



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: **4760/2024**

In the matter between:

V.L.

Applicant

v

F.N.

Respondent

Coram : Salie, J

Date of Hearing : 27 May 2024

Written Judgment delivered : 30 May 2024

Counsel for Applicant : Adv. Julia Anderssen

Attorneys for Applicant : Mandy Simpson Attorneys

Counsel for Respondent : Adv. Janet McCurdie SC

Attorney for Respondent : Smith-Symms & Associates

JUDGMENT DELIVERED ELECTRONICALLY ON 30 MAY 2024

SALIE,J:

Introduction:

1] This is a relocation application of a minor for hearing on an urgent basis. The applicant seeks this Court's leave to remove the parties' minor son permanently from South Africa so that he can reside with her in Germany. She has accepted an employment offer, commencing on 1 June 2024. The application was launched two (2) months ago, for hearing on the urgent roll on 13 May 2024. By agreement between the parties, the matter was set down for hearing this week.

2] The record consisting of an application by the mother and a counterapplication by the father, in excess of 400 pages, contains detailed affidavits from both parents, comprehensive reports by the appointed experts and an array of collateral information. The most salient words were however expressed by none other than the minor parties' 12 year old son, whom forms the subject of this application.

*"It's going to be a loss for one of the parents and a loss for me no matter what."*¹

3] This heartfelt comment well illustrates the thorny feature of this type of applications in family matters. In a locale where both parents are stressing what they consider the best interest for their child, the consequent *impasse* places the Court as the upper guardian of the minor child to make that decision. Through the development of our case law, in line with our Constitutional imperatives and the Children's Act 38 of 2005, this decision must be considered along with various criteria applied to the facts of the matter. It is undeniable that each family dynamic is different and unique.

Background Facts:

4] I shall refer to the applicant (mother) and respondent (father) as "V" and "F" respectively in this judgment unless the context states otherwise. This brings me to the background facts of this family leading to this relocation application, briefly summarized as follows:

¹ Record page 245, paragraph 10.8 – Report of Clinical Psychologist Toni Raphael dated April 2024

4.1] V and F were married in South Africa in 2009 and lived in Cape Town. One child was born of their marriage, a boy (“T”) born in October 2011. The parties separated and divorced during 2015. In terms of the settlement agreement, which was incorporated in the decree of divorce, V and F cared for their son on an almost equal basis. Both play an important role in the minor’s daily life and interests.

4.2] V married her husband (“S”) in 2019. V is employed as an air traffic controller (ATC) at Cape Town International Airport, having been so employed for almost 16 years. Her husband is a cargo pilot for DHL. V set out in detail in her founding affidavit, that she became aware of the vacancy with DFS Aviation Services in Germany in August 2023. She states that she was headhunted by a former colleague in the aviation industry and given her qualifications and experience, she did some research, discussed it with her husband and decided to apply. She formed the view that it was not only an opportunity to advance her career but it would also allow them to immigrate to Germany and would provide T with wonderful opportunities for his future. She contacted the respondent on 11 August 2023 with an electronic written message that she had applied for the position at the aviation academy in Frankfurt, Germany and requesting his consent for their son to relocate with her. She set out further in her whatsapp that T would receive his schooling education in Germany as well as other appealing factors which would advance their son’s interests. She indicated that she could afford 2 to 3 return tickets for him to visit their son in Germany or vice versa. She acknowledged that

the language adaptation would be difficult but that the education system has integration classes for foreigners in school to help assist in the learning process.

4.3] V and F met subsequently and discussed the matter including the practical issues and considered options as to how they could make the relocation work between them and their son. Whilst F asked whether she would allow T to finish his primary schooling in South Africa, she indicated her concern that this would not be best for T. She expressed the view that the sooner he was able to integrate in the new school system, the better and that it would be easier for him to do so in a younger grade. Leaving South Africa was not a new concept for either of them since the respondent enquired from her some 4 months prior whether she would be willing to *“live somewhere safer than South Africa”* and that he wanted T to have an international education. At the time F proposed moving to Mauritius and in turn the applicant and her husband enquired if they could likewise move to Mauritius. After consultation with a relocation expert, V and her husband could obtain work and residency visas however the respondent would have a problem. The proposal was not pursued by the respondent thereafter.

4.4] Whilst the respondent indicated that he was unhappy with seeing T only 3 times per year, V indicated that is all that she can afford in providing him and T to see each other. He could also arrange to see T more often given that she would not be expecting him to contribute to T's expenses whilst they live in Germany.

4.5] Upon the conclusion of the meeting, the applicant states that she was under the impression that the respondent was not objecting to T's relocation to Germany with her but that he was merely unhappy about having contact only on 3 occasions per annum and furthermore that he was exploring options to allow him to relocate to Europe (if not Germany). She understood that the logistics of the relocation required further resolution.

4.6] While she was scheduled to commence employment on 24 January 2024, this was later scheduled by her prospective employer to 1 June 2024. In the interim, communication continued between the parties via their respective attorneys. The respondent subsequently indicated that he is not prepared to consent at this stage for their son to relocate to Germany. Given the mounting tension and disagreement, the applicant appointed a clinical psychologist, Ms Toni Raphael, to conduct a relocation assessment and to provide a recommendation as to what would be in T's best interests. The appointed expert commenced her investigation in November 2023. Similarly, the respondent appointed Dr Astrid Martalas, an expert counselling psychologist with similar experience to investigate and assess T's best interests. Dr. Martalas commenced her investigation on 22 January 2023. Both filed their final reports after the launching of the matter.

Correspondence prior launch of the application for relocation:

4.7] Various correspondence were communicated between the parties' respective attorneys. The applicant sought to mediate the matter and for the respondent to cooperate in the investigation by Ms. Raphael. Mediation was however turned down by the respondent and he instead appointed his own expert to likewise conduct an investigation as set out above. Both parties agreed to co-operate with their respective appointed experts. The correspondence by the V's attorney dated 8 November 2023 acknowledged that the relocation would raise various concerns for the respondent and set out in much detail aspects and information to address and answer the concerns. The correspondence was set out under the subheadings:

4.7.1] Accommodation;

4.7.2] Healthcare;

4.7.3] Schooling including information relating to various different schools in the area in and around V's secured residence in Langen, Germany;

4.7.4] Holiday Contact;

4.7.5] Daily Contact;

4.7.6] Details pertaining to V's employment in Germany including her shift times, salary and expenses in Germany as well as an annual leave period of 25 days;

4.7.7] Visa Application Process further addressed in subheadings with the process applicable for the applicant, the minor as well as the respondent respectively;

4.7.8] Support network (relatives, friends and colleagues) in Germany and London.

The views of mother and father:

5] The information set out in the correspondence is incorporated in the applicant's founding affidavit. She further states that she would not be able to afford private education should she remain in South Africa whilst a school education in Germany will grant the minor an international education which "*will broaden his horizon*". She had done extensive research into the schooling options for T in Germany. She identified 4 schools which would be suitable in or near Langen, 3 of which are public schools and within walking distance from their residence whilst the fourth school is a private school in the next town, some 8 kilometers away.

6] She further states that T will be eligible to qualify for citizenship and an EU passport within 3 years, provided that he has lived in Germany for three years and made application for citizenship before his 16th birthday, October 2027. T will be turning 13 in October this year. In order to facilitate his adaptation and language integration, V had enrolled T in a German education course, in terms of which he had started to learn the language. She had also identified a child psychology practice closest to her residence in Langen in order for T to continue with psychotherapy for his anxiety and ADHD diagnosis when he was in Grade 1. V's new work schedule would only consist of work from 08h00 to 16h00 daily, which will allow her to drop T off at school in the mornings and to collect him from school. She would also have the opportunity to attend his extra-curricular activities, which is not always possible given her shift times in South

Africa. As she would be earning a higher salary, she would be able to give T a higher standard of living and offer him additional extra-curricular activities relating to his interests such as computer studies.

7] The applicant also set out the costs for the respondent to visit with T and travelling costs including airfare, transport from the airport, accommodation and that she would finance 3 return tickets per annum and the costs thereof. She further submits that as the respondent will be saving on maintenance contributions for T in the event of his relocation, it would allow the respondent a monthly saving of approximately R4000 which he could utilize towards additional travel to see their son, whether in Germany or in South Africa. Travelling overseas is familiar to the minor, given that he joined the applicant and her husband in previous overseas visits to Hong Kong, Singapore and more recently a visit to Langen, Germany.

8] T is presently attending primary school in the northern suburbs of Cape Town and the school terms ends on 14 June 2024. The academic year in Germany starts on 26 August 2024. The schools in Germany close on 12 July 2024, requiring application before then. This in turn requires T to be in Germany by the end of June 2024.

9] The respondent opposes the application for relocation on a number of grounds. Firstly, as a point in limine, he views the launching of the application premature given that the appointed experts had not yet completed and submitted their reports. He also

considered the applicant's accepting of the employment position in Germany as a way of presenting the Court with a *fait accompli* in respect of relocation by taking up employment.

10] He further expressed his dissatisfaction with the applicant's relocation plans as being sudden, despite his raised concerns, the applicant had moved ahead with her plans with little consideration of the many potential implications for T, which includes the position if T struggled to adapt to life in Germany. That the minor is an anxious child, presents a real risk that his anxiety would increase with relocation and that adaptation to a new environment would cause the minor more anxiousness without sufficient support structure. The respondent states that the minor's needs and interests are not aligned with that of the applicant and that she is misguided in her views.

11] The nub of the father's concern is that T would have to learn a new language, depart from his circle of friends and more importantly, being moved away from his father. The respondent feels very strongly that the disadvantages for T far outweigh the advantages of relocation. The applicant's reference to his previously pursued interest for T to live abroad, whether in Portugal or Mauritius, was on the basis that he would be living in the same country with T and would continue to live respectively with him and the applicant on an equal basis as they have been hitherto. The father simply finds a position where he would not see his son for 3 or more consecutive months as simply untenable particularly since father and son had spent time with each other equal to that

of the applicant and T. He is of the view that T is at a vulnerable state of his development, and moreover given his generalized anxiety for which he attends psychotherapy sessions, he should not leave now but may sometime in the future when he is older. F's overarching concern is that his current close bond with his son will not survive relocation and that they will both miss out on their relationship.

12] The respondent denies however that he turned mediation down and refers to the correspondence from his attorney wherein which it was stated that they were of the opinion that mediation "*at this time*" would be premature as there are simply too many unknowns.

13] I will deal with the expert's views and their recommendations in more detail later in this judgment.

Applicable legal principles:

14] Section 28(2) of the Constitution protects the best interests of the child as being of paramount importance in every matter concerning the child. In line with this Constitutional imperative, the Children's Act ("the Act") provides at section 7 thereof various factors that are to be taken into account when determining what would be in the best interests of the child with Section 10 stating that due consideration must be given to the child's views, with deference to his or her age, maturing and developmental level.

15] Our Courts accept that relocation would inevitably involve some loss for the child and require adjustment. No doubt adjustment would have to entail a substantial measure of resilience, fortitude and perseverance on the part of the child but so too for the parents. In a situation such as this, where there are no winners, the question is whether the potential losses and adjustment required for the child would have long-term damaging effects on his or her development and psychological functioning. 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 minor's best interest in this relocation debate.

16] The criteria followed by Courts in the consideration of relocation are essentially:

16.1] whether the application to relocate is in good faith and reasonable;

16.2] the application of the best interests' principle;

16.3] the child's views and wishes.

Joint Expert minute:

17] Both experts concluded in a joint minute that T should be allowed to relocate to Germany with his mother, with a post-relocation parenting plan detailing contact

between father and son.² The experts differ however on **when** the relocation ought to occur.

18] Ms. Raphael recommends that relocation should follow shortly, co-inciding with the German academic school year. This commences on 26 August 2024.

19] Dr Martalas recommended that T should remain in his father's care until the South African school year concludes, in other words, when T completes grade 7 by the end of this year and that pending the fulfilment of a number of conditions, namely:

- “3.1 The selection of a school in Lengen with an appropriate integration programme.*
- 3.2 V securing accommodation in Germany that permits the relocation of the family pets.*
- 3.3 V successfully completing her 6 month probation period.*
- 3.4 F and T having had an opportunity to visit Germany to see where T would be living and what the schooling options are.”*

20] The joint minute states Ms. Raphael's view in response to the above that V has demonstrated that:

² Record page 330 – Joint Minute signed by both Dr Martalas and Toni Raphael

“4.1 T does not require German language proficiency for enrolment at a school with an integration programme, where T will be placed.

4.2 T needs to be resident in Germany, on a family reunification visa, in order to be placed in a school.”

21] Ms Raphael also opined that due to the fact that V had actively been recruited for the job which she has secured, it is most probable she would be permanently appointed after the mandatory 6 month probation period.

Oral Submissions for applicant and respondent:

22] It was not disputed that the application for relocation was made in good faith and that V's motivation for the removal was reasonable and genuine. This accords with the views of both experts. I can find no facts to warrant or support otherwise. In the premise I need not delve into this aspect further.

23] Consideration of what would serve the best interests of the child, the parties agreed that it was also a matter of deciding which option (relocation or not) would cause the least amount of detriment for the minor. Indeed a conspectus of all factors need to

be placed into consideration when embarking on this enquiry. The loss suffered by F in the event of this Court granting T's relocation must be afforded appropriate recognition and sensitivity and I am bound to consider the circumstances which would permit the continued nurturing of this relationship in that event including the minor's own emotional capacity to retain the relationship with his father notwithstanding residing in Germany. The same consideration applies to the applicant in the scenario where the child is to remain in South Africa.

24] In my view, the concerns of F as well as that set out by his expert are essentially that the relocation ought to happen at a later stage when more certainty is obtained regarding the minor's language and schooling integration, together with certainty as to which school T would be attending and after his mother's 6 month probation period had been completed. In short, he further seeks a dismissal of the application for relocation and instead that this Court grant the relief in his counter-application namely, that the minor continue living with him in South Africa with ancillary relief *apropos* contact with the applicant. He has also obtained placement for T at a private school, Curro in Durbanville which would afford him with an outstanding education as well as other interests.

25] During oral argument, the position was essentially that the certainty which the respondent require (moreover the issue of schooling and integration) can only be realized upon the T being in Germany. The process in short is that he would join the

applicant in Germany on the strength of a family reunion visa. Once T obtains a visa he must first attend, within 2 weeks of his arrival in Germany, at the Aliens Authority to register his arrival. Thereafter the applicant would be able to submit an application to the Admissions and Counselling Centre of the State Education Authority in Offenbach. This is a central hub for government schools and they determine which school T will attend. It is clear to this Court that T would have to be present when the application is made as it includes aptitude testing in the German language and assessment of the child in person. In order to ensure that T has a place at a school in Langen and can start on the first day of the academic year in August, his application has to be made prior to the last day of the current academic year being 15 July 2015.

26] It is evident from the trail emails from the schooling institutions (attached to the papers), that the respondent's quest for certainty as to which specific school the minor would be attending can only be attained once the minor in fact registers as set out above, apply and presents himself in Germany, including doing the tests. What suffice for this Court is that the child will indeed receive schooling in Germany. That he would need to attend an aptitude test as well as a German language proficiency test are certainly not filters by which he would be denied schooling. Instead, it is very clear from the papers that the tests would simply allow the system to determine how he needs to be placed so as to integrate accordingly.

The minor's wish to relocate to Germany:

27] It is not in dispute that the minor has expressed to both experts that he wishes to relocate to Germany with his mother. This Court is duty bound to consider his expressed wishes, however it does not mean that it is on him to make this decision. I am not attaching exclusive weight to the wishes of the child, however, it gives me valuable insight in the adjudication of this matter. I am mindful that in expressing his wishes, T is an adolescent who is not able to appreciate the far reaching consequences or impact of his decision. T visited Germany in January this year for a week vacation around the festive season. Whilst this gave him an experience of visiting Germany, this could have also given him an unrealistic impression of daily life in Germany, removed from what is familiar and predictable to him and of course, the comfort and bond with his father.

Expert reports:

28] In a comprehensive assessment report, Ms Raphael concludes that in her opinion T is not necessarily able to articulate his actual reasons for wanting to relocate with his mother, and that he is worried about hurting his father's feelings. She further indicated that in her opinion T feels better able to tolerate extended absences from his father than from his mother at this stage of his life. Furthermore, although care and contact of T was shared on an equal basis, his mother had historically carried more of the parental and mental load in terms of anticipating and reliably providing for T's emotional, education, social, logistical and practical needs. T looks more to his mother

for aspects of parental support than his father, although he finds both parents fulfilling of his needs. At paragraph 12.8 of her report, she concludes in her observations that:

“...in a scenario where there had to be a so-called primary residence and parent of T, at this stage of his life, the scales tip in [the mother’s] favour.”

29] I hasten to state though that the minor was found by Ms. Raphael to enjoy a positive and secure attachment to his father. He too had been a devoted and attentive parent to T from birth and had shared in all aspects of childcare. F was found to be a “good enough” parent to T, meaning that if T were to remain in his primary care, he would be well-enough care for and parented. However, the respondent was found to be a less emotionally attuned and proactive in his parenting of T than the applicant. It was very clear though that the respondent would be emotionally devastated not to be part of T’s everyday life and growing up, having built his life around T. It is encouraging and significant a fact that in her view, not challenged by Dr Martalas, that T is at an age and stage of his development, and with particular reference to the relationship that he has with his father, with continued contact, that he will be able to maintain that bond and relationship with his father notwithstanding residing in Germany.

30] Ms Raphael sets out at paragraph 12.11 in her report that:

“The proposed relocation undeniably represent certain losses and challenges to T. On a balance of factors, however, it is the author’s opinion that the least

detrimental alternative, should [the applicant] relocate to Germany, would be for T to accompany her.”

31] As I had indicated earlier on in this judgment, the expert for the respondent, Dr Martalas had also concluded that it would be in the minor’s best interests to relocate with his mother subject to certain conditions. Dr Martalas concludes that whilst there does not appear to be any ideal time to relocate, the general principle is that the earlier in a child’s school career the relocation happen, the better. She does however recommend that T remains with his father for the completion of his grade 7 year in South Africa and thereafter ought to be allowed to relocate to Germany. This is so because she believes that T must become more proficient in the German language given that he has only a level A1 German proficiency which is the most basic proficiency level at present. She also maintains the view that T’s schooling must first be secured before he is allowed to relocate, that the mother and her husband first obtain permanent residential accommodation and after the mother’s relocation to Germany. Furthermore, after the mother’s probation period had passed and adequate arrangements had been made to maintain contact (actual and electronic) between father and son. Should T however be allowed to relocate immediately, the relocation be reviewed in the event T does not adjust to life in Germany.

Oral submissions during the hearing:

32] Counsel for the respondent had during oral submissions and the heads of argument duly set out the concerns of the respondent by way of substantial reference to the record and the supporting attachments. The areas of uncertainty and concerns demonstrated, if not most of them, are indeed valid. These aspects were also ventilated and debated at length during the hearing by the Court with counsel for both parties. I have weighed the concerns raised against relocation, including whether relocation is to happen now or at a time in the future or whether to dismiss it entirely, against other factors and have balanced them accordingly in arriving at my conclusion set out below.

Findings:

33] I am satisfied that the applicant had duly and sufficiently addressed the concerns of the respondent in considerable detail and that the requirements for relocating the minor have been adequately ventilated and addressed. Making more of the concerns over and above that which had been addressed on these papers would amount to raising the threshold for relocation of the minor to such an extent that it would surmount to an impossible task. I pause to add that both experts had executed a comprehensive assessment of the parties and the minor including collateral information. I am satisfied that the concerns referred to by Dr. Martalas are addressed and that an order incorporating her professional concerns would be sufficient to address same adequately. For the sake of completion, I do not however agree that the school placement and language proficiency is a bar for the relocation order as the integration programme provided by the German educational system accommodates non-speaking learners and is designed to facilitate the educational transition of learners from foreign

countries. It is so that T will get school education, and he will get school placement however he needs to be in Germany as indicated above in order to be placed in a specific school. I am also persuaded that the applicant has displayed the capacity including ongoing psychotherapy and counselling to provide T with the emotional and practical support to assist him with the challenges that he will be facing.

34] The information placed before me, together with a balancing of all the relevant factors and applicable legal principles, satisfies me in coming to the conclusion that it is in the minor child's best interests that the application for his relocation to Germany be granted now. A delay in his relocation would amount to him commencing the German academic year mid-way (January 2025) when his peers would have already commenced in August this year. I believe this would alleviate his anxiety as his peers would be in a similar boat so to speak and he can get support from the navigation of new terrain which his peers would similarly have to tread.

35] I am also persuaded on the totality of these facts, considered cumulatively, that the minor must relocate imminently, with sufficient time to travel to Germany, orientate himself with his new surroundings, apply for placement at a school and be ready to commence the new academic school year in Germany which commences in August. An order that he depart South Africa by latest 30 June 2024 would allow him a month from the granting of this order to spend time with his father in his present surrounds and support structure.

Urgency:

36] I am further fortified that the launch of the application was necessary given the polarized views of the parties, bearing in mind that they each were immovable in their positions as what would be in their son's best interests or which choice would have the least detrimental effect on him. Given the chronology of events and moreover that the applicant had in the months prior to launching the application sought to address in writing a substantial amount of the concerns raised by the respondent, I disagree that the respondent had been prejudiced by the application brought on an urgent basis. In any event the parties were both granted leave to supplement their papers, which they duly did, having cognizance of the two expert reports filed. I pause to add that the Registrar of this Court had also in the week prior to the hearing of the matter enquired on my behalf on the prospects of the parties' success in settling of the issue in dispute, which had not had any success. The matter was thus argued before this Court. The application was launched in March and heard before me earlier this week, 27 May 2024. Although urgent, the matter was not launched on an extremely truncated basis. The parties, and in particular the respondent, had a reasonable time to place his position before the Court and the matter was ventilated fully on the papers and further during the hearing of the matter.

37] It was important and in the best interests of the minor for this Court to hear this matter now and decide on the issues placed before it urgently. This judgment is

delivered with the urgency it requires so as to define the *status quo*. The minor's school term is about to adjourn (14 June 2024) and it is important for T to know what his position henceforth would be. This would grant him dignity with an opportunity to bid farewell to his fellow classmates, teachers and peers. It would also grant him an adequate opportunity before the school term ends, to discuss ways in which he wishes to keep contact with them after his relocation. I am of the view that it will also grant him comfort in his valediction and assuage his anxiety associated with parting with his school and fellow learners. I am also making adequate provision, *inter alia*, to allow the respondent to accompany his son to Germany should he wish, though it ought not to be construed as a condition for the minor's departure as ordered below.

38] For the reasons set out herein, taking into account all relevant factors and the expert recommendations filed of record, I am of the view that the application for relocation of the minor to Germany must succeed and the counterapplication must fail with each party to pay their own costs in both applications. Wherefore I make an order as attached hereto and marked "X".

SALIE, J
JUDGE OF THE HIGH COURT
WESTERN CAPE