REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

CASE NUMBER: 93463/2016

26/7/2019

In the matter between:

F[….], L[….] Applicant

and

F[….], D[….] P[….] Respondent

In re the matter between:

F[….], D[….] P[….] Plaintiff

and

F[….], L[….] Defendant

REASONS FOR JUDGMENT

LE GRANGE AJ:

[1] Before me was an application, brought under section 27(1)(b) of the Superior Courts Act 10 of 2013, in terms whereof the applicant/defendant seek to have the action, instituted by the respondent/plaintiff in this court on 30 November 2016, transferred to the Gauteng Local Division, Johannesburg.

[2] On date of hearing of the matter, I found that it would not be in the interest of justice if the matter is further delayed and hence granted my judgement forthwith. The application for transfer was dismissed with cost of two counsel. Herewith are my reasons for judgement:

[3] The relevant portion of Section 27(1) of the Superior Courts Act provides:

> *"If any proceedings have been instituted in a Division or at a seat of a Division and it appears to the court that such proceedings -*
>
> *(a)* ... ; *or*
>
> *(b)* *Would be more conveniently or more appropriately heard or determined* -
>
> *(i)* *at any seat of that Division; or*
>
> *(ii)*
>
> *that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or* seat, *as the case may be."*
>
> (Own emphasis)

[4] *Applicant (per N Breytenbach):* is of the view that the transfer should be granted for the following reasons:

1. There are currently two matters before two courts:
   (i) the matter instituted on 13 April 2016 in the Gauteng Local Division (the Jhb-matter) in terms whereof the respondent seeks the setting aside (based on misrepresentation) of a settlement agreement entered into between the parties hereto in December 2014, following a breakup between them, dealing with a wide

range of issues, Including all property issues between the parties, as well as a parenting plan with regards to care, contact, and maintenance pertaining to the parties' minor child (Lyla Rose, born on 26 April 2010).

(ii) the matter instituted on 30 November 2016 in the Gauteng Division (the Pta-matter) in terms whereof respondent seeks an order restoring contact with the minor child which is met by a counter claim by respondent, in essence for the opposite relief.

2. Both matters resolve around and are based upon the same settlement agreement, the same dispute, the same conduct and the same incidents between the parties. Further as respondent, in the Jhb-matter, seeks the setting aside *inter al/a* of the maintenance provisions, as contained in the settlement agreement and the repayment of the amount of R 3.5 million without any tender to maintenance, it reflects on his inability to be granted parental rights and responsibilities and hence a cardinal factor which must be taken into account by the court adjudicating the claim for contact.

3. It would be more convenient and/or more appropriate that the matters be dealt with simultaneously (an application for consolidation to follow the granting of the transfer, the entitlement thereto not being common cause) as to obviate any unnecessary legal costs and the duplication of evidence.

4. The family advocate aside, some of the experts, the legal representatives and the parties are based in, or conduct business from Johannesburg, which also makes it more convenient for the matter to be heard in Johannesburg.

[5] *Respondent (per M Feinstein & J Burger):* in opposition of the relief claimed, contended that:

1. The transfer would inevitably result in undue delay as the entire process conducted this far by the office of the family advocate, Pretoria (which started in April 2017, now two years in the making) need to start afresh in Johannesburg. The undue delay would be contrary to section 6(4)(b)

of the Children's Act 38 of 2005, which provide that: *"[i]n any matter concerning a child ... a delay in any action or decision to be taken must be avoided as far as possible."*

2. Although some evidence may overlap, the essential elements pertaining to the two actions are not the same, as the action for contact is not based upon the settlement agreement and/or the setting aside thereof.

3. The distance between Pretoria and Johannesburg should not be the determined factor as the parties, the witnesses and/or the legal representative are neither paupers nor stranger to travel the distance between Johannesburg and Pretoria.

[6] In my view the test then to be applied is whether it will be (taking into account the distance of travel, a possible delay and/or a possible consolidation of the actions) more convenient or more appropriate for the Gauteng Local Division, Johannesburg to adjudicate the matter.

Distance as factor

[7] It is common cause that most, but not all relevant persons (parties, experts and representatives) are from Johannesburg. Depending on the exact location (not being provided in the papers) it may be more convenient for some to travel to the centre of Johannesburg and for others to the centre of Pretoria.

[8] It is however general knowledge that the trip of 54 km, between Johannesburg and Pretoria, usually takes less than 30 minutes on the well-known Gautrain which link the two cities, at a current cost that rage between R49 and R75 (one way) depending were you embark and disembark) and should in my view (considering cost and convenience) not be a determined factor anymore in this day and age, unless specific and special circumstances and/or substantial prejudice can be shown to exist or that may materialize.

[9] Applicant failed to show any such specific and special circumstances or prejudice, nor was any evidence tendered by the experts and/or legal counsel which bemoaned the traveling to Pretoria.

Delay caused by transfer

[10] It is common cause that advocate Salome Langeveld-Goosen (as appointed family advocate), has already conducted her investigation and made various recommendations as contained in her report pertaining to the contact between the respondent and the minor child. Failure by the applicant to cooperate with the recommendations of the family advocate led to an application and an order was granted by Mokose J on 12 March 2019 in terms whereof the family recommendations are to be Implemented forthwith. There is no pending appeal to this order (the procedural entitlement thereto, not common cause) although reasons were requested and to date not provided.

[11] Although I am not convinced by the respondent, that the entire process, undertaken thus far by the office of the family advocate In Pretoria, will start afresh with a consequential two years of waste, I can safely conclude that undue delay will most likely result from the transfer of the matter from the office of one family advocate to that of another (both of them normally overburden with matters) and that certain thoughts, considerations and labour will be lost in the transfer.

[12] What needs further consideration is the fact that the affairs pertaining to the child's interest is uncertain for the last four (4) years and according highly undesirable.

[13] This matter should be finalised to a point of certainty one way or the other without further undue delay.

[14] The applicant to urge this as well. If she is right in her view and her counter claim succeeds, this will give finality to the matter, to the best interest of the minor child.

[15] It however seems that the applicant *is* unduly delaying the matter. Applicant's denial (in para 12 of her replying affidavit) that this application is nothing more than an attempt to avoid having to give effect to the recommendations contained in the final report of the family advocate dated 30 August 2018, which resulted in an order of court, is *contra* to her intention to appeal the latter and her attack on the family advocate with her words (as contained in her statement, dated 7 March 2019, and in opposition of the respondent's

application for implementation):

> *"As will be more fully obvious from the said chronologies, the office of the family advocate has always shown bias towards me, in favour of the [respondent]. The case has not been dealt with objectively and the Family Advocate and her various agents have always commenced interaction with me with a sentiment of me being the offending and/or guilty party. The recommendations of the family advocate are based on false representations .. the report ... falls to be set aside completely and the process of the Family Advocate's investigation in this matter needs to be restarted afresh."*

[16] It is noticeable that this attack was not put forward in this application (purposefully left out in the founding affidavit) as a further ground for the transfer of the matter to the office of a new (Johannesburg) family advocate, which then makes one wonder if the applicant's statement *supra* in opposition of the respondent's application to implement the family advocates final report, and the indication of a threatened appeal, is not just an attempt to have the matter delayed.

Adjudication of both actions simultaneously

[17] In adjudication of this issue, I could not find more appropriate words (albeit different relief sought) than that of Van der Schyff AJ in the matter of *M.K. v M.C (Born HJ,* a matter heard in the Johannesburg Local Division under case number 15986/2016, where It was stated that:

> *[24] This court sits as the Upper guardian of all minors within its jurisdiction. The discretion that is to be exercised when decisions pertaining to the best interests of children are to be made is unique, and not to be circumscribed in the narrow or strict sense of the word as it* is *explained in Bezuidenhout v Bezuidenhout 2005 (2) 187 (SCA) para 17. Satchwell J stated in LW v DB 2015 JDR 2617 (GJ) para 5 that the discretion to decide whether or not a child can accompany a parent who leaves the jurisdiction of the court, requires no onus in the conventional sense. This approach is in line with the principle set out by the Supreme*

Court of Appeal in Jackson v Jackson 2002 (2) SA 303 (SCA) para 5 that where the interests of minor children are involved, the litigation amounts to a Judicial investigation of what is in their best interests. The court is not bound by the contentions of the parties. That slavish adherence to technical procedural requirements might result in a court not being able to decide an Issue in the best interests of a child, has been recognised in the unreported judgment of Matojane J in DJB v MDP case number 30377/2008 decided in 2010 in the North Gauteng High Court, Pretoria, para 12. Here, the court held that the most important consideration in the case is the physical, psychological and emotional well-being of the minor child under the circumstances, and that technical procedural objections might shift the focus and undermine efforts to determine the best interests of the child.

[25] This investigation involves an application of law to the facts. This in turn, requires a holistic, case-specific analyses. The court must, in the words of Murphy J in Cunningham v Pretorius, acquire 'an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the Court must render a finding of mixed fact and opinion, in the final analysis a structured value judgment, about what it considers will be in the best interests of the minor child. '

[26] It is a pity that the parties in this matter were not guided to solve their disputes in a way other than through adversarial litigation. Since the issue of the summons in May 2016, the conflict between the parties, and the acrimony and animosity have only been fuelled by the legal process.

(Own emphasis added)

[18] The court as upper guardian of all minor children, hearing the claim and counterclaim pertaining to the parental rights and responsibilities, is not bound by the contentions of the parties and similarly not bound by the *inter partes* agreement (pertaining to the child, maintenance towards, or contact rights) or the setting aside thereof; more so, in this event where compliance with, and

enforcement of, the settlement agreement is put in issue; and even more so, as this settlement agreement was never made an order of court and hence *never* under judicial overview of the upper guardian of the minor child.

[19] I can also see no reason why the Johannesburg court hearing the claim for the setting aside of the settlement agreement, on the basis of misrepresentation (based upon events that took place prior to the conclusion of the settlement on 1 December 2014) should consider the evidence of multiple experts pertaining to the current physical and emotional wellbeing of the minor child and the fitness of the parties to assume parental rights and responsibilities.

[20] The court, adjudicating the parental rights and responsibilities, should in my view bring a fair mind to the facts as set out by the parties and the experts and should not to be clouded with irrelevant matter.

[21] Although r do not regard a possible delay as the main consideration in this transfer application, I do take it into account with my view that this court can and should finalise the matter, pertaining to the minor child and any contact and deterioration of the relationship between the respondent and the child, one way or the other, forthwith, without undue delay and without irrelevant evidence pertaining to the enforceability of an *inter partes* settlement.

[22] I therefore conclude that it would not be more convenient or more appropriate for the Local Division of Johannesburg to hear or determine the matter pertaining to contact and parental responsibilities. It is for the abovementioned reasons that I granted the order as contained in paragraph 2, *supra.*

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AJ LE GRANGE

ACTING JUDGE OF TH E HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant:	Adv. N Breytenbach on the instruction of JM Berkowitz Inc.
For the Respondent:	Adv. M Feinstein and Adv. J Berger on the instruction of Schuler Heerschop Pienaar Attorneys.