IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 46881/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES

In the matter between:

N[....] S[....] **Applicant**

V

J N **Respondent**

JUDGEMENT

MOSOPA, J

INTRODUCTION

1. On 2 October 2020, I made the following order;

1.1. The applicant shall on or before 10h30 on 2 October 2020, hand over the minor child, D[....] S[....] O[....], into the care and primary residence of the respondent;

1.2. The respondent shall be permitted to return to her primary residence in Malaysia with the minor child;

1.3. Part B of the applicant's application is postponed *sine die* for hearing on the ordinary opposed motion roll and parties are entitled to supplement their papers if necessary for the purposes of adjudication of Part B of the applicant's application.

1.4. Applicant shall hand to the respondent the following documents to enable her to return to Malaysia with the minor child: -

1.4.1. the minor child's passport;
1.4.2. the minor child's original unabridged birth certificate;
1.4.3. the minor child's immunization card and baby book containing medical records issued in Singapore and updated from time to time;

1.5. Pending the finalization of Part B, the applicant shall be entitled to exercise contact with the minor child in Malaysia by prior agreement with the respondent, such contact right to include but not limited to;

1.5.1. Daily telephonic and FaceTime at reasonable times.

1.6. The respondent's application for reconsideration of the court order by De Vos J on 22 September 2020 is postponed for final adjudication together with Part B.

2. The postponed Part B of the applicant's application ostensibly intended to deal with the full parental responsibility and rights of the minor child, primary residency and contact rights of the minor child.

3. On 17 August 2021, when the application for leave to appeal served before me, the applicant had not complied with prayer 2 of my order of 2 October 2020. It is so, as the minor child was only returned to the respondent on 4 December 2020, in total contradiction of my order that the child be returned to the respondent on 2

October 2020. Prayer 4 of the order of 2 October 2020 has still not been complied with.

4. After hearing argument on behalf of the parties, I then reserved judgment to be delivered at a later date.

HISTORY OF LITIGATION

5. On the same day of the order of 2 October 2020, the applicant filed a notice of application for leave to appeal that order, which was followed by an urgent application to stay the execution of that order pending finalization of the application for leave to appeal. The matter could not proceed on the night of 2 October, which was a Friday and the urgent application served before Sardiwalla J, who made the following order on 3 October 2020;

5.1. that the respondent is ordered not to remove the minor child from Gauteng Province; and

5.2. that the applicant retains the child's passport and the original unabridged birth certificate.

6. Despite the matter meant to stay the execution of the order, Sardiwalla J made an order which materially contradicts my order that the respondent is not allowed to travel to Malaysia with the child.

7. On 7 October 2020, Sardiwalla J, still dealing with the same application that served before him as the matter was stood down to the above date, made the following order;

7.1. that the status quo to remain that Judge Mosopa's order remains in effect; and

7.2. that the office of the Family Advocate investigates issues pertaining to the parental rights in respect of the minor child.

8. Following the orders made by Sardiwalla J, which in my considered view are contradictory, the applicant sought an order to declare such order a nullity and of no force and effect. On 16 November 2020, Lamprecht AJ made the following order;

> 8.1. orders granted by Sardiwalla J on 3 and 12 October 2020, as well as the *ex tempore* order granted by him on 7 October 2020, are declared to be *pro non scripto* and of no force and effect and are set aside; and
>
> 8.2. the first respondent's application (respondent in this application) dated 2 October 2020 for leave to appeal the order granted by Mosopa J on 2 October 2020, is declared not to have suspended the operation and execution of Mosopa J's order.

9. An application was also brought by the respondent to declare the applicant in contempt of the court order of 2 October 2020.

10. I was informed from the bar by counsel representing the applicant that the Supreme Court of Appeal granted leave to appeal against the order of Lamprecht AJ, but I was not informed of the current status of the appeal matter. I must also mention that this matter also served before judges in our division and our local division.

DISCUSSION

11. When the application served before me on 17 August 2021, the minor child was in the care of the respondent since 4 December 2020 and they were residing together in Malaysia.

12. The issue I raised with the parties is whether the order I made on 2 October 2020 is appealable or not. The applicant was of the view that the order is appealable, as it constitutes a final order, whereas the respondent contended that the order is not appealable, for the following two reasons;

12.1. Firstly, that the order of 2 October 2020 is an interim order, pending finalization of Part B of the applicant's application; and

12.2. Secondly, based on the provisions of section 16(2)(a)(i) of the Superior Courts Act 10 of 2013, which provides as follows;

> *"When at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal must be dismissed on this ground alone."*

13. The most important consideration in the determination of the issue of whether or not the order of 2 October 2020 is appealable, that I raised with the parties, relies on the fact that the order I issued has a final effect or disposes of a substantial portion of the relief sought in the postponed (pending) Part B of the applicant's application. Another consideration is that the order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable (see ***City of Tshwane Metropolitan Municipality v Afriforum and Another 2016 (9) BCLR 1133 (CC)***).

14. The effect of the order I made on 2 October 2020 is that the minor child be returned to the respondent, pending the finalization of the order sought in Part B of the application. Further, that the documents of the minor child, like the unabridged birth certificate and so forth, be handed over to the respondent. The question flowing from such order is whether it is final or disposes of a substantial portion of the relief sought. The issue of the residency of the minor child and parental rights and responsibilities in respect of the child remains pending. I do not see such an order as irreparable, because the applicant will still have the opportunity to determine the residency of the minor child and ancillary relief once Part B of the application is heard. In my view, the order of 2 October 2020 is not final and does not dispose of a substantial portion of the relief sought in Part B.

15. Having found that the order I made on 2 October 2020 is not a final order, and that it does not dispose of a substantial portion of the relief sought in the pending application, the question now remains whether such an order is appealable. In the

matter of ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 233 (CC)***, the Constitutional Court when determining whether interim orders are appealable, observed at para 25;

> *"This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is "the interests of justice". To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable."*

16. In the matter of ***International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC)***, Moseneke DCJ, when dealing with a similar situation, observed;

> *"…the jurisprudence of the Supreme Court of Appeal on whether a "judgment or order" is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in* ***Zweni v Minister of Law and Order*** *which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."*

Further,

> *"Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined."*

17. The Supreme Court of Appeal has an occasion of revisiting the issue of appealability of interim orders in the matter of ***United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others [2021] 2 All SA 90 (SCA)*** at para 25, Sutherland AJA, writing for the majority observed;

> *"The endeavour of the appellants to persist in their efforts to appeal against the interim order is in truth, an attempt to entice this Court to decide issues which lie within the province of the trial court when determining final relief."*

18. The court in the ***United Democratic Movement*** matter also confirmed the principle that interim orders that do not have the effect of disposing of substantial relief in the pending application are not appealable, and also, when determining such issues, the interests of justice should be considered.

19. Having regard to the above, the question which follows is, is whether it is in the interests of justice that the applicant be granted leave to appeal against the order of 2 October 2020. No such argument was made by the applicant; however, I am of the view that the court can *mero motu* determine that. The issue which still remains to be determined is whether irreparable harm will result if leave to appeal is not granted. The applicant failed to show that irreparable harm would result if leave to appeal is not granted. I see no irreparable harm caused by my order of 2 October 2020 and it is for this reason alone that the leave to appeal application should not succeed. It is further not in the interests of justice that the application for leave to appeal should succeed.

20. In the consequence, I then make the following order:

1. Application for leave to appeal the interim order of 2 October 2020 is dismissed with costs.

MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant:	Adv E de Lange
Instructed by:	Muthray and Associates Inc.
For the respondent:	Adv L Segal
Instructed by:	Tanya Brenner Attorneys
Date of hearing:	17 August 2021
Date of judgment:	Electronically transmitted