IN THE NORTH GAUTENG HIGH COURT,

PRETORIA /ES (REPUBLIC OF SOUTH AFRICA)

CASE NO: 3524/09

DATE: 22/06/2012

NOT REPORTABLE

IN THE MATTER BETWEEN

H

S PLAINTIFF

AND

WCS DEFENDANT

JUDGMENT

PRINSLOO, J

[1] This divorce trial came before me and lasted seven days. It was concluded a few days ago. There is an element of urgency about arriving at a conclusion, and I will treat the matter

accordingly, and craft this judgment on an urgent basis. I have to say that it is not without a measure of regret that I write this judgment in English, but I do so at the request of the plaintiffs counsel because the contents may at some stage have to be considered by the Australian authorities.

[2] Before me, Ms Neukircher SC assisted by Ms Strauss appeared for the plaintiff and Mr Botes assisted by a younger Mr Botes appeared for the defendant.

[3] At the commencement of the proceedings, it was submitted to me by both sides that it would be convenient and practical to first hear the evidence of the defendant, Mr S, before hearing the plaintiff. I was persuaded that the rules make provision for such a somewhat unusual procedure. I relented, although I never did, and still do not, see that this sequence in which the evidence was received made any difference to my impressions of the witnesses, and the conclusions I have arrived at.

[4] This different sequence in which the testimony was presented, also did not flow from any serious dispute as to onus between the parties. It was submitted from both sides that the question of onus is a "neutral" one where it comes to a judicial investigation as to what is in the best interests of the minor children - see Jackson v Jackson 2002 2 SA 303 (SCA) at 307G-H, and the authorities there quoted. This is not a case, such as those referred to, where one party applies for a variation of an existing order, which application will attract an onus. In the present case, it seems to me, that, without considering that either party is burdened with an onus, I have to decide, on the probabilities, what would be in the best interests of the two minor children, namely whether they should stay on in Australia or come back to South Africa.

Brief synopsis of the case

[5] The parties were married to each other out of community of property and with the exclusion of the accrual system on 13 February 2001.

[6] Two boys were born from the marriage, namely C, on 1 July 2002 (now almost 10 years old) and W L ("W") on 6 February 2004 (now 8 years old).

[7] The defendant was born on 1 April 1960, so that he is now 52 years old and the plaintiff was born on 1 June 1969, and is now 43.

[8] The parties met each other at a dance in Pretoria in 1990, soon after the plaintiff turned 21. The plaintiff then lived in a flat in Gezina Pretoria which belonged to her after it was given to her by her father. At that stage she had obtained a nursing diploma but was in the process of resigning as a nurse having been given employment at Momentum Life with effect from 1 August 1990 where she started as a learner medical underwriter. To this day, more than twenty years later, she is still working as a medical underwriter, but now in Australia, in Sydney, and enjoying the work a great deal.

[9] The parties formed a relationship which lasted for more than ten years, until they got married in February 2001.

[10] After matriculating in 1978, the defendant performed two years compulsory military service in the citizen force and from 1983 to 1987 he studied for, and obtained, the degree BLC at the University of Pretoria. Thirteen years later, in 2000, he obtained the LL.B degree at the same university.

During the period 1990 to 2001 (roughly covering the period when the parties had their relationship prior to the marriage) the plaintiff worked for, inter alia, General Mining, and a family law clinic, Flamac. He also worked for himself as a "commodity broker" and a law advisor. He owned the "Paces" dancehall and transported generators to Vodacom towers. He also tried his hand at initiating a gear lock distributing company. He stayed in a flat in Sunnyside.

[11] A few years before the marriage in 2001, the defendant moved in with the plaintiff in her flat.

[12] The plaintiff was always keen to get married but the defendant said he would marry her in the year 2000. When they finally got round to agreeing on a date for the marriage in 2000, they selected a venue and the marriage invitations were printed and posted. At a late stage, the defendant cancelled the marriage on the ground that his relationship with the plaintiffs parents was not good enough. Her parents paid the costs of the aborted marriage. As far as the wedding ring was concerned, the plaintiffs father donated the diamond and she paid for the casing and the design thereof.

[13] The plaintiff comes from a happy and close-knit family. She is the eldest of two daughters. They come from a town called Vryheid in Natal province. Her parents used to struggle financially but built up a business and later reaped the rewards. The father owns a game farm and other fixed property in Vryheid and also a number of properties in Richards Bay on the Natal north coast. The parents are now of advanced years and both suffer from cancer, although they are both now in remission.

[14] Despite the fact that the first attempt at getting married was aborted, the plaintiff wanted to marry the defendant and they got married in February 2001, as I stated. The plaintiff made most of the arrangements and bore the lion share of the costs.

[15] At the time of the marriage, the defendant was busy doing his pupillage as a pupil advocate at the Pretoria Bar. He failed at the first attempt but passed after the second pupillage in 2002.

During this time, the plaintiff supported the defendant financially. It is common cause that the defendant was generally prepared to assist with the housekeeping, although the couple always had a fulltime servant, also after the children were born.

Indeed, it is clear from the weight of the evidence, and not disputed, that the plaintiff was always the main breadwinner and this state of affairs prevails until today.

Not only was she the main breadwinner, but also the main supplier of accommodation for the family: after the marriage, she sold the flat which she owned and the couple moved into a house in Montana Park which the plaintiff already built in 1995. This she did, no doubt, with her own resources and perhaps also with assistance from her parents. After W was born in 2004, the couple decided to buy a larger house in Spronge Street. This was achieved by using the proceeds of the house in Montana Park as well as a deposit of Rl 00 000,00 supplied by the father of the plaintiff. The defendant insisted that the house should also be registered on his name. This was done. There was an arrangement whereby each party would contribute 50% to the bond payment in respect of the loan for the outstanding balance

of the purchase price. There are clear indications that the defendant did not always comply with his obligations to pay his portion of the bond instalment.

[16] The plaintiffs parents, throughout, actively supported the couple. They did so, although they were not particularly fond of their son-in-law. At the time of the marriage, the defendant would have been about 41 years old and the plaintiff about 32. The plaintiffs parents were very involved with the raising of the children and always there to assist at times of need and illness. Long and pleasant December holidays were spent at the holiday home of the plaintiffs parents in Richards Bay. Deep-sea fishing was done with the boat of the plaintiffs father. The children were allowed to spend quality time with their grandparents and the grandfather took them to the game farm and treated them in many other ways.

No such support was forthcoming from the defendant's parents. This is not his fault. His father already passed away in 1997 and his mother in 2005. His two brothers also passed away at relatively young ages.

[17] While there is clear and undisputed evidence of the plaintiffs income throughout her career, the defendant's earnings have remained somewhat of a mystery. No details thereof were supplied to me during the trial. Mr Visser, the registered clinical psychologist who evaluated the parties and testified before me, also complained that he could never find out what the earnings of the defendant were. The defendant told him that he has a "private advocate's practice" and also does consulting work for three affiliates of a SADEC directed Development Bank. The defendant appears to receive monthly income payments but Mr Visser ("Visser") was uncertain as to the regularity thereof. In his report dated 31 January 2012, Visser concludes his report on this particular subject as follows:

"To date of this report the assessor unfortunately remains uncertain as to Advocate S' specific occupational and remuneration status, more specifically surrounding his total monthly income and the precise nature of his involvement with the Development Bank affiliates. More importantly than this it would seem that Advocate S is involved in numerous business ventures, ventures that most certainly keep him very busy albeit that he indicated to the assessor that he is readily available to the two minor children. The assessor thus remains uncertain as to Advocate S working hours and general availability."

In response to a question posed by myself, the defendant said that he is not a member of the Pretoria Bar but a member of a so-called "independent" Bar known as the Gauteng Society of Advocates. He wants to join the Pretoria Bar and has already successfully applied to do so. He testified that after he completed his pupillage, he did a lot of work for the Legal Aid Board (generally not very lucrative work) and also some civil work. I have a clear impression that he never built up a lucrative and successful practice.

[18] Perhaps as a result of his practice woes, and the fact that the plaintiff had to stand in as the main breadwinner, the parties decided, in about 2006, that the defendant would open a practice in Richards Bay. The idea was that the defendant would be virtually the only practising advocate in the area and under those circumstances he should be able to build up a thriving practice. Indeed, the defendant did practice as an advocate in Richards Bay and adjoining areas from 2006 to 2008. He stayed in one of the flats owned by the plaintiffs father in Richards Bay. He did not have to pay for the accommodation. He only paid his own expenses. He visited the plaintiff and the two children in Pretoria at regular intervals. The plaintiff, apart from having to be the breadwinner, had to stay alone with the two children, then aged 2 and 4 respectively, in Pretoria.

It also appears from the evidence that the couple contemplated, when the decision was taken that the defendant would practice in Richards Bay for a certain period, that in the event of the practice turning out to be successful, the plaintiff could move down to Richards Bay and live as a housewife with her children and the defendant closer to her family still based in Vryheid, which lies inland, but not too far from Richards Bay.

[19] The weight of the evidence clearly indicates that the Richards Bay practice was not a success. The defendant complained to the plaintiff that attorneys for whom he rendered services, were slow to make payment. The defendant only had to pay his own personal expenses where he was living free of charge in the accommodation supplied by his father-in-law.

[20] The plaintiff, on the other hand, was living a relatively stressful life in the family home in Spronge Street in the Pretoria suburb of Montana with the two children aged 2 and 4 respectively. She had to pay for the household. She was the main breadwinner. She was a member of a lift club travelling to her work at Momentum in the Pretoria suburb of Centurion not far to the south of the city. She dropped the children at a playschool early in the morning and fetched them again after work. She was concerned about high crime levels in the area. She slept with a revolver near her at night. She was mindful of an armed robbery which took place in 2002. Four armed men entered the home while she was in the bath. She was apprehended naked by the attackers and sexually assaulted, although not raped. The defendant was also tied up with her at the time. They escaped relatively unscathed.

[21] During the defendant's absence in Richards Bay, the plaintiff started doing research

about possibilities in Australia. She used the internet and other sources. I add that both the parties appear to be exceptionally competent internet users. They converse or correspond by e-mail and, judging by the evidence, they are very well informed when it comes to advanced electronic communication techniques.

[22] With the help of an ex-colleague who had emigrated to Australia, Mr Jaco van Heerden, the plaintiff managed to gather important information. If she could get an employer, she could be the recipient of a so-called 457 visa, sponsored by the prospective employer. This would enable her and her family, including the defendant, to relocate to Australia.

[23] From 2007, the plaintiff and the defendant started talking seriously about the possibility of settling in Australia. The plaintiff felt that the defendant, after five years in practice as an advocate, was not building a successful practice. She could earn more in Australia and offer her children a better future. The education system and the health care system were excellent. Educational qualifications were generally recognised throughout the world, something which could no longer be said about South African qualifications. With the assistance of her friend in Australia, the plaintiff had an opportunity to obtain employment with Beatty Finance but the defendant indicated that he was not yet ready for such a move and the idea was abandoned. Towards the middle of 2008, the defendant gave the green light for the plans to proceed, and after a telephonic interview, the plaintiff was employed on a probation period by a company called ING. She got the post in July 2008. Exhibit "E45" of the record before me, is a "confirmation of employment" letter by the HR advisor of ING Administration (Pty) Ltd of 347 Kent Street, Sydney NSW 2000. It is dated 14 April 2009 and confirms that the plaintiff had been in their employ since 30 September 2008. Part of the letter reads as follows:
"Henriette is currently employed on a full time, permanent basis as a Senior Underwriter.

Henriette's total salary package is $130 800 per annum."

Exhibit "E46" is the appointment letter sent to the plaintiff by ING and dated 10 July 2008. Provision is made for the remuneration package aforementioned as well as health insurance, repatriation expenses, a relocation allowance of $10 000, salary continuance cover, an incentive scheme, a motor vehicle scheme and many other impressive opportunities and facilities.

The relocation allowance would cover, inter alia, economy flights for the plaintiff and the rest of the family, removalist fees, up to three months rent of suitable accommodation and a Living Away From Home Allowance ("LAFHA") which would be covered as part of the plaintiffs employment cost. These advances would have to be refunded in the event of the employment being terminated within twelve months.

[24] Now, four years later, the plaintiff is still employed by the same company, although since taken over by a company called ANZ. I am not sure whether it was simply a change of name or an actual take-over.

The plaintiff wants to apply for permanent residence. This has to be done by the end of this month, June 2012 while the existing rules, favouring such a change of status are still in place. New rules kick in thereafter, which may make it more difficult for the plaintiff to obtain the permanent residence status. Up to now, the defendant has refused to co-operate and to support this application. The plaintiff testified that those advising her with this proposed application are confident that it will be successful. She either needs the support of the defendant or a court order authorising the permanent relocation of the children in Australia.

Permanent Residence offers endless advantages to the successful applicant. For example, school fees drop from about $4 500 per annum to about $200 to $400 per annum. Hospitalisation and medical expenses are obtainable at state expense. Additional medical fund expenses are cheaper than in the case of a non-resident. The state also pays for five visits per annum to specialists offering services for children such as speech therapists and also about ten free visits per annum to psychologists. Pensioners enjoy free transport and cheap accommodation facilities. In South Africa, the plaintiff had to pay the medical aid fund covering the family's needs and at a stage she could no longer afford the top option. Additional expenses not covered by the medical fund also had to be borne by her. She could not make ends meet.

With the 457 visa the plaintiff does not enjoy the benefits aforementioned, neither can she be employed at any place of her choice in Australia. She is committed to stay with the sponsor (employer) of the visa. Importantly, the plaintiff testified that the employer can also assist her in obtaining permanent residence and if this happens, she only has to stay with the employer for two years thereafter, whereupon she can seek other employment. She said repeatedly that she was extremely happy doing the work of a medical underwriter.

[25] Armed with this employment opportunity, the family left for Australia in September 2008. The plaintiff started working with ING almost immediately. The defendant stayed at home and looked after the household. It is common cause that he was co-operative and diligent in this regard. The children were entered as scholars at Beaumont Hills public school at the Parkway, Beaumont Hills in the Sydney area. Today, four years later, they are still happy scholars at that educational facility.

[26] The evidence presented by the plaintiff and the defendant is not in harmony when it comes to the question whether or not they decided to settle permanently in Australia. The plaintiff testified compellingly that it was clearly a decision to settle permanently. They decided that their future and that of the children lay in Australia. The defendant would do certain bridging exams to qualify as a lawyer in Australia and may ultimately have become the breadwinner. They already took certain preparatory steps with the view to obtaining permanent residence: they obtained tax clearances, police clearances and unabridged birth certificates. They selected only the furniture that they would need abroad when they packed the container. They sold all their vehicles with the exception of one which they could not sell because of a technicality involving a changed engine number. They kept the bank account open in order to facilitate the channeling of the bond payments because the house could not be sold as a result of an unfavourable property market. Outbuildings, including en suite rooms with bathrooms, the building of which was financed by the plaintiff who, inter alia, cashed in an insurance policy, were let out to tenants. The rental for the home was paid into her bank account. The outbuildings were upgraded before they left for Australia precisely because they could not make ends meet.

As against this, the defendant testified that the house was not sold because it was kept as a back-up in the event of things not working out in Australia. He testified, less convincingly, that the decision was not to move permanently but the excursion would only serve as an experiment.

In my view, the version offered by the plaintiff is to be preferred on the overwhelming probabilities.

[27] It is clear from the defendant's evidence, that he did not see through his plans to write the bridging examinations and to settle in Australia as a lawyer. Broadly speaking, his version was that the expense flowing from these examinations was prohibitive and unaffordable. The testimony of the plaintiff was that she offered to finance the writing of these exams. Although the defendant testified that he did speak to some well connected individuals and that he made some enquiries from the university, I got the impression that he lost his appetite for the proposed project of obtaining the added qualification and decided not to go through with it. It does not appear that the defendant disclosed this intention to the plaintiff at the time.

[28] The trouble started when December 2008 came along and it turned out that the plaintiff would have to work during the festive period and over the school holidays. It was agreed that the defendant would fly back to South Africa with the children in order to give them a holiday and for them to see their grandparents and other family and friends. There was a clear understanding between the parties that the defendant would return with the children during late January 2009. The plaintiff bought return air tickets for the three of them to make this possible.

While in South Africa, and towards the middle of January, the defendant, by e-mail correspondence with the plaintiff, indicated that he had reservations about the future in Australia. He felt that the children were not coping and suggested that he could not commit himself to life in Australia. He said this in a letter of 20 January 2009. What he did not tell the plaintiff, was that he had already cancelled the return flight on 17 January 2009. The cancellation appears from exhibit ffH6". When the defendant was cross-examined on this issue, he said that he did not cancel the tickets but only changed the dates. When I asked him to what date the return flight had been deferred, he said that he could not remember. I find

this evidence unconvincing and inherently improbable. The plaintiffs enquiries in Australia clearly indicated that the flight had been cancelled.

There was also an earlier and longer letter from the defendant, dated 14 January 2009, which is exhibit "H5". In this letter he also complains about many difficulties he experienced in Australia and suggested that the children were not adapting, that there was no future for him in that country and that he wanted the plaintiff to return to South Africa.

[29] Things were made worse by the fact that towards the end of December 2008, and after the defendant and the children had left for South Africa on 24 December, the plaintiff received, by e-mail, some evidence that the defendant had sent a message to a Johannesburg dating agency with a view to securing female company over the festive period. The message bears the defendant's e-mail address and is dated 17 December 2008. It explains that the defendant lives in Sydney but will be arriving in Johannesburg before Christmas. These dates coincide with the actual holiday plans of the defendant and the children. The document is exhibit "H4M. I do not wish to unduly embarrass the defendant, but where the evidence was offered to me I am not inclined to simply ignore it. When the defendant was cross-examined on the document, he denied any knowledge thereof. He described the document as part of a smear campaign. I find this inherently improbable and, in my view, this evidence has a negative impact on the credibility of the defendant as a witness. Apart from that, I accept, for purposes of this judgment, that the defendant's communication with the dating agency does not per se make him a bad parent neither does it mean that the children must not be ordered to settle in South Africa rather than in Australia.

Still on this subject, I have to add that other documents in the form of letters written by a

certain lady to the defendant were also made part of the record. Two of them are dated February 2009. This would be when the defendant was already back in the republic with the children. In the letters the lady makes clear and repeated reference to a love relationship with the defendant. From one letter it can be gathered that this relationship had been lasting for almost four years by the time the letter was written. To his credit, the defendant admitted the illicit relationship, and conceded that it was a mistake. Given the nature of this case and the issues involved, I unfortunately cannot overlook these facts because they may well cast a shadow over the defendant's declared commitment to keeping the family intact.

[30] It was under these circumstances that the plaintiff travelled to South Africa with a view to securing the return of the children. She launched an urgent application to achieve this result. On 30 January 2009, this court postponed the application (which was opposed by the defendant) in order to obtain an urgent report from the Family Advocate.

[31] The matter was reinstated in July 2009 with more or less the same result and with the court ordering the Family Advocate to furnish his or her report by 20 August 2009.

[32] Each time the plaintiff had to return to Australia to comply with her work commitments. In the meantime the defendant kept the children in South Africa and entered them in local schools. There is clear evidence that during this period the defendant moved around with the children and relocated them at different addresses on three or four occasions.

[33] The plaintiffs application for the return of the children finally came before my brother MAKGOBA, J, on an opposed basis, on 10 September 2009. The learned Judge upheld the application and granted consent to the plaintiff to remove the children from the republic to

Australia. She was ordered to return to South Africa with the children for purposes of disposing of the final divorce action, which is the case that came before me. The learned Judge made provision for visits to the republic and to the defendant by the children and dealt with the question of the shared costs of the air tickets. I do not deem it necessary to repeat the detailed provisions contained in the order with regard to contact rights of the defendant. There was also a provision for the applicant to set up a Skype facility in order to improve further the defendant's opportunities to maintain contact with the children.

Finally, the plaintiff was ordered by the learned Judge to, at her own costs, take all necessary steps to cause his order to be made an order of the Family Court of Australia and/or to take such other steps as may be necessary to ensure that the order is enforceable in Australia. The order of MAKGOBA, J was made exhibit "H7" before me and his comprehensive judgment which followed upon the order on 16 September containing his reasons is also part of exhibit "H7".

Exhibit "E368" is a letter from the Registrar of the Family Court of Australia Parramatta Registry George Street, Parramatta NSW 2150. It is dated 1 July 2010, refers to this particular urgent application no 3524/09 and reads as follows:
"This is to confirm that the order made on 10 September 2009 in the North Gauteng High Court, Pretoria (Republic of South Africa) in this matter is registered with the Family Court of Australia.
Yours sincerely"

Finally, on the subject of the enforceability of orders of this court in Australia, I add that the issue was briefly debated before me at the commencement of the proceedings. I was given

the assurance by counsel on both sides that the question of such enforceability had no bearing on the fmalisation of this trial before me. If necessary, and depending on the outcome of the trial, appropriate steps will be taken to ensure enforceability if such steps are required.

[34] The trial was enrolled for August 2011 but was again postponed. It finally came before me from 4 to 12 June 2012.

[35] So much for a brief overview of the case, and the chronological sequence of events and procedural developments.

[36] I turn to a few other specific topics which, in my view, are of relevance.

The plaintiff in Australia with the children since September 2009 to the present (a period of almost three years)

[37] On the authority of the order by MAKGOBA, J, supra, the plaintiff took the children back to Australia in September 2009. They went straight back to the Beaumont Hills school and have been there ever since. In my view, the weight of the evidence clearly suggests that they are doing well, are well adapted and are happy. I will briefly revert to this subject.

[38] During the aforesaid period ("the three year period" for the sake of convenience), the children regularly visited the defendant. For example, they were here for two weeks in July 2010, eight weeks in December 2010/January 2011, six weeks in July 2011 (that was when they were here for the trial which was then postponed and when they spent a few weeks with the defendant), six weeks in December 2011 and the parties plan to have them here again in July 2012.

[39] Broadly speaking, it is fair to say that the plaintiff contributed more than her fair share towards payment for the air tickets. Airfares were also funded, to an extent, from monies kept in trust by the defendant's attorney of record, being the proceeds of the sale of the house in Spronge Street.

[40] During the three year period, the defendant did not visit the children in Australia except for one occasion when he went to fetch them to accompany them on a flight. During the three year period the defendant paid no maintenance for the children. His evidence that the rental income from the house (prior to the sale) would have served as maintenance, I consider to be unconvincing.

[41] There is clear evidence of the plaintiff having invited the defendant to come to Australia to visit the children, visit their school and teachers and go on outings with him. On one occasion she offered him the use of a vehicle. He declined the invitation.

[42] The weight of the evidence suggests that the plaintiff complied with her obligation, as per the order of MAKGOBA, J, to set up Skype facilities. This requires a similar installation on the side of the defendant, which was duly done. There was some difficulty in co-ordinating the arrangements. The weight of the evidence indicates that the plaintiff made all reasonable efforts to pre-arrange suitable dates, Australian time, for the Skype exercises to take place. When there was a request for these sessions to take place when the plaintiff would still be at work, she arranged to make use of the computer facilities of her "nanny" which she employed to assist the children. It is clear that this facility can be employed to enhance the contact rights and opportunities between the defendant and the children if they were to remain in Australia.

According to the plaintiff, both the boys now have I-pods independently fitted with cameras to be "Skype friendly". If she were to be allowed to stay on in Australia with the children and were to obtain permanent residence she will apply for a so-called landline or ADSL line which offers better electronic communication with Skype, sms and the like. The ADSL line will also facilitate direct telephone calls.

[43] On considering the evidence as a whole, I have come to the conclusion that during the three year period the children adapted well in Australia, that they are well looked after and that they are happy. During the three year period the defendant managed to exercise his contact rights on a fair basis and often saw the children. The process of exercising contact rights is enhanced by the electronic devices to which I have referred. The September 2009 order of MAKGOBA, J was complied with in all material respects by the plaintiff.

The defendant as a witness

[44] The evidence offered by the defendant was lengthy and somewhat elaborate. He travelled into detail which in many respects was irrelevant. His evidence in chief lasted for the better part of two days.

[45] It is clear that the defendant cares a great deal for the children and that he was closely involved with their upbringing, at least until 2006 when his two year stint in Richards Bay started. He was also prepared to help with the housekeeping during the three months or so which he spent in Australia with the plaintiff and the children.

[46] It is also clear from the defendant's evidence that he taught the children a great deal, not only about general knowledge issues but also about Fauna and Flora and the outdoors in

general. He paid a lot of attention to them during holidays and was generally "a fun parent". The plaintiff conceded as much in her evidence.

[47] I regret to say, though, that I did not find the defendant's evidence satisfactory in every respect. I considered him to be argumentative, particularly in cross-examination. He was evasive at times when it came to answering direct questions and on certain aspects, which I have already mentioned, I considered his credibility to be open to question.

[48] Generally, it is clear that the defendant did not contribute his fair share to the household expenses and the maintenance of the children. He was prepared to allow the plaintiff to be the main breadwinner. Much, if not most, of what he offered the children by way of entertainment, originated from the facilities graciously made available by his parents-in-law. He did not make any, or any meaningful contributions to the costs of the two weddings, the wedding ring, the honeymoon, accommodation in the plaintiffs flat and the subsequent two houses, construction of outbuildings and the costs of other installations.
[49] I have, regrettably, come to the conclusion that the defendant brought the children back to South Africa in December 2008 under false pretences. His action in cancelling the return flight, despite a clear arrangement that the children would go back at the end of January 2009, was, in my view, not honourable.

There was also evidence that at one stage he undertook to contribute to the maintenance of the children in Australia, only to renege on his undertaking claiming the right to set-off his maintenance obligation against monies received by the plaintiff in the form of rental income in respect of the fixed property.

[50] For purposes of this trial, I accept that the defendant is a loving and committed parent and that his children are very fond of him and enjoy his company. This redounds to his credit.

[51] In view of the aforegoing I regret to say that I was not unduly impressed with the defendant as a witness.

The plaintiff as a witness

[52] I considered the plaintiff to be an exceptionally good and impressive witness. She was not in any way discredited in cross-examination. The only aspect which may raise an eyebrow is the fact, which she readily admitted, that she did not disclose to her legal team, when coming back for the case before MAKGOBA, J, that she had given up the house shortly before leaving Australia. According to her, she allowed this to happen because she did not know what the outcome of the proceedings in court would be. She did not know whether or not to disclose this to her legal team. I consider this predicament of hers to be understandable. As soon as she got back to Australia with the children she immediately entered into a new lease of a home near the Beaumont Hills school.

[53] The plaintiffs testimony was impressive, frank and to the point. She is clearly on top of her game when it comes to realising and understanding her rights and obligations in Australia. She knows all about the health and educational facilities on offer. She enjoys her work and is clearly making a success thereof. She has been a medical underwriter without interruption for the last twenty one odd years since qualifying as a nurse in 1990. She knows exactly what the advantages are when comparing the status of a permanent resident to that of a holder of a sponsored visa. She knows about the comparative tax advantages and disadvantages. She knows about the ADSL line and clearly understands everything necessary about the

electronic communication equipment at her disposal such as the Skype mechanism, I-pods, I-phones, sms facilities and the use of e-mail.

[54] She is an impressive and committed and loving mother. It is common cause, as will appear hereunder, that the parties are in agreement that she must be the primary care giver and that the children should stay with her post divorce whether in Australia or in South Africa.

[55] The plaintiff offered compelling evidence in support of her case that it would be in the best interests of the children to remain in Australia. I will revert to certain aspects of this evidence.

[56] The plaintiff adopts the attitude that the family agreed, after much research and debate, to settle permanently in Australia. This they did, and it was the defendant who acted in breach of this agreement by returning to South Africa.

[57] I briefly turn to a few specified topics which emerged from the testimony of the plaintiff and which I consider to be of particular relevance. This evidence is, by its nature, largely undisputed.

Life in Australia

[58] The house which the plaintiff is presently renting at about $2 400 per month is a double story affair. The bottom section includes a large living area, furniture, TV, study cum dining room, kitchen with a six seater dining room suite in the dining room area, bathroom and toilet. There is a closed in garage and a veranda. The top story includes four large bedrooms. The smallest bedroom houses a double bed. There is a large "rumpus room", another TV and

computers. There are three divan type sleepers, two bathrooms and a Jacuzzi. The plaintiff copes easily with her income and without maintenance from the defendant, although such maintenance would be of assistance.

[59] The plaintiffs salary at present is $7 000 per month and she gets paid twice a month. According to my research, the present exchange rate with the rand is R8,40 to the Australian dollar. Her salary would therefore come to approximately R59 500,00 in local currency terms per month.

[60] There is clear evidence that the plaintiff and the children lead an active life in Australia. They go on regular excursions, details of which she mentions in a series of e-mails to the defendant. They have many friends and a considerable proportion of them are South African. They still speak Afrikaans at home and the children have the benefit of mixing with South African and Australian friends. They can attend Afrikaans church services at regular intervals and there are regular South African cultural occasions with South African artists performing, South African cuisine available and so on.

[61] I accept the evidence of the plaintiff that she is well settled and happy in Australia and she wants to stay on. She can offer the children more in Australia than in South Africa. She has enough money and they can eat out regularly, with each member of the family having the use of his or her own television set. The children have play stations, I-pods and the like. Their academical qualifications are internationally recognised. They can further their studies at a tertiary level by obtaining student loans which only have to be repaid after the qualification has been achieved and when the student, as a qualified person, earns a certain salary per annum. Crime levels are very low and completely under control.

Beaumont Hills public school

[62] Comprehensive school and academical reports of the two boys are included in the record, roughly from exhibit "E454" to exhibit "E522".

[63] On a general reading of these documents, the boys are performing well and they are coping. Reports for the two semesters of 2011 are available. Extra and special tuition is offered on a regular basis by specially trained teachers for the pupils who do not have English as a first language. There are "Student Self Assessment" reports where the pupils assess themselves with regard to schooling and social skills. Follow-up assessments indicate growing confidence on the part of the two boys. There are also assessments known as "the National Assessment Program Literacy and Numeracy" or "NAPLA". Carl, for example, scored well above the national average in all but one of the disciplines, ie spelling.

[64] Both children are active participants in sport. In one rugby match Carl was the man of the match. They have since changed to swimming in consultation with their mother. They take part in swimming galas.

[65] The boys get dropped at a pre-school facility called "the Island" before school. There they take breakfast and get transferred to the nearby school by bus. After school they go back to "the Island" for lunch and they also do homework and have some "free time".

[66] Reverting to the question of crime, the plaintiff says she sleeps very soundly. She perceives no danger and leaves her doors open. They go walking at night in the park and visit a dam. They cycle at night and leave the doors open. There are no burglar bars or fences in

front of the houses.

The plaintiffs interaction with the teachers

[67] She visits the teachers regularly and has discussions with them. There are no serious difficulties.

[68] The reports on view are of a high quality, in my opinion, and very detailed. They leave one with the impression that the children are performing satisfactorily and they are adapting well.

The children can fly to South Africa on their own

[69] In the order of MAKGOBA, J, it was anticipated that the children should be accompanied by an adult when flying to and from Australia.

7.1.2.5 The first part of the December holiday of 2012 up to 2 January 2013 will be spent with the plaintiff, the remainder of the holiday with the defendant.

7.1.2.6 The December-January holiday periods thereafter will be divided between the parties in equal parts to enable the defendant to have minimum contact for a period of four weeks during this period, the Christmas and New Year portions to rotate between the parties on a yearly basis.

7.1.2.7 If the plaintiff cannot exercise her allocated holiday with the children in Australia, or if the parties so agree, the plaintiff will allow the children to have contact with the defendant for the full December-January holiday of six-eight weeks in South Africa. In this event the defendant will allow the children contact with their maternal grandfather and grandmother for a period of at least seven days in this period or as otherwise agreed.

7.1.2.8 When the plaintiff is in South Africa in the December-January holiday the parties will

share the December-January holiday equally in South Africa.

7.1.2.9 The parties will each pay half of the costs of any visit by the children in South Africa and the children' will be allowed to fly unaccompanied on such contact visits.

7.1.2.10 The defendant and plaintiff will in the beginning of each contact year finalise a schedule of contact for the short and long holidays by no later than 26 February of any given year.

7.1.2.11 The plaintiff and defendant will install an internet landline such as ADSL at their respective residences. The plaintiff will also load Skype access on the minor children's I-pod. The plaintiff will apply for an I-phone within sixty (60) days from this order to facilitate Skype access.

7.1.2.12 The defendant will be allowed to have Skype contact with the minor children every Saturday between the hours of 08:00 to 10:00am, Australian time.

7.1.2.13The defendant will advise the plaintiff and/or minor children fifteen (15) minutes prior to such Skype contact via sms, that he intends to have contact via Skype.

7.1.2.14 The defendant can also e-mail the minor children on their shared e-mail address at any reasonable time.

7.1.2.15 The defendant may have regular telephonic access with the children at reasonable times preferably between the hours of 18:30 to 20:00, and as far as reasonably possible every Tuesday and Thursday between 18:30 to 20:00 Australian time.

7.1.2.16 The plaintiff will be responsible for making the necessary travelling arrangements for the children for those access periods during which the defendant intends to exercise his rights as aforesaid, and will notify the defendant in writing of such travelling arrangements. The plaintiff will advise the defendant of the costs as well as payment date, and the parties will effect payment of their portion of such airline tickets and related costs within the time stipulated by the travel agents.

7.1.2.17 Both parties will reasonably enquire about the cheapest airline tickets and earliest possible booking for such flights and will advise each other thereof.

7.1.2.18 The defendant will notify the plaintiff in writing prior to exercising his rights of access precisely where he will spend his time with the children, and will furnish her with the relevant addresses and telephone numbers so that she can contact them.

7.1.2.19 The plaintiff will have the right to have reasonable telephonic contact with the children during the defendant's access period.

7.1.2.20 The plaintiff will furnish the defendant at regular intervals with copies and details of the children's school reports and photographs, extra curricula activities, sport activities and any serious illness if applicable.

7.1.2.21 The plaintiff will encourage the children to correspond with and contact the defendant and will facilitate telephonic and Skype contact as far as reasonably possible.

7.1.2.22 The plaintiff will keep the respondent informed of the children's place of residence, school, e-mail address and telephone numbers at all times.

7.2 The defendant will pay maintenance of R3 000,00 per child per month directly to the plaintiff in her bank account, details to be provided within seven days from the date of this order. The first payment will be made on or before 7 July 2012, to be followed by consecutive monthly payments each month thereafter on or before the 7th day of that month.

7.3 The maintenance payments will escalate at a rate of 10% per annum on the anniversary of such maintenance date.

7.4 The defendant will be liable to pay 50% of the children's school fees, the cost of their school books and uniforms and any reasonable medical, dental and related expenses not covered by the medical aid fund which the plaintiff is ordered to maintain for the children, or by state health facilities. Such 50% contributions will

be payable on demand from the plaintiff and upon submission of documentary proof of the relevant expenses.

7.5 The plaintiff will be reimbursed in the amount of R30 000900 as payment in full and final settlement of the costs order obtained against the defendant under case no 3018/2009, from the trust funds held by Attorneys Beyers & Day within five days from the date of this order.

7.6 The plaintiff will be reimbursed in the amount of R26 500,00 being payment made for the expert fees of Mr Franco Visser, from the aforesaid trust funds kept by Attorneys Beyers & Day within five days from date of this order.

7.7 The plaintiff will be reimbursed from the same trust monies by Messrs Beyers & Day in respect of the costs of the air tickets of the children for December 2010 and June 2012 within five days from the date of this order and subject to proof being submitted of these expenses.

7.8 Any balance remaining in the aforesaid trust fund after withdrawal of the aforesaid funds, will be distributed equally between the parties, subject also to the prior deduction of the reasonable costs of Messrs Beyers & Day attorneys.

8. Each party will pay his or her own costs.

W R C PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 4 - 12 JUNE 2012

FOR THE PLAINTIFF: B NEUKIRCHER SC ASSISTED BY S STRAUSS

INSTRUCTED BY: LIZELLE VAN RENSBURG ATTORNEY

FOR THE DEFENDANT: F W BOTES ASSISTED BY H W BOTES

INSTRUCTED BY: SCHOEMAN'S ATTORNEYS