REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: A 244/2015

SAMANTHA BAILLIE MOOR **APPLICANT**

And

JOHAN HENDRIK McDONALD **1ST RESPONDENT**

MARTIE McDONALD **2ND RESPONDENT**

Neutral citation: *Moor v McDonald* (A 244-2015) [2015] NAHCMD 261 (04 November 2015)

Coram: GEIER J

Heard: **07 October 2015**

Delivered: **04 November 2015**

Flynote: Appeal – Leave to appeal - Against order directing the enrolment of the parties' minor children in the hostel of a private school pendente lite – Held that such order was akin to a ruling and thus not appealable even with leave as it was not final in effect and was always susceptible to alteration by the court of first instance or the Children's Court; such order also not definitive of the rights of the parties and did not have the effect of disposing of, at least, a substantial portion of the relief claimed in the main proceedings in the Children's Court. Application for leave to appeal accordingly dismissed with costs.

Summary: The facts appear from the judgment.

ORDER

The application for leave to appeal is dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel.

JUDGMENT

GEIER J:

[1] The first respondent to this urgent application for leave to appeal had himself, a few days earlier, brought an urgent application, seeking the interim variation of an agreement concluded with the applicant governing the custody and maintenance of the parties' three minor daughters, pending the institution and finalisation of an application in the Children's' Court, through which he had sought the interim placement of the two younger children into the custody and care of their paternal grandmother as well as their immediate enrollment and placement into the Edugate Academy and hostel in Otjiwarongo.

[2] After heated exchanges and argument wiser counsel prevailed and the parties were able agree on most aspects that would now - pending the outcome of the proceedings to be instituted in the Children's Court - regulate the affairs of their minor children on an interim basis.

[3] More particularly the parties had agreed that custody and access to their children would, in essence, continue to be regulated in terms of their original agreement, as concluded on 19 September 2013. This meant that the applicant would, for the meantime, retain custody of the children.

[4] In addition the parties specifically also agreed - which agreement they asked to be embodied in the courts order - that:

> '1. The status quo pertaining to Jessica Patricia McDonald, the parties' eldest daughter, remains, that is to mean that Jessica will be allowed to complete her schooling at Edugate Academy in Otjiwarongo,
>
> **1.** The two younger children of the parties [K……..] [M…….] [M…….] and [S…….] [S…….] [M……..] are to remain enrolled at the Windhoek Afrikaanse Privaatskool (WAP),
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> **2.** The access to all the aforesaid minor children of the parties is restored to the applicant with immediate effect.'

[5] The parties also gave each other certain undertakings which they asked to be recorded. These undertakings where aimed at ensuring the emotional wellbeing of the children and at reducing their exposure to parental conflict.

[6] The only issue on which the parties could not agree was whether their two younger daughters, K and S, should also - and in the interim - be placed in the WAP hostel, during weekdays – The parties thus where *ad idem* that the court determine this aspect, as the only outstanding issue, for them.

[7] After hearing argument on this limited issue the court ordered, on 21 September 2015, that the two younger children of the parties, K and S, be enrolled in the hostel of WAP as of 28 September 2015, as the court considered and found that this would be in the best interest of the two younger children, as this would remove them out of the middle of the parental conflict.

[8] The applicant reacted to this ruling by launching her own urgent application on 25 September 2015. In this application she now sought the committal of the 1st respondent for contempt of court, as well as certain protection orders against him, including orders that the respondent's rights of access to his children be removed forthwith. She also requested that her application for leave to appeal the court's order of 21 September 2015 be heard on an urgent basis, at the same time seeking the suspension of the court's order pending the finalization of the appeal.

[9] This second urgent application was heard on 30 September 2015.

[10] This application had in the meantime become opposed in which, by way of a counter application, the first respondent, inter alia, also similarly sought the committal of the applicant for contempt of court, as it had become clear by then that the applicant had not enrolled K and S at the hostel at WAP, as ordered and that she had also not complied with the access arrangements, as ordered, by refusing the first respondent access to his children altogether.

[11] Due to the applicant's blatant non-compliances with the court's order - and for the reasons contained in a separate judgment - the court insisted that the applicant first comply with the court's orders, before she would be heard. Her urgent application was thus struck from the roll until such time that she had purged her contempt. The court however allowed the applicant to proceed with her case, on condition that she first provide proof, on affidavit, that she had complied with the court's order of 21 September 2015.

[12] The applicant subsequently removed the obstacle, which had so prevented

her from being heard, by filing the requisite affidavit, on the afternoon of 06 October 2015, after 16h00, in which she now confirmed the enrolment, and placement, of K and S, in the hostel, as of 05 October 2015.

[13] This then cleared the way for the hearing of the applicant's application for leave to appeal on an urgent basis on the following morning.

[14] It should be mentioned that the parties had, in the interim, also agreed that their separate quests, to have each other committed for contempt of court and ancillary relief, be deferred for the moment in that such relief would now be sought in the normal course. In terms of this agreement the respondents also undertook not to oppose the issue of urgency, as far as this application for leave to appeal was concerned.

[15] It is against this background - and a further interlocutory episode - which delayed the hearing of this application - and which resulted in an adverse costs order against the applicant's legal practitioner of record - that his matter eventually became to be heard on 7 October 2015.

[16] Counsel for the applicant contended that the applicant could only appeal the court's ruling, to place the younger children, in the hostel at WAP, with leave.

SUBMISSIONS ON BEHALF OF RESPONDENTS

[17] Counsel for the respondents argued that the order of 21 September 2015, on the other hand, was not appealable as it did not have the hallmarks of an appealable decision. He relied in this regard on the Supreme Court decision of *Shetu Trading CC v Chair, Tender Board of Namibia,*[1] which had approved and applied the test formulated by the South African Appellate Division in *Zweni v Minister of Law and Order* [2] and from which case law it appears that an appealable 'judgment or order' has three attributes:

[1]2012 (1) NR 162 (SC)
[2]1993 (1) SA 523 (A)

‘ … it must be final in effect and not susceptible to alteration by the court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.’ [3]

[18] In written heads of argument it was submitted further that:

‘In light of this the immediate investigation at hand would then naturally have to be an analytical approach to the instant judgment in respect to the three attributes-

a) The judgment is not final as it operates in the interim pending the finalisation of the custody matter in the chilren’s court, therefore at the very least it is susceptible to change in that court. In any event the judgment operates *pendent lite* those proceedings. Section 5(1) of the Children Status Act, Act 6 of 2006 puts the above contention in perspective in that it provides as follows-

Despite anything to the contrary contained in any law, a children’s court may, if circumstances have changed, alter an order of the High Court pertaining to custody, guardianship or access made in connection with a divorce or in any other proceedings.

b) The judgment of 21 September 2015 is certainly not definitive of the parties’ rights, in that it only provides for an interim arrangement as to the access and living arrangements of the minor children. It is common cause that the right to custody of the minor children, which is the nub of the relief sought by the first and second respondent (in their application in convention) will only be decided in the children’s court. This court in its judgment of 21 September 2015 has not dealt with the issue of custody.

c) Finally it is clear that the relief sought in the main proceedings (those instituted in the children’s court) is that of custody and control of all three of the children. This court has not even dealt with that relief and has definitely not disposed of a substantial portion thereof.

For these reasons I submit that this is not an appealable judgment. In any event even if this court was to grant leave to appeal that does not mean that the Supreme Court will hear the appeal, in this regard the court in Shetu Trading CC went on to hold that-

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[3] *Zweni v Minister of Law and Order* at 531I – 533B

'The fact that leave to appeal is granted by a lower court does not put an end to the issue whether a judgment or order is appealable. The question of appealability, if an issue in the appeal, remains a question for the appellate court to determine. If it decides that, despite the fact that leave to appeal has been granted by the lower court, the judgment or order is not appealable, the appeal will still be struck from the roll.'

[19] During oral argument Mr Ravenscroft-Jones, for the respondents, re-emphasized that the order, in respect of which the applicant was seeking leave to appeal, did not fit the said set criteria for appealable judgments or orders. He pointed out that if the respondents would have failed to institute their intended proceedings in the children's court, the order of 21 September 2015 would, automatically, have lapsed. That order had also, and in any event, never finally varied the existing custody agreement of the parties, which continued to be in place, until such time that the Children's Court or the High Court would possibly change them. All that had been done was to regulate one issue on a temporary basis. The order of 21 September 2015, which might have restricted the custodian rights of the applicant temporarily, had however not been diminished otherwise. In any event, the order of 21 September 2015 was susceptible to alteration at any time by the High Court, also the Children's Court could change such order. He emphatically submitted that the order of 21 September 2015 had certainly not disposed of 'at least a substantial portion of the relief claimed in the main proceedings'.

SUBMISSIONS ON BEHALF OF APPLICANT

[20] Mr Mouton, in his heads of argument, filed of record, for the applicant, initially failed to address these aspects altogether.

[21] Subsequently, and during oral argument however, he addressed the three attributes relating to the appealability of an order or judgment, as again recognised in *Shetu Trading*. He submitted that the order of 21 September 2015 had diminished the custodian rights of the applicant, which rights had essentially been taken away from her and/or, at the very least, that such rights had been restricted dramatically.

He relied heavily on the South African case of *Van Oudenhove v Gruber* [4] where the Appellate Division had considered that the interim variation of a custody order enabling the father to take his children to Austria, for a year, was not the usual type of interim order, but was one which was, in essence, final in effect, and thus appealable with leave, as it had the effect of actually depriving the mother of access and as such order had also effectively negated her custodian rights to the children's education etc.. He submitted that that case was on par with the present one, as also the court's order, in this instance, had taken the applicant's rights, as far as custody was concerned, away altogether, so much so that she could not be called a custodian parent anymore. In any event, her rights had been definitively affected and therefore, and if I understand this argument correctly, he meant to contend that the order, enrolling K and S in a hostel, during weekdays, was also final in effect and thus appealable with leave.

[22] He submitted further that in this regard his client's prospects of success where good, especially if regard was had to the fact that the court had erred in taking Professor Naudé's expert report into account, and also if regard was had to the court's 'unreasonable refusal' to allow the applicant sufficient time to answer, and that therefore, in all of these respects, another court would come to a different conclusion.

THE GROUND OF APPEAL BASED ON THE COURT"S REGARD TO AN EXPERT REPORT POSSIBLY OBTAINED IN CONTRAVENTION OF A STATUTE

[23] After having listened to argument I have no hesitation to state immediately that the applicant may have a point regarding the court's finding made in regard to Professor Naudés report. That was a report seemingly obtained in contravention of Section 17 of the Social Work and Psychology Act, No 6 of 2004, which criminalizes the conduct and practising of certain persons not registered in accordance with the Act in Namibia.

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[4] 1981 (4) SA 857 (A)

[24] This court - for the reasons set out in its judgment - decided that it could legitimately have regard to the report – It is obvious that another court might very well have decided that it would- and could not have regard thereto as evidence, possibly obtained in contravention of a statute, – i.e that evidence possibly illegally obtained, for purposes of civil proceedings, would not be admissible, as this, for instance, might impact on a party's fair trial rights, as enshrined in the Namibian Constitution, which fundamental rights would obviously also govern civil proceedings.[5]

[25] What this seemingly good point crucially loses sight of is that the court - essentially and ultimately – always followed the alternative recommendation of the applicant's own expert, Mrs Vorback, when it decided that it would be in K and S's best interests to enroll them in the hostel of a private school in Windhoek, during weekdays, *pendente lite*. Prof Naude had recommended the return of K and S to the hostel of the Edugate Academy in Otjiwarongo for them *'to benefit from the therapeutic hostel placement'*. Mrs Vorback on the other hand, in response, had indicated that her preference was for the children to remain in Windhoek. This she expressed in her letter of 16 September in which she also offered an alternative proposal in this regard when she stated that *' in order to keep them out of the middle of the conflict an option might be to move them to a hostel in Windhoek, but keep them at WAP, where the children feel secure and happy and where they have a support system that is available to them.'*

[26] On analysis it appears that the court did not follow Prof Naude's recommenation to remove K and S from Windhoek to Otjiwarongo or to take them out of WAP in Windhoek in order to place them into the Edugate Academy in Otjiwarongo. It appears further that the court followed Mrs Vorbacks recommendations to keep the children in Windhoek and at WAP. The court found that the placement of K and S in the WAP hostel '… would – at the moment –and in the interim – be in their best interest – as this would keep them – as Mrs Vorback

[5]This was however not argued by the parties

has put it – 'out of the middle of the conflict' – which – in all probability will escalate again – … '.[6]

[27] The above analysis then reveals that the court essentially embraced the recommendations of the applicants own expert and that such decision was fortified only in a very limited respect by Prof Naude's recommendation to place the children in a hostel, in so far as this suggestion overlapped with Mrs Vorbacks hostel recommendation.

[28] It appears therefore and, although the court did have regard to Prof. Naude's report that such regard was of no real significance to the eventual outcome and the court's ultimate decision. In such premises it thus becomes unlikely that the court's regard, to a report, possibly obtained in contravention of a statute, would be such that it would enhance the applicants prospects of success in any material way or that another court might come to a different conclusion for that reason.

THE PROCEDURAL GROUND RAISED

[29] The procedural ground relied on is similarly not on a firm footing. The essence of that complaint was formulated by Mr Mouton as follows:

'His Lordship Mr Justice Geier unreasonably refused the Applicant sufficient time to prepare and answer to a 250 page Founding Affidavit whereas it is the duty of the Court in matters of this nature to make sure that all possible evidence are sufficiently before Court in order to be able to arrive at a valued and legally sound judgment. The insufficient time granted to the Applicant to have answered to the 250 plus page Founding Affidavit had the result that not all and/or insufficient evidence was placed before Court and the Court was consequently not in a position to have arrived at a judicially sound judgment. The Applicant clearly stated in her Answering Affidavit that she did not have sufficient time to have answered the allegations made in paragraph 28 of the Founding Affidavit yet the Court thought it wise to have relied on the uncontested allegations as stated in paragraph 28 of the Founding Affidavit. The Court consequently failed in its duty to have ensured that all issues were properly before Court, canvased before it gave an one sided judgment.'

[6]See judgment at [46]

[30] Counsel for the respondents, in reply, made the following submissions in this regard:

'In short the applicant complains that she was not able to effectively answer the respondents voluminous application in the time period that was afforded to her, from 16H30 on 15 September 2015 until 09H00 on 17 September 2015, which was essentially extended to 13H30 on 17 September 2015.

Sight must also not be lost of the fact that despite the matter being set down for 09H00 on 17 September 2015 and then later being postponed to 14H15 that same day, the application was only essentially heard the next day (at 09H00 on 18 September 2015) this essentially afforded the applicant a further opportunity to bolster and supplement her answering papers, she however chose not to.

Therefore in essence the applicant failed, over a period of approximately 60 hours to deal, at the very least, with the respondents' (applicants in the main application) founding affidavit, which comprised of 15 pages (48 paragraphs).

To put this in even more perspective the applicant did not even, at the very least, answer to the portion of the respondents' papers where he dealt with the facts rendering the matter urgent, these are therefore admitted. I am of the opinion that if the applicant had at least dealt with paragraphs 28 and 39-46 of the founding affidavit, she would be far better positioned. Instead she rather focused on attacking the respondent's credibility, loosing focus of the fact that the relief being sought was urgent interim interdictory relief and not final relief.'

[31] With hindsight it seems that the timelines offered and agreed to initially by applicant's instructing counsel, Mr Stolze, and thus consequentially endorsed also by the court, for the filing of answering papers, where probably inadequate. What this ground of appeal and Mr Mouton's argument however loses sight of is, that he, as instructed counsel, especially once he had come into the matter later in the day, and thus took charge of his client's case subsequently, failed to apply for more time. He also failed to ask for leave to supplement the applicant's answering affidavits in circumstances where there was more than ample opportunity to do so and where the court even questioned him, during argument, why this had not been done. Even then Mr Mouton did not get the cue. In addition it must be of significance in this regard

that the amplification of the applicant's papers would not have been problematic, especially in circumstances where the respondents had elected not to file any replying papers in that application.

[32] It must further be of import that the exchange of papers in an urgent application, if regulated by court order, would always have been an interlocutory procedural ruling, which could have been changed at any time, at the request of a party, on good cause shown. This avenue was simply not utilized by the applicant.

[33] Most importantly - and what this ground of appeal also - and in addition - totally lost sight of – was - that the entire focus of the application had shifted - as the application proceeded. The application ultimately became argued on one remaining issue only. All the many other issues, in respect of which fuller answering papers, and more time might have been required, initially, had become resolved once the parties had reached the agreements, and given the undertakings, which are reflected in the court's order of 21 September 2015. It was against this background they then agreed that they would confine argument only to the limited issue of whether or not K and S should be enrolled in the WAP hostel, in the interim.

[34] The fact that the parties were able to reach an interim agreement on the main questions of custody and access, had the effect of limiting the remaining issues for determination so dramatically that it was not surprising that the parties decided to argue the remaining point, without amplification of their papers, and in respect of which they then also signaled their agreement that this could be done, on the papers, as they stood at the time before the court.

[35] To sum up: this ground of appeal could thus have had merit if the application would have had to be determined with reference to the myriad of issues that were originally raised on the papers. In this regard it could probably have been said that another court could, possibly, have decided the interlocutory issue, relating to the exchange of papers, differently. Once the application however took a different route, so to speak, the parties' election, to proceed, on one limited issue only, on the

papers as they stood, now, in my view, precludes them from raising this point *ex post factu*.

[36] I believe that leave to appeal on this ground would therefore not have been granted as far as the merits of this ground are concerned and in respect of which it is in any event highly doubtful, whether or not such ruling would even be appealable with leave.

[37] With this said, the cardinal issue of the appealability of the order, directing the enrolment of the minor children in the WAP hostel, during weekdays, *pendende lite,* comes to the fore and needs to be determined. The determination of this issue then turns on an analysis of the characteristics of the order in respect of which the applicant now seeks leave to appeal.[7]

IS THE ORDER OF 21 SEPTEMBER APPEALABLE?

[38] In this regard, and in the first instance, it seems that Mr Ravenscroft-Jones is correct when he submitted that the order in question does not have the requisite three attributes required for an appealable order as set out in *Shetu Trading*. [8]

[39] Surely the ruling, that K and S be enrolled, *pendende lite,* in a hostel, can be varied at any time by this court – it is not final because this court is entitled to alter it.

[40] It was in addition correctly pointed out that also the Children's Court, in terms of section 5(1)[9], seems to have the power to alter an order of the High Court

[7]See : *Vaatz and Another v Klotzsch and Others*, unreported judgment of this court, SA 26/2001, dated 11 October 2002; *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC); *Wirtz v Orford and Another* 2005 NR 175 (SC); *Handl v Handl* 2008 (2) NR 489 (SC); M*inister of Mines and Energy and Another v Black Range Mining (Pty) Ltd* 2011 (1) NR 31 (SC); *Knouwds NO (in his capacity as provisional liquidator of Avid Investment Corporation (Pty) Ltd) v Josea and Another* 2010 (2) NR 754 (SC); *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC). *Shetu Trading CC v Chair, Tender Board of Namibia and Others* 2012 (1) NR 162 (SC); *Kahuure and Another in re Nguvauva v Minister of Regional and Local Government and Housing and Rural Development and Others* 2013 (4) NR 932 (SC)

[8]See also : *Namibia Financial Institutions v Nedbank Namibia Ltd* (SA26-2015) [2015] NASC (19 August 2015) at [15] to [20]

[9]Of the Children's Status Act No 6 of 2006

pertaining to custody and access – The enrolment of K and S, in a hostel, is relevant to the issue of custody. The Children's Court would thus have the power to alter this court's order, should circumstances have changed, a requirement expressly imposed by section 5(1) of the Children's Status Act of 2006.[10]

[41] Does the enrolment have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings? – The main proceedings in this instance is the application which has since been instituted in the Children's Court by the respondents. The relief claimed in that court is to the effect that the applicant is to be stripped of all her rights as custodian parent, as far as all three minor children are concerned, and that their paternal grandmother, the second respondent is to become the custodian of K and S, whereas the first respondent seeks that custody of the eldest daughter J, be awarded to him.

[42] Now it does not take much to fathom, upon comparison, that the order directing the enrollment of K and S during weekdays in a hostel is a far cry from the relief claimed in the proceedings pending in the Children Court which are aimed at awarding custody of the children to the respondents.

[43] The interim order of this court does not remove the applicant's status as custodian parent of her children.

[44] In short – she retains custody.

[45] By that same token it emerges that this court's order of 21 September 2015 does not dispose of at least a substantial portion of the relief claimed by the respondents in the Children's Court – In fact it would appear that it disposes of no portion of the relief claimed there.

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[10] '5 Review of certain decisions - (1) Despite anything to the contrary contained in any law, a children's court may, if circumstances have changed, alter an order of the High Court pertaining to custody, guardianship or access made in connection with a divorce or in any other proceedings.'

[46] It becomes clear also, at the same time, that in this sense, the order of 21 September 2015, is also not definitive of the rights of the parties.

[47] Upon closer analysis it appears nevertheless that certain facets, of the applicant's custodian rights, were affected by the court's order, temporarily – As custodian parent the applicant has the right to enrol her children at WAP and also to choose whether or not they should be enrolled in a hostel – The latter facet was impacted upon as was correctly pointed out by Mr Mouton – He had bolstered his submissions in this regard with the argument that certain ancillary aspects, which flowed from the applicant's rights to custody, such as the regulation of the contact of her children, with other children, was also affected and that she would not now be able to regulate the daily affairs of the children as in the past. It was in this regard that Mr Mouton's reliance on the *Van Oudenhove v Gruber* case comes to the fore.

[48] That case entailed the analysis of the nature of a decision granting a variation of an existing custody order, on an interim basis, to enable the removal of the children in question out of the South African jurisdiction, to Austria, for a year. The Appellate Division held that that the interim order in question did not entail 'the usual temporary variation' – and that its actual effect was that it deprived the mother, who was still the custodian parent, of her rights of access for a whole year and that, during that period, also her rights, relating to the children's education and upbringing and choice of where they would stay, had been negated altogether – The court thus held that the interim relief granted, pending the hearing of the fathers action, was in substance final relief, varying, in essence, the existing custody order.

[49] The *Van Oudenhove v Gruber* case must, in my view, however be distinguished, on the facts, from the present one – In this case the applicant's access to her children is not taken away or negated altogether – On the contrary there is nothing barring her from seeing her children at any time also during the week while they are in the hostel. In this regard it is clear that she will see S at least on Wednesdays as opposed to the first respondent's rights of access which now, by

agreement between the parties, have been totally taken away during the time that K and S are actually in the hostel during week days. The applicant continues to control the education of her minor children, at the very least in the sense that her will continues to prevail in that K and S continue to remain enrolled at the Windhoek Afrikaanse Privaatskool in Windhoek. Express recognition is thus given to the wishes of the applicant regarding the upbringing of her children through their continued enrolment at WAP, the educational institution of the applicant's choice. In effect the enrolment of K and S in the hostel of WAP merely places them additionally in the custody of the applicant's approved agency during weekdays in the afternoons and evenings, in circumstances where they would, in any event, not have been with the applicant in the mornings – during which time she, in any event, would not have been able to control her children's contact with other children for instance. The applicant continues to exercise influence over the school and will be able to communicate in this regard with the teaching staff if and when the need arises in relation to any wishes she may have and in regard to any issues that may arise in respect of K and S's schooling and their needs even when they are in the hostel – At all times, that is while the children are with the applicant also during holidays her rights remain unchanged *pendende lite*.

[50] Can it thus be said that the interim regulation of only an aspect, relating to the applicant's custody, totally negates her rights as custodian parent, as was essentially contended for by Mr Mouton, or, that it can thus be said that such interim regulation was definitive of such rights in the sense that this regulation was final in substance and effect, particularly when the regulation of this specific facet of their school life and aftercare, during week days, continues to be open for variation, I would think not. Even if I were wrong in this regard it has emerged that the interim regulation of this component of the applicant's custodian rights has certainly not disposed of a substantial portion of the relief claimed by the respondents in the main proceedings.

[51] I therefore conclude - particularly in circumstances where the applicant's custodian rights where not as dramatically and absolutely negated as in the *Van Oudenhove* matter - that the interim enrolment of K and S - especially for reasons

and for purposes of moving them out of the conflict zone, which conflict incidentally and not surprisingly has escalated again - does not amount to 'an unusual temporary variation' of the existing custody arrangement, as Galgut AJA has put it in *Van Oudehove v Gruber*[11], but is also not final in effect. In any event – and from what has already been said above – it has appeared in addition that the order in question does also not bear the hallmarks of an 'apealable judgement or order'.

[52] Consequentially I also find that the interim regulation of one facet relating to the applicants custodian rights is thus in substance akin to a ruling, in respect of which no right of appeal lies, even with leave.

[53] Even if I would be wrong in coming to this conclusion, and thus keeping in mind that the Supreme Court in *Shetu Trading* has stated that *' …* the principles set out in *Zweni* on the question of appealability are *'not cast in stone'* but are *'illustrative and not immutable*'[12] and that such guidelines are thus *'useful guidelines but not rigid principles to be applied invariably* [13] *… '* I would always have had to find that the order, directing the interim enrolment of K and S in the hostel at WAP, would not be an order as contemplated in Section (18)(1) of the High Court Act[14], and which would thus have been appealable as of right, but that such order amounts to an interlocutory order, as contemplated in Section 18(3), which could only have been appealed against with leave.

[54] As the applicant was in any event unable to show good prospects of success on appeal or that another court might come to a different conclusion on the matter I believe that leave to appeal should- and would, in any event, have been refused.

[55] In the result, the application for leave to appeal is dismissed with costs, such costs to include the costs of one instructed- and one instructing counsel.

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[11] At 866F
[12] *Shetu Trading* at para [22].
[13] *Supra at para 22.*
[14] Act 16 of 1990

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H GEIER

Judge

APPEARANCES

APPLICANT: Mr CJ Mouton
Instructed by Conradie & Damaseb,
Windhoek

RESPONDENTS: Mr JP Ravenscroft-Jones
Instructed by Theunissen, Louw & Partners,

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Windhoek