IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

15/12/2016
CASE NO.: 82527/2016
Reportable: No
Of interest to other judges: No
Revised.

I. D. Applicant

and

S. P. Respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. Having Solomon's Wisdom would be of great assistance in this matter. However, his practical solution would no doubt have been seen with aghast in modern times in view of society's view on human rights and in particular children's rights.

2. The courts as upper guardian of minors have the daunting task in deciding the destiny of minors when their parents, either due to their own actions or due to particular circumstances forced upon them, cannot agree on what would be in the best interests of their minor children. More than often, the parents tend to see the best interests of their children through their own self centred interests, and then

pose those interests as being that of the minor child. Rightly or wrongly, that is life. It does, however, impose a greater duty upon the court to determine what the best interests of the minor child are.

3. The Constitution of the Republic South Africa, 1996, and the Children's Act, 2005 (the Act), to an extent assist in shouldering that daunting task, but may, to some Extent, create further difficulties. In particular, guidelines in respect of how competing Constitutional rights, specifically where such rights are identical, are to be married with one another are few. This is more so where in addition there are competing rights of society that are to be considered as well. Furthermore, section 7 of the Act stipulates a lengthy list of factors that need to be considered when determining the best interests of a child.

4. This application initially came before me on 27 October 2016 by way of urgency. I conveyed my views to counsel appearing on behalf of the parties and by agreement a draft order was granted. In terms of that order, a *curatrix ad litem* was appointed on behalf of the minor child. *Inter alia,* leave was granted to the parties to enrol the matter in consultation with the Deputy Judge President, on the urgent roll as soon as the stipulated reports were received and the parties were further granted leave to supplement their papers, if so advised.

5. The matter was duly enrolled on the roll of the Urgent Court and I was tasked to hear this matter, although I was not designated to sit in the urgent court this week.

6. I would prefer to have more time to consider the various submissions made by counsel and consider in more detail the authorities referred to and relied upon by counsel, but circumstances dictate otherwise.

7. Briefly the facts are as follows:

    (a) The applicant and the respondent were married to each other in 2004.
    (b) In 2007 a child, S. (soon to be 9 years of age), was born of the marriage.
    (c) The parties separated in 2009 and finally divorced in 2010.

(d) The respondent was awarded primary care and residential parent of the minor child, both parties retaining full parental responsibilities and rights as envisaged in section 18(2)(a) of the Act.

(e) Since the separation of the parties, S. was always in the care of the respondent and remained so after the divorce until now.

(f) Initially no problem was encountered in respect of the applicant's right to contact with S..

(g) This however, changed when the applicant met his present wife during 2011. The applicant's contact with S. became restricted. The parties came to an agreement during 2012 as to the contact rights of the applicant.

(h) However, when the applicant and his present wife got married, the applicant's contact rights with S. once again became restricted. It dwindled into infrequent, erratic and unpredictable contact.

(i) The acrimony between the parties came to a head when the applicant unilaterally removed S. from her school with the intention to enrol her in a different school. The parties came to an agreement and S. was enrolled in the school she attended during the course of this year, 2016.

(j) As will be discussed below, the acrimony between the parties erupted beyond their control when the respondent covertly decided to relocate to Durban. Hence this application being launched as an urgent application in October 2016.

8. A further complicating factor was the respondent's re-conversion to the Christian faith. During her student years the respondent converted to the Islamic faith. The parties married according to Muslim rights and also divorced in terms of Muslim rights. The applicant is a staunch Muslim.

9. At the outset it is to be recorded that I accept that both parties love S. dearly and that she in turn loves her parents dearly. I also accept that both parents are of the view that they only have the best interests of S. at heart. The nub of the problem in this matter lies in what is in the best interests of S.. It may not be what either parent regard as being in her best interests. Hence the referral to Solomon's wisdom.

10. Initially the respondent and the minor child would have relocated to Durban prior to 1 November 2016. That decision was only conveyed to the appointed mediator on 17 October 2016, which prompted the launch of this application on 20 October 2016.

11. The relief sought relates to an order restraining the respondent from relocating to Durban pending the finalisation of the assessment and recommendation by Dr Lore Hartzenberg and further relief flowing from the foregoing that would enable this court to determine definitively whether the intended relocation would be beneficial to S.. Included in the relief sought, S. was to continue receiving play therapy from Dr Opper.

12. In January 2016, the applicant obtained a court ·order regulating his contact rights with S.. In June 2016, the parties commenced mediation with a view to draft a parenting plan. To date, naught has come of that mediation.

13. It has no advantage to further delve into the relationship between the parties, suffice to say that it is acrimonious. One would have thought that the parties, professionals in their own right, would have sufficient maturity to put the interests of S. before their own self centred interests.

14. It appears that the appointment of the *curatrix ad litem* was beneficial. S. has her own voice in the acrimonious dispute between her parents. This is evident when regard is had to the expert reports that have been compiled and filed in this matter, subsequent to the hearing of 27 October 2016.

15. Prior to the institution of this matter, S. was being evaluated by Dr Lore Hartzenberg, an educational psychologist, and received play therapy from Dr Opper, an educational therapist. Subsequent to the granting of the order of 27 October 2016, Dr Hartzenberg requested Mr N van Zyl, a clinical psychologist to evaluate the applicant and the respondent. His reports on the respective evaluations have been filed. It will suffice to state that although he could find no pathology in respect of either the applicant or the respondent, his recommendation is that both are to undergo counselling to address their apparent

inability to address key issues relating to S..

16. The findings of the experts and their respective recommendations highlight the fact that S. is confused and disoriented, despite an outward appearance of being happy and joyful. Dr Hartzenberg reports that it is clear from the tests that were applied in evaluating S. and her parents, that S. has become what is termed a 'parenting child' towards her mother, whom she perceives as being unhappy and sad and whom she is obliged to humour. Sadly this results in an unconscious false projection upon her father as the culprit for her mother's unhappiness and sadness.

17. In my view, the problem experienced in many divorced families often results in a single-family unit on the one part and a newly completed family unit on the other. Understandable the head of the single-family unit fears that he or she would "lose" the child to the completed family unit, and hence actions are undertaken to "prevent" such loss. This may result in the head of the single-family unit subconsciously influencing the minor child against the other parent. That this may be true in the present instance is to be gleaned from the reports of Dr Hartzenberg and Dr van Zyl and to an extent from the comments of Dr Opper.

18. I have had the benefit of written heads of argument by counsel appearing on behalf of both parties and the written report of the *curatrix ad litem* for S.. I have also had the benefit of oral argument. Both counsel referred me to various judgments dealing with the issue of relocation. In particular I find the judgment of Satchwell, J. in *LW v DB* 2015 JDR 2617 (GJ) informative. In that judgment, the leading cases on relocation of a parent are considered and commented upon. Although the courts address the interests of the minor child as paramount, the conclusion inevitably appears to be directed at the interests of the respective parents and evolves into a decision one way or the other. In my view, that seems to put the cart before the horse. I am mindful of the tests to be applied relating to the best interests of the child as stipulated in the Act. I am also mindful of the principles to be applied as laid down by the courts.

19. Applying the principles enunciated in the cases relating to the relocation of one

parent slavishly to the present instance, would, in view of the particular circumstances that led to this application, lead to the inevitable rubber stamping of the respondent's decision to relocate. To my mind that would not necessarily have the best interests of S. at heart. The question is whether that decision was taken in a rational and considered manner.

20. The parties' respective views, as expressed in their affidavits and in the arguments put forward on their behalf, are divergent and do not lean towards an approach that could accommodate the concerns of the parties. Hence, I am to consider and to determine what would be in the best interest of S.

21. In this regard, I find some assistance from the recommendations of the respective experts. However, the practical implementation of those recommendations results in the proverbial catch-22.

22. I interpose to address some historic events that have important ramifications in the present instance.

23. Problems surrounding the applicant's rights to contact with S. have been in existence since at least 2011 when the applicant met his present wife. The parties to some extent addressed the issue, although not definitively and some problems remain.

24. The recent decision of the respondent to relocate to Durban has serious consequences. The respondent has resigned from her employment, has sold her house and has packed all her belongings ready to move to Durban. The practical effect thereof is that should I not endorse the relocation, the respondent would effectively be unemployed and homeless. The respondent and S. are presently being accommodated by friends pending a decision in this matter. A situation, submitted by Mr Smith SC, who appears on behalf of the respondent, warrants an order for relocation.

25. However, the decision of the respondent to relocate has erupted in a deep distrust between the parties and brought their underlying acrimony to the fore. Mr

Smith sought to downplay the emotive decision of the respondent in relocating and clothed it in the constitutional right to chose where to live, what employment to take up and the right to relocate whenever the desire arose.

26. In my view, such approach focuses mainly upon the interests of the party wishing to relocate, and not necessarily focusing on what would be in the best interests of the minor child. It ignores by implication the set principles of *bona fide* and reasonable consideration to be applied when deciding to relocate.

27. Section 31(2) of the Act obliges a parent holding parental responsibilities and rights in respect of a child to first consult with the other parent before taking a decision contemplated in section 31(1)(b) of the Act. In the present instance that did not happen. The respondent, whilst there are pending evaluations and therapy relating to S., took the decision to relocate and once all steps were completed in that regard, merely advised the applicant thereof. There was no compliance with the peremptory provisions of section 31(2) of the Act.

28. The respondent appears to have received legal advice, contrary to the peremptory provisions of section 31(2) of the Act, to first attend to all issues of the decided relocation before advising the applicant thereof. The applicant then being confronted with a situation *au fait accompli.* The apparent intention was to make it impossible for the applicant to *veto* that decision. This approach is concerning. In my view it is an important and relevant factor when considering whether a *bona fide* and reasonable decision was taken to relocate.

29. Mr Smith submitted that in view of the respondent's Constitutional right to choose how and where to eke out a living and to move forward in life, would outweigh, or at least be in, the minor child's best interests. That logic seems constrained in the present instance. It is also submitted on behalf of the respondent that the relocation would remove, or heal, the acrimony between the parties. That logic also seems constrained. What is good for the goose is not necessarily good for the gander. Mr Smith further submitted that despite the Constitution prescribing that the best interests of minor children are paramount, those interests on occasion are to play second fiddle to the Constitutional right of a parent to choose

where he or she prefers to live and eke out a living. No authority for that proposition was advanced and I know of none. It is certainly contrary to the provisions of section 36 of the Constitution which provides that any right can be limited depending upon the particular circumstances.

30. On behalf of the respondent it is further submitted that the recommendations by the experts can be implemented without denying S. the right to relocate to Durban.

31. In particular, it is submitted that the recommendations relating to contact rights of the applicant could still be implemented. In my view, such approach would have serious practical and logistical implications.

32. The recommendations relating to S.'s continued play therapy and the proposed counselling of the parties may well be implemented wherever the respondent and S. relocate to. However, the vexed question is whether it would be in the best interests of S. to be subjected to further and new experts in that regard, resulting in starting afresh with the building of trust, confidence and the like at such tender age. S. already suffers confusion and bewilderment.

33. Furthermore, according to the export reports, there exists an amiable report between S. and the applicant. No doubt due to the effort exerted by the applicant in that regard.

34. Mr Smith further submitted that should the respondent be permitted to relocate to Durban, it would enhance the situation of S.; she would be among her maternal family, in a less acrimonious environment, will be attending a good school where she could excel as good as in the present school.

35. The issue whether the intended environment would be less acrimonious is speculative. It may be less acrimonious for the respondent, non constat that it would or may be the same for S. Again only the interests of the respondent would be served.

36. Further in this regard. S. will be denied the known environment presently enjoyed; the comfort of existing friends, the warm relationship with her paternal family, the support received from present and trusted experts and a school environment that she has become accustomed to.

37. Relocating under the present circumstances can hardly be said to be for the better. The only "advantage" may be that her mother, whom she dearly loves, may be happier. However, that again reflects on the interests of the respondent. It further emphasises S.'s child parenting role.

38. From the report of the *curatrix ad /item* it is gleaned that effectively the relocation, financially and employment wise, is no different from that enjoyed prior to the decision to relocate, despite Mr Smith's submissions to the contrary. In my view, the only inference to be drawn from the manner in which the relocation is approached is that it only serves the interests of the respondent.

39. Mr Bates SC, who appears on behalf of the applicant, submitted that the bemoaned effect that the respondent, and hence S. too, would be homeless and the respondent being unemployed should the relocation not be ordered, is to be laid at the door of the respondent. She only is to blame. Mr Bates further submitted that the respondent holds a professional qualification and can be readily employed. Again those aspects only serve the interests of the respondent.

40. Mr Smith further submitted that the recommended contact proposals could readily be implemented should relocation be ordered. It was submitted that Durban is a mere 45-minute flight from Johannesburg and hence every alternative weekend is plausible. In this regard a draft order was handed into court. It seeks to address all the issues at stake within the context of a relocation. There is no merit in that submission. It ignores the travelling to and from the airport, the inevitable probabilities of delays, cancellation of flights and the like. Inevitably the weekend results in a full day at best. It further ignores the scholastic, religious, and extramural activities that would only increase as S. progresses. Although the foregoing is also true in most cases, the complicating factor in the present instance is the counselling and therapy that is recommended, in particular with

reference to S.

41. The suggestion that should S. be denied the relocation, she would project the unhappiness of her mother towards the applicant is mere speculation. That could only be true should the respondent allow her "unhappiness" with the result to engulf S.

42. There is merit in some of the submissions made on behalf of both parties in respect of the issue of relocation and its effect. However, in my view those submissions only serve the interests of the parties and not necessarily that of S.

43. The concerns raised in the reports of Dr Hartzenberg and Mr Snyman relating to S.'s vulnerability as a result of the acrimonious relationship between the parties cannot be ignored. Those concerns need to be addressed, one way or the other.

44. In this regard, Mr Bates handed into court a similar draft order addressing the recommendations of the experts.

45. Having regard to:

    (a) The paramount consideration of the best interests of the minor child and in particular her tender age;
    (b) The purpose of the relocation and in particular the irrational and inconsiderate manner in which decision was made;
    (c) The respective interests of the relocating and non-relocating parent; and
    (d) The views of the minor child in so far as it can be determined and as advanced by the *curatrix ad litem* in the present instance,

    I am not convinced that S.'s best interests would be served in granting relocation under the present circumstances.

I grant the following order:

(a) The matter is enrolled as one of urgency;

(b) The respondent is ordered:

(i) Not to remove S., born […] 2007 (the "minor child"), from this Court's area of Jurisdiction in order to relocate the minor child to Durban;

(ii) To re-enrol and to retain the minor child at Midstream Primary School immediately;

(c) The mediation presided over by Adv Natasha van Niekerk specifically to adopt a parenting plan will continue until not later than 28 February 2017, failing which Adv van Niekerk's appointment shall terminate and lapse;

(d) The applicant and the respondent shall participate in a meaningful and reasonable manner in assisting Adv van Niekerk in drafting a parenting plan;

(e) Subject to what is provided for in this order, the terms and provisions of the order dated 14 January remain operative and in force and effect;

(f) The applicant and the respondent retain full parental responsibilities and rights in respect of the minor child, as envisaged in section 18(1) of the Children's Act, No. 38 of 2005 (the Act);

(g) The respondent shall attend to the minor child's primary care, as envisaged in section 18(2)(a) of the Act, subject to the applicant's rights of reasonable contact with the minor child, as envisaged in section 18(2)(b) of the Act;

(h) Specific parental responsibilities and rights in respect of contact with the minor child, as envisaged in section 18(2)(b) of the Act, are awarded to the applicant and to exercised in accordance with the provisions of paragraph 19.8 of Dr Lore Hartzenberg's psychological report dated 2 December 2016 and shall in addition there to include:

(i) That the minor child shall be with the respondent for the Easter weekend, inclusive of Good Friday and Easter Monday;

(ii) That the minor child shall spend the last three days of each Ramadan, and the two Eid days thereafter with the applicant, provided this will not interfere with the minor child's schooling and the applicant shall be responsible for her attending school and any extramural activities that the child may be involved in during that period;

(i) The minor child will continue with the therapy currently attended to by Dr Opper on a regular basis until such time that Dr Opper deems it necessary;

(j) The respondent will avail herself for psychotherapy treatment in respect of the psychological issues referred to and identified in Dr F N v Zyl's report dated 28

November 2016;

(k) The applicant and the respondent will attend parental guidance cessions with Dr Opper, or a psychologist recommended by Dr Opper, to support them in their parenting skills and ability to focus on the best interests of the minor child as opposed to focusing on their own needs;

(l) The applicant and the respondent are directed to refrain from making any critical comments of each other in the presence of the minor child;

(m) The minor child will continue her schooling academic career at Midstream Rid£1e Primary School and any change in school must be mediated with the assistance of Adv Natasha van Niekerk in a parenting plan;

(n) Adv Johanni Barnardt will continue as the minor child's *curatrix ad litem* until such time that she deems it necessary, specifically to monitor the minor child's progress and the applicant and the respondent's insight into and understanding of the minor child's best interests;

(o) The applicant and the respondent will at all relevant times act in the minor child's best interests and establish an environment which is conducive to the minor child's best interests, without giving preference to their personal (self centred) interests;

(p) The costs of Dr Opper and the *curatrix ad !item* to be paid in equal shares by the applicant and the respondent;

(q) The costs of Dr Hatrzenberg and Dr van Zyl to be paid by the applicant and the respondent proportionately to their respective incomes;

(r) No order is made in respect of the costs of this application, including the costs reserved on 27 October 2016.

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C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	F W Bates SC
Instructed by:	Suze Buitendach Attorneys
On behalf of Respondent:	D A Smith SC
Instructed by:	Schoeman & Associates