

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/43557

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	NO

Judge Dippenaar

In the matter between:

AK

Applicant

And

LKG

Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 15th of November 2021.

DIPPENAAR J:

[1] Because the interests of a minor child are involved, the parties will be referred to by their initials rather than by name.

[2] The applicant as a matter of urgency sought an order terminating the respondent's rights of guardianship under ss 18(3)(c)(iii) and (iv) of the Childrens Act¹ ("the Act") of the parties' five year old daughter (referred to as "A") together with ancillary relief, to enable her to relocate to New Zealand. The respondent is the biological father of A.

[3] The application was originally launched in the normal course on 10 September 2021 ("the original application"). Pursuant to the delivery of the respondent's answering affidavit, the applicant obtained employment in New Zealand and was advised by her employer to commence employment on 31 January 2022. She is a clinical psychologist. An amended notice of motion and supplementary affidavit were delivered on about 28 October 2021, which amended the relief sought to include that the application to be heard as a matter of urgency and certain further ancillary relief.

[4] The respondent is a freelance film editor. He opposed the application on various grounds. First, he contended that the application was not urgent alternatively that any urgency was self- created as the applicant was in control of the immigration process and sought to prematurely rush the application in circumstances where the respondent has had insufficient opportunity to safeguard his interests. Second, the respondent contended that the application was premature as there was no expert report dealing with whether it was in A's best interests to relocate. The basis of the respondent's opposition was that the relationship between the respondent and A would be severely prejudiced if A were to relocate to New Zealand.

¹ 38 of 2005

[5] The background facts are not contentious. The applicant and respondent were involved in a tumultuous romantic relationship from 2014 to March 2019 when they finally separated. The parties were never legally married although a ceremony was held celebrating their relationship during July 2018. A was born on 25 May 2016. The respondent has a history of substance abuse and tested positive for heroin on various occasions during 2018. During March 2018 he survived a heroin overdose. There is no formal process in place for the testing of the respondent, one of the principal areas of concern of the applicant. Since her birth, A has been in the primary care of her mother, the applicant and has not been separated from her save for the limited sleepover access the respondent enjoyed for a period.

[6] The applicant married her husband, RH, during September 2020 after they formed a relationship during April 2019 after her separation from the respondent. RH is an engineer. Their son, N, was born on 6 July 2021 and is some four months old. A thus has a new brother and a step- father in her life. It was not disputed that there is a close relationship between A and RH, who actively participates in her care and contributes substantially to her financial well-being.

[7] By agreement between the parties, a psycho forensic assessment of the applicant, the respondent and A was conducted by Dr Anthony Townsend pertaining to A's care and respondent's contact to her, pursuant to which his final report was produced on 28 July 2020. The report was produced at a time before the relocation of the applicant was envisaged. In terms of that report, Dr Townsend recommended that A's primary residence should be with the applicant. He further recommended certain contact and access arrangements which included sleep over contact. The parties accepted the recommendations and the contact regime was implemented by the parties.

[8] Disputes arose between the parties pertaining to the sleep over contact and the applicant ceased such contact during January 2021 pursuant to certain concerns including concerns pertaining to the respondent's alleged alcohol use, substance abuse,

uncontrolled rage and addiction to pornography. In lieu of the sleep over contact, the applicant afforded the respondent additional weekend contact to A. The respondent disputes the applicant's averments and contends that he is not using substances or alcohol. The respondent accuses the applicant of frustrating his access to A and of parental alienation.

[9] Opposed proceedings are presently pending in the Children's Court, instituted by the respondent on 9 June 2021 pertaining to his contact to A. The applicant sought the respondent's consent to stay those proceedings, which request was refused. Those proceedings were postponed to 30 November 2021 to await the outcome of the present application.

[10] Prior to launching the original application and during July 2021, the applicant discussed her proposed relocation with the respondent and sought his views thereon. On 28 July 2021, the applicant sought the respondent's consent for A's relocation and to vacate the borders of the Republic of South Africa. On 13 August 2021, the respondent via his legal representatives responded that he would not consent. The urgent application was precipitated by the applicant obtaining a permanent position as a clinical psychologist in Auckland New Zealand. At the time the original application was launched, she had applied for employment but had not yet obtained any.

[11] I turn to consider the issues. They are: (i) urgency; (ii) whether the application is premature and an expert report is required; (iii) whether the relief pertaining to A's relocation should be granted; and (iv) costs.

[12] Regarding the first issue pertaining to urgency, I am persuaded that the applicant will not obtain substantial redress at a hearing in due course² and that the applicant will suffer prejudice if the application is not dealt with urgently³. Considering all the facts, I

²East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others [2011] ZAGPJHC 196 (23 September 2011) paras 6 and 7

³ Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and Others (2014) JOL 32103 (GP) at paras 63-64

am persuaded that the applicant has made out a sufficient case for the application to be determined as one of urgency.

[13] Were the application to proceed in the normal course, the available date provided to the parties is only during February 2022, whereas the applicant is to commence employment in New Zealand on 31 January 2022, prior to which numerous logistic arrangements have to be finalised. Although the applicant ultimately is in control of her emigration, she is not in control of all aspects thereof and it cannot be concluded that the urgency of the application is self-created as averred by the respondent. The respondent's contention that the applicant should find alternative employment or negotiate with her new employer to commence her employment later, is self-serving and entirely disregards the realities of the situation in which the applicant finds herself. It further disregards the applicant's rights and her entitlement to proceed with her life, an issue to which I later return.

[14] Regarding the second issue, the respondent contended that the application was premature as there was no expert report pertaining to whether it would be in A's best interests to relocate to New Zealand. He sought an order postponing the application to the ordinary opposed roll together with an order directing a the investigation and recommendations of a mutually agreed expert or the Family Advocate pertaining to whether it would be in A's best interest to relocate with the applicant to New Zealand and, if so, to devise a detailed plan and strategy in terms of which the respondent's reasonable rights of contact to A would be protected so as to encourage a strong and healthy father daughter relationship between the respondent and A in the context of a relocation. He also sought an order that the costs of such expert would be for the applicant's account.

[15] The applicant countered this argument by contending that Dr Townsend had already conducted a comprehensive assessment and had concluded that it would be in A's best interest that her primary residence be with the applicant. She further argued that all the relevant facts were before the court, which would be able to determine A's

best interests from those facts and that it is not necessary to appoint an expert. She argued that in those circumstances, an opinion by an expert would be irrelevant and inadmissible, as held by the court in DJB v MB⁴

[16] Although the respondent contended that he has since 12 August 2021, requested that an independent psychologist or the Family Advocate be appointed to investigate A's best interests pertaining to the relocation, he did not launch any counter application seeking such relief. More importantly, the respondent did not take any steps to have an expert or the Family Advocate's office appointed to conduct any investigation pertaining to the relocation since the original application was launched by the applicant during September 2021. Rather he adopted a supine approach and demanded various investigations at the cost of the applicant. He further did not meaningfully engage with the applicant's suggestions to appoint a parental coordinator to assist and resolve the issues pertaining to his contact with A.

[17] Whilst it is correct that a detailed plan pertaining to the respondent's rights of contact to A have not yet been determined and that such process is necessary to safeguard the respondent's interests, I am not persuaded that it is necessary for an investigation to be conducted by an expert to determine whether it is in A's best interests to relocate with the applicant.

[18] S 7 of the Act, particularises the best interest standard and the relevant factors pertaining thereto. The relevant factual matrix has been placed before the court in the application papers which are of a voluminous nature. The applicant has comprehensively placed the relevant facts pertaining to her relocation before the court. The respondent on the other hand has not presented any countervailing evidence, but has instead criticised the completeness of the facts presented by the applicant, without any factual basis underpinning his objections. The suggestion is that an investigation must be conducted regarding what A's conditions in New Zealand would be. The Family Advocate's office or a local South African expert, would not be in a position to properly

⁴ (13973/2020)[2021] ZAWCH 27 (18 February 2021) at para [21]

comment on those issues. The respondent's conclusion that the applicant has sought to present expert evidence as a clinical psychologist in her own matter, lacks merit. In my view, the applicant has presented factual evidence and her views as custodian parent of A, all of which fall to be considered and are relevant.

[19] I conclude that it is not necessary to postpone the application or direct the delivery of an expert report pertaining to whether it is in A's best interests to relocate. Sufficient information has been placed before the court to do so.

[20] Although it will be necessary to consider appropriate terms on which the respondent's contact to A should be regulated, it is not necessary that these issues be determined now or together, absent any counter application for such relief. The latter issue cannot be determined in the present application.

[21] It would thus be appropriate to appoint a parenting coordinator to assist the parties in agreeing to an appropriate mechanism for the regulation of the respondent's contact with A. Such an appointment can be made urgently by agreement between the parties, considering that the respondent did not object to the appointment of such coordinator or the three individuals proposed by the applicant.

[22] Moreover, the respondent's contact to A is the subject matter of the pending proceedings in the Childrens Court. With the aid of the parenting coordinator, the parties can hopefully resolve their issues before the applicant's departure to New Zealand. If they cannot do so by the time of their next appearance, the respondent has suitable remedies at his disposal to safeguard his interests.

[23] To maintain the current status quo until the issues between the parties are resolved, the present contact regime must remain, as sought by the applicant.

[24] I turn to consider A's best interests and whether the relocation relief sought should be granted. The applicant argued that a proper case for relief was made out, considering A's best interests and the consideration of all relevant factors as envisaged by ss 7 of the Act. The respondent on the other hand, argued that the applicant's relocation was not bona fide, reasonable and the decision genuinely taken as she has only provided her subjective opinion of what would be in A's best interests. He contended that the applicant has since February 2021 continued to attempt to alienate him from A, by refusing access on various occasions and refusing the sleep over contact recommended by Dr Townsend.

[25] In the context of A's best interests, the applicant explained her motives to relocate as being potentially better schooling, tertiary education and employment opportunities for A, A's general safety, the quality of life, free education and healthcare offered in New Zealand and the high unemployment rate in South Africa.

[26] In my view, it cannot be concluded that the relocation is not bona fide or reasonable. It can also not be concluded that the relocation decision was not taken bona fide. The opposition of the application on this basis lacks merit. The respondent has put up no primary facts which would justify the inferential conclusions he seeks to draw.

[27] I turn to consider A's best interests. As enshrined in s28(2) of the Constitution, a child's best interests are of paramount importance in any matter concerning the child. This principle is enshrined in terms of s 9 of the Act.

[28] It is apposite to refer to *Jackson v Jackson*⁵, wherein Scott JA stated:

"...it is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is

⁵ 2002 (2) SA 303 (SCA) para [2]

shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent, it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavor to immigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same- and, while past decisions based on other facts may provide useful guidelines, they do not more than that. By the same token, case should be given not to elevate to rules of law the dicta of Judges made in the context of the peculiar facts and circumstances with which they were concerned.”

[29] It is also apposite to refer to *F v F*, wherein Maya AJA stated:⁶

“In deciding whether or not relocation will be in the child’s best interests, the court must carefully evaluate, weigh and balance a myriad of competing factors, including the child’s wishes in appropriate cases. It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible. Our courts have always recognized and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life”.

[30] Applying these principles to the facts, it emerges that the points of contention mainly surround inferences that can legitimately be drawn from the undisputed facts or a construction of the inferences that can legitimately be drawn therefrom⁷.

[31] The applicant is the primary caregiver of A, who has been in her primary care since birth, barring the sleep over contact which the respondent had for a period. The applicant, more recently with the assistance of her husband, RH, carries the bulk of the financial expenses pertaining to A. The respondent only commenced paying maintenance in July 2019. The parties agreed on a yearly escalation. At present he was supposed to contribute an amount of R4600 per month. During May 2021, the

⁶ [2006] 1 All SA 571 (SCA) at para 10

⁷ MK v MC (15986/2016) [2018] ZAGPJHC 4 (22 January 2018) at para [27]

respondent unilaterally reduced his monthly contribution to A's maintenance to R3 500 per month, contrary to the agreement concluded between the parties.

[32] The respondent further exercises only sporadic contact to A and is not involved in her life on a daily basis. The applicant contends that the respondent does not exercise all access agreed to between the parties. The respondent on the other hand contends that the applicant has frustrated his contact rights on various occasions. This dispute cannot be resolved in the present proceedings.

[33] The respondent has not raised any complaints or concerns pertaining to the applicant's care of A and expressed his view to Dr Townsend that the applicant was an "amazing mother". The applicant in contrast, has raised various concerns with the respondent's ability to care for A, whilst he is exercising contact with her. I have already alluded to these disputes.

[34] A is still of a tender age, being only five years old. She is not of the age or maturity where her views could significantly contribute to determining her best interests.

[35] The applicant's marriage and the arrival of A's new brother are further factors to take into consideration. Both siblings are of a tender age and it would be in their best interests that they grow up together. The formation of a strong supportive family unit, creating a secure and stable family environment is an important factor to consider.⁸

[36] It was undisputed that A does not share a close family bond with the respondent's family. Although a relocation would mean that A will not have a support system in the form of her maternal grandparents, with whom A does share a bond, the applicant has envisaged arrangements to facilitate contact between A and her grandmother. The applicant has further particularized a support network of friends in New Zealand who will be available to assist in A's needs if required.

⁸ S7(1)(k) of the AcA does share a bond, t

[37] It is well established that the parent who bears the primary responsibility to raise a child should be left to do so⁹. It is also well established that thwarting a custodian parent's rights to dignity, privacy and freedom of movement, may well have a severe impact on the welfare of children.

[38] The applicant is a trained clinical psychologist, who has secured a good position in the profession and the location of her choice. She is relocating with her nuclear family, a husband, new baby and A to pursue a new life in a secure location with free education and healthcare programs and a much lower unemployment rate than in South Africa. To deprive her of that opportunity and the friction that may be caused in her marriage as a result, may well in my view have a severe impact on the welfare of A and her new brother and the happiness and security of their family unit.

[39] Other than criticise the applicant for not providing sufficient proof in support of her averments, a criticism that is unwarranted, the respondent has put up no facts to controvert the applicant's averments.

[40] The respondent further disregards the applicant's entitlement to pursue her career and her new life¹⁰. As held in *F v F*, the custodial parent has the right to dignity, privacy and freedom of movement, when regard is had to her right to pursue a career and a life after divorce. The respondent wishes to deprive the applicant of what is undisputedly a good professional opportunity or at least, to put her employment in jeopardy, without any sound reason to do so.

[41] Our courts have further held¹¹ that:

“ Courts must be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts who have no reciprocal legal obligation to maintain contact with the child and may relocate at will may, and

⁹ *F v F* supra para 10-11

¹⁰ *DJB v MB*

¹¹ *F v F* supra para [12]

often does, indirectly constitute unfair gender discrimination. Despite the constitutional, commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses”.

[42] In the present instance it is clear that the applicant bears the primary responsibilities in relation to A, and that if relocation is refused, it would have a disproportionate impact on her as her own interests and personal choices would be subverted.

[43] It is indisputably so that the relationship between the respondent and A would be prejudiced if A were to relocate to New Zealand. That is the inevitable result of parents living on different continents. This prejudice, when weighed against all the other relevant factors cannot however carry the day. Although it is in A's best interests to have a good relationship with both her biological parents, the prejudice to her best interests if the relief sought is not granted in my view by far outweighs the prejudice if the relief is granted. It would be less detrimental to A not to deprive the applicant of the opportunity to relocate to New Zealand. It is open to the respondent to mitigate such prejudice to A by negotiating or obtaining generous access to A, albeit primarily virtually, at least on a day to day basis. If the respondent puts in the effort on a sustained basis and cooperates with the parenting coordinator to achieve a workable solution, the prejudice would be substantially mitigated.

[44] In considering all the relevant factors referred to, I conclude that it would be in A's best interests to allow the relocation to New Zealand and to grant the relief sought in the face of the respondent's refusal to consent to her relocation.

[45] I turn to the issue of costs. The question to be determined is whether both parties acted bona fide in what they perceived to be A's best interests¹². In such event, the normal principle is that each party bears his/her own costs.

[46] In the present instance, the respondent is understandably unhappy with the applicant's decision to relocate as it by necessity has a negative impact on the contact he can exercise to A. The respondent did not however make any constructive proposals as to how that could be achieved. Rather he accused the applicant of mala fides, ulterior motives and parental alienation. It appears that in doing so, the respondent was focusing on his own best interests, rather than those of A. He clearly failed to appreciate the disruptive and negative effect his opposition to the relocation application would have, not only on the applicant, but on the whole family, including A.

[47] On the other hand, I am persuaded that the applicant was acting in A's best interests and in seeking to amicably resolve the issue with the respondent prior to launching the present application. In opposing the application, the respondent did not put up any facts controverting the version of the applicant. His grounds of opposition were dilatory and aimed at acquiring relief which would assist his interests, without taking any steps to procure any expert report and whilst insisting that the applicant should be liable for those costs. It was undisputed that the respondent further preferred criminal charges for *crimen iniuria* against the applicant arising from the other litigation between them, well knowing that the existence of such charges may well hamper the applicant's relocation. The respondent's conduct was in my view unreasonable in various respects. In those circumstances, it would be a just exercise of the discretion afforded to direct the respondent to pay the costs of the application.

[48] I grant the following order:

[1] The Respondent's specific parental responsibilities and rights in respect of guardianship, as provided in terms of sections 18(3)(c)(iii) and (iv) of the

¹² F v F supra at para [27]

Children's Act 38 of 2005 ("the Act"), in respect of A ("the minor child") be terminated as contemplated in s 28 read with s 18(5) of the Act.

[2] The respondent's parental responsibilities and rights as provided for in terms of ss 18(3)(c)(iii) and (iv) of the Act pertaining to the minor child be henceforth terminated as guardian of the minor child, to: -

[2.1] give or refuse any consent required by law in respect of the minor child, including: -

[2.1.1] consent to the child's departure or removal from the Republic of South Africa; and

[2.1.2] consent to the minor child's application for a passport.

[3] That, in terms of s 18 of the Act, the applicant be granted sole guardianship in respect of the minor child, to: -

[3.1] give or refuse any consent required by law in respect of the minor child, including: -

[3.1.1] consent to the minor child's departure or removal from the Republic of South Africa; and

[3.1.2] consent to the minor child's application for a passport and/or the renewal of a passport.

[4] That, insofar as it may be necessary, the respondent's consent, the respondent's signature of all such documents, including all such steps necessary by the respondent, to enable the applicant to lawfully remove the minor child from the Republic of South Africa, be dispensed with forthwith.

[5] The applicant is granted leave to relocate the minor child outside the Republic of South Africa to New Zealand.

[6] The minor child will be primarily resident with the applicant.

[7] The respondent is to continue exercising contact with the minor child, pending the appointment of a parenting coordinator and the finalisation of a formal parenting plan pertaining to the respondent's contact to the minor child, as follows:

[7.1] Every Monday from 16h00 to 17h30;

[7.2] Every Wednesday from 16h00 to 17h30;

[7.3] Every alternate Saturday from 10h30 to 17h30; and

[7.4] Every alternate Sunday from 08h30 to 15h30.

[8] A parenting coordinator, the identity of which is to be agreed between the parties from the list provided from the applicant, is to be immediately appointed which parenting coordinator would have the following mandate to:

[8.1] Urgently Assist the parties in formulating an appropriate parenting plan pertaining to the respondent's contact with the minor child;

[8.2] Address any issues that require negotiation, mediation or arbitration;

[8.3] Contact the minor child's school, the teachers, any doctors, as well as any individual therapists if the parenting coordinator feels it is important in the service of the best interests of the minor child;

[8.4] At any specific time, call for a hair follicle test or any other substance-related test from the respondent at the parenting coordinator's discretion in order to ensure that no substance use by the respondent interferes with

his ability to appropriately care for the minor child. Should the respondent engage in substance use that may impair his ability to effectively care for the minor child, the parenting coordinator may amend the respondent's contact rights (including but not limited to supervised contact) if deemed necessary to protect the minor child's best interests;

[8.5] Call for a re-investigation of this matter if the parenting coordinator believes that the minor child's best interests are not being served in any way that the parenting coordinator will determine;

[8.6] Assess the applicable period within which the respondent's contact with the minor child is to be reassessed.

[9] Any of the parties would be entitled to challenge the determinations of the parenting coordinator in a competent court of law.

[10] The respondent is directed to pay the costs of the application.

**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 09 November 2021

DATE OF JUDGMENT : 15 November 2021

APPLICANT'S COUNSEL	: Adv. JC Borman
APPLICANT'S ATTORNEYS	: SKV Attorneys Inc.
RESPONDENT'S COUNSEL	: Adv. L De Wet
RESPONDENT'S ATTORNEYS	: Barter McKellar Attorneys