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

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

17/06/2026
DATE ___ SIGNATURE

CASE NO: 2025-202092

In matter between:

S[…] V[…] G[…] (previously N[…]) Applicant

and

K[…] G[…] Respondent

This judgment is handed down electronically by circulation to the applicant's legal representatives and the respondent's legal representatives by email and by publication on Case Lines. The date for the handing down is deemed 17 JUNE 2026.

JUDGMENT
(APPLICATION FOR LEAVE TO APPEAL)

LANGE AJ

INTRODUCTION

[1] This is an application for leave to appeal against the whole of the judgment and order granted by this Court on 22 April 2026. The Applicant, Mrs S[…] V[…] G[…] (previously Naidoo), seeks leave to appeal to the Full Court of the Gauteng Division, Johannesburg, alternatively to the Supreme Court of Appeal. The Respondent, Mr K[…] G[…], opposes the application and seeks its dismissal with costs on the scale as between attorney and client on Scale B.

[2] The order under appeal was granted in urgent motion proceedings brought by the Respondent. Those proceedings followed the Applicant's unilateral relocation of the parties' two minor children from Johannesburg to Cape Town while matrimonial proceedings were pending and a Rule 43 application she had launched remained unresolved.

[3] Subsequent to the granting of the order and, as the Applicant records, without abandoning her appeal rights, the Applicant complied with its terms. She returned to Johannesburg with the minor children and is presently residing with them in the former common home, where the Respondent also resides. The Rule 43 application has not yet been set down for hearing. The Family Advocate process, which was at an early stage at the time the order was granted, is still ongoing.

[4] The application for leave to appeal is opposed on three principal bases: first, that the order is not appealable; second, that even if it were appealable, the Applicant has established neither reasonable prospects of success nor compelling reasons for the appeal to be heard; and third, that the application has become moot or devoid of practical effect. As will appear below, the first ground is dispositive. This Court is satisfied that the order is not appealable and that leave to appeal must accordingly be refused. The second and third grounds are addressed in the alternative.

BACKGROUND

[5] The parties are married and are embroiled in pending divorce proceedings. A Rule 43 application for interim relief was launched by the Applicant, in which the relocation of the minor children features as a central issue. That application had not yet been set down for hearing in the ordinary course at the time of the events giving rise to the urgent proceedings.

[6] It is necessary to set out with some precision the procedural history, because the Applicant's argument on urgency and on the competency of this Court to entertain the second urgent application depends in material part upon the characterisation of the earlier proceedings before Mia J. The first urgent application was *the Applicant's own* application, brought in the context of Rule 43 proceedings, in which *she* sought, among other things, leave to relocate the minor children to Cape Town. That application was struck from the urgent roll by Mia J and directed to proceed in the ordinary course. No determination was made on the merits of the relocation issue. No relief was granted or refused on the merits. The application was simply removed from the urgent roll.

[7] It is significant that the application before Mia J was the Applicant's application and that the substantive relief sought in it was the Applicant's relocation relief. Whatever submissions the Respondent may have advanced in argument before Mia J, including any draft order or practice note that may have addressed the question of the children's return to Johannesburg, those submissions did not constitute an application by the Respondent for return relief. The Respondent was the respondent in those proceedings, not the applicant. His return relief was not the subject matter of *any* application that had been placed before any court, let alone adjudicated or refused. The striking of the Applicant's application from the urgent roll accordingly left the position entirely open: the relocation issue remained

unresolved, and the Respondent had not yet launched his own application for any relief.

[8] Notwithstanding the striking of the first urgent application, the Applicant did not return the children to Johannesburg. She instead took active steps to entrench their presence in Cape Town as she sought to enrol them in a Cape Town school. The Respondent thereupon instituted the second urgent application, *his* application, seeking the children's return to Johannesburg. This was the application that gave rise to the order being challenged. The Respondent's application was a fresh proceeding, instituted by a different party, seeking different relief, in different proceedings. The Court accordingly had full and unimpeded jurisdiction to hear and determine it. This Court found in favour of the Respondent and granted the order on 22 April 2026.

[9] The Applicant thereafter brought an urgent application for a stay of execution pending leave to appeal, which was refused with costs. She subsequently complied with the order being challenged.

THE LEGAL FRAMEWORK FOR LEAVE TO APPEAL

[10] Section 17(1)(a) of the Superior Courts Act 10 of 2013 (“the Act”) provides that leave to appeal may be granted where the court is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the question involved.

[11] The threshold is deliberately more stringent under the current Act than under its predecessor. In *S v S and Another* 2019 (6) SA 1 (CC) at paragraph 30, the Constitutional Court confirmed this. The word “would” in section 17(1)(a) imposes a higher bar than “might”: it requires a realistic and not merely remote prospect that another court would in fact reach a different conclusion. Mere disagreement with

the reasoning of the court a quo, or the fact that the issues are arguable, does not suffice.

[12] The compelling reasons ground provides a separate basis for granting a litigant leave to appeal, independent of reasonable prospects. It may be invoked where the matter raises a novel or important question of law, where there is a conflict of authority, or where some other consideration of public or legal importance renders the hearing of the appeal necessary or appropriate in the interests of justice. However, a litigant cannot invoke the compelling reasons ground as a substitute for demonstrating reasonable prospects merely by asserting that the issues are interesting or legally complex.

[13] Before either of those enquiries can be reached, the threshold question of appealability must be resolved. An order that is not appealable cannot attract leave to appeal regardless of the merits.

APPEALABILITY

The statutory bar under section 16(3)

[14] Section 16(3) of the Act provides, in peremptory terms, that no appeal lies against an order "given on an application" for interim custody, care or access in pending matrimonial or parental proceedings. The purpose of this provision was authoritatively stated by the Constitutional Court in *S v S and Another*[1] at paragraphs 30 to 35 and 48 to 58. The Court confirmed that the bar is constitutionally valid and serves a pressing purpose: the preservation of a speedy, inexpensive and accessible interim remedy in matrimonial litigation. The section is designed to prevent interim child-related orders from becoming launching pads for tactical appellate delays that consume resources, protract litigation, and prejudice the very children whose welfare the orders are designed to protect.

[1] 2019 (6) SA 1 (CC)

[15] The Applicant's primary argument in favour of appealability is that the order was not granted “in” a Rule 43 application but in separate urgent motion proceedings. She submits that section 16(3) therefore has no application, and she further seeks to distinguish the present order from the order considered in *S v S* on the basis that the present order was granted in separate urgent proceedings and is in substance a coercive mandatory return order rather than a conventional interim care, residence and contact order.

[16] These submissions require careful consideration; Appealability under section 16(3) depends not on the procedural form of the application, but on the substance, character, and effect of the order. An order that operates as an interim regulation of the children’s care, residence, and contact during pending matrimonial litigation does not fall outside section 16(3) merely because it was obtained by way of separate urgent motion proceedings rather than under Rule 43. To hold otherwise would elevate form over substance and undermine the statutory bar, since any party seeking to appeal an interim child-related order could avoid section 16(3) simply by framing the matter as a separate urgent application.

[17] The Applicant's characterisation of the order as a “mandatory return order coupled with prohibitory interdicts” has descriptive accuracy but does not assist her. The question is not whether the order resembles a conventional Rule 43 order in its terms, but whether it functions as interim regulation of the care, residence, and movement of children during pending matrimonial proceedings. This order plainly functions as such. Its opening terms acknowledge the pending Rule 43 application. Its operative provisions are expressed to endure only until the Rule 43 application is finalised. The relocation dispute that gave rise to the urgent proceedings is the central issue in the Rule 43 application. The order does not resolve that dispute. It regulates the interim position pending its resolution. In substance and in effect, the

order is an interim child-related order within the meaning of section 16(3), regardless of the procedural path by which it was obtained.

[18] This conclusion is consistent with the approach in *JL v DJ*[2], where a court in this Division held that interim orders concerning children in the context of ongoing matrimonial litigation are not rendered appealable merely by pointing to their practical effect on the children or their parents. It is also consistent with *PC v CC*[3], which held that *pendente lite* child-related orders are appealable only in exceptional circumstances and that the bar established by section 16(3) and the policy considerations underlying it apply to orders that function as interim regulation of the children's circumstances, irrespective of the precise form of the application. In *DTL v GB (Leave to Appeal)*[4], an order suspending a parent's contact with a child for a limited period pending further proceedings was held not appealable because it met none of the *Zweni* indicators. The Court accordingly refused leave to appeal with costs.

[19] I accordingly hold that the order falls within the prohibition in section 16(3) of the Act. No appeal lies against it as of right.

The common-law and interests-of-justice test

[20] The Applicant invokes the interests-of-justice standard confirmed by the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another* [5] at paragraphs 40 to 42, and submits that even if section 16(3) applies, the practical effect of the order is such that the interests of justice require appellate scrutiny. She further relies on *Philani-Ma-Afrika and Others v Mailula and Others* [6]

---

[2] 2024 JDR 4447 (GJ)
[3] 2025 JDR 4448 (GP)
[4] 2023 JDR 2872 (GJ)
[5] 2016 (6) SA 279 (CC)
[6] 2010 (2) SA 573 (SCA)

at paragraph 20, and *S v Western Areas Ltd and Others*[7] at paragraphs 20 and 24 to 28, for the proposition that a decision not appealable under the strict *Zweni* formulation may nonetheless be appealable in the interests of justice.

[21] The argument requires consideration. It is correct that the common-law test for appealability, as articulated in *Zweni v Minister of Law and Order*[8], has been modified by constitutional jurisprudence. The *Zweni* criteria, namely that the decision be final in effect, definitive of the parties' rights, and dispositive of a substantial portion of the main relief, are no longer exhaustive. The interest of justice is the overarching standard. However, the *Zweni* criteria remain highly relevant and are, as the Constitutional Court observed in *City of Tshwane*, typically central to the interests-of-justice enquiry. A court should not too readily discard the *Zweni* framework in favour of an open-ended interests-of-justice enquiry, particularly in the context of interim matrimonial relief where the legislature has itself prescribed the applicable limitation through section 16(3).

[22] Applying the *Zweni* criteria to the order under challenge, all three indicators point firmly against appealability. First, the order is not final in effect: it expressly terminates upon the finalisation of the Rule 43 application. Second, it is not definitive of the parties' rights as the relocation dispute remains wholly unresolved and will be determined in the Rule 43 proceedings. Third, it does not dispose of any substantial portion of the main relief; it merely restores an interim factual position pending that adjudication. The order leaves intact every right of every party in respect of the substantive issues in the litigation.

[23] The Applicant argues that the order has "practical finality" by reason of its implementation, contending that the order has already caused the children to be returned to Johannesburg, has placed the Applicant and the children back in the

---

[7] 2005 (5) SA 214 (SCA)
[8] 1993 (1) SA 523 (A)

common home with the Respondent, and has materially altered the children's lived reality. This submission misapprehends the concept of practical finality in the appealability context. Practical finality, properly understood, refers to the situation where an order finally determines an issue between the parties in a manner that cannot be revisited. That is not this case. The Rule 43 court will consider the relocation issue on the full record, with the benefit of a Family Advocate report and such expert evidence as the parties' place before it and will make an order that may differ materially from the interim regime established by this order. Nothing in this order predetermines or constrains that adjudication. The fact that the order has been physically implemented does not give it the character of finality that is required for appealability.

[24] The Applicant also contends that the coercive and intrusive nature of the order, namely its mandatory provisions, its physical collection authority, its educational consent restrictions, its regulatory reach over the children's schooling and therapeutic attendance, renders it exceptional and therefore appealable in the interests of justice. The Respondent correctly answers that coerciveness, in the sense of enforceability, is an inherent feature of all court orders. Interim child-related orders necessarily operate with immediacy and often intrusively. Questions of residence, schooling, contact and movement are inherently practical matters. If practical intrusion or mandatory content were sufficient to render such orders appealable, the bar in section 16(3) would be rendered meaningless and appellate courts would be drawn into piecemeal supervision of interim family litigation in a manner directly contrary to the purpose of the provision. As was observed in *JL v DJ*[9], the involvement of children does not, without more, create appealability.

[25] I am not persuaded that the interests of justice require appellate intervention at this stage. The appropriate forum for the resolution of the relocation dispute, including

[9] supra

all the legal and factual questions concerning sections 30 and 31 of the Children's Act 38 of 2005, the children's best interests, the conduct of the parties, and the proper scope of any interim care arrangements, is the Rule 43 proceedings, which will be heard in the ordinary course on a full record and with the assistance of the Family Advocate. The Applicant is not without a remedy. She has the Rule 43 proceedings. Any attempt to use this application for leave to appeal as a mechanism for obtaining interim appellate supervision of the children's living arrangements prior to the Rule 43 adjudication, is precisely the species of procedural fragmentation that section 16(3) was enacted to prevent.

[26] For these reasons, I hold that the order is not appealable. The application for leave to appeal falls to be dismissed on this ground alone. I proceed, however, to deal with the further grounds in the alternative, so that the Applicant has the benefit of this Court's views on the merits for any further application she may bring.

MOOTNESS

[27] The Respondent submits that the application has become moot by reason of the order's implementation, relying on section 16(2)(a)(i) of the Act. The submission is that the purpose of the order, namely the restoration of the children to Johannesburg pending the Rule 43 determination, has been achieved, that the children have resumed their schooling and routines in Johannesburg, and that any appellate relief would serve no practical purpose other than to reintroduce instability into their lives.

[28] The Applicant responds that the order has not ceased to operate. She points to the following continuing consequences: she remains restrained from removing the children from Johannesburg or relocating them to Cape Town or any other jurisdiction outside Johannesburg; she remains restricted in relation to educational enrolment decisions, which require the Respondent's written consent or a court

order; and she and the children are presently residing in the former common home with the Respondent in circumstances that she regards as untenable. She submits that a successful appeal could relieve her of these constraints and that the matter therefore remains practically and legally alive.

[29] I accept that the application is not wholly moot in the technical sense. The Applicant's analysis of the order's continuing operative effect is correct. The prohibitory provisions of the order remain in force and continue to regulate her conduct. A successful appeal could relieve her of those constraints. The mootness argument is therefore not sustained as a standalone ground for dismissal.

[30] It must be noted, however, that the continuing practical consequences of the order, upon which the Applicant relies both to resist mootness and to advance appealability, cut both ways. The children are now settled in Johannesburg. They have re-established their schooling and routines. The very disruption that would attend yet another relocation *pendente lite* is a consideration that tells against the granting of leave to appeal. Even if appellate relief were granted and this order set aside, the Rule 43 court would still be left to determine the relocation issue on the merits, and the outcome of that determination is uncertain. Granting leave to appeal in these circumstances risks creating precisely the further disruption and uncertainty that is inimical to the children's best interests.

ALTERNATIVE: NO REASONABLE PROSPECTS OF SUCCESS

[31] In the event that I am wrong on appealability, I am satisfied in any event that the Applicant has failed to demonstrate reasonable prospects that another court would reach a different conclusion. I address each principal ground in turn.

(a) Unlawfulness and the characterisation of the relocation as self-help

[32] The Applicant's central submission on the merits is that the Court erred in characterising her conduct as unlawful self-help or a legally impermissible *fait accompli*. She relies on sections 30 and 31 of the Children's Act 38 of 2005. Section 30(2) permits co-holders of parental responsibilities and rights to exercise those rights independently unless regulated otherwise by agreement or court order. Section 31 imposes a duty of due consideration of another co-holder's views but does not, in terms, impose a prior consent requirement for internal relocation. The Applicant submits that the Court erred by effectively equating the absence of the Respondent's consent with unlawfulness, and by treating the absence of a court order authorising relocation as if it constituted a prohibition against relocation.

[33] This argument has a degree of legal merit as a freestanding statutory proposition. It is correct that section 31 does not in terms impose a consent requirement for internal relocation, and it is correct that no court order prohibited the Applicant from relocating at the time of the move. However, this argument divorces the legal proposition from the factual and procedural matrix in which the relocation occurred. The Court did not find that internal relocation is *per se* unlawful in the absence of a consent order. The finding was narrower and more contextual: that relocation conducted unilaterally, in the face of an existing Rule 43 application that had placed the children's future residence arrangements before the Court, and during the currency of pending litigation in which the Respondent had formally invoked the Court's jurisdiction over the children, was conduct that subverted the integrity of the judicial process and created an improper *fait accompli*. That finding is not the same as holding that internal relocation without consent is always unlawful.

[34] The question of whether a co-holder's unilateral relocation during pending judicial proceedings, in the face of a known and litigated dispute about residence, constitutes impermissible self-help is not answered by sections 30 and 31 alone. It engages the Court's inherent jurisdiction to prevent the unilateral alteration of the

subject matter of pending litigation and, more particularly, the Court's jurisdiction as upper guardian of minor children to preserve the *status quo* pending adjudication where a party has sought to pre-empt the Court's determination. The Applicant herself had launched Rule 43 proceedings requesting consent to relocate the minor children to Cape Town. She was therefore not acting in a legal vacuum but in the shadow of pending judicial proceedings to which she was the applicant and in which the children's future care arrangements were directly in issue. Her conduct, properly viewed, fell squarely within the category of self-help that courts have consistently declined to condone.

[35] The Applicant contends that her having launched the Rule 43 proceedings is inconsistent with a finding of wilful disregard of judicial process. This contention does not assist her. The fact that she had approached the Court for relocation relief made her unilateral relocation *before* that relief was granted all the more difficult to justify. A litigant who has invoked the Court's jurisdiction in relation to a particular matter cannot simultaneously act as though that jurisdiction does not exist. Having placed the relocation issue before the Court, the Applicant was obliged to await the Court's determination.

[36] Another court would not, in my view, find that the Court committed a material misdirection in this regard. The factual finding that the Applicant created a *fait accompli* is supported by the record. The legal conclusion that this warranted urgent restorative relief is consistent with this Court's role as upper guardian of all minor children and with the general principle that litigants may not unilaterally alter the subject matter of pending litigation in order to gain a tactical advantage. This ground does not establish reasonable prospects of success.

(b) The best interests enquiry

[37] The Applicant submits that the Court conducted a materially deficient best interests enquiry. She identifies specific failures: the Court did not adequately consider the emotional impact on the children of a second cross-provincial relocation; did not consider the changed circumstances of the Johannesburg household following matrimonial breakdown; did not engage with her evidence of the measures she had taken to provide continuity and stability for the children in Cape Town; failed to consider that the Respondent had produced no independent or expert evidence establishing that Cape Town was an unsuitable environment; and placed excessive weight on the restoration of the *status quo ante* as if it were synonymous with the children's best interests. She further contends that the Court ought to have deferred to the imminent Family Advocate investigation rather than granting coercive relief before that process could run its course.

[38] The best interests enquiry in urgent restorative proceedings necessarily operates under significant constraints. A court seized with an urgent return application does not have the luxury of the full evidential and investigative framework that a final adjudication affords. It does not have the benefit of a Family Advocate report, which exists precisely to assist the Court with a structured and independent assessment of the children's actual circumstances and developmental needs. It must assess a paper record that is frequently incomplete, partisan and contested. It would accordingly be an error of principle to judge the best interests analysis conducted in these proceedings against the standard appropriate to a final adjudication.

[39] The correct question is whether the Court conducted an appropriate assessment of the children's best interests in the context of urgent restorative proceedings, recognising that the ultimate determination of those interests is reserved for the Rule 43 court, and whether that assessment justified the relief granted on an interim basis. Viewed through that lens, the Court's reasoning is defensible. It

identified the risk that the children's established connections to Johannesburg, namely their schooling, their therapeutic relationships, their extended family networks and their primary relationship with their father, were being severed by unilateral conduct. It found that the preservation of those connections on an interim basis, pending a proper investigation, was in the children's best interests. That is a reasonable conclusion on the material before the Court.

[40] The Applicant's submission that restoration of the *status quo ante* cannot be assumed to be in the children's best interests has abstract merit but limited application on these facts. The *status quo ante* was not an artificially created or court-imposed position. It was the children's organic lived reality immediately prior to the Applicant’s unilateral relocation of the children to Cape Town. The Court's conclusion that this reality should be preserved pending proper adjudication, rather than permitting the Applicant to entrench a new factual position through unilateral action, does not constitute an abdication of the best interests enquiry. It reflects a recognition that, in the absence of a full evidentiary record, the pre-existing position provides a more reliable interim baseline than one created by unilateral parental conduct.

[41] I am not satisfied that another court would find a material misdirection in the best interests analysis. This ground does not establish reasonable prospects of success.

(c) The Family Advocate process

[42] The Applicant submits that the Court erred in failing to await the outcome of the Family Advocate's investigation before granting coercive mandatory return relief. It was common cause that the Family Advocate's office had already been engaged and that a meeting was scheduled for 14 May 2026. The submission is that the

best interests of the children required that the statutory investigative process be allowed to proceed before coercive relocation relief was imposed.

[43] This submission conflates the role of the Family Advocate with the Court's own jurisdiction as upper guardian of minor children. The Family Advocate process is a valuable statutory mechanism that assists the Court with an independent investigation of children's circumstances. It does not oust or suspend the Court's upper guardian jurisdiction. This Court is not obliged to await the completion of a Family Advocate investigation before exercising its jurisdiction to grant interim relief, particularly where the continued absence of intervention would permit one party to entrench an advantage obtained by unilateral action. The Respondent correctly submits that were it otherwise, any party who wished to forestall urgent child-related relief could do so simply by triggering the Family Advocate process and then relying on its pendency as a bar to interim intervention.

[44] The Court expressly acknowledged the importance of the Family Advocate's investigation and did not purport to determine the relocation issue finally. It confined its order to the interim period pending the Rule 43 adjudication, which will have the benefit of the Family Advocate's report. That is a proper and proportionate exercise of the Court's jurisdiction. This ground does not establish reasonable prospects of success.

(d) Urgency

[45] The Applicant submits that the second urgent application was not genuinely urgent and that it substantially duplicated the issues raised in the first urgent application struck from the roll by Mia J. She contends that the Respondent had already sought return relief in substance before Mia J, and that the second application was

an impermissible attempt to obtain, under a different procedural guise, relief that had been refused or not granted in the first urgent application.

[46] This submission must be considered against the procedural history set out above. The application before Mia J was the Applicant's application for relocation relief. It was struck from the urgent roll; it was not dismissed on the merits, and the relief was not refused. Whatever the Respondent may have raised in argument or in a draft order before Mia J, he was the respondent in those proceedings. His return relief was not the subject of any application that had been placed before that court. It was never adjudicated, never refused, and never determined. The Respondent's second urgent application was therefore a fresh application by a different party, for relief of a different character, in different proceedings.

[47] Furthermore, the factual basis for urgency in the second application was materially distinct from the position before Mia J. By the time the Respondent launched his application, the Applicant had taken further active steps to entrench the children's presence in Cape Town in that she had enrolled them in a Cape Town school. These were new facts, not merely a continuation of the relocation already known to Mia J. The risk of entrenchment was increasing with each passing week. The Court correctly identified these developments as constituting fresh and cogent grounds of urgency.

[48] A finding on urgency is pre-eminently a discretionary factual assessment. An appellate court will interfere with such a finding only where there has been a material misdirection or an error of principle. No such error is demonstrated here. This ground does not establish reasonable prospects of success.

(e) The scope and proportionality of the order

[49] The Applicant submits that even if some form of relief was warranted, the order as granted was overbroad and disproportionate. She takes issue with the

authorisation of physical collection of the children by the Respondent; the prohibition on educational enrolment without the Respondent's written consent or a court order; the compelled re-enrolment in specific Johannesburg schools and therapeutic programmes; and the comprehensive regulatory framework imposed on her parental decision-making. She contends that less intrusive alternatives were available, including expedited Rule 43 case management, structured interim contact arrangements, accelerated Family Advocate involvement, or limited interim relief preserving the Respondent's relationship with the children without compelling physical return, and that the failure to consider them constitutes a material misdirection.

[50] This is the ground upon which the Applicant makes her most substantive argument, and it warrants careful treatment. It must be acknowledged that the order is broader in scope than a conventional Rule 43 order. Its provisions go beyond the identification of an interim residence arrangement. The physical collection provision, in particular, is an unusual and intrusive feature, and the consent requirement for educational enrolment imposes a constraint on the Applicant's parental decision-making that goes beyond what is ordinarily encountered in interim relief of this nature.

[51] However, the breadth of the order must be assessed against the specific facts that gave rise to it. The Court was faced with a party who had unilaterally relocated the children in the face of pending litigation, enrolled them in a new school, and declined to return them voluntarily even after the first urgent application was struck from the roll. The risk was that any order that was less than comprehensive and enforceable would prove ineffective: the Applicant had already demonstrated a willingness to take unilateral steps with the children when it suited her, and the Respondent's application before Mia J had not resulted in any protective order. In those circumstances, the Court was justified in crafting an order that was

sufficiently robust to be effective, and in including implementation provisions that could be activated in the event of non-compliance.

[52] Moreover, the order is expressed to operate only until the Rule 43 application is finalised. Its intrusive features are therefore time limited. Any hardship caused by the educational consent requirement or the movement restrictions will be resolved when the Rule 43 court makes final provision for the children's care and residence arrangements. The temporary nature of these constraints is a material consideration in assessing whether the order was proportionate.

[53] Nonetheless, I record that the Rule 43 court may, in its discretion, wish to review the appropriateness of specific provisions, particularly the educational consent requirement, if the Rule 43 application is not brought on for hearing promptly. The parties would be well advised to ensure that the Rule 43 application is set down expeditiously so that the current interim regulatory regime does not subsist longer than is strictly necessary. For present purposes, however, I am not satisfied that the scope of the order discloses a reasonable prospect that another court would interfere with it as a whole. This ground does not establish reasonable prospects of success.

(f) Requirements for interdictory relief

[54] The Applicant submits that the Respondent failed to establish the requirements for interim interdictory relief as set out in *Setlogelo v Setlogelo*[10]: a clear right (or prima facie right open to some doubt), injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy. She submits that the Respondent did not establish a clear legal right to compel the immediate return of the children, that he did not establish irreparable harm, and that he had alternative remedies available in the pending Rule 43 proceedings.

[10] 1914 AD 221

She further points out that the Respondent had already sought, before Mia J, a court order in relation to the children, and that that relief was not granted.

[55] On the last point, the Applicant overstates the position. As set out in the background section above, the Respondent was the respondent in the proceedings before Mia J. He had no application before that court. He was not the moving party. Whatever he may have raised in submissions or in a draft order does not constitute an application that was adjudicated or refused. His return relief was never placed before any court as the subject of his own application until the second urgent application. This aspect of the Applicant's submission accordingly rests on a mischaracterisation of the procedural history and cannot sustain the weight placed upon it.

[56] On the substantive interdictory requirements, this Court held in the principal judgment that the Respondent had established the requirements for the relief granted, with particular regard to the Court's role as upper guardian and the interests of the children. The Court did not approach this matter as a conventional interdict application between private litigants. It exercised its jurisdiction as upper guardian, which is a broader and more flexible jurisdiction that permits intervention in the best interests of children even where the strict *Setlogelo* requirements are not technically satisfied in their conventional form. The Applicant's submission that the Respondent had alternative remedies in the Rule 43 proceedings fails to engage adequately with the nature of those alternatives: proceedings that have not been set down for hearing are not a practical remedy for the prevention of ongoing entrenchment. This ground does not establish reasonable prospects of success.

THE COSTS ORDER IN THE PRINCIPAL JUDGMENT

[57] The Applicant makes a discrete challenge to the award of costs on the attorney and client scale in the order of 22 April 2026. She submits that there was no finding

of dishonesty, contempt, mala fides or vexatious conduct, and that the matter involved genuinely contested legal issues concerning parental responsibilities, relocation, and the proper scope of interim relief. She submits that a punitive costs order was accordingly disproportionate, particularly in litigation involving the welfare of children, and that another court would interfere with it even if it did not interfere with the substantive relief.

[58] The Respondent submits that the costs order was within the Court's discretion, having regard to the Applicant's unilateral conduct, the *fait accompli* she created, the failed urgent stay application, and the sustained nature of her litigation strategy. It is further submitted that the punitive costs order was an appropriate mark of the Court's disapprobation of the Applicant's conduct in the litigation.

[59] The award of costs is pre-eminently a matter for the discretion of the court making the order. An appellate court will interfere only where that discretion has been exercised capriciously, upon a wrong principle, without due regard to all relevant facts, or in a manner that results in a demonstrable injustice.

[60] A costs order on the attorney and client scale is a punitive order that requires justification beyond mere failure in the litigation. It is ordinarily reserved for cases where a party's conduct in the litigation has been dishonest, vexatious, or so unreasonable as to warrant condemnation. Courts have been cautious about awarding punitive costs in matrimonial and family law matters involving children, recognising that such litigation is frequently acrimonious and emotionally charged, and that the issues are often genuinely contested and legally complex.

[61] In the present matter, the Court made no finding of dishonesty or contempt. The Applicant's conduct, while properly found to be unilateral, self-serving, and prejudicial to the judicial process, was not characterised as malicious or fraudulent. The legal questions she raised about sections 30 and 31 of the Children's Act,

while ultimately not decisive, are not frivolous. However, she had launched the Rule 43 proceedings herself, then in defiance of the relief which she herself sought, unilaterally relocated to Cape Town. When the Respondent demanded that she return the minor children as she did not have consent of the Court or of the Respondent, not only did she not return the minor children, but she went further to try and entrench their position in Cape Town by enrolling them in school. In argument, counsel for the applicant submitted that they cannot set the Rule 43 down for hearing in the absence of the report from the Office of the Family Advocate that could take months to be finalised. The Applicant was therefore aware that there could be a considerable delay before the report was ready. In that time and bearing in mind the tender ages of the minor children, enrolling them in school and settling them in Cape Town would weigh heavily in her favour. It is difficult to see how this could be anything other than a deliberate tactical ploy to gain the upper hand in the Rule 43 application and sway the decision in her favour.

[62] Having regard to the findings set out above, I am not persuaded that the costs order on the attorney and client scale was anything other than a proper exercise of the Court's discretion. Even if another court could conceivably have taken a different view on the appropriate scale, that does not establish the reasonable prospect that it **would** have done so, which is the standard required by Section 17(1)(a). This ground also does not establish reasonable prospects of success.

COMPELLING REASONS

[63] The Applicant submits in the alternative that, even if reasonable prospects of success have not been demonstrated, compelling reasons exist for the appeal to be heard. She identifies the following: the proper interpretation of sections 30 and 31 of the Children's Act in the context of internal relocation; the appealability of

coercive mandatory return orders in the matrimonial context; the interaction between urgent proceedings, Rule 43 proceedings, and the Family Advocate process; and the permissible scope of restorative interim relief involving children.

[64] I accept that the questions identified by the Applicant are not trivial. The interpretation of sections 30 and 31 of the Children's Act in the relocation context, and the proper limits of the Court's power to grant coercive restorative relief prior to the completion of the Family Advocate investigation, are questions of genuine importance to family law practice. However, the existence of legally interesting questions does not, without more, constitute a compelling reason to hear an appeal against an interim order.

[65] The compelling reasons ground must be assessed in its proper context. The order under challenge is a time-limited interim measure that will be superseded by the Rule 43 adjudication. The legal questions the Applicant seeks to ventilate on appeal will arise, in full, in that adjudication. They will be argued on a complete record, with the benefit of a Family Advocate report, expert evidence, and the full range of factual material that the urgency of these proceedings precluded. The Rule 43 court will be far better placed to develop the law in this area than an appellate court considering a compressed urgent record relating to interim relief.

[66] Granting leave to appeal in these circumstances would not advance the development of the law in any meaningful way. It would fragment the litigation, delay the Rule 43 adjudication, and prolong the period during which the children's circumstances are regulated by an order that all parties acknowledge is insufficient as a permanent solution. That outcome is inimical to the children's best interests and contrary to the policy considerations that underpin section 16(3) of the Act.

[67] No compelling reasons exist to grant leave to appeal. This ground also fails.

COSTS OF THE APPLICATION FOR LEAVE TO APPEAL

[68] The Respondent seeks costs on the attorney and client scale on Scale B in respect of the leave application, submitting that the application is a continuation of the Applicant's broader litigation strategy of delay and obstruction.

[69] I do not agree that a punitive costs order is warranted in respect of the leave application itself. An application for leave to appeal is a recognised and legitimate procedural step. While this application has failed on all grounds, it cannot be said to have been so devoid of merit, or so clearly an abuse of process, as to warrant condemnation through a punitive costs order. The Applicant raised grounds particularly on the questions of appealability, the interpretation of sections 30 and 31, and the costs order in the principal judgment, that required and received careful consideration. The costs of one counsel on the ordinary party and party scale is the appropriate order.

ORDER

[70] In the result, the following order is made:

1. The application for leave to appeal is dismissed.

2. The Applicant is to pay the costs of the application for leave to appeal on the party and party scale, including the costs of one counsel.

LANGE AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing: 19 MAY 2026

Date of judgment: 17 JUNE 2026

Counsel for the Applicant: Adv A R van der Merwe

Counsel for the Respondent: Adv A Saldulker

Instructed by: C Olckers Attorneys Inc