

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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



CASE NO: 2022-026981

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

03 MARCH 2023

JUDGE RM KEIGHTLEY

In the matter between:

W[...] H[...]

Applicant

And

THE STATE

First Respondent

MINISTER OF POLICE

Second Respondent

MINISTER OF HOME AFFAIRS

Third Respondent

M[...] U[...]

Fourth Respondent

In Re:

W[...] H[...]

Appellant

and

M[...] U[...]

Respondent

In Re:

D[...] P[...] H[...]

Minor Child

D[...] W[...] H[...]

Minor Child

JUDGMENT

KEIGHTLEY J:

INTRODUCTION

[1] This matter is the latest in a long-running salvo of litigation between the applicant, WH, and the third respondent, MU. These parties are involved in divorce proceedings. The husband, WH, is a prolific self-represented litigator. A summary of the ongoing litigation is contained in the judgment of Wilson J, delivered on 6 February 2023, rendering it unnecessary to re-summarise the events here. However, it is necessary to explain how the current application instituted by WH is related to the Wilson J proceedings.

[2] It is not over-dramatic to say that WH and MU are at war over their children. Save for recent events giving rise to the Wilson J litigation, the two minor children, who are 8 and 10 years old, have been in the primary care of MU, the wife and mother of the children. She and the children left the previous family home in 2021. For reasons explained in the affidavits filed in the Wilson J litigation, MU relocated with the children to the Western Cape. WH remains resident in Gauteng. An agreement was reached between WH and MU that the children were to visit WH in Gauteng from 9 December 2022 and return to MU's custody and care on 26 January 2023. WH reneged on the agreement by refusing to return the children. Instead, he kept them in his custody in Gauteng. It was this action on his part that led MU to institute urgent proceedings in this Court. The application came before Wilson J.

[3] It is important to highlight what relief was sought by MU in her notice of motion. She sought an order:

[3.1] directing the Family Advocate to investigate the best interests of the minor children and to compile a report with recommendations pertaining to their primary care, residence and contact;

[3.2] directing that pending the Family Advocate's investigation, primary care and residence of the minor children to vest in MU, with telephonic contact for WH;

[3.3] directing WH immediately to return the minor children to the care of MU in the Western Cape; and

[3.3] authorising and directing the Sheriff to facilitate the return of the children should WH fail to comply with the order within 5 days.

On 11 January 2023 Wilson J made an order in the terms sought, save for substituting the South African Police Service for the Sheriff. WH sought leave to appeal the 11 January order. Wilson J refused the application for leave to appeal on 3 February 2023. As part of his order dismissing the application, Wilson J directed the South African Police Service: '*... forthwith (to) assist with the execution of the order of (11 January 2023)*'.

[4] Undaunted, on 4 February (which was a Saturday), WH uploaded a second application for leave to appeal. Not surprisingly, that application was struck from the Roll. On 6 February Wilson J delivered reasons for his refusal of the first application for leave to appeal and the striking of the second. In the final paragraph of his reasons, he records:

'For the avoidance of doubt, I record that neither WH's application for leave to appeal, nor my order striking it from the roll has any effect on the rights of MU to enforce my order of 11 January 2023. I also record I will not entertain any further attempt to seek leave to appeal from me against any of the orders I have made in this matter. WH's further remedies, such as they are, are spelt out in the Superior Courts Act 10 of 2013.'

[5] WH must have taken heed of what is stated in the final sentence because on 9 February 2023, before the 11 January order could be executed, he lodged an application for leave to appeal with the Constitutional Court. On 10 January 2023 the SAPS, acting in terms of that order, and the order of 3 February 2023, removed the children from WH's custody and returned them to that of MU. In response, WH filed an urgent application in this Court on 16 February 2023 seeking, on an urgent basis, an order that the minor children immediately be returned to his custody within two days. He also sought an order interdicting the Minister of Police from '*aiding and abetting (MU) pending the hearing of the appeal by the Constitutional Court*'.

[6] I should add that WH cited the Minister of Home Affairs as the third respondent. He sought no relief from this Minister but sought costs against 'the Respondents'. Consequently, the Minister of Home Affairs briefed counsel to appear and oppose the

application. I dismissed with costs the application insofar as the Minister is concerned for reasons given *ex tempore*.

[7] Neither the remaining Minister nor MU entered appearance to oppose. My registrar contacted MU to determine her position regarding the application and she advised that she could no longer afford to engage attorneys to act for her. Given the barrage of litigation WH has engaged in, MU's response cannot be perceived to be unreasonable. I accordingly decided the matter without the benefit of an answering affidavit from MU. Despite this, I am unpersuaded that WH has made out a case for the relief he seeks.

[8] I will proceed on the basis that the matter was urgent despite the fact that, on the date it was set down for hearing, the children had been returned to the custody of MU for over 10 days. The upheaval that would undoubtedly occur were they to be uprooted once again after a lapse of this period of time mitigates against urgency. However, the application involves minors and it is in their interests that some certainty prevails as to where they are to live pending further proceedings.

[9] WH's primary contention was that the removal of the children subsequent to his lodging of an application for leave to appeal with the Constitutional Court was unlawful, unconstitutional and invalid. He relies on s 18(1) of the Superior Courts Act for support. This section states:

'Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.' (my emphasis)

[10] Subsection (2) provides that:

'Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.'

[11] No final order has yet been made about the primary residence, care and contact regarding the children. The 11 January 2023 order is an interim order. It is to prevail pending a report by the Family Advocate. What is more, as part of his suite of litigation, WH has instituted an application that he be awarded primary residence and care of the children. That application was filed prior to the urgent application that served before Wilson J. The Deputy Judge President has directed that WH's application cannot proceed without a report from the Family Advocate. It is thus plain that the state of play as far as

the children are concerned is that no final order can be made without the Family Advocate's involvement. The 11 January 2023 order is consistent with the DPP's directive. It is patently interlocutory in nature. It follows that s 18(1) does not apply. On the contrary, under s 18(2), the 11 January 2023 and 3 February 2023 orders were not suspended pending the outcome of WH's application for leave to appeal to the Constitutional Court. The SAPS were acting under the authority of the Wilson J order when they removed the children from WH. Quite simply, the removal of the children from WH and their placement, once again, with MU was not unlawful. This finding alone is sufficient to result in a dismissal of the application.

[12] There is a second reason why the application must be dismissed. The 11 January 2023 had been executed by the time WH's urgent application was instituted. In a dispute like this one, where children are involved, one cannot simply turn back the clock. Their best interests must be considered. The best interests of the children were considered by Wilson J when he made his original order on 11 January 2023. He decided that it was in their best interests to be returned to the care of MU. He refused leave to appeal against that ruling. In these circumstances, very exceptional circumstances would have to be demonstrated, based on solid evidence, to convince a court, in a new application a few weeks later, that it could possibly be in the children's best interests that they be returned to WH in the interim. In his founding affidavit WH made no more than unspecified and unfounded allegations that if the children were left in MU's care they would suffer 'maltreatment, neglect, abuse or degradation'. These unfounded allegations are insufficient to establish that it would be in the children's best interests to be placed with WH.

[13] For all of these reasons, the application must fail.

[14] I make the following order:

'The application is dismissed with costs.'

R M KEIGHTLEY
JUDGE OF THE HIGH COURT

APPLICANT

SELF REPRESENTED

**COUNSEL FOR THIRD RESPONDENTS
THIRD RESPONDENTS' ATTORNEYS**

**ADVOCATE R PETERSON
OFFICE OF THE STATE ATTORNEY**

**DATE OF HEARING:
DATE OF JUDGMENT:**

**23 FEBRUARY 2023
03 MARCH 2023**