

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3451/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ANGELA ROBERTS

Applicant

And

BRENDAN SCOTT KEARNEY
ILZE STRYDOM

First Respondent
Second Respondent

In re: Application between:

ANGELA ROBERTS

Applicant

And

BRENDAN SCOTT KEARNEY

Respondent

HEARD ON: 28 APRIL 2022

JUDGEMENT BY: LITHEKO, AJ

DELIVERED ON: 12 MAY 2022

INTRODUCTION

[1] The Applicant brought an application against the First and Second Respondents on a semi-urgent basis in terms of Rule 6 (12) of the Uniform Rules of Court. The application is opposed by the First Respondent only. The relief which the Applicant seeks is the following:

“2. That an order be granted in accordance with the provisions of section 18 (1) and section 18 (3) of the Superior Courts Act 10 of 2013 declaring that:

2.1. The operation, the execution and the implementation of the Court Order granted by the Free State High Court on 17 March 2022 under Civil Case Cover Number 3457/2021 will not be suspended *pendent lite (sic)* the finalisation of the Application for Leave to Appeal and/or any other Appeal proceedings to be brought by any of the parties.

2.2. The Court Order granted by the Free State High Court on 17 March 2022 under Civil Case Cover Number 3457/2021 shall be operational and can be implemented by the Applicant with immediate effect.

2.3. Should the appeal proceedings ultimately be finalised in favour of the First Respondent, then the Applicant shall return the minor child to the Republic of South Africa within a reasonable period of time.

3. The Second Respondent is ordered and directed to hand over the passport of the minor child to the Applicant upon the production of this Order.

4. The First Respondent is ordered to pay the costs of this Application.”¹

[2] The relevant and material terms of the Court Order that was granted on the 17th March 2022 and which is sought to be put in operation and executed, pending the finalisation of the application for leave to appeal or appeal are the following:

“1. The Applicant is granted leave to remove the minor child IGK, permanently from the Republic of South Africa to Ireland.

2. The Respondent is ordered to forthwith sign all documents pertaining to the relocation of the minor child, IGK and to take all such steps that may be necessary to enable the applicant to apply for the issuing of passports and /or for the issuing of visas for the minor child, failing which the sheriff of the above Honourable court is authorized and directed to take all such steps and to sign all such documents on the Respondent’s behalf.

¹ Case number 3457/2021 is incorrect. The correct case number is 3451/2021.

3. The Respondent is ordered to forthwith sign all such documents and to take all such steps that may be necessary to enable the Applicant to lawfully remove the minor child from the Republic of South Africa, failing which the sheriff of the Honourable Court is authorized to take all such steps and to sign all such documents on the Respondent's behalf.

4. Upon the relocation of the Applicant and the minor child to Ireland, the Respondent will be entitled to maintain contact with the minor child as follows:

4.1 The Respondent shall be entitled to continue contact as set out in the Children's Court Order dated the 10th November 2020, subject to the condition that such contact rights must be exercised within Ireland.

4.2

FACTUAL BACKGROUND

[3] Before I consider the issues that are raised by this application, the following facts need to be outlined. The Applicant and the First Respondent are the biological parents of the minor child involved in this application. She was born on the 30th June 2017 while the parties were engaged and shortly thereafter the parties' engagement was ended. The minor child stayed with the Applicant. On the 10th November 2020 the First Respondent obtained an order in the Children's Court in terms of which he formally acquired his parental rights and responsibilities, amongst others, to maintain contact with the minor child. On the 28th July 2021 the Applicant applied for and, on the 17th March 2022, was granted a relocation order which is partly quoted above.

[4] The First Respondent is aggrieved by that relocation order and on the 23rd March 2022, his legal representatives delivered a notice of application for leave to appeal, which, in terms of section 18 (1) of the Superior Courts Act², (the SC Act)

² Act 10 of 2013.

automatically suspended the order sought to be put in operation and executed, hence the application.

[5] The First Respondent opposes the application on the grounds that:

5.1. The application is not urgent.

5.2. There are no exceptional circumstances that warrant the order.

5.3. The Applicant will not suffer irreparable harm if the order is stayed pending the outcome of the application for leave to appeal or of the appeal.

5.4. The First Respondent and the minor child will suffer irreparable harm if the order is enforced pending the outcome of the application for leave to appeal or of the appeal.

[6] I now turn to deal with the issues raised by this application:

I. RULE 6 (12) OF THE UNIFORM RULES OF COURT

[7] Rule 6 (12) gives the court a discretion to dispense with the forms, service and other procedural steps provided for in the Uniform Rules of Court and may dispose of a matter in any manner that it deems fit, provided there are circumstances which render the matter urgent.

[8] In his heads of argument and oral submissions Mr. Coetzer, who appeared for the Applicant, argued that the event that triggered this application is the receipt by the Applicant of the letter dated the 28th March 2022 which her employer, Square 1, addressed to her, wherein she is informed that if she does not report for duty in Dublin, Ireland within four weeks, her position will be reconsidered. In the letter, she is called upon to advise her employer of the steps to be taken to ensure that she reports not later than the 30th April 2022. Mr. Coetzer argued that although the Applicant's employer does not state in the letter that failure on the part of the

Applicant to report for duty in Dublin on or before 30th April 2022 will result in termination of her contract of employment, that is what in his submission the employer meant by 'reconsideration' of the Applicant's position. He submitted that as the Applicant does not want to stay in the Republic of South Africa anymore owing to lack of safety and opportunities and because the Applicant's employment in Ireland is a once-in-a-lifetime opportunity that may be lost if she does not relocate on or before the time stated in the letter, the matter is urgent enough to warrant disposal thereof without strict adherence to the procedures set out in the Rules. His submission is that the application to enforce an order pending the outcome of an application for leave to appeal is inherently urgent.

[9] Mrs. Georgiou, on behalf of the First Respondent, argued that the application is not urgent and that it must be dismissed on that ground alone. She submitted that the Applicant's interpretation of the contents of the letter as meaning that employment contract of the Applicant will be terminated if she does not report for work in Dublin, Ireland by the 30th April 2022 is wrong. Her grounds for this submission are that the Applicant possesses highly sought after skills and she has been working remotely for her employer since February 2021. If the employer's intention was to terminate the employment contract of the Applicant in the event she does not report for duty on the 30th April 2022, he would have stated so in the letter. She argued that in her view, because of the indispensability of the Applicant, what the employer meant by reconsideration of her position is that the Applicant would be given a different title or be allowed to continue working remotely as she has been doing since February 2021, instead of having to report for duty in Ireland by the 30th April 2022.

[10] The Applicant's employer has not deposed any affidavit clarifying what he meant by the ambiguous contents of his letter and, any meaning accorded the contents of the letter will be mere conjecture. However, for the reason that the First Respondent was not prejudiced in any manner as a consequence of the Applicant's non-compliance with the Uniform Rules of Court pertaining to forms and service and considering the fact that the orders that the parties seek in this application, although diametrically opposed, are not in the nature of final judgements as they may change

depending on the outcome of the application for leave to appeal, and the fact that the interest of a minor child are at stake, I decided to treat this matter as one that deserves urgent adjudication.

II. SECTION 18 OF THE SUPERIOR COURTS ACT REQUIREMENTS

[11] In this application, the relevant subsections of section 18 of the SC Act are subsection (1), (3), (4) and (5) and they provide that:

“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) ...

(3) A court may only order otherwise or 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 purpose of subsection (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.”

[12] In order to succeed, an applicant who seeks to invoke the provisions of section 18 must prove on a balance of probabilities that:

12.1. There are exceptional circumstances warranting the operation and execution of an order which is the subject of an application for leave to appeal or of an appeal.

12.2. The Applicant will suffer irreparable harm if the order is not put into operation and execution.

12.3 The Respondent, who seeks leave to appeal, will not suffer irreparable harm if the order is not suspended.³

EXCEPTIONAL CIRCUMSTANCES

[13] In the case of *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another*⁴, a case referred to in *Incubeta Holdings*, which considered what the words “exceptional circumstances” mean, the following was said at 156I-157C:

“What does emerge from an examination of the authorities, however, seems to be the following:

1. What is ordinarily contemplated by the words “exceptional circumstances” is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; “besonder”, “seldsaam”, “uitsonderlik”, or “in hoë mate ongewoon”.

2. To be exceptional the circumstances must arise out of, or be incidental to, the particular case.

³ *Incubeta Holdings (Pty) Ltd & Another v Ellis & Another* 2014 (3) SA 189 (GJ) at paragraph 16.

⁴ 2002 (6) SA 150 (C).

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used the word “exceptional” has two shades of meaning: the primary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional”.

[14] Sutherland J, in the *Incubeta Holdings* case expressed the view that “*exceptionality must necessarily be fact-specific. The circumstances which are or may be ‘exceptional’ must be derived from the actual predicaments in which the given litigants find themselves.*”⁵ I am in respectful agreement with this view. In this application, the actual predicament in which the parties find themselves in is the fact that at the centre of their dispute is a minor child aged just under 5 years. Consequently, any decision that may be arrived at, whether to stay or to execute the order, will affect the interests of the minor child and I am enjoined by section 28 (2) of the Constitution of the Republic of South Africa, 1996 to be mindful of the paramount importance of her best interest in this matter.

[15] The factors that I took into account in my finding on the urgency of the application are intertwined with those that are relevant in the determination of the exceptionality of the circumstances warranting leave to put into operation and execution an order which has been suspended by an application for leave to appeal. Of paramount importance however is the best interest of the minor child.

[16] Although there are divergent views on whether the prospects of success on appeal are relevant in the application in terms of section 18 of the Superior Courts

⁵ At paragraph 22.

Act,⁶ I am in support of the view that the prospects of success are relevant. It is obvious, however, that there will be cases wherein the circumstances dictate that the prospects of appeal are of no particular relevance as was the position in the *Incubeta Holdings* case⁷.

[17] The relevant circumstances that in my view have to be taken into consideration in this application are the following:

17.1. The application has concluded an employment contract in terms of which she has to report for duty in Ireland.

17.2. She has received a letter from her employer calling upon her to advise the employer as to steps that she intends to take to report for work in Ireland no later than the 30th April 2022.

17.3. She has successfully applied for a Critical Skills Employment Permit which entitles her to enter, reside and work in Ireland and which expires in April 2023.

17.4. She has already made arrangements for the education of the minor child in Ireland, where her sister is also resident.

17.5. The relocation order, whether or not it is executed with immediate effect, will have effect on the best interests of the minor child. In other words, whether or not First Respondent's appeal succeeds, the interest of the minor child will be adversely affected.

17.6. The order sought to be implemented does not necessarily deprive the First Respondent of all contact with the minor child in the event of its implementation and execution.

⁶ In *Incubeta Holdings*, Sutherland J was of the view that prospects of success play no role. However, in *Minister of Social Development Western Cape & Others v Justice Alliance of South Africa & Another* (20806/2013) [2016] ZAWCHC 34 (1 April 2016), Binns-Ward J, with whom Fortuin and Boqwana JJ concurred, held that prospects of success on appeal are a relevant factor to be considered. The latter view was approved in *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) at paragraph [15].

⁷ *Supra*.

17.7. The Applicant and her family have decided to emigrate to Ireland and have no desire to stay in the Republic of South Africa owing to what they perceive to be lack of opportunities and safety.

[18] The question is whether those circumstances are exceptional for purposes of section 18 (1). I am of the view that cumulatively considered, especially in the light of the fact that the interests of the minor child are involved, these circumstances are indeed exceptional.

IRREPARABLE HARM TO THE APPLICANT

[19] As indicated earlier in this judgement, the event that triggered the application is the letter written to the Applicant by her employer calling upon her to report for duty in Ireland within 4 weeks and propelled by the First Respondent's refusal to allow the Applicant to leave with the minor child.

[20] Mr Coetzer argued that this contract of employment is a once-in-a-lifetime opportunity for the Applicant and her family and should it be lost, it will result in a substantial financial setback. This is the only chance that the Applicant has to move to Ireland because if the employment contract is terminated, the Critical Skills Employment Permit that was issued also becomes null and void. Counsel argued that the Applicant and her family will suffer irreparable harm if the order is not immediately executed and implemented to allow them to relocate to Ireland.

[21] Although Mrs Georgiou argued that the Applicant will not suffer irreparable harm as she still can find employment in the Republic of South Africa based on the critical skills she possesses, I am satisfied that the Applicant has succeeded in proving on a balance of probabilities that she will indeed suffer irreparable harm contemplated in section 18 (3) if the order is not implemented pending the outcome of the application for leave to appeal or of any further appeal in the event leave to appeal is refused.

IRREPARABLE HARM TO THE FIRST RESPONDENT

[22] In order to determine whether or not the First Respondent will suffer irreparable harm if the order of relocation is implemented, the following factors are relevant:

22.1. The order which is the subject of the First Respondent's application for leave to appeal is to the effect that upon the relocation of the Applicant and the minor child to Ireland, the First Respondent will continue to exercise his contact rights in terms of the Children's Court Order dated 10th November 2020 on condition that those rights are exercised in Ireland. The Children's Court Order provided that First Respondent was entitled to have contact with the minor child every alternative weekend, one short school holiday to rotate between the parents and 50% of all long school holidays, Christmas, New Year's day and Easter to rotate between the parents. It goes without saying that these contact rights were to be exercised within the Republic of South Africa.

22.2 Personal contact that the First Respondent was entitled to have with the minor child in terms of the Children's Court Order will no longer be practical.

22.3. In her report the Family Advocate found that it is indeed important for physical contact between the First Respondent and the minor child to be progressively strengthened as this is beneficial to the minor child's psychological and emotional wellbeing. This finding accords with the provisions of section 7 of the Children's Act 38 of 2005.

22.4 Although the Applicant's application for sole guardianship was denied on the basis that no cause existed to deprive the First Respondent of guardianship, there is a finding that the parties struggle to communicate in a manner that nurtures the wellbeing of the minor child.

22.5 If the order is put into operation, the minor child will relocate to Ireland, which relocation will make it impractical, if not impossible, for the First Respondent and the minor child to maintain bi-monthly physical contact as it

was the position in terms of the order of the Children's Court granted on the 10th November 2020.

22.6 The First Respondent and the minor child had only recently extended physical contact with each other in terms of the Children's Court's Order and the Order of this court dated the 2nd December 2021. If the order is implemented forthwith, and the minor child relocates to Ireland, the fragile relationship between the First Respondent and the minor child would have been adversely affected by the time the appeal is finalised, if it is eventually successful.

22.7 Doubtlessly, the minor child's best interest will be served both in South Africa, pending the finalisation of the appeal process, or in Ireland, if the order is put into immediate operation.

[23] The immediate and direct consequence of the implementation and execution of the order will be that the First Respondent will not be able to exercise regular physical contact with the minor child. Although he and the minor child were entitled to a bi-monthly physical contact with each other within the Republic of South Africa in terms of the order of the Children's Court, if the order is put into operation, it would mean that such contact will only be exercised in Ireland. Whereas the Children's Court order envisaged that this contact be in the Republic of South Africa, the order appealed against, on a proper construction thereof, deprives the First Respondent the right to exercise physical contact with the minor child wherever they may be in the world, with the exception only of Ireland.

[24] The duty to prove that the First Respondent will not suffer irreparable harm if the order is executed rests upon the Applicant. In his argument Mr Coetzer submitted that this loss of physical contact which the First Respondent raised is simply a fact of life and an occurrence that is bound to happen as there is no law that forces people in the position of the parties to stay either together or in the same country. He argued that the First Respondent and the minor child will still have regular voice and video calls with each other. Mr Coetzer however conceded that

the effect of the order, in particular paragraph 4.1 thereof, is that upon relocation of the Applicant with the minor, no physical contact can be established between the First Respondent and the minor child in any part of the world, except in Ireland, without such contact constituting a contravention of the order. He submitted that in spite of this predicament, the prospects of appeal on this point will fail as the Applicant can apply for the amendment of the order to include other locations where physical contact may be exercised.

[25] Mrs Georgiou argued that, contrary to Mr Coetzer's argument, the First Respondent's appeal should succeed on this point alone and, as this Court is not sitting as a Court of Appeal, no amendment to the order can be effected at this stage. I agree with Mrs Georgiou regarding the amendment.

[26] In her report, the Family Advocate points out that although she could find no evidence of parental alienation alleged by the First Respondent, it was clear that the parties' acrimonious relationship and lack of proper communication between them has resulted in the high parental conflict around the implementation of First Respondent's contact rights with the minor child. This is the basis whereupon the First Respondent is apprehensive and believes that the situation will worsen should the Applicant relocate immediately with the minor child.

[27] Sight should not be lost, however, of the fact that in the present application, the issue is not whether relocation *per se* is in the interest of the minor child or that it will irreparably harm any of the parties. The issue is whether the relocation order should be implemented and executed pending the finalisation of the application for leave to appeal or any appeal. In this regard, it is worth noting that the order is not final until the Court of Appeal makes its pronouncement thereon.

[28] Mr Coetzer has urged the Court to consider the fact that an appeal may be a very lengthy process and it would be to expect too much for the Applicant's

employer to wait until finalisation thereof in order for the Applicant to report for duty in Ireland. Even if that may be the position, however, if the application is denied and the execution awaits finalisation of the appeal, the Applicant will not be without relief, as the Uniform Rules of Court make provision for set down of appeals on urgent basis where circumstances permit.

[29] For all the reasons set out in the preceding paragraphs, I find that the First Respondent will suffer irreparable harm should the order dated the 18th March 2022 be put into operation and executed.

[30] In the case of *Incubeta Holdings (supra)*, Sutherland J accorded the following meaning to the provisions of section 18 (3)⁸, with which I agree:

“The proper meaning of the subsection is that if the loser, who seeks leave to appeal will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. The discretion is indeed absent, in the sense articulated in *South Cape* case.... What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of so-called ‘fact’ of irreparability.”⁹

[31] Mr Coetzer called upon this Court, in its capacity as the upper guardian of all minor children, to grant an order for implementation and execution notwithstanding the application for leave to appeal for the reason that to order otherwise would negatively affect the best interest of the minor child.

[32] I have indeed applied my mind to that and, as indicated in this judgement, I have found that as the interests of the minor child will be affected whether she

⁸ Of the Superior Courts Act 10 of 2013.

⁹ At paragraph [24].

remains in the Republic of South Africa pending the finalisation of the appeal, or she relocates to Ireland, what I consider to be in her best interest is that the *status quo*, which may change depending on the outcome of the appeal, must be maintained as she might suffer more trauma in the event she settles in Ireland and has to relocate again to the Republic of South Africa upon successful finalisation of the appeal.

COSTS

[33] Generally the costs follow the cause but, considering the fact that the Applicant is the party who is vested with the parental rights and responsibilities with regard to residence and care of the minor child, whose interest have had to be considered in the adjudication of this matter, and the fact that this is a family matter, it would not be just apply the general rule and order that Applicant bear the costs of this application.

ORDER

[34] In the result, I make the following order:

1. The application is dismissed.
2. Each party to pay his/her own costs.

M. S. LITHEKO, AJ

For the Applicant: Adv. J C Coetzer
Instructed by: Honey Attorneys
Bloemfontein

For the First Respondent: Adv. S Georgiou
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