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REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 15986/2016

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

____29/01/2018____

DATE

SIGNATURE

In the matter between:

M: K

PLAINTIFF

and

M: C

DEFENDANT

Heard: 25 January 2018

Delivered 29 January 2018

JUDGMENT

Coram: VAN DER SCHYFF AJ

Introduction

[1] This is an application for leave to appeal. Although it is stated in the plaintiff's notice of application for leave to appeal (hereafter 'the notice') that the plaintiff applies for leave to appeal against the whole of the order granted on 22 January 2018, plaintiff's counsel argued from the bar that the application only relates to the portions of the order pertaining to the finding on relocation, maintenance and costs.

[2] Plaintiff's counsel's oral argument was structured in accordance with the heads of argument handed up by her. She also handed up a bundle of authorities. The heads of argument are helpful in that it delineates the issues clearly. For this, I am indebted to counsel.

[3] I have before me in this leave to appeal, *inter alia*, submissions and arguments of what I should have considered critically and where I erred in not considering factors, in not taking certain factors into account, in attributing undue weight to certain factors while attributing insufficient weight to other, in making incorrect factual findings, in making incorrect findings pertaining to the expert and other witnesses and in applying the incorrect legal principles adjudicating the dispute regarding the children's proposed relocation, and that I evinced a bias in favour of the defendant, erred in terminating the children sleeping over with the plaintiff, in not putting in place a exit strategy that addresses the best interest of the minor children, and in not correctly applying the provisions of s 7 of the Children's Act.

[4] Section 17(1) of the Superior Courts Act, No. 10 of 2013, stipulates that:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and*
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'*

[5] In view of the peremptory provision that leave to appeal '*may only*' be given if the court is of the opinion that the appeal would have a reasonable prospect of success or if there is some other compelling reason why the appeal should be heard, it is evident that the test captured in s 17(1)(a) is two-fold.

[6] In her argument pertaining to s 17(1)(a)(i) plaintiff's counsel referred me to *Normkow Administrators (Pty) Ltd v Fedsure Health Medical Scheme* 2005 (1) SA 80 (W) and argued that it is noteworthy that Goldstein J placed strong emphasis on prospects of success no matter how remote they appear to be.

[7] However, Hughes J explained in *Nannen and Others v Momentum and Others* (6796/05, 2275/05) [2017] ZAGPPHC 433 (14 June 2017); *Honda Giken Kogyo Kabushiki Kaisha t/a Honda Motor Co Ltd v Big Boy Scooters* (24784/2016) [2017] ZAGPPHC 752 (15 November 2017); *BWM Financial Services (SA) (Pty) Ltd v Finlay and Others* (55858/10, 55860/10, 56219/10) [2017] ZAGPPHC 383 (31 March 2017) that the test that applied previously in applications of this nature, was whether there were reasonable prospect that another court may come to a different conclusion. She continued:

'What emerges from section 17 (1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words 'only' used in the said section. See The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para [6], Bertelsmann J held as follows:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." [My emphasis]. (Nannen, supra par [5]).

[8] This view can further be substantiated if it is considered that Selke J' said in *Starr v Ramnath and Others* [1954] 2 All SA 106 [N] 113 that '*[i]n the idiom of English, the words 'will' and 'would' are possessed of many variations of meanings and shades of meaning.*

In s 17(1) the word 'would' replaced the word 'may' as was previously the case. Linguistically considered the word 'would', is the past tense of the subjective mood of the word 'will' - *Amalgamated Retail Ltd v Spark and Another* [1991] 3 All SA 545 (SE). The only sensible way to interpret the word in this context is to give it the meaning of its source, namely 'will'.

[9] As stated in *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016) paragraph [17] – *'An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'*

[10] In view of the above, the general submission in paragraph 4.2 of plaintiff's counsel's heads of argument that *'another court could come to a different decision of opting for the less traumatic option of preserving the status quo'* is untenable. This contention is also untenable in light of the fact that this court has stated in *Baloyi v Baloyi* (6208/2014) [2015] ZAGPPHC 728 (16 October 2015) paragraph [37] that the question of what a child's best interests are must be determined according to the facts and particular circumstances of each case and not on reasonable generalisations such as the principle of "preserving the status quo".

[11] It is trite that s 17 empowers the trial judge to give leave to appeal, and that that power must be exercised judicially. In view of the particular manner in which s 17(1)(a)(i) is phrased the court can rely on the decision of the Appellate Division, as the Supreme Court of Appeal then was, in *Rex v Baloi* 1949 (1) SA 523 (A), for guidance as how to approach an application for leave to appeal in a context where it is prescribed that leave to appeal should not be granted unless the applicant will have (would) have a reasonable prospect of success on appeal. Centlivres JA stated at 524-525: *'For the trial judge must, in the nature of things, find it somewhat difficult to look at the matter from a purely objective standpoint; he has a natural reluctance to say that his own judgment is so indubitably correct that the Judges of appeal will concur therein. But the test laid down ... is the only test that can be applied'*.

[12] In *R v Kuzwayo* 1949 (3) SA 761 (A) 765, a criminal case, the court explained:

‘That test must, to the best of the ability of the trial judge, be applied objectively. By that is meant that he must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused: he must ask himself whether there is a reasonable prospect that the judges of appeal will take a different view. This applies to questions both of fact and of law: there is, in this respect, no distinction between a question of fact and a question of law’.

[13] In matters where the best interests of children are at stake this would mean that a trial court should carefully and objectively re-consider the judgment in view of the facts of the case and the grounds of appeal advanced by the applicant for it would not be in the best interests of the children to (a) grant leave to appeal just as a matter of caution, this will come down to a court ‘passing the buck’, although this might seem to be an attractive option or easy way out, this is not the statutorily prescribed approach and such an approach may further unduly delay the finalisation of the matter and as such be contrary to the statutory prescripts of s 6(4)(a) of the Children’s Act, No 38 of 2005 or (b) dismiss an application for leave to appeal because the trial judge stubbornly persists in his or her views without taking a step back to objectively determine the possibility of another court coming to a different decision on either the facts or the law. Neither (a) or (b) meets the required standard set by s 17(1)(a)(i).

[14] It is, in addition, trite that an applicant seeking leave to appeal must set out its grounds of appeal succinctly and in unambiguous terms in order to enable the court and the respondent to understand the case the applicant seeks to make out and which the respondent has to meet in opposing the application for leave to appeal - *Songono v. Minister of Law and Order* 1996(4) S.A. 384 (E) 395J-386A; *Philip v Estate Agency Affairs Board* (39922/12) [2013] ZAGPPHC 276 (2 October 2013) para [31]; *Fuku v Mpoka* (A137/2013) [2013] ZAFSHC 152 (19 September 2013) para [5]; *Lewis NO and Others v Cooper NO and Another, Lewis v Soundprops 236 (Pty) Ltd and Others* (11292/08, 14889/08) [2009] ZAWCHC 51 (27 February 2009) para [2]; *Xayimpthe court and Others v Chairman Judge White Commission (formerly known as Browde Commission) and Others* [2006] JOL 16596 (E).

Considering the grounds of appeal - Would the appeal have a reasonable prospect of success?

[15] I cannot deal with each individual submission contained in the plaintiff's notice in the written judgment, although each has been considered. In particular, where I am of the view that there is no reasonable prospect that another court will have a different view on either fact or law pertaining to aspects that were argued during closing argument that are addressed in the judgment, these will not again be traversed. It will serve no purpose to re-write the judgment.

[16] The grounds of appeal relating to relocation, maintenance and costs will first be assessed by determining whether they substantiate a finding that the appeal would have a reasonable prospect of success. In the event that it is found that no reasonable prospect of success exists, the focus will fall on determining whether compelling circumstances exist necessitating that an appeal should be heard.

[17] At the onset of the analysis it is important to note that my finding that the defendant's motive to relocate is *bona fide* and reasonable, as dealt with in paragraph [46] of the judgment is not disputed in the notice or listed as a ground of appeal either as a finding of fact or issue of law on which it is alleged that I erred. The plaintiff's issue on appeal is that it is surmised that the court *'incorrectly reasoned that once it is found that the children should reside primarily with the defendant and her decision to relocate to Germany is reasonable, then, as an automatic consequence thereof, the children should relocate to Germany. This reasoning prioritises the rights of the defendant to return to her country of origin over the interests of the children'*.

[18] It is also relevant that the correctness of the factual matrix set out in paragraphs [13] – [23] of the judgment is not disputed, save for the fact that it is stated in the notice that there is no evidence supporting the finding I made that the defendant is still breastfeeding and was argued that the claim in the summons that the defendant failed to wean Keano reflected the situation, as it was at the time when summons was issued, and did not absolve the defendant of the onus to lead evidence that she is still currently breastfeeding. The aspect is dealt with further below.

Aspects contained in the notice of application for leave to appeal

Relocation

Unenforceability of the order in Germany

[19] Counsel for the plaintiff argued that the court erred in failing to consider, or have any regard to the unenforceability of the order, in Germany.

[19.1] It is stated as a fact in paragraph 4.3 of the notice that the order is not enforceable in Germany.

[19.2] Counsel could not refer me to any case law or authority in the heads of argument or during oral argument. This contention is based on a submission made by defendant's counsel in closing argument, which has no basis.

[19.3] Counsel could not address me on the implication of s 108 and 110 of the German statute the 'Act on Proceedings in Family Matters and Matters of Non-Contentious Jurisdiction' of 17 December 2008 (*Gesetz über das Verfahren in Familiensachen und in Angelegenheiten der freiwilligen Gerichtsbarkeit*) - FamFG. Section 108 of this statute deals with the recognition of foreign judgments and s 110 deals with the enforceability of foreign judgments (https://www.gesetze-im-internet.de/englisch_famfg/englisch_famfg.html).

[19.4] I was not referred to or addressed on the impact of the Reciprocal Enforcement of Maintenance Orders Act, No. 80 of 1963, or the Reciprocal Enforcement Maintenance Agreement between South-Africa and Germany (www.justice.gov.za/ilr/intmnt.html), and more importantly the effect that this reciprocity has on the enforcement of the order in Germany.

[19.5] I am not convinced that the blanket statement made on behalf of plaintiff that the order is unenforceable in Germany constitutes a proper ground of appeal, and I am of the opinion that I can take judicial recognition of the FamFG, the Reciprocal Enforcement of Maintenance Orders Act, No. 80 of 1963 and the Reciprocal Enforcement Maintenance Agreement between South-Africa and Germany.

[20] Plaintiff's counsel expressed concern regarding the fact that paragraph [113] of the judgment *'does not form part of the Order, save by reference and in addition to stating when the plaintiff is to have contact, it contains the Court's reasoning, findings and conclusions'*. Since I did read paragraph [113] into the record after I read the Order as contained in the printed judgment, this does not pose a problem and the Order must be retyped to reflect the correct position. This will be done.

Applying the incorrect legal principles in adjudicating the dispute regarding the children's proposed relocation

[21] Based on the submissions made on behalf of the plaintiff in the notice, the heads of argument and during oral argument, it is evident that plaintiff's counsel submitted that because I did not address each relevant factor set out in s 7 of the Children's Act I did not consider it, and paid mere lip-service to the principle 'best interests of the child'.

[22] It is stated clearly in paragraph 44 of the judgment that *'the fact that a specific factor listed in section 7 is not specifically addressed below, does not mean that it has not been considered'*. The judgment is evident of the fact that the children's best interest were considered within the broad context of the facts of the case, the applicable constitutional matrix and the guidance provided by case law, despite the fact that no comparison or analyses was made in tabular form. I am of the opinion that there is no reasonable prospect that a court of appeal would find that, in the circumstances of this case, taking into consideration the facts of the matter and the constitutional and legal matrix within which the court's discretion must be exercised, it is not in the best interests of the children to relocate with the defendant to Germany.

[23] In addition, the approach to adjudicating disputes of this nature has been explained by Murphy J in *Cunningham v Pretorius* (31187/08) [2008] ZAGPGC 258 (21 August 2008) para [9], in that the court must acquire an overall impression. The investigation required a holistic, case specific analyses.

[24] Although reference is made in paragraphs [47], [51] – [54], [101], [121] and [113.2.5] of the judgment to Buchbach without incorporating reference to Lain am Zee, this is not *'misleading, unhelpful or incorrect'* as unfortunately submitted in plaintiff's heads of argument. The defendant's evidence was that Lain am Zee is a family village/holiday resort 3km from the town Buchbach. The evidence led by the defendant and Dr. Kruger clearly referred to both and the omission to refer specifically to Lain am Zee in correlation with Buchbach is negligible and not a ground for appeal.

[25] It is argued in paragraph 5.3.1.4 of the heads of argument that there is no evidence to support the finding that the defendant is 'still breastfeeding'. In addition to the relevant paragraph in the summons referred to in paragraph [67] of the judgment, defendant's counsel during argument drew attention to, *inter alia*, paragraph 39.1 of the plaintiff's plea to defendant's counterclaim where it is admitted that *'The plaintiff admits that the defendant ... continues to breastfeed Keano.'* It is in addition stated in paragraph 6.3 of a

letter, dated 18 October 2017, written by the plaintiff's attorney of record for the attention of the Deputy Chief Judge President, which I take cognisance of because it was provided by the plaintiff although not referred to during the trial, that *'The plaintiff's contention in this regard is that the defendant persists in breastfeeding Keano to create an interdependence with Keano so as to positively influence her case for an order that Keano resides primarily with him'*. The issue of continued breastfeeding was never disputed until in closing argument.

[26] It is contended in paragraph 3.2 that I erred in not finding that the defendant did not want to frustrate the plaintiff's contact with the minor children, with reference to paragraph [113.1.1] of the judgment. It is imperative to take note of the fact that the specific sentence reads – *'I am not persuaded that the defendant wanted to frustrate contact between the plaintiff and the children 'at all costs'*. This finding must be read in context of the judgment as a whole and specifically paragraph [71.3.] thereof.

Incorrect factual finding

[27] The only claim under the heading *'The Court erred in making incorrect factual findings'* that is contained in paragraph 10 of the notice, is that the court made an incorrect factual finding by finding in paragraph [70] of the judgment that the defendant's endeavours to frustrate the children's contact with the plaintiff, was in respect of the so called 'third phase'. In this regard it is sufficient to state that I did consider the evidence that was before me. The mere mentioning of two contempt of court charges is not evidence that the defendant frustrated contact, specifically if read in the context of plaintiff's evidence as to why he laid the charges *'...it was always her trying to [indistinct] and tell "nee" what the order should say and it was enough and it was wrong and it is wrong on many occasions and that is why I at the time did lay the charge. Because if most things [indistinct] when it came, because acted Katherine arrogantly in the last 3 and a half 2 years, it was very arrogantly and it was all about her and **that was the main reason for that**'*. I also considered the nature of the incident referred to in paragraph [80] in the judgment.

Incorrect findings pertaining to the expert and other witnesses

[28] Save for stating that the aspects referred to in paragraph 11 of the notice forms part of the context within which the post-divorce contact and care regime was considered, as

set out in paragraph [23] of the judgment, the remainder of the submissions contained in this paragraph are argumentative and were dealt with in the judgment.

Bias in favour of the defendant

[29] Save for stating that the reason why the court dealt with the defendant as a witness is contained in paragraph [28] of the judgment, I am of the view that none of the aspects listed are indicative of a biased attitude. There are no merits in these averments. The judgment as a whole evince a balanced approach aimed at determining the appropriate post-divorce care and contact regime that would be in the best interests of the children having regard to the factual matrix of this case and amidst their parent's acrimony and strife.

[30] It is nowhere in the judgment stated that I accepted evidence of Dr. Kruger '*that the family in Germany will welcome the plaintiff with open arms*'- the correct finding is contained in paragraph [53] of the judgment.

[31] The reason for accepting Dr. Zaobi's report is set out in paragraph [51] of the judgment. Prior to accepting this report the defendant's counsel argued that the report should be admitted in terms of s 34 of the Civil Proceedings Evidence Act, No 25 of 1965, since Mr Zaobi was outside the Republic and it was not reasonably practical to secure his attendance at the trial. Although his report was admitted, the evidentiary value attributed thereto is explained in paragraph [51] of the judgment. The findings made pertaining the living conditions in Germany were based on Dr. Kruger's evidence. Dr Robyn Fasser's report was not accepted into evidence. No justifiable reason exists to admit a report if an expert witness who is available in South-Africa does not testify at the trial, particularly in circumstances where other expert witnesses, who assessed the same parties, gave their evidence and was subjected to thorough cross-examination.

[32] In paragraph 12.9 of the heads of argument it is stated that the court incorrectly found that the plaintiff insisted on the children's passports being held by a third party and that therefore it was the plaintiff that prevented any contact between the children and the extended family. Evidence was led by the plaintiff, when he was cross-examined in this regard. This evidence is unfortunately not captured in the typed record on page 232 of the record where it is supposed to be and the record needs to be supplemented in this regard. I have recorded the plaintiff's response to a statement that the defendant has not

been in Germany during the last two years because she cannot afford it and the plaintiff did not agree thereto. – Plaintiff testified (I paraphrase as my notes do not represent a verbatim account) *that the passports were held by a third party attorney – how could they go this year... ‘of course they’ haven’t gone- I do not trust her not to go away.* The defendant’s evidence was that she was *forced* to agree to the passports being held by an independent attorney.

Error in terminating the interim sleepover regime

[33] It is argued in the heads of argument that there was no rationale or justification for reducing the sleep-over contact that the plaintiff has with the children during the week. Neither of the parties addressed the court in closing on an appropriate sleep-over regime for the interim in the event that it was found that the defendant and the children could relocate. Since the court is the upper-guardian for the minor children the court incorporated a contact regime that was deemed appropriate in the circumstances. In light of the fact that the defendant’s visa lapses on 3 February 2018 and the finding that she may relocate with the children, this was an interim arrangement.

Exit strategy

[34] Neither of the parties proposed an appropriate exit strategy in the event that I found that the children may relocate with the defendant. Taking into account the children’s best interests, the court deemed it necessary to provide an opportunity to the children to greet the plaintiff and the extended family. Nothing is to be gained by prolonging or delaying the parting. In light of the fact that the defendant’s visa lapses on 3 February 2018, the exit regime is appropriate, and I am of the opinion that the appeal of this aspect would not have a reasonable prospect of success.

[35] The plaintiff complained that the exit strategy did not allow for a sufficient period for him to bid the children farewell in circumstances where he *‘may potentially not have physical contact with the children at the very least for the next month’*. It can thus be deduced that he intends to maintain contact with the children and that is ultimately in the children’s best interests.

[36] After juxtaposing the judgement and order , and the application for leave to appeal as structured in the notice and supported by the argument contained in the heads of

argument and the oral argument presented from the bar, I am of the view that an appeal pertaining to the finding on relocation would not have a reasonable prospect of success.

Spousal maintenance

[37] It was argued that the court erred in finding that the defendant is entitled to four years rehabilitative maintenance in the amount of E1000 per month, in light of the fact that no evidence was lead pertaining to the quantification of the maintenance or the specific period for which the maintenance is needed. The aspects that were considered are stated in paragraphs [120] – [125] of the judgment.

[38] Van Dijkhorst J explained in *Porthino v Porthino* [1981] 2 All SA 33 (T) the test that needs to be applied is '*whether on the probabilities maintenance is or will be needed.*'

[39] On the probabilities the defendant needs to be maintained for a period and I am not of the opinion that an appeal pertaining to the defendant's need to receive rehabilitative spousal maintenance has a reasonable prospect of success.

[40] If section 7(2) of the Divorce Act 70 of 1979 is considered, the only factor mentioned in the section whereon no evidence was led is the 'financial needs and obligations' of the parties. The fact that the defendant was unable to earn any income for the past years, necessitates a maintenance order. The only contentious aspect is the amount and period thereof. In determining the four year period the court took into account that logic dictates the defendant will have to assist the children to adapt to their new environment in the first year after relocation. It is only thereafter that she will be able to use the time to better her qualifications or enhance her skills and experience. The period of four years was thus determined taking the best interests of the minor children in consideration. The amount of E1000 was determined taking into consideration the defendant's current interim maintenance of R 10 000,00 per month, the amount tendered for rent payment – R12 000,00 per month, and the medical aid contributions that will now fall away. However, it is possible that there is a reasonable prospect that another court would consider different criteria and come to a different decision pertaining to the amount and period of rehabilitative maintenance. This ground for appeal is thus upheld and the plaintiff is granted leave to appeal the duration and amount of the maintenance order.

Child maintenance

[41] In light of the circumstances of the case, the basis used for the calculation of the children's maintenance, the fact that the amount is less than what the plaintiff is currently paying, and the provisions of section 6(3) of the Divorce Act, I am of the view that an appeal pertaining to child maintenance does not have a reasonable prospect of success.

[42] Plaintiff's counsel's argument that plaintiff will be inconvenienced by having to arrange to pay the maintenance in euros, is not a ground for appeal against a finding of the liability to pay.

[43] Counsel could not refer the court specifically to a regulation pertaining to the submission that in circumstances where the payment of maintenance in euros is not subject to the defendant being *de facto* in Germany the order contravenes the South African Exchange Control Regulations. Since it has not been argued that the defendant's nominated account is a South-African account and if considered that her visa expires on 3 February 2018 I am of the view that this is not a proper ground for appeal.

Costs

[44] The contention that the defendant should not be allowed costs because her legal costs has to some extent been funded by an NGO is opportunistic in light of the fact that plaintiff, whose legal costs were fully funded by his father, claimed to be awarded costs in the draft order submitted on his behalf during closing argument.

[45] Evidence was led by the defendant that the contribution by the NGO was not a gift and that she would want to pay it back when she is in a position to do so. Defendant's counsel argued that the contribution by the NGO is *res inter alios acta*.

[46] I am of the view that an appeal pertaining to the costs order would not have a reasonable prospect of success.

Is there a compelling reason why the appeal should be heard?

[47] In light of the fact that I am of the view that the appeal pertaining to relocation, the obligation to pay spousal maintenance, child maintenance and costs would have no reasonable prospect of success, I must consider whether there is some other compelling reason why an appeal pertaining to these matters should be allowed.

Compelling reasons raised by plaintiff

[48] The following are listed in the heads of argument as compelling reasons why an appeal should be allowed:

[48.1] The substantial importance of the case to the plaintiff or to both the plaintiff and the defendant;

[48.2] The decision sought to be appealed against involves an important question of law (during oral argument reference was made to the maternal preference rule) – in paragraph 14 of the heads of argument another point of law is identified, namely the contention that the order is not recognised and/or enforceable in Germany without the plaintiff launching legal proceedings *de nova* in Germany;

[48.3] The best interests of the minor children are to be determined;

[48.4] The matter is of substantial importance to both parties, more so for the plaintiff in that his constitutional rights in terms of section 34 stands to be impeded by the order;

[48.5] The order imposes considerable inconvenience and prejudice on the plaintiff and the minor children, with the latter now at the threshold of having their right to parental care from the plaintiff severely curtailed;

[48.6] The judgment has the effect of silently relinquishing jurisdiction into the ‘oblivion’ of “some” German court as ‘*conceded in argument by counsel for the Defendant*’.

[49] In light of the fact that the most important of these reasons, namely the best interests of the children, was considered during the trial and, in coming to a final judgment, and re-considered now, and that the issue of the enforceability of the judgment in Germany is dealt with above although counsel could not refer to appropriate authority to substantiate this contention, the court is not convinced that any of the reasons listed constitute a compelling reason for granting leave to appeal. Inconvenience caused by an order of court is not a compelling reason that an appeal should be heard. The plaintiff’s constitutional right as contained in s 34 is not affected since he will have access to the German courts – in this regard it is important to note that LC Haupt explained in her doctoral thesis *Die reg van die kind op oorlewing, ontwikkeling en beskerming* (1998) 127, that s 6 of the German *Grundgesetz* acknowledges the *Kindswohl* (child’s best interests) as benchmark and constitutional norm that serves as a legal criterion for the foundation and limitation of the interests and rights of children, parents and the state. In

any event, the plaintiff's constitutional right as encapsulated in s 34 of the constitution must be balanced with the defendant's constitutional right set out in s 21 and the children's constitutional right contained in s 28(2) of the Constitution. The fact that the court is relinquishing jurisdiction over the children to German courts is a natural consequence of relocation and in light of the similarities between the approaches of the two jurisdictions to safeguarding the children's best interests, this is not in itself a compelling reason why the appeal should be heard.

[50] I accordingly find that there is no compelling circumstances why the appeal should be heard.

ORDER:

IT IS THUS ORDERED THAT:

1. Leave to appeal is granted to the plaintiff to appeal the narrow issue pertaining to the amount and period of spousal maintenance, to the Full Court of the Gauteng Division (Johannesburg).
2. Leave to appeal the remainder of the judgment is refused.
3. Applicant is to pay the costs of the application, which costs include the costs of two council.

E VAN DER SCHYFF
Acting Judge of the High Court

Plaintiff's Attorneys
Steve Merchak Attorney
1st Floor, 3 Gwen Lane
SANDTON
Adv. A de Wet (SC)

Defendant's Attorneys
Darryl Furman & Associates
Illovo Law Chambers
4 Fricker Road
ILLOVO
Adv. J Peter (SC)