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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2025-076576

In the matter between:

N[...] T[...] R[...] - F[...]

Applicant

and

J[...] A[...] L[...]

Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 18 AUGUST 2025

SARKAS AJ:

INTRODUCTION

[1] For convenience, the parties are cited as in the main application.

- [2] The main application was directed at securing the respondent's co-operation in an assessment to be undertaken by the applicant's appointed expert, Dr Basil Carnie, regarding whether the applicant's intended relocation to the United States of America serves the best interests of the minor child born of their erstwhile relationship.
- [3] The respondent seeks leave to appeal to the Supreme Court of Appeal, alternatively the full bench, in terms of s 17 (1)(a)(i) and s 17 (1)(a)(ii) of Superior Court's Act 10 of 2013 (**the Superior Courts Act**), against the judgment and order of this court directing that:
- 3.1. The respondent shall cooperate in the relocation assessment(s) that may be undertaken by Dr Basil Carnie, and on reasonable notice of not less than 7 (seven) days, shall make himself available for such assessment(s) to be conducted and completed.
- 3.2. In the event that the applicant does not institute an application for leave to remove the parties' minor child from the Republic of South Africa in order to relocate to the United States of America on a permanent/temporary basis (together with any ancillary relief) by no later than 30 (thirty) days after the date of the granting of the Order, the Order in paragraph 2.1 above shall fall away.
- (the Order)**

GROUND OF APPEAL

- [4] In summary, the respondent's grounds of appeal are that this court erred in:
- 4.1. Not striking the main application for lack of urgency.
- 4.2. Not upholding the respondent's *in limine* points of (a) *lis alibi pendens*, in that the issues raised in the main application are already the subject of extant proceedings in the Children's Court; and (b) non-joinder, in that Dr Carnie was not a party to the main application.
- 4.3. Not attaching sufficient weight to the directive issued in the Children's Court proceedings requiring that the Office of the Family Advocate

report on the issues of care and contact in respect of the minor child, which report the Family Advocate had not yet delivered, and the fact that the main application had not been served on the Office of the Family Advocate.

- 4.4. Granting interdictory relief when the requirements for an interdict had not been met.
- 4.5. Directing that the applicant bring an application for relocation within 30 days when such order is not '*allowed*'.
- 4.6. Directing that the respondent cooperate with an expert in proceedings that were not before court.

THE TEST FOR LEAVE TO APPEAL

[5] Section 17(1) of the Superior Courts Act provides that:

'17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) *(i) the appeal would have a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;...'*

[6] The respondent contends that the appeal would have a reasonable prospects of success in that another court will find merit in the arguments advanced by the respondent, and that there is a compelling reason why the appeal should be heard in that there are conflicting judgments on the matter of urgency.

[7] In *MEC Health, Eastern Cape v Mkhitha*, the Supreme Court of Appeal explained:

'[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. ...

[17] *An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*¹

[8] The threshold for leave to appeal is relatively stringent to prevent meritless appeals. A Court must be convinced on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.²

[9] If the court is unpersuaded of the prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. However, the merits of the appeal '*remain vitally important and are often decisive*'.³

ANALYSIS

Urgency

[10] The first ground of appeal concerns the issue of urgency.

[11] In the respondent's submission, this court was bound by the case of *E.S and Others v P.S and Another* (16138/24) [2024] ZAWCHC 201 (12 August 2024) (***E.S. v P.S.***), where the court held that the mere involvement of a child does not automatically confer urgency on an application. The respondent further submits that the main judgment conflicts with the case of *MM v NM and Others* [2023] ZAKZPHC 117 (18 October 2023) (***MM v NM***), which was cited with approval in *E.S. v P.S.*. Reliance is also placed on the practice directives of this court concerning urgent applications, which directives are subordinate

¹ *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) paras 16-17.

² *Four Wheel Drive Accessory Distributors CC v Rattan* NO 2019 (3) SA 451 (SCA) para 34.

³ *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2.

to, and cannot be applied to restrict or undermine, the Uniform Rules of Court.

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[12] The main judgment contains detailed reasons for the determination that it was in the interests of justice to deal with the matter out of the ordinary course, including that:

12.1. The Court in *E.S. v P.S.* stated that it is well-established in our jurisprudence that matters involving the welfare of a child are often regarded as inherently urgent.⁵

12.2. The applicant did not delay unduly when regard is had to the exchange of correspondence between the parties regarding the proposed assessment by Dr Carnie, including the detail provided in response to the respondent's various queries.

12.3. While the applicant may still obtain redress in an application in due course, it may not be substantial.

12.4. The papers were complete, and counsel on both sides had been briefed to be prepared to argue the matter.

[13] The main judgment is not in conflict with the decision in *E.S. v P.S.*. In that case, the court declined to the approach taken by Binns-Ward J in *Xtraprops* (where the court, despite recognising a borderline case of urgency, proceeded to hear the matter due to the completeness of the papers and the readiness of counsel to argue the merits), because the context in *E.S. v P.S.* was 'markedly different'.⁶

[14] There is also no conflict with the decision in *MM v NM*, which is referenced in *E.S. v P.S.* in relation to the question of self-created urgency. *MM v NM* is

⁴ See the discussion in Erasmus *Superior Court Practice* (online version, RS 25, 2024) at N1-1, and the authorities cited there.

⁵ *E.S. and Others v P.S. and Another* (16138/24) [2024] ZAWCHC 201 (12 August 2024) (***E.S. v P.S.***) at para 21.

⁶ *E.S. v P.S.* at paras 25-26, with reference to *Xtraprops 66 (Pty) Ltd v Phiopater Supplies (Pty) Ltd* (20228/14) [2014] ZAWCHC 177 (25 November 2014).

distinguishable on the facts, and it is on the strength of those particular facts that the court determined that the urgency in that case was '*self-evidently self-created*'.⁷

[15] The approach of an appellate court to an appeal against the exercise of a discretion by another court will depend upon the nature of the discretion concerned.

[16] In *Cornerstone Logistics (Pty) Ltd v Zacpak Cape Town Depot (Pty) Ltd* [2022] 2 All SA 13 (SCA), the Supreme Court of Appeal held that:

*'It is trite that in pronouncing on the issue of urgency, the court a quo was exercising a wide discretion. This court can only interfere with that discretion if it is manifest that the judge misdirected herself. I can find no evidence of such misdirection or irregularity, and this court is, accordingly, not at liberty to interfere. In any event, in my view, the urgency issue is moot. The court a quo had decided to hear and dispose of the matter on a semi-urgent basis. That cannot be undone.'*⁸

[17] In the present instance, the respondent has not demonstrated any proper basis for interference with the exercise of this court's wide discretion to pronounce on the issue of urgency.

Lis alibi pendens

[18] The further grounds of appeal concerning the issues of *lis alibi pendens*, the directive issued in the Children's Court proceedings underway, and the report by the social worker, all traverse the respondent's previous arguments in the main application.

⁷ *MM v NM and Others* [2023] ZAKZPHC 117 (18 October 2023) at para 19.

⁸ *Cornerstone Logistics (Pty) Ltd v Zacpak Cape Town Depot (Pty) Ltd* [2022] 2 All SA 13 (SCA) at para 30.

[19] These are dealt with in detail in the main judgment with reference to the facts and law, including that:

19.1. While a social worker and a therapist were appointed to prepare the child for the intended relocation, there has been no relocation assessment by an expert.

19.2. The proceedings in the Children's Court concern the respondent's rights of contact with the child, and the counter-application in those proceedings was for an order directing the Office of the Family Advocate to be appointed to conduct an investigation and report to that Court in respect of the contact arrangements between the respondent and the child.

19.3. In *Nestlé (SA) (Pty) Ltd v Mars Incorporated* [2001] 4 All SA 315 (A), the principle of *lis alibi pendens* is explained as follows:⁹

'There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. In my view, none of those elements is present in this case. Indeed, it is difficult to see how they can exist where the matters in issue have been placed before two quite different tribunals (as in this case), the one operating consensually and the other by force of statute, each having its own peculiar functions, powers and authority. For in such a case each tribunal will, by definition, be inquiring into a ruling upon different matters, and neither will be capable of ruling authoritatively on the issue that falls within the competence of the other.'

19.4. The High Court and the Regional Divorce Courts have exclusive jurisdiction to rule on relocation matters (see s 45(3)(d) read with s 46 of the Children's Act 38 of 2005 (**the Children's Act**); pending the

⁹ At par 17.

establishment of '*family courts*' by an Act of Parliament this position will prevail).

19.5. The Children's Court is therefore not capable of ruling authoritatively on the issue of the removal the parties' minor child from South Africa, and the respondent's reliance on the principle of *lis alibi pendens* is without merit.

[20] In the application for leave to appeal, the respondent submits that the court that is conferred with the power to grant guardianship over a child to a person, must have the power to grant an order for the relocation of a child within its jurisdiction to another district, province in South Africa or foreign country, and that any other interpretation would render section 45(3B) of the Children's Act superfluous.

[21] It is well-established that interpretation is the objective process of attributing meaning to words used in legislation. This process entails a simultaneous consideration of: (a) the language used in the light of the ordinary rules of grammar and syntax; (b) the context in which the provision appears; and (c) the apparent purpose to which it is directed.¹⁰

[22] Section 45(3B) provides that the High Court and the Children's Court have concurrent jurisdiction over the guardianship of a child as contemplated in s 24 of the Children's Act. Section 24 in turn provides for the assignment of guardianship by order of court.

[23] The Children's Act defines guardianship with reference to s 18, which is headed '*Parental responsibilities and rights*'. Section 18(3)(c)(iii) provides that a parent or other person who acts as guardian of a child must *inter alia*:

¹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at para 50.

‘(c) give or refuse any consent required by law in respect of the child, including—

...

(iii) consent to the child’s departure or removal from the Republic.’

[24] Section 18(5) then provides that:

‘Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c)’.

[25] The competence of the relevant courts is dealt with in s 45(3)(d) of the Children’s Act, which provides that:

‘(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:

...

(d) the departure, removal or abduction of a child from the Republic.’

[26] Section 46 of the Children’s Act goes on to detail the orders Children’s Court may make, and does not confer jurisdiction on a Children’s Court to deal with the question of relocation.

[27] On a proper construction, taking into account relationship between the words used, the concepts expressed by those words, and the place of the contested provisions within the scheme of the Children’s Act:

27.1. Section 18 of the Children’s Act explicitly provides that only a ‘competent court’ may order relocation in the absence of the consent of all the persons that have guardianship of a child;

27.2. The High Courts and Divorce Courts have exclusive jurisdiction to deal with the matter of relocation.

27.3. The powers of the Children's Court, as expressly provided for in the Children's Act, do not include the power to deal with the matter of relocation.

[28] There are no reasonable prospects of another court coming to a different conclusion on these issues.

Non-joinder

[29] As addressed in the main judgment, the test in a joinder application is whether or not the party has a direct and substantial interest in the subject matter of the action, i.e. a legal interest in the subject matter of litigation, which may be affected prejudicially by the judgment of the court.¹¹

[30] The respondent characterises the Order as a *mandamus* against Dr Carnie, and further submits that the fact that Dr Carnie will receive compensation for services this court has '*compelled*' him to render, means that Dr Carnie has interest in the outcome of application.

[31] The clear and unambiguous terms of the Order are dispositive of this contention. The Order provides that the respondent shall cooperate '*in the relocation assessment(s) that may be undertaken by Dr Basil Carnie*'. DR Carnie is therefore not compelled by the order of this court to undertake any such relocation assessments.

[32] Relatedly, service of the main application on the Office of the Family Advocate was not necessary at this stage because of the nature of the relief sought.

¹¹ *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 12.

Interdict

[33] The respondent contends that the applicant failed to establish the three requirements for interdictory relief.

[34] An applicant seeking the grant of a final interdict must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.¹² In granting the Order, the following factors were taken into account in the main judgment:

34.1. While a social worker and a therapist were appointed to prepare the child for the intended relocation, there has been no relocation assessment by an expert.

34.2. In *F v F* 2006 (3) SA 42 (SCA), the Supreme Court of Appeal held that from a constitutional perspective, the rights of a custodian parent to pursue his or her own life or career involved fundamental rights to dignity, privacy and freedom of movement.¹³

34.3. What is more, thwarting a custodian parent in the exercise of those rights might well have a severe impact on the welfare of the child involved.¹⁴

34.4. It is also clear that the applicant approached the court as a last resort, when regard is had to the exchange of correspondence between the parties regarding the proposed assessment by Dr Carnie.

[35] The respondent therefore does not establish prospects of succeeding on this ground of appeal.

The Order

¹² *Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA) at para 29.

¹³ *F v F* 2006 (3) SA 42 (SCA) at par 11.

¹⁴ *Ibid.*

[36] In the notice of application for leave to appeal, the respondent submits that the orders granted in the main application are impermissible because it is *'trite law that Judges are not allowed to instruct the parties to initiate proceedings that are not before Court or instituted on instructions of their client in any proceedings before Court as it is not in the interest of justice for judicial officers to be a player and a referee in litigation before Court.'*

[37] The respondent further submits that the court erred in ordering that the respondent co-operate with an expert in the proceedings that were not before court.

[38] These grounds of appeal misconstrue the terms of the Order. The Order is conditional:

38.1. The co-operation order was granted subject to the applicant launching the intended relocation application within 30 days from the granting of the Order, failing which the co-operation order would fall away. This does not mean that the applicant is compelled or obliged to institute such proceedings in terms of the Order. The election to institute such proceedings remains that of the applicant.

38.2. The respondent's cooperation is also tied to the institution of the relocation application.

[39] It warrants emphasis that at the heart of this matter is the best interests of the minor child. Section 28(2) of the Constitution provides that the child's best interests are of paramount importance in every matter concerning the child. The principle of the best interests of the child has also been incorporated in s 9 of the Children's Act.

[40] In the recent decision of *M.D.P v W.T.P and Another* (Appeal) (A139/2024) [2025] ZAWCHC 300 (17 July 2025) the Full Court affirmed the wide powers of the High Court in such matters as follows:

*'As was made clear in Terblanche v Terblanche, as upper guardian in custody and related matters the High Court has wide powers to establish what is in the best interests of minor children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes. This requires that account be taken of relevant factors and circumstances, both past and future, and the possibility of what might happen in the future when making an order.'*¹⁵

- [41] Furthermore, in *DR v NM and Another* (3358/2024) [2024] ZAWCHC 165 (7 June 2024) this Court held that:

'...the High Court sits as upper guardian in matters involving the best interests of child (be it in custody matters or otherwise), and that it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitations of the evidence presented or by contentions advanced or not advanced by the respective parties
*As an upper guardian of all dependent and minor children, this court has an inalienable right and authority to establish what is in the best interest of the children and to make corresponding orders to ensure that such interests are effectively served and safeguarded....'*¹⁶

- [42] This approach is also consistent with the principle set out by the Constitutional Court in *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) that:

'Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior

¹⁵ *M.D.P v W.T.P and Another* (Appeal) (A139/2024) [2025] ZAWCHC 300 (17 July 2025) at para 32.

¹⁶ *DR v NM and Another* (3358/2024) [2024] ZAWCHC 165 (7 June 2024) at paras 21-22.

*court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.'*¹⁷

- [43] The contention that the Order as framed is not permissible is therefore without merit. The relevant question is whether the Order granted, for cooperation in a relocation assessment, secures the best interests of the minor child.
- [44] The main judgment highlights the applicant's explanation that she requires the respondent's co-operation in order to bring a carefully considered and reasoned relocation application, which deals with all of the factors as per s 7 of the Children's Act.
- [45] Given his mother's stated intention, the Order allows for the commencement of the relocation assessment process, which assessment is in the best interests of the child. As was submitted by the applicant, the absence of such an order would only serve to prolong the continued uncertainty in the minor child's life in relation to the issue of relocation. The Order serves to ensure that the minor child's interests are safeguarded and given paramountcy.
- [46] The respondent therefore does not establish prospects of succeeding on the grounds of appeal raised. The respondent has also failed to establish a compelling reason why, despite the lack of prospects of success, there is a compelling reason that the appeal should be heard.

ORDER

- [47] **I accordingly make the following order:**

¹⁷ *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 30.

1. Leave to appeal is refused.
2. The applicant in the application for leave to appeal shall pay the costs of the application for leave to appeal, including those of counsel on the 'B' scale.

ACTING JUSTICE T SARKAS

For applicant in the application for leave to appeal / respondent in the main application:

Adv R **Nthambeleni SC**

Adv A **Van Loggerenberg**

Instructed by: Philip Venter Attorneys

For respondent in the application for leave to appeal / applicant in the main application: Adv RJ **Steyn**

Instructed by: Van der Spuy & Partners