



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

SIGNATURE

DATE: 18 October 2022

Case No. 14941/2022

In the matter between:

ZIO

Applicant

and

JSO

Respondent

JUDGMENT

WILSON AJ:

- 1 The applicant, Mr. O, is presently divorcing the respondent, Mrs. O. The divorce action is pending in this court. On 15 June 2021, Manoim J, then sitting as an Acting Judge, made an interim order regulating the parties' rights and obligations regarding spousal maintenance, residence and contact with the parties' minor children, and a contribution towards Mrs. O's legal costs.

- 2 The 15 June 2021 order provided that the parties' three young children would reside with Mrs. O, subject to daily in-person contact with Mr. O. That arrangement could only be altered on the recommendation of either one of two social workers identified in the order, and even then only once the order had been varied in terms of Rule 43 (6) of the Uniform Rules of Court. It was accepted before me that no such variation had been sought or granted.
- 3 The arrangement worked well until Mrs. O expressed a wish to relocate to Stellenbosch with the children. Mr. O was naturally opposed to this, as it would make the implementation of the 15 Jun 2021 order impossible. Mr. O would not be able to exercise daily in-person contact with the children if he lived in Johannesburg and Mrs. O lived with the children in Stellenbosch.
- 4 Mr. O understandably took the view that Mrs. O could not relocate to Stellenbosch before seeking a variation in the 15 June 2021 order. However, it soon became clear that Mrs. O did not share that view, and that she intended to relocate without seeking the leave of the court.
- 5 In an effort to prevent this, Mr. O applied urgently to this court for an order restraining Mrs. O from relocating with the children. The matter came before van Nieuwenhuizen AJ. On 10 May 2022, van Nieuwenhuizen AJ granted an order permitting Mrs. O to relocate to Stellenbosch with the children, and making various ancillary orders. These included an order requiring a psychologist, Megan Main-Baillie, to investigate whether the relocation was in the children's best interests, and imposing a new contact regime between Mr. O and the children. This included a provision completely suspending any

in-person contact between Mr. O and the children for six weeks from the date of the order – although daily virtual contact was permitted.

- 6 Nieuwenhuizen AJ's order does not explicitly vary the 15 June 2021 order, and it is not clear from Nieuwenhuizen AJ's written judgment whether he had regard to the interaction between the order he made and the 15 June 2021 order.
- 7 Aggrieved, Mr. O sought leave to appeal against van Nieuwenhuizen AJ's order. Van Nieuwenhuizen AJ refused leave to appeal on 25 May 2022. Mrs. O relocated to Stellenbosch with the children on the same day.
- 8 On 2 June 2022, Mr. O renewed his application for leave to appeal directly to the Supreme Court of Appeal. The Supreme Court of Appeal has not yet ruled on the application for leave to appeal against van Nieuwenhuizen AJ's order.
- 9 On 15 June 2022, Mr. O applied urgently to this court for an order declaring that his application for leave to appeal against van Nieuwenhuizen AJ's order had the effect of suspending it. That application came before Swanepoel AJ, who found that van Nieuwenhuizen AJ's order had been suspended, and issued a further order directing that the children be brought back to Johannesburg. That order attracted an application for leave to appeal from Mrs. O. Swanepoel AJ refused leave to appeal, but Mrs. O has now renewed the application before the Supreme Court of Appeal.
- 10 Mr. O now seeks leave to execute Swanepoel AJ's order pending Mrs. O's appeal. He also seeks an order declaring Mrs. O to be in contempt of

Nieuwenhuizen AJ's order, insofar as it requires her to allow Ms. Main-Baillie to perform an assessment of the children's best interests. The essence of that contempt is said to be that Mrs. O is refusing to allow the assessment to take place in Johannesburg.

The interim execution application

- 11 Section 18 (3) of the Superior Courts Act 10 of 2013 provides that an order may only be executed pending appeal in exceptional circumstances, and, even then, only when the applicant for interim execution will suffer irreparable harm, and the respondent will not suffer such harm.
- 12 In matters of this nature, the section 18 (3) test takes on a slightly different character. The inquiry is into the balance of harm between the parties in their capacities as parents, not in their personal capacities. In this case, that inquiry reduces to whether it would be in the children's best interests to be brought back to Johannesburg pending the exhaustion of the appeal proceedings. The fact that Mr. O cannot presently have daily in-person contact with his children does not in itself mean that it would be in the children's best interests to be temporarily returned to Johannesburg pending appeal.
- 13 If I had the jurisdiction to make a final order preventing the children from being relocated from Johannesburg, I would have had no hesitation in doing so. It seems to me that the residence and contact regime set out in the 15 June 2021 order ought to have been left in place unless and until the various reports the order itself provided for had been submitted and considered by a

court. I can see no justification on the papers for departing from that arrangement.

- 14 However, my jurisdiction under section 18 (3) of the Act is limited to making an order pending the outcome of an application for leave to appeal, and any subsequent appeal that may be allowed to proceed against the order of van Nieuwenhuizen AJ. This raises fundamentally different issues.
- 15 There are a number of conceivable permutations in this litigation. In the first place, Mr. O's application for leave to appeal against van Nieuwenhuizen AJ's order might not succeed. A decision on that application is fairly imminent. If the application does not succeed, then the Swanepoel AJ order, and the prospective appeal against it, falls away. In that event, any decision I make will lack much practical consequence.
- 16 If Mr. O's application for leave to appeal against the van Nieuwenhuizen AJ order succeeds, then the question becomes whether Mrs. O's application for leave to appeal against the Swanepoel AJ order will succeed. If it does, then Swanepoel AJ's order would ordinarily be suspended indefinitely, unless I order the children to be returned to Johannesburg. If I make such an order, a further application aimed at keeping the children in Stellenbosch is likely to follow. Further permutations arise from how any appeals that are allowed to proceed are actually disposed of on their merits. There is also the more remote, though not negligible, possibility that either party in either case might attempt to engage the jurisdiction of the Constitutional Court.

- 17 All of this raises the spectre of the children being involved in a damaging tug of war, in which their primary residence changes from Stellenbosch to Johannesburg and back again as the appellate litigation proceeds.
- 18 I cannot see that this could possibly serve the children's best interests. However they got there, the children are now relatively settled in Stellenbosch. They have lived there for five months. They are at school, and there is no suggestion that they are in danger of any imminent or ongoing harm, other than the harm arising from the fact that they cannot have daily in-person contact with Mr. O. But I do not think that harm justifies triggering the possibility of the frequent changes to the children's residence that I have outlined.
- 19 This is a classic case in which things should remain as they are until the various appeal processes have been exhausted. That means that the children ought to stay in Stellenbosch for the foreseeable future. In other words, although I am satisfied that there are exceptional circumstances in this case, I cannot find that the children are suffering irreparable harm. Nor can I find that Mr. O would suffer irreparable harm if they were not forthwith returned to Johannesburg. There is no dispute that Mr. O is free to visit the children in Stellenbosch. Imperfect as that is in light of the contact rights afforded Mr. O in the 15 June 2021 order, it seems to me to be preferable to any of the alternatives.
- 20 I have given some thought to whether I can and should order that arrangements be made to ensure that Mr. O exercises occasional in-person contact with the children in Johannesburg pending appeal. While I was

initially attracted by such an interim arrangement, I do not think that it would be wise to order it. I do not know enough about the parties and their circumstances, or about how the children would be affected by such an arrangement in general, or by the wide variety of particular forms such an arrangement could take.

- 21 It follows that, despite my sympathy for Mr. O, his application for interim execution must fail.

The contempt proceedings

- 22 The essence of the breach of the Nieuwenhuizen AJ order alleged in Mr. O's papers is that Mrs. O has refused to co-operate with Ms. Main-Baillie's assessment of whether it would be in the children's best interests to relocate to Stellenbosch. That in turn boils down to the proposition that the children must be returned to Johannesburg so that Ms. Main-Baillie can assess them in the context of Mr. O's home environment.

- 23 However, the order of Nieuwenhuizen AJ says nothing about how Ms. Main-Baillie's assessment is to be performed. In his judgment on the application for leave to appeal, Nieuwenhuizen AJ envisaged that Ms. Main-Baillie would be able to conclude her review during the six week period during which he directed that there would be no in-person contact between Mr. O and the children. That seems inconsistent with the view that Nieuwenhuizen AJ had a Johannesburg-based assessment in mind.

- 24 It does, though, stand to reason that a full assessment of the merits of the relocation might encompass observing the children in the context of Mr. O's

Johannesburg home. However, the question is whether Mrs. O's refusal to allow that to happen is a wilful and *mala fide* breach of the court order. I cannot say that it is. Even if it were established that the assessment, or some part of it, must take place in Johannesburg, I cannot conclude that Mrs. O is wilful or *mala fide* in resisting this. The order does not explicitly require it, and Nieuwenhuizen AJ himself clearly thought that the assessment would not necessarily entail the children being brought to Johannesburg.

25 The contempt proceedings must also fail.

Costs

26 There is no warrant to mulct either party in costs in a case like this. Each party will pay their own costs.

Order

27 For all these reasons, and with some reluctance, I order that the application is dismissed, with each party paying their own costs.

S D J WILSON
Acting Judge of the High Court

HEARD ON: 13 October 2022

DECIDED ON: 18 October 2022

For the Applicant: A Bester SC
Instructed by HJW Attorneys

For the Respondents:

PV Ternent
Instructed by Billy Gundelfinger Attorneys