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

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

21 February 2024

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Case No. 035901/2023

In the matter between

T[...] R[...]

Applicant

and

S[...] M[...]

Respondent

JUDGMENT

MAHOMED AJ

1. The applicant seeks leave to appeal the whole of the judgment I handed down on 17 January 2024.¹

2. The application was opposed, when Advocate van der Walt for the respondent, submitted that the issues had become moot,² in that the respondent

¹ Caselines 13-1

was no longer relocating to Kenya and therefore the minor child will continue to live in her current location and the respondent/applicant no longer required permission to remove the minor child from the country.

3. The dispute before me is about the punitive costs order which was granted.³ The applicant persists in his application for leave on the basis that the order for costs is informed by my reasons in the judgment and my judgment is incorrect, it was further contended that the applicant has satisfied the requirements for leave as provided for in s17 (1)(a)(i) of the Superior Courts Act⁴ ("the Act") on the grounds in his notice of appeal, he has prospects of success, and that there is almost a certainty that another court would arrive at a different finding.

4. The grounds in the applicant's notice of appeal,⁵ are as follows:

4.1. The applicant contends the court was incorrect in finding it is in the best interest of the minor child to relocate. The applicant, the respondent in the main application, failed to address this court on his reasons as to why it was not in the best interests of the minor child to relocate. I considered the minor child's best interests.⁶

4.2. The applicant argued that the court made a finding without a family advocates report, however it is noteworthy, it was not his case in his answering papers, and he failed to obtain a report himself. There was no evidence before me which raised any concerns for the minor child's best interests and the court noted that the respondent, had fully researched the relocation. Her role and performance, as primary caregiver was not disputed.⁷

² Caselines 17

³ Caselines 0001 paras 46 -51

⁴ 10 of 2013

⁵ Caselines 13

⁶ Caselines paras 8-10, 27, 29, 43 and 44

⁷ Caselines para 41, 42 and 44

4.3. The court made findings on submissions made in the replying affidavit. The allegations in reply affidavit related to applicant's failure and inability to pay maintenance, the issue before the court was the relocation of the minor child and her best interests. The allegations made were objective evidence and family relations present a dynamic environment, when a court must be apprised of all facts up to date of hearing, the respondent suffered no prejudice, it was common cause that he has not paid maintenance for several years.⁸

4.4. The judgement was attacked for failing to hear the father on his access to his minor child. At the hearing of the matter, the applicant declined to cooperate with the court regarding suitable access arrangements to be made an order. Furthermore, the access this court ordered was in line with suggestions he had made in correspondences with the respondent prior to the hearing of this application, the court further ordered telephonic contact on three days per week.⁹

4.5. The court failed to note that there were disputes of fact which could only have been determined at trial. There was no bona fide, genuine dispute of fact on the papers. The applicant was unable to present the court with reasons as to why it was not in the best interest of the minor child to relocate to Kenya with her mother, her primary care giver, who was relocating to pursue a job offer in an executive position, and who has never been able to rely on the respondent for the minor child's maintenance, as he argued his business was affected by the Covid 19 pandemic. I considered the history to this litigation and noted that the applicant was amenable to the relocation on certain impractical conditions.

5. At the hearing of this application, counsel for the applicant argued that the court's decision regarding costs was informed by the incorrect findings as set out in the grounds of appeal and was the order for costs is therefore incorrect. No grounds of appeal on costs are set out in the notice of appeal, however the applicant relies on the preamble to the notice, being an appeal against the "whole of the judgment and order".

⁸ FirstRand Bank Limited v Barnard [2016] JOL 36061 (GP) [24]

⁹ Caselines 02-28

6. In paragraphs 46 to 50 of the judgment, I set out my reasons for costs on a punitive scale. There were no disputes between the parties for the applicant to withhold his consent, see footnote 9.

7. For the reasons set out above, I am of the view that the applicant has no prospects of success and does not satisfy the threshold set in s17(1)(a) of the Act.

8. Section 16 (2) (a) (i) of the Act provides:

“When at the hearing of the appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”

9. It would serve no practical effect to grant leave, and a court exercises its discretion when ordering costs, see note 10. There are no grounds of appeal on costs in the notice, nothing further need be addressed.

10. Accordingly, leave to appeal is refused with costs.

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. 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 19 February 2024.

Date of Hearing: 16 February 2024

Date of Judgment: 19 February 2024

¹⁰ R v Zackey 1945 AD 505

Appearances

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