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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 88660/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 5 DECEMBER 2024

SIGNATURE:

In the matter between:

W[...], C[...] J[...]

FIRST APPLICANT

W[...], B[...]

SECOND APPLICANT

and

P[...], S[...] J[...]

FIRST RESPONDENT

P[...], H[...] I[...]

SECOND RESPONDENT

AMINAAH KHAN N.O.

THIRD RESPONDENT

(in her capacity as nominee for ABSA TRUST LTD, the duly appointed trustee of the C[...] J[...] W[...] Testamentary Trust)

ABSA TRUST LIMITED N.O.

FOURTH RESPONDENT

(in their capacity as the appointed executor)

ABSA PENSION FUND

FIFTH RESPONDENT

MASTER OF THE HIGH COURT

SIXTH RESPONDENT

In re:

ADV LC HAUPT SC in her capacity as curator *ad litem* for the minor children -
M[...] W[...] (born on 12 June 2009)
R[...] W[...] (born on 07 May 2015)

Coram: Millar J

Heard on: 5 December 2024

Delivered: 5 December 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 5 December 2024.

JUDGMENT

MILLAR J

- [1] On 2 December 2024, I handed down judgment and an order in the main case. The judgment and order provide *inter alia* for the removal of the first respondent (Mr. P[...]) as guardian of two minor children and for the appointment of the first applicant (Mr. W[...]) in his stead. The order also provides that the primary residence and care of the two minor children are also awarded to Mr. W[...]) and his wife (the second applicant). There are in addition ancillary orders relating to the engagement between the guardian and primary care giver/s and the Trust established for the minor children by their late father.
- [2] After the handing down of the order, the youngest of the minor children was handed over to the applicants. The older child, being away on a school sporting camp has still not been handed over.
- [3] Mr. P[...] then delivered an application for leave to appeal. After the delivery of the application for leave to appeal, Mr. and Mrs. W[...] then brought an application in terms of Sections 18(1) and (3) of the Superior Courts Act¹ for the orders granted by me to be put into operation, were leave to appeal, to be granted. The application was opposed, and an answering affidavit filed.
- [4] During the argument, counsel for Mr. and Mrs. W[...] informed the Court that counsel for Mr. P[...] had informed her that if leave to appeal was refused, an application for leave to appeal would be made to the Supreme Court of Appeal. This was not placed in issue.
- [5] It was on this basis that Mr. and Mrs. W[...] argued that even if I were to refuse the application for leave to appeal, the Section 18(1) and (3) application ought nevertheless to be entertained at this stage and granted *ex abundante cautela*.

¹ 10 of 2013.

[6] After hearing argument, I reserved judgment in both applications. I have since delivered judgment refusing Mr. P[...]’s application for leave to appeal and so now turn to deal with the present application.

[7] In terms of Section 18(3),² Mr. and Mrs. W[...] are required to demonstrate:

[7.1] Firstly exceptional circumstances which justify the execution of the order pending an appeal.

[7.2] Secondly that they will suffer irreparable harm if it is not executed, and,

[7.3] thirdly that Mr. P[...] would not be irreparably harmed if the order is executed.

The consideration of these factors is through the lens of the prospects of success of the pending appeal.³

² “18 Suspension of decision pending appeal

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)
 - (i) the court must immediately record its reasons for doing so
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency and (iv) such order will be automatically suspended, pending the outcome of such appeal.

For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.” See also *Incubeta Holdings (Pty) Ltd v Ellis* 2013 (3) SA 189 (GJ).

³ See *Democratic Alliance and Others v Premier for the Province of Gauteng and Others* (18577/20) [2020] ZAGPPHC 330 (10 June 2020) paragraphs [11] – [13].

- [8] The first stage of the enquiry, whether “exceptional circumstances” are present depends on the peculiar facts of each case. The exceptional circumstances must be derived from the actual predicaments in which the litigants find themselves.
- [9] The following factors, to my mind, establish exceptional circumstances:
- [9.1] Firstly, the history⁴ of the present litigation establishes clearly that Mr. P[...] is disinclined to comply with any court order which does not suit him.
- [9.2] He has a history of appealing each and every order granted against him with the purpose of frustrating the operation of those orders. The consequence of this is that the minor children were denied access to necessary therapy that had been recommended by both the *curatrix*, the experts and ordered by court.
- [9.3] Secondly, the presence of the fiancé of Mr. P[...]’s daughter in the family home. While Mr. P[...] agreed that his daughter’s fiancé would no longer reside in the house, the agreement did not extend to his visitation or presence, both of which given the nature of what was reported by *inter alia* Ms. Chiloane, pose a potential threat to the minor female child. This factor alone weighs heavily and is exceptional.
- [9.4] Thirdly, Mr. P[...]’s own expert, Dr. Kirsten, reported in respect of Mr. P[...] that there was “*the possibility of neurocognitive decline in Mr. P[...], especially considering his age and the symptomatology that he reported during the psycho-legal process.*”

⁴ See paragraphs [20] to [25] of the main judgment.

[9.5] Fourthly, given that the findings of Ms. Du Plooy as set out in the main judgment at paragraph [98] that:

“(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs:

- *It has been observed that the maternal grandparent have in the past year passed many parental responsibilities on to Marna and [name omitted], despite the paternal uncle’s willingness and clear capacity to provide for the minor children’s needs in a developmentally appropriate manner. It was observed throughout the process that the paternal family has greater capacity to provide for the minor children’s needs (including emotional and intellectual needs). A simple example is the manner in which the maternal family has refused cooperation regarding attending therapy in order to take care of the children’s mental health.*
- *Considering the minor children’s social, emotional and moral developmental delays, as well as their specific needs as per their respective developmental stages, the maternal family has not been able to meet these needs sufficiently (as has been revealed by the respective psychometric assessment results and observations regarding family dynamics).*
- *Specifically noting the psychometric assessment results of the parties, Mr. P[...] does not appear to have the capacity to take care of the minor children.”*

It is in the interests of both minor children that their guardianship as well as primary residence and care be granted to Mr. and Mrs. W[...].

[10] The second and third stages of the enquiry is in regard to whether or not there is any irreparable harm to either Mr. and Mrs. W[...] or Mr. P[...].

[11] This is not a commercial case where prejudice and irreparable harm can be measured and attributed to either of the two litigants. In this case, the question to be decided is whether, if the order is not put into operation, the minor children (who are the subject of the order and whose welfare is the object of the order) will be irreparably prejudiced.

[12] In the application brought on behalf of Mr. and Mrs. W[...], they indicate that the handover of the youngest child occurred in the following circumstances:

- “3. *The order provided for the immediate handover of the minor children to be placed and care of the residence of the Applicants.*
4. *On 2 December 2024 the necessary arrangements were made with the First Respondent to facilitate the process and it was arranged that R[...] would be provided to the Applicants at 18:00 that evening and the necessary arrangement was made to see the family therapist at 12:30 on Tuesday 3 December 2024 to explain the order to R[...].*
5. *The above process proceeded as arranged between the parties and R[...] was placed in the care of the Applicants and attended the family therapist session with Ms E Visser. In the session the order was explained to him and that he will now reside with the Applicants. The First Respondent did not take part in the hand over process, and it was left to Ms. M P[...], the maternal aunt (“M[...]”) to attend to. M[...] also provided some of R[...]s personal belongings and after a further request delivered some further items on 4 December 2024.*
6. *This process was dealt with great care and understanding in an attempt to minimize the negative emotions that R[...] might experience during the transition process. It goes without saying that it is [a] sensitive*

process that affects R[...] and also my own two minor children who are 11 and 13 years old. “

- [13] Mr. P[...] for his part, denied that the hand over had been dealt with in a careful and understanding way.⁵ Significantly, notwithstanding the findings of the experts, Mr. P[...] stated in regard to M[...]re that:

“I state that, by virtue of my intimate knowledge of the children’s emotional state and/or requirements, in particular during the last 5.5 years, that no amount of professional assistance especially assistance from Ms Elmarie Visser, will manage the distress and emotional trauma M[...] is going to experience when she must go to the applicants.”

- [14] Despite the assertion by Mr. P[...] that if the court order were suspended, *“the minor children will not suffer any form of harm. This fact is substantiated by the fact that the children did not experience any form of harm, whatsoever when the matter had already been suspended for the period of time when the first appeal process was commenced with and finalized.”*

- [15] It is readily apparent, that Mr. P[...] is unwilling to accept that the minor children require therapy and that the requirement for this therapy is urgent.

- [16] If the order in terms of Section 18(3) is not granted, the situation outlined by Ms. Du Plooy, as set out above, will only persist and will be exacerbated to the point where it will be too late and that no amount of therapy will be of any benefit to these children.

- [17] Mr. and Mrs W[...] have subjected themselves to psychometric testing as well as therapy and have demonstrated a willingness to ensure that the minor children are also given access to the therapy that they need. Mr. P[...] for his part, persists in his recalcitrant attitude by failing to recognize the need for his

⁵ There was a confirmatory affidavit by his daughter Marna, attached to his affidavit.

grandchildren to attend therapy and the need for him (whatever is personal feelings about it are) to ensure that the minor children attend such therapy.

[18] Put simply, in the circumstances of this case, it is not whether the litigants will suffer irreparable harm but whether the minor children (who are the subject of the litigation) will suffer irreparable harm. In all matters involving children, it is trite that their best interests are to be preferred above all else. The urgent need for therapy militates in favour of them being immediately placed with Mr. and Mrs. W[...] who will ensure that they get it.⁶

[19] For the reasons set out above, I intend to make the order that I do. The costs will follow the result.

[19.1] The application in terms of Section 18(3) of the Superior Courts Act 10 of 2013 is granted.

[19.2] It is ordered that in the event that Mr. P[...] launches an application for leave to appeal to the Supreme Court of Appeal, then pending the final determination of such application and any appeal, the order made by this court on 2 December 2024, be put into operation immediately.

[19.3] The order in paragraph [19.2] above is subject to the provisions of Section 18(4) of the Superior Courts Act 10 of 2013.

⁶ See Section 6(4)(b) read together with Section 7(1)(n) of the Children's Act 38 of 2005. Section 6(4)(b) provides that in any matter concerning a child, "*a delay in any action or decision to be taken must be avoided as far as possible.*" And 7(1)(n) which provides that, relevant to the present situation: "*which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child.*"

[19.4] The operation and execution of the order of this court dated 2 December 2024 is to be effected and implemented by the applicants and first respondent immediately.

[19.5] In the event that the first respondent does not facilitate the handover of the minor child M[...] W[...] to the applicants immediately, a social worker, appointed by the applicants alternatively a representative of the South African Police Service at Wierdabrug Police Station is authorised and mandated to execute this order and to deliver the minor child/children to the applicants at their residence.

[19.6] The first respondent is ordered to pay the costs of this application on the scale as between attorney and client which costs are to include the costs of both the applicants and *curatrix*'s attorneys together with the costs of counsel for the applicants and the *curatrix*, such costs are on scale C.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 5 DECEMBER 2024

JUDGMENT DELIVERED ON: 5 DECEMBER 2024

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