REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2025-038564**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

29 April 2025
DATE

SIGNATURE

In the matter between:

H[...], S[…] B[…] Applicant

and

THE HONOURABLE MAGISTRATE MNCUBE N.O. First respondent

H[…], S[…] A[…] Second respondent

JUDGEMENT ON POST-JUDGEMENT APPLICATIONS

HA VAN DER MERWE, AJ:

Introduction

[1] After my judgment dated 8 April 2025 was handed down (the first judgment), Mr H[…] brought an application for leave to appeal against that judgment. That prompted Ms H[…] to bring an application in terms of section 18(3) of the Superior Courts Act 10 of 2013. In the latter application, Mr H[…] brought an application for the rescission of the first judgment as a counter-application. Mr

H[…] also brought an application that, in form, was cast as an application to lead further evidence on appeal. In substance however, the last-mentioned application served as a ground on which he sought leave to appeal against the first judgment.

[2] For the sake of convenience, I shall refer to the parties as they were in the initial urgent application in which I handed down the first judgment, i.e. Ms H[…] will be referred to as "the applicant" and Mr H[…] as "the second respondent". The three applications now before me will be referred as follows: the application for leave to appeal against the first judgment as the "the application for leave to appeal"; the application in terms of section 18(3) of the Superior Courts Act as "the section 18(3) application" and the application for the rescission of the first judgment as "the rescission application".

[3] The facts as recorded in the first judgment are relevant for the application for leave to appeal, the section 18(3) application and the rescission application. Those facts are not repeated in this judgment.

[4] All three application were heard together, but as Ms Bezuidenhout for the applicant correctly argued, the three applications are discrete and each demand the application of discrete principles.

The new evidence

[5] Before I turn to the three applications, it is appropriate to set out at the outset the facts that emerged after the judgment dated 8 April 2025 was handed down. These facts bear on the three applications now before me in one way or another.

[6] For the sake of making out a case that it serves the best interests of the 11-year old minor girl born of the marriage between the applicant and the second respondent (the minor), the applicant in her founding affidavit in the initial urgent application set out in some detail the provisions that had had been made for the living conditions of the minor in Durban, were the applicant to be permitted to relocate to Durban (paragraph [26] of the judgment dated 8 April 2025). I found those to be adequate (paragraph [50]).

[7] It now turns out that the home in Durban is not habitable and will not become habitable for at least a matter of weeks. From the photographs taken on 19 April 2025, annexed to the second respondent's answering affidavit in the section 18(3) application, it appears that the Durban home is undergoing extensive renovations. The Durban home is surrounded by a high brick wall, so that for the most part is home itself is not visible. What is visible is scaffolding. When the photographs were taken, the home did not even have a roof. What appears to be a garage is filled with building rubble.

[8] The applicant does not deny the photographs. In her replying affidavit in the section 18(3) application, she states that the renovations began in December 2024. Her version is that she expected the renovations to have been completed sooner, but due to extraordinary rainfall the renovations were delayed. According to a note from the builder dated 22 April 2025 (not confirmed in an affidavit), the construction works is approximately 75% complete and is estimated to be completed by the end of May 2025, barring further unforeseen delays. In the meantime, if allowed to relocate with the minor to Durban, the applicant will reside with her husband and her new-born child in a two-bedroom cottage on a property of a member of her husband's family. As two-bedroom cottages go, it is of the larger kind and there is nothing about it that suggests that it is not adequate.

[9] The founding affidavit in the initial urgent application was deposed to by the applicant on 19 March 2025. At that time the renovations were already underway. The founding affidavit however is completely silent about the renovations. On any reasonable reading of the founding affidavit, it conveys that the Durban home is ready for occupation and that if the order as sought is granted, the minor will take up occupation in the Durban home. The relevant allegations in the founding affidavit read as follows:

> "The property to which we intend to relocate is a freestanding home situated at […]. The home is close to shopping centres, [the minor's] Kumon centre, grandparents, aunts, uncles, and cousins. Both [the applicant's husband] and I purchased the home together. It is mortgaged and transfer took place in September 2024. A copy of the deed of transfer is attached …

> The home has a large garden for [the minor] to play and keep her pets. She currently has 2 rabbits, 2 birds, 2 cats and a hamster which will come with us to Durban. [The minor] has been asking for a dog for a long time however our home in Johannesburg doesn't have enough space for a dog. She will be getting her dog in Durban. [The minor] enjoys swimming and playing in the garden. The home has a pool for [the minor] to enjoy all year round due to Durban's lovely weather.
>
> She will also have her own room where she will be very comfortable. She is looking forward to having her cousins over for sleepovers and play dates as they live down the road from our home.
>
> The house is currently vacant …"

[10] The allegation that the "house is currently vacant", is not true. It was not vacant at the time. Although it was not occupied for residential purposes, it was in the possession of the builder. The other allegations may not be untrue in the same way – it has a garden and so forth, irrespective of the fact that it is a building site. The use of the future tense in the paragraphs quoted above, also means that, strictly speaking, those allegations are not untrue, but only if read out of context. Affidavits, like any other document is read and is meant to be read in context. In context, the use of the future tense indicates not that the home uninhabitable at the time, but that once the order sought is granted, then the minor will have her own room, etc. In context therefore, those allegations are also untrue. The applicant must have realised that the allegations made in the founding affidavit create the impression that the home is ready for occupation. To this extent it is at least misleading.

The rescission application

[11] The current state of the Durban home are the foundational facts for the application for the rescission of the first judgment. At common law, a judgment may be rescinded if it was obtained by fraud, that is to say if the first judgment was granted in the basis of deliberately false evidence. However, one of the requirements for the rescission of a judgment on the basis of fraud, is that the to

be impugned judgment would have gone the other way, had the false evidence not been placed before the court.[1]

[12] For purposes of the rescission application, the enquiry is an objective assessment of how the initial application would have been decided had the applicant's founding affidavit reflected the truth from the outset. It is not an assessment of how the initial application would have been decided, if it was known that the applicant's founding affidavit contained the false evidence, but which was corrected before the first judgment was handed down. For purposes of the rescission application therefore, the fact that the founding affidavit contained untruths is not relevant as such. For the rescission application, what should be postulated is how the initial application would have been decided if the applicant was truthful from the outset.

[13] Had the applicant stated the truth in her founding affidavit in the initial application, it does not seem to me that it would have affected the outcome of the first judgment. I take it for granted that this is an objective assessment, i.e. the question is not how I would have decided the initial application had the false evidence been substituted for the truth. The question is whether, objectively assessed, it would have made a difference. Had the applicant stated that the Durban home was, at the time, a building site, but that within a month or so, it should be completed, and that in the meantime, the applicant will live in the cottage with her husband, her new-born child and the minor, then it would not have made a difference to the outcome of the first judgment. The best interest of the minor has little to do with particular attributes of the home in which she will live if the applicant is allowed to relocate with her. So long as it can be described as adequate, it is good enough. What is far more important is the people with whom she will share the home she is to live in and whether its location is such that it will not impact on the involvement of her larger support structure (the other members of her larger family), her schooling, and other activities.

[14] For these reasons, although the founding affidavit in the initial application contained false evidence, the rescission application should be dismissed.

---

[1] *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166I

The application for leave to appeal

[15] Even though the rescission application should be dismissed, it does not mean that the false evidence in the founding affidavit in the initial application is without consequence. For purposes of the application for leave to appeal, it seems to me that it matters a great deal. Insofar as it concerns the application for leave to appeal, it is permissible for the second respondent to rely on his intended application to lead further evidence on appeal, as a ground on which he may seek leave to appeal. To be clear, the application to lead further evidence on appeal is not before me. In terms of section 19 of the Superior Courts Act, it for the court of appeal to consider and rule on an application to lead further evidence on appeal. What is before me is the second respondent's contention that I should grant him leave to appeal, so that he may, on appeal, seek an order to lead further evidence. If I am convinced that: (a) the second respondent has reasonable prospects on appeal to succeed with his intended application for leave to lead further evidence; and (b) that the further evidence would mean that he has reasonable prospects of success on appeal; then he is entitled to an order granting him leave to appeal.

[16] I am satisfied that the second respondent has reasonable prospects on both (a) and (b) above. The learned authors of *Erasmus Superior Court Practice*, state as follows on section 19(b) of the Superior Courts Act:[2]

> While holding that it is undesirable to lay down definite rules as to when the court ought to accede to the application of a litigant desirous of leading further evidence upon appeal, the Appellate Division (as well as the Supreme Court of Appeal and the Constitutional Court) has in a series of decisions laid down certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasize the court's reluctance to reopen a trial. They may be summarized as follows:

[2] 3rd ed: (vol 1), revision service 4, at p. D-141 to D142

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.

…

Non-fulfilment of any one of the stated requirements would ordinarily be fatal to the application, but every case must be decided on its particular merits, and there may be rare instances where, for some special reasons, the court will be more disposed to grant relief." (footnotes omitted)

[17] The further evidence only became available to the second respondent after the first judgment was handed down. If I take the applicant at her word that the renovations began in December 2024, then, had the second respondent undertaken the investigations that led him to the state of the Durban home, then that evidence could have been led when he deposed to his answering affidavit in the initial application. However, the initial application was brought on an urgent basis and allowance should be made for the circumstances in which he was required to prepare that affidavit. The truth of the further evidence is beyond doubt, inasmuch as the applicant concedes that Durban home is presently a building site.

[18] Requirement (c) quoted above (i.e. that the evidence should be materially relevant to the outcome of the application) seems to me answer two questions at once. If the further evidence is materially relevant, then it means in the first instance that the second respondent has reasonable prospects of success on appeal to have the further evidence admitted. It must also mean, in the second instance, that he has reasonable prospects of success on appeal.

[19] Much of the first judgment is concerned with whether there ought to have been a referral to oral evidence. Had it been known that the applicant is capable of untruths in her founding affidavit, it seems to me that there are reasonable

prospects that a court of appeal may be swayed to order oral evidence, given that in cases involving minor children, the ordinary rules pertaining to the resolution of factual disputes do not apply in same way as it would in ordinary strictly adversarial matters.[3] In this context, the enquiry is different to the enquiry that the rescission application calls for. As I found above, for the rescission application, the fact that the applicant was untruthful in her founding affidavit in the initial application is irrelevant, because that enquiry is concerned with the outcome of the initial application, had the applicant been truthful. For present purposes, the fact that the applicant was untruthful is very much relevant, because it has a bearing on whether oral evidence should have been ordered.

[20] An appeal court may be able to decide the issues on those facts that do not depend on the veracity of the applicant's version, so that her credibility does not enter the picture. For instance, Dr Duchen's "voice of the child" report may be sufficient to establish that the applicant is the appropriate parent for purposes of primary residence, especially if coupled with the fact that the second respondent is content for the minor to remain in the applicant's primary residence, so long as she is in Johannesburg. However, that is not for me to decide. All I should consider is whether the second respondent has reasonable prospects of success on appeal. For the reasons set out above, in my view the second respondent has shown that he has.

[21] Ms Bezuidenhout argued that the current condition of the Durban home will be irrelevant on appeal, because by then the renovations will be complete and the minor will live in the conditions precisely as (falsely) described in the founding affidavit in the initial application. So far as it goes, Ms Bezuidenhout's argument is well made, but that argument is no answer to the real implications of the applicant's false evidence. Having shown herself to have little regard for the oath in one respect, it lends support for an order referring the disputes on the best interests of the minor to oral evidence.

[22] The application for leave to appeal should therefore be granted.

---

[3] *B v S* 1995 (3) SA 571 (SCA) at 584J – 585E

[23] The second respondent relies on various other grounds on which he seeks leave to appeal. Among those grounds is the contention that it was not permissible to have found that the order of the first respondent is a nullity, because the applicant did not make that contention in her affidavits. Ms Segal is quite correct that the applicant did not contend in any of her affidavits that the order of the first respondent was a nullity. However, the applicant did seek an order for the review and setting aside of the first respondent's order. If the order is a nullity, it cannot be reviewed, because then there is nothing to review (see paragraph [38] of the first judgment). Moreover, this Court's function as upper guardian of the minor is, in my view, sufficiently wide that an enquiry into whether the first respondent's order is a nullity or not, is permissible even though it was not raised by the applicant.[4] In terms of section 28(2) of the Constitution, "[a] child's best interests are of paramount importance in every matter concerning the child." If the best interest of the minor indicates that an enquiry into whether the order of the first respondent is a nullity or not is warranted, then it does not seem to me that it is off limits, whether the applicant raised it or not. On this ground therefore, in my view, the second respondent does not have reasonable prospects of success on appeal.

[24] The same goes for the grounds on which the second respondent seeks leave to appeal that are concerned with *lis pendens* and the fact that the first respondent's order was an interim one. The court's function as upper guardian of the minor, coupled with section 28(2) of the Constitution, mean that so long as the best interests of the minor indicate that the relocation application should be granted, then neither ground could stand in the way.

[25] The second respondent also contends that he has reasonable prospects of success on appeal to show that the order of the first respondent was severable, in that the finding that the order so far as it concerns Living Links, is severable from the order that in the interim and pending the final determination of the proceedings before the Children's Court, the recommendations of the family advocate should stand. It does not seem to me that the second respondent has

[4] *Kotze v Kotze* 2003 (3) SA 628 (T) at 630G; *Mpofu v Minister for Justice and Constitutional Development and Others (Centre for Child Law as amicus curiae)* 2013 (9) BCLR 1072 (CC) at para [21]; *Terblanche v Terblanche* 1992 (1) SA 501 (W) at 504C

reasonable prospects of success on this ground. The recommendation of the family advocate was made pending the referral to Living Links. Ms Segal argued that the interim operation of the recommendation of the family advocate should be understood to have been made pending the final determination of the proceedings before the Children's Court in a manner that is not so closely tied to the order concerning Living Links that the one cannot exist without the other. In other words, Ms Segal, as I understood her, argued that the second respondent has reasonable prospects of success on appeal to convince an appeal court, that despite the setting aside of the order so far as it concerns Living Links, to nonetheless maintain the interim operation of the family advocate's recommendation and to leave it to the Children's' Court to decide the issues that were before that court. This argument does not take account of my finding that it is in the best interests of the minor to be allowed to relocate to Durban with the applicant. So long as that finding stands, then it does not seem to me that there any room to argue that the status quo (i.e. the minor remaining in Johannesburg) should be maintained, in light of the court's role as upper guardian and section 28(2) of the Constitution. However, having found that the second respondent has reasonable prospects of success on appeal on a referral to oral evidence, this contention seems to me to fall by the wayside. If a court of appeal makes an order referring the very question at stake, i.e. the best interests of the minor to oral evidence, then the appeal court will decide the issue, as upper guardian of the minor. In that event there would be no sense in any further proceedings in the Children's Court.

[26] Ms Segal argued that the first judgment non-suited the second respondent in his application before the Children's Court that primary residence of the minor should be awarded to him. It seems to me that Ms Segal's argument is sound. In the first judgment, I ordered that the applicant may relocate to Durban, with the minor, as her primary resident parent. In effect therefore, the first judgment disposes of the second respondent's application for primary residence, because in terms of the first judgment, the primary residence of the minor is to remain with the applicant, in Durban. My finding that the minor should relocate to Durban with the applicant, therefore by necessary implication also determined the second respondent's claim for primary residence and thereby put an end to his

application in the Children's Court. That however does not mean that the second respondent has reasonable prospects of success on appeal, unless he has grounds on which to attack my finding on the relocation application. It is therefore not a standalone ground on which an application for leave to appeal may be founded. That said, once the second respondent is granted leave to appeal so far as a referral to oral evidence is concerned, it catches within its ambit the second respondent's case for primary residence. It will be for the appeal court to determine precisely on which issues oral evidence may be led, if the second respondent is successful on appeal. It will then be for the appeal court to determine whether the oral evidence should cover the second respondent's application for primary residence.

[27] It does not seem to me that there is any cogent reason for leave to appeal to be granted to the Supreme Court of Appeal. Leave to appeal should therefore be granted to the Full Court of this Division.

The section 18(3) application

[28] That then brings me to the application in terms of section 18(3). Section 18 reads as follows in relevant part:

> "(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.
>
> …
>
> (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)*(a)* If a court orders otherwise, as contemplated in subsection (1) —
>
> (i) the court must immediately record its reasons for doing so;
>
> …"

[29] Ms Bezuidenhout and Ms Segal made common cause with the proposition that section 18(3) does not trump the best interest of the minor, in the sense that an order in terms of section 18(3) should not be made if it would against the best interest of the minor. Section 28(2) of Constitution does not permit such an outcome. That does not however mean that section 18(3) can be ignored without more. In terms of section 39(2) of the Constitution:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[30] The caselaw on section 18(3) show that it requires an assessment of the effect that the suspension of a judgment appealed against has on the rights of the litigating parties, if the suspension is allowed to operate and if the suspension is not operational. Leaving aside the question of exceptional circumstances for the moment, two questions are relevant: (a) if the judgment appealed against is suspended and the appeal is dismissed, will the respondent on appeal suffer irreparable harm; and (b) if the judgment appealed against is carried into effect and the appeal is successful, will the appellant suffer irreparable harm? The same questions are relevant when there is only an application for leave to appeal, but then of course, the parties are to be referred to not as respondent on appeal or appellant, but as respondent in an application for leave to appeal and applicant in an application for leave to appeal.

[31] Sutherland J's judgment in *Incubeta Holdings (Pty) Ltd v Ellis*[5] (*Incubeta*) is instructive. In *Incubeta* the issue was whether an application in terms of section 18(3) should be granted in respect of a judgment in which it was found that an agreement in restraint of trade should be enforced. Sutherland J dealt with the issue at hand as follows in paras [24] to [25]:

> "[24] … The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of

[5] 2014 (3) SA 189 (GJ)

entitlement has been created, absent from the *South Cape* test. Two distinct findings of fact must now be made, rather than a weighing-up to discern a 'preponderance of equities'. The discretion is indeed absent, in the sense articulated in *South Cape.* What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so-called 'fact' of 'irreparability'.

[25] Turning to the circumstances of these litigants, what is relevant, in my view, is the following:

- If the order is not put into operation, the relief will, regardless of the outcome of the application for leave to appeal, be forfeited by Incubeta because the short duration of the restraint will expire before exhaustion of the appeal processes.
- The only value in the relief is to stop the breach and protect legitimate interests during the precise period of the next four and a half months. Unrebutted evidence in the affidavits alleges a breach is taking place at this very time.
- Damages are not an appropriate alternative remedy precisely because the very relief obtained is posited on the absence of such a remedy being available. This places a restraint interdict in a different position to other forms of relief, such as money claims, where the aspect of irreparable harm is a factor extraneous to the substantive relief procured.
- Ellis will, on the probabilities, be without work for four and a half months and without pay. This will be financially detrimental.
- Significantly, no allegation is made that Ellis or his family will endure true hardship during this short period.
- If the appeal is won, Ellis' loss of earnings can be sued for, and the quantum is feasible to compute, including the loss of interest or lost-opportunity cost of being out of funds, and any such interest expended on borrowing for living expenses, if necessary.

- Moreover, security under rule 48(12) is available."

[32] *Incubeta* shows that what is required is an assessment of the effect of the suspension of a judgment appeal against on the rights asserted by the parties, namely the right asserted by Incubeta that Ellis should be restrained versus the right asserted by Ellis that he should be allowed to work for an employer of his choosing. That assessment is done in two postulated outcomes of an appeal: the effect on Incubeta if the judgment is suspended and the appeal is dismissed and, so far as Ellis is concerned, the effect on his rights if the judgment is carried into effect and the appeal is successful.[6] The converse postulate does not arise. It is not relevant to consider the effect of the suspension of the judgment if the appeal is successful and it is not relevant to consider the effect of giving effect to the judgment and the appeal is dismissed. If the judgment is overturned on appeal, then there is no divergence from justice if the judgment is suspended in the meantime, because then should not have been a judgment in the first place. There is only a potential divergence from justice if a judgment that should not have been granted, is carried into effect while an appeal is pending. There is also only a potential divergence from justice if an appeal is dismissed and the judgment is suspended in the meantime. Section 18(3) is concerned with the aberration that results either from giving effect to a judgment that is overturned on appeal, or not giving effect to a judgment that is upheld on appeal.

[33] It is therefore essential to in the first instance identify the rights asserted by the applicant and the second respondent. In *B v S*[7] Howie JA found:

> "The *dicta* in these cases are clear and persuasive. They show that no parental right, privilege or claim as regards access will have substance or meaning if access will be inimical to the child's welfare. Only if access is in the child's best interests can access be granted. The child's welfare is thus the central, constant factor in every instance. On that, access is wholly dependent. It is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be

[6] *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA) at paras [10]–[11]*; Knoop NO v Gupta (Execution*) 2021 (3) SA 135 (SCA) at para [48]
[7] 1995 (3) SA 571 (A) at 581J – 582A

granted. Essentially, therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent."

[34] The Children's Act 38 of 2005 speaks of parental responsibilities and rights (sections 18 to 21) but that does not change the fundamental nature of the rights of the minor as described in *B v S*. In substance, the applicant and the second respondent therefore do not assert their own rights. They are asserting what they perceive to be the rights of the minor. This means that section 18(3) must be applied to the rights of the minor, not the rights of either the applicant or the second respondent. For section 18(3), the question is whether a suspension of the first judgment will result in irreparable harm for the minor if: (a) the first judgment is suspended and the second respondent's appeal is dismissed; and (b) the first judgment is carried into effect and the second respondent's appeal is successful.

[35] For purposes of the section 18(3) application, the evidence on the current state of the Durban home and that, until the renovations to it are complete, the applicant will stay with the minor in the cottage, is squarely before me. As I found above, the cottage, while certainly the lesser home compared to the Durban home (once the renovations are complete), is nonetheless adequate. However, the applicant has not provided the address of the cottage. Its precise location is however not relevant. The only extent to the which the location of the cottage could be relevant, is if it could compromise the minor's school attendance and so forth. I intend to deal with this aspect in the order that I will make.

[36] If the first judgment is suspended, then the minor will remain in Johannesburg until the appeal is decided. The applicant made it clear that she will not move to Durban if that means that she cannot make the move without the minor. What these consequences will be for the minor were considered in the first judgment and are therefore not repeated here. The question I am not concerned with is whether those consequences will amount to irreparable harm if the second respondent's appeal is dismissed. In my view, if that were to happen, it will, on a balance of probabilities, amount to irreparable harm to the minor.

[37] If on the other hand, first judgment is carried into effect, the minor moves to Durban with the applicant and it is ultimately found that she should have stayed

in Johannesburg with the applicant, then what falls to be assessed is the consequences for the minor. So far as the minor is concerned, if the first judgment is carried into effect, she will still enjoy contact with her father, however it will then require either him or her traveling between Johannesburg and Durban. The second respondent's contact with the minor will be affected, about that there can be little doubt. However, the extent to which it will be affected, in my view, although not insignificant, is a quantitative difference, not a qualitative one.

[38] It therefore comes down to this: if the minor were to remain in Johannesburg with the applicant, and it is ultimately found that she should have moved to Durban, it will have severe consequences for her, that will, on a balance of probabilities result in irreparable harm to her. If she were to move to Durban and it is ultimately found that she should have stayed in Johannesburg, then the consequences for her, while not insignificant, will not, on a balance of probabilities, result in irreparable harm to her.

[39] That leaves the requirement that exceptional circumstances must be present. To my mind, it will amount to exceptional circumstances of the minor is exposed to the kind of harm that will result if she is to remain in Johannesburg pending the outcome of an appeal against the first judgment. If the first judgment is suspended, it will be against the best interests of the minor, for the reasons set out above. As the interests of the minor are paramount, in terms of section 28(2) of the Constitution, any order that I may make that is against the minor's best interests must, categorically, be exceptional.[8] Here the second respondent's prospects of success on appeal is a relevant factor.[9] Having found that leave to appeal should be granted, it counts in the second respondent's favour, but not enough to disturb my conclusion that the section 18(3) application should succeed.

Costs

[40] Had it not been for the applicant's false evidence in her founding affidavit in the initial application, I would have been minded to make no order as to costs.

[8] *LB v MSB* Unreported GDP case number: 2023-046143 (31 July 2023) at para [17]
[9] *University of the Free State v Afriforum* 2018 (3) SA 428 (SCA) at paras [14] and [15]

However, whenever a deponent in an affidavit makes a false statement, knowing it to be false, it has implications for the effective administration of justice. Motion proceedings serve a useful function, but its functionality will be eroded if judges cannot take it for granted that deponents to affidavits take the oath seriously. That implies, to my mind, that the applicant's false evidence should have consequences, to not only discourage her from making the same mistake again but to also send an appropriate signal to other litigants. It is therefore appropriate that the applicant should be liable for the costs of all three applications dealt with in this judgment.[10]

[41] In the result I make the following orders:

(a) The application for the rescission of the judgment dated 8 April 2025 is dismissed;

(b) Mr H[…] is granted leave to appeal against the judgment dated 8 April 2025 to the Full Court of this Division;

(c) Pending the outcome of the appeal, the operation and execution of the judgment dated 8 April 2025 shall not be suspended;

(d) Pending the outcome of the appeal, Ms H[…] is to ensure that the minor child attends school and attends her reasonable extra-mural activities, so long as the minor child is fit to do so;

(e) Ms H[…] is liable for the costs of the application for the rescission of the judgment dated 8 April 2025, the application for leave to appeal against the judgment dated 8 April 2025 and the application in terms of section 18(3) of the Superior Courts Act 10 of 2013, including the cost of two counsel, with the costs of senior counsel on scale C, as between party and party.

---

[10] *Kernick v Fitzpatrick* 1907 TS 389; *Hulscher v Voorschotkas voor Zuid-Afrika* 1918 TS 542; *Heilig v African Export* 1928 WLD 44; *Naylor v Wheeler* 1947 (2) SA 681 (D); *Essop v Mustapha and Essop NNO* 1988 (4) SA 213 (D) at 224; *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at 1201J–1202B, 1204A–1207E

H A VAN DER MERWE

ACTING JUDGE OF THE HIGH COURT

Heard on: 23 and 25 April 2025

Delivered on: 29 April 2025

For the applicant in the applications for leave to appeal and rescission of judgment and for the second respondent in the application in terms of section 18(3) of the Superior Courts Act 10 of 2013: L Segal SC and Adv GT Kyriazis instructed by Farhan Cassim Attorneys

For the applicant in the application in terms of section 18(3) of the Superior Courts Act 10 of 2013 and the respondent in the applications for leave to appeal and rescission of judgment: Advv F Bezuidenhout and S Mabaso instructed by Joselowitz & Andrews Attorneys