IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2022/14941
Date of hearing: 13 June 2022
Date delivered: 15 June 2022
REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED

In the application between:

Z [....] I [....] O [....] 1 **Applicant**

and

J [....] S [....] O [....] 2 **Respondent**

JUDGMENT

SWANEPOEL AJ:

[1] Some cases require the wisdom of King Solomon. This is such a matter. Its outcome is not only of great moment to the parties, but also to their three young children. The matter came before me as an urgent application. These are the brief reasons for my order. A short history of the matter is as follows:

[1.1] The parties are the parents of three small children. They are separated from one another and are in the throes of an acrimonious divorce, in which one of the issues in dispute is the contact and care of the minor children. In

terms of a rule 43 order handed down on 15 June 2021 the primary residence of the children vests in respondent, with applicant having specifically defined rights of contact.

[1.2] Applicant has repeatedly complained that respondent is attempting to frustrate his contact with the children, and that she is alienating them. The result is that the parties have engaged the services of Dr Lynette Roux, a forensic psychologist, as parental coordinator and Ms. Leonie Hennig, to assist them in resolving the issues between them.

[1.3] During February 2022 respondent mooted the possibility of relocating to Cape Town with the children, and she sought applicant's view on the matter. Applicant was implacably opposed to the proposal. Both Roux and Hennig were of the view that the proposed relocation should be investigated by a forensic psychologist, and Roux, in her capacity as parenting coordinator, made a directive to that effect. Respondent was opposed to a further assessment, and refused to participate. In fact, respondent stated the view that she would not abide by any finding in an assessment.

[1.4] Respondent took the final decision to relocate, initially indicating that the relocation would occur in the period between May and July 2022. Respondent then told applicant that she would relocate on 25 May 2022. On 10 May 2022 applicant launched an application seeking, in Part A thereof (on an urgent basis), an interdict against respondent prohibiting her from relocating the children to the Western Cape. He also sought an order that Megan Maine-Bailie be appointed to investigate whether a relocation was in the best interests of the children, and if so, on what terms the relocation should proceed.

[1.5] In Part B of the application applicant sought a final order that the children were prohibited from relocating outside of Gauteng, alternatively, if it were found to be in their best interests, that the relocation should occur on certain conditions.

[1.6] On 10 May 2022 an order was granted by Van Nieuwenhuizen AJ in the following terms (I summarize, and I omit the ancillary paragraphs):

[1.6.1] Respondent was granted leave to relocate to the Western Cape;

[1.6.2] Megan Main-Bailie was appointed to investigate the relocation;

[1.6.3] Once Megan Main-Bailie had reported, in the absence of agreement between the parties, either party could institute further proceedings.

[1.6.4] Applicant's rights of contact in the Western Cape were defined, including a prohibition of applicant having any physical contact with the children for six weeks.

[1.7] Applicant sought leave to appeal against the order, and on 25 May 2022 the application for leave to appeal was dismissed. On 2 June 2022 applicant filed an application for leave to appeal to the President of the Supreme Court of Appeal.

[1.8] Applicant took the view that the application for leave to appeal suspended the operation of the order of 10 May, while respondent took the opposite view. She relocated to the Western Cape at the end of May 2022.

[2] In this application applicant seeks:

[2.1] A declaratory order that the operation and execution of the order of 10 May (erroneously referred to as the order of 13 May) is automatically suspended pending the application for leave to appeal

[2.2] An order that the respondent return to Gauteng with the children.

[3] The first question to be determined is whether the order of 10 May is automatically suspended by the application for leave to appeal. Section 18 (1), (2) and (3) provides:

"*(1) 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 the 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] In *KR v KR*[1] a Full Court held as follows:

"A proper reading of section 18 (1) and (2) together, reveals that there are two classes of orders. One class is orders 'having the effect of a final judgment' and the other class is orders not having such an effect. Orders having a final effect can be interlocutory in form but still be final in effect and are thus suspended pending the exhaustion of the appeal process. Only an interlocutory order which lacks the effect of finality is not suspended."

[5] The Supreme Court of Appeal has held [2] that a judgment or order is appealable when:

[5.1] The decision is final in effect and cannot be altered by the court of first instance;

[5.2] It is definitive of the rights of the parties; and,

[1] Gauteng Division case number 44169/2019 dated 18 March 2021 at para 11
[2] Zweni v Minister of Law and Order of the Republic of South Africa 1993 (1) SA 523 (A)

[5.3] It has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[6] Another way of putting the test is to say that an order will be appealable when it "*irreparably anticipates or precludes some of the relief which would or might be given at the hearing.*"[3]

[7] With the aforesaid in mind I turn to the facts of this matter. In the initial application before my brother Van Nieuwenhuizen AJ the order that was sought was an order prohibiting the respondent from relocating with the children to the Western Cape. Only Part A was before the learned Judge. Nevertheless, an order was granted authorizing the relocation of the children. The relocation order was not couched in interim terms. Although the order provides for an assessment by Megan Main-Baillie, it does not create a mechanism by which the assessment report can be placed before a Court in the event that one of the parties requires a reconsideration of the relocation order. In fact, the order specifically records that any one of the parties may initiate fresh proceedings upon receipt of the report. If no such proceedings are instituted, the order remains final in nature.

[8] Ms. De Wet, acting for respondent, argued that the order may be reconsidered at any stage by the launching of further proceedings, and that, ultimately, it may be reconsidered in the divorce action. That fact does not, to my mind, make the order an interim one without final effect. The fact is that the order has disposed of one crucial issue, which is where the children are to reside.

[9] Mr. Bester SC, acting for applicant, argued that this matter is on all fours with the KR matter (*supra*). I agree. In the latter case a mother had been deprived of her rights of care for her son, who was placed in the care of his grandmother on an interim basis, pending the final determination of the child's primary residence. The Full Court held that the order in Part A was final in nature, notwithstanding that Part B had not yet been decided. In the case before me the respondent has been allowed to relocate to the Western Cape with the children, and not only is the order not interim in nature, it disposes of the final relief sought in Part B of the application. The

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[3] Jacobs v Baumann NO 2009 (5) SA 432 (SCA)

order grants final relief not sought by the respondent. There is no doubt in my mind that the order is final in nature.

[10] Consequently, the operation and execution of the order is automatically suspended by the filing of the application for leave to appeal. The declaratory order sought in paragraph 1 must then be granted. The result is that the rule 43 order relating to applicant's care of and contact with the children is still of full force, and must be given effect to. That can only be done if respondent returns to Johannesburg.

[11] There is no application by respondent in terms of section 18 (3) before me, for an order setting the 10 May order in operation, if it were to be found to be a final order. I have, however, been addressed at length by both parties as to the effect of the order on applicant's contact with the children if the respondent were to be allowed to remain in the Western Cape, and on the other hand, the effect on respondent if she were made to return.

[12] Even if there had been an application by respondent in terms of section 18 (3), I would nonetheless not have made an order setting the 10 May order in operation. I say so for the following reasons:

> [12.1] Respondent has been employed in an administrative role by her mother in Johannesburg for some time. Respondent's mother operates a business called "Call a Crew", which evidently specializes in providing crew members to the film industry. Even though Call a Crew has business interests in Cape Town, it has operated from Johannesburg for some 20 years.
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> [12.2] Evidently Call a Crew decided to relocate to Cape Town at some point in time, and respondent says that she is completely reliant on the income that she receives from this business. Therefore, she is obliged to relocate with her parents, respondent says. Respondent does not say why she would be unable to work remotely, given the fact that her role is

administrative in nature. Her statement that she would be left without work if she were to return to Gauteng is dubious.

[12.3] Respondent attempted to minimize the effect of a relocation on the relationship between applicant and his children. The rule 43 order allowed applicant extensive time with the children, including daily contact on weekday afternoons, sleepover visits for the eldest child on Wednesday evenings on one day per weekend, and weekend contact with the two younger children for four hours at a time.

[12.4] Respondent tenders contact in the Western Cape as follows:

[12.4.1] Contact on Saturday 25 June 2022 from 09h30 when applicant must fetch the children and their nanny at 09h30 and return the youngest two children to respondent at 18h00.

[12.4.2] On Sunday 26 June 2022 applicant may again fetch the youngest children, and their nanny, at 09h30 and return them at 18h00. Keira is allowed to sleep over.

[12.4.2] The above contact is predicated on the condition that applicant shall provide appropriate meals and snacks for the children, and bath them.

[13] Presumably the same contact is to be exercised on alternate weekends. It is obvious from the above that applicant's contact with his children will change radically. One must also bear in mind that the children are young, and that at their age, if a parent is out of sight, he or she is often out of mind. It is imperative that the relationship between parent and child be reinforced as far as is possible, especially at this formative age. That is why it was especially important that the effect of a relocation on the children be assessed. Ms. De Wet argued that applicant would not suffer irreparable harm should the children reside in the Western Cape. I believe that the more pertinent question is whether the relationship between applicant and the children would be harmed, and in that regard, I have no doubt that the answer is in

the affirmative. The effects of the relocation on the relationship between applicant and the children may last forever.

[14] On the other hand one must consider whether respondent would suffer irreparable harm should she be ordered to return to Gauteng. Important in this regard is that the applicant is paying respondent R 54 000.00 per month in cash, pursuant to the rule 43 order, as well as paying all of the children's expenses, including the nanny's salary. In addition, applicant has tendered to provide respondent with accommodation of a similar standard to that which they were accustomed to if she were to return to Gauteng. I cannot believe, firstly, that respondent would suffer financially, given the amount of money at her disposal, and secondly, that she cannot work remotely from Johannesburg as many millions of South Africans have done and are still doing. Respondent has not said why this would not be possible. Furthermore, as Ms. De Wet argued, the assessment will be completed in a short space of time, and if it is found that the children must relocate, the matter can be brought before a court expeditiously. I do not believe that there would be irreparable harm to respondent should she be ordered to return to Gauteng, although it may be inconvenient to her.

[15] Applicant has alleged that respondent has been obstructing his contact with the children. Respondent denies that allegation and I make no finding in this regard. What is of concern is that respondent was urged by two professionals who are intimately involved in this case to agree to a proper investigation as to whether the relocation would be in the children's best interests. Dr. Le Roux, as parenting coordinator gave a directive to that effect. Respondent has refused to agree to an assessment, on the flimsiest of grounds. Eventually respondent agreed to the appointment of Main-Bailie, but only if she motivates the reason for the assessment to respondent's satisfaction, and then respondent would only agree to the appointment if she wanted to participate in the assessment.

[16] I find respondent's attitude to be concerning. She seems to believe that she has the sole right to decide on the children's best interests, and she is, in my view, intent on ignoring any other point of view. Although I cannot say that respondent has been trying to alienate the children from applicant, the possibility exists that applicant

is correct in this regard, and therefore, if respondent were to be allowed to continue residing in the Western Cape, the opportunity to alienate the children would be even greater. That is, however, an aspect that the experts should advise upon.

[17] In summary, therefore, there is no section 18 (3) application before me. Given my finding that the order was final in nature, it was incumbent on respondent to bring such an application to suspend the operation of the order, if she so wished. However, even if there had been such an application, I would not have been able to find that respondent had shown exceptional circumstances for the implementation of the order, nor that she had shown that applicant would not suffer irreparable harm, nor that respondent would suffer irreparable harm should the order not be implemented.

[18] In the premises I make the following order:

[18.1] It is declared that the operation and execution of paragraphs 2 and 6 of the order under case number 2022/14941 is automatically suspended pending the applicant's application for leave to appeal to the Supreme Court of Appeal, and if leave to appeal is granted, pending the outcome of the appeal.

[18.2] Respondent is ordered to return the minor children to Gauteng.

[18.3] In the event that respondent does not return to Gauteng, the minor children shall reside primarily with applicant, subject to respondent's contact:

[18.3.1] On alternative weekends from after school on Friday until Monday morning when respondent shall take the children to school;

[18.3.2] Virtual contact every evening from 17h00 until 19h00.

[18.4] In the event that respondent returns to Gauteng with the children:

[18.4.1] Then applicant shall, in addition to the maintenance payable in terms of the rule 43 order dated 15 June 2021, provide respondent and the minor children with accommodation of a similar standard to what they were accustomed;

[18.4.2] The terms of the aforesaid order in regard to applicants contact with, and care of the children shall be given effect to.

[18.5] Respondent shall pay the costs of the application.

JJC Swanepoel
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15June 2022 2022

COUNSEL FOR APPLICANT:	**ADV. A. BESTER SC**
ATTORNEY FOR APPLICANT:	**HJW ATTORNEYS**
COUNSEL FOR RESPONDENT:	**ADV A DE WET**
ATTORNEYS FOR RESPONDENT:	**MOUMAKOE CLAY INC INV**
DATE HEARD:	**13 JUNE 2022**

DATE OF JUDGMENT: **15 JUNE 2022**