

SOUTH AFRICA / JUDGMENT

J.L v D.J (2024/088101) [2024]

ZAGPJHC 1210 (15 October 2024)

[2024] ZAGPJHC 1210

COURT

South Gauteng High Court, Johannesburg

BEFORE

Gundelfinger

CASE / FILE NUMBER

2024/088101

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

CASE NO:

2024/088101

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER
JUDGES:

YES

(3)

REVISED: YES

In the matter between:

J.

L.

Applicant

and

D.

J.

Respondent

JUDGMENT

Summary: Application for leave to appeal an interim order. When leave to appeal should be granted. Interim interdicts generally not appealable. Application dismissed with costs on scale C

Gundelfinger, AJ

1. This is an application brought by the Respondent in the main application, as Applicant, for leave to appeal the Order and decision made by me on 8 August 2024 on the grounds set out in a notice dated 8 August 2024. In her notice, she set out the grounds of appeal as follows:

“1. That the court a quo grossly erred and misdirected itself in ordering that the Applicant’s first daughter, J J, born 26th of March 2016, be placed under the interim primary care and residence of the minor child’s alleged sexual abuser’s brother, the Respondent, in the absence of any safe-guards to protect the child-victim and in the absence of any application for such relief.

2. The court grossly erred and misdirected itself in directing that the interim care and primary residence of both minor children, J J, a daughter born 26th of March 2016 and A J, a daughter born 12th day of March 2019, be awarded to the Applicant in the absence of any evidence or report justifying interference with the Applicant’s care and residency of the minor children, herself being an unmarried mother of two.”

2. The application for leave to appeal is opposed by the Applicant in the main application, whom I shall refer to in this application for leave to appeal as the Respondent.

3. On 8 August 2024, I granted an interim order in terms of part A of an application brought in two parts, part A being brought as one of urgency. In terms of my Order, I ordered that:

“1. Both minor children, A J and J J (hereinafter referred to as the children) are placed on an interim basis with the Applicant pending the urgent investigation by Social Worker Tanya Kriel into the best interests of the minor children, with specific reference to contact, care and residence;

2. The Applicant will be liable for the fees of Tanya Kriel payable on demand;
3. Pending the outcome of Part B, the Respondent shall exercise contact to the children as follows:

3.1 Every weekend, alternating on a Saturday and Sunday from 09h00 to 17h00, commencing this Saturday, the 10th of August 2024.

3.2 telephonic, electronic, and virtual contact.

4. The Applicant shall similarly be entitled to the contact referred to in 3.2 hereof during the periods that the children are in the care of the Respondent in terms of 3.1 hereof.
5. Costs of part A are reserved for the determination of the Court hearing Part B.

6. The matter is postponed sine die and can be enrolled on an urgent basis immediately social worker Tanya Kriel's report is available."
4. On 20 August 2024 I provided the written reasons for the Order made by me.
5. On 21 August 2024 I directed the parties to file heads of argument and requested that the Applicant address the issue as to whether the interim order I granted was appealable. Both parties complied with the directive and delivered heads of argument inter alia in relation to the appealability of the interim order.
6. Section 17(1) of the Superior Courts Act, number 10 of 2013, provides as follows:

"Leave to appeal

17.(1) Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that -

(a)

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

(b) the decision sought on appeal does not fall within the ambit of Section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

7. The Superior Courts Act has raised the bar for granting leave to appeal. In *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and Others*[1], Bertelsmann J, held as follows: "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion, see *Van Heerden v Cronwright and Others*, 1985 (2) SA 342 (T) at 343 H [2]. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

The appealability of the interim order

8. In *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others*[3], Khampepe ADCJ said as follows:

"[47] Turning to the present matter, it should be borne in mind that both applicants seek urgently to appeal an interim interdict, which is purely interlocutory in nature. An interim interdict is a temporary order that aims to protect the rights of an applicant, pending the outcome of a main application or action. It attempts to preserve or restore the status quo until a final decision relating to the rights of the parties can be made by the review court in the main application. As a result it is not a final determination of the rights of the parties. It bears stressing that the grant of an interim interdict

does not, and should not, affect the review court's decision when making its final decision and should not have an effect on the determination of the rights in the main application. The purpose of an interdict is to provide an applicant with adequate and effective temporary relief[4].

[48]

[49] The law concerning the appealability of interim interdicts is settled. Interim interdicts are generally not appealable[5]. This is because interim interdicts are not final in nature; they are not determinative of the rights of the parties and do not have the effect of disposing of a substantial portion of the relief claimed.[6] However, these reasons are not exhaustive[7]. There are various other sound policy reasons for the general non-appealability of interim interdicts. One of these is that appeals are not entertained in a piecemeal fashion, as that would prolong the litigation, resulting in the wasteful use of judicial resources and incurrence of legal costs[8].

[50] However, an interim order may be appealed if the interests of justice so dictate[9]. Accordingly, the paramount test for the appealability of a particular interim interdict is whether it would be in the interests of justice for the interim interdict to be appealed in the light of the facts of its specific case.[10] As stated in *South Cape Corporation*, a court has a wide general discretion in granting leave to appeal in relation to interim

interdicts.[11] The appropriate test for the appealability of an interim interdict was perspicuously laid out by Moseneke DJC in *OUTA* where he affirmed

that-

"[t]his Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is 'the interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or

disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.[12]"

[51] Accordingly, in determining what the interests of justice demand, a court must have regard to, and carefully weigh, all relevant circumstances and factors. Undoubtedly, the relevant factors will differ based on the facts of each case. These non-exhaustive factors include:

- (a) The kind and importance of the constitutional issue raised;[13]
- (b) the potential for irreparable harm if leave is not granted;[14]
- (c) whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review;[15]

- (d) whether there are prospects of success in the pending review[16];
 - (e) whether, in deciding an appeal against an interim order, the appellate court would usurp the role of the review court[17];
 - (f) whether interim relief would unduly trespass on the exclusive terrain of the other branches of government, before the final determination of the review grounds[18] and
 - (g) whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or legal costs[19].”
9. Thus the test for the appealability of an interim order is whether it would be in the interest of justice weighing the factors set out in the judgment of Moseneke DCJ in OUTA and the circumstances and facts of the specific matter before me.
10. In her notice of application for leave to appeal, in regard to the appealability of the interim order, the Applicant stated that:

“And whereas the circumstances of this court and the dictates of the provisions of Section 28 of the Constitution, demands that the

decision of this court be subjected to an appeal and be reconsidered by another court within the hierarchy of courts established by the Constitution given the immediate and detrimental impact of the said order and decision on the interest of the minor children involved”.

11. This ground of appeal was framed in the most generalised and broad terms. In submissions made before me in the application for leave to appeal, it was argued on behalf of the Applicant that:

11.1. there are exceptions to the rule that interim orders are not appealable;

11.2. interim orders can be appealed in exceptional cases and this case is an exceptional case;

11.3. the interests of justice and the interests of minor children demand that the interim order be appealable;

11.4. the order was patently erroneous because it was structured as interlocutory but it in fact will have a lasting impact on the minor children;

11.5. a Court dealing with minor children exercises a discretion;

11.6. there were material disputes of fact and the test articulated by Corbett AJ in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*[20] should have been applied and I should have dismissed the Respondent’s application subject to whatever other measures could have been put in place to safeguard the minor children.

12. In regard to the exceptional circumstances, the Applicant argued that:

- 12.1. whilst recognizing the need for an urgent investigation, I had failed to provide time frames within which the investigation would be made and another Court would have provided clear time frames;
- 12.2. the order made no provision for the further prosecution of the matter;
- 12.3. the order materially changed the living arrangements of the children;
- 12.4. the order to place the older child with the Respondent was a patently erroneous decision and another Court “sitting with the facts would have reached a different decision”;
- 12.5. I had no regard to the views and wishes of the child , a girl 8 ½ years of age;
- 12.6. there existed no evidence for the relief that was granted.
13. The approach to disputes of facts when interim relief is sought differs from that when final relief is sought[21].
14. The applicant did not set out in the notice of application for leave to appeal or during argument before me, the grounds on which I did not exercise a discretion judicially, what the grounds were that made this case exceptional and the grounds on which the best interests of the children were not served by the interim order. The applicant conflated an argument between the best interests of the child standard and exceptional circumstances. The argument was focused primarily on the merits of the case and in regard to the appealability of the interim order in the most vague and generalized terms. The grounds of appeal in paragraphs 1 and 2 of the notice of application do not constitute exceptional circumstances and are without any merit.
15. I accordingly find that weighing all of the facts and circumstances of this matter, the interim order is not appealable.
16. The Applicant’s grounds of appeal in paragraphs 1 and 2 of the notice of motion were nothing more than a duplication of the

arguments made before me previously and which arguments I had dealt with previously. In *T & M Canteen CC v Charlotte Maxeke Academic Hospital and Another*[22], Adams J held as follows:

“[8] Not much needs to be said about these overly technical defences, which, in my view, are without merit”. For starters, these are all issues which have already been decided in the main application. It does not behove the Respondents to rehash the same defences, which the court has already found to be without merit.....”

17. In *M.S.H v J.S.H – Application for Leave to Appeal*[23], the Court held:

“[28] The question arises as to the extent a party is bound to the grounds set out in an application for leave to appeal when regard is had to Rule 49(1)(b)? An applicant seeking leave to appeal is required in peremptory terms to stipulate the grounds of appeal[24] in succinct and unambiguous terms.[25] This enables the Court and the Respondent to assess and consider the merits of the application. The latter is then in a position to prepare and counter the Respondent’s case or, if there is merit, choose not to oppose the application. As the Respondent

was taken by surprise, there was clearly prejudice to the Respondent as this was not the case, she was called upon to meet when opposing the application for leave to appeal.

[29] The failure to specify clearly in unambiguous terms exactly what case the respondent must be prepared to meet meant that the application did not comply with Rule 49(1)(b). An application for leave to appeal may be dismissed on the basis of non-compliance with Rule 49(1).[26]

[30] In *Phiri v Phiri and Others*[27], Mavundla J held that ‘[i]t does not help the applicant to marshal grounds of appeal from the bar which have not been set out clearly and succinctly in the notice of leave to appeal, no matter how meritorious these might be, ... otherwise, there is no need for the Rules.’ This is a view with which I find myself in respectful agreement, and this view is echoed in several judgments.[28]

[31] As the Applicant’s application for leave to appeal does not meet the peremptory requirements of Rule 49(1)(b), the argument raised from the bar ought, as the current law stands, to be discounted for lack of its inclusion as a ground in the Notice of Application for Leave to Appeal. It follows, as a matter of course, that this additional point is not a valid ground upon which I may, or ought to, grant leave to appeal and falls to be dismissed.”

18. The Applicant’s legal representative sought to place “evidence” before me which was not placed before me in the affidavits in the main application. This “evidence” constituted statements made by the Applicant’s legal representatives in argument. In *Maboho and Others v Minister of Home Affairs*[29]

“The Respondent’s heads of argument namely paragraphs 3, 4 and 5 raise a point of law which should have been raised in the notice in terms of Rule 6(5)(d)(iii) and not for the first time in the heads of argument served on the applicant before the court started and to the court during the hearing.

Argument is not evidence and it is not given under oath. It is merely a persuasive comment made by the parties or legal representatives with regard to questions of fact or law. Argument does not constitute evidence, and cannot replace evidence”.

19. In addition to finding that the order made by me is not appealable, I have considered the further arguments raised before me. I am not persuaded that another Court will come to a conclusion different from my conclusion. The Applicant has no prospects of success.

20. In the result I make an order that the application for leave to appeal be dismissed with costs on scale C.

B GUNDELFINGER

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

For the applicant: U. Dorasamy instructed by Ureesh Dorasamy Attorneys For the respondent: L Khan instructed by Collins Attorneys Date of hearing: 08 October 2024 Date of Judgement: 15 October 2024

[1] 2014 JDR 2335 (LCC)

[2] 2014 JDR 2325 LCC at para 6

[3] (CCT 232/19; CCT 233/19 [2020] ZACC 10; 2020 (8) BCLR 916 (CC); 2020 (65) SA 325 (CC) (29 May 2020)

[4] Pikoli id at 404A

[5] Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation

[2017] ZASCA 134; 2018 (6) SA 440 (SCA) (Cipla) at para 19

[6] Nova Property Group Holdings v Cobbett

[2016] ZASCA 63; 2016 (4) SA 317 (SCA) at para 8. This principle was authoritatively set out in Zweni v Minister of Law

[1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J-533A. See also Cipla id at para 18 and S v Western Areas Ltd

[2005] ZASCA 31; [2005] (5) SA 214 (SCA) (Western Areas) at para 20

[7] Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service

[1996] ZASCA 2; 1996 (3) SA 1 (A) at 10E G

[8] South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg

[2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) (Informal Traders) at para 20(g)

[9] OUTA above n 3 at para 24. See also Informal Traders id at para 17 which states that: “Provided a dispute relates to a constitutional matter, there is no general rule that prevents this Court from hearing an appeal against an interlocutory decision such as the refusal of an interim interdict. However, it would be appealable only if the interests of justice so demand.” Also Philani-Ma-Afrika v Mailula

[2009] ZASCA 115; 2010 (2) SA 573 (SCA) at para 20

[9] OUTA above n 3 at para 24. See also Informal Traders id at para 17 which states that:

“Provided a dispute relates to a constitutional matter, there is no general rule that prevents this Court from hearing an appeal against an interlocutory decision such as the refusal of an interim interdict. However, it would be appealable only if the interests of justice so demand.” Also Philani-Ma-Afrika v Mailula

[2009] ZASCA 115; 2010 (2) SA 573 (SCA) at para 20

[10] Informal Traders above n 51 at para 20

[11]

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) (South Cape Corporation) at 545B-546C

[12] OUTA above n 3 at para 25

[13] International Trade Administration Commission v SCAW South Africa (Pty) Ltd

[2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 55

[14] Machele v Mailula

[2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) at paras 23-8

[15] OUTA above n 3 at para 2

[16] Id at para 26

[17] Id

[18] id

[19] Informal Traders above n 51 at para 20(g)

[20]

[1984] ZASCA 51; 1984

(3) SA 623 A at 634 H to 635 C

[21] Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another, 1996 (3) SA 706 C at 714 E to F

[22] 2021 ZAGPJHC 519 at para 8

[23] (8470/2021)

[2023] ZAWCHC 345 (14 September 2023) at paras 28 to 31

[24] Phiri v Phiri and Others (39223/2011) [2016] ZAGPPHC 341 (14 March 2016) at para 9

[25] Sogono v Minister of Law Order 1996 (4) SA 384 (ECO) at 385-386A

- [26] Xayimpi v Chairman Judge White Commission (formerly known as Browde Commission [2006] 2 ALL SA 442 E at 446 I-J
- [27] (39223/2011)
- [2016] ZAGPPHC 341 (14 March 2016) at para 10
- [28] Ntsoereng and Another v Sebofi and Another; In re: Sebofi v Ntsoereng (4518/2012) [2016] ZAFSHC 153 (7 July 2016) at paras 33 and 52 and Kilian v Geregsbode, Uitenhage 1980 (1) SA 808 (A) 808 at 81 5 8-E
- [29] (833/2007, 1128/2007) [2011] ZALMPHC 4 (28 November 2011) at paras 12 and 13

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