



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

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

SIGNATURE

DATE: 16 March 2023

Case No. 2019/26732

In the matter between:

JJVW

Applicant

and

NVW

Respondent

JUDGMENT

WILSON J:

- 1 On 22 February 2023, I struck an application for leave to appeal brought by the applicant, Mr. VW, from the roll, with costs. I also appointed Laura Edmonds, a social worker, as the supervising professional who will manage contact between the respondent, Mrs. VW and the parties' child, SA, in terms of my order of 18 October 2022.

- 2 I indicated that my reasons for making these orders would be provided in due course. These are my reasons.

The application for leave to appeal

- 3 Mr. VW's application for leave to appeal was directed against my order of 14 December 2022, in which I lifted a suspension I had previously placed on Mr. VW's obligation to pay maintenance to Mrs. VW pending the finalisation of the parties' divorce action. My reasons for making that order were published to the parties on 9 January 2023.
- 4 Both the suspension of Mr. VW's maintenance obligations, and my decision to lift that suspension, are orders in terms of Rule 43 (6) of the Uniform Rules. They are also orders on proceedings taken "by one spouse against the other for maintenance *pendente lite*" for the purposes of section 16 (3) (a) of the Superior Courts Act 10 of 2013.
- 5 They are, accordingly, not appealable. Ms. De Wet, who appeared for Mr. VW, accepted that this is the default position, but sought to persuade me that the Constitutional Court's decision in *S v S* 2019 (6) SA 1 (CC) ("S") had carved out an exception to this rule where a court grants a "patently unjust and erroneous order" (see S, paragraph 58). In those circumstances, Ms. De Wet argued, a court could exercise its inherent power to regulate its own process, under section 173 of the Constitution, 1996, and grant leave to appeal, even though appeals against interim maintenance orders generally are forbidden by statute.

- 6 I found this argument unpersuasive. In *S*, the Constitutional Court was asked to declare section 16 (3) of the Superior Courts Act unconstitutional. The court declined to do so, on the basis that the limitation section 16 (3) places on appeals against interim orders in matrimonial actions does not infringe the constitutional rights the applicant in that case relied upon. The court found that a limitation on appeals against interim orders in matrimonial matters is essential to maintain Rule 43 as an inexpensive and speedy remedy that helps preserve, amongst other things, the financial security of relatively disadvantaged spouses (predominantly women) in pending divorce actions.
- 7 At the end of the judgment in *S*, at paragraph 58, the court held *obiter* that, in the event of a patently erroneous and unjust order being made under Rule 43, an aggrieved party's remedy is not an appeal, but an application to vary the order citing changed circumstances, or to ask the court to exercise its inherent power to regulate and protect its own process under section 173 of the Constitution, 1996. What the court meant by an application citing changed circumstances is clear enough. What the court meant by the role of the inherent power is less clear, but if the court meant to create the option of an appeal, it would have declared section 16 (3) of the Superior Courts Act unconstitutional to the extent that provision forbade an appeal against a patently erroneous or unjust order. This the Constitutional Court declined to do.
- 8 It follows from this that Mr. VW's application for leave to appeal was misdirected, and had to be struck from the roll.

- 9 It seems to me that Mr. VW's true remedy lies in the speedy finalisation of the divorce action. My order lifting the suspension on Mr. VW's duty to pay the interim maintenance due to Mrs. VW was interim in nature. I see no reason to believe that it results in any unfairness to Mr. VW, but, if it does, that unfairness can be dealt with by an appropriate order in the final divorce proceedings. If, in other words, Mr. VW ends up paying Mrs. VW amounts to which she is not entitled, there is no reason why he cannot ask the court that disposes of the divorce proceedings to address that when it deals with the distribution of the marital estate.
- 10 A further remedy open to Mr. VW is to obtain the evidence that I found was lacking in his application to end his interim maintenance payments to Mrs. VW. As I pointed out in my judgment of 9 January 2023, none of the information Mr. VW relied upon to quantify Mrs. VW's alleged earnings was placed under oath. The fact that Mrs. VW had occasional work was not disputed, but Mr. VW's allegations about what she earned were based entirely on a private investigator's report of unspecified authorship, on a set of internet advertisements for Mrs. VW's services, and on Mr. VW's own guesswork.
- 11 Whatever else may be said of my refusal to relieve Mr. VW of his maintenance obligations in these circumstances, I do not think that my decision can realistically be criticised and "patently unjust and erroneous", even if such a characterisation could provide Mr. VW with a route to appeal. However, as I have already explained, Mr. VW has no appeal, which is why I struck his application for leave to appeal from the roll.

- 12 Given that Mr. VW's application was plainly misconceived, and that it was brought contrary to the applicable statute, it was appropriate that he pay the costs associated with it.
- 13 Ms. De Wet argued that Mrs. VW should be deprived of her costs, because she is represented *pro bono*. I rejected that submission. I do not think that it has been established that Mrs. VW is represented *pro bono*, but even if she were, section 92 of the Legal Practice Act 28 of 2014 entitles legal representatives appearing *pro bono* to tax their costs as if they had a paying client.
- 14 The salutary policy lying behind that provision is to encourage competent representation for poor litigants with meritorious cases. If I had accepted Ms. De Wet's argument, I would have decided the issue contrary to the purpose of the statute.

Appointment of a supervising professional

- 15 The parties initially disagreed about who should be appointed as the supervising professional to oversee the contact between Mrs. VW and SA that I authorised in my 18 October 2022 order. Mr. VW complained of the inconvenience involved in travelling to the professional Mrs. VW nominated, and suggested a list of professionals based nearer his residence, which is where SA also resides.
- 16 In the end, there was no disagreement that Mr. VW's concerns were reasonable. Mr. van der Merwe, who appeared for Mrs. VW, accepted that he

could not make any submissions in opposition to the appointment of Ms. Edmonds, who was one of the professionals Mr. VW proposed.



S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or 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 16 March 2023.

HEARD ON: 22 February 2023

DECIDED ON: 22 February 2023

REASONS: 16 March 2023

For the Applicant: A A De Wet SC
Instructed by Moumakoe Clay Inc

For the Respondents: LK van der Merwe
Instructed by Malan Kruger Inc