IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: **15944/22P**

In the matter between:

A[…] D[…] B[…] **APPLICANT**

and

B[…] A[…] K[…]
RESPONDENT

ORDER

The following order is granted:

1. The applicant is given leave to re-locate with the minor child, H[…] P[…] K[…], a girl born on 9 December 2020, from Durban to Cape Town for the purpose of taking up permanent residence in Cape Town.

2. Until the child enters Grade 1, the respondent shall be entitled to have contact with the child:

    2.1 every alternate week from after school on Thursday until 16h00 hours on a Sunday in Cape Town (with the costs associated with such contact to be borne by the respondent); and

    2.2 video contact on weekdays between 17h00 and 19h00 and on Saturdays and Sundays between 08h00 and 19h00.

3. In addition to the contact provided for in paragraph 2 above, the respondent shall be entitled to have overnight contact with the child in

Durban whenever the applicant travels to Durban for work purposes. The applicant shall give the respondent not less than one week's notice of her intention to travel to Durban.

4. The applicant shall bring the child to Durban to stay with the respondent for a long weekend from Thursday to Sunday, once per annum, at her own cost. She shall give the respondent not less than one month's notice of the dates on which she shall be bringing the child to Durban.

5. Such other contact as may be agreed between the parties.

6. The respondent is directed to pay the costs of this application.

JUDGMENT

MOSSOP J:

[1] The applicant is the mother of a young girl, H[…] P[…] K[…], aged two (the minor child), who was born on 9 December 2020. The respondent is the natural father of the minor child but never married the applicant. The applicant and the respondent separated from each other when the minor child was 14 months old. In so doing, they decided to conclude a parenting agreement (the parenting plan) regulating how the minor child was to be raised by them and generally fixing each of their responsibilities towards her. The parenting plan records that the minor child shall have her primary place of residence with the applicant, subject to the respondent's rights of contact with her, and that the applicant shall be her primary care-giver. The parenting plan also contains a clause that reads as follows:

'Neither party shall be allowed to relocate outside the borders of KwaZulu-Natal and/or South Africa, without the other party's written consent which consent shall not be unreasonably withheld or delayed.' (The non-relocation clause.)

It is the non-relocation clause that has excited the controversy in this matter.

[2] The applicant now wishes to relocate from Durban to Cape Town in pursuit of more lucrative employment within the same company that currently employs her. In terms of the non-relocation clause, the consent of the respondent is required for her proposed relocation to occur. While the respondent is content for the applicant personally to relocate, he is not prepared to let the applicant relocate with the minor child. By reason of the aforegoing, the applicant has brought this urgent application to this court in which she seeks the following relief:

'A rule nisi is hereby issued calling upon the respondent to show cause to this court on the 1st day December 2022 [sic], at 09h30 or so soon thereafter as the matter may be heard why an order in the following terms should not be granted:

3.1 The Applicant is given leave to re-locate with the minor child, H[…] P[…] K[…], a girl born on 9 December 2020, from Durban to Cape Town for the purpose of taking up permanent residence in Cape Town.

3.2 Until the child enters Grade 1, the Respondent shall be entitled to have contact with the child:

3.2.1 every alternate week from after school on Thursday until 16h00 hours on a Sunday in Cape Town (with the costs associated with such contact to be borne by the Respondent)

3.2.2 video contact on weekdays between 17h00 and 19h00 and on Saturdays and Sundays between 08h00 and 19h00.

3.3 In addition to the contact provided for in paragraph 2.2 [sic] above, the Respondent shall be entitled to have overnight contact with the child in Durban whenever the Applicant travels to Durban for work purposes. The Applicant shall give the Respondent not less than one week's notice of her intention to travel to Durban.

3.4 The Applicant shall bring the child to Durban to stay with the Respondent for a long weekend from Thursday to Sunday, once per annum, at her own cost. She shall give the Respondent not less than one month's notice of the dates on which she shall be bringing the child to Durban.

3.5 Such other contact as may be agreed between the parties.

3.6 The Respondent is directed to pay the costs of this application only in the event of him opposing it.'

[3] This application is being heard during the long recess that straddles the end of one court year and the beginning of the next. The matter first came before me in motion court during the fourth term when I considered that there was a degree of urgency attaching to it. The urgency is attached to the deadline imposed by the applicant's employer on her to commit to the position that it has offered her in Cape Town. However, it was not possible to finally determine the application when it initially came before me because the Family Advocate had not had an opportunity to investigate the matter and consequently had not prepared a report for the court. I reluctant to proceed without the input of the Family Advocate. Ultimately, the Family Advocate did not report, as will be explained shortly. Being mindful of the importance of decisions relating to children, I therefore agreed to hear the application during my period of recess duty when opposed motions are generally not heard, in the belief that the Family Advocate would be in a position to present a report on the matter when the matter was argued. This judgment is given on the day that the matter was argued in order not to further delay the decision that must be made in this matter.

[4] Counsel have played their part in ensuring that the matter is capable of being dealt with in this fashion and have seen to it that their respective heads of argument and practice notes have timeously reached me during recess to allow me to properly prepare. I must accordingly record my sincere thanks to Ms Law, who appears for the applicant, and Mr Skinner SC, who appears for the respondent.

[5] My preliminary view on the urgency of the matter has not diminished and I note that there is no suggestion in the respondent's heads of argument that it is not urgent.[1] I shall accordingly treat it as being urgent. In addition, it being recess, I intend to follow, as best that I can, the sage advice of Pythagoras, who urged one not to say little in many words, but a great deal in few.

[6] To commence, in her heads of argument, Ms Law drew my attention to *LW v DB.*[2] In my view, that is a good a place to begin. In that matter, Satchwell J concluded that certain guidelines that should guide a court hearing a relocation matter, such as this one, may be distilled from the

[1] The question of urgency was raised in the answering affidavit by the respondent but was taken no further when the matter was argued.
[2] *LW v DB* 2020 (1) SA 169 (GJ) para 20.

Constitution, the judgments of our courts, and the various conventions to which our country is a signatory. The guidelines that Satchwell J identified are that:

(a) The best interests of the child 'are the first and paramount consideration';

(b) Each case must 'be decided on its own particular facts';

(c) 'Both parents have a joint primary responsibility for raising the child and, where the parents are separated, the child has the right, and the parents [a corresponding] responsibility to ensure that contact is maintained';

(d) Where a custodial parent wishes to relocate, a court will not lightly refuse leave

for a child to be taken out of a province 'if the decision of the custodial parent is shown to be bona fide and reasonable'; and

(e) The courts have always been mindful of, and 'sensitive to the situation of the parent who is to remain behind'.

[7] With regard to the last mentioned guideline, Mr Skinner in his heads of argument referred to *Hinds v Hinds*,[3] an appeal judgment of Koen J in this division where each of the three judges hearing the appeal wrote judgments, and where the learned judge remarked that:

'Where a non-custodian parent already has to suffer the loss of company and contact with a child, it is vital that his/her position not be made worse by any conduct on the part of the custodian parent to frustrate, whether deliberately or inadvertently, the rights of contact to a child, or the ease of maintaining regular contact with the child in any way. Indeed, everything should be done to facilitate such regular contact as the program of the child may allow. The inevitable disparity in equal contact to a child can only be justified on the basis that those rights need to be limited and necessarily have to yield to the greater right and best interests of the child.'

There is much wisdom in the words of Satchwell J and Koen J and I shall hold them in mind as I consider the outcome of this application.

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[3] *Hinds v Hinds* [2016] ZAKZPHC 92 para 72.

[8] It is necessary to briefly consider the history of the relationship between the applicant and the respondent, what it currently is and their personal circumstances.[4] They were involved in a romantic relationship over the period from November 2019 to February 2022. During that period, the minor child was conceived. The minor child is the only child of the applicant but is not the only child of the respondent who has two children, aged nine and seven respectively, from an earlier marriage. The applicant is presently employed as a domestic insurance underwriter. The respondent is a self-employed printer.

[9] The applicant indicates that she had difficulties with the respondent's conduct both before and after separating from him. He, inter alia, spoke to her in a demeaning fashion and belittled her at every opportunity by using harsh and unnecessary language towards, and about, her. To try and resolve these difficulties, she consented to undergo mediation after they separated. This ultimately resulted in the conclusion of the parenting plan. She states that at the time of concluding the parenting plan she was not made aware of the fact that she did not require the respondent's consent to relocate within the borders of South Africa. She explains that she was not legally represented at the time and her rights in this regard were not explained to her. Had she been made aware of this, she states that she would not have included the prohibition in the parenting plan that now necessitates her bringing this application.

[10] The applicant is presently paid maintenance in respect of the minor child by the respondent, but claims that what she receives from him is insufficient. She accordingly relies upon her parents for financial assistance to make good the shortfall that she experiences each month. She presently earns a gross amount of R21 000 per month which nets her approximately R18 000 per month and the respondent pays her maintenance of approximately R9 000 per month in respect of the minor

[4] *FS v JJ and another* [2010] ZASCA 139; 2011 (3) SA 126 (SCA) para 44.

child. She thus has income of approximately R27 000 per month.[5] The applicant claims that her monthly expenses come to approximately R28 500. She thus has a shortfall of income over expenditure, which shortfall, as previously mentioned, is made good by her parents. Her parents also used to offer her subsidised accommodation in Durban in a dwelling that they owned in respect of which she paid a greatly reduced rental. That dwelling has now been sold. The applicant's parents also paid for her utilities. The applicant's parents relocated to Knysna in the Western Cape approximately a year ago but now intend taking up residence in Cape Town itself.

[11] The position that her employer first offered the applicant in Cape Town, was that of a domestic underwriter, and initially came with a pay increase of approximately R5 000 per month. This increase was attractive to her and even at the level at which it was initially offered would have been difficult for her to turn down. This offer was, however, later revisited by her employer and she was then offered the position in Cape Town of a senior domestic underwriter with an increase in salary of an additional amount of R7 000 per month, making the offered position even more attractive.[6] The applicant's salary would thus be R28 000 gross per month, giving her a net salary of just over R23 000 per month, to which the respondent's maintenance of R9 000 per month for the minor child must be added. In my view, despite the respondent in his heads of argument terming this an 'insubstantial' or a 'slight' financial advantage, this is potentially a substantial and significant change in the applicant's economic reality.

[12] Since separating from the applicant, the respondent has enjoyed liberal access to the minor child. He sees her for overnight visits at his home every alternate week, commencing on Thursday until Sunday

[5] The actual amounts are R17 952.81 and R8 932.33 respectively.
[6] The offer also provided that the applicant was required to take up her duties in Cape Town on 1 January 2023. This is what created the urgency. It appears that this deadline has now been extended to allow this court to determine whether the minor child should be allowed to accompany the applicant to Cape Town.

evening and on the weeks when he does not see the minor child over the weekend, he has contact with her on a Wednesday afternoon.

[13] The applicant appears to have approached the proposed relocation to Cape Town in a careful and measured manner. She contemplates taking up accommodation with her parents once they secure accommodation in Cape Town, which they are in the process of doing.[7] This will again provide her with a reduced rental for her accommodation and will also provide her with a family support network upon which she can rely. She has also identified a suitable crèche close to her place of employment that apparently has the capacity to accommodate the minor child whilst she is at work.

[14] While the parenting plan was to be a roadmap for the future rearing of the minor child by the parties, and while it was intended to provide certainty to them, it was not intended to be immutable. The parenting plan specifically makes provision for its amendment. Clause 8.1 reads as follows:

'The Parties agree that Parenting Plan may need to be revised from time to time, which shall
be subject to the developmental need of H[…] or a material change in the parent's circumstances or in a situation that would make the present Parenting Plan unworkable.'

[15] At the time that the parenting plan was concluded, the parties were resident in KwaZulu-Natal. They may well have expected, and intended, to remain in this province for the foreseeable future. But they did foresee that such might not be the case. The extract from the parenting plan referred to above establishes this. And that is why the non-relocation clause is worded in the manner that it is. The default position is that the parties remain in KwaZulu-Natal. Any move to another province is dependent on the party remaining in KwaZulu-Natal being informed thereof and that party's consent being requested and provided for such a

[7] The applicant's parent's dwelling in which she resided in Durban at a subsidized rental has been sold to fund the purchase of an immovable property in Cape Town by her parents.

move. The remaining party, however, may not unreasonably withhold his or her consent for such a proposed move.

[16] On the face of it, this clause does not impact on the minor child. The clause appears to apply only to the applicant and the respondent and thus to both the custodial as well as the non-custodial parent. The parenting plan does not explicitly provide that the minor child is to remain in the province. The parenting plan is divided into two periods insofar as the minor child is concerned: the period from the date of its signature until the minor child enters grade one at school and a second period from grade one onwards. Both periods contain the same non-relocation clause.

[17] After a consideration of the parenting plan in its totality, and both its text, context and its sense,[8] it is evident that what was intended was that the parties, and therefore the minor child, would remain within this province, subject to the necessary consent being given by the remaining parent for a relocation outside the province to occur. This is the interpretation that I shall apply to the parenting plan.

[18] The applicant makes the allegation in her founding affidavit that the respondent alleges that she has 'reneged' on the parenting plan by virtue of her desire to relocate to Cape Town. That argument needs to be swiftly nipped in the bud. From the wording of the parenting plan, the parties recognised that events in the future may occur that renders the relocation of a party a necessity. The position was not that the applicant and the respondent were bound to remain within KwaZulu-Natal until the minor child attained majority. That being the case, there can be no question of the applicant reneging on anything: she is, on the contrary, acting entirely in consonance with the terms of the parenting plan. Any argument to the contrary must accordingly be rejected.

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[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

[19] There was, in addition, some debate before me about who bears the onus given the wording of the non-relocation clause. In my view the answer to that is that to the extent that it exists, it is to be borne by the respondent. Guidance on this issue is provided by the English case of *Treloar v Bigge*,[9] where the court stated that a clause that provided that consent could not be unreasonably withheld did not permit a claim for damages to arise if a party believes that such consent has been unreasonably withheld. The example of the sale of a ship, subject to consent for such sale not being unreasonably withheld, was used. If the consent to sell the ship was regarded by one party as having been unreasonably withheld, then the party holding that view would be at liberty to sell the ship. The party who declined to provide the necessary consent would then have to approach the court to demonstrate that its withholding of consent was not unreasonable. That party would have to demonstrate:

'… fair, solid, and substantial cause …'.[10]

[20] In the more recent Canadian case of *1455202 Ontario Inc v Welbow Holdings Ltd et al,*[11] the court held when dealing with a lease that:

'[i]n determining the reasonableness of a refusal to consent, it is the information available to – and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material...'

[21] *1455202 Ontario Inc* was followed, with approval, in *Airport Inn and Suites (Pty) Limited v Strydom,*[12] which also dealt with a lease, where the court stated the following:

'I am in respectful agreement with this *dictum*. The reasonableness of a lessor's refusal to consent should be determined with reference to the reasons advanced by the lessor at the time of refusal. Additional or different facts or reasons provided by a lessor to a court subsequently should not be taken into account when determining the reasonableness of the lessor's refusal to consent. There

[9] *Treloar v Bigge* 1874 LR Exch 151.
[10] Ibid at 154.
[11] *1455202 Ontario Inc v Welbow Holdings Ltd et al* 2003 CanLII 10572 (ON SC); [2003] OTC 396 (SC).
[12] *Airport Inn and Suites (Pty) Limited v Strydom* [2021] ZAGPJHC 63 para 32.

are, in my judgment, good grounds for a court to only concern itself with the reasons advanced by a lessor at the time of refusal. The reasons advanced by the lessor at the time of refusal can reasonably be expected to be the true reasons. The lessor's refusal to consent may impact negatively on the relationship between the parties. A deterioration of the relationship between the parties might cause a situation where the lessor conjures up additional reasons for refusing to consent. An unscrupulous lessor might even find ways to create additional reasons to refuse consent. A court's determination of the reasonableness of a lessor's refusal to consent solely on the basis of the reasons advanced by the lessor at the time of refusal, is also a matter of fairness to the lessee involved. It is not hard to imagine a situation where a lessee, having been refused consent for reasons advanced by the lessor at the time of refusal, cures the issues underlying those reasons only to be confronted with additional or different reasons advanced by the lessor in subsequent litigation.'

[22] The reasons advanced by the respondent in declining to provide his consent to the proposed relocation emerge in the correspondence exchanged between the parties' legal representatives before this application was brought. The topic of a relocation was broached by the applicant's erstwhile attorneys in a letter dated 30 September 2022 sent to the respondent's attorneys. It is brusque in its content, and posits the act of relocation as a fact and not merely a possibility that may occur, but does request input from the respondent on what form of contact he envisages could occur given the fact of the relocation to Cape Town. The acidulous response to that letter was a letter from the respondent's attorneys, incorrectly dated 9 September 2022.[13] The relevant parts of the letter are the following:

'With all due respect to your client, our instructions are that a relocation of the minor child to Cape Town would not be in H[…]'s best interest. She has a close bond with her paternal family which includes our client, his mother as well as her two siblings, not to mention extended family and friends here in KwaZulu-Natal.

Therefore, if it is your client's intention to relocate to Cape Town in January 2023 our client obviously cannot prevent her from doing so. However, we record that

[13] That the letter is incorrectly dated appears from the fact that it acknowledges the applicant's erstwhile attorney's letter dated 30 September 2022. The respondent's attorney's letter should probably have borne the date 9 October 2022.

our client does not provide his written consent in terms of the parenting plan for the relocation of the minor child. In light of such reasonable refusal H[...] will have to live primarily with our client, with your client to have rights of access and we look forward to her input in regard thereto.'

I immediately point out that there is no counter application from the respondent that seeks such relief.

[23] The first thing to be noted from this response is that the respondent holds the view that the bond between the minor child and the respondent's immediate family, including the minor child's half siblings and friends, should be retained and the bond between the applicant, the minor child's birth mother and primary care-giver, should be sacrificed. Why this should occur, given the tender age of the minor child is not motivated except than by what is stated in the respondent's attorney's letter of 9 September 2022. The age and gender of the minor child are significant factors that simply cannot be overlooked. She is little more than an infant who currently has no ability for independent functioning. This will obviously change as she matures. Given this, it is entirely understandable that she may presently be more reliant upon the applicant who, as previously recorded, is her primary care-giver, than upon the respondent. As was stated by Maya AJA in *F v F*:

'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.'[14] (Footnotes omitted.)

[24] There can be no doubt that bonds with parents are vital for young children. The ability to bond with others is also of importance in the growth of a child. To the extent that there may be a bond already between the minor child and her half siblings, I am of the view that such bond cannot be favoured above the primary bond between the applicant and the minor child. In reaching that conclusion I have considered, primarily, the age of the minor child. I am, however, not suggesting that family ties, friendships and the respondent are not important or necessary in the

[14] *F v F* 2006 (3) SA 42 (SCA); [2006] 1 All SA 571 (SCA) para 12.

minor child's life. On the contrary, all of the aforegoing are desirable. These desirable occurrences and influences must, however, fit into the reality of the lives led by the applicant and the respondent and must accord with what is in the best interests of the minor child.

[25] Unfortunately, I discern indications in the papers that the respondent is not truly motivated by what is in the best interests of the minor child but rather by what is in his best interests:

(a) Firstly, I am perturbed that he holds the view that a two-year-old child should be separated from her mother because she allegedly has a strong bond with his family, which includes his children born from a prior marriage with a third party. This view was clearly articulated in his attorney's letter of 9 September 2022. He appears not to appreciate that the proposed separation of the minor child from her primary care-giver would occasion great anxiety and distress to the minor child. It seems to me to be obvious that this would occur, yet the respondent does not identify this as a potential problem nor does he therefore propose how it could possibly be ameliorated. In my view, his attitude on this single point reveals much about him as a person and the values to which he ascribes; and

(b) Secondly, he appears to hold the view that the applicant's career is an irrelevancy and that her rights to it are subservient to his rights. His rights and interests trump hers. This is demonstrated in a message directed to the applicant in March 2022, where the respondent expressed himself as follows:

'This is why I think we are just so different as I want someone who supports me and has my back and makes me feel like I am the breadwinner and the man of the house. I did not feel that with us... you were too busy trying to compete or prove yourself when I never asked you to... I wanted you to be there treat me like I was your king for supporting our family. I am a man so it's not my priority to look after your emotions it's my priority to provide for my family...'

Unfortunately, this entirely egocentric point of view appears to continue to guide the respondent. He accordingly states that the applicant should simply resign from her present employment and take up different employment with a new employer in Durban to enable him to continue enjoying his rights of contact with the minor child. To this end, he puts up job advertisements that he contends the

applicant could respond to. The applicant is, however, already in secure employment and has been offered a career path to progress further by her employer. Should she be required to forfeit that to meet the needs of the respondent? I think not. The applicant is entitled to a career of her own, as much as the respondent is also entitled to earn his living the way he chooses. I can understand that as a mother of a young child the applicant has a degree of anxiety about her financial future in the difficult economic times that we find ourselves in in this country. While she does have a B.Comm degree, it is, unfortunately, a notorious fact that our country is awash with graduates who cannot secure employment. Resignation from secure employment to commence afresh with different employment appears to me to be unsound, unnecessary and too risky.

[26] The fact of the matter is that because the applicant has had a child with the respondent does not mean that her entitlement to a life of her own must be discounted and ignored whilst his can continue as he chooses and directs. This is also something that the respondent does not appear to acknowledge. The applicant herself has rights that she is entitled to claim. As was said by Maya AJA in *F v F*:

'From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment.'[15] (Footnote omitted.)

I agree with these remarks.

[27] There are other aspects of the respondent's case that do not sit well with me:

(a) I cannot agree with the respondent's submission that the applicant chooses to relocate, not for the increased salary that she will earn, but because of the increased

[15] *F v F* 2006 (3) SA 42 (SCA); [2006] 1 All SA 571 (SCA) para 11.

status she will personally derive from her appointment as a senior underwriter. The fallacy in this argument is that the applicant's erstwhile attorneys wrote to the respondent's attorneys on 30 September 2022 informing them of her intention to relocate when the position of a domestic underwriter had been offered to her in Cape Town. The offer of the position of senior domestic underwriter was only made to the applicant on 24 October 2022, by which time the applicant had already informed the respondent that she wished to relocate. Increased status could not have been a motivating factor. There is thus no evidence for the proposition advanced; and

(b) The further argument by the respondent that the applicant has not demonstrated that she is 'not making ends meet' is borderline distasteful in my view. The proposition appears to be that as long as the applicant has just enough, that is adequate. If she is getting by then she can have no valid reason to move to Cape Town. There is no acknowledgement by the respondent that she should be able to get ahead or that the applicant has a career and aspirations of her own. I do not accept that as a valid proposition.

[28] The children of parents who are not prepared to conduct themselves reasonably often suffer the consequences of that conduct. Such suffering is to be deprecated and avoided if humanly possible but it often is an inescapable reality. But one constant about life is that things change all the time. The applicant and respondent recognised this in the way that they worded the parenting plan and, in particular, the non-relocation clause. Life itself is uncertain and unpredictable and a person must make the most of opportunities that present themselves from time to time. This applies to all the citizens of our country, but especially so to women who for too long have been denied opportunities for self-advancement. The applicant is attempting to do this. She should be encouraged, not restrained, from improving herself and thereby the minor child.

[29] It is perhaps appropriate at this juncture to deal with the fact that the Family Advocate has not played a part in this application. I was advised from the Bar that the time period between the last appearance and today's appearance did not give the Family Advocate sufficient time to investigate and report. Fortunately, the parties' legal representatives,

in their cumulative wisdom and experience anticipated this and agreed to instruct an independent registered social worker to, in essence, perform the work of the Family Advocate. The social worker, Mrs Humswari Archary (the social worker) has prepared a report that I have received and considered. The report identified the competing interests that exist but does not really assist much in resolving those issues. One point of significance that does emerge from the report is that the respondent now holds the view that the minor child's primary residence should be with the applicant. This is a significant departure from his original view on the matter. The recommendations of the social worker are that the minor child's primary residence remain with the applicant. That much is clear. What is not clear is what follows thereafter. She recommends that the respondent maintains his rights to contact with the minor child but that the costs of exercising such contact be shared between the parties. She does not, however, indicate where that contact should be exercised. By referring to the costs, it must be that the contact is to occur with the applicant and the minor child living in Cape Town. She does not, however, make such a finding that the applicant should be permitted to relocate. Only if the respondent's rights to access are protected and his obligation to pay maintenance is concretised in a court order should the right to relocate be granted, according to the social worker.

[30] My understanding is that there is no suggestion on the applicant's part of the respondent's rights to have contact with the minor child being formally pruned back or restricted or stopped. He can have the same contact as he now enjoys if he is able to be in Cape Town at the appropriate time. The rights which the respondent presently possesses must, however, conform with the practical reality within which life is lived. I have considered the suggestion that the social worker makes about the parties sharing the costs of such contact. I know what the applicant will be earning and I know what her expenses are. I do not know anything about the financial circumstances of the respondent and he has not taken advantage of the opportunity to inform me of what he earns and what his

expenses are. In those circumstances, I am more inclined to grant the order insofar as it relates to costs as it is presently formulated in the notice of motion. On the final finding of the social worker regarding a maintenance order being issued, this is not a maintenance application and I am not entitled to make a decision on that issue on the papers before me, nor could I do so for the same reason that I have no knowledge of the respondent's financial position.

[31] There is nothing to suggest that the promotion that the applicant has been offered by her employer is anything other than bona fide. That she has considered the offer and has resolved to accept it is not, in my opinion, given her circumstances, unreasonable. She has considered and disclosed how the proposed relocation is to occur. What she proposes is accordingly not a stratagem that has been devised in order to thwart the respondent of any rights that he has in respect of the minor child. It also does not constitute a decision where the applicant has put her needs and interests ahead of the welfare of the minor child. On the contrary, as was said in *MVZ v WGH,*[16] this is a situation where:

'... the welfare of the minor child could not be achieved unless the applicant was given the ordinary opportunity to pursue her goals and to make her choices without unreasonable restriction.'[17]

[32] In concluding the parenting plan, the respondent undertook not to unreasonably withhold his approval to the relocation of the applicant, and, by implication, the minor child, from KwaZulu-Natal. Given the information that the respondent had at his disposal when his permission was sought by the applicant, his expressed opposition to the proposed relocation is not, in my view, reasonable. He has not demonstrated his refusal to be reasonable or in the best interests of the minor child. In so saying, I immediately acknowledge that it is entirely human for him to oppose the relocation of the minor child purely on an emotional level. That he has done so on this level perhaps demonstrates the full extent of his love for his child. But such reflexive opposition is ultimately one-dimensional and does not consider the practicalities of the situation. It also does not demonstrate any objective

[16] *MVZ v WGH* [2022] ZAWCHC 81.
[17] Ibid para 16.

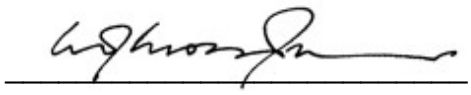
reasoning concerning what would really be in the best interests of the minor child. The respondent has assumed an inflexible position where his interests are of paramount importance, not the minor child's. He proposes that the applicant be bound to the terms of the parenting plan simply because she concluded it when circumstances were different and the future was unknown. This, notwithstanding the fact that the parenting plan catered for the very change proposed by the applicant.

[33] In my view the relocation of the applicant to Cape Town is reasonable and it is in the best interests of the minor child that she accompanies her mother in that move, subject to the respondent's rights of access being preserved as best they can in the changed circumstances.

[34] I accordingly grant the following order:

1. The applicant is given leave to re-locate with the minor child, H[…] P[…] K[…], a girl born on 9 December 2020, from Durban to Cape Town for the purpose of taking up permanent residence in Cape Town.
2. Until the child enters Grade 1, the respondent shall be entitled to have contact with the child:
    2.1 every alternate week from after school on Thursday until 16h00 hours on a Sunday in Cape Town (with the costs associated with such contact to be borne by the respondent); and
    2.2 video contact on weekdays between 17h00 and 19h00 and on Saturdays and Sundays between 08h00 and 19h00.
3. In addition to the contact provided for in paragraph 2 above, the respondent shall be entitled to have overnight contact with the child in Durban whenever the applicant travels to Durban for work purposes. The applicant shall give the respondent not less than one week's notice of her intention to travel to Durban.
4. The applicant shall bring the child to Durban to stay with the respondent for a long weekend from Thursday to Sunday, once per annum, at her own cost. She shall give the respondent not less than one month's notice of the dates on which she shall be bringing the child to Durban.

5. Such other contact as may be agreed between the parties.
6. The respondent is directed to pay the costs of this application.



MOSSOP J

APPEARANCES

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Counsel for the respondent	:	Mr B L Skinner SC
Instructed by	:	Daly Morris Fuller Inc.
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		Westville
Date of Hearing	:	9 January 2023
Date of Judgment	:	9 January 2023