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

Case number: 14941/2022

Date of hearing: 5 September 2022

Date delivered: 6 September 2022

REPORTABLE: YES/NO

OF INTEREST TO OTHERS JUDGES: YES/NO

REVISED

In the application between:

J [...] S [...] O [...] 1

and

Applicant

Z [...] I [...] O [...] 2

Respondent

JUDGMENT

SWANEPOEL AJ:

[1] This is an application for leave to appeal against an order granted by me on 15 June 2022. I may only grant leave to appeal if I find that there is a reasonable prospect that an appeal would be successful before another Court. ¹ The facts of the matter and the order are a matter of record, and I will not repeat them.

¹ Section 17 (1) (a) (i) of the Superior Courts Act, 2013

[2] The applicant now argues that paragraphs 2 and 6 of the order of Van Nieuwenhuizen AJ were not sought by applicant, were not underpinned by fact, and that those paragraphs of the order are pro non scripto. Therefore, the argument goes, the only orders that remain are the orders dismissing the application, and appointing a person to assess the children. It follows, applicant says, that I should not have entertained an application to suspend an order which is pro non scripto.

[3] There are two fundamental problems with this argument. Firstly, as counsel for respondent correctly pointed out, an order which is pro non scripto cannot merely be ignored, and should be given effect to until it is set aside by a competent court. In *Department of Transport and Others v Tasima Pty) Ltd* the Court said²:

"Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence. "

[3.1] Secondly, my order did not suspend the order of Van Nieuwenhuizen AJ. I granted a declaratory order to the effect that the order was automatically suspended by virtue of section 18 (1) of the Superior Courts Act, 2013.

[4] Applicant persisted (in the alternative to the submission that the order was pro non scripto) with the contention that the order was interlocutory in nature. I have already expressed my views on that argument, and I did not hear anything further which would move me to change my view on the matter.

[5] Applicant's counsel argued that applicant did not require any order to relocate to Cape Town, and that, as primary caregiver, she was entitled to make the decision unilaterally. She says that section 31 of the Children's Act, 2005 gave her the right to decide to relocate if she so wished. Firstly, I do not believe that applicant has correctly interpreted section 31. I do not believe that it is necessary for this

² 2017 (2) SA 622 (CC) at para 147

judgment to expound on how I understand section 31. Secondly, and the main point, is that respondent ignores the fact that there is an existing rule 43 order which she cannot give effect to whilst she resides in Cape Town.

[6] In argument, counsel for applicant did not persist in the submission made in the application for leave to appeal, to the effect that this Court had lost jurisdiction upon applicant relocating to Cape Town. It has been repeatedly held, and it is trite, that once jurisdiction is founded, it persists until the matter is finalized.

[7] In the premises I do not believe that an appeal would be successful before another Court.

[8] I make the following order:

[8.1 The application for leave to appeal is dismissed with costs.

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

COUNSEL FOR APPLICANT: Adv. P.V. Ternent

ATTORNEY FOR APPLICANT: Billy Gundelfinger Attorneys

COUNSEL FOR RESPONDENT: Adv A. Bester

ATTORNEYS FOR RESPONDENT: HJW Attorneys

DATE HEARD: 5 September 2022

DATE OF JUDGMENT: 6 September 2022