REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED

CASE NO: 1917/2018
1/2/2019

In the matter between

M, T P Applicant

and

P, D M (previously J) Respondent

JUDGMENT

Van der Linde, J:

Introduction

[1] The applicant in this urgent application is the father of a six year old son and the respondent is his mother. I heard oral submissions on 22 and 23 January 2019 aggregating more than

five hours and then, given the other matters in the urgent court that required attention, requested that Ms Ternent for the applicant complete her reply by way of written submissions. Ordinarily the business of courts is conducted in the open, and this principle is enshrined in s.34 of the Constitution, whereby everyone has the right to a *"public hearing"*. S.32 of the Superior Courts Act 10 of 2013 echoes that principle, and limits it only where a court in *"special circumstances"* otherwise directs.

[2] The open court principle implies that parties are entitled to make their submissions orally, in open court; they cannot, barring special circumstances, be compelled to make their submissions only in writing. In Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd, 1973 (1) SA 627 (A) Trollip, JA said at 628 (emphasis supplied):

"I pause here to say that generally arguments for the litigants in a trial should be delivered orally in open court and not in writing to the trial Judge in his chambers. For sec. 16 of the Supreme Court Act, 59 of 1959, requires that 'all proceedings' in a court (i.e., including the final addresses of counsel) must be carried on in open court, 'except in so far as any such court may in special cases otherwise direct'. The same is implicit in Rule 39 (10) of the Rules of Court, which says that, upon the cases of both sides in a trial being closed, the parties or their advocates may 'address the court' in the order therein laid down. Moreover, for reasons that are too trite to be listed here, oral argument is far more effective than the written substitute. Consequently, neither the court nor the litigants should normally be deprived of the benefit of oral argument in which counsel can fully indulge their forensic ability and persuasive skill in the interests of justice and their clients. A trial court should, therefore, not direct that the arguments be delivered in writing except in special circumstances and then only after discussion with counsel."

[3] There was no objection from either counsel to my request for Ms Ternent to complete her reply in writing. Given the pressing business of the urgent court, the time that had already been allowed for the matter, the fact that Ms Ternent's estimate of the duration in her practice note was one and a half to two hours, and the fact that Ms de Wet, SC for the respondent had estimated two and a half hours (thus more than twice the estimated time had already been allowed), I considered that a *"special case"* existed for the request.

[4] The understanding was that if the written argument on behalf of the applicant contained new matter, the respondent could respond to this in like manner. In the event, I received

forty five pages of additional written argument on behalf of the applicant and nine pages of written argument on behalf of the respondent.

The principal issue

[5] The parties were never married to each other but they lived together from 2010 for some seven years. The boy, P, who turns seven in May this year, was born of that relationship. The relationship ended in April 2017 when the respondent became involved in another relationship, with a Mr P. The two of them subsequently married in 2018. The applicant has a son, K, from a previous relationship; he lives with his mother in Cape Town. The respondent has no other children; Mr P has a boy, N, from a previous relationship, and although N is not his biological son, I accept that Mr P treats him as such. N lives with the Respondent and Mr P.

[6] There is no dispute between the applicant and the respondent that the applicant has full parental rights and responsibilities as envisaged in terms of s.21 of the Children's Act 38 of 2005. The parties are also agreed that the respondent should be the primary care-giver, that P should live with her, and that the applicant should have reasonable access to P.

[7] What has caused the present dispute is the fact that the respondent has moved from Gauteng where she lived when she and the applicant were together and P was born, down to Langebaan in the Western Cape. The applicant contends that his right to reasonable access has been impeded by this move, and he asks an order that the respondent be directed to move back to Gauteng.

[8] It is common cause that the applicant is currently unemployed but not of long term independent means, that although the applicant was employed when they were together the respondent was the breadwinner in their relationship, and that the respondent is now the breadwinner in her current marriage (she was previously married but that marriage was terminated by the death of her husband). It is also common cause that the respondent, a

businesswoman, can and does conduct her businesses, which are in Gauteng, from Langebaan in the Western Cape. It is further common cause that the applicant has a family support structure in Gauteng. In fact, his mother lives with him.

[9] The applicant does not contend that he should be P's primary care-giver. He does not argue that the private school [….] where P has now been enrolled in Langebaan, is not a good school, nor that P's needs – special as they are – will not properly be cared for there. He does not argue that two weekend visits per month – the respondent's tender from the Bar - are inadequate, should the respondent be permitted to stay down in Langebaan. He has some debate about the costs of travelling to achieve this, but that is an issue that is subsidiary to the principal question which the applicant's application raises. It is this.

[10] As a general proposition, all things being equal, is the parent with access rights (aka known as visitation rights) entitled to insist that the other parent, the one who is the primary care-giver, lives within such close proximity of the former, say one to two hours apart, that the visitation rights may be exercised more frequently than they would be if the parents lived say five hours apart?

[11] The applicant's affirmative proposition founds on the contention that it is in the interests of the minor child that both parents have as frequent as possible access to him; the respondent's contending proposition is that her right to make a free choice as to where she wishes to live with the minor child and raise him weighs too, and may legitimately tip the scale against unimpeded access by the other parent. This knot must be cut, but first some prior observations are apposite.

<u>More background</u>

[12] The parties began living together in 2010 in Midrand. On 1 February 2011 the applicant was employed by the respondent's businesses as a property maintenance manager. On 30 May 2012 the boy P was born. In June 2015 the parties moved to a house in Sandton which was

registered in both their names. In that year P began attending a Montessori School in Sandton, where a speech impediment was diagnosed.

[13] On 17 April 2017 the respondent left the common home and the parties' relationship terminated. In the next month, May, P was enrolled at [….] School to commence his Grade R year there in 2018. In October 2017 the respondent and Mr P became engaged. It was in this time-frame that the applicant heard that the respondent intended moving to Cape Town.

[14] In November 2017 an altercation led to the applicant laying an assault charge against Mr P, and the respondent laying an assault charge against the applicant.

[15] The parties managed to agree – through their attorneys – access by the applicant to P over the December 2017/January 2018 holidays. When after this period of access the respondent had P in the bath on 2 January 2018, he rubbed his penis. The respondent over-reacted. She interrogated the boy, and inferred that the applicant had sexually abused his own son. This led to a charge laid against the applicant at the SAPS of sexual assault on P.

[16] Although the sexual assault charge was dropped, and never had any factual foundation at all, the respondent denied the applicant access to P. The applicant then applied urgently to have contact restored. The matter came before my colleague Kathree-Setiloane, J who made an order on 31 January 2018 whereby the applicant could have only supervised access every weekend for three hours. Since the respondent had moved to the Cape in mid-2018 with P, this meant that P had to – and did – fly up every weekend to see his father (the applicant) for three hours, and under supervision. This applied for the rest of last year.

[17] My colleague also ordered that Dr RA Duchen, a forensic psychologist, be directed to investigate what is in the best interests of P. The learned judge direct that this instruction was not limited to the question whether he was subjected to any sexually inappropriate behaviour. The expert was also to investigate what contact the applicant should have with P. When that order was made the respondent had not yet moved to the Cape with P. As said, that only came mid-2018.

[18]The Duchen 124 page comprehensive report came out in August 2018. She found that there had been no sexually inappropriate conduct on the part of the applicant. She proposed too that while the respondent is resident in the Cape, the applicant should have three-weekly contact with P, who should fly up for the weekend. School holidays should be split between the parents.

[19]In November 2018 the applicant re-enrolled the application he brought in January 2018, and on 4 December 2018 my colleague Siwendu, J made a holding order which bided the matter over to January 2019 when it came before me.

[20]This thumbnail history is incomplete without a reference to Mr P and his job change. When the respondent and Mr P commenced their relationship in 2017, he was living and working in Nelspruit. On 1 January 2018 he started attending a skipper's course in the Cape as he envisaged a business opportunity there. Dr Duchen describes Mr P's vocation as that he "builds and repairs things". It would appear, considering pages 40 and 103 of Dr Duchen's report, that Mr P and Mr M share remarkably similar personality traits, some of the passages there used to describe the two being verbatim the same.

[21]Mr P concluded a lease on 28 January 208 in respect of a residence in Yzerfontein, some distance from Langebaan. On 20 February 2018 the respondent and Mr P's mother left to organise the house in Yzerfontein, and on 10 March 2018 the respondent and Mr P married. There is some debate about precisely when the respondent and P followed Mr P and moved down.

[22]The applicant's case is that the respondent's decision to move to the Cape was not rational and not bona fide because – principally – the notion that Mr P had a legitimate job opportunity there is false. The applicant submits that although the respondent contends that Mr P received a business opportunity in March 2018, in truth he only became alerted to a business opportunity in October 2018. Had the business opportunity in fact been present

when the respondent and Mr P settled, in the Cape, argues the applicant, Dr Duchen would have known about it. She did not, according to the submission.

Factual disputes

[23]If truth be told, submits the applicant, the move to the Cape was driven by the desire of the respondent to make a life-style change and that was not justified, because P would in the result not see his father as often as he would have, had the respondent elected instead to remain in Gauteng. But since the respondent's version is that her move was in fact driven by the business opportunity for Mr P, there is a factual dispute between the parties.

[24]There are also other factual disputes: for example, did the applicant really block the respondent on his mobile phone; did the respondent commit a non-disclosure to the court on 31 January 2018 by not advising the court that she had by then already formed a firm intention to relocate to the Cape; did Mr P have a real job opportunity when the parties decided to relocate or was that just a ruse to camouflage their true motivation, which was that they were driven to enjoy a lifestyle change?

[25]The parties' heads of argument, and especially their further written argument, analysed the probabilities one way or the other in an attempt to resolve some of these disputes. Ordinarily such disputes cannot be resolved on affidavit, and such disputed issues would have to go to evidence in one form or another, provided of course the specific factual dispute is needed to be resolved before the court can come to a resolution of the main issue in the matter.

[26]This is because motion proceedings are not designed to resolve factual disputes. This proposition was put thus by the Supreme Court of Appeal in National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1 (12 Jan 2009) at [26] (emphasis supplied):

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of

fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

[27] But in my view it is not necessary to resolve the factual disputes, some insignificant and other less so, because the real issue between the parties cuts through such disputes, for the following reason.

[28] As already intimated, the applicant's proposition comes down to this: that since the respondent could conduct her business from either the Cape or Gauteng, she should opt for Gauteng because that is where the applicant lives. The applicant's submissions from the Bar did not go as far as to suggest that if he had to move to say Durban because of a job opportunity there, the respondent was obliged to follow him because she could as easily conduct her business from that location.

[29] Nor did his submissions cover the case where say Mr P in fact had a legitimate business opportunity early on, but after a year or two it collapsed, and he and the respondent decided that he would not pursue any other opportunities: on the applicant's case, would the respondent then also be obliged to move back to Gauteng?

Discussion

[30] The course of the applicant's submissions, I was referred to cases where relocation decisions were reconsidered by courts. Those decisions, generally, dealt with the requirements needed to be satisfied before a decision would not be overruled by a court. And generally, they said that such a relocation decision – usually to an overseas country – was required to have been rationally taken, and bona fide, meaning not simply to deny the other parent his/her visitation rights to the minor child.

[31]That is understandable, because otherwise the best interests of the child are not being served: the primary caregiver should not, in the interests of the minor, follow irrational whims by moving abroad. Such a minor could otherwise be exposed to upheaval that could rock his/her emotional boat for years to come.

[32]In AC v KC (A389/08)[2008]ZAGPHC 369 (13 June 2008) the full court dealt with an appeal against an order of a single judge. There the applicant mother applied for the court to substitute its consent for that of the husband under s.18(5) of the Children's Act 38 of 2005 to remove the minor children with her to pursue a job opportunity in Abu Dhabi. The court a quo granted the order. The appeal against that order was dismissed. The court accepted that the decision, in those circumstances, had to be bona fide and reasonable. It also accepted that a court will not readily interfere with a bona fide decision which the custodian parent regards as reasonable.

[33]I was referred also, among others, to Godbeer v Godbeer, 2000 (3) SA 976 (W). There Nugent, J (then) said at p982:

"It was submitted that the terms in which the agreement is framed is indicative of the fact that it was considered best that the children should remain in this country. I do not think it reflects any more than the circumstances which prevailed at the time the agreement was concluded. The fact is that the applicant is the custodian parent and primarily must decide upon the circumstances in which she and the children should live. While this Court is the upper guardian of all minors and may insist in appropriate cases upon limiting the freedom of choice of the custodian, I do not think that should be translated into this Court imposing its own subjective whims upon the children of the parties concerned. In Bailey's case at 136 the Court quoted the following extract from the judgment of the Court in Du Preez v Du Preez 1969 (3) SA 529 (D) at 532E - F, apparently with approval:

'This is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside, indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it.'

In this case the applicant seems to me to have given careful consideration to the matter. Whether the children will be better off in this country or in the United Kingdom in the long term remains to be seen. I do not think the decision made by the applicant can be faulted. It is a rational and well-balanced judgment as to what she considers to be best for her and her

children. She has taken into account the reduced access that the children will have to their father and is willing to encourage as much contact as possible in accordance with their means."

[34] I refer to this case for two purposes: first, to suggest, respectfully, that the standard there laid down is one that applies when the court has to decide whether to interfere in a refusal to agree that a minor departs from or is to be removed from the country. I suggest that that is a move markedly more drastic than a move within the country, to a place no more than two hours by plane and perhaps another one and a half hour on each side to provide for logistics, away from the non-custodian parent's residence.

[35] The second reason for referring to that judgment is the deference nonetheless accorded to the custodian parent's right to decide the circumstances in which s/he and the children should live.

[36] As to the requirement that the decision should be bona fide, both parties accepted that this means that the decider must not have taken the decision deliberately to foil the other parent's rights in relation to the child. In this case the question would be whether the respondent decided to move to the Cape deliberately to frustrate the applicant's access to P.

[37] In my view that hardly applies here. The respondent offers access every second weekend, and offered to pay the transport costs of one of the two. But in this context Ms Ternent for the applicant stressed s.31 of the Act. It provides (my emphasis):

*"31 **Major decisions involving child***
(1) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.
(b) A decision referred to in paragraph (a) is any decision-
(i) in connection with a matter listed in section 18 (3) (c);
(ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
(iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or

(iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

(2) (a) ***Before*** *a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.*

(b) A decision referred to in paragraph (a) is any decision which is ***likely to change significantly****, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child."*

[38] For the applicant it was argued that the decision to move to the Cape was one that qualifies under s.31(2)(b) of the Act, and so the respondent should have, but did not, have given due consideration to the applicant's views and wishes before her move. Assuming – without deciding - that the applicant's exercise of parental responsibilities are *"likely to change significantly"* by the respondent' s move to the Cape; and assuming – again without deciding – that in this case the respondent did not give the applicant's views and wishes "*before"* she took the decision: in J v J, 2008 (6) SA 30 (CPD) a full court held (at 43 F – D) that a failure to have taken the other parent's views into account, does not invalidate the decision. The decision remains subject to review, the standard being the best interests of the minor child. Compare s.28(2) of the Constitution.

[39] As to the reasonableness of the decision, it seems to me that the enquiry there too must focus on the well-being of the minor child. Dr Duchen's report is comprehensive. To begin, she is eminently qualified to express an opinion that will assist the court. Her report shows that she considered the fact that the parents were living apart. She considered the background of the parties. She interacted with both parties, their mothers, Mr P, and above, with Philp. She examined the history of P's care from the separate perspectives of both parents, and their individual concerns.

[40] She consulted Mr P and performed psychometric testing of him. She consulted the respondent' smother and performed psychometric testing of her. She interviewed P. She

performed what she calls “interactional analysis” of the parents and P. After her comprehensive analysis, she concluded as follows.

[41] P was not the victim of sexual abuse, but the respondent – sincere and hyper-vigilant but inaccurate - believed that he was. P must remain in the respondent’s primary care in the Cape and shared residency, irrespective of the relocation, will not be in P’s best interests.

[42] Dr Duchen considered that the applicant should have access to P every third weekend. I raised with Ms de Wet in argument whether every second weekend would not be in P’s better interests, and she agreed.

[43] As I see it, when all is said and done, P is but five hours away by plane. No-one suggests that, whilst the applicant is a good and caring father to P, the respondent is not a wonderfully caring mother who is more than able financially to afford P the safety, security and creature comforts that would offer security for a boy of tender years. No-one suggests seriously that P is unhappy where he now lives. The Duchen report suggests the contrary. The only concern ultimately raised in the application is whether P will be prejudiced for having to see the applicant less, now that he lives in the Cape.

[44] There is of course no doubt that access during the week is absent when the visiting parent and the primary caregiver live apart, whereas otherwise that might not be so. But that could potentially apply in any event should the applicant land a job which keeps him occupied for more than nine to five, even if the parents live in the same city. It is only now that the applicant is unemployed that he would have had full access to P during the week to attend his extra-murals, had the parents lived in the same city. And I have little doubt that the applicant will be continuously on the look-out for employment opportunities, given his limited financial resources.

[45] But I do not see that a case has been made out for this court to interfere with the respondent’s decision to live in the Cape. I do not view the decision as being irrational, given that she has a right to decide where to live with P, given her new live as a married women

with a husband who wishes to pursue a vocation in the Cape area, given that her ability to continue being the financial core of the family remains unaffected by it and, finally, given that P is being accommodated in an upmarket private school that will fully cater for his needs.

[46] As will have been evident, I do not accept either that a case has been made out that the respondent moved to the Cape deliberately to curtail the applicant's access to P. Such a proposition is inconsistent with her offer that the applicant sees P alternate weekends, and her offer to pay for (one weekend of) the applicant's air tickets and accommodation, including that of his other son, Kyle.

Conclusion

[47] It follows that in my view this court ought not to direct the respondent to move back to Gauteng. Access every second weekend ought to be allowed. I think too that the respondent should pay for it, because from the get-go she was the breadwinner between the two. This part of the order below may be revisited should the applicant land a job and a steady income because, after all, if he goes down to Cape Town he will be seeing Kyle as well.

[48] I am inclined to agree with the notion that each school holiday should, at least for the rest of this year, be split between the parents. This may be revisited at the end of the year, for 2020, to see if it would benefit all parties, especially P, if he spends alternate holidays (in full) with the other parent. For the rest, the order below was not really contentious.

Costs

[49] Costs became an issue. The applicant sought the costs of the initial application, as well as the subsequent proceedings. He submitted that, should this court not direct the respondent to return to Gauteng, each should pay his/her own costs in respect of the subsequent proceedings, i.e. after the order of 31 January 2018.

[50]I believe the applicant should get the costs of the initial proceedings and their execution because, ultimately, he was vindicated by the Duchen report and by what the respondent now accepts. She certainly overreacted, at a price for the applicant and, inevitably, for P. I am disinclined to make a special order.

[51] As to the subsequent proceedings, I do not believe it is fair to view the two protagonists in terms of winners and losers. I believe it is fair to make no order on the proceedings that were launched on 19 November 2018, and that ultimately culminated in this judgment.

[52] In the result I make the following order:

(a) The applicant's application dated 15 November 2018 is dismissed.

(b) The applicant and the respondent retain full parental responsibilities and rights with regard to P Tyrel M ("P") as contemplated in s.18(2) of the Children's Act 38 of 2005.

(c) P will reside with the respondent, who will be his primary caregiver.

(d) The applicant will be entitled to exercise contact with P at all reasonable times upon prior arrangement with the respondent. In addition, the applicant will be entitled to have access to P as follows.

i. Every alternate weekend in Cape Town or Langebaan, at the applicant's election, from Fridays at 16h00 to Sundays at 18h00, and the applicant will collect him from and return him to the respondent.

ii. The respondent shall provide reasonable accommodation in Cape Town or Langebaan for the applicant, P, and the applicant's son Kyle M during such weekends, which accommodation the respondent shall select.

iii. The parties may by agreement substitute for the above access, from time to time, a weekend in Johannesburg for P.

iv. The respondent is to pay for the reasonable return air fare for the applicant or for P, as the case may be, on the above weekends.

v. P will spend half of each school holiday for the remainder of 2019 with the applicant and the respondent respectively, which school holiday arrangement is to be reviewed at the end of 2019 for 2020.

vi. The respondent will facilitate contact between the applicant and P on P's birthdays.

vii. P will spend the weekend closest to the relevant parent's birthday with that parent on the basis that the primary alternate weekend arrangement referred to above will be adjusted to accommodate this arrangement, the principle being that P will spend each alternative weekend with the applicant unless the parents agree otherwise in writing.

viii. P will spend the weekend closest to the relevant parent's Father's Day or Mother's Day with that parent on the basis that the primary alternate weekend arrangement referred to above will be adjusted to accommodate this arrangement, the principle being that P will spend each alternative weekend with the applicant unless the parents agree otherwise in writing.

ix. Public holidays will be shared equally between the parents, subject to whatever reasonable arrangement can be made in the circumstances.

x. P will alternate Christmas and Easter between the parents.

(e) The costs of the application since its inception up to and including the receipt of the report of Dr R Duchen, and its subsequent consideration, and the taking of instructions in respect of it, including all reserved costs, are to be paid by the respondent.

(f) No order as to costs is made in respect of all costs incurred subsequent to the date identified in the previous paragraph.

WHG van der Linde

Judge, High Court

Johannesburg

Date heard: 25 January 2019

Date judgment: 1 February 2019

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