

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

Case number: **126003/2023**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 08 April 2024

SIGNATURE

In the matter between:

F[...] H[...]

APPLICANT

And

S[...] F[...] H[...]

RESPONDENT

JUDGMENT-LEAVE TO APPEAL

LESO AJ,

INTRODUCTION

1. This is an application in terms of Rule 49(1)(b) of the Uniform Rules of the High Court for leave to appeal to the Supreme Court of Appeal alternatively the Full Court of the High Court against Orders 1,2 and 6 granted by the court on 20 December 2023 and the whole judgment dated 16 February 2024 including order for costs.

BACKGROUND

2. The Orders made by the Court on 20 December 2023 read as follows:

1. *The application is not urgent;*
2. *The application is dismissed;*
3. *Adv Chris Maree is appointed to conduct an investigation into the best interest of the two minor children (the twins) with specific reference to their relocation to Franschhoek Western Cape Province, their primary place of residence and the scope and ambit of the applicant right and entitlement to maintain contact with them;*
4. *The primary residence of the two minor children (the twins) remains with the respondent and the applicant is entitled to maintain contact with them as provided for in the settlement agreement which was made an order of this court on 06 October 2022;*
5. *The applicant and the respondent are entitled to set this application down for hearing after receipt of Adv Chris Maree report and recommendation on conditions that the parties comply with the provisions of this court practice directive;*
6. *The applicant is ordered to pay the costs of this application on the scale between attorney and client scale.*

3. The above order was made pursuant to the ex tempore judgment which was later transcribed to be reduced to a written judgment on 16 February 2024. I will not reprise the reasons for my judgment save to state that the court stands by the reasons in the ex tempore judgment.

The Orders as per ex tempore judgment of 16 February 2024

1. *that the applicant (F[...]) shall exercise reasonable contact rights with the minor children as named in the papers, for physical visitation during every alternate weekends, reasonable telephone calls and videos, contact or as she deems necessary, with the physical contact to be exercised within this Court's area of jurisdiction and under the supervision of the suitable person as agreed to by the parties.*
 2. *Christiaan Johannes Maree the duly independent suitably qualified person will conduct the investigation relating to the interest of the minor children including the relocation of the minor children and any other issues concerning the well-being and interest of the minor children and compile a report.*
 3. *that the parties may approach this Court on the same papers duly supplemented if necessary, after having received the report of Christiaan Johannes Maree or the duly independent suitably qualified person.*
 4. *The primary residence of the minor children will remain with the respondent (S[...]).*
 5. *The applicant(F[...]) is to pay the cost on an attorney and client scale.*
4. At first glance the latter Order there is no order for dismissal of the urgent application when Orders 1 and 3 are amplified to read differently from the initial order.

Grounds for leave to appeal (Court Orders 1,2 and 6)

5. The applicant filed leave to appeal and the supplementary leave to appeal after receiving a written ex tempore judgment of 16 February 2024 that the court erred in the following:

- 5.1 in finding that the application is not urgent after making the ruling during the argument as follows: *'I am going to grant condonation. I am satisfied that a case has been made out and the matter is urgent'*;
- 5.2 in dismissing the application notwithstanding the relief granted in paragraphs 3,4 and 5 of the order;
- 5.3 In making an order in terms of which the parties may approach this Court on the same papers duly supplemented if necessary, after having received the report of Christiaan Johannes Maree notwithstanding that the application was dismissed;
- 5.4 In granting an order in terms of which the applicant should pay the costs of the application on the scale as between attorney and client, premised on the fact that the merits of the application have not been canvassed or dealt with.

Supplementary grounds for leave to appeal are as follows:

6. The applicant raised 10 grounds I will only make reference to the first two grounds from the 10 grounds raised by the applicant in the supplementary leave to appeal, the rest I will deal with under discussion later. The applicant's additional grounds are as follows:
 - 6.1 Leso AJ is *functus officio* and has no right to recall the order made on 20 December 2023;
 - 6.2 Leso AJ to make the following additional order on Friday, February 2024;
 1. The applicant (F[...]) shall exercise reasonable contact rights with the minor children as named in the papers for physical visitation during every alternative or alternate weekend, reasonable telephone calls and videos, contact or as she deems necessary, with the physical contact to be exercised within this Court's area of jurisdiction and

under the supervision of the suitable person as agreed to by the parties.

SUBMISSIONS ON LEAVE TO APPEAL

7. In the application the applicant avers firstly, that the court should have found that the application is urgent hence the order provided for on No. 3, 4 and 5 of the Court Order and in the event that the application was not urgent, the judge should have struck the application from the roll with appropriate costs. The applicant avers secondly, that the dismissal of the application presupposes that the court dealt with the merits of the application which brings the end to the application. Lastly, the applicant avers that the Order made by the court is ambiguous, strange confusing and bad in law. The applicant's counsel went on to submit that once the application is dismissed the court cannot entertain the application in the future or reconsider the merits of the application in the future because the court is *functus officio*.
8. The applicants argued that the court erred in the orders contained in the *ex tempore* judgment, to be specific, Order 1 which orders the applicant to exercise his rights under the supervision and Order 3 which granted parties leave to approach the court on the same papers duly supplemented if necessary after having received the report of Christiaan Johannes Maree or the duly independent suitably qualified person. The applicants and the Respondent counsel submitted that Order was an error because the applicant's rights to contact were not subject to supervision. The respondent's counsel further submitted that the respondent, S[...] is aware of the error and does not intend to enforce Order No.1.

ANALYSIS

9. This application rests mainly on the dismissal of the urgent application as contained in Orders 1 and 2 of the order granted on 20 December 2023 and the cost order contained in No. It is clear from the record which the applicant is in possession of that orders 1 and 2 were a mistake as it is recorded that

the court had in fact made a ruling that the matter was urgent. The applicant was aware that the application was not dismissed because the first Order was a draft prepared by the counsel in agreement with the respondent's counsel. In that Draft Order there was no order for dismissal. The applicant is outright correct that the subsequent orders could not be made by the court if the court found that the application was urgent but this is not the case in this matter. In fact that the applicant insisted that the court ruled that the matter was not urgent and yet he refers to the finding of the court which indicates that the matter was not dismissed has no logic. The mistake on the Order was clarified and corrected in the written judgment and the applicant's counsel takes no issue with such correction, consequently the amended order stands.

10. I now proceed with the applicant's submissions on the *ex tempore* judgment dated 16 February 2024. The applicant took issue with the date on which the court found that the minor children had relocated as 21 August 2023 instead of 5 December 2023. The applicant is correct that the court erred on the date because the evidence was that the intention to relocate was in August suffice to state this reason on the judgment does not change the form or content of the Order which is the operative part of the judgment. There is no basis for appeal on this ground as it was held in *SA Eagle Versekeringsmaatskappy Bpk v Harford*¹ that '*an order is what a losing party appeals against because it is the operative part of the judgment*'. On the same theme this court in *Administrator, Cape, and Another v Ntshwaqela and Others*² declared that '*there can be an appeal only against a substantive order made by a court, not against the reasons for judgment*'. This ground cannot stand because the finding does not change the order nor does it deserve to be before another court for hearing.
11. the applicant's rights of contact with the minor in order 1 is amplified with the applicant exercising his rights under the supervision and in order 3 the parties are granted leave to approach the court '*on the same papers duly supplemented if necessary after having received the report of Christiaan*

¹See *SA Eagle Versekeringsmaatskappy Bpk. v Harford* [1992] ZASCA 42.

² See *Administrator, Cape, & Another v. Ntshwaqela & Others*, 1990(1) SA 705.

Johannes Maree or the duly independent suitably qualified person'. It is on the basis of the above the applicant tiled a supplementary leave to appeal. It came out during the submission by counsels that there was an error in Order No.1 where the applicants are to exercise '*physical contact with the minor children within this Court's area of jurisdiction and under the supervision of the suitable person as agreed to by the parties*'. When one compares the Order of 20 December 2023 and the current judgment there was no order of supervision of the applicant's physical visitation in the previous order. Counsel for the applicant conceded that when one compares the two Orders it shows that the Order No. 1 on 16 February 2024 was a patent error because the issue of supervision was not before this court. I was shocked when the counsel proceeded to incorrectly submit that the court amended or varied the court of 20 December 2023 without the party's consent. The applicant avers that they erred by not complying with Rule 42(1) and (3) of the Uniform Rules of the High Court by amending or varying or altering it made on 20 December 2024 without the parties' consent and made an order which neither the applicant nor the respondent applied for and the courts acted irregular and ultra vires constitutes prospect of success.

12. I note The counsel's submission follows the legal principle that the court has become *functus officio* and its jurisdiction in the case having fully and finally exercised its authority over the subject matter ceases. This general principle of the common law applicable to the variation of orders of court were summarised in *Firestone South African (Pty) Ltd v Genticuro A.G.*³ In Para 11 the court with reference to *Estate Garlick v Commissioner for Inland Revenue 1934 AD 499 at 502* held that the general, well-established principle is that '*once the court has duly pronounced a final judgment or order, it has itself no authority to set aside or to correct, alter or supplement it...In this case there are however certain exceptions to general principle*'. In *Daniel v President of the Republic of South Africa and Another 2013 (11) BCLR 1241 (CC)*, the Constitutional Court stated that '*rule 42 of the Uniform Rules creates exceptions to this principle.*'

³ See *Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) SA. 298.*

13. I will deal later with the variation or alteration of Order No.1 of 16 February 2024 but first deal with exception(s) as found in the applicant submission that the judgment of 16 February 2024 pre-supposes that the investigations are not finalised because the judgment reads that *'the applicant and the respondent may approach this Court on the same papers duly supplemented if necessary, after having received the report of Christiaan Johannes Maree or the duly independent suitably qualified person to ascertain the best interest of the minor children concerned for the appropriate relief'*.. Firstly, the submission by the counsel that the order is incorrect because the report on the relocation of the minor children is pending and any party can approach the court should any party wish to challenge such report. Secondly, the respondent counsel was correct when she submitted that there is a pending litigation which the court was made aware of in the urgent application. In the main application, the applicant contradicts himself that the report is finalized while during oral submission the order that counsel flaunted in court that he came up with the draft contained the provision of the report on relocation in any event, in the judgment the court indicated that it was aware of the pending litigation between the parties and the parties were merely given leave to pursue this matter should they wish to do.
14. In *Carter v Haworth*⁴ [2009] ZASCA 19, the court dealt with the appealability and non-appealable order where the proceedings in the trial court were not finally concluded. In para 10, with reference to *Zweni v Minister of Law and Order*; *Ndlovu v Santam Ltd* [1992] ZASCA 197; the court found that an appealable 'judgment or order' as intended by s 20(1) of the Supreme Court Act 59 of 1959 has three attributes, first, it must be final in effect and not susceptible to alteration by the court of first instance. Second, it must be definitive of the rights of the parties in the sense that the person seeking relief has, for example, been granted definite and distinct relief. Third, the 'judgment or order' must have the effect of disposing of at least a substantial portion of the relief claimed.

⁴ *Carter v Haworth* [2009] ZASCA 19.

15. I am conscious of the fact that the conflicting order above is prejudicial to the applicant because it affects the applicant's rights of visitation and contact with the minor children as inscribed in the report of Adv Maree who recommended that the *'contact enjoyed and specified in the divorce settlement between the parties be reinstated...and that serious consideration be given to create more opportunities for the applicant to share quality time with the minor..'* the order is not appealable because I am of the view that the court has not finally disposed of the matter because no definite and distinct relief as sought by the applicant was granted unless the parties settle or agree otherwise after the investigation.
16. The question of whether the court can vary, correct or alter the Orders of December 2023 and February 2024 where it is found to have erred or made a mistake. I am of the view that this court has not finalized and therefore is entitled to correct with ambiguities, errors and omissions found in the *ex tempore* judgment. Rule 42 of the Uniform Rules provides for the court to reconsider its decision because the court is not faultless or infallible. The court is simply correcting its mistakes without extending its powers or acting *ultra vires* as the applicant suggested. It is in the interest of the proper administration of justice that the court exercises its powers to correct the Order.
17. The appeal would not have a reasonable prospect of success despite the conflicting judgments on the matter under consideration as envisaged in section 17(1)(a)(ii). The applicant has no automatic right to appeal, he faces a legal challenge in terms of Section 17(1)(a)(i) or (ii) of the Superior Courts Act 10 of 2013 where leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard including conflicting judgments on the matter under consideration.
18. Unfortunately, in this application, the law has changed and the bar has been raised for the application to succeed. The test is not as simple as it used to

be, the law on appeal seek assurance than just a probability of a reasonable success. The applicant prospects cannot be found wanting.

CONCLUSION

19. The purpose of the judgment on 16 February 2024 was to merely reduce the ex tempore judgment to a word document without any alterations or amendments. The appeal would not have a reasonable prospect of success because the court is within its rights and power to correct Order 1 of 16 February 2024 by error by removing the supervision of the applicant's rights to read as follows:

Order No. 1 in the ex tempore judgment is amended to read:

‘The applicant (F[...]) shall exercise reasonable contact rights with the minor children as named in the papers for physical visitation during every alternative or alternate weekend, reasonable telephone calls and videos, contact or as she deems necessary, with the physical contact to be exercised within this Court's area of jurisdiction’.

20. The amended Court Order of 20 December 2023 is the appropriate Order granted by the court save for Orders No. 1 and 2.

COSTS

21. The applicant contends that the costs should have been reserved because the merits are still to be determined. The question that arises from the above facts is why the applicant filed this application despite him being aware that merits were dealt with. I do not doubt that this application was motivated by costs that the applicant envisaged he would recover in the appeal should he succeed because during the oral submissions by the applicant's counsel, the court voiced the view on this issue to which the applicant's counsel responded ‘... *yes but the cost is not the only reason...*’ If one pays attention to this

ground, there is no doubt that the applicant seeks an order to strike off the application with the view that the costs order would have been reserved. This finding is on the basis that the applicant proposes that the costs of the application should be reserved for the final determination after the finalization of the investigation and recommendation by Adv Chris Maree. It is not clear what the applicant meant by an appropriate cost order upon dismissal of the matter.

22. Despite the parties agreeing that the order has a patent error, the animosity between the counsels was such that they could agree to on anything that could have simplified the process. I could not find a sound and rational basis why the applicant would insist on the appeal while he could simply make the court aware of the error for the court to correct it. The court did not shy away from expressing its views on what the court believed was the reason the application was brought, the costs order which the applicant thinks he will recover should he succeed in the appeal. because more suspicious when the applicant insisted on the SCA hearing the appeal. There are various less costly ways to correct the judgment and the stance taken by the applicant does not advance the noble cause of justice. The shouting of the name of the Judge whose name is already on the Order and the conduct of the senior counsel during both applications was too loud to ignore.
23. It is clear as a daylight that this part in inserted by mistake, there was no need for the senior counsel theatrical about it. I was not surprised when there was a confrontation in court between two counsels because the senior counsel refused to withdraw the defamatory statement against the junior counsel and continued to mock her accent. In *Mkete v Mkutschu*⁵ the court held that '*a successful appellant may be deprived of the costs of appeal or be ordered to pay the costs of appeal if the appellant's conduct has been mala fide or malicious*' and in *Maharaj v Balesar*⁶ the court found that '*the appellant may be refused the costs of appeal or even be ordered to pay such costs if the appellant succeeds in obtaining only a minor variation in the form of correction*

⁵ See *Mkete v Mkutschu* 1915 EDL 170.

⁶ See *Maharaj v Balesar* 1931 NPD 370.

of a patent error or a very small reduction or a purely technical alteration but fails on merits’.

24. I was surprised that the applicant started arguments about the interpretation of sections 31 and 32 of the Children Act on whether consent is only necessary for the relocation outside the Republic of South Africa and strongly argued that this appeal should be referred to the SCA for this issue to be resolved as it had been problematic. The issue here was that the respondent did not comply with section 31(2) of the Children Act No. 38 of 2005 because the respondent had no right or entitlement to remove the minor children from the court's area of jurisdiction. In the application, the SCA has been his court of choice. The counsel who represented the applicant is Senior counsel who during the submission made it a point that remind the court that when he sits on the bench as the court he does things differently, in this case, his actions were embarrassing for a person who sat on the bench never mind a senior counsel.

I NOW MAKE THE FOLLOWING ORDER:

ORDER

1. The application for leave to appeal is dismissed;
2. Applicant to pay the costs of the application.

Leso J (Acting Judge of the
High Court Pretoria)

Date of hearing 04 March 2024

Date of judgment 08 April 2024

For the Applicant

Attorney: Van Der Merwe Attorneys Inc
Contacts: 087 700 3219/072 079 3614
reception@vdmlegal.com
Counsel: F W Botes SC

For the Respondent

Attorney: Strydom & Bredenkamp Inc
Contact: 012 460 1930
henk@lawsb.co.za
Counsel: Adv L Van Der Westhuisen
082 636 9121

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