THE HIGH COURT OF SOUTH AFRICA, SOUTH GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO: 27028/2019

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

17 April 2020

DATE SIGNATURE

In the matter between:

MEMANI FEZILE REEVESE	**APPLICANT**
AND	
CUMMINS SOUTH AFRICA (PTY)LTD	**FIRST RESPONDENT**
MKHWANAZI THULI	**SECOND RESPONDENT**
MKHWANAZI ANDISWA	**THIRD RESPONDENT**
DIRECTOR GENERAL, HOME AFFAIRS	**FOURTH RESPONDENT**

JUDGMENT.

Molahlehi J

Introduction

[1] The dispute in this matter involves the relocation of a child by the mother, Ms Thuli Mkhwanazi to the United States of America (US) for three years during which he is to continue with his studies. The second respondent, Ms Mkhwanazi sought the relocation of the child during July 2019, following her assignment by her employer to work in the United States of America (US).

[2] The objection to the relocation is raised by the boy-child's biological father, Mr Memani, an advocate of many years' experience and a member of the Johannesburg Society of Advocates.

[3] At the time the dispute arose, the boy-child was 15 years and 9 months old. The parents of the child, Mr Memani and Ms Thuli Mkhwanazi, were never married to each other and thus their two children were born out of wedlock.

The history of litigation.

[4] Initially, this matter served before Wanless AJ as an urgent application. The relief sought by Mr Memani at the time was an interdict against the first respondent Cummins, the second respondent, Ms Thuli Mkhwanazi, the third respondent Ms Andiswa Mkhwanazi, and the fourth respondent, the Director-General, Department of Home Affairs.

[5] Mr Memani objected to both children relocating with their mother and to further their studies in the US. He objected to Andiswa relocating and insisted that although she was 19 years old and thus a major, she still needed his consent. She joined her mother in the US after the dismissal of the interdict and has registered for a four-year degree course in global and entertainment studies.

[6] On 5 August 2019, Wanless AJ granted an interim order restraining Lwazi, the boy-child, from leaving the country pending a final determination of the relocation dispute. The first return date for the determination of the dispute was 29 August 2019, and after that, the period was extended on several occasions. The order further directed the family advocate to prepare a report on the issue of the relocation of the child. The application against Andiswa and Cummins were dismissed with costs.

[7] On 22, November 2019, the Family Advocate, in compliance with the order of Wanless AJ, issued her report with recommendations.

Application for postponement - 2 December 2019

[8] The matter served before this Court on the return date, 2 December 2019 and on that day, Mr Memani unsuccessfully sought the postponement of the hearing. The reasons for the dismissal of the application are dealt with later in this judgment.

[9] After handing down the ruling dismissing the application for the postponement, Mr Memani immediately indicated that he did not know how the Court wished to approach the matter because he had filed a counter application to the counter application of Ms Mkhwanazi the previous Friday, 29 November 2019. The application was also served on Cummins. It was however not clear whether the application was properly served on Cummins and thus, the Court adjourned and required the parties to find out if it had received the application. The matter stood down to after lunch.

[10] On my return from lunch, I found both Mr Memani and his attorneys Mr. Wakaba at my chambers. They were not with their colleagues, representing the respondents and failed to provide any satisfactory explanation as to why they did not invite their colleagues to join them.

Application for postponement- 4 December 2019

[11] Having determined that there was a need to find out whether Cummins received the counter application, the matter stood down to 4 December 2019. Another application

to postponement the case was made by Counsel acting for Mr Memani on that day. The reason for the application was that Mr Memani was not well and in support, thereof a medical certificate was handed in. After accepted the medical certificate, the matter was postponed to 11 December 2019, with the *rule nisi* extended to the same day.

Reasons for refusing the application for postponement- 2 December 2019.

[12] As indicated earlier in this judgment, Mr Memani applied for the postponement of the matter on the 2 December 2019. The application was made from the bar, with no reasons proffered as to why no substantial application was made.

[13] Mr Memani indicated that he needed a postponement so that he could appoint an expert to contradict the report of the Family Advocate. He wanted the case postponed to the first term in 2020.

[14] Mr Memani contended that he was not in a position to contradict the Family Advocate's report because it was in the form of "an expert report" and an expert will according to him be required to deal with the findings made by the family advocate. He was concerned that in the absence of an expert report, the Court was likely to put more weight to the report of the Family Advocate.

[15] He complained that the Family Advocate had made adverse findings against him, and thus he wished to find an expert who could "advance his case." The other issue, he

wanted his expert to investigate was why was it that the child could not remain behind and not join her mother in the US because he could stay with his maternal grandmother who he was staying with at the time.

The guidelines on postponement.

[16] It is trite that in considering an application for a postponement, the Court has the discretion which is to be exercised judicially. It is also trite that a postponement is not a right but an indulgence given by the Court. It is for this reason that in seeking a delay, the applicant must furnish a full and satisfactory explanation of the circumstances that gave rise to the need for a postponement. And as repeatedly stated by the authorities postponement is not there for the taking.

[17] An application for a postponement must be *bona fide* and not be used as a stratagem to delay the finalization of a dispute. In considering an application for postponement, the Court may also take into account other factors such as, the prejudice that may result if the postponement is refused. The tender to pay costs to be occasioned by a postponement is a factor to take into account. But such tender does not necessarily mean that a postponement would be automatically granted. The key consideration is whether the dictates of justice requires that a postponement should be granted.

[18] In Lekolwane v Minister of Justice and Constitutional Development,[1] the Court held that:

> "The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the Court. A postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect, the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the Court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for the postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the Court to determine whether it is in the interests of justice to grant the application."

[19] It is important to note that this matter was enrolled for hearing before this Court following a case management which was conducted by Fisher J. After the conclusion of the case management the Deputy Judge President issued a directive which required that the hearing of the matter to be expedited and scheduled it for hearing in the week of 2 December 2019.

[20] Mr Memani contended and insisted during his submission that the matter was no longer urgent and therefore saw no reason why the postponement could not be granted.

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[1] 2007 (3) BCLR 280 (CC) at paragraph [17].

He criticized the Family Advocate's report for biased but could not say why he did not challenge it on the review. He hinted that there was no basis to review the report. Another telling aspect in his submission is that he has the right to lead evidence to advance his case, and therefore he was entitled to a postponement. He does not, however, say why he had not taken steps at that stage towards that direction. This submission, in a sense suggests that he had a right to a postponement.

[21] In my view, Mr Memani sought to use postponement as a tactic to delay the finalizing of the arrangements for the relocation of the child. The consequent prejudice was to be suffered, not by his partner, but by his child who had expressly indicated to the Family Advocate that his wishes were to relocate to the US. It is not clear to me in what way the finding of the Family Advocate adversely affected Mr Memani as he contended. The finding is based on what the child, who is mature enough to can voice his preference, told the Family Advocate. This is a child who is, on his own version (Mr Memani) intelligent and is a good performer at school. It is thus difficult to see why he would not have had the capacity to express his own views in relation to the relocation issue.

[22] On the papers before this Court, I see no need for expert testimony. I have serious doubt as to what contribution would such an expert make about the determination of the issue of the best interest of the child.

[23] The purpose of seeking the appointment of an expert was for no other reason than as stated, by Mr Memani "to be given an opportunity to put an expert who can agree," with him. That in my view, is a total misconception of the purpose of calling an expert to testify.

[24] In light of the above discussion, there is no satisfactory explanation of the circumstances that gave rise to the application for the postponement of the matter on the day of the hearing. And more importantly, it seems to me that the attitude of Mr Memani was that the postponement was there the taking.

[25] It was for the above reasons that the application to postpone the matter was dismissed.

Application to postpone immediately following the above ruling

[26] After making the above ruling, refusing the postponement of the hearing, Mr Memani, brought another application from the bar again seeking a postponement. The application was brought when the Court inquired about service of the counter application on Cummins.

[27] He suggested that the matter could be postponed to a date in the ordinary course during the first term of 2020, seemingly to address the issue of service on Cummins.

[28] There is, in my view, no doubt that the application to postpone was unsustainable because it was based on a defective counter application filed by Mr Memani. The application was defective because it did not comply with the rules. It was an application not supported by an affidavit.

[29] The application was accordingly dismissed.

Application to postpone -11 December 2019-

[30] On 11 December 2019, Mr Memani briefed Counsel to move an application for the postponement of the matter on his behalf. Counsel indicated that his brief was limited to arguing for the application to postpone the matter and not to argue the merits of the dispute.

[31] The application was based on the ground that an application for leave to appeal the refusal to postpone the matter was filed with the Court. It is clear that the attitude of Mr Memani was that Counsel should simply appear in Court and ask for the postponement which "would be granted." In other words, the Counsel had come to Court to "ask for the postponement and to have it."

[32] As indicated earlier, Counsel admitted that his brief was only limited to moving the application to postpone the matter. In this regard and in response to the question as to why Mr Memani did not attend Court in case the application was refused, Counsel

informed the Court that he (Mr Memani) could not attend the hearing because he was busy drafting heads of argument in another matter. He further indicated that Mr Memani had instructed him that he could be available to argue the matter on 20 December 2019.

[33] The respondents raised as a preliminary point concerning the issue of the appealability of the ruling dismissing the application to postpone the matter on 2 December 2019. After considering the submissions made by both parties regarding this point, I ruled that the leave to appeal would be heard on that day. Before making this ruling, I inquired from Mr Memani's Counsel as to what prejudice his client would suffer if the application was heard on that day, in particular, to consider the preliminary point raised by the respondents. He indicated that there would be no prejudice and proceeded to argue

[34] The reasons for dismissing the application for leave to appeal are the following: In my view, the refusal to grant the postponement of the matter was of no final effect, not definitive of the rights of the parties and did not dispose of any part of the relief claimed in the main application. Furthermore, I was not persuaded that it would be in the interest of justice to grant leave to appeal in the circumstance where the appeal would cause an unnecessary delay in finalizing the issue of whether it was in the best interest of the child to relocate to the US. Put in another way there was no prospect of success on appeal. I was also, considering the facts and the circumstances and the

history of the matter, of the view that this was part of the stratagem to delay the finalization of the dispute.

[35] The issue for determination on the return day in the main application, in this matter, was whether an order should be made interdicting the relocation of the child to the US. The counter application, on the other hand, sought a relief to authorize the relocation of the child.

[36] The above reasons are informed by the principles set out in Zweni v Minister of Law and Order,[2] and First Rand Bank Limited t/a First National Bank v Makaleng.[3]

[37] The three attributes that need to be considered in determining whether an interlocutory ruling is appealable as set out in *Zweni* are the following:

1. the decision must be final in effect and not susceptible to alteration by the Court that made it,
2. it must be definitive of the rights of the parties and
3. It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[38] In First Rand Bank Limited (supra) the Supreme Court of Appeal found that a decision that is of no final effect or is not definitive of the rights of the parties may be

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[2] 1993 (1) SA 523 (A).

[3] [2016] ZASCA 169 para 15.

appealable where there are other consideration such as the fact that the appeal would lead to important consideration such as a speedy resolution of the issues in dispute between the parties. In addition to these, the other general consideration is whether it would be in the interest of justice to grant leave to appeal the interlocutory ruling.

[39] The order made in light of the above was the following:

1. The application to postpone the hearing is dismissed.
2. The application for leave to appeal is dismissed with costs on attorney and client scale in case of the first respondent.
3. The respondent shall pay costs on the party and party scale for the second respondent.
4. The matter stands down for the following day 12. December 2019.

[40] Following the above order, the matter was set down for hearing on 12 December 2019. On that day Mr Memani contended that the matter should stand down pending the outcome of the petition he made to the President of the Supreme Court of Appeal without disclosing for which order he had petitioned.

[41] Section 18 of the Superior Court of 2013 provides:-

"18 Suspension of decision pending appeal:-

(1) Subject to subsections (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.

(2) 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.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the Court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the Court does not so order and that the other party will not suffer irreparable harm if the Court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)-

(i) the Court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest Court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

[42] The ruling not to suspend the decision of this Court pending the petition filed by Mr Memani was informed by the consideration that since the granting of the order in the urgent application the proceedings have become a sham and an abuse of the court process. The abuse materially undermined the interest of the child. Mr Memani approached the matter with minimal, if at all, any objectivity. This in my view created

exceptional circumstances warranting refusal to suspend the implementation of the decision pending the outcome of the petition. It was for this reason that I proceeded to consider the merits of the dispute. It should be noted that after making this ruling, Mr Memani withdrew from participating in the proceedings and made no submission in relation to the merits of the matter.

The merits

[43] It is trite that in terms of section 10 of the Children's Act (the Act),[4] children have a right to participate in matters affecting them. It follows thus that due consideration has to be given to the views expressed by children on matters affecting them.[5] Of course, the view of a child has to be weighed, taking into account his or her age, maturity and the stage of development.[6] It is also trite that the overriding consideration is the notion of the best interest of the child.[7]

[44] In my view, considering the objections raised by Mr Memani, in their totality, they are unsustainable and inconsiderate of the children interest. He amongst others contend that it is only the mother who is advantaged by the deployment to the US, whereas for the children it is, "a disaster." He is also concerned that the deployment is

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[4] Act 35 of 2005.

[5] See section 31(1) of the Children's Act.

[6] See section 7 (1) (g) of the Children's Act.

[7] See section 28 of the Constitution.

for a very short period, and there is no guarantee that the employer could terminate the employment contract of the mother before the expiry of the deployment.

[45] It is clear from the papers that the mother had in accepting the offer from the employer to work in the US carefully considered moving the child from his country of birth and whether the relocation would be in his interest. She had researched, made inquiries and finally secured the schooling for the child. The financial implication of the education of the child once relocated also received proper attention in my view.

[46] The contribution by her employer goes a long way in securing the child's education, and she will also be earning a salary with which she would be able to cater to his needs.

[47] The mother's view that it would be in the interest of the child is supported by the findings and recommendations of the Family Advocate. The finding is essentially based on the review and the desire of the child to join her mother and her sister in the US. The child does not only have the aspiration to be in the US but also has clear plans as to what he would like to do once he is there. Put in another way; the child has voiced his wishes of joining her mother and her sister in clear and unequivocal terms. The child was at the time of the institution of the urgent application almost sixteen years old. There is in my view, no reasons to doubt his voice, as expressed in the report of the Family Advocate's report, as being genuine and expressed with confidence.

[48] It is common cause if not that it has not been disputed that the caregiver of the child was the mother. Although the father has a good relationship with the child, the fact that the mother is the caregiver gives considerable weight in the determination of whether the relocation of the child should be authorized. It is important to note that the evidence before this Court which has not been disputed is that since the departure of the mother, Mr Memani has seen the child on only three occasions and for a very short period.

[49] In considering the above, I find that it was in the best interest of the child to relocate and join his mother and his sister in the US. Accordingly, the applicant's application must fail, and the *rule nisi* discharged. The second applicant's application stands to succeed.

[50] Concerning the case against Cummins, it is quite clear the proceedings as instituted against them was ill-conceived. There are no merits as to why Mr. Memani had in substance instituted proceedings which are no different to those dismissed by Wanless AJ in the urgent application. In any case, he had failed to show on what basis he was entitled to interfere with the employer-employee relationship between the mother and her employer.

Order

1. The *rule nisi* granted on 5 August 2019 is discharged.
2. The main application is dismissed.

3. The applicant's counter application to the Second Respondent's counter application is dismissed.

4. The second respondent is granted leave to remove the minor child, Lwazi Mkhwanazi (the minor child) temporarily for a period of three years, from the Republic of South Africa to Columbus, Indiana, United States of America.

5. The consent of the applicant for the minor child to be removed from the Republic of South Africa, shall not be required in terms of section 18 (5) read together with section 18 (3) (c) (iii) of the Children's Act 38 of 2005.

6. The applicant shall be afforded the following contact with the minor child:

6.1.1 Daily telephonic and Skype contact at reasonable times since:

6.1.2 The Applicant shall have at least one visit per annum with the minor child in South Africa, and at all reasonable times in the United States of America, by prior arrangement between the parties.

7 The applicant shall pay the Second Respondent's costs of the main application, the applicant's counter-application and the Second Respondent's conditional counter application, on an attorney and client scale.

8 The applicant shall pay the First Respondent's costs in respect of the applicant's counter-application to the Second Respondent's counter-application and the applicant's application for leave to appeal argued on 11 December 2019, including the costs of 4 December 2019 and 12 December 2019 on the attorney and client scale.

E Molahlehi

Judge of the High Court;

Johannesburg

Representation:

For the Applicant: In person

For the First Respondent: Adv Feinstein

For the Second Respondent: Adv Bezuidenhout

Date of the reasons: 16 April 2020

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