

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

CASE NO.:2023-065213

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 12/09/2023

SIGNATURE:

In the matter between:

M[...] J[...] T[...]

Applicant

and

K[...] T[...]

Respondent

CONCISE REASONS FOR JUDGEMENT

MOGOTSI AJ

- [1] The applicant seeks to enforce clause 1.2.7 of the deed of settlement made a divorce order. The applicant contends that the said clause entitles him to remove the minor child from the primary care of his mother, the respondent, to relocate with him to Canada. The respondent was awarded primary residence of the minor child by the deed of settlement.

- [2] The crisp issue in this matter is the interpretation of Clause 1.2.7 which reads as follows:

“To the extent necessary, The Parties agree that the minor child shall alternate between the parties when they are in deployment to overseas countries as they have always been during the subsistence of the marriage and neither party shall withhold consent unreasonably and shall sign all the necessary documents and shall attend to all necessary meeting/ attendances, at his own cost, to enable the minor child, to travel outside the Republic of South Africa, from time to time.”

- [3] Clause 1.2.7 regulates the unreasonable withholding of consent by either party when they are on deployment to overseas countries in the event either intends to travel with the minor child. The intention of the parties is that consent should not be unreasonably withheld. The phrase “to enable the minor child, to travel outside the Republic of South Africa, from time to time” implies that clause 1.2.7 regulates the child’s travelling arrangements. The word “travel” in clause 1.2.7 indicates that the parties intended the clause to be employed in the event either unreasonably withhold consent when the minor child is about to travel outside the Republic of South Africa and has nothing to do with the primary resident of the minor child. The parties, in my view, never intended the primary resident of the child to alternate between them when deployed overseas. The contextual interpretation of the deed of settlement yields the same results.

- [4] The court is the upper guardian of all minor children and I was persuaded by the following reasons to exercise my discretion to dismiss the application. It was not in the interest of the minor child to have him removed from school in the middle of the year more so that there was a complaint about his performance at school. The schooling systems in Canada differ from the South African one and there are no concrete plans of the way forward at the expiration of the four years when the minor is to progress to High School. The applicant will be based in Canada for four years and is silent on his plans for the minor child’s schooling thereafter.

[5] The minor child in casu is currently 12 years of age. In my view, he is not mature enough to make an informed contribution relating to his future.

[6] The applicant's approach to this matter is worth mentioning. The approach to the issue of relocating with the minor child was deceiving. He intended to catch the respondent off guard by not telling her outright of his intentions. The respondent had to second guess his intentions as a result of the WhatsApp messages transmitted between the two. He arranged the travelling documents secretly and thereafter informed the respondent of his intentions when he was ready to relocate with the minor child. This trend continued in his founding affidavit by concealing crucial information. The applicant struck me as a dishonest person by attempting to mislead the court. In my view, a punitive cost order was appropriate in the circumstances.

[7] In the result, the following order was made:

7.1 The application is dismissed.

7.2 The applicant is ordered to pay the cost of the application on attorney - client scale.

P J M Mogotsi
Acting Judge of the High Court

Date of hearing :11 July 2023

Date of Reasons for judgment :12 September 2023

Appearances:

For plaintiff: Adv M R Maphutha appearing with Adv W Sithole (Instructed by Abrahams Madira Attorneys)

For defendant: Adv Mari Fabricius (Instructed by Kgaugelo Baloyi Inc. Attorneys)

