

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape, Kimberley)

Case No: 1222/09
Case Heard: 20/10/2009
Date Delivered: 30/10/2009

In the matter:

J H JONKER
H J J A JONKER

1st Applicant
2nd Applicant

v

FRANCOIS C STOFFELS

Respondent

JUDGMENT

KGOMO JP:

- 1] Having regard to my order quoted below, in particular paras 4 and 5 thereof which are intended to regulate the respondent's future access to his daughter, 'C', I should not be writing a judgment. However this has been necessitated by an unfortunate turn of events which have been precipitated by respondent's

("Stoffels") forum-shopping or forum-hopping with the singular motive of avoiding the consequences of the order of this Court contained in the judgment delivered on Friday 02 October 2009. I refer to the parties by their names in light of the multiple applications brought in this Court and the Western Cape High Court("CPD").

2] On the aforesaid date I made the following order:

- "1. *Custody and guardianship of the minor child 'C' S, born on 23 January 2006, is awarded to the applicants, Mrs Jacoba Hendrina Jonkers and Hans Johannes Jacobus Albertus Jonkers.*
2. *The applicants are awarded full parental responsibilities and rights as contemplated in s18(2)(a) – (d) of the Children's Act, 38 of 2005, in respect of the child, which incorporate to care for the child, to maintain contact with her, to contribute to her maintenance and generally to act as her guardians.*
3. *The permanent residency of the child is awarded to the applicants.*
4. *The respondent, Mr Francois Christiaan Stoffels, as father of the child, has the right of reasonable access to the child the terms of which access must be drawn up by counsel with the aid of the Family Advocate, Mr A H Nel; the psychologists Dr J D Stemmet (representing the applicants) and Ms Mandi Bouwer, representing the*

respondent.

5. *If agreement concerning the terms of the respondent's access rights is reached an order by consent should be obtained in the Chambers of the Judge President at 09h00 on Tuesday 20 October 2009 or otherwise be argued in court on the very stipulated date and time.*

6. *There shall be no order as to costs."*

3] The 09h00 time was set because a part-heard civil matter was proceeding before me on 20 October 2009. On this latter date para 4 of the Court order quoted above had not been complied with due to the subterfuge employed by Stoffels in a manner adverted to more comprehensively below.

4] On 03 October 2009, thus a day after the delivery of judgment of this Court, Stoffels obtained an order on urgency with the following terms before Bozalek J in the Western Cape High Court.

"2. That, pending the filing of the Applicant's Notice of Appeal to be lodged in the Appeal of the Judgment under Northern Cape High Court, case number 1222/08(or 09) on or before 9 October 2009, the Court Order therein dated 02/10/2009 (involving the above parties) is stayed so that the minor child, 'C", shall remain in the Applicant's care.

3. *The Order in (2) above shall lapse upon the filing of the Notice of Appeal aforesaid or at 4.00pm on 9 October 2009, whichever occurs first.*

4. *This Order shall be served on the First and Second Respondents on 5 October 2009 by way of fax to their attorney of record."*

- 5] The purported reason for Stoffels' curious approach to the CPD emerges from a letter written on 08 October 2009 by attorney Odette Deyssel of the firm of attorneys Haupt & Van Zyl of Paarl to the applicants' ("the Jonkers") correspondent attorneys in Kimberley Messrs Elliot, Maris, Wilmans & Hay. The entire content is reproduced:

"Ons het opdrag by ons kliënt ontvang om die volgende regstappe te neem:

- a) Appèl aan te teken teen die bevel van Kgomo RP vir die redes wat sal blyk uit die aansoek om verlof om te appèleer; en*
- b) 'n Dringende aansoek te loods om 'n verysing van die bepalings van die bevel gegee deur Kgomo RP. In hierdie verband is dit ons advies dat beide die hooggeregshof in Kimberley (waar die bevel toegestaan is) en die hooggeregshof in Kaapstad (waar 'C' tans woonagtig is) jurisdiksie het om so 'n aansoek aan te hoor. Dit is ons kliënt se instruksies dat die wysigingsaansoek in Kaapstad gebring moet word uit hoofde daarvan dat:*
 - (a) 'C' hier woonagtig is en (b) dit vir ons kliënt goedkoper sal wees om uit hierdie hof te litigeer.*

In die lig van sy instruksies het ons die kliniese sielkundige, Dr Rosa Bredenkamp (wat welbekend is in hierdie Hof en baie forensiese ervaring het), opdrag gegee om op 'n dringende basis 'n volledige ondersoek te doen na Cursin se beste belang (spesifiek na waar haar primêre woonplek moet wees). Sy het opdrag ontvang om haar ondersoek in twee fases af te handel soos volg:

- (i) Eerstens het sy opdrag om slegs onderhoude met 'C" te voer en 'n assessering te doen van haar binding met die primêre figure in haar lewe. Sy het aangedui dat sy 'C" sal sien (en die nodige assessering sal doen) op Donderdag 15 Oktober 2009, Vrydag 16 Oktober 2009, Donderdag 22 Oktober 2009 en Vrydag 23 Oktober 2009. Sy sal hierna 'n tussentydse verslag beskikbaar maak ten opsigte van die resultate van haar assessering teen Vrydag 30 Oktober 2009.*
- (ii) Tydens die tweede fase van haar ondersoek het sy opdrag om 'n volledige assessering te doen ten opsigte van welke party die geskikte persoon sal wees om die primêre versorging van 'C" waar te neem. Ons sal dit waardeer indien u kliënte sal instem om hul volle samewerkig te gee tot hierdie proses en deel te neem aan sodanige assessering.*

In die lig van bogenoemde het ons opdrag om hierdie skrywe aan u te rig en u kliënte te versoek om hul instemming te gee tot die volgende:

- 1) U kliënte sal hul volle samewerking gee tot die assesseringsproses en sal konsultasies met Dr Bredenkamp bywoon;*
- 2) 'C" sal tot 30 Oktober 2009 aanbly in die huis van ons*

kliënt sodat Dr Bredenkamp die eerste fase van haar assessering kan afhandel waarna haar primêre woonplek hangende die afhandeling van Dr Bredenkamp se ondersoek by ooreenkoms of deur 'n hofbevel gereguleer kan word.

Aangesien beide u kliënte en ons kliënt dit nie finansieel breed het nie, wil ons u vriendelik en dringend versoek om in te stem tot bovermelde voorstel aangesien dit vir beide partye aansienlike regskoste sal bespaar. Aangesien Dr Bredenkamp opdrag ontvang om eerste vir 'C" te assesseer beteken dit dat sy sonder enige "beïnvloeding" deur besigtiging van die aansoeke of verslae wat in die verlede bekom is of onderhoude met enige van die partye 'n assessering kan doen wat gemik is op wat op die huidige oomblik in 'C" se beste belang sal wees. U is welkom om haar telefonies te kontak en uself van haar onpartydigheid, kwalifikasies en ervaring te vergewis op 021 914 3110.

Ons verneem graag van u voor/op Vrydag 9 Oktober 2009 om 10h00."

- 6] In the meantime Stoffels has, in order to avoid the lapsing of Bozalek J's order that "stayed" the order of this Court pending the filing of a Notice of Appeal on or before 09 October 2009, filed his Notice of Appeal with the Registrar of this Court on Friday 09 October 2009, before the cut-off time.
- 7] In reaction to the steps taken by Stoffels in the CPD the Jonkers brought an application to be heard

simultaneously with the directive (in para 4 thereof) which envisaged the fashioning of the manner in which Stoffels was to exercise his right of access to 'C" on 20 October 2009 at 09h00. The relief sought is the following:

- "1. *Die respondent (Stoffels) gelas sal word om van verdere verdragingstaktiek en/of minagtende optrede ten aansien van die bogenoemde agbare Hof se bevel van 2 Oktober 2009 te weerhou.*
2. *Die respondent gelas word om onmiddelik en wel binne 3 dae vanaf datum van hierdie aansoek, naamlik 20 Oktober 2009, uitvoering sal gee aan paragraaf 22 van die bogenoemde agbare Hof se bevel van 2 Oktober 2009 en wel as volg:*
 - 2.1 *Ten opsigte van paragrawe 1 tot 3:
Gemelde minderjarige kind, 'C" binne 3 dae aan die applikante terug besorg sal word te Keimoes.*
 - 2.2 *Ten opsigte van paragraaf 4:
Respondent in samehang met die applikante binne 3 dae sal begin om die bevel van die agbare Hof ten uitvoer te bring.*
 - 2.3 *Ten opsigte van paragraaf 5:
Die agbare Hof `n verdere datum sal bepaal ten einde die oogmerk wat beoog is vir bereiking teen 20 Oktober 2009, te bereik.*
3. *Die respondente se aansoek om verlof tot appèl, soos geliaseer, sal oorstaan tot dieselfde datum as diè vervat in paragraaf 2.3 hierbo.*
4. *Respondent aanspreeklik is vir die koste van hierdie aansoek."*

8] Stoffels initially opposed this application. His contention emanate from the Answering Affidavit filed by his attorney Ms Odette Deysel for doing so. I quote the most significant aspects thereof:

8.1 "9. *Ek het meneer Gerrie van der Merwe versoek om 'n dringende aansoek te bring in bogenoemde Agbare Hof ten einde die uitvoering van die bevel op te skort hangende die liassering van die Kennisgewing van Appèl wat in terme van die reëls van die Wet op Hooggeregshofe, Wet 59 van 1959, outomaties die bevel sou opskort. Meneer Van der Merwe het egter meegedeel dat die Agbare Hof in reses is en dat daar waarskynlik nie 'n advokaat beskikbaar sou wees om so 'n aansoek te argumenteer oor die naweek nie.*"

This statement is preposterous, far-fetched and ridiculous. A party cannot create jurisdiction synthetically in another forum on some outlandish belief that counsel might not be available to argue his case. Besides, Mr Van der Merwe, referred to, is a senior attorney who appears regularly in this Court and has argued complex matters, which the case at hand, in which he appeared in any case, is not.

8.2 "13. *Dit is korrek dat daar geem betekening van die stukke persoonlik op Applikante was nie, maar speel Applikante nie heeltemal oop kaarte met bogenoemde Agbare hof in hierdie verband nie.*"

Ms Deysel states that the Jonkers avoided service of

process for the application in the CPD, hence the order was obtained on an unopposed basis.

8.3 "21. *Dit is korrek dat die aansoek gebring is met die oogmerk dat daar nie uitvoering gegee word aan bogemelde Agbare Hof se bevel nie, maar ontken ek dat die aansoek gebring is met die doel om die reël te misbruik en die Agbare Hof se bevel te omseil*"

8.4 "31. *Dit is nie korrek dat die Agbare hof alreeds beslis het oor wat in die beste belang van 'C' tans is nie.* Bogenoemde Agbare Hof het 'n beslissing gemaak gegrond op die geloof dat 'C' primer by die Applikante woonagtig was wat sedert April 2009 nie meer die geval was nadat die partye aktief die intergrasieproses, by ooreenkoms, in werking gestel het nie. Die uitnodiging wat gerig was aan Applikante in die gemelde skrywe het ten doel om ondersoek in te stel wat tans in die beste belang van 'C' is." (My emphasis).

That an attorney can suggest, if she has read my judgment and order, that no decision has been made as regards what is in the best interest of the child 'C' is simply mischievous. If no such decision has been made then the matter is still pending in this Court – *lis pendens*. If the matter is still pending what is it that Stoffels is seeking to appeal against in his Application for Leave to Appeal?

- 9] Before 09h00 on Tuesday 20 October 2009 Adv Japie Schreuder and his attorney, for the Jonkers, brought to

my attention a letter dated 14 October 2009 from Stoffels' instructing attorneys, Haupt & Van Zyl also authored by Ms Deysel to the Jonkers attorneys, Elliot, Maris, Wilmans & Hay which reads:

"Bostaande aangeleentheid verwys sowel as ons Kennisgewing tot verlof om Appèl wat geliaseer is.

In terme van die Wet op Hooggeregshoue, Wet 59 van 1959, wens ons u daarop te wys dat die liassering van bogemelde kennisgewing die uitvoering van die bevel gemaak deur sy Edele Regter-President Kgomo op 2 Oktober 2009, outomaties opskort.

In die lig daarvan sal daar dus geen verskyning namens ons klient op 20 Oktober 2009 wees in terme van bogemelde bevel nie, aangesien die uitvoering in hierdie verband dus ook outomaties opgeskort is." (My emphasis).

- 10] Mr Van der Merwe was blissfully oblivious of the existence of the letter just quoted in para 9 above. He attended the hearing to present Stoffels' case, whatever his instructions may have been. Having read the letter shown to him in Court he respectfully disassociated himself on procedural grounds from what his instructing attorneys submitted, by letter for that matter. I agree. In addition Ms Deysel's attitude and conduct is testimony to her utter ignorance of the Rules of Court and her abject discourtesy to this Court by agitating non-appearance.

- 11] In light of the latest developments I postponed the hearing (from 20 October 2009) to Thursday 22 October 2009 at 09h00 (my part-heard was still running) and directed that the parties file short Heads of Argument to enable me to understand crisply what it is that the parties wanted done or not done.
- 12] On Wednesday 21 October 2009 in the place of the Heads of Argument Stoffels' Kimberley attorneys, Van de Waal & Partners, understandably filed a Notice of Withdrawal as attorneys of record. They had no option because their mandate had been terminated and in fact this was also done by way of a supplementary affidavit to confirm it. Stoffels also withdrew his opposition to the relief sought in the Notice of Motion quoted in para 7 above whereby the Jonkers seek to enforce the implementation of my order issued on 02 October 2009.
- 13] I wish to deal with a few points raised in the supplementary affidavit (dated 21 October 2009) as they have a bearing on some of the orders that I propose making including why the application for Leave to Appeal cannot be retained on the court roll as a mere subterfuge to enable Stoffels to obtain the relief

sought in the CPD and to discard the application as soon as that is done. If the application should fail the Leave to Appeal becomes the fall back position. The Jonkers can also not be frustrated from executing the responsibility enjoined and the benefit of the order accorded to them and the child 'C' by this Court.

- 14] Ms Deyssel explains (in the supplementary affidavit dated 21 October 2009) what she meant to convey in her letter of 14 October 2009 why there will be no appearance for her client, Stoffels. She states:

"5.2 On the 9th October 2009 Respondent filed his Notice in his Application for Leave to Appeal in the above Honourable Court. In terms of Rule 49(11) of the High Court Act, Act 59 of 1959, the operation of the execution of the order in question was automatically suspended pending the decision of such appeal.

5.3 On the 14th of October 2009 I addressed the abovementioned letter to the Applicants' attorneys of record as a mere courtesy indicating that the rules prescribed that the execution of the order is automatically suspended, which made an appearance on 20 October 2009 unnecessary;

5.4 On the 16th October 2009 the Applicants filed their latest application asking the above Honourable Court to order the immediate execution of the order granted on 2nd of October 2009. This application was also brought under rule 49(11);

5.5 The letter of 14 October 2009 thus did not deal with the latest application and did not state that my client would not appear in Court on that matter.

6. At no stage did I indicate to the attorney of record of

Applicants that we will disregard the orders of the High Court of the Northern Cape based on orders made by the local High Court. I merely pointed out to the Applicants' attorney of record what the rules governing all High Courts in South Africa prescribed.

7. Furthermore, at the time of the writing of the abovementioned letter, the current application by the Applicants had not even been brought. The current application was only served on Respondent's corresponding attorney two days later, late on the 16th of October 2009.

8. It is my submission that neither I, nor Respondent, acted with disrespect for the above Honourable Court."

This explanation only serves to obfuscate the clear meaning of the letter.

15] On 19 October 2009 Stoffels obtained the following Rule Nisi from Yesiko J of the CPD on urgency:

"2. A Rule Nisi is issued in terms whereof Respondents are called upon to submit reasons on Friday, 27 November 2009, before this Honourable Court why the following order should not be made final:

2.1 Applicant shall be a holder of full parental responsibilities and rights in respect of the minor child 'C' STOFFELS (born on 23 January 2006) (presently 3 years and 9 months)("the minor child"), in terms of the provisions of the Children's Act, 38 of 2005 ("the Children's Act") as set out hereunder;

2.2 The minor child shall reside primarily with Applicant, who shall be her primary carer;

2.3 Applicant shall make those decisions as set out in section 31(1)(b)(ii),(iii) and (iv) of the Children's Act in the minor child's

interests;

2.4 The minor child shall have such contact [with] First and Second Respondents as may be recommended by Dr Rosa Bredenkamp pending finalisation of this application and thereafter;

2.5 First and Second Respondents shall co-operate in the investigation to be conducted by Dr Rosa Bredenkamp regarding the best interest of the minor child in the implementation of a parenting plan.

3. Paragraphs 2.1 to 2.4 operate as an interim order pending the finalisation of the application.

4. The Applicant is granted leave to supplement his papers by the filing of a further affidavit in the event that this application is opposed."

- 16] In consequence of Yesiko J's order quoted above (para 15) Stoffels filed a further supplementary affidavit consisting of 169 pages: Over the top for someone who pleads financial improvidence, makes no appearance and withdraws his opposition. The entire CPD application is incorporated. It would be inappropriate to express myself relative to what is pending in the CPD concerning, amongst other things the issues of *lis pendens*, jurisdiction, what is in the best interest of the child etc. However, that Court will have due regard to the fact that potentially two conflicting and/or concurrent orders may be issued in two jurisdictions in respect of the same child and same

subject-matter.

17] On his further participation in this Court Stoffels state:

"10. As indicated above, I am in no position financially to pay any further legal costs in this matter and therefore am also not in a position to instruct Mr Gerrie van der Merwe or a advocate to argue the matter on the 22nd of October 2009 before the above Honourable Court. I was again forced to make loans with friends and family members to secure the services of Dr Bredenkamp.

11. In light of the above mentioned I instructed Mr Gerrie van der Merwe to withdraw as my attorney of record and instructed my attorney not to proceed in the opposition of the above application. I am also advised that:

11.1 The matter before the above Honourable court has been finalized and I don't need a service address anymore in terms of the court rules. (My emphasis).

11.2 The current application, even if successful, will de facto be stayed by the order that was made by [the] Honourable Justice Yekiso in the Cape High Court on the 19th of October 2009. This order amended the order given by the above Honourable court on the 2nd of October 20009 and granted me primary residency of 'C'.

12. In light of all the above facts I am forced to withdraw my opposition of the urgent Application brought by the Applicants of the 20th of October 2009 asking for the immediate execution of the order granted on the 2nd of October 2009 even though I do not believe that such relief is in 'C"'s best interests."

If Stoffels carried out the order of this Court he would not have incurred the costs in the CPD and the matter would have been finalised on 20 October 2009. He saved no costs because Mr Van der Merwe appeared for him on the stipulated date. Curiously in the para 8.4 breath of this judgment Stoffels states that no final decision has been taken by this Court concerning 'C''s custody, however in the para 17 breath (emphasised) he states the opposite because it suits him.

- 18] The conduct of the respondent as set out hereinbefore unquestionably attracts costs on an attorney and client scale for 20 October 2009 and 22 October 2009.
- 19] There being no opposition and no appearance by the respondent (Stoffels) the Jonkers are entitled to part of the relief claimed as set out in the order below. The application for Leave to Appeal stands to be struck from the roll.
- 20] In the result I make the following order:
1. The Application for Leave to Appeal by the respondent (Mr Francois Christiaan Stoffels) is struck from the roll with costs. The application may only be re-enrolled upon a substantive application being made and on good cause shown.

2. The respondent (Stoffels) is ordered to deliver 'C' to the home of the applicants (Mrs Jacoba Hendrina Jonker and Mr Hans Johannes Jacobus Albertus Jonker) at Keimoes, Northern Cape, within 7 (seven) days of this order failing which the Sheriff of the Western Cape and/or any of his/her deputies is/are directed to remove 'C' from the respondent (Stoffels) and hand her over to the applicants (the Jonkers).

3. That the orders in paragraphs 4 and 5 of the judgment delivered by the Northern Cape High Court on 02 October 2009 will take effect and must be complied with within 10 (ten) days of 'C' having been handed over to the Jonkers couple.

The order in question are the following:

"4. The respondent, Mr Francois Christiaan Stoffels, as father of the child has the right of reasonable access to the child the terms of which access must be drawn up by counsel with the aid of the Family Advocate, Mr A H Nel; the psychologists Dr J D Stemmet (representing the applicants) and Ms Mandi Bouwer, representing the respondent.

5. If agreement concerning the terms of the respondent's access rights is reached an order by consent should be obtained in the Chambers of the Judge President

at 09h00 on Tuesday 20 October 2009 or otherwise be argued in court on the very stipulated date and time."

4. The respondent is to pay the costs of this application on the attorney and client scale.
5. The applicants are granted leave to bring an application for Contempt of Court against the respondent on the same papers suitably supplemented.

**F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

**For Applicant :
On Behalf of:**

Adv J J Schreuder
ELLIOTT, MARIS, WILMANS & HAY

For the First Respondent:

No Appearance.