercise his rights and to protect his child's interests. I see no reason to deprive him of the costs of the appeal.

[54] I record too that the litigation has not been in any of the parties' interests. Clearly, after Ms R's death in particular, emotions ran high. All wanted to keep C with them. But had the Js not ambushed S at the funeral with papers in respect of proceedings in the Children's Court, and had all concerned attempted to talk about her genuine best interests, they would not have spent nearly five years embroiled in a dispute about her residence. This was not only at great emotional cost to all, but also at great financial cost which none of them could really afford. Fortunately C's interests have been served by Deysel who has acted pro bono. I endorse the views expressed by Brassey AJ in *MB v NB*[8] that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort. Legal practitioners should heed s 6(4) of the Children's Act which provides that in matters concerning children an approach 'conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided'.

[55] The following orders are made.

8 2010 (3) SA 220 (GSJ) paras 52 to 59.

A

1 The appeal against the whole of the order of the Northern Cape High Court

made on 2 October 2009 succeeds, with costs.

2 That order is replaced with the following:

'(a) The first and second applicants' application is dismissed.

(b) It is declared that the first respondent is the holder of full parental responsibilities and rights in terms of s 18 of the Children's Act 38 of 2005.

(c) C shall reside permanently with the first respondent.

(d) The applicants may have contact with C on a regular basis, which should be arranged with Mrs A J, the mother of Mrs A S, and which should take place at the home of Mrs A J or at a place agreed by Mrs A J and the first applicant. All such arrangements should be discussed with the first respondent prior to contact taking place.

(e) In the event that the parties experience difficulty in arranging contact they must first attempt to resolve this through a mediator rather than through court proceedings.'

B

1 The appeal against paragraphs 2, 3 and 4 of the order made by the Northern Cape High Court on 30 October 2009 succeeds with costs.

2 The order is replaced with the following:

'The first and second applicants' application is dismissed.'

C

1 The appeal against the order made by the Northern Cape High Court on 21 May 2010 succeeds with costs.

2 The order is replaced with the following:

'The application is dismissed with costs.'

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C H Lewis

Judge of Appeal

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APPEARANCES

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