

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: EL 1311/2016

ECD 3211/201

In the matter between:

N. E. B.

Applicant

and

M. T. B.

Respondent

**REASONS FOR THE ORDER POSTPONING THE MATTER ON 24
NOVEMBER 2016**

MBENENGE J:

[1] The applicant and the respondent are awaiting judgment in a divorce action launched before the Regional Court, East London reserved way back on 29 July 2016.¹

¹ This flies in the face of item 5.2.6 of the Norms and Standards for the Performance of Judicial Functions issued by the Office of the Chief Justice, which provides:

“Judgments, in both civil and criminal matters, should generally not be reserved without a fixed date for handing down. Judicial Officers have a choice to reserve judgments *sine die* where the circumstances are such that the delivery of judgment on a fixed date is not possible. Save in

[2] Pending the finalization of the divorce action, the minor children born of the marriage between the parties, namely K. B. (a boy born on [.....] 2005) and L. B.(also a boy born on [...] 2009), have become the subject of a custody scramble between their estranged parents.

[3] In the midst of orders previously granted by the lower courts which, in light of the view I have taken of this matter, are of no moment for present purposes, the applicant resorted to this court seeking, by way of urgency, an order mainly-

3.1 declaring that “*the children’s court order under application number 14/1/4-52/2011 be of no further force and object pending judgment to be delivered in the divorce proceedings between the parties and that the Regional Court order in terms of Rule 58 dated 24 July 2014 made under case number EC/EL/RC638/11D and confirmed on 6 October 2016 be the prevailing order pending the outcome of the divorce proceedings between the parties;*” and

3.2 directing the respondent to “*immediately deliver the minor children to the residence of the applicant at her residence at 1434 NU10, Mdantsane, together with whatever belongings of the minor children are to be found there, such as school uniforms and the like.*”

[4] The application was heard on 12 October 2016 on which day this court (per Bacela AJ), pursuant to an *ex tempore* judgment, ordered that the minor children be delivered to the applicant’s residence at Mdantsane.

[5] The order referred to in paragraph [4] above attracted the launch of an application whereby leave is being sought by the respondent to appeal to the Supreme Court of Appeal “*against the whole of the ex tempore judgment and order of Madam Justice Bacela (AJ) delivered on 12 October 2016.*” Such leave is sought despite the impugned

exceptional cases where it is not possible to do so, every effort shall be made to hand down judgments **no later than 3 months** after the last hearing.” (Emphasis added.)

order being liable to be construed as one for the interim custody of the minor children pending the outcome of the parents' matrimonial action whose judgment remains reserved by the Regional Court.²

[6] The applicant now seeks an order in terms of section 18 of the Act directing that the order of 12 October 2016 granted in her favour be operative pending the outcome of the application for leave to appeal and any resulting appeal that may be noted. The application is being opposed.

[7] When the matter came before me I expressed concern about the challenges associated with hearing the section 18 application without the benefit of the reasons for the impugned order.³ My view was that the court whose judgment is the subject of the application for leave to appeal would be better placed to pronounce even on the section 18 application. The parties' counsel, somewhat grudgingly, gave heed to my concern. After engaging in talks and reaching agreement in relation to custody and access rights to the minor children, I postponed the matter to 07 December 2016, on the following terms:

- "1. The matter is postponed for hearing on 7 December 2016 by the Honorable Madam Justice Bacela (AJ) on which date:
 - 1.1 the application for leave to appeal the order dated 12 October 2016 shall be heard; and
 - 1.2 the application in terms of section 18 of the Superior Courts Act shall be heard.⁴
2. The record of proceedings which are subject of the appeal sought shall be made available to the parties by 29 November 2016.

² In terms of section 16(3)(c) of the Superior Courts Act 10 of 2013 (the Act) "*notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application for the interim custody of a child when a matrimonial action between his or her parents is pending.*"

³ As at the time the matter served before me the *ex tempore* judgment subject to the application for leave to appeal had not been transcribed.

⁴ Nothing in this order should be construed as directing the Judge concerned to hear the leave to appeal and section 18 application simultaneously. Her discretion remains unfettered.

3. The respondent (applicant) in the application for leave to appeal is granted (two) days upon receipt of the record to supplement his papers regarding the application for leave to appeal.
4. Until the finalization of this application as per paragraph 1.1 and 1.2 above the minor child shall spend alternative weeks with the parties, the children to be returned to other party by 17:00 on Sunday each week alternating.
5. Costs occasioned by the postponement shall be in the cause.
6. All reserved costs shall stand over for determination by the court hearing the section 18 application. To that end, the parties shall deliver any affidavits they may wish to file by Friday 02 November 2016. The respondent shall deliver his affidavit on the question of the reserved costs by Wednesday 30 November 2016, and the applicant hers an answer to that of the respondent by Thursday 1 December 2016. The respondent shall deliver her replying affidavit, if any, by Friday 2 December 2016.
7. Reasons for the postponement of the section 18 application shall follow in due course.”

[8] Below are my reasons for the order I granted. In part, the practical difficulty of hearing the section 18 application before the hearing of the leave to appeal application is also dealt with in these reasons.

[9] Section 18 of the Act upon which the applicant’s cause of action is founded, in so far as relevant hereto, reads:

- “(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.”

[10] The section sets out the test for leave to put into operation and execute an order pending the appeal process in fresh terms. It overtakes judicial authority that predates its enactment.⁵ In the manner in which it is couched, section 18 makes it possible for a litigant to launch an application envisaged therein even before an application for leave to appeal has been heard. In my view, especially regard being had to the nature of the dispute between the parties, a consideration of the section 18 application before the application for leave to appeal is heard does give rise to some difficulty. In terms of section 17(1)(a) and (b) of the Act, 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 the appeal should be heard. Entertaining the section 18 application before the leave to appeal application is heard would mean that even the most frivolous of litigants would, if successful, be able to frustrate a victor with a strong case who wants to put into operation and execute an order, or a loser (with a strong case) who seeks leave to appeal.

[11] Section 17(2)(a) of the Act provides that leave to appeal may be granted by the Judge against whose decision an appeal is to be made or, if not readily available, by any other Judge of the same court or Division. In terms of section 48 of the Act any person who has been appointed as an acting Judge of a Superior Court must be regarded as having been appointed also for any period during which he or she is necessarily engaged in the disposal of any proceedings in which he or she has participated as such Judge, including an application for leave to appeal that has not yet been disposed of at the expiry of his or her period of appointment.

[12] It is not the intention of the parties in this matter to have the related leave to appeal application heard by a Judge other than the one against whose decision the appeal sought

⁵ *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at 194 B-D (where Sutherland J held that one must now look exclusively to section 18 when leave is sought to execute on an order pending an application for leave to appeal or the appeal itself i.e. whether or not exceptional circumstances exist (which involves a finding of fact) and proof on a balance of probabilities of the presence or absence of irreparable harm).

is to be made, as indeed enquiries made have revealed that she is readily available to hear the leave application. All indications were that by the time the leave to appeal application is heard by Bacela AJ the transcript embodying the *ex tempore* judgment would have come to hand timeously, and the respondent supplemented his grounds for leave to appeal.

[13] In my view, it is expedient and proper to have the section 18 application heard immediately after the application for leave to appeal or simultaneously therewith by the Judge concerned, as indeed she is better placed to pronounce on the matter and enquire, in so far as it may be necessary, into whether or not the appeal sought enjoys a reasonable prospect of success, or whether the opposition to the section 18 application is a mere frivolous attempt to delay the winning litigant her relief.

[14] In the *Incubeta*⁶ case, the court decided the case without recourse to the merits and to the *ex tempore* judgment whose transcription would not come about rapidly. As far as I could have ascertained from a reading of the *Incubeta* case, apart from exceptional circumstances (which are said to be fact specific) that must be established is the question of weighing the competing parties' interests ("*balance of convenience or hardship*").⁷ In the instant matter, however, unlike in the *Incubeta* matter, the transcribed *ex tempore* judgment will be availed to the parties timeously, and the Judge concerned has availed herself to hear the leave to appeal application rapidly. Moreover, the interest of the minor children, with this court as upper guardian thereof, and not the competing interests of the parties, is paramount.

[15] I am also of the view that an approach that renders the judgment a vacuous gesture undermining the role of courts in the ordering of social relations⁸ ought to be avoided as far as is possible. I distance myself from adopting an approach that determines

⁶ *Supra*.

⁷ *Ibid*.

⁸ Compare *Incubeta (supra)* at para [28].

exceptional circumstances and weighs probabilities in isolation, without due consideration to the underlying judgment. At the risk of being repetitive, there can be a proper consideration of exceptional circumstances and weighing of balance of convenience against the background of the merits of the case and the judgment subject to the application for leave to appeal or the appeal itself.

[16] On the issue of costs, it was argued on behalf of the respondent, that the applicant should pay the costs occasioned by the postponement. The issue I raised with the parties is quite novel and is based on the peculiar circumstances prevailing in this case, for which none of the parties is to blame. The applicant is not to blame for having set down the section 18 application before me. I found the stance adopted by the respondent to have been opportunistic, hence I did not uphold the same. There remains the question of reserved costs. The parties have been afforded the opportunity to deliver further papers and ventilate themselves on the issue of costs, to enable the court hearing the section 18 application to pronounce properly on the reserved cost issue.

S M MBENENGE

JUDGE OF THE HIGH COURT

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Date heard : 24 November 2016

Date postponement order issued : 24 November 2016

Date reasons handed down : 01 December 2016