

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

CASE NO: 95071/2016

26/1/2018

In the matter between:

K M

Applicant

and

J W

Respondent

JUDGMENT

MOSOPA, AJ

[1] The Applicant launched an application on which is seeking relief in the following terms:

- 1.1 Dispensing in terms of section 18(5) of the Children's Act no 38 of 2005, with the Respondent's consent in terms of section 18(3)(c)(ii)i and (iv) of the Act and for the purpose of this prayer the consent of the Respondent for the issue of the passport and/or a visa to be issued for the minor child, T A W, in order for the minor child to travel with the applicant to and between the Republic of South Africa and the Democratic Republic of the Congo, is dispensed with; and ancillary relief.

[2] The Respondent before the commencement of the proceedings applied for postponement of the matter and the application was opposed by the Applicant. I have already made the ruling in that regard that the application for postponement is refused and the matter should proceed. The application for postponement was pre-empted by the fact that the Respondent did not file his written submissions as directed by the Practice Directives. After allowing the Respondent to argue the matter I requested counsel appearing on behalf of the parties to submit supplementary written submissions and I am grateful for their written submissions.

Factual Matrix

[3] The parties in this matter have been in an intimate relationship since 2008 but were never married which relationship was terminated in January 2012. When the Applicant left the Respondent's place of residence unbeknown to her, she was one month pregnant; the Respondent being the father of the unborn child.

[4] Both parties are the biological parents of the minor child, T, and are co-holders of full parental responsibilities and rights in respect of the minor child as contemplated by section 18(1) and (2) of the Children's Act. Applicant's pregnancy reunited the parties and they stayed together from September 2012. Tiago was then born on the 10th October 2012. The Applicant and the minor child vacated the Respondent's place of residence after staying with the Respondent for a period of approximately eleven (11) months after the birth of the minor child, when the Respondent informed the Applicant that he wanted to move in with his fiancé.

[5] After moving out of the Respondent's place of residence the Applicant and the minor child stayed at Bedfordview. The Applicant then relocated to Kuruman, Northern Cape, in October 2014 together with the minor child. The applicant became engaged to her fiancé, Mr R L, on the 28 November 2015. Whilst staying in Kuruman the applicant obtained a protection order against the Respondent in terms of the provisions of the Domestic Violence Act 116 of 1993, after the

Applicant alleges that the Respondent is harassing and threatening her.

[6] Eventually the Applicant relocated to Democratic Republic of Congo ("DRC") to assume her employment responsibilities in the DRC with effect from the 5th December 2015. When she left the Republic of South Africa ("RSA") the Applicant did not leave with the minor child and left the child in the care of the Respondent. The respondent has since been staying with the minor child since that time.

[7] I must pause to mention that before the Applicant left for DRC, the respondent launched an application in the Northern Cape High Court, Kimberley, under case number 2226/14, seeking primary residence and care of the minor child and the parental responsibility of the minor child. The application was not opposed by the Applicant but the Respondent was not successful in obtaining the primary residence and care of the minor child as primary care and resident of the minor child was awarded to the Applicant.

[8] The Respondent refused to grant the required consent of the removal of the minor child to DRC and his refusal is mainly grounded on the fact that the applicant has not:

- 8.1 provided the Respondent with the address where the minor child is going to stay in DRC;
- 8.2 the name of the school where the minor child is to attend school at is not provided;
- 8.3 the place where the Applicant is going to work at and her remuneration and most importantly the fact whether she will be in a position to maintain the minor child;
- 8.4 given information regarding available medical facilities in the event the minor child falling ill or being in an accident;
- 8.5 given information relating to the safety of the minor child in a country which is politically unstable and not safe.

[9] The Applicant on the other hand contends that:

- 9.1 She has secured proper accommodation for herself and the minor

- child which is a two bedroom house with a very good security (even though no reasons given why there is security);
- 9.2 The minor child's bedroom is furnished and awaits the child to occupy it;
- 9.3 The minor child will be enrolled in a Belgian School (no name provided) with subjects in English, French and Belgian;
- 9.4 The school has an aftercare centre where the minor child can be taken care of after school;
- 9.5 She is not prepared to mention the physical address of the place she is residing in at the DRC

The law

[10] The legal principle applicable in relocation cases was set out by Scott JA writing for the majority in the case of *Jackson v Jackson* 2002(2) SA 303 (SCA) para 2 at 318 E-1: "It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where; following a divorce, the custodian parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interest of the children that the custodian parent be thwarted in his or her endeavor to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which could adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and while past decisions based on other facts may provide useful guidelines they do no more than that. By the same token, care should be taken not to elevate to rules of law the dicta of Judges made in the context of the peculiar facts and circumstances with which they were concerned."

[11] In *F v F* 2006 (3) SA 42 Maya AJA as she then was, stated: "In deciding

whether or not relocation will be in the child's best interest the court must carefully evaluate, weigh and balance myriad of competing factors, including the child's wishes in appropriate cases. It is unfortunate reality of marital breakdown that the former spouse must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible. Our courts have always recognized and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life. Thus, for example, in *Bailey v Bailey* 1979(3)SA 128 (A), the court, in dealing with an application by a custodian parent for leave to take her children with her to England on a permanent basis, quoted - with approval - the following extract from the judgment of Muller J in *Du Preez v Du Preez* 1969 (3) SA 329 (O) at 532 E-F: "This is not to say that the opinion and divine 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 parents' decision and the emotions or impulses which have contributed to it."

[12] Further in Jackson supra, the following was said: "The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decision is correct. The reason why a court is reluctant to interfere with the decisions of a custodian parent is not only because the custodian parent may as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interest of a child but, more importantly, because the parent who bears the primary responsibility of raising up the child should as far as possible be left to do just that. It is, however, a constitutional imperative that the interests of children remain paramount. That is the "central and constant consideration."

[13] Section 7 of the Children's Act 38 of 2005 dealing with the best interest of child standards provides as follows:

"7. (1) Whenever a provision of this Act requires the best interest of the child standard to be applied, the following factors must be taken into consideration

where relevant namely;

- (a) the nature of the personal relationship between-
 - (i) the child and the parent, or any specific parent, and;
 - (ii) the child and any care-giver or person relevant in these circumstances;
- (b) the attitude of the parents or any specific parents, towards:-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from -
 - (i) both or either parents, or
 - (ii) any brother or sister or other child, or any care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his parents, family and extended family; and
 - (ii) to maintain connection with his or her family, extended family, culture or tradition,
- (g) the child's -
 - (i) age, maturity and stage of development;

- (ii) gender;
 - (iii) background, and
 - (iv) any other relevant characteristics of the child,
- (h) the child's physical and emotional security and his or her intellectual emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by -
 - (i) subjecting the child to maltreatment , abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behavior, or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behavior towards another person;
- (m) any family violence involving the child or family member of the child; and
- (n) which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child."

[14] Section 9 of the Children's Act further provides that when dealing with the best interests of a child:

"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied."

[15] Equally section 28(2) of the Constitution of the Republic of South Africa

Act 108 of 1996 (as amended) provides that:

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

[16] In terms of Art 3(1) of the United Nations Convention on the Rights of the Child (1989) ratified by South Africa on 16 January 1995 the following is stated: "in all actions concerning children whether undertaken by public or private social welfare institutions, courts or law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration." The best interests of the child standard is also enshrined in Art 16(1) of the United Nations Convention on the Elimination of All forms of Discrimination Against Women 1979, ratified by South Africa in December 1995 and brought into force here on 16 January 1996.

[17] From the foregoing it is clear that the court as an upper guardian of all minor children when dealing with matters affecting the child, the standard to be applied is of the best interest of a minor child. Most importantly when dealing with cases of relocation of minor children it is important for the court to determine as to whether such relocation is reasonable, genuine and *bona fide* and to the best interest of the minor child.

Issues to decide

[18] The only issues to decide is whether the Applicant has made out a proper case for the court to consent for the removal of the minor to stay with her in the DRC or that the Applicant has shown that the child's relocation to the DRC is reasonable and *bona fide* and to the best interest of the child.

18.1 The Respondent's counter- application.

Application

[19] The Respondent is *de facto* the custodian parent of the minor child since the Applicant left the minor child in the care of the Respondent when she left for DRC in mid-November 2015. I am saying so as before the relocation of the Applicant to the DRC the minor child has always been staying with the Applicant

and also the Northern Cape High Court also awarded the Applicant with the residency and care of the minor child. However it is clear that the applicant had access problem with the minor child whilst in the care of the Respondent as she was exercising her access right to the minor child by skype while she was in the DRC. This caused the applicant to launch an urgent application in this court in March 2016 where the parties entered into a settlement of the matter.

[20] It appears that the major reason why the Applicant left the minor child in the care of the Respondent was because the Respondent refused to consent for the minor child's removal to the DRC, by refusing to sign passport documents for the minor child.

[21] The only reason why the Applicant relocated to stay in the DRC it was because her employers wanted her to establish branches in DRC and was appointed to the Management Team and such relocation was purely for employment purposes. The Applicant avers that such opportunity will improve her financial situation and that of a minor child. It appears that her relocation to the DRC is not intended to be a permanent but only for the duration of her employment in the DRC.

[22] However the Applicant fails to take the court into her confidence and indicate how much is her salary in the DRC as opposed to what she was earning whilst working in the Republic of South Africa and what is the name of the company she is working for and in what capacity is she employed in that company. Ms. Fabricius on behalf of the Applicant contended that the abovementioned aspects are not the requirements for the award of custody. However I disagree with counsel based on that fact that the child is currently in a stable environment under the care of the Respondent and the child cannot only be allowed to be relocated to an unknown environment.

[23] As already indicated the interest of the minor child is of paramount importance. The Applicant has been away and not living with the minor child for approximately a period of two years. The minor child is currently five years old. It is clear that over the period in which the child was left in the care of the Respondent the two created a serious bond. During her period of absence the Applicant had limited access to the minor child.

[24] The applicant does not give a detailed account of what inspired her to

relocate to the DRC save to state that they were opening branches in the DRC and it is difficult at this stage to can determine that her decision to relocate was bona fide and genuine or not. Moreover her relocation to DRC was done in the heist manner, taking into account that already in March 2015, she was aware of her possible move to DRC but did little to convince the Respondent to sign the passport documents of the minor child. In November 2015 she was informed of such work opportunity and assumed her work responsibility on the 5th December 2015, leaving the minor child in the care of the Respondent. Despite being in the DRC for approximately two years the applicant does not indicate how her financial situation has improved since relocating to the DRC.

[25] In *F v F* supra, the court said that: "In deciding whether or not relocation will be in the child's best interest the court must carefully evaluate, weigh and balance a myriad of competing factors, including the child's wish in appropriate cases."

25.1 Also in *Van Rooyen v Van Rooyen* 1999(4) SA 435 the court said the following: "Turning to the application for relocation, two preliminary issues arise. The first relates to the approach of the court in matters of this nature. It is that there is no onus in the conventional sense. The court will evaluate, weigh and balance the many consideration and competing factors which are relevant to the decision whether the proposed change to the children's circumstances is in their best interest. The court will make an assessment on the particular children, in other words, it will apply individual justice in the sense that all the relevant factors, even the mother's fundamental right to freedom of movement, will be assessed in the context of these children' s best interest."

[26] In *casu* as already indicated the Respondent is *de facto* custodian parent and there are myriad duties flowing from being a custodian parent which duties includes, the duty to provide the child with accommodation, food, clothing and medical care, the duty to educate and to train the child, and a duty to care for the child's physical and emotional wellbeing. It is clear that all this duties were relegated to the Respondent and the Respondent did all without the assistance of the Applicant during the whole period the minor child was left in the care of the Respondent.

[27] As a consequence it is generally accepted that custodian parent (in casu Respondent) has the right to have the child with him or her to regulate its life and to decide all questions of education, training and religious upbringing. See *JvJ2008* (6) SA 30 (C).

[28] It is also important to consider the motivation of the Applicant of relocating the child to DRC whether it will serve the best interest of the minor child. On the same breath it is also important to consider the current custodian parents interest as to whether his refusal to consent to the removal of the minor child will advantage or disadvantage the minor child.

[29] The minor child is only five years and because of his age it is practically impossible for him to participate in the process of relocation and give his wishes. This is borne by the fact that communication between the child and the Family Advocate was not being without challenges and the Family Advocate label it as "difficult".

29.1 In terms of the United Nations Convention, the courts must "assure" to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. Thus if the court is satisfied that the child in question has the requisite intellectual and emotional maturity to make an informed and intelligent judgment, then the court should give serious consideration to the child's expressed preferences;

29.2 Section 10 of the Children's Act provides that, "Every child that is on an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

[30] The family Advocate in her report indicated that Ms Lotters, in her absence due to the fact that she was sick, had a session with the minor child who was only 4 (four) years at that time, who indicated that he does not recognize the Applicant and his fiancé and later said that it is his mother and further that things are not good between him and the Respondent. The Family Advocate recommended that the primary residence of the minor child be with the applicant and stay with the child in DRC.

[31] It must be noted that the Family Advocate was the only expert in this matter. In her report she concedes to the fact that there is no bond between the Applicant and the minor child which needs to be rebuilt. No proper consideration was made as to the circumstances in which the minor child was to live under in the DRC. The educational needs of the minor child were not properly considered as is the safety and security of the minor child. The minor child speaks English, Portuguese and Afrikaans whereas in DRC a different language(s) i.e. Belgian, is spoken in the DRC. On the contrary the report does not report that the minor child is subjected to any form of maltreatment, abuse, negligent, exploitation or degradation while in the care of the Respondent. No mention is made that if the child is not removed to DRC, there is a likelihood of the effect on the child's circumstances.

[32] The following I found to be competing factors and considerations:

- 32.1 The minor child and the Respondent created a strong bond between themselves since the Applicant left the minor child in the care of the Respondent in November 2015;
- 32.2 The Applicant's wish to relocate to DRC is not *bona fide* and genuine;
- 32.3 The Applicant fails to provide court with the proper and detailed arrangements of the child when staying in DRC. Judicial notice is taken of the fact that DRC is not politically stable and safe. Moreover the court is in the dark as to the exact location of the Applicant's residence in the DRC;
- 32.4 The Applicant failed to provide, even though recently in her supplementary heads of argument, said she is willing to provide, the Respondent with the place, address where she is staying in the DRC;
- 32.5 The Respondent is employed as a Regional Manager for the Chamber Tarr Group, Broadacres, Fourways and is maintaining the minor child who is currently attending a pre-school;
- 32.6 The Applicant even though she is saying that she is employed she does not indicate where she is employed and what amount she is

- earning to can properly take care of the child;
- 32.7 The Applicant has still to establish bond with the minor child as the child has forgotten the Applicant;
- 32.8 The Applicant does not indicate as to where she is staying in the DRC there are medical facilities which cater for the child's needs in cases he gets sick or involved in accidents;
- 32.9 Due to the age and maturity of the minor child, the child could not give his preferences;
- 32.10 The removal of the minor child from the Respondent in my view, will have far reaching consequences in the circumstances of the child in terms of language, culture and wellbeing in the DRC.

Counter-application

[33] The Respondent brought a counter-application to the Applicants' application in which he seeks relief to:

- 33.1 delete and substitute prayers 1.1; 1.2 and 2 of the court order of the Northern Cape High Court to read as follows:
- 33.1.1 that primary residence of the minor child is awarded to the Respondent and that he will be responsible for the day to day care of the minor child;
- 33.1.2 the Applicant be awarded reasonable contact of the minor child, by having the child during with her when visiting South Africa, while living in DRC;
- 33.1.3 and when she permanently returns to South Africa to have the child every alternative weekend, alternative short school holidays and 50% of the long school holidays.
- 33.2 The court in the Northern Cape High Court when granting the Applicant residence and care of the minor child, even though the application was not opposed by the Applicant, was to a large extent guided by the Family Advocate report which investigated the

circumstances of the minor child at that stage.

- 33.3 As already indicated the major reason why the Respondent happened to be in the care and custody of the minor child was for the fact that he refused to sign passport documents of the minor child. The Applicant as a last option left the minor child in the care of the Respondent. It is not clear as to why she opted to leave the child with the Respondent as her parents are still alive and living in the Republic of South Africa.
- 33.4 However this is the decision which the Applicant has to live with for the rest of her life. I do not intend to interfere as a whole at this stage with the court order of Northern Cape High Court but I am compelled to give temporary residency and care of the minor child to the Respondent during the stay of the Applicant in the DRC.
- 33.5 This decision is mainly driven by the fact that the minor child has been with the respondent since the Applicant left the country for DRC. No wrong doings have been brought to the attention of the court that the child is neglected or abused. Even during the time of the Applicants' visit to South Africa she did not pick-up any signs of abuse of the minor child, because if it was the case she would have as a matter of urgency bring it to the attention of the Social Workers or the court.
- 33.6 It will be a travesty of justice if the Applicant can lose the right of reasonable access to the minor child simply because the court did not grant her the relief in terms of the Notice of Motion. The Applicant is entitled to exercise her right to access which must be preceded by binding. - process as recommended by the Family Advocate.

[34] I am alive to the fact that this issue is a sensitive and emotional one which affects both parties. Both parties are emotionally tied to the minor child and the Applicant want to permanently reside with the minor child in the DRC. It must be emphasized on the parties that this is not a game and there is no winner and loser in this matter. I am also of the view that justice and fairness will be best

served if no order as to costs is made.

[35] I therefore make the following order:

1. The application to dispense with consent in terms of section 18(3)(c)(iii) and (iv) of the Children's Act is refused;
2. Both parties shall retain parental responsibilities and rights in respect of the minor child **T A W**, born on 10 October 2012, subject to that hereunder;
3. The primary care and residency of the minor child will be temporarily with the Respondent while the applicant is in the Democratic Republic of Congo;
4. The Applicant's right of contact shall be as follows:
 - 5.1 Reasonable skype contact and the Respondent is ordered to furnish the Applicant with the contact numbers to give effect to such skype contact;
 - 5.2 The Respondent is to inform the Applicant every time he changes the skype contact details of such new details;
 - 5.3 The Respondent is not to unreasonably deny the Applicant skype contact;
 - 5.4 The right of the Applicant to remove the minor child and be with her at any time when the Applicant is in the Republic of South Africa;
5. The parties to appoint a practicing Educational Psychologist jointly to assist the Applicant and the minor child with the necessary binding - process as recommended by the Family Advocate, and such binding - process to commence immediately and it must be done before the Applicant exercise her physical contact with the minor child..
6. Each party to pay his or her cost.

M.J Mosopa
Acting Judge of the High Court

APPEARANCES:

For the Applicants: Adv M Fabricius
Instructed by:
Schoeman & Associates Attorneys, Pretoria

For the Respondent: Adv E Heyneke
Instructed by:
Van Der Berg Attorneys, Pretoria