IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO: 261/09

In the matter between:

G E

Applicant

And

L E

Responden t

Date of hearing: 30 April, 2009 Date of judgment: 14 May, 2009

Advocate J. M. v.d. Walt (Instructed by Currie and Sibandze Associate^) for the Applicant

Mr. Attorney B. Magagula for the Respondent

JUDGMENT

MASUKU J.

[1] Two principal questions arise for determination in this matter. The first is whether this Court is the proper Court

to determine the validity or otherwise of a notice of appeal filed in the Supreme Court against a judgment of this Court. Second, and in the event the Court finds in the negative on the first question, whether this is a proper case in which to grant the Applicant leave to execute a judgment, an appeal notwithstanding.

[2] There are, however, certain preliminary points of law raised *in limine* by the Respondent and with which I shall first deal. If I uphold any of them, then *cadit quaestio.* If not, it is then only that I shall be required to address the principal issues mentioned in paragraph [1].

[3] The Applicant is a male adult businessman, residing at Bahai., Ezulwini. The Respondent is an adult female currently resident at eZulwini. The two were joined in matrimony but are presently engaged in what appears from all accounts to be an acrimonious divorce. This acrimony has resulted in a number of legal skirmishes warranting the intervention of this Court. Central to the issues for

determination of the questions earlier mentioned is the custody of the parties' two minor children whose names do not appear in any of the papers before me.

The Applicant, has approached this Court on an urgent basis seeking the following relief:-

1. That the usual forms and service relating to the institution of proceedings and notice in terms of the High Court Rules 6 and 30 be dispensed with and that this matter be heard as a matter of urgency.

2. That the Applicant's non-compliance with the Rules relating to the above-said forms and service be condoned.

3. That the Respondent's Notice of Appeal filed on 3 April, 2009 under Supreme Court Case No: 15/2009 be set aside as an irregular step in that the judgment

appealed against is not appealable and/or not appealable without leave of the Supreme Court, such leave which has not been obtained, and that the notice therefore constitutes a nullity.

Alternatively

That leave be granted to allow the judgment of this above Honourable Court dated 18th March, 2009 under the above High Court Case Number 261/2009 to be carried into operation and effect and to be executed.

4. Costs of suit including the costs of Counsel as certified in accordance with High Court Rule 68 (2), such costs to be punitive costs on the scale as between attorney and own client, alternatively, costs *de bonis propriis.*

This application is a sequel to an Order granted by this Court relating to the custody of the minor children referred to earlier. To cut the matter to the chassis, it would appear that

the Applicant approached this Court on 29 January, 2009 for access to the minor children. A consent order was recorded in terms of which the applicant was granted access to the children every afternoon between 2.00pm and 5.00pm pending the outcome of an application in terms of Rule 43 of this Court's Rules.

It would appear that there are certain events that occurred and which are not material for present purposes which apparently constrained the Applicant to approach this Court yet again for the variation of the consent Order referred to above, pending the fmalization of the Rule 43 proceedings. That application served before Maphalala J., who in his judgment dated 18 March, 2009, in the main ordered that the parties should retain joint custody; that the children should stay with each parent for three consecutive days; that neither party may remove the children from the precincts of this Court's jurisdiction without the written consent of the other and that the children's passports should remain in the custody of the Royal Swaziland Police.

[7] By notice dated 3 April, 2009, the Respondent appealed against the judgment issued by Maphalala J. and on grounds that I need not advert to for present purposes. It is this notice of appeal that is subject to the attack in prayers of the Notice of Motion above. Shorn of all the frills, the foregoing constitutes the essential background. It should be noted however that I have on account of the live issues identified in paragraph 1, not found it necessary or desirable to enmesh myself in the myriad of factual disputes, allegations and counter-allegations, accusations and counter-accusations, which have rendered the papers fairly prolix and may be unnecessarily so.

[8] I presently turn to consider the points *in limine* raised by the Respondent in her answering affidavit. The points are (i) lack of urgency (ii) *res judicata;* and (iii) abuse of the Court process by the Applicant. I must mention that the latter point was not pursued by Mr. Magagula during the hearing. I shall, in consequence, say not

much about it, except to the extent that I may deem necessary or expedient.

Urgency

[9] Regarding urgency, it was the Respondent's contention that there was no urgency in the matter to require the abridgment of the Rules to the extent stipulated by the Applicant. In his application the Applicant contends that he and the children are confused for the reason that the effect of the notice of appeal (provided it is valid), is to stay execution of the order appealed against. As a result, he contends, there is no certainty as to what his rights to access the children are and that there were instances where he would expect to see the children but that would not eventuate. He contended that as a result he had not seen the children since 16 April, 2009.

[10] I will not belabour all the allegations made by the Applicant regarding urgency nor the contentions of the Respondent, on the other. I am of the considered view

that the Applicant has made out a clear case for urgency in his papers, justifying an abridgment of the Rules. I am, in particular, satisfied that he has sufficiently addressed the requirements of Rule 6 (25) (a) and (b) as enunciated by this Court's decisions, such as *Humphrey H. Henwood v Maloma Colliery and Another* Case No. 1623/93; *Megalith Holdings v RMS Tibiyo 199/2000 and HP. Enterprises Ltd v Nedbank.*

[11] I say so primarily for the reason that with the Respondent having filed its notice of appeal, the common law position is that the order or judgment appealed against is stayed. In the circumstances, there is no clear position as to how the issue of access to the children should be handled, hence the confusion alleged by the Applicant is understandable and unfortunately, it does not appear that the parties are able to sit down and come to an agreement on this issue in the interregnum.

[12] In the case of *B v B* 2008 (4) SA 535 (W), Mashidi J., who was confronted with a similar argument stated as follows at paragraph 23 page 542:-

> "It is trite law that the interests of minor children are of paramount importance. See in this regard *McCall v McCall* 1994 (3) SA 201 (c); and *F v F* 2006 (3) SA 42 (SCA) [2006] 1 All SA 571. A matter such as the current matter where there is need to remove uncertainty about the future, safety and well being of minor children, will always be urgent. See *Terblanche v Terblanche* 1992 (1) SA 501 (W). I therefore deemed it necessary to deal with this matter as one of urgency"

[13] Admittedly, the facts in the instant case do not resemble the dire ones that the, Learned Judge had to deal with. In that case there were allegations which placed the safety of children in jeopardy. In this case there is, however, a need, particularly for the Applicant, to have his mind set at rest pending the determination of the Rule 43 application and of course the appeal, as to the issue of access to the children. This is also important for the children to know and adjust

themselves accordingly. The anxiety caused by being uncertain as to if and when the Applicant will see the children is not in his or the childrens' interest. It was therefore necessary for the Applicant, as he did, to approach this Court on an urgent basis. I accordingly dismiss this point *in limine.*

[14] There is a wise injunction that was delivered by Erasmus J. *in J v J* 2008 (6) SA 30 (c) at 37 paragraph 20, where the Learned Judge said:-

> "As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. In *Terblanche v Terblanche* 11 (11) it was stated that when a court sits as upper guardian in a custody matter -
>
> > '...it has extremely wide powers in establishing what is in the best interest of minor or dependent children. It is not bound by procedural strictness or by the limitations of the evidence presented or contentions advanced by the respective parties it may in fact have recourse to

> any source of information, of whatever nature, which may be able to assist it resolving custody and related disputes.'
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> ... In *AD and DD v DW and Others* (Centre for Child Law as Amicus, Curiae; Department for Social Development as Intervening Party, 13 (13) the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be lield to ransom for the sake of legal niceties and held that in the case before it the best interests of the child' should not be mechanically sacrificed on the altar of jurisdictional formalism."

I am of the view that the above excerpts apply with equal force in this jurisdiction and that strict sterile legal formalism should not stand in the way of substantive justice when issues relating to the interests of minor children are being determined by the Court. If necessary, these must be relaxed to ensure that all unnecessary legal inhibitions and hurdles are removed in the Court's quest to establish the all-important question of the interests of minor children. This relaxation should, in my view, include application of the Rules relating to urgency as propounded in the aforestated cases.

Res judicata

[16] Regarding the issue of *res judicata,* the Respondent contends that the Applicant ought to be non-suited on the grounds that the relief he seeks presently, has already been dealt with in another application which was eventually settled *inter partes* on 9 April 2009. This argument necessarily requires that one adverts to the requirements for the upholding of the plea of *res judicata.* This will enable this Court to decide whether on the facts of the instant case, the Respondent's contentions are at all meritorious.

[17] This principle was dealt with admirably by Corbett J.A (as he then was) in *Evins v Shield Insurance Company Ltd* 1980 (2) SA 814 (A.D) at 835 in the following terms:

> "Closely allied to the 'once and for all' rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties or their privies, in regard to the same subject - matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio res judicatae vel litis*

> *finitae.* The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions."

[18] In the Zimbabwean case of *De Klerk and Others v Makvura* 1992 (1) ZLR 73 (H) Chambakare J. quoted with approval the works of Spencer Bower *On Res Judicata,* as cited in *Schitnellens v Rondalia Assurance Corporation of SA Ltd* 1969(1) SA 517, where the application of the principle was summed up in the following graphic fashion:-

> "Where there is substantially one cause of action and it is not a case of splitting separable demands but at splitting into two quantitative parts, the plea is sustained. In homely phrase, a party is entitled to swallow two separate cherries in successive gulps, but not to take two bits at the same cherry. He cannot limit his claim to a part of one homogenous whole, and that the inseparable residue as available for future use, like good parts of a curate's egg."

[19] What emerges from the foregoing authorities is that for this plea to be sustained, there must be a final judgment which I must add, must have been on the merits, issued by a

competent Court between the same parties, regarding the same subject-matter and based upon the same cause of action. There is, however, authority brought to the Court's attention by the Respondent's attorneys that a *transactio* which is claimed to have taken place, does found a competent plea of *res Judicata.* See Amler's Precedents of Pleadings, by Harms *et al,* page 84; *Gollach & Gomperts v Universal Mills & Produce Co. 1978 (1) SA.914 at 922 B and Georgias v Standard Chartered Finance Zimbabwe Ltd 2000 (1) S.A. 126 at 139.*

[20] I have looked at the Notice of Motion related to the matter i.e. annexure "L.E.I" to the Respondent's affidavit and the Order issued by the Court in respect of that Application.

What is significant is that the notice of motion in that application is strikingly akin to the present one. The Order issued by the Court pursuant to that application, however, dealt with the issue of access to the children.

It would appear to me that the Court did not deal with the issues raised in the papers but with the consent of the parties, granted an Order relating exclusively to the issue of access to the children. I do not think that it is correct for the Respondent to state that the matter has been settled in it's entirety on that day. This is borne at by the fact that the issues brought before Court and on which an Order was sought were not deliberated and the Court issued an consent Order unconnected to the issues raised for the Court's determination. Furthermore, there is no memorandum or memorial signed by the parties which would show that there was an agreement *inter partes* to settle the issues brought before Court.

[22] In the *Gollach* case *{supra),* Miller A.J.A, in defining the word "*transactio*", referred to *Cachalia v Harberer & Co.* 1905 T.S. 457, where the definition was accepted as given by Grotious i.e. 'an agreement between litigants, for settlement of a matter in dispute.' (Emphasis added). The definition is expanded to include settlement of issues between parties who are not litigants and even agreements on doubtful

matter arising from the uncertainty of pending conditions even though no suit is then in being or apprehended.

[23] In the *Georgias* case *[supra),* at page 138, Gubbay C.J. had this to say regarding a *transactio* at I - J to page 139 A:-

> " Compromise or *transactio* is the settlement by agreement of disputed obligations, or of a lawsuit of which in uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something - either dimishing his claim or increasing his liability ... The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved."

Regard had to the foregoing, it would appear to me, from the papers that the agreement, recorded in the consent order did not relate to the settlement of issues in dispute. I say so for the reason that the issues in dispute related to the appealability of the Order in question; the propriety of the notice of appeal and

the leave to execute judgment. None of these issues were dealt with by either the parties or the Court and this much is clear from the consent Order. The Order had nothing, in my view, to do with the live issues then before Court. In the premises, I am of the view that the plea of *res judicata* is, in the circumstances, inapplicable and is therefore dismissed.

Abuse of Court's Processes

Regarding the allegation that the Applicant is abusing the Court's processes and ought therefore to be non-suited, the

Respondent alleges in the main that there has been a flurry of Court applications brought against him by the Applicant and the family company since 27 January, 2009. She contends that these were aimed at forcing her to give up the children and her interest in the said company. The Respondent contends further that at the time this present application was launched, the Applicant was fully alive to the position that he would have access to the

children every alternative weekend or every afternoon from 2 pm until 5 pm. (Emphasis added).

Whereas I am not qualified to comment on whether or not the previous applications did amount to an abuse of this Court's process, and I need not, it will already have been clear from my treatment of the urgency issue that it was necessary for the Applicant to obtain certainty regarding his access to the children. Clearly with the notice of appeal staying execution, the Applicant did need to have clarity on the issue of access. It is also worth considering that his application, in the alternative, is to apply for the judgment of this Court to operate pending the appeal. This, in my view, was a necessary step. Had he not brought this application, he may well have been compelled to take the law into his own hands, which would be an ugly and unwelcome spectacle.

I should mention that the confusion that must have confronted the Applicant in the exercise of his rights to access, which I must mention, can not be properly said to have been taken away by the

notice of appeal, is evident in the Respondent's own averments. It is for that reason that I underlined the or in paragraph 21 above. This illustrates that the position is not clear cut and demanded this Court's attention which could only be obtained through an application. I again come to what I consider an inexorable conclusion that this point of law is devoid of merit and ought to be dismissed. As indicated earlier, Mr. Magagula did not persist in arguing it during the hearing.

[28] Having determined the points of law *in limine,* I now proceed to deal with the prayers sought by the Applicant *ad seriatim.*

Validity of Notice of Appeal

[29] Principally, the Applicant requires of this Court to declare the notice of appeal filed by the Respondent dated 4 April, 2009, an irregular step or proceeding for the reason that the said notice was filed by the Respondent without leave from the Supreme Court, notwithstanding that the judgment appealed

against is not final and is therefore not appealable as of right.

[30] I do not find it necessary for the present purposes to enter the arena and to engage in the legal gymnastics of deciding whether the judgment appealed against is final or interlocutory regard had to section 14 of the Court of Appeal Act, 79 of 1972. The immediate question for determination is whether it is within this Court's province to determine the status of the said Notice of Appeal. Put differently, is the question of the validity of the said notice of appeal not one to be determined by the Supreme Court to which the appeal has been noted?

[31] Ms. Van der Walt helpfully referred to a number of judgments in a quest to assist this Court in resolving the quandary. The first judgment the Court was referred to is local. It is my judgment in *Joncon (Pty) Ltd v Barlows* (Pty) *Central Finance Corporation Ltd t/a B.R.L Leasing* In *re: Barlows Central*

Finance Corporation (Pty) Ltd t/a B.R.L Leasing v Joncon (Pty) Ltd, Case No. 2491/99 delivered on 20 March, 2000.

[32] One of the issues which fell for determination in that case was the issue of the appealability or otherwise of a ruling issued by the Court as of right. I considered the provisions of Section 14 in great detail and further considered a number of judgments especially from the Republic of South Africa. At the end of the judgment, I found that the decision of the Court in that matter was interlocutory and was therefore appealable only with the leave of the then Court of Appeal, which it was common cause had not been applied for. I consequently held that no proper notice had been filed in that matter.

[33] The important issue to note regarding that case is that the question that I am grappling with presently was not raised, *viz* whether it was within this Court's power to make the declaration of validity. For that reason, the Court proceeded

to make the declarator assuming that it did have the power. I am also aware of a judgment by Dunn J. in which I featured as Counsel in the matrimonial case of *Van Ryswyck v Van Ryswyck* (unreported), where the Court issued a similar Order. Again, the question of the Court's competence to entertain that question was not investigated. I am of the opinion that I may not proceed to issue the declarator in the instant case only for the reason that this has been done before, particularly because the question of the Court's competence, though raised *mero motu* by the Court, has come up for determination.

[34] I should say that it would appear that the question of this Court's competence to determine the issue did to some degree torture Ms. Van der Walt's mind, hence the Applicant was made wise by applying for the alternative Order perchance the Court found that it did not have the competence to issue the declaration sought.

[35] The relevant provision for the proper determination of the issue, as I see it, is Section 14 (1) of the Court of Appeal Act *[supra),* and which has the following rendering:-

> "An appeal shall lie to the Court of Appeal -
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> (a) from all final judgments of the High Court and
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> (b)by leave of the Court of Appeal from an interlocutory order, an order *made ex parte* or an order as to costs only."

What is abundantly obvious, from the nomenclature employed, is that whereas the appeal noted is against a judgment of this Court that appeal is directed to and lies with the Court of Appeal, which is now referred to as the Supreme Court, in line with the Constitution of Swaziland Act, 2005.

For that reason, it would appear on first principles that this Court ordinarily has no business in deciding on any matter which is placed before the Supreme Court on appeal. That appeal, lying as it does with the Supreme Court, it is my view that it is that Court that should deal with the issue of the validity or otherwise of any

notice or document by which an appeal is noted. In like manner, where the appeal lies with leave of the Supreme Court, it is to that Court that the application is made. It is also that Court that for instance will decide whether or not a proper notice has been filed; whether it has been filed timeously and would consequently deal with issues of condonation for late filing e.t.c.

[37] The only situation I can possibly conceive where this Court may have to deal with the issue of the validity of the notice is in respect of matters which come before it in its civil appellate jurisdiction as envisaged by section 15 of the Court of Appeal Act or in its criminal appellate jurisdiction as provided in section 4 (2) (b) of the said Act. It is my considered opinion that in every other respect, the question of the validity or propriety of notices of appeal must be left to the Supreme Court to decide. If not, then this Court could be correctly accused of arrogating to itself the powers, duties and responsibilities of the Supreme Court, thus blurring the necessary and desirable lines of demarcation between the

powers, jurisdiction and authority of this Court and the Supreme Court.

[38] I am of the considered opinion that once, this Court has finally pronounced on a matter in its original jurisdiction it has thus fully and finally exercised its jurisdiction and is thereby rendered *functus officio.* It may not thereafter be roped in to make any determination on the appeal against its judgment, save the exceptions carefully stated in the celebrated case of *Firestone S.A (Pty) Ltd. v Gentiruco A.G.* 1977 (4) SA 298 (A).

[39] Before delivering judgment, I fortuitously stumbled on a judgment in *Winnie Muir v S.C. Dlamini & Others* Civil Case No. 3692/02, where I dealt with this very point and came to the same conclusion as I did in instant case. At page 4 of the *Muir* judgment, I said the following:

> "Having established the foregoing, the question to be determined at this juncture is whether in view of the obvious irregularity

committed by the Defendants in noting the appeal without the necessary leave from the Appeal Court, this Court is competent to set aside the purported Notice of Appeal.

I am of the view that this is an issue that must be left for determination by the Appeal Court. By filing a Notice of Appeal, it becomes clear that this Court thereafter becomes *functus officio* in relation to the question to which the appeal relates, no matter how glaring the irregularity may appear to a Judge of this Court. It would in my view amount to a usurpation of the power, jurisdiction and authority of the Appeal Court for this Court to pronounce on the validity or otherwise of appeals already noted.

It is also worth remembering that the word "Court" occurring in Rule 30 (3) is described in the interpretation as referring to this Court. It is therefore clear that the Rules of this Court govern the procedure of this Court in as much as the Appeal Court has its own Rules governing the procedure of that Court. It would in my view be absurd for this Court to use its Rules to set aside proceedings, not only before another Court, but before a higher Court.

One cannot help but sympathise with the Plaintiff in this case, particularly in view of the situation which presently prevails where we have no Appeal court as aforesaid and it is not clear when normalcy will in this regard be restored. Such issues could have been easily disposed of by the Court."

[40] Rule 30 (1), in terms of which this application is brought, subject of course to the abridgment sought by the Applicant and granted by this Court as seen from the dismissal of the point in *limine* regarding urgency, provides as follows:-

> "A party to a course in which an irregular step or proceeding has been taken by another party, may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceeding.
>
> Provided that no party who has taken any further step with knowledge of the irregularity shall be entitled to make such application."

It is in my view clear that the relief this Rule as applied in the instant case is available to a party in respect of a step or proceeding which is taken in a cause pending before that Court. For that reason, it is clear that this Court exercised its jurisdiction in this matter and that the step that was taken is alleged to be irregular, is one taken before the Supreme Court and not before this Court. For that reason, it must be the Supreme Court that should properly deal with the Rule 30 application in the circumstances.

Ms Van der Walt, helpfully referred the Court to the judgment of the Full Bench of the Transvaal Provincial Division in *South African Druggists Ltd v Beecham Group pk*

1987 (4) SA 876 (T), where Eloff D.J.P. stated the following at p. 881:-

> "In my view the jurisdiction of this Court to entertain the application flows from the provision of Rule 30 (1) which gives 'any party to a cause in which an irregular or improper step has been taken by any party' the right to apply to this Court to set it aside. The filing of a notice of appeal is a step in the cause in this Court.... And this Court may deal with it. Different considerations may arise if the appeal is prosecuted... but until it is prosecuted the following *dictum* by Colman J. in *D & H (Pty) Ltd v Sinclaire* 1972 (1) S.A. 157 (W) at 158 E.G with which I respectfully agree, applies:-
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> > 'In the present case the appeal has not yet been prosecuted, still less set down for hearing and that, to my mind, is a distinguishing feature. The notice of appeal has of course become seized with the matter. In view of the fact that the ruling of an appeal stays execution, it will sometimes be a matter of importance to the party who has been successful at first instance that he be able to approach some tribunal urgently with an application to set aside the notice of appeal if it is defective. It seems to me that pending prosecution of the appeal, the

> only tribunal which can entertain such an application is the
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> > Court in which the notice of appeal was filed."

[42] In the context of the South African Courts, the judgment of course makes a lot of sense. This is because there, it would appear that at least some appeals from a single Judge of the Division concerned are placed on appeal before a Full Bench of that Division. This is not the case in Swaziland and Ms. Van der Walt drew the Court's attention to this important difference. It therefore becomes clear that in the *South African Druggist* case *(supra),* the notice of appeal was lodged with the High Court hence the Full Bench it found itself properly placed to deal with the defect alleged in the said notice. In our situation, however, as pointed out earlier, the notice is filed with the Supreme Court, which is the proper Court that should deal with any irregularities or defects alleged.

[43] There is probably a lot to be said for the view expressed by Colman J. in the *Do It (Pty) Ltd* case *[op cit)* that it is at times

a matter of some importance for the successful party to be able to bring the issue of a defect in the notice to a tribunal urgently. Unfortunately, in this jurisdiction, all matters, including those for leave to appeal, are to be placed, according to the Court of Appeal Act, before a Bench of three Supreme Court Justices.

It is perhaps high time, particularly as we now have a resident Chief Justice, to allow him or any other available Justice of the Supreme Court, to hear such applications and those relating to leave to appeal, as a single Judge. In this way, some urgent matters in which parties' rights are affected may be resolved with relative promptitude and these parties would not have to wait, as the present practice is, for the Court to convene during the stipulated sessions. I would accordingly recommend that the relevant provisions of the Court of Appeal Act (op *cit),* and to the necessary extent, those in the Constitution, be amended in order to cater for these situations and to deliver justice to deserving litigants swiftly. I say this for the reason that the present position

may work grave injustice and inconvenience to the successful party at the hands of the unsuccessful party, who may seek to abuse the process of the Court by filing a spurious notice of appeal, knowing full well that there are no prospects, taking advantage of the fact that the Supreme Court does not sit regularly.

[45] Before I finally leave this subject I have yet one other argument by Ms. Van der Walt to consider. She cited with approval the judgment of *J. v J. [supra]* in particular, to which I referred earlier, where it was opined that in dealing with interests of minor children, Courts must not be bound by sterile legal formalism and be "held to ransom for the sake of legal niceties". It was her submission that regard being had to the interests of the minor children, and the symbiotic need for the children and father to have certain times to meet as determined by the Court in the interregnum, this would be a deserving case where this Court should, notwithstanding the earlier finding, that this is properly a matter for the Supreme

Court, deal with the matter and deliver justice to the Applicant and the children.

[46] This argument is fairly persuasive and compelling. That, however, is not the criterion if that will at the level of substantive and not just procedural law, be *ultra vires.* I understand the Court in the *J v J* case *[supra),* to be dealing with issues of procedure and how the rights and interest of minors may be sacrificed at the shrine of legal formalism, particularly on procedural issues. I understand this to mean that the Court though having jurisdiction, may have some entrenched legal hurdles in its way and which prevent it from rendering justice to whom justice is due. I do not, however, understand this judgment to mean that this Court should venture into matters that are, in terms of legislation the sole preserve of the Supreme Court. That would be the result if I acceded to this argument.

[47] I should also mention in this connection that the Applicant is not rendered bereft of a remedy in the event that this Court

does not agree with him on this score, as is presently evident. There is still the alternative prayer to consider which may, depending on whether the Applicant is able to satisfy its requirements, deliver the justice on entire conspectus of all the relevant facts, circumstances and the law applicable. Having considered all the arguments so ably delivered by Ms. Van der Walt, it is my considered conclusion that this Court does not have the jurisdiction to grant the order prayed for in prayer 3. That is the exclusive preserve of the Supreme Court.

Application to execute judgment

I now turn to the Applicant's alternative prayer that this Court should, notwithstanding the notice of appeal, grant the Applicant leave to execute the judgment. It should be recalled that Rule 40 of the Court of Appeal Rules, 1974, which prescribed that the noting of an appeal does not operate as a stay of execution or proceedings was deleted *vide* Legal Notice No: 32 of 1999. The

said amendment, in the circumstances, reinstated the ordinary common law position to the effect that the noting of an appeal serves to operate as a stay of execution. The onus is then thrust on the successful party to apply for leave to execute the order or judgment. I use the word onus without diffidence as this was found to be the appropriate term in *Southern Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* **c**/at 546.

The leading authority on the requirements for such an applicant to succeed in executing the judgment is the high watermark case of *Southern Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A). At 545, Corbett J. A. (as then was) after a scholarly analysis of a numerous cases and other writings, concluded that in cases where the Court is urged to execute a judgment, it exercises a wide discretion to grant or refuse leave. In the event it does grant the leave to execute, it is entitled to determine the conditions upon which such right shall be exercised.

[50] The Learned Judge of Appeal further held the following on the same page:-

> "In exercising this discretion the Court should, in my view determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia,* to the following factors:
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> > (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> > (2) the potentiality of irreparable harm being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be granted;
> > (3) the prospects of success on appeal, including more particularly the question whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or haness the other party; and
> > (4) where there is potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

[51] The stage is now set for the Court to decide, regard had to all the circumstances of the case at hand, whither the interests of justice lie; put differently, what course appears to be most consistent with real and substantial justice in the circumstance? I am of the opinion that on the facts, and I deal with the first two requirements jointly, the potentiality of irreparable harm to the Respondent is negligible if leave to execute was to be granted. On the other hard, the potentiality of irreparable harm that would eventuate to the Applicant is great if leave to execute was to be refused.

[52] I say so for the reason that in the context of this case, the Applicant is in a situation where he and the children are uncertain as to the number and times for access. This, in my view, does not auger well for the development of the father - child relationship, which should be encouraged notwithstanding the fact that the marital ship is treading on less than tranquil waters. A situation which ferments

bickering and argument on this very important issue should in my judgment be avoided.

[53] There was nothing substantial or convincing said for the Respondent to show that the granting of the application for leave would deal her interests a shattering blow. In point of fact, Maphalala J. sought, it would seem, to issue an order that is as balanced as possible considering that joint custody was issued. It does not lie within my domain though to say whether or not he was correct in so doing. By noting the appeal, the Respondent contends that the Learned Judge erred and it is the Supreme Court that shall ultimately have to deal with that question.

[54] I am of the view that access of the Applicant to the children will benefit both him and the children and there is no reasonable suggestion as to how the access granted by Maphalala J. would negatively affect the Respondents or the minor children. Children are not a commodity that is likely to

depreciate to the Respondent's prejudice if leave to execute is granted. The certainty of the access issue would serve in my judgment to sufficiently maintain the link the children should have with both parents.

[55] Turning to the question of prospects of success, I am, to a limited extent, allowed to do what I could not do in relation to prayer (3) i.e. to comment on the validity of the notice of appeal, an issue inextricably intertwined in my view, with the issue of prospects of success. The issue of prospects of success in this case will be based mostly on procedural than substantive law matters.

[56] It is clear from the judgment of Maphalala J. that the Order he issued and which is appealed against, was granted in full appreciation that there was still pending for this Court's determination of the Rule 43 application. It was in that spirit that the Learned Judge concluded his judgment by saying, "I wish to comment *en passant* that the Rule 43 application

should be enrolled for arguments as soon as possible to safeguard the interests of the minor children."

[57] This therefore makes it clear that the judgment or ruling by the Learned Judge was interlocutory in nature and effect and is therefore not appealable without leave of the Supreme Court, and which it is common cause, has not been sought or obtained. This suggests to my mind that the appeal is unlikely to succeed for procedural matters. I cannot comment on the merits in view of the clear procedural challenges the said notices poses.

[58] The Respondent has cited certain cases, including *Edwards v Edwards* 1960 (2) SA 523 and *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) for views which appear to criticize the propriety of joint custody which it is common cause, was granted by Maphalala J. in his aforesaid Order. Whatever the criticism of such Orders, justified or not, it would appear to me that the cases referred to are cases where the Order relating to custody was final at the hearing of the divorce or

after. We have not reached that stage yet and the propriety of the Order can in any event, be dealt with on appeal, as the Respondent has noted an appeal or at the divorce trial.

In the instant case, it appears to me as I have said, that the issue of custody is to be dealt with during the Rule 43 application and settled finally by the trial Court when the divorce finally serves before Court. That the Order by Maphalala J. is and was understood to be interlocutory is even borne out by the Respondent's South African attorneys Shepston 8s Wylie in their letter dated 23 April, 2009. At paragraph 5.1, headed custody/access, they say:

> "5.1.2 the issue of custody/access and interim maintenance and a contribution towards costs will now be the subject of a fresh rule 43 application and that application will no doubt be opposed by Goveth which will result in a full hearing of same.
>
> 5.1.3 thereafter, once the interim position has been resolved the issue of custody/access will still have to be resolved by the trial court once trial dates are allocated, which we understand will be a long time in the future unless the court is prepared to

> grant us preference to have it heard sooner rather than later."

[61] The Respondent also sought to rely on the judgment of *Bashford v Bashford* 1957 (1) SA 21 (N) for the proposition that the Order of Maphalala J's is appealable without leave. Two things need to be said in that regard. That judgment was clearly based on section 3 (b) of Act 1 of 1911, which was subsequently amended.

[62] It has not been shown by the Respondents that the provisions of that Act is *in pari materia* with those of local Act. Secondly, a proper reading of the *South Corporation* case *[supra)* at page 551, reveals that the correctness of the conclusion in *Bashford* on this issue, was to say the least, doubted by Appellate Division.

[63] I therefore maintain that the Order granted by Maphalala J. was, in the circumstance interlocutory and therefore not appealable as of right. It is also clear from Rule 43 of this Court's Rules, once the matter is properly dealt with in terms

thereof, that the Court may vary its decision in terms of Rule 43 (7) thereof.

[64] Regarding the balance of hardship or convenience, it would appear to me that if leave was not granted, the Applicant would have to wait until the Supreme Court's sitting in the latter part of the year and the extended period of uncertainty does not do the interests of the minor children a world of good. It is also doubtful whether this Court can, in order to ameliorate the harm, properly deal with the Rule 43 application in so far as it pertains to the issue of custody whilst the appeal awaits prosecution before the Supreme Court.

[65] In all the circumstances, it would appear to me that the interests of justice lie in favour of leave to execute being granted in this case. I shall, however, refrain from commenting generously on the question of the *bona fides* of the Applicant in lodging the appeal and whether or not the

appeal is frivolous or vexatious. Having said the above, I cannot help but note that to appeal against a judgment which is clearly interlocutory, as if it was one as of right, speaks volumes about the Respondent's *bona fides.* Obtaining leave would probably have done her interests no harm. The conclusion of lack of *bona fides* in noting the appeal appears irresistible in the circumstances.

[66] On the question of costs, I have been urged to mulct the Respondent with costs on the punitive scale, alternatively *de bonis propiis* on the same scale. I do not find it appropriate to do so in the instant case. There are relationships to be fostered in this matter and it is my view that this is not a case in which a punitive costs order would serve a legitimate purpose. I also do not find it in order to mulct costs *de bonis propiis* against the Respondent' attorneys, appreciating as I must that Mr. Magagula joined the ship when it was already on the high tempestuous seas.

[67] In the premises, I grant the following relief:

67.1 The application to have the notice of appeal dated 4 April, 2009 set aside as an irregular step or proceeding and therefore a nullity be and is hereby dismissed.

67.2 The Applicant be and is hereby granted leave to execute the judgment of this Court, dated 18 March, 2009 pending the hearing of the appeal by the Supreme Court.

67.3 The Respondent be and is hereby ordered to pay costs of this application on the scale between party and party, such costs, to be certified in accordance with High Court Rule 68 (2).

DELIVERED IN OPEN COURT ON THIS THE 14th DAY OF MAY 2009.

T.S. MASUKU
JUDGE

Messrs. Currie & Sibandze Associates for the Applicant

Messrs. Cloete - Henwood - Dlamini - Magagula Associted for the Respondent