

(Inlexso Innovative Legal Services) HVR

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21465/2020

DATE: 2020-04-22

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DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	YES / NO
(2) OF INTEREST TO OTHER JUDGES:	YES / NO
(3) REVISED	
Signature:	<i>[Signature]</i>
Date:	<i>10/6/20</i>

In the matter between

EX PARTE: M SWANEPOEL

APPLICANT

JUDGMENT

EX PARTE APPLICATION

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TOLMAY, J: In this matter, Mr and Ms Swanepoel arrived at the Urgent Court on 21 April 2020, they were not represented and had no papers drafted. As this Court could, due to the technical difficulties which could not be addressed during the course of that morning by our IT-team, attend to a virtual hearing. The Court, after being informed of the circumstances

of the case, decided to hear the matter in open court, seeing that only the parties, myself, my registrar and the stenographer were present in court, we could all adhere effectively to social distancing, and everyone present wore masks.

Under these circumstances, I regarded it as appropriate to hear this matter in an open court.

Furthermore in the absence of papers, it was in my view imperative that evidence be led so that it could be
10 transcribed if the need ever arises, for anyone to consider the judgment.

Ms Swanepoel testified that her mother, who is presently in Tygerberg Hospital suffers from acute leukaemia, and a letter from a certain Dr S Irusen at that hospital, was handed up. This letter indicated that Ms Brits, Ms Swanepoel's mother would probably not survive the period of lockdown.

The doctor implored the Court in this letter to allow Ms Swanepoel to come and visit her mother. Ms Swanepoel
20 expressed a strong and very human and understandable desire to be with her mother during these last days. She and her husband, she testified, will travel by car and stay in her mother's residence in the Western Cape, until the lockdown is lifted.

Although she indicated that they do not present with

Covid-19 symptoms, the Court requested both of them to get tested. These tests were completed and proof of it was handed up to Court and the tests were done and the results were that they tested negative.

They have three children. The eldest is 20 years old and according to them, will be able to take care of the two younger siblings who are respectively 18 and 13 years old. It is clear that the whole family unfortunately as it may be, will not be able to travel in one vehicle to the Western Cape.

10 Section 27(2) of the Disaster Management Act 57 of 2007, gives the Minister the authority to regulate the movement of people and goods, during times of disaster. Presently the regulations issued, do not make provision for circumstances like those that presented it in this case.

Regulation Gazette 11078, Volume 658, dated 2 April 2020, number 43199 in regulation 3B presently provides as follows:

"2B. The substitution of paragraph A of sub-regulation

(i) of the following paragraph, for the purposes of lockdown:

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(i) Every person is confined to his or her place of residence unless strictly for the purpose of performing an essential service; obtaining essential goods or services; collecting a social grant pension or seeking emergency

life saving or chronic medication.

(ii) Every gathering as defined in Regulation 1 is hereby prohibited, except for a funeral as provided for in sub-regulation (viii), and (iii) movement between provinces and between metropolitan and district areas is prohibited except:

(aa) for essential workers who have to travel to and from work;

(bb) transportation of cargo from ports of entry to their intended destination on condition that necessary precautions have been taken to sanitise and disinfect such cargo;

(cc) for the transportation of the mortal remains and

(dd) attending of a funeral as provided for and on the conditions set out in sub-regulation (viii)."

20 Sub-regulation (viii) then goes further and sets out the conditions that will apply in circumstances where a funeral takes place.

It would seem that these regulations, especially referring to the attendance of funerals, were promulgated in order to assist people on humanitarian grounds and in order

to pay respect to their loved ones during these very difficult times.

In the matter of *Van Heerden*, case 1079/2020 of the Mpumalanga High Court, which was handed down before the amendment of the regulations regarding funerals were made, the Court refused to grant an order for the applicant to travel and assist his mother with his grandfather's funeral. The learned judge was of the view that he could not grant an order in contradiction of the lockdown, as it would imply allowing
10 people to break the law under judicial decree.

I am of the view that this is not correct.

The courts are there to interpret and apply the law, in terms of the Constitution, the rule of law, applicable legislation, and most importantly, the Courts have an oversight role to play and a discretion that should be applied, obvious judicially.

As a result the Courts are there also to assist people not to act unlawfully. Under exceptional circumstances in my view, the Courts may grant orders that allow for a deviation
20 from the regulation, obviously this must not be done lightly, and any deviation should be determined on a case by case basis.

It is obvious that it will be impossible for the executive to make regulations for every conceivable event and that is, in my view, where the Courts come in to apply the

law but also to grant orders that may assist people. In this instance, the executive has allowed for funerals, implicating a willingness on humanitarian grounds to allow people to pay respect to their loved ones under certain strict conditions.

In this instance Ms Swanepoel wants to say goodbye to her mother. If a funeral is allowed, I cannot see any reason why she cannot be allowed to do that and why she cannot be allowed to be granted the opportunity to be with her mother, especially seeing that they tested negative.

10 She will see her mother under professional medical supervision, furthermore, she and her husband will live in her mother's residence alone and adhere to all other lockdown regulations. Apart from travelling to Cape Town, which is not allowed, none of the other provisions of lockdown will be contravened.

If the spirit of the regulation is interpreted, rather than the letter, the idea clearly is to respect basic human rights and the need to say goodbye to their loved ones.

20 In my view the opportunity to say goodbye to one's parent while she is still alive, is even more meaningful and human and might assist both of them to get closure and comfort by spending these last precious moments in each other's presence.

Therefore, I am of the view that a deviation in this instance, should be allowed and should be granted and

Ms Swanepoel should be granted the opportunity to spend these last few days with her mother.

As a result, I make the following order:

ORDER

- [1] Grant William Swanepoel, ID number: 741206 5084 089 and Marijke Swanepoel with ID number 810731 0154 088 is granted leave to travel to the Western Cape, where they will reside at 1208 Seesig, Section 214 and 39 Tafelsee SS 123/1991 Bellville, Cape Town on their own.
- 10 [2] The aforesaid parties are permitted to present themselves at the Tygerberg Hospital, to Dr S Irusen, who may in her discretion, if she is satisfied that it poses no threat to Ms Selda Brits or any other patient or person at that facility, to visit Ms Selda Brits under the conditions that the doctor may prescribe.
- [3] Apart from the exceptions mentioned above, the applicants must abide with all the other lockdown regulations, as prescribed by the Minister from time to time.
- 20 [4] If any member of the SAPS or Defence Force question the validity of this order, they should call the Registrar of Judge Tolmay, Karin Erlank on 0764597066.
- [5] The SAPS and Defence Force may not arrest the aforesaid parties for non-compliance of the lockdown regulations as set out above, unless they approach the

Court for a variation of the order on various grounds.

.....*R. J. Tolmay*.....

TOLMAY, J

JUDGE OF THE HIGH COURT

DATE: