

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, J[...]**NESBURG****

Case Number: 2023-058030

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

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|------------|-----------|
| _____ | _____ |
| 22.03.2024 | |
| DATE | SIGNATURE |

In the matter between:

C[...] **K[...]**

Applicant

and

J[...] **J[...]** **S[...]**

Respondent

JUDGMENT

LANGE, AJ

[1] This is an urgent relocation application in which the Applicant wishes to relocate with the parties' minor child, J[...], a son aged eleven, to Ballito at the end of the school-term.

[2] The application was brought in two parts. Part A was unopposed, and Judge Kuny granted an order on 26 September 2023, in terms of which:

2.1 The Office of the Family Advocate was requested to investigate and make recommendations regarding the best interests of the minor child, in relation to the proposed relocation of the applicant with him, within one month of the granting of the order; and

2.2 Professor Gertie Pretorius, a clinical psychologist, was appointed to investigate and make recommendations regarding the best interests of the minor child, in relation to the proposed relocation of the applicant with him.

[3] Professor Pretorius released her report on 30 November 2023, which report was provided to the Office of the Family Advocate on their request.

[4] The Family Advocate filed their report on 18 March 2024, the day before the matter was heard.

[5] The Applicant launched Part B of the application on an urgent basis on 26 February 2024 on the basis that she received a call on 21 February 2024 indicating that there was only one place left in the Afrikaans stream at Curro for the second term which commences on 3 April 2024.

[6] At the hearing of the matter counsel for the Applicant submitted that the legal test for relocation matters is the reasonableness of the decision to relocate and whether the relocating parent's decision is bona fide. The Applicant listed a number of factors which she took into account when considering a relocation to Ballito. There is no doubt in my mind that the decision was taken in a thoughtful manner and that the Applicant's decision had nothing to do with creating distance between the Respondent and the minor child.

[7] Likewise the Respondent has justifiable reasons for his refusal to agree to the relocation and this Court sees nothing to censure the Respondent in his dogged refusal to agree to the relocation.

[8] It was clear from all the affidavits, Professor Pretorius's report and even the Family Advocate's report that this proposed relocation has caused J[...] enormous

stress and anxiety. He has clearly verbalised to both Professor Pretorius and the Family Counsellor as well as both the parties that he does not want to move and wants everything to remain the same.

[9] Counsel for the Applicant submitted that the Family Advocate report is defective in that it is piggy backing off Professor Pretorius's investigation and report, and in addition the Family Advocate and Counsellor created the impression that a future meeting would be convened. The report is helpful in that it corroborates Professor Pretorius's findings vis a vis J[...]s desire for everything to remain the same.

[10] Counsel for the Applicant was insistent that in reaching a decision, I should have regard to the matter of *LW v DB* 2020 (1) SA 169 (GJ) where Judge Satchwell summarises the legal principles that a court must consider when adjudicating relocation matters and exhorted me to find in favour of the relocation.

[11] Counsel for the Respondent argued that the abovementioned matter was distinguishable from the current matter as the minor child in *LW v DB* was only four years old and J[...] is already 11. Moreover, J[...] has his residence jointly with the parties and spends equal amount of time with each parent which was not the case in *LW v DB*, where the applicant was the primary residential parent.

[12] Section 9 of the Children's Act 38 of 2005 unequivocally states that "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

[13] If I have regard to the best interests of child standard as set out in section 7 of the Children's Act, I cannot escape the conclusion that forcing J[...] to relocate will not be in his best interests. Professors Pretorius's report makes it clear that J[...] is equally bonded to both his parents and forcing him to leave Johannesburg will negatively impact on his relationship with the Respondent. Electronic contact and alternate weekends do not make up for the lived experience of seeing both parents weekly. Furthermore he is entrenched in his school and social circles and disruptions to this, on top of the disruption to his relationship with the Respondent weigh heavily against the reasons for relocation.

[14] Whilst counsel for Applicant correctly pointed out that regard must be had to the Applicant's constitutional enshrined right to freedom of movement, of association and freedom to pursue her professional aspirations, this has to be weighed against the potential harm to the minor child if he is forced to relocate.

[15] There is no proof that the Applicant cannot pursue her professional aspirations by remaining in Johannesburg and travelling to Ballito when she is required to be there in person. The Applicant has a partner who is already in Ballito to assist her. In the same way that the Applicant maintains that electronic contact between the minor child and the Respondent is a mitigating factor in support of her relocation, the same thinking can be applied to her business.

[16] In *McCaLL v McCaLL* 1994 (3) SA 201 (C) the Court stated in the context of a relocation application, that the "Court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The Court's concern is for the child". It is inevitable that in all relocation matters, one of the parties will be unhappy with the decision and this is no different.

[17] The Court also confirmed that, if a Court is satisfied that a "child has the necessary intellectual and emotional maturity to give in his/her expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his/her expressed preference."

[18] Counsel for the Respondent provided a very helpful table in her heads of argument which I have appropriated hereunder:

| JOHANNESBURG: | BALLITO: |
|--|--|
| Continue in Afrikaans schooling | Change to English school with Afrikaans stream |
| Settled and familiar home environments with both parents | New and unfamiliar home environment with only one parent |
| Enrolled in same school for 6 years | Unknown, new school |
| Continues with Grade 7 in known school | Change of schools between two school |

| | |
|--|--|
| environment | terms |
| Friendships since pre-school. Friends indicated at Family Advocate as Lian, Liam, Hendrik, Luke and Carmen | Friendship with one child made during holidays |
| Settled and happy in current school | Uncertainty and displeasure about having to start new school |
| All significant relationships in Johannesburg would be maintained as they are currently | Child will have mother, stepfather and half-brother and grandmother in daily routine |
| Teachers since January 2024 | New teachers |
| Continue with therapy at Ms Sharp | New therapist |

[19] For all the reasons set out above, I cannot find in favour of the Applicant and must refuse her application to relocate with the minor child.

[20] In the circumstances, I make the following order:

1. The Rules pertaining to notice, and service are dispensed with and this application is heard as one of urgency in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court.
2. The application is denied.
3. No order as to costs.

LANGE AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv K Meyer

Instructed by:

Mr R van Reenen

For the Respondent:

Adv L Keisjer

Instructed by:

Lombard & Partners