REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11/10778

DATE:16/11/2011

REPORTABLE

In the matter between:

CELIMENE, ROBERTA GILLIAN Applicant

and

SCHOLTZ, CHRISTOPHER Respondent

J U D G M E N T

MAKUME, J:

[1] On the 7th of September 2011 I handed down an order in this matter and undertook to furnish my reasons thereto. These are now my reasons.

[2] The applicant in this matter seeks an order in terms of the provisions of section 18 of the Children's Act No. 38 of 2005 ("*the Act*"). She requests that she be granted permission to remove her minor child N permanently from the Republic of South Africa to France.

[3] The respondent is the biological father of N. N was born on the 12th October 2005 out of a relationship between the respondent and the applicant.

[4] The net effect of section 18(3)(c)(iii) and (iv) of the Act is that both parents are required to consent to a child's departure or removal from the Republic. In the event of opposition to such request by one parent a competent court may order otherwise and grant the requesting parent the right to remove the child and depart with such child from the Republic of South Africa (see section 18(5) of the Act).

[5] In the notice of motion the applicant further seeks an order regulating the respondent's contact with N in view of the envisaged changed circumstances. The respondent would exercise daily contact with N per telephone and/or Skype contact at appropriate times. Over and above this N

will spend half of his annual school holidays in South Africa with the respondent. The applicant would pay for two economy class return air tickets for N each year. Lastly the applicant seeks an increase of maintenance contributions to the amount of R4 000,00 per month (four thousand rand) per month in respect of N which amount should increase annually by the equivalent of the weighted Consumer Price Index.

[6] The respondent opposes the application and in his counter-application he seeks an order that he be granted permanent residence of the minor child N. He says that he will afford the applicant the same contact as the applicant offers him and will not require any maintenance contribution from the applicant.

[7] The parties in this matter commenced dating in the year 2004 having met in January in the year 2003. In the report of Robyn L Fasser the Clinical Psychologist whose report will be referred to later the applicant's date of birth is given as the 5th August 1979 and that of the respondent as the 29th July 1980 which means that in the year 2004 the applicant was 25 years old and the respondent 24 years old.

[8] The applicant describes her relationship with the respondent as tumultuous and characterised by numerous breakups only to be followed by a reconciliation. They finally broke up in March 2006 after the birth of N. At that time each one was satisfied that the relationship would not work and that it was in their best interests to finally end it and for each one of them to go his or

her own way. They abandoned whatever ideas they had of one day getting married to each other and raising N within a marriage set up between the two of them.

[9] Whether this final breakup was in the best interest of the minor child N or not is not evident however what is clear is that it was in their personal interests to breakup the relationship.

[10] It is interesting to take note that despite their breakup the parties have treated each other with respect and have recognised each other's strengths. None has depicted the other as a bad parent not worthy of taking care of and raising the child N. This fact is supported by the report of the Family Advocate and to a large extent in the report of Robyn L Fasser the Clinical Psychologist.

[11] In her founding affidavit especially paragraph 10 thereof the applicant says:

> "*Whilst we were not dating during my pregnancy, Respondent was a source of emotional support to me. Respondent was present at many of the doctor's appointments and scans during the pregnancy and attended the birth.* "

[12] In paragraph 17 the applicant continues as follows:

"*Respondent has from the start been a committed and loving father to N, and has had regular contact with N throughout N's life. In the first year of N's life, Respondent had weekly contact with N, which evolved into two contact sessions during each week and alternate weekends.* "

[13] It is at this stage convenient to set out the events leading to this application.

[14] It is common knowledge that shortly after their breakup in March 2006 the respondent resumed his intimate relationship with Nathalie. The respondent married Nathalie on the 16th of May 2008. In that marriage a child named J, was born on the 15th of November 2009. The respondent, his wife Nathalie and their son J live in Centurion.

[15] Similarly during May 2007 the applicant met her present husband Mr Thomas Celimene a French citizen. She and N moved permanently into Thomas' Johannesburg home in January 2009. They married in February 2010 and on the 5th of December 2010 their son M was born.

[16] Mr Thomas Celimene is permanently employed by Bouyges, a French company. He is an engineer contracted to the Bombela CJV M&E for work on the Gautrain project as a Mechanical Contract Manager. His contract in

South Africa has come to an end and he is now required to return to Paris in France where his company's head office is located.

[17] Thomas Celimene and the applicant have decided to relocate to Paris in France and take N along with them. The respondent was approached to give his consent in terms of section 18(3)(c)(iii) of the Act. He refused. Applicant and the respondent underwent a mediation process in an attempt to resolve the impasse that also failed hence the applicant launched this application.

[18] It is significant to note that during all this time not only has the respondent kept contact with N as per agreement he has also been paying maintenance of R1670,00 per month to the applicant. This after he was ordered to do so by the Magistrate's Court in Randburg during May 2006.

[19] The applicant maintains throughout in her application despite the report of the Clinical Psychologist and the Family Advocate's report that it is in the best interest of N that he be allowed to relocate to France with her and the rest of the family and that respondent's refusal to grant his consent is unreasonable.

[20] The applicant further adds in favour of the respondent that she has always considered him to be a good father to N. She has never felt any need to reduce N's contact with the respondent.

[21] The applicant's reason for relocating to France is firstly that her husband's contract in South Africa has come to an end and that her husband Mr Thomas Celimene wants to remain in the employment of his company where he has a bright future.

[22] In his opposition to the application the respondent relies mainly on the report of the Clinical Psychologist Robyn L Fasser. He has quoted extensively from the report. He maintains that it will not be in the best interest of N that he should be allowed to relocate to France.

[23] His main contentions are that the minor child N will be removed from his present stable and secure environment and most importantly would lose the benefit of his close and meaningful relationship with him and the extended family.

[24] The legal principles applicable in relocation cases was eloquently set out by the Supreme Court of Appeal in the matter of *Jackson v Jackson* 2001 (2) SA 303 (SCA) para [2] at 318E-I where His Lordship Scott JA said the following:

> "*It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to*

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

[25] The parties as well as in the reports of the Clinical Psychologist Dr Robyn L Fasser, the Family Advocate Adv R Kathawaro and the Family Counsellor Estelle Otto are all agreed that N has a close relationship with both his parents. N is also said to have bonded closely with Nathalie his stepmother and J his stepbrother. The same cannot be said according to Robyn L Fasser about Thomas, N's stepfather with whom he has to relocate permanently to France.

[26] The only dispute between the parties is precisely what this Court has to decide it is what is in the best interest of the minor child N. The applicant says it is in N's best interests that he be allowed to leave the Republic of South Africa with her whilst on the other hand it is the respondent's view that it is not in his interests to leave the country.

[27] The respondent says that in view of his consistent refusal to give his consent the applicant should have known that a dispute of fact exists which cannot be resolved on the papers. I do not agree with that argument and in this regard I can only repeat the sentiments of other judges that cases like these give rise to anxious considerations and pose the knottiest and most disturbing problem. See in this matter *Godbeer v Godbeer* 2000 (3) SA 976 (W) and *Ford v Ford* [2004] 2 All SA 396 (W). In the as yet unreported case of *Maryke Cunningham v Daniel Johannes Jacobus Pretorius* Case No. 31187/08 Gauteng North High Court His Lordship Murphy J expressed himself on para [10] thereof as follows:

> "*The letter and spirit of the new framework giving supremacy to the best interest of the minor child, sets a standard which is not proof on a balance of probability. What is required is that the Court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the Court must render a finding of mixed fact and opinion, in the final analysis a structured value judgment, about what it considers will be in the best interests of the*

minor child. ”

[28] Section 7 of the Act sets out factors to be taken into consideration in determining what is in the best interests of the minor child. Some of these factors identified for consideration by section 7(1) can be immediately discounted as having no relevance to the present application for instance N suffers no chronic illness (section 7(1)(j)). There is no need to protect N from any physical or psychological harm that may be caused by subjecting him to maltreatment, abuse, neglect, exploitation or degradation or exposing him to violence or exploitation or other harmful behaviour (section 7(1)(l) and (m)).

[29] What is key in this application is what is set out in section 7(1)(d), (e) and (f) which must be read in conjunction with the opinion expressed by the Clinical Psychologist and the Family Advocate. I quote hereunder in full section 7(1)(d), (e) and (f):

> Section 7(1): “*Whenever a provision of this Act requires the best interest of the child’s standard to be applied, the following factors must be taken into consideration where relevant namely:-*
>
> *d) the likely effect of any change in the child’s circumstances, including the likely effect on the child of any separation from –*

(i) both or either of the parents or

(ii) any brother or sister or other child, or any other care-giver or person with whom the child has been living;

e) the practical difficulty and expense of a child having contact with the parents or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents or any specific parent on a regular basis;

f) the need for the child –

(i) to remain in the care of his or her parent, family and extended family and to maintain a connection with his or her family, extended family, culture or tradition. "

[30] Robyn L Fasser is a Clinical Psychologist registered with the Health Professions Council of South Africa and holds a B.A. Hons Degree (SA) as well as a Master's Degree in Clinical Psychology which she obtained with distinction. She is a trained family therapist focusing mainly on assessment and evaluation of adult individual relationships and child problems as well as

how they manifest in families. She assesses school children with emotional and scholastic problems as well as psychological evaluation of perspective adoptive parents as part of their preparation and screening.

[31] Robyn L Fasser has co-authored articles published in the South African Journal of Psychology and is a member of the Association of Family and Conciliation Courts of America ("*the AFCC*"). The AFCC is a leading international interdisciplinary association in the field of Family Law which cuts across legal, mental health, dispute resolution, educators, scholars and social science research fields and profession. The AFCC is dedicated to improving the lives of children and families through the resolution of conflict.

[32] Robyn L Fasser was instructed to assess the minor child N, his mother the applicant and his father the respondent with a view to recommending what would be in N's best interest with regard to the applicant's desire to relocate to Paris in France.

[33] In carrying out his mandate Robyn L Fasser obtained information through interviews, clinical observations as well as various psycho-diagnostic tests in which N and his parents participated.

[34] The psycho-diagnostic tests employed are the following:

- The Draw-A-Person Test ("*DAP*")

This projective test is used to obtain necessary information

regarding self-image, personality functioning and developmental information with children.

- Kinetic Family Drawing Test ("*KFD*")

This test is designed to assess the child's perception of the relationships and dynamics in his/her nucleur family.

- Bere Anthony Family Relations Questionnaire ("*BARFT*") Test

This assessment tool is extremely effective in measuring a child's emotional response to his/her family, the words for which may be difficult to express.

- The Tree Test

The tree is a projective test. It is based on the assumption that the tree form with its symmetrical construction around a central axis can be used to interpret the projection of psychic content. As a non-threatening test and easy for children, it adds to the battery that is designed to describe the personality.

- The Personality Assessment Inventory ("*POTI*")

It is a self-administered objective inventory of personality designed to provide information on critical clinical variables.

- The Minnesota Multiphasic Personality Inventory-2 ("*MMPI-2*")

It is a broadband test designed to assess a number of the major patterns of personality and emotional disorders. It is a self-administered objective inventory designed to provide objective scores and profiles determined from well-documented norms.

- The Clinical Multiaxal Inventory-III ("*MCMI-III*")

It is a self-administered inventory designed to profile the respondent along certain scales that include basic personality styles, pathological personality syndromes and symptom disorders.

[35] N was not questioned by the Clinical Psychologist about the proposed relocation to France. However, the following conclusions drawn from the opinion of the psychologist based on the abovementioned tests are of importance. They are:

- N experiences his mother the applicant as his primary care-giver.

- N is equally bonded to both his parents despite the difference in the nurturing responses.

- Although he has a bonded relationship with his stepmother Nathalie and a dilute relationship with his stepfather when compared to other adult relationships there is nothing unhealthy in that relationship.

- He experiences all adult relationships in his life as safe and secure.

- His relationship with his younger half-brother J is a positive and healthy relationship. He does not evidence any jealousy or sibling rivalry.

N has internalised that he has two families and that he can happily reside within each.

- The applicant has evidenced good parenting decisions in that she has facilitated good contact between N and his father the respondent and has worked constructively and positively with the fact that N has two sets of parents and two home bases.

- There is no historical evidence of malice or interference in the manner in which she has worked with the respondent as the parents of N.

- Both the applicant and the respondent responded to

all assessments tools with a positive test taking set. They both evidenced no clinical pathology that would preclude them from performing their parental roles.

- The respondent's reticence and opposition to N's proposed relocation is *bona fide*, appropriate and understandable given the nature of his relationship with his son.

- There are no negative findings on both step-parents that could preclude them from playing a meaningful role in the upbringing of N.

[36] In support of his opposition to the application the respondent says that N has an extended family in the Republic of South Africa with whom he has and maintains a close relationship and is exposed to them on a regular basis.

[37] It is correct that N on relocation will have to learn a new language being French. In fact there is evidence that he has already commenced doing so whilst in South Africa. The applicant enrolled him at a French school in Johannesburg since the beginning of the year his French vocabulary and language is said to be improving daily.

[38] There is an attempt in the respondent's papers to promote this aspect of a new language as an obstacle to N's development. N's stepfather is French speaking and at his young age of 6 I foresee no difficulty in N rapidly

grasping new language skills. Robyn L Fasser in his report could say no more than just mention that N has to learn a new language. Robyn L Fasser is no expert in language nor a speech therapist to can inform the court as to what extent the new language will affect N's development.

WHAT IS IN THE BEST INTEREST OF THE MINOR CHILD N?

[39] In determining what is in the best interest of the minor child N this Court must decide which of the parents is better able to promote and ensure the child's moral, physical emotional welfare whether it is in South Africa or in France. This is better achieved by making reference to the standard set out in section 7 of the Children's Act.

[40] Section 7(1)(a)(i) and (ii) refers to the personal relationships between the child and the parents or any specific parent and the child and any other care-giver or person relevant in those circumstances. The personal relationship between N and his parents is excellent. This is confirmed by Robyn L Fasser as well as in the interview report of N by the Family Advocate when he says on paragraph 5.3 on page 429 the following:

> "*It appears as if the parties are the significant people in Noah's life. It appears as if he looks for comfort from both parties if he is in distress.* "

There is no adverse report about the personal relationship that N has with Mr Celimene his stepfather and Mrs Scholtz his stepmother. The fact that the

relationship is not on the same level is explainable by the fact that Mrs Scholtz has known N for a longer period than Mr Celimene.

[41] Section 7(b)(i) and (ii) refers to the attitude of the parents or any specific parent towards the child and the exercise of parental responsibilities and rights in respect of the child:

- As regards this standard requirement both sets of parents exhibit a good attitude towards the child. Mrs Celimene the applicant has not only been the primary care-giver and provider for the minor child N since his birth. Mr Celimene has taken special interest in N and teaches him the French language.

- In the report of the Family Advocate on page 426 paragraph 4.5 it is reported that the respondent confirmed that N is happy at his new French school. It is correct that by moving to France the respondent will lose the frequent contact with the child. However, it is significant to note that in paragraph 4.13 on page 427 of the Family Advocate's report it is reported as follows:

"*The Respondent stated that the minor child is secure in South Africa and though he can acknowledge possible*

benefits if N relocates, France will be new to N. ”

- It is clear that the respondent acknowledges possible benefits for relocation all he says is that it will be a new place. N is described as a well-balanced child and should manage to acclimatise much faster in France more so with the applicant’s support who will be a home-based mother for the first twelve months.

- In the June 2011 report by his French teacher it is reported as follows:

“*N has integrated himself very well in his new group and class. Lively, curious, alert, he participates very actively in class and undertakes his learning with pleasure and ease.* ”

His English teacher remarks as follows:

“*He is beginning to converse in French. During the holidays assist him to preserve what he has already learnt to better master the French language (revise the vocabulary and enrich his syntax).* ”

[42]

- Section 7(1)(d)(i) and (ii) is what I consider most important and crucial for a decision on this matter. In this section an enquiry is undertaken regarding the likely effect on the child of any change in the child's circumstances including the likely effect on the child of any separation from both or either of the parents or any brother or sister or other child or any care-giver with whom the child has been living.

- On an elimination process the child N never lived with any care-giver. His care-giver has always been the applicant.

- N has two half brothers J and M one on each side of parents. His relationship with Jordan is only beginning and it is at a developing stage. N only sees Jordan over two weekends in a month. J and N will soon get used to and to not seeing each other for long periods and this will improve as soon as they start communicating with each other on Skype and telephonically. Robyn L Fasser further in his report says that he did not directly test for the implications on N of the loss of his half brother whose relationship he describes as secondary. The Family Advocate

reports in his findings that the respondent stated that N has a good relationship with Mr Celimene and that N is loving and affectionate towards M. N and Mr Celimene do a lot of sporty stuff together. They spend quality time together. The respondent stated that the minor child has a bond with M but he teaches J words and J's face lifts up when he sees N.

- This observation by the Family Advocate can only prove that N's relationship with M is on the uprise and it can only get better and better when they get to spend more time with the applicant and Mr Celimene. With the applicant's commitment which she has maintained since the birth of N there should be no fear that N's relationship with the respondent and his family will diminish.

[43] Section 7(1)(f) deals with the need of the child to remain in the care of his or her parent's family and extended family and to maintain a connection with his or her family, extended family, culture or tradition.

- The applicant is and has always been the primary care-giver of N. The respondent has admitted and conceded this and has in no way said that the applicant is incapable of carrying out her duties as N's

primary care-giver. It should therefore not matter whether she is the primary care-giver in South Africa or in France. Her ability to at all times act in the best interest of the minor child is unquestionable. The applicant says that the respondent and N have a close relationship and speak to one another telephonically. She has never frustrated and never will attempt to frustrate respondent's conduct with N.

- The respondent argues about the loss of contact with his and applicant's extended family in South Africa if N relocates to France. Robyn L Fasser says that N will lose the input of his extended paternal family who have become his friends (cousins) and the connection that this relationship offers. He has become used to this resource and would not immediately or necessarily over time replace this source.

- Besides contact with the extended family it has not been demonstrated by the respondent how it will be in the best interest of the child N that he should stay in South Africa in order to maintain contact with his cousins. There is no evidence that the cousins spent extended periods with each other in contrast it seems as if this is limited to weekends or holiday visits by the

families. The loss of this contact is unlikely to negatively affect the child N. He will always visit them whenever he is back in South Africa on school holidays.

[44] If the decision of the applicant to relocate is shown to have been taken *bona fide* as was decided in the matter of *Jackson v Jackson* (*supra*) then this Court should grant the application. It is so that the welfare of any child is best served if that child has the good fortune to live with both parents in a loving and united family. In the present case that was not to be. The applicant and the respondent broke up in 2006 and they considered that to be in the best interests of themselves to live separate lives. They did not at that stage anticipate or foresee that their separate lives might take them on different paths.

[45] The steps that the applicant took leading up to this application have shown that there is no malice. She has taken this decision in the best interest of N and her family and her undertaking not to estrange N from the respondent cannot be doubted in view of her past record in this regard.

[46] In paragraph 26 of her founding affidavit the applicant says:

"*If I am not granted consent to take N out of the country, Thomas would be forced to resign from Bouygues. This would adversely impact on our current standard of living – and also the standard of living of my*

children N and M – as Thomas would lose his expatriate status and benefits, and would have to try and find employment in South Africa at a local salary. Realistically, it may also put strain on our relationship as I would effectively be the cause of Thomas leaving his job with Bouygues. In any event, there is no guarantee that Thomas would find a position in South Africa that would allow us to remain in close proximity to the Respondent. "

[47] In response to what the applicant says in paragraph 26 of her founding affidavit the respondent simply says that Thomas is secured of a good and stable future here in South Africa. He has not laid out reasons why he says this or demonstrated in which respect Thomas would be secured. What we do know is that Thomas' contract to remain in South Africa has come to an end. Thomas already has a secure position with a successful international company and to expect him to resign with the hope of getting similar work in South Africa is being disingenuous. Thomas will first have to apply for a position like all other unemployed engineers in South Africa and be interviewed to determine his suitability or otherwise for such position. To say that there is a shortage of engineers in South Africa is to put it too simple.

[48] In this case the applicant seems to me to have given careful consideration to the matter. She for instance says in paragraph 46 of her founding affidavit:

"*I am sensitive to Respondent's fears surrounding his relationship with N and the effect that the relocation would have on such relationship. I have advised Respondent, which I reiterate now that I will do everything that I can to facilitate his ongoing relationship with N. I cannot do more than that, I am confident that frequent Skype contact and regular visits will ensure that Respondent and N's relationship remains as strong as it is now.* "

[49] In response to what is contained in paragraph 46 of applicant's affidavit all that the respondent says is that in the event that this Court grants an order in favour of the applicant then in that event he requests that his right of contact to N should be firmly entrenched in a court order and such court order to be made an order of court in France.

[50] I do not think that the decision to relocate made by the applicant can be faulted. It is a rational and well-balanced decision which has not only taken care of what is in the best interest of the minor child but also takes care of future contact between the respondent and N. She has taken into account the reduced contact that N will have with the respondent and as she has pointed out in paragraph 46 she will do everything that she can to facilitate N's ongoing relationship with his father. She has repeated this at various stages of her application and in the interview with Robyn L Fasser and the Family Advocate. This should be sufficient if it is incorporated in this Court's order and I see no purpose that it will serve to have such an order made in France.

[51] The applicant has demonstrated that it will be in the best interest of the minor child to relocate with her rather than let him stay in South Africa with the respondent. In reaching that conclusion the applicant does not imply that the applicant is not a good parent to N.

[52] In his findings Robyn L Fasser says that N feels loved by both his parents and his step-parents. He is equally bonded to his mother and father although he experiences his mother as taking the more nurturing role. The above security and equally is interesting as he has resided primarily with his mother who has been his primary care-giver since he was born. A further finding which is of interest by Robyn L Fasser appears on page 44 where he says:

> "*N has internalised that he has two families and that he can happily reside within each.* "

[53] What is of importance in these findings is that no adverse findings are made against the applicant and the fact that Robyn L Fasser did not ask N about his feelings does not take the matter any further.

[54] The interests of the child N are paramount in this matter. It is the ultimate determinant. Section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 reads as follows:

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

[55] N is still young and has just started school. The applicant and her husband have made adequate preparations for both N and M to settle in Paris. Thomas owns a lovely apartment in Boulogne-Billiancourt a safe, beautiful and family-orientated suburb in Paris. The apartment has two bedrooms and two bathrooms. It is located in a quiet neighbourhood and is in very close proximity to Paris' famous and vast Bois de Boulogne Park and the neighbouring Edmond de Rothschild Park.

[56] The applicant says she has identified her École Active Bilingue Jeannine Manuel School as the most favourable school for N. On page 156 of the papers is attached information about that school and of interest is a paragraph titled "*Adaptation classes for non French-speaking students*" where it is recorded as follows:

"*Each year, EABJM welcomes more than one hundred new non-French speaking students. Over the years, EABJM has developed a program particularly suited to meet the needs of these students, for whom the emotional challenge of relocation is often as great than its academic challenge. The Parents Association also plays a critical role*

in helping the entire family 'adapt'. "

Besides language acquisition, cultural immersion takes place naturally through shared classes and extracurricular activities such as visits, outings and trips organised by the school or by its faculty.

[57] It is evident therefore that the educational interest of the child N will be well-supported not only by his mother but by the environment in which he will be placed.

[58] In argument and in his affidavit the respondent has taken issue with the applicant on various matters that the applicant has raised in affidavit. He submits primarily that to remove N from South Africa will be destructive and that N will miss out on the extended family benefits. These matters are concerns raised by the respondent cannot be said to be matters of decisive significance. N and M will grow up together and will no doubt forge new friendships at school and in the neighbourhood. They will be ably assisted by the applicant to cope with the pressures if any of their new environment. There is no evidence that it is a hostile environment certainly the pictures of the area do not indicate that.

[59] In the matter of *J & J* 2008 (6) SA 30 (C) it was decided that a court as the upper guardian of minors is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance the best interest of the minor child.

[60] In *Terblanche v Terblanche* 1992 (1) SA 501 (W) at p 504C-D His Lordship Van Zyl J said the following:

> "*From this it follows that, when a Court sits as upper-guardian in a custody matter, it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.*"

[61] In the matter of *Maryke Cunningham (born Ferreira) v Daniel Johannes Jacobus Pretorius* (unreported GNP Case No. 31187/08) Murphy J concluded as follows in respect of the loss of contract by the non-custodian parent:

> "*Perhaps the most vexing of the issues in balancing all relevant factors is the practical difficulty and expense involved in B having contact with the respondent if he relocates and the substantial impact it is likely to have on B's right to maintain a meaningful personal relationship with his biological father – Section 7(1)(e). In the modern world, marked by globalisation and increased mobility, when marriages break up, one parent's interests invariably will have to yield to those of the other. When the balance of factors (in this case the age of the child, the*

bond, the favourable environment and opportunities available at the place of relocation and the custodian parent capacity) all favour the custodian parent, the best the court can do is to ensure that meaningful contact and access continues with the non-custodian parent albeit in a less satisfactory manner and will not be thwarted by the non-custodian parent."

[62] Robyn L Fasser the Clinical Psychologist notwithstanding the fact that he had done extensive tests and consultation with all the stakeholders in this matter concluded that a firm recommendation was extremely difficult as this is indeed a difficult matter and left the decision to this Court. On the other hand the Family Advocate and the Family Counsellor reached a conclusion that N should remain with the respondent in South Africa if the applicant relocates to Paris.

[63] In their report the Family Advocate and Counsellors made extensive reference to a report of Robyn L Fasser. Robyn L Fasser interviewed the step-parents. The Family Advocate did not. Secondly Robyn L Fasser for good reasons did not ask for N's feelings about relocation. The Family Advocate gives the impression that they conducted a meaningful interview with N. This Court does not regard the story about Scooby Doo exploring Egypt which the Family Advocate related to Noah as being a good test. N in response to that fable said that Scooby Doo would either run away or he would stay forever if it was nice in Egypt.

[64] The moral of this story is that N would run away from France if it is not comfortable or nice to stay there. We have evidence of a suitable and nice environment where N will be relocating to. To compare N with the character in the story of Scooby Doo is misguided and unconvincing, the Family Counsellor has not told us if Scooby Doo is all by himself in that foreign country or not. This is definitely not the position about N.

[65] The recommendation by the Family Advocate and Counsellor therefore stands to be rejected as it is wanting and unconvincing. This Court must and has decided the issue of the best interest of the child itself and is free to reject any contrary opinion on that question expressed by any expert.

[66] In conclusion therefore having regard to the allegations and opinion put up by the respondent, the removal will undoubtedly cause some disruption to the relationship between N and the respondent. As a result of the relocation his rights of contact will be drastically curtailed and N will be deprived of the advantage of being in close contact with his father during his early boyhood stage leading up to adolescence. However, it is so that adequate provision has been made to keep contact. All that is required is for the respondent to commit himself to buy into the programme in the best interest of N.

[67] It is correct that no court can predict the future with certainty however it seems though that life in Paris holds many attractions for N and the applicant. The Honourable Nugent J as he then was expressed the following in the matter of *Godbeer v Godbeer* 2000 (3) SA 976 at p 981J:

> "*The respondent and the applicant considered that it was in the best interests of themselves, and no doubt the children, that they should live separate lives, thereby anticipating that their lives might take them on different paths. I do not think the applicant can be expected to tailor her life so as to ensure that the children and their father have ready access to one another. That would be quite unrealistic. The applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family. She is undoubtedly fully aware of the value to be placed on close contact between the children and their father and I think that is borne out by the nature of the access arrangements which have existed until now and the ease with which they have been exercised.*"

[68] The passage referred to above is in my mind appropriate in many respects with the facts in the present matter. It goes without saying therefore that this application must succeed. However, as in most cases I do not deem it appropriate to make any order for costs.

[69] The following orders are accordingly made:

[1] The applicant is granted the right to remove the minor child N and to depart with him from the Republic Of South Africa to France and within Europe on holidays.

[2] The consent of the Respondent is not required by the applicant or the relevant authority for the purposes of applying for or the issuing of a passport to the minor child N

[3] The respondent shall have right of reasonable contact with N such contact to include at least the following:

3.1. Daily telephone and/or Skype contact at appropriate times and by arrangement between the parties.

3.2. One long and one short school holiday per year by agreement between the parties and in respect of which applicant shall pay for two economy class return air tickets for N each year.

[4] The respondent shall pay to applicant the sum of R2000.00 (Two Thousand Rand)per month as maintenance in respect of N which amount shall increase annually, commencing on the first day of the month following the anniversary of the date of this application, by the equivalent of the weighted average of the Consumer Price Index for the previous 12 (twelve)

month period as published from time to time by Statistics South Africa or it's successor subject to a maximum of 10% (ten percent) per annum.

[5] Each party shall pay own costs.

Dated at Johannesburg on this the 16th day of November 2011

M.A MAKUME

THE HONOURAB LE JUDGE OF THE HIGH COURT

APPLICANT'S COUNSEL:	ADV: J WOODWARD SC
APPLICANT'S ATTORNEYS:	CLARKS ATTORNEYS
RESPONDENT'S COUNSEL:	ADV: D SMIT SC
RESPONDENTS ATTORNEYS:	SCHOEMANS ATTORNEYS