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

CASE NO: 2024-005569

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

06 October 2025

Date

K. La M Manamela

In the matter between:

P[...] **C[...]**

and

C[...] **C[...]**

Respondent

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge's secretary. The date of the judgment is deemed to be 06 October 2025.

**JUDGMENT
(APPLICATION FOR LEAVE TO APPEAL)**

KHASHANE MANAMELA, AJ

Introduction

[1] The applicant seeks leave to appeal an order granted by the Court on 17 June 2025¹ - on an urgent basis - refusing his application for the permanent removal of the minor child ('Main Application'), born from the marriage between him and the respondent ('the Order').

The Order in its full terms was as follows:

1. That this application be heard as an urgent application in accordance with the provisions of Rule 6(12) and that the requirements pertaining to the time periods and service be dispensed with;
2. That the relief sought by the Applicant in terms of paragraphs 3, 4, 5 and 6 of the Notice of Motion to this application dated 2 June 2025 is postponed sine die pending the following:
 - 2.1 the referral of this matter, including regarding the issues in paragraphs 3, 4, 5 and 6 of the Notice of Motion to this application dated 2 June 2025, to the Office of the Family Advocate for investigation and furnishing a report on an urgent basis, bearing in mind the report already compiled by the Family Advocate dated 13 August 2024;
 - 2.2 alternatively to 2.1 above, the referral of this matter by agreement between the parties including regarding the issues in paragraphs 3, 4, 5 and 6 of the Notice of Motion to this application dated 2 June 2025, to an appropriately qualified professional in private practice, comparable to the Family Advocate, for investigation and furnishing a report on an urgent basis, bearing in mind the report already compiled by the Family Advocate dated 13 August 2024.
3. That leave be granted to the parties to supplement their affidavits, if necessary, upon receipt of a report envisaged in 2 hereof, and place the matter on the roll accordingly and in terms of the relevant practice directives;
4. That the costs of this application be the costs in the divorce action, and
5. That, to avoid doubt:
 - 5.1 any relief sought by the Applicant in terms of this application not directly addressed by the terms hereof is dismissed, and
 - 5.2 the terms of the order made in respect of the application in terms of Rule 43 on 21 November 2024 remain extant or in force, save as may have been varied by the terms hereof.²

[underlining added]

¹ The order is deemed to have been made on 13 June 2025, although signed on 17 June 2025 and date stamped 18 June 2025. See CaseLines ('CL') 22-8 to 22-10.

² *Ibid.*

[2] The applicant entered into a marriage with the respondent on 16 April 2016 and on 11 June 2018, a minor child was born from their marriage. The respondent launched divorce proceedings in January 2024. Despite the equivocations of the applicant's legal representatives the divorce action appears acrimonious and lacks traction. The hive of activity is located in the motion court by way of interlocutory applications launched by the applicant.

[3] The applicant has already brought three interlocutory applications. The current application for leave to appeal is in respect of the intermediate interlocutory application for the removal of the minor child (i.e. the Main Application), which was brought between a Rule 43 Application and an application for contempt of court. The latter application, despite its label, sought substantially the same relief for the removal of the minor child from the primary residence of the respondent to that of the applicant, as in the intermediate Main Application which served before me in June 2025.

[4] The minor child is seven years old and is currently living with the respondent in Pretoria. The applicant lives in Modimolle, Limpopo. The parties have not shared a common matrimonial home since 2023 when they still lived in Cape Town. By December 2023 the respondent had relocated from Cape Town to Pretoria with the minor child. The applicant relocated from Cape Town to Modimolle in September 2024.

[5] On 22 July 2025, I furnished the reasons for the Order ('the Reasons').³ On 13 August 2025, the applicant launched this application for leave to appeal ('Leave to Appeal'). The respondent did not formally note her opposition of the Leave to Appeal, but made an appearance at its virtual hearing on 11 September 2025. I was informed by Ms A Korf (*nee* Greyling), appearing for the applicant, that the respondent had been urged to seek *pro bono*

³ CL 31-1 to 31-16.

legal representation by Lenyai J, when she appeared in person before the learned judge in the contempt of court proceedings. The respondent, when probed for feedback in this regard, mentioned that she could not meet the affordability criteria for free legal services. She was confident, though, to proceed legally unaided, as she previously did in the Main Application when the Order was made. This judgment was reserved at the conclusion of the hearing of the Leave to Appeal.

Applicable legal principles for applications for leave to appeal

General

[6] It is my view that the terms of the Order effectively postponed the relief sought in terms of the Main Application, pending the delivery of a report by the office of the Family Advocate or a jointly appointed professional with comparable qualifications to those of the Family Advocate. This speaks to the appealability of the terms of the Order. The legal principles applicable to this area of law are of longstanding existence and, thus, durable.

[7] Under this part, I devote my attention to the legal principles applicable, specifically, to the issue of appealability of interim or non-final orders and those applicable, generally, to applications for leave to appeal. I start with the latter.

Superior Courts Act 10 of 2013 and leave to appeal, generally

[8] The legal principles or law central to applications for leave to appeal are/is located in section 17(1) of the Superior Courts Act 10 of 2013. Its provisions read as follows in the material part:

- (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 ...

[9] The following observation in *Democratic Alliance v President of the Republic of South Africa and Others*⁴ by a full court of this Division regarding the test for leave to appeal is authoritative:

[4] The test as now set out in s 17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion... The fact that the Superior Courts Act now employs the word “would” as opposed to “might” serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012 (1) SACR 567 (SCA) at para 7:

‘More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[5] ...

[6] The second basis upon which leave should be granted is that there is a compelling reason, that is apart from the existence of conflicting judgments on the matter under consideration which require clarification from a higher court. In essence the compelling reason is whether the case raises issues of significant public importance.

[10] The same authority stressed that the threshold for granting leave to appeal against judgments of the High Court has been raised to a more formidable level in the Superior Courts Act.⁵ The latter holding has actually descended from a long line of cases since the decision in *The Mont Chevaux Trust v Goosen and others*⁶ of the Land Claims Court (now the Land Court).

Appealability of orders or judgments

⁴ *Democratic Alliance v President of the Republic of South Africa and others* (21424/2020) [2020] ZAGPPHC 326 (29 July 2020), *coram*: Mlambo JP, Davis JP and Molefe J.

⁵ *Democratic Alliance v President of the Republic of South Africa* [2020] ZAGPPHC 326 [4].

⁶ *The Mont Chevaux Trust v Goosen and others* 2014 JDR 2325 (LCC); (LCC14R/2014) [2014] ZALCC 20 (3 November 2014) [6], *per* Bertelsmann J.

[11] In *Zweni v Minister of Law and Order* ('Zweni')⁷ the Appellate Division (now the Supreme Court of Appeal ('SCA')), as the then apex court, set out the principles of appealability of orders or judgments as follows:

1. ... as a general rule, piecemeal consideration of cases is discouraged...
2. In order to achieve this result, a number of different legislative devices have been employed from time to time. The requirement of leave to appeal is one. Another is to prohibit appeals unless the order appealed against has the effect of a final judgment. And the Courts have, by way of interpretation, held consistently that rulings are not appealable decisions.
- ...
7. In determining the nature and effect of a judicial pronouncement, 'not merely the form of the order must be considered but also, and predominantly, its effect' (*South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H).
8. A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (*Van Streepen & Germs (Pty) Ltd* case *supra* at 586I-587B; *Marsay v Dilley* 1992 (3) SA 944 (A) at 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (*Willis Faber Enthoven (Pty) Ltd v B Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 214D-G).
9. The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability (*South Cape Corporation (Pty) Ltd v Engineering C Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550D-H). To illustrate: the exclusion of certain evidence may hamper a party in proving his case...⁸

[12] Recently, in *MEC for Economic Development Gauteng and Another v Sibongile Vilakazi and Others* ('Sibongile Vilakazi'),⁹ the SCA used the opportunity to summarise the principles on appealability of orders from *Zweni* as follows:

... (a) the decision must be final in effect and not open to alteration by the court of first instance; (b) it must be definitive of the rights of the parties; (c) and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.¹⁰

⁷ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) *per* Harms AJA (as he was then).

⁸ *Zweni* at 532-533.

⁹ *MEC for Economic Development Gauteng and Another v Sibongile Vilakazi and Others* (783/2023) [2024] ZASCA 126; [2024] 4 All SA 344 (SCA) (17 September 2024), *per* Smith JA.

¹⁰ *Sibongile Vilakazi* [21], relying on *Zweni* at 532-533.

[13] These principles were actuated by the Constitutional Court, over a decade ago, in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* ('SCAW')¹¹ to a foundation constituted by a consideration of the interests of justice.¹² The same Court expatiated on its approach in *Tshwane City v Afriforum and another*.¹³

[14] The Constitutional Court held that a determination of appealability no longer hinges 'largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application', as held in *Zweni*, as that test or approach 'is now subsumed under the constitutional interests of justice standard'.¹⁴ A determination of appealability or applications for leave to appeal ought to be premised on a consideration of the interests of justice which does not yield to any impediments which existed in terms of the common-law prevailing prior to the advent of the constitutional era.¹⁵

[15] The interests of justice approach is shared by the SCA in *Sibongile Vilakazi* and the latter Court confirmed that the approach extends beyond the Constitutional Court to other courts, including the High Court.¹⁶ But the SCA recently cautioned that the approach does

¹¹ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ('SCAW'), per Moseneke DCJ for a unanimous court.

¹² SCAW at [41].

¹³ *City of Tshwane Metropolitan Municipality v Afriforum and Another* (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016) ('*Tshwane City v Afriforum*'), per Mogoeng CJ for the majority.

¹⁴ *Tshwane City v AfriForum* [40].

¹⁵ *Tshwane City v Afriforum* [41].

¹⁶ *Sibongile Vilakazi* [22], relying on *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC) [45].

not amount to a jettison of the common law principles, albeit that the latter would yield to the interests of justice where required by the specific facts of a matter.¹⁷

[16] This means that the principles in *Zweni*¹⁸ maintain their durability and gravitational pull on appealability of orders amidst ‘the capacious remit of the interests of justice’.¹⁹ In *Zweni* the court called for maintenance of a general guard against a piecemeal consideration of cases to ensure that the courts bring matters or cases to finality.²⁰ The mischief sought to be guarded against in this regard is eradication or, if not possible, the limitation of piecemeal appeals for cost-effective and speedy resolution of court disputes.²¹ Piecemeal appeals have an infectious adverse effect on, among others, the workload of the appellate courts.²²

Grounds of appeal

General

[17] Bearing in mind the above background and legal principles, I now turn to the applicant’s grounds pivoting the Leave to Appeal. I have decided to quote extensively from the material filed to avoid any doubt that same has been traversed. This type of doubt seems to linger in the applicant’s mind and/or those of his legal representatives regarding the disposal of the Main Application in terms of the Order.

¹⁷ *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart and another* [2025] 1 All SA 60 (SCA); 2025 (1) SA 392 (SCA) (‘*Minmetals*’) [32], per Koen AJA (as he was then).

¹⁸ *Zweni* at 532-533.

¹⁹ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* 2023 (5) SA 163 (SCA) (‘*TWK*’) [30], per Unterhalter AJA [30]; *Minmetals* [32].

²⁰ *Zweni* at 532I.

²¹ *TWK* [21]; *Minmetals* [33]; *Zweni* at 532-533.

²² *Venter and Another v Steyn and Others (Leave to Appeal)* (3368/2019) [2023] ZANWHC 228 (14 December 2023) [13] per FMM Reid J.

[18] It is contended that the applicant ‘has excellent prospects of success on appeal’. The test in terms of the Superior Courts Act, as quoted above, is ‘reasonable prospect of success’.²³ Leave to appeal is sought to the Full Bench, but I understand this to refer to a Full Court of this Division.

[19] It is submitted that it is in the interests of justice and the ‘public interest’ that the Leave to Appeal succeeds. For parents of minor children ought ‘not be deterred from bringing urgent applications where circumstances permit such application’.²⁴ The turning down of this Leave to Appeal, it is contended, ‘would have adverse and devastating effects on child justice and the best interest of minor children across the Republic of South Africa’.²⁵

[20] The Leave to Appeal is prefaced by submissions or contentions that the Court did not consider the facts or considered facts which were not relevant to the matter, for the following reasons: (a) the removal of the minor child was substantiated by Ms Annelise Joubert (‘Ms Joubert’), a social worker in private practice with qualification comparable to those of the Family Advocate; (b) Ms Joubert was jointly appointed by the parties; (c) the minor child had been found to be in need of care and protection, as opined by Ms Joubert; (d) the respondent did not improve the situation of the minor child in a period of three months from Ms Joubert’s first report, and (e) the Court wrongly noted that the application was ‘due to acrimony in the divorce and that the divorce had lost traction’.

²³ Par [8] for a reading of section 17(1)(a)(i) of the Superior Courts Act.

²⁴ Leave to Appeal par 5.3, CL 000-31.

²⁵ Leave to Appeal par 5.5, CL 000-31.

Grounds for the intended appeal (and their discussion)

[21] The following are some of what is labelled grounds for the intended appeal against the Order as expatiated by the Reasons (collectively, ‘the Judgment’): (a) both parties strongly consider themselves to be entitled to primary residency of the minor child; (b) the Court only considered the facts considered material for the reasons for its judgment; (c) the Family Advocate report of August 2024²⁶ ‘is outdated and was compiled during a time when there was no contact between the minor child and the [a]pplicant’; (d) Ms Joubert’s report is cardinal and is subsequent to the Family Advocate’s report, hence it has new facts not contained in the latter, including the changed circumstances of the parties and substantially changed surrounding facts regarding the minor child; (e) Ms Joubert’s several reports pivoted the Main Application and not just the applicant’s say-so; (f) Ms Joubert’s serious and urgent findings were not considered by the Court, which findings remain uncontested; (g) there was no opposing affidavit by the respondent before Court, save for the respondent’s verbal submissions; (h) the Court erroneously referred to the forensic report by Joubert when the forensic investigation is by the Teddy Bear Foundation; (i) the Court did not consider that the minor child needs care and protection; (j) the Court conflated the relief sought in the main application with that previously sought in the Rule 43 application; (k) there is a discrepancy between the Order and the Reasons in that a psychologist is to be appointed in terms of the latter whereas the former only referred to the Family Advocate or an expert with similar qualifications; (l) the Court appears to accept and reject the report(s) by Ms Joubert; (m) the Court erroneously held that the Family Advocate’s report ought to take precedence over Ms Joubert’s several reports, including denoting that other experts, such as Ms Joubert, are bound by the outdated Family Advocate’s report; (n) the Court disregarded the concessions or admissions by the respondent regarding: (i) the respondent’s non-disclosure to the applicant and Ms Joubert (for latter’s investigation) of the minor child’s more than two incidents of

²⁶ CL 29-48 to 29-85.

sexually inappropriate conduct, and (ii) the respondent's contact by the minor child's school regarding the minor child's sexually inappropriate conduct (with the latter said to have been withheld from 'all the experts involved'); (o) the Court erred in drawing an inference not borne by the facts before the Court that the '[a]pplicant and his attorney decided that the [a]pplicant is to move to Modimolle', when the facts before the Court were that the applicant decided on the relocation in order to be closer to his son, the minor child; (p) the Court ruled 'that the application was "propped up" by the social worker' which ruling 'is unfounded and cannot be inferred by the [C]ourt', as Ms Joubert was jointly appointed by the parties and professionally specialises in matters involving minor children in their best interests; (q) the Court considered the issue of costs when the respondent was 'self-represented and appeared in person'; (r) the Court did not make a finding on the potentially detrimental effect of the respondent's actions on the minor child; (s) the Court did not consider the best interests of the minor child, particularly against the backdrop of the reports by Ms Joubert, and (t) the Court allowed the respondent 'to make submissions not contained in her papers, which was [sic] not commissioned and therefore not before [C]ourt'.²⁷

[22] I do not think it is necessary to comment on the grounds numbered (a), (b), (e), (h), (j), (o) and (p) in paragraph [21] above. Therefore, I will discuss the remaining grounds, in some instances with the grounds blended due to interlinkages. I do so under self-explanatory paragraphs appearing after the next topic. Some of the material from the latter topic would have a bearing on the discussion. I will also have regard to the written and oral argument by counsel, for which I am grateful.

²⁷ Leave to Appeal par 2, CL 000-22 to 000-27.

Other relevant factors for purposes of appeal

[23] Under this rubric, the applicant stated, among others, that the following factors are worthy of consideration for purposes of the intended appeal: (a) the respondent took an affirmation regarding the contents of her non-commissioned opposing affidavit, but the applicant was not afforded an opportunity to question the respondent's version; (b) the applicant doubts that the Court or myself as the presiding judge 'considered the whole of the documents before' the Court, as I 'did not relay many of the facts contained in the papers and was also not sure of the ages, dates, times and progression of the reports of Joubert'; (c) the Court made determinations 'which were not before the ... Court for determination'; (d) the Court or in the Reasons 'entertained queries of the [r]espondent raised with the learned Honourable Justice before and after the granting of the order'; (e) there is reference in the Reasons 'to an opposing affidavit when none served before the Honourable Court'; (f) the Court was not required or entitled to make a finding that the respondent seems to be fine and faring well in her task to oppose the matter (i.e. the Main Application), in relation to her mental capacity or the need for her assessment in terms of the order made in the Rule 43 application; (g) findings on the veracity of the report by Ms Joubert were made by the Court 'without hearing from [Ms] Joubert, who was available to attend to the [sic] proceedings', and (h) the respondent 'was untrustworthy and disingenuous in her opposing of the matter, especially after admitting that she had kept information from the experts involved as well as the [a]pplicant'.²⁸

[24] I am of the view that the factors numbered (b), (c), (d) and (f) in paragraph [23] above do not warrant further attention for purposes of the Leave to Appeal. The rest will be discussed along the identified grounds of appeal.

²⁸ Leave to Appeal par 3, CL 000-27 to 000-29.

Appeal is not competent against the reasons for judgment but against the substantive order made by the court

[25] As borne by the grounds of appeal and the so-called ‘other factors’ appearing above, the Leave to Appeal dissects every syllable in the Reasons and even seem to raise objections – subtle even if they may seem – against the choice of words by the Court. This approach is unhelpful and has been long disavowed by our courts, as confirmed by the following *dicta* by Brand JA in *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole*:²⁹

‘In the result I agree with the ultimate conclusion arrived at by Davis J, albeit for different reasons. This renders it unnecessary to decide on the correctness of his reasoning, since an appeal does not lie against the reasons for judgment but against the substantive order made by the court a quo...’³⁰

[underlining added]

[26] In my view the majority of the so-called ‘grounds of appeal’ is directed at the reasoning in and findings made in paragraphs within the Reasons. The heads of argument by counsel are also not immune from this approach.

No opposing affidavit was filed by the respondent in the Main Application

[27] It is submitted that the Main Application was determined without any valid opposing affidavit by the respondent, but only on the basis of the respondent’s verbal submissions. I dealt with the circumstances regarding the opposing affidavit in the Reasons.³¹ Although this

²⁹ *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA).

³⁰ *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) [39], per Brand JA, relying on *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 354-355, per Centlivres JA. See also *President of the Republic of South Africa and Another v Tembani And Others* 2025 (2) SA 371 (CC) [73]-[74], per Rogers JA.

³¹ Reasons par [33], CL 31-12.

does not amount to a ground of appeal, the implications of this contention is dire. So, I will address the misgivings.

[28] It is correct that the respondent had delivered a document seeking to address the issues in the founding papers but the document was not in the form of an affidavit.³² At the beginning of the proceedings when the Main Application was heard the respondent confirmed by way of an affirmation the contents of the document. There was no objection on behalf of the applicant.

[29] In fact, the applicant had already reacted to the unsigned and non-affidavit response by the respondent through his own affidavit comprising 38 pages without factoring in the annexures.³³ There is no explanation why this elaborate step was taken against the document considered – in the first place - by the applicant a nullity (i.e. unsigned and non-affidavit response by the respondent).

[30] As indicated above the respondent took an affirmation to confirm - as the truth - the contents of her unsigned and non-affidavit response. The respondent was not legally represented in an urgent matter involving the interests of a minor child. I didn't, under the circumstances consider there to be prejudice in the approach taken by the Court on the part of the applicant and I wasn't alerted to any by counsel appearing for the applicant.

³² CL 29-278 to 286.

³³ CL 29-349 to 29-387.

[31] Therefore, it is incorrect to assert that there was no evidence by the respondent before the Court. The originally uncommissioned document was elevated to an affidavit after its contents was dully confirmed by way of an affirmation. It is also incorrect that the respondent was sworn in by me as the presiding judge. This was done by my secretary in Court as it is the convention before the Court. It is further incorrect that the respondent was sworn in as a witness. She merely confirmed the truthfulness of the document before the Court by way of an affirmation, as it is done with depositions. There was no room for the applicant's counsel to be 'afforded an opportunity to question the respondent's version', when - in reaction to the respondent's document - her client had already delivered his own elaborate affidavit. And I may have asked for clarity on some aspects of the document if it was necessary, but there was no obligation on the part of the Court to question the respondent regarding the document. If this was a requirement, it would have equally found application with the applicant regarding his two affidavits before the Court.

[32] There is also a contention that the respondent was allowed to make various submissions 'from the bar' not contained in her document. I am not aware of same and neither was I made aware of such by the counsel for the applicant to the extent that this happened and her client found it prejudicial. Perhaps the applicant could have been more specific with this accusation, so that everyone can be saved from the effort of guessing what the relevant issues raised by the respondent were worthy of consideration by the appellate court.

[33] I note that 'the attorney of the applicant in an attempt to have the matter run smoothly and without any further postponements' had offered 'guidance' to the respondent. This seems

commendable as long as it didn't have implications of conflict of interests. The approach of the Court in ensuring that the respondent affidavit is affirmed in Court, as opposed to externally, also avoided delay in hearing the matter. But there was really nothing of concern in all these.

Family Advocate report versus Ms Joubert's reports

[34] Another paramount concern or ground on the part of the applicant is that the Court ordered for another report by the Family Advocate, as opposed to deciding the matter on the basis of the reports compiled by Ms Joubert, the social worker in private practice.

[35] The respondents in her opposing affidavit had made statements which appeared to me to be indicative of non-acceptance of the role played by and some of the opinions by Ms Joubert.³⁴ She also told the Court that Ms Joubert had referred her to the applicant's attorneys when she asked for copies of the reports. She told the Court that she only received copies of the reports a few weeks prior to the hearing. I enquired on how the services of Ms Joubert were retained and it was during this exchanges that the respondent's statements indicated that she does not accept Ms Joubert as her expert witness. Therefore, I view with great concern the accusation in the Leave to Appeal and elsewhere that I 'prompted' the respondent to change her version regarding the joint appointment of Ms Joubert. This would not accord with the administration and dispensation of justice 'impartially and without fear, favour or prejudice', constitutional guarantee.³⁵ Ms Korf apologised for the accusation during the hearing of the Leave to Appeal, but I urge all applicant's legal representatives to cease and desist in making such accusations against the Court, unless they seriously consider same to be

³⁴ For example Answering affidavit pars 38, 5.52, 66.6.75, 84, 87 and 93.

³⁵ Section 165(2) of the Constitution of the Republic of South Africa, 1996.

correct in which instance, they should take concrete steps to address same in the protection of their client's interests. This is not an isolated incident, as I have noted other disparaging remarks made against myself in the application for contempt of court. It is clear to me that the Leave to Appeal is substantially grounded upon the alleged conduct of the presiding judge and his reasons for judgment and alleged omissions on his part, an approach disfavoured by our courts.³⁶

[36] But it does not really matter that Ms Joubert may have been initially appointed with the concurrence of the respondent. Once the respondent expressed concern on how Ms Joubert went about her assessments and investigation, it became a concern for the Court. An expert is there to assist the Court, but once her opinions or the process undertaken to arrive at them is challenged by one of the parties, I thought it prudent to involve the statutorily appointed office of the Family Advocate. And to alleviate any possible concerns as to urgency, I included in the Order that the parties may agree on another expert with comparable skills and qualification.

[37] The decision of the Court as paraphrased in [36] above was made: (a) not to ignore 'serious and urgent findings' of Ms Joubert; (b) not in rejection of the contents of the report(s) by Ms Joubert; (c) not to raise the office of the Family Advocate or its work over that of Ms Joubert or her several reports, including any other experts, and (d) not as expressing doubt of 'the veracity of the report by Ms Joubert' in her absence.

³⁶ Pars [25]-[26] above.

[38] Nothing in the Reasons are indicative of any disparagement or rejection of the reports by Ms Joubert or her opinions by the Court. Surely her reports may interest the Family Advocate or any other jointly appointed expert. And further any Court further seized with the matter may have regard to the contents of the reports, depending on how the presiding judge views the respondent's misgivings about the reports.

[39] Indeed, I mentioned the possible involvement of a psychologist in the Reasons not that same is ordered, but because I expect any comprehensive report to also address the psychological effect of uprooting a seven year old from the primary care of her mother.³⁷ This was not changing the Order. I had raised the issue during the hearing of the Main Application. But one would still expect the parties, as parents of the minor child, to consider the Court's concerns regarding the psychological (or whatever the proper terminology may be) impact of the removal of the minor child and seek that this is properly investigated and reported on by appropriately qualified professionals.

Court did not consider that the minor child needs care and protection

[40] It is submitted in this regard that the Court did not consider that the minor child needs care and protection. Further, that there was no finding by the Court regarding the potentially detrimental effect of the actions of the respondent on the minor child. The best interests of the minor child ought to have been considered by the Court particularly from the premise of Ms Joubert's reports, the submission concludes.

³⁷ Reasons par [40], CL 31-14.

[41] I do not think that the decision of the Court was against the best interests of the minor child. From the papers before me, I considered the continuation or update of the investigation by the Family Advocate to be an appropriate approach to advance the interests of the minor child. To the extent that the office of the Family Advocate was considered inappropriate due to, perhaps considerations of the implications of the workload carried by the latter office on urgent turnaround on the matter, I ordered for a comparable professional jointly appointed by the parties. And to the extent that the situation requires the minor child to be removed to ‘a place of safety’, being a place other than that of the warring parents, the child protection services in our country may be engaged or even the Court. The issue of a third party ‘place of safety’ was not raised by either of the parties and was not established by the evidence before the Court.

Disingenuity and concessions or admissions on the part of the respondent

[42] It is also contended that the appeal would have prospect of success due to fact that the Court is said to have disregarded the respondent’s admitted non-disclosure of the minor child’s incidents of sexually inappropriate conduct. This is said to confirm that the respondent was untrustworthy and disingenuous in her opposition of the Main Application. I don’t think there is any merit in this ground. The interests of the minor child when forming part of the determination before the Court of law is not a contest of virtue between the parents. It is a vital and delicate issue. In the determination of this issue, the Court is enjoined to look beyond the haze of the contestations or skirmishes and, in some instances, deep rooted mutual resentment prevailing between the parties. The interests of the minor child are beyond all these.

Costs in the Main Application

[43] The Order is also criticised for the fact that it ordered the costs of the application to be costs in the divorce action. It is contended that this was somewhat improper considering the respondent was ‘self-represented and appeared in person’. But this was not only reference to the respondent, but to both parties. The applicant retained legal representatives and, naturally, incurred legal costs. But, there is really nothing here to warrant the attention of an appellate court.

The child runs the risk of being over-assessed

[44] Evidently, the prime contention or submission on behalf of the applicant – as appearing above – is that Ms Joubert’s reports are or were sufficient to rule on the removal of the minor child from the primary residence of the respondent to that of the applicant.

[45] But in the Leave to Appeal there is mention of the fact that the Order exposes the minor child to the ‘risk of being over-assessed’. For there is forensic investigation being finalised and, therefore, no need for further investigation. This sounded new to me and Ms Korf for the applicant confirmed during the hearing for the Leave to Appeal that the warning of the risk of overassessment is something that arose after the Order was granted. Be that as it may, I trust that any appropriately qualified professional would always tread with the necessary care and sensitivity when assessing or investigating issues regarding the minor child.

Appealability of the order or the Judgment

[46] I conclude the discussion of the applicant's grounds for the intended appeal on the issue of the appealability of the terms of the Order. I concede that the issue is potentially dispositive of the Leave to Appeal that, generally, ought to be determined first.

[47] The legal principles or test for the appealability of interim orders are discussed above.³⁸ Counsel for the applicant dealt with the issue extensively in her oral and written submissions in this Leave to Appeal. She submitted that in terms of section 16(3) of the Superior Courts Act such orders may be appealed in exceptional circumstances. This provision reads as follows:

Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application-

- (a) by one spouse against the other for maintenance *pendente lite*;
- (b) for contribution towards the costs of a pending matrimonial action;
- (c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or
- (d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted.

[48] The above provision was found by the Constitutional Court in *S V S And Another*³⁹ to pass constitutional muster in an attack from multiple fronts including regarding the best interests of the minor children to which it was held:

[34] In any event, should any rule 43 order be contrary to the best interests of a child, this can be immediately rectified. The High Court regularly hears, on an urgent basis, applications where it is alleged that the best interests of the child are under threat. Such a matter will be treated with the urgency it deserves, irrespective of any previous orders made in terms of rule 43.

[35] An appeal process that is subject to endless delays and protracted litigation will inevitably play into the hands of the litigant who is better resourced. It is therefore inconceivable that it can ever be in the best interest of the most vulnerable members of our society, the children. [quoted without footnotes]

³⁸ Pars [11]-[16] above.

³⁹ *S V S And Another* 2019 (6) SA 1 (CC) *per* Nichols AJ writing for a unanimous Court.

[49] The Main Application was not in the form of a Rule 43 application, but it does not detract from the fact that section 16(3) of the Superior Courts Act is not restricted to those type of applications. But, further, the Main Application did not seek interim relief, so appealability was implicated from another legal point of view.

[50] Counsel for the applicant made submissions on this issue which included what appears next. Determination of appealability of interim orders is based on one or more of the following factors: (a) whether the order is final in effect; (b) demands of the interests of justice; (c) irreparable harm; (d) effect on constitutional rights. Counsel did not reveal the authority for this submission.

[51] But the correct principles on appealability of orders are those in *Zweni*, fully discussed above,⁴⁰ that, the impugned order (as with the Order in the Main Application), ought to: (a) be final in effect and not capable of alteration by the court of first instance; (b) be definitive of the affected parties' rights, and (c) be competent of disposal of at least a substantial portion of the relief sought in the main proceedings.⁴¹ It is directed by higher authority that the principles from *Zweni* be applied against the consideration of the interests of justice.⁴²

[52] I agree with counsel for the applicant that the interest of justice demands that the best interests of the minor child be considered paramount. But I disagree that the Order in any way is against the promotion of the best interests of the minor child, even if the Order may be indicated to be contrary to the reports by Ms Joubert. The determination of what is or was in

⁴⁰ Pars [11]-[16] above.

⁴¹ Pars [11]-[12] above.

⁴² Pars [13]-[16] above.

the best interests of the minor child was not limited to consideration of the reports by Ms Joubert, but all facts before the Court. I have said more about the latter reports above.

Conclusion and costs

[53] I reiterate that the terms of the Order – on the basis of what is stated above – are not capable of an appeal. But even if capable of an appeal, I am of the view that, the intended appeal against the Order would have no reasonable prospect of success. Also, I am of the view that there is no ‘some other compelling reason why the appeal should be heard’.⁴³ For none of the grounds raised by the applicant for the intended appeal against the Judgment has merit. Accordingly, the Leave to Appeal will be dismissed.

[54] The respondent still participated in person and did not file any documentation in her opposition of the Leave to Appeal. There is no need for entering into a debate about whether a litigant in person is entitled to costs of litigation, as I have decided to dismiss the Leave to Appeal with no order as to costs.

Order

[55] In the premises, I make the following order:

- a) the application for leave to appeal is dismissed, and
- b) there is no order as to costs regarding the outcome in a) hereof.

Khashane La M. Manamela
Acting Judge of the High Court

⁴³ Section 17(1) of the Superior Courts Act, quoted in par [8] above.

Date of Hearing : **11 September 2025**
Date of Judgment : **06 October 2025**

Appearances:

For the Applicant : Ms A Korf (*nee* Greyling)
Instructed by : AKS Attorneys Inc, Johannesburg

For the Respondent : In person