

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



Case number: 2023-015928

Date of hearing: 28 July 2023

Date delivered: 31 August 2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

.....
DATE SIGNATURE

Applicant

and

A D K

First Respondent

THE OFFICE OF THE FAMILY ADVOCATE

IN ITS CAPACITY AS CENTRAL

AUTHORITY IN TERMS OF THE

HAGUE CONVENTION ON THE CIVIL ASPECTS

OF INTERNATIONAL CHILD ABDUCTION

Second Respondent

JUDGMENT

SWANEPOEL J:

INTRODUCTION

[1] This matter came before me in the urgent court on 8 March 2023. Applicant sought the following relief pending an investigation into the best interests of the parties' three minor children ("J", a boy aged 11, and "M" and "A", twin girls who are almost ten years of age):

[1.1] That the parties be granted joint parental rights and responsibilities in respect of the children;

[1.2] That the children reside primarily with applicant;

[1.3] That first respondent be granted certain specific parental rights of contact with the minor children;

[1.4] That a psychologist be appointed to interview the children and to compile a 'voice of the child interview'.

[1.5] That the second respondent conduct an investigation into the children's best interests with regard to care and contact;

[1.6] Costs on the attorney/client scale.

[2] First respondent has launched a counter-application seeking an order for the return of the children to Sint Maarten, where the family resided until October 2022.

[3] The applicant is a psychiatrist who now resides in Pretoria. First respondent is a dentist who resides in Sint Maarten in the Caribbean. The parties were married to one another in South Africa on 19 March 2005. They resided in the Netherlands after the marriage, and they have also resided in Spain. All three children were born in South Africa. On 28 December 2018 the family moved to the Dutch side of Sint Maarten, and in 2020 they moved to the French part of the island.

[4] It is clear that the marital relationship between the parties has been rocky for a long time. They each accuse the other of being abusive. There is nothing to gain by repeating their accusations, but it is safe to say that they do not trust one another, and that there is no goodwill between them, especially as far as the children are concerned.

[5] During September 2022 first respondent initiated divorce proceedings in Sint Maarten. On 22 October 2022, whilst the first respondent was away from home, applicant took the children without first respondent's consent and returned to South Africa. She obtained accommodation in Pretoria and she has enrolled the children in a Pretoria school.

APPLICATION OF THE HAGUE CONVENTION PRINCIPLES

[6] The Hague Convention of the Civil Aspects of International Child Abduction¹ ("the Convention") deals with the abduction of children from

¹ Ratified by South Africa in the Hague Convention of the Civil Aspects of International Child Abduction Act, 1996

those territories which are signatories to the Convention. It creates a mechanism whereby the quick return of a child to its habitual residence can be ensured. It requires that a child must be returned to its home, save in certain limited circumstances.² It is, however, common cause that the children were not habitually resident in a territory which is a signatory to the Convention. The Convention, consequently, does not apply to this matter. There is no dispute that applicant abducted the children from Sint Maarten, as defined in article 3 of the Convention. Had the Convention applied, it would have been required of this Court to make an order for the immediate return of the children to Sint Maarten, unless one of the article 13 defences was established.

[7] Respondent's counsel argued, based on English authority, that even if the Convention is not applicable, the common law requires the immediate return of the child to its habitual residence. I was referred to *D v D*³ in which the Court held that, even if the Convention is not applicable, it is in principle in children's interests not to be abducted from their habitual residence, and that it is appropriate that the custody of a child should be determined in the jurisdiction where the child habitually resided. However, the Court also made the point that it retained a discretion to "*consider the wider aspects of the welfare of the wards*".

² The defences are threefold: Firstly, that the person having care of the child was not exercising custody of the child at the time of its removal or retention or that person acquiesced in the child's removal or retention, secondly, that the return of the child would cause a grave risk of physical or psychological harm or would place the child in an intolerable situation, or, thirdly, if the child is of such age and maturity that its views can be taken into account, and the child objects to being returned.

³ [1994] 1 FLR (CA)

[8] The approach taken in *D v D* seems to me to be correct. It is not, in principle, in a child's best interests to be abducted from its habitual residence, and it would generally be appropriate for the court in whose jurisdiction the child previously resided to determine the child's best interests. But that principle cannot be elevated to a rule in our law. Section 9 of the Children's Act, 2005 ("the Act") provides that the best interests of the child are paramount in all matters relating to the care, protection and wellbeing of the child. This is consonant with section 28 (2) of the Constitution which also places the best interests of the child at the forefront of the enquiry.

[9] The Convention places an obligation on a court to return a child unless it would be at grave risk of harm if returned to its habitual residence, even if the best interest of the child dictate that the child should not be returned. This causes some tension between the Convention and the Constitution. In my view, when the Convention is not applicable to a case, the dictates of the Constitution must prevail and the best interests of the child must be placed at the forefront.

[10] I do not believe that it is appropriate, nor in accordance with Constitutional principles, for the common law to be so interpreted as to reflect the principles of the Convention.

JURISDICTION

[11] The divorce proceedings in Sint Maarten have been largely finalized, save for the determination of the care and contact

arrangements in respect of the children. First respondent's counsel argued that the divorce court in Sint Maarten has jurisdiction to determine the care and contact arrangements of the children, and that I should order the children's return to Sint Maarten, so that that court can hear the remaining issues relating to the children.

[12] Applicant's counsel argued, correctly in my view, that this Court also has jurisdiction to determine the parties' rights and responsibilities in respect of the children in view thereof that the children reside within this Court's jurisdiction.⁴ The real question is, I believe, whether I should exercise my jurisdiction and hear the matter, or whether I should return the children to Sint Maarten so that that court may deal with the matter. As will become apparent hereunder, I am firmly of the view that it is in the children's best interests not to return to Sint Maarten. To make an order for their return would be to exacerbate the trauma that the children have already suffered. Furthermore, I do not believe that the court in Sint Maarten would be in a better position to consider the children's best interests than I am. I therefore intend to deal with the application and the counter-application.

BEST INTERESTS OF THE MINOR CHILDREN

[13] When the matter came before me on 8 March 2023 I granted an order that a psychological assessment of the children and the parties should be conducted by Dr. Samantha van Reenen, a clinical

⁴ Section 21 of the Superior Courts Act, 2013

psychologist suggested by the parties. I also appointed Adv Chris Maree as a curator-ad-litem for the children, with the powers, inter alia, of giving directives as to contact between first respondent and the children. In the meantime, I ordered that the children should remain in applicant's primary care.

[14] Adv. Maree ("the curator") enlisted the aid of Ms. Neritha Klue, a wellness counsellor, to supervise the visits between first respondent and first respondent, and to report thereon. The curator first met the children on 11 March 2011 when he delivered gifts to them on behalf of first respondent. J immediately wanted to know whether the curator was the person whom the court had appointed to 'protect' them. Clearly, applicant had discussed the litigation with the children in advance of the curator's visit.

[15] During the interview, without any mention by the curator of the children being returned to Sint Maarten, the children spontaneously told the curator that they did not want to return. A said that she was scared of first respondent, because he wanted to put them in a dungeon on Sint Maarten. At a second meeting a few days later a telephone call was scheduled between first respondent and the children. J refused to speak to his father. A started to cry, and M had tears in her eyes. When first respondent called, the children attacked him verbally. The curator, an erstwhile senior family advocate with many years' experience, found their behaviour towards first respondent to be shocking. First respondent tried to call a second time, but once again J attacked him

verbally. The children repeated their belief that first respondent wanted to “steal” them back to Sint Maarten. J clearly knew of the litigation because he said that first respondent had sued them, meaning the applicant and the children had been sued.

[16] Ms Klue became involved in the reunification process in Cape Town. In a preparatory meeting with the children, J told Ms Klue that the curator had told them that they had to meet with her, as they were not ready to see their father. J explained that he had a dream in which first respondent put him and his sisters in a dungeon. He expressed the concern that first respondent would kill his sister M, and his mother. J said that applicant had told him that he was having these nightmares because he was scared of first respondent. J said he could choose whether to see first respondent or not. J’s responses seemed rehearsed to Ms Klue. J was extremely negative about first respondent, saying that first respondent never played with them, that he lived like a pig and that he swore at them. J accused first respondent of never buying them gifts, but he also said that he believed that first respondent would buy gifts now that the divorce was happening, in order to “lure them to his side”. J wanted first respondent out of their lives. He said his mother had told him that nobody could force them to see first respondent. J again complained that first respondent would not give them (applicant and the children) money. He said that both applicant and her mother had told him that first respondent had cheated during the marriage. He said that first respondent was like a gangster. In stark contrast to his negativity

towards first respondent, J could not mention anything negative about applicant.

[17] M said that their mother did everything for them, and that first respondent paid for nothing. She was also very negative towards first respondent. She said he was very bad (“baie sleg”). M truly believed that first respondent would put them in a dungeon. She was also scared that first respondent would harm her mother and her maternal grandparents. She did not miss first respondent and wanted to remain in applicant’s care.

[18] A said she did not want to see first respondent. She was positive about applicant, but said that first respondent had never given her anything. She was also scared that first respondent would harm her mother and grandparents. When A was asked to explain why she was scared of first respondent, she could recall one incident during which first respondent allegedly gave her a hiding, and one incident during which first respondent allegedly pinched the applicant. A said she did not want to reside with first respondent, and she also said that she was scared first respondent would kidnap them.

[19] The first reunification visit between first respondent and the children took place on 4 April 2023. When applicant dropped the children off, she told them that “Jesus” would protect them. This, in my view, is a clear indication that applicant was trying to plant the message that the children were in need of protection when they were with first

respondent. Not surprisingly, when first respondent arrived the children were very hostile towards him. First respondent tried to show interest in the game that they were playing, but J and A quickly withdrew from the game. A kept glaring at her father and J went to sit in the reception area. When Ms Klue attempted to get J involved in the game, he told her that applicant had said that they could choose whether to see first respondent or not. J was angry and in tears.

[20] The first 30 minutes of the visit was tense, but gradually the girls started interacting with first respondent. They started to play ball, and J later also became more lighthearted, playing with first respondent. They then travelled to the Tobogan Park. During the drive the girls made derogatory comments about first respondent never spending time with them. When he reminded them of certain memories that they shared, they denied that those events had ever occurred. At the park M eventually initiated physical contact with first respondent, and the girls took turns riding with him. In conversation, they interrupted one another when speaking to first respondent, as children who need attention tend to do. During a registration at an Ipic play area, J started writing his surname as "Furs.." (the first letters of applicant's surname) on a registration document but stopped when he realized that he had to write his correct surname. He then wrote his surname on the document. As the visit unfolded the children seemed more and more comfortable with first respondent.

[21] Towards the end of the visit, M kept putting her arms out to hug first respondent, but then withdrawing. When applicant arrived A tattled to applicant that M had hugged her father, which M then denied. M became defensive and insisted that she had not hugged her father. Clearly her perception was that applicant would disapprove of her hugging first respondent. J told his mother that he never wanted to see first respondent again, despite the fact that relations between him and his father had thawed somewhat during the visit.

[22] At the next visit between first respondent and the children they went to a football club where they played soccer. J and M especially played eagerly with first respondent. Later on, A also became more involved and interacted with first respondent, spontaneously holding his hand. However, there seemed to be some conflict between J and M on the one hand, and A on the other.

[23] At a visit the following day J immediately started arguing with first respondent about emails that first respondent had apparently sent to applicant. J threatened first respondent that if he sent one more email J would stop seeing him. The only conclusion is that applicant had told J about the emails, and J felt that he should intervene to protect his mother. During lunch J told first respondent that the 'judge' had ordered him to pay for 'everything' and that they would celebrate that night that first respondent had paid. Again, this is something that J could only have heard from applicant.

[24] The following day the children were in good spirits, but resistant to first respondent's idea of having a picnic. J called the idea 'stupid'. During the day Ms Klue took photographs of the children to send to applicant. When A noticed her taking photographs, she jumped up from where she was sitting next to first respondent, and stood to one side, as if she did not want applicant to see her near first respondent.

[25] When it was time for the children to leave, J told first respondent that he loved him. Minutes later, when applicant arrived to fetch them, J told his mother that first respondent was an (expletive).

[26] Ms Klue expressed the view that the children were strongly aligned with applicant. Their narrative was, in her view, rehearsed. She believed that it was important to continue with the contact so that the "fragile" relationship between the children and their father would not unravel.

[27] The curator attended three of J's rugby matches, which were also attended by first respondent. At the first match A refused to greet first respondent, and she asked the curator to 'protect' her against him. It is not clear why she felt she was in need of protection against first respondent. Applicant's mother confronted first respondent in front of A and J about the ongoing litigation and about first respondent's "aggressive" legal team. J heard the applicant's mother speaking to first respondent and he screamed at first respondent that he did not want to

see him, and that he hated him. The curator had to intervene to calm the situation and the children left in a highly upset state.

[28] At a second match applicant's mother again confronted first respondent about the litigation. She seemed to have not learned any lesson from the previous episode, or she simply did not care that she was upsetting the children. J became so upset that he called his father an extremely disgusting expletive. He accused first respondent of not believing in God. Once again the curator had to intervene. He requested applicant's mother not to discuss the matter in front of the children, which she reluctantly did. The curator expresses the belief that inappropriate discussions had taken place in front of the children, which is why they know everything about the litigation.

[29] The curator noted that as the visits progressed, the children became more and more relaxed with first respondent, and they stopped bad mouthing him. He was of the view that the children should undergo therapy to assist them in dealing with their trauma, and that the relationship with first respondent should be preserved. Unfortunately, neither party has taken any steps to implement the curator's suggestion. The curator believed that both parties had failed the children, and had caused them emotional harm. I agree with this sentiment.

[30] Dr van Reenen's report very much echoes the observations of Ms Klue and the curator. During the assessment M came across as being very hostile towards first respondent, but when she was asked

how first respondent had hurt her, she could not explain her negativity. She views applicant as mostly good, and first respondent as mostly bad.

[31] J told Dr Van Reenen that he had no happy memories of first respondent. He said that when he was four years old first respondent began to lose interest in them, as a result of which J started hating him. He also said that first respondent should not have cheated on applicant, once again, an allegation that he could only have heard from applicant or from his maternal grandparents. In respect of Ms Klue, J said that she had started dressing more provocatively when meeting with first respondent, and he said that applicant had noted the same. Applicant was obviously expressing her insecurities to the children, and involving them in matters that should not concern children.

[32] A told Dr van Reenen that first respondent never gave her presents, did not make food for them, was never there for a birthday, and that he smoked and used alcohol. She was afraid that first respondent would kill them. All three children had an irrational fear of first respondent putting them into a dungeon. Strangely, although applicant described first respondent as an unengaged parent, she did concede that he had previously assisted with the care of the children, and had taken part in their social activities. She did not relate any incidents which could have triggered such extreme fear in the children's minds.

[33] Dr. Van Reenen points out that parental alienation is considered to be a bona fide form of family disfunction. Bernet *et al*⁵ defines parental alienation as being when *“a child allies himself or herself strongly with one parent (the preferred parent) and rejects a relationship with the other parent (the alienated parent) without legitimate reason.”* In *T v M* the Appellate Division (as it was then) quoted a report which defined parental alienation as *“..the situation in which one parent is victimized by the other that the child will go along with whatever is expected of it by the accusing parent”*.⁶ Richard Gardner⁷ defines parental alienation as *“a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child’s campaign against the parent, a campaign that has no justification. The disorder results from the combination of indoctrinations by the alienating parent and the child’s own contributions to the vilification of the alienated parent.”*

[34] Parental alienation, more especially when it is as serious as in this matter, can cause a child to suffer serious emotional trauma. It robs a child of a meaningful relationship with a parent, and it may result in trauma that lasts for a lifetime. For that reason it is, in my view, no less dangerous than physical abuse. It often manifests subtly, when, for instance, a parent is suddenly told that the child does not wish to see him/her, without there being any discernable reason why the child would

⁵ Bernet. W et al (2010) Parental Alienation, DSM-V and ICD-11 The Journal of Family Therapy, 38, 76-187

⁶ *T v M* 1997 (1) SA 65 (A)

⁷ Gardner RA (2001) Parental Alienation Syndrome (PAS): Sixteen Years Later, Academy Forum 45 (1) 10-12

suddenly express such a sentiment. Sometimes the parental alienation is more obvious, as in this case.

[35] Dr van Reenen says there is a ‘suggestion’ that the children’s relationship with first respondent has been impacted by “*suggestion and influence*”. In my view the alienation here is anything but subtle and much more than a suggestion. It is palpable in the behaviour of the children and the applicant, that she is influencing the children negatively against first respondent. To simply say that here there is a suggestion of parental alienation is to downplay the evidence. Applicant has enlisted the children as her allies in her fight with first respondent. She has clearly discussed details of the litigation with them, and she has planted negative thoughts in their minds, for instance, that they require protection from first respondent. It is regrettable that applicant, as a qualified psychiatrist, has so little insight into the harm that she has caused the children. Perhaps she is so intent on hitting back at first respondent that she does not care whether she harms the children. Applicant’s actions are not motivated by the children’s best interests, but rather her unresolved issues with the first respondent

[36] In my experience experts are often reluctant to call this kind of conduct exactly what it is: abuse. Adams J recently took a hard line in a similar matter⁸, where the experts found mild parental alienation, and he removed the child from the care of the abusive parent. In my respectful

⁸ T.L.D v B.G [2023] ZAGPJHC 801 (13 July 2023)

view, this is exactly what courts should do in appropriate cases to assist children to recover from abuse such as this.

[37] First respondent, on the other hand, has not been a model father either. I accept applicant's version that before the parties separated first respondent was not as involved in the children's lives as he might have been. First respondent denies that he was an absent father, but I accept that the children felt his absence intensely. An example of first respondent's failure to engage with the children occurred when applicant moved to South Africa at the end of October 2022. In early November 2022 first respondent was advised of their whereabouts. Notwithstanding that first respondent spent weeks in South Africa, he made no effort to see the children.

[38] First respondent has also made no contribution whatsoever to the children's maintenance since they moved to South Africa. I would have thought that he would set his animosity towards applicant aside and act in the children's best interests, but unfortunately that has not been the case. Furthermore, first respondent has attacked applicant's landlord, accusing him of abetting a child abductor and demanding that the landlord should stop assisting applicant. He has done the same with the children's school, accusing the school of enabling applicant to alienate the children. First respondent has laid criminal charges against applicant, which he has yet to withdraw, despite knowing where the children are and that they are safe. This is not something one does lightly, given the possible emotional trauma to the children if their

mother were to be arrested. Whereas parties in matters related to children are expected to act in a conciliatory fashion towards one another, in matters concerning children⁹, first respondent took the opposite approach.

[39] Unfortunately, the animosity that both parties have for one another has clouded their judgment to the point that they have both acted to the extreme detriment of their children.

[40] I am faced with a situation where the children are not only very hostile to first respondent, they are also implacably opposed to returning to Sint Maarten. It may be that they are not mature enough to express a view, and that they do not realize that they have been manipulated by the applicant, but nonetheless, that is their view. There is no doubt that the children see the applicant as their primary caregiver. They are settled in Pretoria, and they are happy in their school. I bear in mind the dictum expressed in *P v P*¹⁰ that “...a Court is not looking for a ‘perfect parent’- doubtless there is no such being. The Court’s quest is to find what has been called ‘the least detrimental available alternative for safeguarding the child’s growth and development.’” I agree with the experts that to return the children now would cause more harm than good.

⁹ Section 6 (4) (a) of the Act: “In any matter concerning a child- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.”

¹⁰ 2007 (5) SA 94 (A) para 24

[41] If first respondent were resident in South Africa, I would have given serious consideration to making an order that the children be placed in his care for an extended period, and that they undergo therapy, so that the relationship between them and their father can be restored. That is not possible in these circumstances. Dr van Reenen has made recommendations that the entire family should relocate to the Netherlands where the parties can exercise joint parental rights and responsibilities. Her recommendations are not acceptable to either party and are unpractical. Unpalatable as it may be, I see no alternative but to leave the children in applicant's care.

[42] However, I am going to put strict conditions in place. I am also going to make an interim order, with a return date seven months hence, so that applicant's compliance with the order may be monitored. First respondent will be given an opportunity to show cause at that time why this order should not be made final. I will continue to case manage the matter.

[43] As far as costs are concerned, it is generally not appropriate to make costs orders in family matters. In this case, where both parties have shown scant regard for the children's best interests, it is, in my view, even more appropriate not to make any cost orders.

[44] In the premises I make the following order:

[44.1] The parties shall have joint parental rights and obligations in respect of the minor children JD K born on 12

March 2012, M-A K born on 30 September 2013 and AL K born on 30 September 2013.

[44.2] Primary care and residence of the minor children shall vest in applicant.

[44.3] First respondent shall have the following rights of contact with the minor children:

[44.3.1] In addition to the contact outlined below, telephonic contact (including facetime, Zoom and/or Teams) every evening at 18h00 (South African time) for a period of not less than 30 minutes;

[44.3.2] When first respondent is not in South Africa, then for one long and one short school holiday per annum, with the Easter and Christmas holidays alternating annually;

[44.3.3] When first respondent is in South Africa:

[44.3.3.1] Every alternate weekend from after school on Friday (first respondent shall fetch the children from school) until Monday morning when first respondent shall return the children to school;

[44.3.3.2] One long and one short school holiday per annum, with the Easter and Christmas holidays alternating annually.

[44.4] Neither applicant nor respondent may remove the children from the Republic of South Africa, without the other party's prior written consent, which consent may not be unreasonably withheld.

[44.5] Neither party may remove the children to a territory which is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction.

[44.6] The children shall undergo therapy with a view to implementing this order and to resolve the emotional issues identified in the report of Dr S van Reenen;

[44.7] Adv C Maree is appointed as parental coordinator to:

[44.7.1] To monitor the implementation of this order;

[44.7.2] To resolve, as far as possible, any disputes between the parties relating to the children;

[44.7.3] To arrange for the children to undergo therapy with a therapist of his choice, and to engage

with the therapist in order to obtain feedback regarding the therapeutic progression and process;

[44.7.4] To refer the parties to therapy with a therapist of his choice if he deems it necessary, and to obtain feedback from the therapist;

[44.7.5] To assist the parties in drafting a parenting plan;

[44.7.6] To approach the case manager if necessary to extend his duties or to issue directives;

[44.7.7] To report back to Court if it is, in his view, necessary to do so.

[44.8] The parties shall bear the costs of the therapy and of the parental coordinator equally.

[44.9] The parties are interdicted and restrained from directly or indirectly making any remarks in front of or to the children which are disparaging of the other party, and furthermore, the parties may not discuss this application or any other litigation between them with the children.

[44.10] The parties are directed not to expose the children to third parties who make negative or disparaging remarks

concerning the other party, or who discuss the present or any other litigation with, or in front of the children.

[44.12] This order shall operate as a rule *nisi*, and any party may show cause on 18 March 2024 why paragraphs 44.1 to 44.11 of this order should not be made final.

[44.13] Notwithstanding paragraph 44.12 above, paragraphs 44.1 to 44.11 shall take immediate effect.

[44.14] Each party shall pay its own costs.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

COUNSEL FOR APPLICANT: Adv M Haskins SC
Adv B Bergentuin

ATTORNEY FOR APPLICANT: Arthur Channon Attorneys

COUNSEL FOR
FIRST RESPONDENT: Adv. F Botes SC

ATTORNEYS FOR
FIRST RESPONDENT: Hartzenberg Inc

DATE HEARD:

28 July 2023

DATE OF JUDGMENT:

31 August 2023