

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

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
.....	
.....	DATE
SIGNATURE	

CASE NO: 2022/028593

In the matter between:

E[...]: H[...] C[...]

Applicant

(ID No: [...])

and

D[...] J[...] F[...]: P[...] J[...] C[...]

Respondent

(ID No: [...])

In re:

D[...] J[...] F[...]: E[...] J[...]

The Minor Child

Id: [...]

D[...] J[...] F[...]: G[...] I[...]

The Minor Child

Id: [...]

D[...] J[...] F[...]: T[...] E[...]

The Minor Child

Id: [...]

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This order is further uploaded to the electronic file of this matter on CaseLines by the Judge or his Secretary. The date of this Order is deemed to be 14 June 2023.

REASONS FOR JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION

1. On 21 June 2023, I delivered an order concerning *inter alia* an opposed interim removal of minor children ages,14,13 and 10 from the Republic of South Africa to the United State of America(USA).

2. The application is between the minor children's biological parents who are both co-holders of parental rights and responsibilities as stipulated in terms of Section 18 of the Children's Act 38 of 2005('the Act').

3. The request for reasons for my order above was received by me only end of October 2023, followed by the transcribed record thereof on 30 November 2023, just a few days before the December 2023 court recess. Accordingly, this accounts for some delay in the granting of the reasons for my order in the following terms:

"1. The Applicant is authorised to remove and depart with the following minor children from the Republic of South Africa to the United States of America as envisaged in terms of Section 18(5) of the Children's Act, Act 38 of 2005, namely- E[...] J[...] D[...] J[...] F[...], a boy born on 4 February 2009 G[...] I[...]L[...] F[...], a girl born on 23 June 2010;

T[...] E[...]D[...] J[...] F[...] a boy born 25 April 2013, as follows:

- 1.1 *Every alternative long South African school holiday every year that the children are returned to Respondent's home at least 3 days before the re-opening of the schools in July and at least one week before the start of schools in January.*
- 1.2 *The Christmas long school holidays to alternate between the parties with the first Christmas holiday after this order to be with Applicant.*

2. *The Respondent is ordered to consent to the minor children's application for passports and or visas as prescribed by Section 18(3)(c)(iii)(iv) of the Children's Act, Act 38 of 2005, and to sign all necessary documentation to give effect to paragraph 1 supra within seven (7) days of written request on each occasion: -*
 - 2.1 *In the event that the Respondent fails to sign all necessary documentation to give effect to paragraph 1 supra following consecutive years, the Sheriff be*

authorised to sign all necessary documentation on behalf of the Respondent after the lapse of seven (7) days of formal written request transmitted to the Respondent.

3. *The Applicant to purchase inbound flight tickets for the minor children to travel from the Republic of South Africa to the United States of America: -*

3.1 *The Applicant to accompany the minor children from the Republic of South Africa to the United States of America at her own cost, alternatively, provide for assisted flight tickets.*

4. *The Respondent to purchase outbound flight tickets for the minor children to travel from the United States of America back to the Republic of South Africa: -*

4.1 *The Respondent to accompany the minor children from the United States of America back to the Republic of South Africa at his cost, alternatively to provide for assisted flight tickets.*

5. *The Applicant and the Respondent shall finalise flight tickets and travel dates 60 (sixty) days prior to the minor children departing from the Republic of South Africa to travel to the United States of America: -*

5.1 *The parties shall ensure that all necessary travel documentation is signed and provided to each other 30 (thirty) days prior to the minor children being due to travel from the Republic of South Africa to the United States of America;*

5.2 *In the event that either party fails to provide the other party with the necessary consent and signed travel documentation as stipulated supra, the one party shall call upon the other by a written demand to comply within 3 (three) days, failing which: -*

5.2.1 *The party who fails to provide the other party with necessary signed documentation to allow for the minor children to depart or travel outside the borders of the Republic, alternatively;*

5.2.2 *fails to give consent as required by law in respect of each minor child to his/her departure or removal from the Republic.*

5.2.3 Automatically waives his/her rights to do so in respect of the specific intended travel as required in terms of section 18(3)(c)(ii)(iv) read with section 18(5) of the Children's Act, 38 of 2005.

6. Whilst the minor children are in the care of the applicant in the United States of America, the respondent shall be entitled to exercise daily reasonable video and telephonic contact with the minor children.

7. In the event of the Applicant temporarily residing in the Republic of South Africa, being for a period or more than (1) month, the parties to exercise the following contact with the minor children:

7.1 Applicant to have reasonable contact with the children on visit in South Africa upon prior arrangement with Respondent subject to the activities and programmes of the children and not over the other long school holiday during which Respondent will have the children.

8. Each party shall have reasonable daily contact with the children while the children are in the other party's care

8.1 Every alternative week commencing when the minor children are collected from school on a Monday afternoon until they are dropped off at school on the following Monday morning, to be collected by the other party;

8.2 In the event of the Applicant temporarily residing in the Republic of South Africa for a period of more than 1 (one) month, the Applicant shall provide the Respondent with 30 (thirty) days' written notice prior to travelling to South Africa together with proof of departure flight ticket and details of where she will be resident within the said period;

8.3 Each party shall be entitled to reasonable telephonic contact with the minor children whilst in the other party's care during this period.

9. The late filing of the Applicant's Replying Affidavit is condoned.

10. Each party to pay own costs".

4. I hasten to mention that the obligation to give reasons (as I shall do hereunder), fulfils a variety of functions. It is expedient to mention a few. Reasons serve to improve the quality of decision-making process and justice and to ensure accountability to the parties involved in the dispute and to the public at large.
5. They inform the person affected by the decision why the decision-maker thinks that it is justified. Reasons enable the person affected to determine whether he or she should abide the decision or take steps to have it corrected or set aside. This is not only fair but also conducive to public confidence.
6. Furthermore, rational criticism of the decision maker can only be made when the reasons for it are known. This also helps the court of appeal to determine whether the court *a quo* applied the correct principle of law in the decision making.
7. It is those reasons that now appears hereunder.

RELIEF SOUGHT

8. Ex facie the notice of motion dated 26 September 2022, the applicant initially sought the following relief:
 1. *"The Applicant be authorized to remove and depart with the following children from the Republic of South Africa to the United States of America for a period of three (3) months once every year;*
 - 1.1. *E[...] J[...] D[...] J[...] F[...];*
 - 1.2. *G[...] I[...] D[...] J[...] F[...];*
 - 1.3. *T[...] E[...]D[...] J[...] F[...]; ("the minor children")*
 2. *Upon expiry of the period mentioned in prayer 1 supra, the Applicant is to return the minor children to the Republic of South Africa in the care of the Respondent.*
 3. *The Respondent be ordered to consent to the minor children's application for passports and or visas and to sign all necessary documentation to give effect to prayer 1 supra within three (3) days of granting of this order and thereafter once a year upon written request by the Applicant.*
 4. *In the event that the Respondent fails to sign all necessary documentation to give effect to prayer 1 supra within three (3) days of granting of this order, the Sheriff of this Honourable Court be authorized to sign all n documentation on behalf of the Respondent to give effect to prayer 1 supra;*

4.1. *In the event that the Respondent fails to sign all necessary documentation to give effect to prayer 1 supra following consecutive years, the Sheriff be authorized to sign all necessary documentation on behalf of the Respondent after the lapse of seven (7) days of formal written request transmitted to the Respondent;*

5. *The Respondent to pay the cost of this application”.*

9. The relevant history of this matter is dealt with in detail in the papers (including supplementary affidavits) filed with this application. For purposes of furnishing the reasons sought, I will quote *verbatim* some paragraphs therefrom as follow:

9.1 On the 23 November 2002, the parties got married in Johannesburg. In 2009, the party's eldest son E[...] was born and in 2010, their daughter G[...] was born and lastly in 2013 T[...] was born.

9.2 The family moved to Langebaan Western Cape Province. At this stage, the Respondent worked full time from home as a software developer and the Applicant did some tutoring job also from home. The children were home-schooled.

9.3 On 14 June 2015, due to marital problems the parties separated.

9.4 In July 2015, the Respondent moved to Johannesburg to look for work, the children remained with Applicant. Whilst the Respondent visited the minor children regularly. The applicant enrolled E[...] (then 6 years) in a primary school in Langebaan as she wanted to find gainful employment.

9.5 The respondent had contact with the children every June holiday and half of December holiday and visited them during the year as well. In 2016 the applicant moved with the children to Gordon's Bay in Strand.

9.6 The parties were divorced on 12 December 2017. In terms of their settlement agreement which was made an order of the Court in terms of which Applicant retained primary residency, the respondent agreed to pay monthly maintenance.

9.7 Respondent was to have contact with the children every alternative school holiday and half of every December holiday. The respondent continued regular contact with the children.

9.8 During 2018, the Applicant informed the Respondent of her intentions to relocate to the USA with the minor children. The Applicants' plan to relocate wanting to have a better life for herself and her family, including the minor children. The Applicant also found a new partner who she could start a new life with. It is common cause between parties that the respondent initially approved that the minor children could relocate with her and had later renegaded his approval.

9.9 During 2018, the applicant with the assistance of a social worker, Ms Megan Van der Westhuizen, engaged with the minor children to ascertain what their wishes were regarding the possibility of relocating to the USA. All the minor children confirmed that they indeed wished to relocate with the applicant.

9.10 During 2019, the Respondent relocated back to the Western Cape and exercised the contact with the minor children.

9.11 On or about 16 June 2019, the Applicant relocated to the USA and remarried thereafter. Again, during March 2022, the respondent relocated back to Gauteng Province from the Western Cape.

9.12 The Applicant contends that due to the Covid pandemic, her employment endeavours in the USA became severally hampered due to global economic constraints. The Applicant has continued with her studies and intends to start her own business.

ISSUES FOR DETERMINATION

10. This court essentially had to make a determination on a number of issues, namely;

10.1 Period/time when the minor children are to exercise contact with the Applicant in the USA;

- 10.2 Respondent to contribute to the costs of the minor children's outbound flight tickets from the USA to South Africa;
- 10.3 The period of contact when the applicant is in RSA for over a period of 1 month;
- 10.4 What will be in the children's best interests?
- 10.5 Late filing of the applicant's replying affidavit and Lastly, the issue of costs of the application.

THE APPLICABLE LEGAL PRESCRIPTS

11. It seems apt to start with the warning in the case of *LW v DB*¹:

"I don't have to determine who are good and bad parents. Parents are not perfect, and sometimes being parents magnify inadequacies and unresolved psychological issues".

12. Still, the starting point of any inquiry must be the Constitution. Section 28(2) of the Constitution of the Republic of South Africa states:

"A child's best interests are of paramount importance in every matter concerning the child".

13. This is confirmed in section 9 of the Children's Act. There is a list of cases dealing with what this entails. To mention a few:

13.1 The old case of *Van Deijl v Van Deijl*², stated that the welfare must be taken in its widest sense – economic, social, moral, and religious considerations play a role, as well as the emotional ties and the ties of affection.

13.2 In the case of *French v French*³, the courts set out four categories to consider when considering what is in the child's best interest: the preservation of

¹ 2020 (1) SA 169 (GJ).

² 1966 (4) SA 260 (R) at 261.

³ 1971 (4) SA 298 (W) 298H.

the child's sense of security; the suitability of the caregiving parent regarding the parent's character; material considerations; and the child's wishes.

13.3 However, the Constitution and Children's Act realigned our focus to focus not on the parent but on what would be in the children's best interest. The parents' characteristics, abilities and situations will play a role in considering what is in the children's best interest. Still, it will be viewed from, as far as possible, the children's physical, social, and psychological needs.

13.4 There has thus been a move in case law from what seems to be a preference to the wishes of the custodian parent and the idea of shared parenting and how time will be spent between the two parents if the relocation is permitted (or not). My starting point is thus not a presumption in favour of the respondent since he has been awarded primary residency in the divorce action.

13.5 Section 18 of the Act, provides that both parties are required to, *inter alia*, give consent to the minor children' departure or removal from the Republic of South Africa and consent to the minor children's application for a passport.

14. As the upper guardian of minors, this court has a duty to consider and evaluate as many factors as possible to decide what is in the child's best interest in this debate of interim removal of the minor children to USA and ancillary matters. The following factors were considered in coming to my decision are:

- i. The children expressed that they prefer to stay with the Respondent and visits the applicant.
- ii. The Applicant when still unemployed spent much time with the children when they were younger while the Respondent was working albeit from home, and thus both the applicant and respondent has a bond with the children that should be considered and nurtured. Adequate contact is essential for this purpose.

- iv. The applicant has been separated from the children for longer periods. The children have not been separated from their father for long periods as he is the holder of their primary residence in terms of the settlement agreement between parties which was made an order of court.
 - v. Since the Applicant mostly took care of the children while she was not employed, there is no indication that the applicant cannot provide the same level of care while being relocated.
15. Having considered the above factors, I pause to mention that it is indeed so that both parents love and care for the children in their imperfect way. There is not a lack of love for the children. They both want to be with their children.
16. The Applicant's relocation does not seem to be out of spite or malice. It is evident that the Respondent no longer objects to the minor children departing from the Republic to visit the applicant in the USA nor does he fear for their well-being whilst in the respondent's care in the USA.

However, the point of contention appears to be, *inter alia*, the period of visitation in the USA and the costs relating to the outbound flight tickets being borne by him. In the Respondent's opposing affidavit, he states that he is in agreement that the minor children visit the applicant, however, they do not visit her beyond a period of one (1) month. Owing to the current school's curriculum, the minor children are registered in, I see nowhere in the respondent's papers that supports the reasonableness of his contention regarding the time periods.

17. However, his counter-proposal shows that he has indeed changed the goalpost regarding the time periods and conditions of their visitation. However, following the Respondent's concession that he has agreed to allow the minor children to travel outside the borders of the Republic, and levelling no concern as to them being endangered, Also suggesting that the applicant is a good mother and took great care of the minor children whilst they were in her primary care.
18. I am of the firm view that the interim removal of the minor children in the terms appearing in my order above stated and ancillary relief therein, is indeed in the children's best interest. For the following reasons:

18.1 Both parties will continue having meaningful contact with the minor children;

18.2 The applicant has taken proactive steps with the children's needs and future in mind.

18.3 She has also not denied the Respondent contact with the children. Further, she has also proposed a workable plan to ensure the Respondent has contact with the children when they are in USA.

18.4 The fact that Christmas will alternate and long school holidays, this will afford both parents to plan time in advance to spend those periods with the minor children.

18.5 Regarding the temporally shared primary residence for periods when the applicant is visiting the Republic of South Africa, this period can be agreed upon by the parties as best convenient to them so as to avoid disruption to daily routine of the minor children, even in the absence of any directive from the court. This is so to allow the applicant to continue with the daily routine the respondent has set in place even during the exams period.

19. Put in another way, if I had not granted the order I granted, I would undoubtedly have put a blight on the potential for the serenity and happiness of the minor children. This would have been manifestly contrary to the welfare of the minor child. This is a reality that a court determining an application for removal must consider. Besides, the appointed expert commented and recommended the broad terms of the court order that I eventually granted.
20. Based on the above list of considerations, read together with the papers filed before me and the oral submissions made by the parties' legal representatives and the proposed draft orders suggested by the parties that for my consideration, stating stability and predictability.
21. Given all these factors, I formed the view that the applicant's decision to relocate was *bona fide* and genuine. I appreciated that the relationship between the applicant and the minor children would be prejudiced if the interim removal order with ancillary relief I granted was not granted.
22. Also, the benefits for the children and their welfare which are borne from the terms of the order I granted, far outweighed the disadvantages stemming from the order proposed on behalf of the respondent.
23. Regarding the condonation of the late filing of the applicants' replying to affidavit, I am satisfied that the applicant indeed has put-up sufficient facts and has shown good cause or reason as to why her replying affidavit should be allowed by the court.

24. After careful consideration of the parties' personal and financial circumstances and the nature of this application, I am satisfied that the costs order I granted must accordingly stand.

25. These are my reasons for the order granted on 21 June 2023.

**N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Case lines. The date for handing down is deemed to be 14 JUNE 2023.

APPEARANCES

FOR THE APPLICANT: Adv. Tonia Carstens

FOR THE RESPONDENT: Reg Joubert

HEARD ON: 14 JUNE 2023

DATE OF JUDGMENT: 31 JANUARY , 2024