



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

Case Number: 2025-038564

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

.....
SIGNATURE

5 June 2025
DATE

In the matter between:

S[...] A[...] H[...]

Appellant

and

S[...] B[...] H[...]

Respondent

In re:

The matter between:

S[...] B[...] H[...]

Applicant

and

THE HONOURABLE MAGISTRATE MNCUBE N.O.

First Respondent

S[...] A[...] H[...]

Second Respondent

Summary: Section 18 of Superior Courts Act 10 of 2013 – leave to execute pending appeal– section 18(3) imposes a stringent test, especially where final relief is granted on contested facts and no oral evidence was led in the main application – requirements of exceptional circumstances and irreparable harm not satisfied – requirements of exceptional circumstances and irreparable harm not satisfied – appeal upheld and execution of the relocation order suspended.

JUDGMENT

WINDELL J (with whom MAIER-FRAWLEY J and MOTHA J agree)

Introduction

[1] This is an automatic appeal in terms of section 18(4)(a)(ii) of the Superior Courts Act 10 of 2013 ('the Act'). The appeal is directed at paragraph 41(c) of the order granted by Van der Merwe AJ (the court a quo) on 29 April 2025, which authorised the operation and execution of a relocation order pending the finalisation of an appeal against that very order. The issue on appeal is whether the court a quo erred in granting such relief under section 18(3), having regard to the stringent statutory requirements.

[2] The background facts are largely common cause. The parties were divorced on 17 March 2023. They have three children, two of whom have since reached the age of majority. This appeal concerns only the youngest child, Z, who is currently 11 years old ('the minor child').

[3] The settlement agreement incorporated into the divorce order granted the respondent (the mother) primary residence of the minor child. The appellant (the father) was afforded defined rights of contact. Both parties retained full and joint parental responsibilities and rights in respect of the minor child.

[4] Since the divorce, both parties have remarried. On 23 February 2024, the respondent informed the appellant that she wanted to relocate with the minor child to Durban. The appellant did not consent to the proposed relocation. In light of this disagreement, the parties jointly appointed parenting coordinators to make a recommendation regarding the relocation to Durban. An additional expert was engaged to assist in ascertaining the views and wishes of the minor child.

[5] On 26 May 2024, after receiving the recommendations from the parenting coordinators, the respondent informed the appellant that she intended to relocate to Durban on 1 June 2024, despite the parenting coordinators' recommendation that any relocation be deferred until December 2024. In response, the appellant launched urgent proceedings in the Randburg Children's Court on 31 May 2024, seeking to interdict the respondent from relocating with the child and that primary residence be awarded to him.

[6] In May 2024, the respondent furnished the appellant with a written undertaking confirming that she would not remove the minor child from Gauteng. However, in June 2024, she instituted a counter-application in the Children's Court, seeking leave to permanently relocate with the minor child to Durban. The parties attempted to resolve the matter amicably, but settlement negotiations were unsuccessful. On 19 August 2024, the

Children's Court referred the matter to the Office of the Family Advocate for investigation and recommendations.

[7] Notwithstanding the pending proceedings in the Children's Court and the provisions of the divorce settlement agreement, the respondent unilaterally removed the minor child from Johannesburg to Durban on 6 September 2024, without the appellant's knowledge or consent. This prompted the appellant to institute urgent proceedings for the immediate return of the minor child to Gauteng. The application was successful, and the minor child was accordingly returned.

[8] Upon the minor child's return to Gauteng, the appellant retained her in his care, contrary to the terms of the divorce order. On 24 October 2024, this Court directed that the minor child be returned to the respondent's residence in Sandton, pending the outcome of the proceedings in the Randburg Children's Court. On 25 November 2024, the Family Advocate released a comprehensive report, which did not support the proposed relocation of the minor child from Gauteng. Thereafter, on 10 January 2025, the Children's Court granted an interim order adopting the recommendations of the Family Advocate. It also directed that the matter be referred to Living Links, a private wellness organisation that appoints social workers, to consolidate the various and conflicting reports, prepared by mediators, an independent expert, the Family Advocate, and the Family Counsellor, regarding the minor child's best interests in relation to the proposed relocation to Durban. The matter was postponed for hearing to 29 April 2025.

[9] On 20 March 2025, the respondent withdrew her counter-application in the Children's Court in which she had sought leave to relocate with the minor child. On the

same day, she served an urgent application on the appellant for the review and setting aside of the interim order granted by the Children's Court on 10 January 2025. The appellant was afforded three days to file an answering affidavit.

[10] On 8 April 2025, the court a quo declared the interim order of the Children's Court, dated 10 January 2025, to be a nullity. In addition, he granted a final order authorising the respondent to relocate to Durban with the minor child. On the same day, the appellant applied for leave to appeal against the entirety of the judgment and order.

[11] On 13 April 2025, the respondent launched an urgent application in terms of section 18(3) of the Act for enforcement of the portion of the order that granted her leave to relocate to Durban with the minor child. She requested that this application be heard simultaneously with the appellant's application for leave to appeal. The section 18(3) application was opposed. In response, the appellant filed a counter-application seeking the rescission of the order granted on 8 April 2025, on the grounds of the respondent's material non-disclosures and false statements in her founding affidavit of 20 March 2025, particularly regarding her and the minor's child's living conditions in Durban.

[12] The appellant also filed an application for leave to adduce further evidence on appeal, pertaining to the respondent's non-disclosures and alleged false statements, made under oath, concerning her and the minor child's living circumstances in Durban. These statements were advanced in her founding affidavit and during argument in court, at which the respondent was personally present.

[13] On 29 April 2025, the court a quo granted the appellant leave to appeal against the order granted on 8 April 2025 in the main application. At the same time, the court:

- (a) granted the respondent relief in terms of her section 18(3) application, permitting her to relocate to Durban with the minor child pending the outcome of the appeal;
- (b) dismissed the appellant's application for rescission of the judgment and order dated 8 April 2025; and
- (c) ordered that the respondent is liable for the costs of the appellant's rescission application, the application for leave to appeal, and the section 18(3) application. The costs order included the costs of two counsel, with senior counsel's fees on the Scale C as between party and party.

[14] On 30 April 2025, the appellant served a notice of appeal in terms of section 18(4)(a)(ii) of the Act, directed against paragraph 41(c) of the order of the court a quo, which authorised the operation and execution of the 8 April 2025 order pending the outcome of the appeal. On an extremely urgent basis, the Deputy Judge President of this Court constituted a full bench to hear the section 18(4) appeal on 22 May 2025.

Application to adduce further evidence on appeal

[15] The respondent filed an application to adduce further evidence on appeal, which was to be heard simultaneously with the hearing of the section 18(4) appeal. She alleged that certain material facts regarding her and the minor child's living conditions in Durban, raised by the respondent in opposition to the relocation, had been misrepresented or misunderstood. The relief sought included dispensation from the usual rules, and permission to introduce new evidence to clarify these matters.

[16] In her founding affidavit, the respondent contended that the evidence she sought to introduce would establish that there was no misrepresentation in her previous affidavits, and that the relocation arrangements were indeed in the child's best interest. She argued that the information related to circumstances that only arose after the main order was granted, or unfairly discredited.

[17] The application was opposed on several grounds. The appellant argued that the evidence sought to be introduced was neither new nor unavailable at the time of the original hearing. It was further submitted that the application amounted to an attempt to supplement a deficient case on appeal and to reopen factual disputes already considered and rejected by the court a quo.

[18] This Court dismissed the application. In our view the evidence sought to be introduced was not material and was largely irrelevant to the narrow enquiry before this Court under section 18(4) of the Act, which concerns only the interim enforcement of an order pending appeal, not the merits of the relocation itself. Allowing the evidence would have served only to prejudice the integrity and finality of the appeal process.

Legal Framework

[19] Section 18 of the Act regulates the effect of appeals on the operation and execution of court orders. In terms of section 18(1), the general rule is that the operation and execution of a decision that is the subject of an appeal is suspended pending the outcome of the appeal. However, section 18(3) permits a court to depart from that general rule under exceptional circumstances and to order the execution of the judgment or order notwithstanding the pending appeal.

[20] Section 18 of the Act provides that:

*‘(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 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.***

(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.’ (Emphasis added)

[21] The requirements for obtaining an order in terms of section 18(3) of the Act, which departs from the ordinary suspension of execution pending appeal, are now well established (see *Ntlemeza v Helen Suzman Foundation and Another*¹ (*‘Ntlemeza’*)). The threshold is stringent and intentionally so, aimed at discouraging execution of judgments pending appeal save in exceptional circumstances. In my view, the standard is particularly onerous where final relief is granted on contested facts.

¹ 2017 (5) SA 402 (SCA).

[22] In order to succeed, the respondent was required to demonstrate: (a) that exceptional circumstances existed justifying the grant of the relief sought; and, (b) in addition, on a balance of probabilities, that (i) irreparable harm will be suffered if the minor child was not permitted to relocate with her to Durban; and (ii) the appellant would not suffer irreparable harm if the child did so relocate. These requirements impose a substantial evidentiary burden on the party seeking to displace the default position that execution is suspended pending appeal. Failure on the part of the applicant to prove any one of these facts is fatal to the application.²

[23] The first stage of the enquiry, as to whether exceptional circumstances are present for the court to order ‘otherwise’, depends on the peculiar facts of each case. In *Incubeta*³ the Court held that “[t]he circumstances which are or may be “exceptional” must be derived from the actual predicament in which the given litigants find themselves’. It 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

[24] In *Ntlemeza*⁵ the Supreme Court of Appeal (SCA), with reference to *MV Ais Mamas: Seatrans Maritime v Owners, MV Ais Mamas and Another*,⁶ held that what is ordinarily contemplated by the words exceptional circumstances is something out of the ordinary and of an unusual nature, something which is expected in the sense that the general rule does not apply to it; something uncommon, rare or different, ‘besonder,

² *KGA Life Limited v Multisure Corporation (Pty) Ltd* Unreported, ECMk case no CA 157/2022 dated 14 December 2022.

³ *Incubeta supra* para [22]

⁴ *Ibid* para [17].

⁵ *Ntlemeza supra* para [37].

⁶ 2002 (6) SA 150 (C) at 156H-157C.

seldsaam, uitsonderlike of in hoë mate ongewoon’ In *Knoop v Gupta NO (Execution)*⁷ the SCA held that the facts relied upon in a section 18(3) application must be ‘sufficiently out of the ordinary and of an unusual nature’ to justify a departure from the default position that the noting of an appeal suspends the operation of the judgment. The Court emphasised that such circumstances must amount to a clear deviation from the norm.

[25] In *Tyte Security Services CC v Western Cape Provincial Government*,⁸ the SCA held that the requirements in sections 18(1) and 18(3) of the Act should not be approached as discrete or compartmentalised enquiries. The Court cautioned against a rigid, ‘tick-box’ method and emphasised that the proper approach is a holistic one, centred on whether exceptional circumstances exist. Within this framework, the presence or absence of irreparable harm may form part of the broader assessment of exceptional circumstances. This marks a departure from the more segmented approach previously adopted by both the High Court and earlier SCA decisions.

[26] In applying sections 18(1) and (3) of the Act, it is important to bear in mind that this is not a commercial matter, where prejudice and irreparable harm can be readily quantified and balanced between the litigants. Here, the best interests of the child are the paramount consideration. As held in *WCJ and Another v PSJ and Others*,⁹ the central question is whether, if the relocation order is not implemented, the minor child—whose welfare lies at the heart of the dispute—will suffer irreparable prejudice.

Evaluation

⁷ 2021 (3) SA 135 (SCA).

⁸ 2024 (6) 175 (SCA) para [10]-[14].

⁹ Unreported (88660/2019) [2024] ZAGPPHC 1217 (5 December 2024) at paragraph 11.

[27] It is common cause that the order granted by the court a quo, authorising the relocation of the minor child to Durban, constituted final relief. It was granted in circumstances where the respondent had previously provided a written undertaking not to remove the child from Gauteng, had withdrawn her counter-application in the Children's Court, but nevertheless proceeded by way of urgent motion in a matter involving a clear dispute of fact, and while an application for the variation of the minor child's primary residence was still pending. Moreover, the order was granted notwithstanding the existence of a Family Advocate's report recommending that the minor child not be relocated, and without the respondent leading any oral evidence to support her case.

[28] At the outset, it is important to distinguish between two separate questions: whether relocation is in the child's best interests—a matter to be determined in the pending appeal—and whether, under section 18(3), the relocation order should be implemented despite the noting of that appeal. The enquiry under section 18(3) is not concerned with the ultimate merits of the relocation, but rather whether exceptional circumstances exist justifying execution of the order, and whether the respondent has, in addition, discharged the onus of proving, on a balance of probabilities, that she will suffer irreparable harm if the order is not executed, and that the appellant will not suffer irreparable harm if it is.

[29] The papers reveal that the respondent's claim of irreparable harm centred on personal and familial disruption—namely, that her husband resides and works in Durban, and that maintaining two households placed her under financial and emotional strain. While such factors may be relevant in a broader inquiry into the child's best interests, they do not, without more, rise to the level of exceptional circumstances and *irreparable harm*

as contemplated in section 18(3). No evidence was placed before the Court demonstrating that the consequences of a temporary delay in relocation, pending the appeal, would be irreversible or incapable of remedy.

[30] By contrast, the appellant demonstrated that he would suffer irreparable prejudice should the child be relocated in the interim. The minor child has been raised in Johannesburg, where her extended family, social network, school, and religious community are located. She has expressed preferences regarding her living arrangements, which were still under investigation by the Family Advocate and Living Links at the time of the 8 April 2025 order. A premature relocation disrupts these connections and risks rendering the appeal academic.

[31] It is also of significance that the respondent's founding affidavit in the section 18(3) application was the subject of serious allegations of material non-disclosure and misrepresentation. The court a quo expressly took this into account when granting leave to appeal the relocation order. It further found that the respondent's failure to lead oral evidence constituted, in itself, a basis for granting leave. A costs order was also granted against the respondent, despite her having been successful in obtaining the relief she sought. In his reasons, the learned Acting Judge observed:

"Much of the first judgment is concerned with whether there ought to have been a referral to oral evidence. Had it been known that the applicant is capable of untruths in her founding affidavit, it seems to me that there are reasonable prospects that a court of appeal may be swayed to order oral evidence, given that in cases involving minor children, the ordinary rules pertaining to the resolution of factual disputes do not apply in the same way as they would in strictly adversarial matters. In this context, the enquiry is different to the enquiry that the rescission application calls

for. As I found above, for the rescission application, the fact that the applicant was untruthful in her founding affidavit in the initial application is irrelevant, because that enquiry is concerned with the outcome of the initial application had the applicant been truthful. For present purposes, the fact that the applicant was untruthful is very much relevant, because it has a bearing on whether oral evidence should have been ordered.”

[32] The role of the prospects of success on appeal, while not determinative under section 18(3), remains a relevant consideration and has been addressed by the SCA.¹⁰ The court a quo’s observation referred to above, highlights a fundamental procedural concern: in matters involving the welfare of minor children, particularly where credibility is in dispute, the failure to hear oral evidence may constitute a material irregularity, with serious consequences for fairness and justice. In the present matter, the court a quo granted final relief in circumstances marked by multiple disputes of fact between the parties, conflicting expert opinions, and serious concerns regarding the respondent’s credibility and parenting conduct. These concerns were amplified by the absence of a comprehensive forensic psychological assessment to assist in evaluating what would truly serve the minor child’s best interests.

[33] In the circumstances, this Court is not satisfied that the respondent has discharged the onus imposed by section 18(3) of the Act. The fact that the matter concerns a child does not relieve the respondent of the strict burden imposed by section 18. On the contrary, it calls for greater judicial caution. As the SCA affirmed in *B v S*,¹¹ in disputes concerning custody or access, where allegations affect credibility and parental capacity,

¹⁰ *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA).

¹¹ 1995 (3) SA 571 (A).

determining the child's best interests without testing the evidence through oral testimony poses a real risk of injustice. Courts must ensure that all relevant evidence, including that of the parties and the appointed experts, is fully ventilated and properly assessed.

[34] The court a quo identified no exceptional circumstances justifying the immediate execution of the relocation order. It is not surprising, as the evidence failed to establish the existence of exceptional circumstances, nor does it demonstrate, on a balance of probabilities, that either the minor child or the respondent would suffer irreparable harm if the relocation order is not implemented pending the outcome of the appeal. By contrast, the appellant has shown that the premature relocation of the minor child poses a real and tangible risk of irreparable harm—both to his ongoing parental relationship and to the child's emotional stability and well-being.

[35] The court a quo erred in granting execution of the relocation order pending appeal in the absence of compliance with the strict requirements of section 18(3). The default position, namely, that the operation and execution of a judgment is suspended upon the noting of an appeal, ought to have been maintained in this matter, particularly given the sensitive and potentially irremediable consequences of interim relocation in matters involving a minor child. The appeal must accordingly succeed.

[36] In the result the following order is granted:

1. The appeal in terms of section 18(4)(a)(ii) of the Superior Courts Act 10 of 2013 is upheld.

2. Paragraph 41(c) of the order granted by Van der Merwe AJ on 29 April 2025 is set aside.
3. The operation and execution of the order granted on 8 April 2025 is suspended pending the outcome of the appeal in the main application.
4. The respondent is ordered to pay the costs of this appeal, including the costs of the application to adduce further evidence, such costs to include the costs of two counsel, on Scale C, where so employed.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

A. MAIER-FRAWLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

M.P. MOTHA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/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 5 June 2025.

APPEARANCES

For the appellant: Ms L. Segal SC

Ms G. Kyriazis

Instructed by: Farhan Cassim Attorneys

For the first respondent: Ms F. Bezuidenhout

Mr S. Mabaso

Date of hearing: 22 May 2025

Date of judgment: 5 June 2025