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REPUBLIC OF SOUTH AFRICA



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

Case No: 44169/2019

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |

18 March 2021

DATE

.....
RT SUTHERLAND

K[....] M[....] R[....]

Appellant

and

K[....] R[....]

Respondent

JUDGMENT

HEADNOTE

An appeal in terms of section 18 (4) (ii) of the Superior Courts Act 10 of 2013 – an interim order had been made requiring a mother(the appellant) to surrender her 7 year old son to the boy’s grandmother (the respondent) pending the outcome of the main hearing which would determine the long term care and custody of the child – the mother applied for leave to appeal; that application was dismissed, and she then petitioned the SCA for leave to appeal - the central controversy was whether the order was final in effect and was thus automatically suspended pending the appeal process (section 18(1)) or was an interlocutory order not having a final effect and thus not suspended pending an appeal process (Section 18(2)) -the court a quo held the order was interim and unappealable.

Held: the effect of the order was final in effect, a finding on the facts – a declaratory order was issued to that effect and therefore the order was automatically suspended pending the conclusion of the appeal process– the appeal succeeded with costs

Sutherland ADJP (with whom Strydom J and de Villiers AJ concur)

Introduction

[1] This appeal came before a Full Court of the Division in terms of the special appeal procedure provided in section 18 of the Superior Courts Act 10 of 2013 (SC act). That section provides thus:

“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.”

[2] This case concerns an order made on 3 November 2020 which, among other matters, required a seven-year old boy, N[...], to be immediately removed from the care and custody of his mother, the appellant, K[...] R[...] (K[...]) and placed in the care and custody of the respondent, K[...] R[...], (K[...]) who is K[...]'s mother and N[...]'s grandmother. The applicant then was K[...], the respondent in this appeal. The application was launched in the customary bifurcated form which is the practice in this Division: Part A was for an interim order pending Part B in which final relief for the removal would be adjudged. The order was that as sought in Part A, albeit the relief claimed was slightly modified in the order that was made.

[3] Immediately after the order was handed down K[...] filed an application for leave to appeal. In addition, there was a difference of opinion between the parties about the status of the order. Was it automatically suspended pending the outcome of an application for leave to appeal as contemplated in section 18(1) of the SC Act? If it was not automatically suspended, was the order one as contemplated in section 18(2); i.e. an interlocutory order not having final effect that is not automatically suspended pending the outcome of an application for leave to appeal?

[4] K[...] accordingly launched an application in terms of section 18 to cater for either characterisation. If the order was automatically suspended, she sought a declaratory order to eliminate confusion and dispute about that question. If it was an “interlocutory order not having the effect of a final judgment” she sought an order suspending it on the grounds that the presence of exceptional circumstances existed and that irreparable harm would eventuate if not so ordered.

[5] The two applications were addressed in the same hearing. K[....] also sought other relief which is irrelevant to this appeal because the section 18 procedure applies only to the putting into operation or not of the order given on 3 November 2020.

[6] On 4 December 2020, both applications were dismissed. At once, K[....] petitioned the President of the Supreme Court of Appeal for leave to appeal. Also, at once, K[....] launched the appeal before us now. The notice of appeal addresses several other issues which are beyond the scope of a section 18 appeal and are, accordingly, ignored.

[7] The rationale for dismissal of the section 18 application is captured in paragraph 21 of the judgment thus:

“Given that the application for leave to appeal must fail, it follows axiomatically that so must the application in terms of section 18(2) and 18(3) ...”.

[8] It was argued that the succinctness of this passage did not mean that the Judge did not apply her mind to the provisions of section 18. That is perhaps the wrong question. The real question is whether this passage states the reason for the decision. In my view it does. A fair reading of the passage is that the Judge considered it unnecessary to conduct an investigation into the presence of exceptional circumstances and irreparable harm as section 18 requires, because she understood the law to be that there was no room to debate that issue if the application for leave to appeal failed.

[9] That view is incorrect. The failure of an application for leave to appeal, still left open the prospects of a petition to a higher court. An explanation of the understanding of the Judge is to be found in the preceding paragraph of her judgment.

“It is plain that the 3 November order is interim in nature, unappealable and that its operation would not be suspended by an application for leave to appeal (even were leave to appeal to have been granted).”

[10] However, even on the premise found by the Judge that the order was “interim in nature” which can only be understood to mean not *final in effect*, a section 18(2) evaluation was still necessary. The conclusion reached is therefore incorrect.

[11] 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.

[12] The compass of an order that is final in effect was addressed in *Zweni v Minister of Law and Order* 1993 (1) SA 523 at 532J -533A:

“A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (*Van Streepen & Germs (Pty) Ltd* case *supra* at 586I-587B; *Marsay v Dilley* [1992 \(3\) SA 944 \(A\)](#) at 962C-F)....”

[13] To the *Zweni* approach must be added the refinements about supposedly interim orders stated in *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) at [39] - [42] where the following was held:

“[39] The appealability of interim orders in terms of the common law depends on whether they are final in effect. In this connection it must be borne in mind that the effect of the restraining and mandatory order granted is to mortify and prevent Council from implementing its resolution. And this is the resolution taken in terms of its constitutional and statutory powers. To say that this

amounts to an intrusion by courts into the domain reserved exclusively for the executive, would not be an overstatement.

[40] The common-law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA* by Moseneke DCJ in these terms:

'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.'

Deputy Chief Justice also dealt with the role of separation of powers in relation to appealability as follows:

'A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever.'

[41] What the role of interests of justice is in this kind of application, again entails the need to ensure that form never trumps any approach that would advance the interests of justice. If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common-law impediments might suggest. This is especially so where, as in this case, the interim order should not have been granted in the first place by reason of a failure to meet the requirements. The Constitution and our law are all about real justice, not mere formalities. Importantly, the constitutional prescripts of legality and the rule of law demand that nobody, not even a court of law, exercises powers they do not have. Where separation of powers is implicated and forbids the grant of the order sought to be appealed against, the interests of justice demand that even an order that is not of final effect or does not dispose of a substantial portion of the issues in the main application, nevertheless be appealable.

[42] Consequently, although the final effect of the interim order or the disposition of a substantial portion of issues in the main application is not irrelevant to the determination of appealability and the grant of leave, they are in terms of our constitutional jurisprudence hardly ever determinative of appealability or leave. The role of the final effect of an interim order recedes into the background when an interim order impermissibly trenches upon the sole terrain of the other branches of government. To arrest the execution of Council's policy decision as finally as the

High Court has done before a determination of the grounds of review, is too drastic a measure to take in the circumstances. It remains the constitutional and statutory responsibility of Council to determine the fate of the street names, obviously subject to facilitation of genuine and appropriate public participation in the name-changing process. The power to determine how much of Council's budget will be used, when and for what purpose is also firmly in the hands of Council."

[14] In general, the attribute of "finality" which may attach itself to a, supposedly, interim order is of course not to be equated with an order which is literally "irreversible". The point at issue is *effect* not *form*. However, even with a reversible order, the aspects of the duration that the order is to operate, the likelihood of contingent factors that might provoke a reconsideration of the order and the logistics of a reverse transition from a change brought about by a new status quo created by the implementation of the order all weigh in the assessment of the true "effect" of an order.

[15] Moreover, especially with orders that affect human relationships, it could fairly be said that they address moving targets. The formal legal reversibility of such an order is not necessarily determined by the status quo at the time the initial order was given but may be dictated by circumstances that flow from the evolution of the conditions and circumstances brought about by the "interim" order itself. In other words, the momentum in the tide of affairs of the affected people can be shaped by the unavoidable consequences of the changes brought about by the "interim" order. Such effects are not always capable of being undone and what in truth happens is that a fresh order is later required to manage a reverse transition, if, and only if the circumstances that prevail at that later time, are conducive to a reversal at all. The reality is that, in given circumstances, the initial order has indeed a final effect.

The order of 3 November 2020

[16] In my view the order of 3 November was final in effect and is therefore automatically suspended pending the exhaustion of the appeal process.

[17] The order is extensive; the text reads thus:

“Pending the finalisation of Part B it is ordered as follows:

1. The applicant and the respondent shall continue to co-hold care, contact, guardianship and the duty of maintenance in respect of the minor child, N[....] M[....] A[....] R[....] (“N[....]”), as contemplated in Section 18(2) (a)- (d), 18(3), read together with Section 23 and Section 24 of the Children’s Act 38 of 2005.
2. The primary place of residence of N[....] shall vest with the applicant in Cape Town.
3. The handover of N[....] by the respondent to the applicant will be facilitated by a social worker, namely Adell-Mari Wolmarans, alternatively Jacqueline Griessel.
4. The applicant is authorised to involve the services of the South African Police Services insofar it is necessary to do so in order to facilitate the handover of N[....] to the applicant.
5. Decisions in respect of N[....]’s religion, major medical interventions, education and extramural activities will be made by the applicant and the respondent in terms of Section 31 of the Act in conjunction with the parenting coordinator referred to below. In the event of a dead-lock, the parenting coordinator’s decision shall be final and binding.
6. The parenting coordinator will facilitate discussions with the applicant and the respondent (either jointly or separately) on the issues that are subject to the decision making referred to in paragraph 5 above.
7. The applicant will take immediate steps for N[....] to commence therapy with a therapist situated in Cape Town, nominated and appointed by the parenting coordinator.
8. Neither the applicant nor the respondent shall be permitted to interfere with N[....]’s therapy:-
 - 8.1 communication by the applicant and/or respondent with N[....]’s therapist will occur through the parenting coordinator, unless the therapist initiates contact with either the applicant or the respondent spontaneously;
 - 8.2 the applicant is responsible for payment of the costs of N[....]’s therapy in the event that it is not covered by N[....]’s medical aid scheme.
9. The applicant will take immediate steps to enrol N[....] in occupational therapy in Cape Town. The applicant is responsible for payment of the costs of N[....]’s therapy in the event that it is not covered by N[....]’s medical aid scheme.
10. The respondent’s rights of contact with N[....] shall be phased in under the guidance and monitoring of the parenting coordinator as follows:
 - 10.1 Pending in-person contact between N[....] and the respondent, N[....] will have electronic contact over the Zoom digital platform with the respondent. The Zoom contact should occur

- alternate days for 15 minutes per session. The respondent shall refrain from speaking negatively of the applicant and the R[...] family during the Zoom sessions aforesaid. This contact may be varied by the parenting coordinator.
- 10.2 Subsequent to a three-month period having elapsed from the date of the applicant and N[...]’s relocation to Cape Town pursuant to this order, the respondent shall be entitled to exercise such further phased in contact as is stipulated by the parenting coordinator.¹
11. Senior mental health practitioner, Dr Astrid Martalas, alternatively Mr Martin Yodaikin, is appointed to act as parenting coordinator in this matter with immediate effect:-
- 11.1 the parties are ordered to enter into a contract of engagement with Dr Astrid Martalas, alternatively Mr Martin Yodaikin, such contract will be suitably amended by the parenting coordinator in terms of the specific demands of this matter;
- 11.2 the parenting coordinator will function as a mediator and a monitor in respect of any potential dispute that may arise between the applicant and the respondent in the event of any occurrence of unhealthy parenting.
- 11.3 The parenting coordinator shall:-
- 11.3.1 facilitate and manage contact between the respondent and N[...];
- 11.3.2 assist in the mediation of any disputes between the applicant and the respondent in the interim;
- 11.3.3 monitor N[...]’s care and well-being by *inter alia*, being entitled and authorised to:
- 11.3.3.1 liaise, weekly or otherwise, with N[...]’s therapist/s;
- 11.3.3.2 receive any information from said therapist/s from his/her mandate.
- 11.4 The parties are ordered to engage constructively with the parenting coordinator, who is tasked with gaining an understanding of N[...]’s maturing needs;
- 11.5 The applicant and the respondent will be responsible for payment of the costs of the parenting coordinating in equal (half) shares.
12. The applicant shall serve a copy of this order on N[...]’s biological father, Robert Marco Boccia (“Mr Boccia”) and Mr Boccia shall be entitled to apply for leave to intervene in Part B of this application, should he wish to do so, within 20 court days of service of this order upon him.
13. The applicant and respondent shall refrain from speaking negatively of the other to N[...] and/or from engaging in any alienating behaviour in respect of the other.
14. Part B of the applicant’s application is referred to oral evidence at a time to be arranged with the Registrar, alternatively the judicial case manager, on the following questions:
- 14.1 Whether the recommendations of Dr Fasser as contained in her report of September 2020, should be finally implemented;
- 14.2 Whether N[...] should be permanently removed from the care of the respondent and remain in the care of the applicant, and if so, the period for which N[...] should reside with the applicant; and
- 14.3 The extent of the parental responsibilities and rights that the respondent should hold during the period that N[...] is residing with the applicant, specifically the extent of the contact that the respondent shall have with him;

¹ It should be noted that there are aspects of the order in paragraph 5, 10 and 11 which are in direct contradiction to the decision in *Hummel v Hummel 2012 JDR 1679 (GSJ)*; see also: *TC v SC 2018 (4) SA 530 (WCC)* at [48], where the subordination of a parent to such a regime in the absence of an agreement to be so subordinated was held to be unlawful. However, along with the balance of the order, it is unnecessary for it to be critiqued in this judgment.

- 14.4 Whether N[...] should permanently reside with the respondent and whether the respondent should hold full and unfettered parental responsibilities and rights to the exclusion of the applicant;
- 14.5 Whether the applicant should continue to hold or co-hold full parental responsibilities and rights in respect of N[...], and if so, the nature and extent of such rights.
15. The evidence shall be that of the witnesses who have deposed to affidavits in respect of Part A of the application.
16. In the event that either party wishes to call additional witnesses, such party shall file a witness statement containing the evidence to be given in chief by the witness or, the court at the hearing, may permit a person to be called despite the fact that no such statement has been served in respect of his/her evidence.
17. Either party may subpoena any person to give evidence at the hearing, irrespective of whether such person has consented to furnish a statement or not.
18. The fact that a party has served a statement in terms of paragraph 15 or 16 hereof, or subpoenaed a witness, shall not oblige such party to call the witness concerned.
19. To facilitate the issues being referred to oral evidence, the parties shall each be entitled to, and/or responsible to, and/or compelled to:-
 - 19.1 approach the Honourable Deputy Judge President with a request that:
 - 19.1.1 A period of at least 5 to 10 days be allocated for the hearing of oral evidence as soon as possible;
 - 19.1.2 A judicial case manager be appointed to facilitate that the oral evidence is heard as expeditiously as possible.
 - 19.2 deliver a discovery affidavit as envisaged by Uniform Rule of Court 35(1) within 10 days of the date of this order and such supplementary discovery affidavits may be required;
 - 19.3 provide to the other party either a hard copy or electronic copy of any documents so discovered, as may be requested by such party subject to the appropriate tender as to the costs photocopying such documents, if applicable;
 - 19.4 file any and all expert reports as envisaged by Uniform Rule of Court 36(9)(a) and (b) in relation to those experts that they wish to call to give evidence at the hearing within 15 days of the date of this order;
 - 19.5 ensure that a meeting of the respective experts is convened, and that said experts endeavour to produce a joint minute within 10 days after the delivery of the reports referred to in paragraph 19.4 above;
 - 19.6 convene a pre-trial conference as envisaged by Uniform Rule of Court 37 within 15 days of the date of this order;
 - 19.7 upload all pleadings, notices, applications and other documents onto the Caselines platform as may be required.
20. The respondent shall continue with her weekly therapy to address any psychological weakness that she may have and receive parental guidance and/or training.
21. The costs of Part A of the application are reserved, to be adjudicated by the Court hearing the oral evidence in Part B.”

[18] The status quo concerning N[....], pre-order, was as follows:

- 18.1 He had resided in Johannesburg for nearly four years and has resided exclusively with K[....] for more than five years.
- 18.2 He had been enrolled in Saheti School for about two years. At present owing to the covid pandemic he is experiencing online tuition.
- 18.3 He has friends with who he interacts.
- 18.4 He has regular contact with his maternal grandfather.
- 18.5 He has contact with his biological father and half-siblings.
- 18.6 He receives therapy from Dr Zaaks among others.
- 18.7 He had had little contact with K[....] in recent times.

[19] The effect of the order is thus:

- 19.1 N[....] is to be summarily, without any transition, plucked from his mother and transported to Cape Town and to be parented de facto by his grandmother, who seeks in part B of the initial application brought by her to make the arrangement permanent. The fostering of a connection with K[....] is the declared intention of the order.
- 19.2 The effect of this is to plunge the child into a different environment, albeit not new or wholly unfamiliar.
- 19.3 N[....] shall be physically apart from his mother who is to communicate on limited occasions by video link in 15-minute segments on alternate days. There shall be no

room for any opportunity of mothering by K[....] of a nature typically associated with the nurture of a 7-year child.

19.4 Current contact with his material grandfather will cease for the duration.

19.5 Current contact with his biological father will cease for the duration.

19.6 The duration of this “interim” arrangement is indefinite. It shall endure until the legal process for Part B is completed. An examination of the steps identified in the order itself indicates that the preparatory phase will take some time. An aspiration is expressed that special arrangements be made by the court administration to speed things up. The Court administration can sometimes assist the process, but in practice, that is usually feasible when both parties’ self-interest is served by expedition. The fact that K[....] and K[....] are hostile to one another will not help to expedite the process; they have directly opposite aims – primary control of N[....]. Accordingly, that incentive is absent in this case. From the order alone the scale of pre-hearing preparation, including the high risk of a referral to oral evidence or to trial is apparent. There are witnesses and their diaries need to be coordinated, no less the legal practitioners in the case, whose retention is important because of their familiarity with a long drawn out and tortuous case.

19.7 Will the losing party, after Part B, appeal? That risk seems high.

19.8 The submission was made that in a person as young as N[....], the change in domicile will affect the trajectory of his life. It will result in a new circle of acquaintances and

the loss of old ones. The separation shall, on the probabilities, profoundly influence the bonding process between him and K[....].

19.9 N[....] is to commence with therapy in Cape Town with a therapist yet to be identified. Axiomatically once that does commence the therapy must not be inopportunistically interrupted. One the effects of removing him from Johannesburg is that a present course of therapy with a therapist to whom he is accustomed is summarily abandoned.

[20] These *effects* are irreversible even if the order is reversible. The residence - arrangements that apply to N[....] shall pre-determine in large part, if not exclusively, the outcome of Part B. The order has indeed the effect of a final order. It is appealable. It is suspended automatically pending an appeal.

[21] It was argued that from a reading the two Judgments given by the Judge a quo, it is plain that she intended the order to be interim. This may be so, but her intention has no weight in determining the effect of the order. It is so that she was conscious of the need to expedite Part B, but neither the order per se, which shows awareness of the extensive preparation still outstanding, nor the practicalities of the dynamics of litigation can by a mere act of will be speeded up.

The merits of the order of 3 November 2020

[22] No part of this judgment is concerned to critique the judgment or order of 3 November; that is the task of the Court of Appeal which hears that matter. The gravamen of this judgment is to determine the character of the order. It has not escaped us that the order was in part an

exercise of a judicial discretion as the upper guardian of minors. Such decisions are intrinsically taxing and due deference ought to be given to the choices made by judges. But that consideration does not affect the characteristics of the order that was granted.

Conclusions

[23] In the result, it must be held that:

23.1 The order of 3 November 2020 was final in effect.

23.2 The appeal must succeed.

23.3 For the sake of clarity, it is prudent to issue a declaratory order that the order of 3 November is suspended pending the outcome of the application for leave to appeal before the SCA, or any further application for leave to appeal or appeal to a higher court.

The Costs

[24] There was a debate about whether K[....] was entitled to a costs order if she succeeded because no prayer for costs was stated in her notice of appeal.

[25] The position in our practice is that, provided that a party is given notice that costs will be sought, regardless of how that occurs, an entitlement to seek a costs order is satisfied.

[26] An example where a defendant had given no notice of a prayer for costs is *National Implement Co v Bouwer* 1955 (3) SA 314 (T,) where for that reason, a costs order was refused. The situation arose when, obtaining a judgment by default, the plaintiff sought to amend the particulars of claim to seek costs. It is manifest in such a case that the defendant might have decided not to defend a debt indeed owed because no costs were prayed for.

[27] However, most recently, in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at [165] the Constitutional Court declared that:

“It is settled law that it is not necessary that there be formal notice of a request for a special costs order. The absence of a prayer for a personal costs order against a public official does not necessarily preclude the granting of such an order. It is sufficient that the party against whom this order is sought is informed that the order will be asked for and has an opportunity to advance reasons why the order should not be granted.”

[28] The furnishing of notice in the heads of argument of an intention to seek costs was held to be sufficient in *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at [15]. In that case Southwood J hinted, without deciding, that because practitioners are aware that costs usually follow the result, a surprise that a costs order is sought, without an express prayer, is feigned. It is, however, not necessary to make a finding on that point for the purposes of this case.

[29] It was not argued that the costs be made costs in the prospective “main” appeal. In my view that would be inappropriate, in any event, because there is no reason why this diversion via

a section 18 special appeal should not be dealt with as a distinct foray, rather than a necessary step in the progression to that hearing.

[30] Both parties wanted costs if successful. There is no reason why the respondent should not be responsible for the costs of this special appeal.

The Order

1. The appeal is upheld.
2. The order in Paragraph 3 of the order of 4 December 2020 is set aside and substituted by the following:

“It is declared that the order and judgment of 3 November 2020 is a Judgment having a final effect and that it is automatically suspended pending the conclusion of any appeal process, including applications for leave to appeal”.
3. The respondent shall bear the costs of the appellant.

ROLAND SUTHERLAND

Acting Deputy Judge-President, Johannesburg
Gauteng Division of the High Court of South Africa

REAN STRYDOM

Judge of the High Court, Johannesburg
Gauteng Division of the High Court of South Africa

NIEL DE VILLIERS

Judge of the High Court, Johannesburg

Gauteng Division of the High Court of South Africa

Heard: 5 March 2021

Judgment: Uploaded to Caselines on 18 March 2021 which is the deemed date of delivery

For the Appellant:

Adv Amandalee de Wet SC,

Instructed by Attorney Steve Merchak.

For the Respondent:

Adv Anthony Bishop,

Instructed by Joselowitz & A[....]s.