

SOUTH AFRICA / JUDGMENT

Jonker and Another v Stoffels (1222/2008) [2010] ZANCHC 46 (25 May 2010)

[2010] ZANCHC 46**COURT**

Northern Cape High Court, Kimberley

BEFORE

F Diale Kgomo

CASE / FILE NUMBER

1222/2008

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IN

THE HIGH COURT OF SOUTH AFRICA(Northern Cape High
Court, Kimberley)

Case No: 1222/2008

Heard: 28/04/2010

Delivered: 21/05/2010

In

the matter between:

J H JONKER

.....1st

Applicant

H

J J A JONKER

.....2nd

Applicant

v

FRANCOIS C STOFFELS

.....Respondent

JUDGMENT

KGOMO JP:

This judgment deals in the first place with an application by the two applicants (the Jonker-couple) that the first respondent (Mr Francois Christiaan Stoffels) and his instructing attorney (Ms Odette Deyssel) of the firm of attorneys Haupt & Van Zyl in Paarl, Western Cape, be committed for contempt of court for disobeying the following order of this court issued on 02 October 2009:

“1. Custody and guardianship of the minor child Curstin Stoffels, born on 23 January 2006, is awarded to the applicants, Mrs Jacoba Hendrina Jonkers and Hans Johannes Jacobus Albertus Jonkers.

2. The applicants are awarded full parental responsibilities and rights as contemplated in s18(2) (a) – (d) of the Children’s Act, 38 of 2005, in respect of the child, which incorporate to care for the child, to maintain contact with her, to contribute to her maintenance and generally to act as her guardians.
3. The permanent residency of the child is awarded to the applicants.
4. The respondent, Mr Francois Christiaan Stoffels, as father of the child has the right of reasonable access to the child the terms of which access must be drawn up by counsel with the aid of the Family Advocate, Mr A H Nel; the psychologists Dr J D Stemmet (representing the applicants) and Ms Mandi Bouwer, representing the respondent.
5. If agreement concerning the terms of the respondent’s access rights is reached an order by consent should be obtained in the Chambers of the Judge President at 09h00 on Tuesday 20 October 2009 or otherwise be argued in court on the very stipulated date and time.
6. There shall be no order as to costs.”

The other leg of this judgment concerns the subsequent directives by this Court in which Mr Stoffels was ordered to deliver the child in question to the Jonkers in compliance with the order of 02 October 2009 and to have him to co-operate with the applicants and other functionaries and/or professionals mentioned in the order quoted above, with the aim of regulating Mr Stoffels’ access to his daughter and matters incidental thereto. Having heard argument in this regard on 22 October 2009 judgment was delivered on 30 October 2009 which contained the following orders:

“1. The Application for Leave to Appeal by the respondent (Mr Francois Christiaan Stoffels) is struck from the roll with costs. The

application may only be re-enrolled upon a substantive application being made and on good cause shown.

2. The respondent (Stoffels) is ordered to deliver Curstin to the home of the applicants (Mrs Jacoba Hendrina Jonker and Mr Hans Johannes Jacobus Albertus Jonker) at Keimoes, Northern Cape, within 7 (seven) days of this order failing which the Sheriff of the Western Cape and/or any of his/her deputies is/are directed to remove Curstin from the respondent (Stoffels) and hand her over to the applicants (the Jonkers).
3. That the orders in paragraphs 4 and 5 of the judgment delivered by the Northern Cape High Court on 02 October 2009 will take effect and must be complied with within 10 (ten) days of Curstin having been handed over to the Jonkers couple. The orders in question are the following:

“4. The respondent, Mr Francois Christiaan Stoffels, as father of the child has the right of reasonable access to the child the terms of which access must be drawn up by counsel with the aid of the Family Advocate, Mr A H Nel; the psychologists Dr J D Stemmet (representing

the applicants) and Ms Mandi Bouwer, representing the respondent.

5. If agreement concerning the terms of the respondent's access rights is reached an order by consent should be obtained in the Chambers of the Judge President at 09h00 on Tuesday 20 October 2009 or otherwise be argued in court on the very stipulated date and time.”
4. The respondent is to pay the costs of this application on the attorney and client scale.
5. The applicants are granted leave to bring an application for Contempt of Court against the respondent on the same papers suitably

supplemented.”

The facts relating to the history of this case emanate to a considerable extent from my judgment of 30 October 2009 referred to in para 2 above. Without that history this contempt of court judgment will be incomplete. On the other hand incorporating it by reference may be inconvenient or even problematic for obvious reasons. Copious extracts of that judgment therefore follow – with apologies:

THE JUDGMENT OF 30 OCTOBER 2009

“[1] Having regard to my orders --- which are intended to regulate the respondent's future access to his daughter, Curstin, I should

not be writing a judgment. However this has been necessitated by an unfortunate turn of events which have been precipitated by

respondent's (“Stoffels”) forum-shopping or forum-hopping with the singular motive of avoiding the consequences

of the order of this Court contained in the judgment delivered on Friday 02 October 2009. I refer to the parties by their names in light of the multiple applications brought in this Court and the Western Cape High Court.

[2] ---.

[3] ---. On this latter date [22 October 2009] para 4 of the Court order quoted above had not been complied with due to the subterfuge employed by Stoffels in a manner adverted to more comprehensively below.

[4] On 03 October 2009, thus a day after the delivery of judgment of this Court, Stoffels obtained an order on urgency with the following terms before Bozalek J in the Western Cape High Court.

“2. That, pending the filing of the Applicant’s Notice of Appeal to be lodged in the Appeal of the Judgment under Northern Cape High Court, case number 1222/08(or 09) on or before 9 October 2009, the Court Order therein dated 02/10/2009 (involving the above parties) is stayed so that the minor child, CURSTIN, shall remain in the Applicant’s care.

3. The Order in (2) above shall lapse upon the filing of the Notice of Appeal aforesaid or at 4.00pm on 9 October 2009, whichever occurs first.

4. This Order shall be served on the First and Second Respondents on 5 October 2009 by way of fax to their attorney of record.”

[5] The purported reason for Stoffels’ curious approach to the [Western Cape High Court] emerges from a letter written on 08 October 2009 by attorney Odette Deysel of the firm of attorneys Haupt & Van Zyl of Paarl to the applicants’ (“the Jonkers”) correspondent attorneys in Kimberley Messrs Elliot, Maris, Wilmans & Hay. The entire contents [are] reproduced:

“Ons het opdrag by ons kliënt ontvang om die volgende regstappe te neem:

- a) Appèl aan te teken teen die bevel van Kgomo RP vir die redes wat sal blyk uit die aansoek om verlof om te appèleer; en
- b) `n Dringende aansoek te loods om `n verwysing van die bepalings van die bevel gegee deur Kgomo RP. In hierdie verband is dit ons advies dat beide die hooggeregshof in Kimberley (waar die bevel toegestaan is) en die hooggeregshof in Kaapstad (waar Curstin tans woonagtig is) jurisdiksie het om so `n aansoek aan te hoor. Dit is ons kliënt se instruksies dat die wysigingsaansoek in Kaapstad gebring moet word uit hoofde daarvan dat:

(a) Curstin hier woonagtig is en

(b) dit vir ons kliënt goedkoper sal wees om uit hierdie hof te litigeer.

In die lig van sy instruksies het ons die kliniese sielkundige, Dr Rosa Bredenkamp (wat welbekend is in hierdie Hof en baie forensiese ervaring het), opdrag gegee om op `n dringende basis `n volledige ondersoek te doen na Curstin se beste belang (spesifiek na waar haar primêre woonplek moet wees).

[Then follows an elaborate explanation of how Dr Bredenkamp will carry out her mandate].

In die lig van bogenoemde het ons opdrag om hierdie skrywe aan u te rig en u kliënte te versoek om hul instemming te gee tot die volgende:

- 1) U kliënte sal hul volle samewerking gee tot die asesseringsproses en sal konsultasies met Dr Bredenkamp bywoon;
- 2) Curstin sal tot 30 Oktober 2009 aanbly in die huis van ons kliënt sodat Dr Bredenkamp die eerste fase van haar assessering kan afhandel waarna haar primêre woonplek hangende die afhandeling van Dr Bredenkamp se ondersoek by ooreenkoms of deur 'n hofbevel gereguleer kan word.

Aangesien beide u kliënte en ons kliënt dit nie finansieel breed het nie, wil ons u vriendelik en dringend versoek om in te stem tot bovermelde voorstel aangesien dit vir beide partye aansienlike regskoste sal bespaar---

- [6] In the meantime Stoffels has, in order to avoid the lapsing of Bozalek J's order that "stayed" the order of this Court pending the filing of a Notice of Appeal on or before 09 October 2009, filed his Notice of Appeal with the Registrar of this Court on Friday 09 October 2009, before the cut-off time.
- [7] In reaction to the steps taken by Stoffels in the [Western Cape High Court] the Jonkers brought an application to be heard simultaneously with the directive --- which envisaged the fashioning of the manner in which Stoffels was to exercise his right of access to Curstin on 20 October 2009 at 09h00. The relief sought is the following:

"1. Die respondent (Stoffels) gelas sal word om van verdere verdragingsaktiek en/of minagtende optrede ten aansien van die bogenoemde agbare Hof se bevel van 2 Oktober 2009 te weerhou.

2. Die respondent gelas word om onmiddelik en wel binne 3 dae vanaf datum van hierdie aansoek, naamlik 20 Oktober 2009, uitvoering sal gee aan paragraaf 22 van die bogenoemde agbare Hof se bevel van 2 Oktober 2009 en wel as volg:

2.1 Ten opsigte van paragrafe 1 tot 3:

Gemelde minderjarige kind, Curstin, binne 3 dae aan die applikante terug besorg sal word te Keimoes.

2.2 Ten opsigte van paragraaf 4:

Respondent in samehang met die applikante binne 3 dae sal begin om die bevel van die agbare Hof ten uitvoer te bring.

2.3 Ten opsigte van paragraaf 5:

Die agbare Hof 'n verdere datum sal bepaal ten einde die oogmerk wat beoog is vir bereiking teen 20 Oktober 2009, te bereik.

3. Die respondente se aansoek om verlof tot appèl, soos geliaseer, sal oorstaan tot dieselfde datum as dié vervat in paragraaf 2.3 hierbo.

4. Respondent aanspreeklik is vir die koste van hierdie aansoek.”

[8] Stoffels initially opposed this application [heard on 22 October 2009]. His contention emanate from the Answering Affidavit filed by his attorney Ms Odette Deysel for doing so. I quote the most significant aspects thereof:

8.1 “9. Ek het meneer Gerrie van der Merwe versoek om `n dringende aansoek te bring in bogenoemde Agbare Hof ten einde die uitvoering van die bevel op te skort hangende die liassering van die Kennisgewing van Appèl wat in terme van die reels van die Wet op Hooggeregshowe, Wet 59 van 1959, outomaties die bevel sou opskort. Meneer Van der Merwe het egter meegedeel dat die Agbare Hof in reses is en dat daar waarskynlik nie `n advokaat beskikbaar sou wees om so `n aansoek te argumenteer oor die naweek nie.”

This statement is preposterous, far-fetched and ridiculous. A party cannot create jurisdiction synthetically in another forum on some outlandish belief that counsel might not be available to argue his case. Besides, Mr Van der Merwe, referred to, is a senior attorney who appears regularly in this Court and has argued complex matters, which the case at hand, in which he appeared in any case, is not.

8.2 “13. Dit is korrek dat daar geen betekening van die stukke persoonlik op Applikante was nie, maar speel Applikante nie heeltemal oop kaarte met bogenoemde Agbare hof in hierdie verband nie. ”

Ms Deysel states that the Jonkers avoided service of process for the application in the [Western Cape High Court], hence the order was obtained on an unopposed basis.

8.3 “21. Dit is korrek dat die aansoek gebring is met die oogmerk dat daar nie uitvoering gegee word aan bogemelde Agbare Hof se bevel nie, maar ontken ek dat die aansoek gebring is met die doel om die reël te misbruik en die Agbare Hof se bevel te omseil”

8.4 “31. Dit is nie korrek dat die Agbare hof alreeds beslis het oor wat in die beste belang van Curstin tans is nie. Bogenoemde Agbare Hof het `n beslissing gemaak gegrond op die geloof dat Curstin primer by die Applikante woonagtig was wat sedert April 2009 nie meer die geval was nadat die partye aktief die intergrasieproses, by ooreenkoms, in werking gestel het nie. Die uitnodiging wat gerig was aan Applikante in die gemelde skrywe het ten doel om ondersoek in te stel wat tans in die beste belang van Curstin is.” (My emphasis).

That an attorney can suggest, if she has read my judgment and order, that no decision has been made as regards what is in the best interest of the child Curstin is simply mischievous. If no such decision has been made then the matter is still pending in this Court – lis pendens. If the matter is still pending what is it that Stoffels is seeking to appeal against in his Application for Leave to Appeal?

- [9] Before 09h00 on Tuesday 20 October 2009 Adv Japie Schreuder and his attorney, for the Jonkers, brought to my attention a letter dated 14 October 2009 from Stoffels' instructing attorneys, Haupt & Van Zyl, also authored by Ms Deysel to the Jonkers' attorneys, Elliot, Maris, Wilmans & Hay which reads:

"Bostaande aangeleentheid verwys sowel as ons Kennisgewing tot verlof om Appèl wat geliaseer is.

In terme van die Wet op Hooggeregshoue, Wet 59 van 1959, wens ons u daarop te wys dat die liassering van bogemelde kennisgewing die uitvoering van die bevel gemaak deur sy Edele Regter-President Kgomo op 2 Oktober 2009, outomaties opskort.

In die lig daarvan sal daar dus geen verskyning namens ons kliënt op 20 Oktober 2009 wees in terme van bogemelde bevel nie, aangesien die uitvoering in hierdie verband dus ook outomaties opgeskort is." (My emphasis).

- [10] Mr Van der Merwe was blissfully oblivious of the existence of the letter just quoted in para 9 above. He attended the hearing to present Stoffels' case, whatever his instructions may have been. Having read the letter shown to him in Court he respectfully disassociated himself on procedural grounds from what his instructing attorneys submitted, by letter for that matter. I agree. In addition Ms Deysel's attitude and conduct is testimony to her utter ignorance of the Rules of Court and her abject discourtesy to this Court by agitating non-appearance.
- [11] In light of the latest developments I postponed the hearing (from 20 October 2009) to Thursday 22 October 2009 at 09h00 (my part-heard was still running) and directed that the parties file short Heads of Argument to enable me to understand crisply what it is that the parties wanted done or not done.
- [12] On Wednesday 21 October 2009 in the place of the Heads of Argument Stoffels' Kimberley attorneys, Van de Waal & Partners, understandably, filed a Notice of Withdrawal as attorneys of record. They had no option because their mandate had been terminated and in fact this was also done by way of a supplementary affidavit to confirm it. Stoffels also withdrew his opposition to the relief sought in the Notice of Motion quoted in para 7 above [due to be heard on 22 October 2009] whereby the Jonkers [sought] to enforce the implementation of my order issued on 02 October 2009.
- [13] I wish to deal with a few points raised in the supplementary affidavit (dated 21 October 2009) as they have a bearing on some of the orders that I propose making including why the application for Leave to Appeal cannot be retained on the court roll as a mere subterfuge to enable Stoffels to obtain the relief sought in the [Western Cape High Court] and to discard the application as soon as that is done. If the application should fail the Leave to Appeal becomes the fall back position. The Jonkers can also not be frustrated from executing the responsibility enjoined and the benefit of the order accorded to them and the child Curstin by this Court.

[14] Ms Deysel explains (in the supplementary affidavit dated 21 October 2009) what she meant to convey in her letter of 14 October 2009 why there will be no appearance for her client, Stoffels. She states:

“5.2 On the 9th October 2009 Respondent filed his Notice in his Application for Leave to Appeal in the above Honourable Court. In terms of Rule 49(11) of the High Court Act, Act 59 of 1959, the operation of the execution of the order in question was automatically suspended pending the decision of such appeal.

5.3 On the 14th of October 2009 I addressed the abovementioned letter to the Applicants’ attorneys of record as a mere courtesy indicating

that the rules prescribed that the execution of the order is automatically suspended, which made an appearance on 20 October 2009

unnecessary;

5.4 On the 16th October 2009 the Applicants filed their latest application asking the above Honourable Court to order the immediate execution of the order granted on 2nd of October 2009. This application was also brought under rule 49(11);

5.5 The letter of 14 October 2009 thus did not deal with the latest application and did not state that my client would not appear in Court on that matter.

6. At no stage did I indicate to the attorney of record of Applicants that we will disregard the orders of the High Court of the Northern Cape based on orders made by the local High Court. I merely pointed out to the Applicants’ attorney of record what the rules governing all High Courts in South Africa prescribed.
7. Furthermore, at the time of the writing of the abovementioned letter, the current application by the Applicants had not even been brought. The current application was only served on Respondent’s corresponding attorney two days later, late on the 16th of October 2009.
8. It is my submission that neither I, nor Respondent, acted with disrespect for the above Honourable Court.”

This explanation only serves to obfuscate the clear meaning of the letter.

[15] On 19 October 2009 Stoffels obtained the following Rule Nisi from Yekiso J of the CPD on urgency:

“2. A Rule Nisi is issued in terms whereof Respondents are called upon to submit reasons on Friday, 27 November 2009, before this Honourable Court why the following order should not be made final:

2.1 Applicant shall be a holder of full parental responsibilities and rights in respect of the minor child CURSTIN STOFFELS (born on 23 January 2006) (presently 3 years and 9 months) (“the minor child”), in terms of the provisions of the Children’s Act, 38 of 2005 (“the Children’s Act”) as set out hereunder;

2.2 The minor child shall reside primarily with Applicant, who shall be her primary carer;

2.3 Applicant shall make those decisions as set out in section 31(1)(b)(ii),(iii) and (iv) of the Children’s Act in the minor child’s interests;

2.4 The minor child shall have such contact [with] First and Second Respondents as may be recommended by Dr Rosa Bredenkamp pending finalisation of this application and thereafter;

2.5 First and Second Respondents shall co-operate in the investigation to be conducted by Dr Rosa Bredenkamp regarding the best interest of the minor child in the implementation of a parenting plan.

3. Paragraphs 2.1 to 2.4 operate as an interim order pending the finalisation of the application.

4. The Applicant is granted leave to supplement his papers by the filing of a further affidavit in the event that this application is opposed.”

[16] In consequence of Yekiso J’s order quoted above (para 15) Stoffels filed a further supplementary affidavit consisting of 169 pages: Over the top for someone who pleads financial improvidence, makes no appearance and withdraws his opposition. The entire [Western Cape High Court] application is incorporated. It would be inappropriate to express myself relative to what is pending in the [Western Cape High Court] concerning, amongst other things the issues of lis pendens, jurisdiction, what is in the best interest of the child etc. However, that Court will have due regard to the fact that potentially two conflicting and/or concurrent orders may be issued in two jurisdictions in respect of the same child and same subject-matter.

[17] On his further participation in this Court Stoffels state:

“10. As indicated above, I am in no position financially to pay any further legal costs in this matter and therefore am also not in a position to instruct Mr Gerrie van der Merwe or an advocate to argue the matter on the 22nd of October 2009 before the above Honourable Court. I was again forced to make loans with friends and family members to secure the services of Dr Bredenkamp.

11. In light of the abovementioned I instructed Mr Gerrie van der Merwe to withdraw as my attorney of record and instructed my attorney not to proceed in the opposition of the above application. I am also advised that:

11.1 The matter before the above Honourable court has been finalized and I don’t need a service address anymore in terms of the court rules. (My emphasis).

11.2 The current application, even if successful, will de facto be stayed by the order that was made by [the] Honourable Justice Yekiso in the Cape High Court on the 19th of October 2009. This order amended the order given by the above Honourable court on the 2nd of October 2009 and granted me primary residency of Curstin.

12. In light of all the above facts I am forced to withdraw my opposition of the urgent Application brought by the Applicants of the 20th of October 2009 asking for the immediate execution of the order granted on the 2nd of October 2009 even though I do not believe that such relief is in Curstin's best interests."

If Stoffels carried out the order of this Court he would not have incurred the costs in the [Western Cape High Court] and the matter would have been finalised on 20 October

2009. He saved no costs because Mr Van der Merwe appeared for him on the stipulated date. Curiously in the para 8.4 breath of this judgment Stoffels states that no final decision has been taken by this Court concerning Curstin's custody, however in the para 17 breath (emphasised) he states the opposite because it suits him.

- [18] The conduct of the respondent as set out hereinbefore unquestionably attracts costs on an attorney and client scale for 20 October 2009 and 22 October 2009.

- [19] There being no opposition and no appearance by the respondent (Stoffels) the Jonkers are entitled to part of the relief claimed as set out in the order below. "The application for Leave to Appeal stands to be struck from the roll." [THE END OF THE JUDGMENT OF 30 OCTOBER 2009].

The contempt of court application was brought on urgency and filed on 11 November 2009 and set down for hearing on 20 November

2009. Attorney Deysel was cited as a party along with her client, Mr Stoffels, in light of what the cocooned judgment quoted above has highlighted but primarily on account of a letter dated 06 November 2009 (Annexure JHJ1) which she addressed to the Jonkers' attorneys in Kimberley Elliot, Maris, Wilmans & Hay informing them that:

"Ons rig hierdie skrywe aan u in opdrag van kliënt, Francois Stoffels.

In terme van die uitspraak gelewer deur sy Edele Regter-President Kgomo op 30 Oktober 2009 is ons kliënt verplig om Curstin aan u kliënte terug te besorg binne 7 dae of voor middernag vandag. Dit is ons instruksies dat ons kliënt nie van voorneme is om Curstin aan u kliënte terug te besorg nie en wel om die volgende redes: [my emphasis]

1. Die bevel van Sy Edele Regter Yekiso het die bevel van sy Edele Regter-President Kgomo gewysig. Soos u kliënt terdeë bewus is, is daar op 19 Oktober 2009 `n bevel bekom in die Hooggeregshof, Wes-Kaap, in terme waarvan Curstin primer woonagtig sal wees by ons kliënt totdat daar finaal op 27 November 2009 oor die aangeleentheid beslis word.

2. Ons kliënt liasseer vandag `n Kennisgewing tot verlof om Appél ten opsigte van die bevel gedateer 30 Oktober 2009. Soos u tereg bewus is, skort die liassering van hierdie kennisgewing die uitvoering van die bevel outomaties op in terme van Reël 49(11) van die Wet op Hooggeregshowe, Wet 59 van 1959.

3. Ons kliënt poog om die beste belange van sy dogter te dien.

In die lig van Regter-President Kgomo se beslissing dat die Balju gemagtig word om uitvoering te gee aan die bevel, sou ons kliënt nie daaraan gehoor gee nie, versoek ons dringend u onderneming dat u kliënte nie die uitvoering van die bevel sal afdwing hangende die aansoek voor die Kaapse Hooggeregshof op 27 November 2009 nie. Hierdie onderneming moet aan ons per faksimilee gegee word voor/op vandag om 15h00 by versuim waarvan ons kliënt sy regsremedies in hierdie verband sal utoefen.” (emphasis as received).

On 20 November 2009 the contempt application served before Majiedt J who ordered that:

“1. Dat die saak uitgestel word na 2 Desember 2009 na die bestrede rol.

2. Dat die Applikant se hoofde geliasseer te word voor/op 23/11/09 om 16h00.

3. Dat die Respondent se hoofde geliasseer te word voor/op 27/11/09 om 16h00.

4. Dat die koste, koste in die aansoek sal wees.”

On 02 December 2009 counsel informed me that the application before the Western Cape High Court wherein Stoffels obtained the Rule Nisi before Yekiso J on 19 October 2009 against the Jonkers has been postponed to 10 February 2010, with the Rule extended. See para 15 of the cocooned (30/10/2009) judgment above. To avoid the semblance of two High Courts competing over turf I postponed the contempt application and made the following order:

“1. This matter is postponed to Friday 12 March 2010 in order to allow the Western Cape High Court, Cape Town, to finalise the matter pending before it and which has been postponed to 10/02/2010 in the matter of F C Stoffels v J H Jonker and Another case no: 28159/09.

2. The order of this Court must be brought to the attention of the [Western Cape High Court] Judge presiding for the Judge, as far as possible, to dispose of the case [before 12 March 2010].

3. Counsel must on 12 March 2010 deal with the impact of the [Western Cape High Court] judgment or decision, if a decision has been made or the judgment delivered, in the contempt of court case pending in this Division in respect of the same parties and the same child.”

On 12 March 2010 the judgment of the Western Cape (Louw J) which was delivered on 05 March 2010 had just become available. At the suggestion of Adv J J Schreuder for the Jonkers which was accepted by Adv A Van Tonder for Stoffels the following Draft was made an order of Court.

“1. That the parties’ Legal Representatives make submissions on paper to Court as to what the contact rights of Mr Stoffels should be by no later than 12h00 on 19 March 2010.”

2. The Family Advocate, Kimberley, makes submissions on paper to Court by no later than 12h00 on 23 March 2010.
3. The Court will make an order on 25 March 2010 on the contact rights of Mr Stoffels.
4. The application for Contempt of Court will be postponed till later finalization of the case in this Court.”

On 25 March 2010 having received the report of the Family Advocate, Mr A H Nel, dated 19 March 2010 on how Stoffels has to exercise his visitation or contact rights to his daughter when she was back with the Jonkers, I decided against hearing argument on the contempt of court issue in order to afford Stoffels an opportunity for the umpteenth time to comply with the now proliferating orders of this Court around the same issues. I then issued the following order:

“1. That the respondent (Mr Francois Christiaan Stoffels) deliver Curstin Stoffels, a girl born on 23 January 2006, to the home of the applicants (Mrs Jacoba Hendrina Jonker and Mr Hans Johannes Jacobus Albertus Jonker) at Keimoes, Northern Cape, not later than Friday 16 April 2010 at 16h00 (four o’clock pm); failing which the Sheriff of the Western Cape and/or any of his/her deputies is/are directed to remove the said Curstin from the temporary custody of the respondent (the said Stoffels) and hand her over to the applicants (the Jonkers). The parties and/or the Sheriff must ensure that Curstin is not traumatised by involving a local social worker during the handing over.

2. That, whilst this order remains in force, the respondent (Stoffels) is authorized to take the minor child with him for an uninterrupted period of 3 weeks during each and every school term until the child reaches the age of 6 years. The respondent will also have reasonable telephonic contact with the minor child while she is in the applicants’ care. (ordered by consent).
3. When the minor child reaches the age of 6 years, the first respondent is to be permitted to take said minor child with him on the following basis:
 - 3.1 For the whole of March, June and September school holidays, as well as for half of the December holidays.
 - 3.2 One weekend per school term from 13h00 on the last school day of the week until 20h00 on the Sunday/last day of the weekend.
 - 3.3 Reasonable telephonic contact. (also ordered by consent).
4. The application by the applicants (the Jonkers) that the respondent (Stoffels) be committed for contempt of Court is finally postponed to Wednesday 28 April 2010 at 09h00. The applicants are authorised to supplement the papers, if so advised, not later than Wednesday 21 April 2010 and the respondent his not later than Friday 23 April 2010 at 15h00.

5. The judgment for the hearing of this matter (that took place on 25 March 2010) will be given together with the contempt of court

judgment.

6. Costs are reserved.”

It will be noted that two of the recommendations made by the Family Advocate and encapsulated in Orders numbers 2 and 3 of the order in para 8 immediately above were made by consent. However, Mr Van Tonder balked at Order number 1 (one) that I proposed making, which Mr Schreuder was agreeable to. Order numbers 2 and 3, as can be noted, merely regulate Stoffels’ access to his daughter. It is only sound common sense (“gesonde verstand” is perhaps more expressive) that Order No one is the

bedrock upon which the access (Orders No’s 2 and 3) is anchored. Take away this substratum upon which the access is predicated and the order is rendered useless, a brutum fulmen. This is so, at the risk of over-elaboration, because the effect of the order will be that Stoffels must exercise access to his daughter in Paarl even though the child is with him Paarl. Meanwhile the Jonkers, the applicants, who have an original order which is extent in their favour would be left high and dry.

Mr Van Tonder was adamant that he has instructions to consent only to the mentioned access orders. Counsel cannot be compelled to consent to particular orders being made. In fact he is incompetent to do so of his own volition. Concessions are on a different footing and an entirely different matter. Be that as it may, Mr Van Tonder also made it plain that based on the Western Cape judgment in the matter of Francois C Stoffels v Jacoba H Jonker and Another: Case No 21859/09 delivered on 05/03/2010, Western Cape High Court, unreported (Louw J) Mr Stoffels does not see his way clear to releasing Curstin into the custody of her grandparents, not even for access purposes.

The ratio and effect of Louw J's judgment (above) emanate from the following paras (which I recite for proper context, copious as that may be):

"18. The applicant seeks confirmation of the rule nisi issued by Yekiso, J. This will in effect amount to a variation of the orders made by Kgomo JP in the Kimberley case on 02 October 2009. The question is whether this court has jurisdiction to make the order sought.

19. The common law is that the High Court is the upper guardian of all minor children which are physically present within its area of jurisdiction and that the court on that ground has jurisdiction to determine issues relating to the custody and guardianship of such children. (Eilon vEilon 1965(1) SA 703 (AD) at 726 BC). The court of the children's domicile and residence has the same jurisdiction. (Bruckman v Bruckman 1976(4) SA 204 (C) at 205H – 206C; Boberg: Law of persons and the Family, Second Edition p94).

20. The fact that this court has jurisdiction over Curstin because of her presence within its area of jurisdiction does not mean that this court has the power to vary an order made in respect of Curstin by another High Court. The common law position is that no High Court has the power to set aside or vary the order of another High Court of equal jurisdiction. (Herbstein and Van Winsen, *The Practice of the High Court of South Africa*, 5th Edition, at pp56-7; 90). In *Joss v Board of Executors* 1979 (1) SA 780 (C) a full bench of this division held (At 781G and 782DE; See also Bruckman's case *supra* at 206F-H) that under the common law this court has no jurisdiction to vary an order for maintenance and a custody order made ancillary to a divorce order made in another division of the then Supreme Court. In coming to this conclusion the court referred as follows with approval to a statement regarding the common law position, made by Greenberg J in *Luyt v Luyt* 1926 WLD 179:

'In *Luyt* case Greeberg, J said in the course of his judgment at p. 181 that ordinarily the only Court which could set aside or vary a judgment of any Court is a Superior Court which has such appellate or reviewing jurisdiction; but that there are certain exceptions where the same Court can alter or amend its own orders, as in the case of orders which are temporary in nature and therefore subject to variation as circumstances vary. The power to vary in such cases is, however, confined to the Court which granted the original order. The decision in *Luyt's* case has consistently been followed by our Courts in the cases to which I have referred, and can in my view by now be accepted as a correct reflection of our common law on this subject ."

At para 25 the Learned Judge continued:

"25. --- This court cannot in my view make an order the effect of which is to vary or rescind the orders made by the Northern Cape High Court on 2 and 22 October 2009." [should read 2 and 30 October 2009].

[13] I am in agreement with Louw J's pronouncements quoted above. This is where the matter should have rested as it is a logical conclusion. However, I must respectfully differ strongly with the quantum leap next taken by the Learned Judge where he said in paras 26 and 27:

"26. As the upper guardian of all minors within its area of jurisdiction, this court does have the power under the common law, where a child is physically present within its area of jurisdiction, to make the order necessary for its protection. (Boberg: *Law of Persons and the Family*, Second Edition p94) Bearing in mind the constitutional injunction set out in section 28(2) of the Constitution, this court may in my view make such an order in this case without thereby usurping the power to vary or rescind the order of a High Court in another Division, by ordering the stay of execution within the jurisdictional area of this court, of the order made by the court in another division, pending the final resolution of proceedings that are pending in that other division. (*Viljoen v Viljoen* 1964(1) SA 197 (T) at 202 DH. This case was decided before the amendment to section 26 of the Supreme Court Act, 59 of 1959 took effect. The ratio of the decision is nevertheless applicable to the present case, in my view.)

27. On the papers filed in this application, Curstin has been present and ordinarily resident within this court's area of jurisdiction since 10 July 2009. I am satisfied on the papers filed in this application that it will be in her best interest to remain with her father in Paarl and not to be relocated to Keimoes pending the final resolution of all the matters pending in the Northern Cape Division under case no 1222/08 (also referred to as case no 1222/09). In order to achieve this result, the execution of the current orders of the Northern Cape High Court within this court's area of jurisdiction should be stayed pending the final resolution of the Kimberley case in the Northern Cape Division. The final resolution of that case may involve an application for the variation of the current orders or the prosecution of the application for leave to appeal and if granted, the prosecution of the appeal. It

may take the form of an application to lead further evidence on appeal if leave to appeal should be granted. I cannot say or predict

what further proceedings may be involved."

Louw J then made the following orders:

- "1. The rule nisi issued by this court on 19 October 2009 under case no 21859/09 is discharged;
2. Pending the final determination on appeal or otherwise of the matter under case 1222/08 (also referred to as case no 1222/09) in the Northern Cape High Court, the execution of the orders of that court made under case no 1222/2009 (also referred to as case no 1222/2008) on 2 October 2009 and 22 October 2009 [Sic] are stayed within the area of jurisdiction of this court and shall not be executed within the area of jurisdiction of this court.
3. There shall be no order as to cost."

The reason why I strongly differ with the "quantum leap" part of Louw J's judgment will become apparent from what appears hereinafter.

The interim order made by the Court flatly contradicts its main and final decision that the Western Cape High Court had no jurisdiction to alter or amend the order of the Northern Cape High Court. In the result an order simply discharging the Rule Nisi is what was required. In a different context Nugent JA writing the unanimous judgment in *Makhanya v University of Zululand* 2010(1) SA 62 (SCA) at 67 B-C stated:

"(F)or the moment I need only say that if the High Court (and by extension the court on appeal) had no jurisdiction in the matter then that ought to have been an end of the matter: by its own decision it would have had no power to dismiss the claim on its merits. Conversely, if the ratio for the order was that the claim was bad in law, it follows that it must have had the power to make that finding."

At p83 C-D the Learned Judge continued:

“[83] The High Court, once having found that it had no jurisdiction, as the majority found, would not have been capable, by its own decision, of making any further orders in the matter. The only course open to it would have been to dismiss the claim, on the ground that it lacked the power to make any further orders.”

With respect, Louw J obfuscated the real issue by indulging in the realm of speculation on several fronts as para 27 of his judgment amply illustrates. The nub of the matter is that the custody issue of the little girl, Curstin, was not pending before me. I had made a final decision thereon in a reasoned judgment which I am debarred from revisiting because I am functus officio. That order appears at para 1 of the judgment at hand. There was also no Leave to Appeal by Stoffels pending in this jurisdiction because the application was struck from the roll for Stoffels' non-appearance and for the further reasons given in my second judgment delivered on 30 October 2009, regurgitated hereinbefore. Louw J was aware of this order because he refers to that judgment in para 25 of his judgment quoted in para 12 of this judgment. The reference to "22 October 2009" is an error and has to read "30 October 2009" because there is no judgment in this Division of the former date relating to the parties.

Louw J states that as upper guardian of all minors physically within his area of jurisdiction under the common law the Western Cape High Court has the power to make the necessary order for Curstin's protection. The Court has not taken into account the purpose for which Curstin was taken to Paarl (to Stoffels) in the first place. Para 113 of the main judgment (delivered on 02/10/2009) shows that on 30 August 2008 Olivier J made an order that Curstin remain with the Jonkers pending the determination of the custody issue by the Northern Cape Division. On 07 November 2008 Majiedt J ordered by consent an integrative process which allowed Curstin to bond with her father pending the custody determination, which I in due course made on 02 October 2009.

Louw J states as one of the reasons for his order that Curstin had been with Stoffels since 10 July 2009. But the Learned Judge had overlooked

that as stated in my judgment of 02 October 2009 at para 18:

"The applicants, the grandparents of Curstin, have brought Curstin up as their own child to this point (she is now 3 years and 8 months)", i.e. in October of 2009. The parties must have brought that fact to the Judge's attention because the child must have lived somewhere for over three years.

In my judgment of 30 October 2009 quoted extensively above full reasons are given why it is unquestionable that Stoffels deliberately circumvented the order made in this Court. The positive effect of the order made by Louw J is that the orders made by Bozalek J on 03 October 2009 in the Western Cape High Court staying the execution of the Northern Cape Division order and the order by Yekiso J on 19 October 2009 purportedly amending this Court's same order, to keep Curstin in Paarl with her father, should not have been made in the first place. How then can that period (8 months) be taken into account by Louw J to trump the more than 3 years that Curstin had been staying with her grandparents, the Jonkers?

I am frankly unable to see how Louw J could make the finding that Curstin remain with her father when it was not his call to make or, more fundamentally, when there is no indication in his judgment that Curstin needs "protection" from her grandparents who brought her up lovingly or what has changed so drastically since 02 October 2009 when my order was made to inform the Learned Judge's decision.

The interim order made by Louw J (quoted in para 14 above) will set the unwelcome precedent: That a party can avoid a court order made in one jurisdiction in South Africa relating to the custody of a child by simply eloping to another jurisdiction in this country and seek the same relief as that which went against him as a respondent. In the Makhanya matter at 71 D-E the Court stated:

"A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court. But where a person has two separate claims, each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court, or each in one of those courts."

In *Gcaba v Minister of Safety and Security and Others* 2010(1) SA 238 (CC) Van der Westhuizen J, writing for the Court, stated at 257 C-D:

"[57] Following from the previous points, forum-shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered."

This is precisely what Stoffels and his attorney Odette Deysel did.

The untenable consequence of the order would also be to change the law that henceforth an order made in one jurisdiction is valid throughout the country unless restricted by a court in another jurisdiction from applying there. As the law stands, no court is competent to do that. Counsel for Stoffels could not refer me to any authority that as High Court can competently do so. Froneman J in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001(2) SA 224 (E) citing amongst others an Appellate Division decision and a Canadian Appeal Court judgment stated at 229B-G:

"The issue in the present application is whether I have the competence to make an order that would nullify the effect of the earlier order made by another Judge of the High Court in respect of the same issue, between the same parties. I thought it obvious that I do not possess that competence."

An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A - C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714). In *Kotze v Kotze* 1953 (2) SA 184 (C) Herbstein J provided the rationale at 187F:

'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.'

The order made by Horn AJ could only be set aside on appeal, or in terms of Rule 42 of the Uniform Rules of Court, or on common-law grounds (*Erasmus Superior Court Practice* B1 - 307). None of those instances apply in the present application. It was, however, suggested that the order made by the Competition Tribunal somehow made a difference. In my view it does not.

If it is accepted that the Competition Tribunal's order conflicts with that of Horn AJ (as the applicant does in his papers) there is no basis, in my view, for nullifying the effect of Horn AJ's order. I am not aware of a rule of our law that allows a court (other than a competent Appellate Court or Court of review) to disregard, or to ignore, or to set aside the order of another court, in a matter that comes before it in respect of a claim for the same relief between the same parties (compare *Garment Workers' Union, Western Province, and Another v Industrial Registrar and Another* 1967 (4) SA 316 (T) at 317D - F). Nor was I referred to any such rule or authority by counsel. The process of a Court order in any Division of the High Court runs throughout South Africa (s 26 of the Supreme Court Act 59 of 1959). Everyone is bound to obey the order even if they may consider it to be wrong. This would apply to a court of any standing." (My emphasis).

In the process of counsel for the Jonkers, Mr Schreuder, criticizing the Louw J judgment I enquired from him whether they have appealed the decision. His response was that the Jonkers are unable to sustain the expensive litigation. He also expressed the view that Louw J's order appears to be provisional and not final and may not be appealable. I am only prepared to say that the order will terminate

upon the fulfillment of certain uncertain events that Louw J speculated upon.

THE LEGAL POSITION IRO CIVIC CONTEMPT OF COURT.

In *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) at 333 C-D (para 9 and 10) Cameron JA held:

"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'.¹ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction². Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).³

[10] These requirements - that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.⁴ Honest belief that non-compliance is justified or proper is incompatible with that intent.”

I have set out the whole attitude of Stoffels and Ms Deysel over a long period of time in respect of several orders of this Court. They have stated in no uncertain terms that the orders will not be complied with or obeyed. After Louw J’s judgment Stoffels was afforded two opportunities to purge his default but has, to use Jones J’s words in the Bezuidenhout case (supra) at 228F decided upon “an amazingly brazen attitude to adopt.” It must also be borne in mind that Stoffels’ initial approach to the Western Cape High Court was made on the false pretext that because the Northern Cape High Court was on recess it was not accessible for lack of a legal practitioner to instruct. His attorney was complicit in all these.

When this matter was heard on 25 March 2010 and 28 April 2010 both counsel confirmed that Curstin was still with her father in the Western Cape and Mr Van Tonder stated that his instruction were that the child won’t be delivered to the Jonkers as repeatedly ordered by this Court. No court should allow its orders to be wantonly disregarded or disobeyed. As Jones J aptly stated in Bezuidenhout at 229B:

“An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong.” Otherwise anarchy is invited.

I am therefore satisfied that Stoffels did not only deliberately disobey the order of this Court but he was mala fide in doing so. He is therefore found to be guilty of contempt of court.

The situation of Stoffels’ attorney, Ms Odette Deysel, has to be handled at a different level. A court must be slow to impute any mala fides to a legal practitioners. Particularly if there is no clear indication that they have acted beyond the mandate they have been vested with or outside the scope of their authority. In LAWSA Vol 14 para 451 (p408) it is stated:

“In pursuing his occupation, an attorney, like professional men in other fields, is obliged to exercise due and reasonable care. The duty to take care is established once it is clear that the danger ‘would have been foreseen and guarded against by the diligens paterfamilias’.

An attorney will not be guilty of negligence merely because he committed an error of judgment, whether on matters of discretion or law. It is a question of degree and there is a borderline within which it is difficult to say whether a breach of duty has or has not been committed.

Liability towards third parties

An attorney is not responsible for any wrongful act committed by him qua attorney within the scope of his authority: *qui facit per alium facit per se*. There is, however, a duty of care owed by an attorney conducting litigation on behalf of a client, to the court, and a duty of care owed towards his opponent. An attorney drawing a contract between his client and an unrepresented party has a duty to be fair to both parties.”

I am therefore unable to state that Ms Deyssel is in contempt of Court and that she must suffer the same fate as her client, although she is walking a fine line and risk being reported to her Law Society. Ordering her to pay part of her client’s costs *de bonis propriis* is manifestly established and justified. Both have to pay costs on a punitive scale.

I accordingly make the following order:

Order

1. The respondent (Mr Francois Christiaan Stoffels) is found to be in disobedience (found guilty) of the following orders:
 - 1.1 The order of 02 October 2009;
 - 1.2 The order of 30 October 2009; and
 - 1.3 The order of 25 March 2010.
2. The respondent (Mr Stoffels) is committed to jail for a period of one month for contempt of court. The committal is suspended for a period of ten (10) ordinary days from date of this order on condition that he delivers the child Curstin, a girl, born on 23 January 2006 to the applicants (Mr Hans Johannes Jacobus Albertus Jonker and Mrs Jacoba Hendrina Jonker) in Keimoes, Northern Cape, before the expiry of the ten (10) days.
3. It is ordered that the respondent (Mr Stoffels) pay 50% of the applicants’ taxed costs on the attorney and client scale and that Ms Odette Deyssel, an attorney of the firm Haupt & Van Zyl Attorneys, Paarl, Western Cape, pay the other 50% *de bonis propriis* on the attorney and client scale.

F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape High Court, Kimberley

On behalf of the Applicants: Adv J J Schreuder

On behalf of the Respondent: Adv. A G Van Tonder

1Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc & Others [1996] ZASCA 21; 1996

(3) SA 355 (A) at 367H - I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape and Another 2004 (2) SA 611 (SCA) ([2003] 2 All SA 223) in paras [18] and [19].

2Consolidated Fish Distributors (Pty) Ltd v Zive and Others 1968 (2) SA 517 (C) at 524D, applied in Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) at 691C.

3Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) at 692E - G per Botha J, rejecting the contrary view on this point expressed in Consolidated Fish Distributors v Zive (above). This Court referred to Botha J's approach with seeming approval in Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others [1996] ZASCA 21; 1996 (3) SA 355 (A) at 368C - D.

4See the formulation in S v Beyers 1968 (3) SA 70 (A) at 76E and 76F - G and the definitions in Jonathan Burchell Principles of Criminal Law 3 ed (2005) at 945 ('contempt of court

consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the

administration of justice in a matter pending before it'); and C R Snyman Strafreg 4 ed (1999) at 329 ('minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike

hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

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