IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A186/2021

In the matter between:

B[....] J[....] K[....] **Appellant**

and

C[....] M[....] K[....] **Respondent**

JUDGMENT DELIVERED: 01 DECEMBER 2021

SALDANHA J:

[1] This is an appeal against a judgment of Ndita J, in which she authorised the respondent, the mother of two minor children, to relocate with them from Plettenberg Bay to Cape Town. She also authorised the respondent to enrol the two children at the Reddam

House School in Tokai, and made further orders with regard to the appellant having to attend therapy and counselling. The children, two boys, referred to in the court a quo, as TJ (born on 15 June 2009) and TW (born on 25 February 2011) were at the time of the judgment in that court, 12 and 10 years respectively. The application was launched on 7 July 2020 and was brought on an urgent basis. It was opposed by the appellant, the father of the two boys. Leave to appeal the decision of the court a quo was granted with a provision that the parties be entitled to approach the Judge President for the early allocation of the appeal, in light of the schooling for the boys and that the relocation involved the question, amongst others, of the best interests of the minor children.

[2] The appellant's central challenge to the decision of the court a quo was that the relocation sought by the respondent was not bona fide and reasonable, and that it was not in the best interests of the minor children.

[3] The application arose in the context of the two children who were assessed as functioning at a high intellectual level and described as gifted, and whose educational and extramural needs were not being met at the school, the Greenwood Bay College ("GBC"), which they presently attend in Plettenberg Bay. The application was also undergirded by a complex and conflictual relationship between the parties, who had previously married in December 2007 and divorced in April 2018. The appellant is a successful businessman in semi-retirement, while the respondent is an accomplished musician.

[4] The application was initially set down for hearing in the court a quo on 29 July 2020. The appellant filed a notice of intention to oppose and, in a preliminary answering affidavit, disputed both the urgency and the merits of the application, and sought that it be postponed to enable him to appoint his own expert. He also sought that the respondent pay the costs occasioned by the postponement. On 29 July 2020 the application was postponed by agreement on account of the appellant's clinical psychologist, Mr Martin Yodaiken, having contracted the Covid-19 virus and that his report was not available at that stage.

[5] The matter was heard by Ndita J on 25 February 2021, who, after having heard argument, raised with the parties that there was very little information about the emotional state and current views of the children concerning the relocation, inasmuch as the expert reports dated as far back as October 2019, in respect of Dr Hetta Van Niekerk, the expert engaged by the respondent, and December 2020, in respect of the report prepared by Mr Yodaiken, the appellant's expert.

[6] An order was taken by agreement between the parties in which the application was postponed to 24 March 2021, for the appointment of a practicing advocate, Ms Urice Deetlefs, to consult with the children, either separately or together, in order to ascertain their emotional state and their views in relation to their schooling and the question of a relocation.

[7] Ms Deetlefs interviewed the children and delivered a written report on 17 March 2021. At the resumed hearing on 24 March 2021, Ms Deetlefs consulted privately with Ndita J and appraised her of the children's views concerning a relocation and the changing of schools. In an affidavit submitted at that stage by Ms Deetlefs, she indicated that she wanted to respect the children's wishes that their views not be divulged to any of the parties. In her judgment, Ndita J recorded that she had received the views of the children and would take them into account amongst other factors in the determination of their best interests and the application.

[8] In the course of the hearing of the appeal before this full bench, the court raised with the parties that it likewise needed to be appraised of the views of the minor children, as expressed by Ms Deetlefs to Judge Ndita, and so too on a confidential basis. Ms Deetlefs was requested to provide the court with an affidavit, which would be sealed for confidentiality, wherein she records the views of the children. I will in due course revert to this aspect.

[9] The order of Ndita J is recorded under paragraph 35 of the judgment of the court a quo, as follows:

'35.1 Paragraph 16.3 of the applicant's replying affidavit is hereby struck out, and the applicant is ordered to pay costs;

35.2 The applicant is authorised to relocate to Cape Town from Plettenberg Bay with the parties' minor children, TJ, born on 15 June 2009 and TW, born on 25 February 2011 ("the children"). Such relocation shall take place at the end of the second school term.

35.3 The applicant is authorised to enrol the children at Reddam House School in Tokai, Cape Town.

35.4 The children's contact with the Respondent shall continue in accordance with the Parenting Plan, which was incorporated in the parties' final decree of divorce, duly amended to accommodate the changed circumstances.

35.6 The respondent shall forthwith comply with paragraphs (j) and (m) of the recommendations of Mr Yodaiken dated 15 December 2020.

35.7 With regard to the costs occasioned by the postponement of the matter, each party will pay its own costs.

35.8 The respondent shall pay the costs of this application.'

[10] The appellant appeals against the orders obtained in paragraph 35.2, 35.3, 35.6, 35.7 and 35.8 of the judgment.

Background to the matter

[11] In terms of the settlement agreement and parenting plan, which formed part of the decree of divorce granted on 11 April 2018, the parties were ordered to be co-holders of the parental responsibilities and rights and to remain as co-guardians of the minor children.

[12] In paragraph 1.3 and further of the parental plan, the following is provided for:

'1.3 The parties agree that the children shall be primarily resident with Plaintiff, who is presently living in Noordhoek, Cape Town. It is recorded that since approximately January 2016, Defendant has been partly resident in Plettenberg Bay and partly resident in Noordhoek, Cape Town. In order to spend quality time with the children and to play an active role in their daily routine, when Defendant is in Cape Town he stays on the property where Plaintiff and the children reside.

1.4 It is recorded that for lifestyle and business reasons, Defendant wishes to relocate to Plettenberg Bay on a long-term basis. In order for both parties to continue to share parental rights and obligations, they have agreed that Plaintiff and the children will relocate to Plettenberg Bay with effect from April 2018 where the children will attend school from the second term in 2018.

1.5 It is recorded that the parties and the children have spent continuous periods of time in Plettenberg Bay between 2015 and February 2018 and that the proposed relocation has been discussed with the children who have already attended the school at which they will be enrolled from the second term of 2018.

1.6. In terms of the relocation, the children shall continue to reside primarily with Plaintiff in Plettenberg Bay.'

[13] It appears that the minor children were born in Cape Town, and that shortly prior to the divorce proceedings and thereafter, the parties and the children lived intermittently between Noordhoek in Cape Town and Plettenberg Bay. The respondent recorded that the children had alternated between schools in Cape Town, being Green Acres Preschool and Reddam House Preparatory School, and Little Footsteps Preschool, Plettenberg Bay Primary and ultimately GBC. In terms of the parenting plan major decisions relating to the children's welfare were to be made jointly by the parties, which included the enrolment at any school or extra tuition or tertiary education institution and any change in the children's place of residence to an area outside their current residential location.

[14] The respondent claimed that after the relocation to Plettenberg Bay she became increasingly concerned about the children's education at the GBC and their emotional status, in particular that of TJ. She had TJ assessed by a clinical psychologist, Ms Pandora Neser, who was of the opinion that he displayed symptoms of anxiety relating to the tension and the uncertainty of his parents' relationship and his place of residence. Ms Neser had not met with or communicated with the appellant in the assessment, other than having met with the respondent and TJ. The respondent also claimed that TJ`s class teacher advised her in August 2018 that he required play therapy, which he thereafter received from a Ms Carol Surya. TJ had also been treated with medication for depression. The respondent claimed that given that she and the appellant were not

able to agree on whether the children should move from GBC, which she believed was wholly inadequate in meeting the educational and recreational needs of both the children, she appointed Dr Hetta Van Niekerk to conduct an assessment as to what school would best serve the children's interests. The appellant pointed out that the initiative of the respondent to have the children assessed by Dr. Van Niekerk was not in accordance with the parenting plan, as both of them were required to agree thereto. He also claimed that in about April 2019 he and the respondent attempted to reach an agreement in respect of the children's schooling, as they were both concerned about it, and that they had sought the input of TJ`s therapist, Ms Surya, as well as a mediator, a Mr Evans. He claimed that during that process he was open to considering an alternate school. However, despite the assessment of Dr Van Niekerk that GBC was not meeting the needs of the children's educational aspirations and abilities, the appellant's immediate response was to reject the recommendation that they be moved from that school to an alternate school.

[15] In an extensive psycho legal report compiled by Dr Van Niekerk, she recorded her mandate as having been requested by the respondent to conduct a 'comprehensive child centred evaluation of TJ and TW respectively with the view to Mr K[....] and Mrs K[....] evaluating the present parenting plan (5.3.1) in terms of the children's development needs.' Her report records a detailed evaluation of the parties, based on their own perspectives and that of each other, and she records her observations of a home visit in respect of the children and the parties. She provided an extensive background to the co-parenting by the parties and recorded what she observed as the parental dispute between the parties in respect of the schooling of the children. That largely related to the respondent's view about the inadequacies of the schooling programme and opportunities for the children at the GBC which, due to the size of the school, meant that the sports teams and the chess club did not meet the expectations of the children compared to their previous experiences at Reddam House. The choir operated at a very limited scale, as a result of which TJ had stopped participating in it as with most of the other extramural activities. There were no music lessons offered in school time and very limited instruments were taught at the school. The music students were no longer entered for music exams, nor the annual Eisteddfod in George, which is

the only one held along the Garden Route. The GBC did not have a chess team that entered competitions and there was no extension mathematics or other forms of accelerated learning offered to fast learners such as the two boys. Moreover, the children do not have access to a proper library, which at GBC was no more than two or three shelves of books donated by parents. Notwithstanding these shortcomings at the GBC, the appellant initially remained adamant that it was adequate for the children and had initially failed to appreciate the frustration of the children with the limited exposure and opportunities at the GBC. The appellant claimed though that he had accepted that the GBC was inadequate, and the respondent claimed that at some stage he even suggested to the children that they would be enrolled at the Oakhill School in Knysna if they performed well. Apparently, and notwithstanding the children having performed well, the appellant allegedly reneged on his undertaking to them. This was confirmed by the children in their meetings with both of the experts. Dr Van Niekerk also carried out an extensive evaluation on both of the children, in particular their schooling, both preschool and scholastic development, and highlighted their exceptional abilities, particularly of TJ at maths and TW as a high achiever. She investigated their emotional development and also did so with reference to the previous assessments by Ms Neser and the therapist Ms Surya in respect of TJ. In dealing with the trauma experienced by TJ in particular, she recorded that he had found the move from Noordhoek to Plettenberg Bay extremely hard, and that both of the children had been seriously impacted on by the divorce of their parents, and they appeared to be traumatised by the ongoing dynamics between parents and what Dr Van Niekerk described as their incompatible values. She measured the psycho-educational profiles of the children, their intellectual functioning and the various perspectives of both of the children.

[16] In her report she explained that intimate partner violence, which is referred to as evidenced by, amongst others, patterns of coercive behaviour that adults use against their intimate partners (Graham-Bermann & Howell 2011)[1], had formed part of the marital history between the parties as well as their present relationship. She noted that it was important to acknowledge that there was still passive abuse (covert, subtle and

[1] IPV refers to a pattern of assaulting and coercive behaviours that adults use against their intimate partners.

veiled) and which included victimisation, neglect and both spiritual and intellectual abuse, present in the relationship even after the divorce. She recorded that the respondent claimed that there were incidents of financial and emotional abuse by the appellant, who continued to be dominant in their relationship. Dr van Niekerk had noted that from the appellant's point of view the respondent was the children's caregiver, and that her needs for personal development and self-fulfilment was irrelevant. She was of the view that the respondent's journey to personal development and fulfilment was being held hostage by the agreement in the divorce settlement of her relocation with the children to Plettenberg Bay. She was also of the view that the appellant had displayed a disregard for the psychological integrity of the respondent, and she was concerned that it was a poor moral example set by him for their sons at a time where gender inequality in the country remains a burning issue. She was also of the view that the appellant displayed a limited understanding that his own interests were secondary to that of the children, and she raised a reservation about the appellant's capacity to co-parent and that some of his actions appeared to have an authoritarian parenting style, where he sought to make decisions for the children. Dr Van Niekerk also noted the differences between the children themselves, with TW being a lot more spontaneous and someone who easily spoke his mind, as opposed to TJ. She noted that there was a stronger attachment between TW and the appellant than TJ, and that despite his favourable attachment to the appellant, TW expressed a concern about the appellant's inconsistency and limited reliability. In this regard, TW had raised with her that the appellant has not always kept his word in what he had committed himself to. In respect of TJ she noted that his development was below par which, due to an interplay of various factors, appeared to be compromised, as a result, he was not developing optimally. Anti-depressants had been prescribed to him due to symptoms of anxiety and depression at that young age, and his therapist had described him as a very sensitive child who had given up hope.

[17] In adopting a child centred evaluation Dr Van Niekerk distinguished between the wishes and needs of the two children respectively. TJ had expressed the wish to return to Reddam House to his friends and anticipated that at Reddam House he would be provided with sufficient intellectual stimulation on a level that is on par with his cognitive

competency. He believed that playing chess and sports would be more enjoyable at Reddam House due to a higher numbers of participants, as opposed to the GBC where he often had to compete directly with his younger brother. He also wished that his parents would 'stop fighting' about both him and his brother. He also preferred to have a fixed contact schedule with the appellant, according to a calendar, to make life more predictable. If he had his way 'he would not want to be left behind neither by his mother nor his father'. It was TW's wish that both he and his elder brother would attend a school where they would not be left to fall behind in their preparation for what they would like to become as adults. For example, he wished for both of them not be bored during maths lessons. TW also wished to play water polo and wished that his father would not say 'no' to everything that he and his brother suggested to change their situation. TW enjoyed making music, but did not want the lessons to be in the evenings.

[18] Dr Van Niekerk noted that both of the children had been exposed to instability over a substantial period. The demands that had been placed on them were evident from the frequent change of schools. She explained that because children needed stability in their lives it was important to provide consistency and predictability in maintaining routines and schedules. TJ in particular appeared to be sensitive to a change in routines. She was of the view that the intellectual development of the children needed stability. In respect of TW, because he had an exceptional musical talent and excelled in both maths and chess, this needed to be addressed with appropriate stimulation, which was lacking in his present educational environment. It was also likely that TJ's under achievement was due to his unfavourable mental state, as a result of educational neglect, for which specialised intervention was required to address the educational barriers created and the difficulties with his cognitive control, one of the components of high-order functioning and thinking. TW was also not being fulfilled educationally at his present school, and Dr Van Niekerk was of the view that it was important that he be part of an educational community that was inviting, complimentary and supportive of his expectations of actualising his own outstanding talents. It was also important that he be placed in a suitable educational setting to ensure a greater possibility that his under achievement was addressed by the time he

reached adolescence, as under achievement in adolescence was a greater problem with a doubtful prognosis.

[19] Dr Van Niekerk made the following recommendations:

i. That the appellant seeks therapeutic assistance with a view to increasing his ability in parenting.

ii. She considered it in the best interests of both children that the exercising of contact with the appellant remains in accordance with the parenting plan schedule, and that it was necessary that both parents keep to the agreed care and contact timetable contained in the parenting plan. With regard to the concerns about the parents' responsibility to facilitate the actualisation of the children's intellectual and scholastic potential, she recommended that (a) both children be registered with a programme for gifted children; and (b) that TW be further assessed by an expert working in the field of giftedness, with the view to do planned individualised interventions in terms of his learning areas that would likely have to include a cognitive enrichment programme.

iii. That the following schooling options, in order of preference, be considered as an alternative to GBC: Reddam House Preparatory Constantia, Oakhill School Knysna and Glenwood House Preparatory George.

[20] In his answering affidavit and in his response to the report of Dr Van Niekerk, the appellant revealed the nature of his relationship with the respondent and in particular his dismissiveness of her views. Importantly though, he acknowledged that she had been unhappy living in Plettenberg Bay since 2015. He also criticised the report of Dr. Van Niekerk as being one-sided and biased against him, largely fuelled by the views of the respondent herself, and he disputed his dominance over her in the relationship. He also displayed a lack of appreciation about the condition of the two boys at the GBC where he claimed that they had by all accounts performed well at the school and were happy. He described the condition of the elder child TJ as no more than an anxious child who needs certainty and predictability in his life, and for that reason a relocation would be contra-indicated. He claimed that a relocation would diminish his contact with his children and would make it 'impossible' for him to co-parent them or be involved in their

day to day lives. The matter was postponed to enable the appellant to appoint an expert to assess whether it was in the interest of the children to relocate from Plettenberg Bay to Cape Town and to enable the appellant to file a further answering affidavit.

[21] Mr Martin Lester Yodaiken, a registered clinical psychologist and family and commercial mediator and facilitator, was appointed by the appellant to conduct the assessment. His mandate was to conduct a full relocation assessment to determine the best interests of the children. Mr Yodaiken conducted extensive interviews with the parties, the children and obtained collateral information. In October 2020 he met with the parties, where he presented a memorandum of recommendations to them in an attempt to reach a settlement of the matter. He recommended:

i. That a relocation to Cape Town should not take place at that point in time.
ii. That while the GBC was a good school it did not provide TJ nor TW with sufficient stimulation and sophistication to allow them to be stimulated and happy in the school environment, which was having a negative impact on both boys, especially TJ. He recommended that the boys attend the Oakhill School in Knysna.
iii. He further recommended that the parties obtain a driver or an au pair to ferry the children between Knysna and Plettenberg Bay until they were old enough to use the school bus.
iv. He stated that the children had been subjected to a ‘great number of changes in their lifetime’.
v. He recommended that two parental co-ordinators be appointed in the matter: one a clinical psychologist and the other an advocate.
vi. The parenting plan should be modified in order to assist the appellant to change his relationship with TJ, and that he would require an extended length of time with both boys in order to be able to adjust his relationship with them.
vii. He also recommended that the appellant should receive parental coaching to assist him with dealing with TJ’s specific needs.

viii. TJ should continue to receive psychotherapy to assist him with his adjustment, certainly for the first part of his entry into the Oakhill School.

ix. He noted that it appeared from collaterals that much damage had been done to the respondent's reputation in Plettenberg Bay. The appellant was required to assist her in reversing that perception.

x. He noted that the parties' perpetual conflict was having a negative impact on the minor children. He also recommended that they receive couples counselling/coaching to assist them to find other means of resolving their conflict.

[22] The recommendations were rejected by the respondent, and Mr Yodaiken thereafter proceeded to draft a full report on his mandate.

[23] In his written report he addressed the question as to whether the respondent's reasons for wishing to relocate were bona fide and reasonable. He found that in evaluating the family, there was no reason to conclude that the respondent's 'reasons for wishing to relocate were not bona fide.' The appellant had never expressed an opinion that the respondent's intention to relocate was underpinned by her seeking to prevent him from having contact with the children, or for them to be alienated from him. The appellant had also never expressed that it was respondent's intention to cut him out of the children's lives or for there to be a minimal paternal identity in their lives. The appellant had also never suggested that the respondent had attempted to minimise his contact with the children, or had been inflexible so as to make contact difficult. Mr Yodaiken found support from collateral evidence that the respondent was willing for the children to have contact with their father even where there was overt conflict between them as the parents.

[24] Mr Yodaiken, as pointed out by counsel for the respondent, made a rather inexplicable leap that while he found that there was no doubt that the respondent's wish to relocate with the children was bona fide, he was concerned about other aspects of her bona fides with regard to a relocation. In this regard, he noted that the respondent had raised her unhappiness about living in Plettenberg Bay and that she had felt coerced into relocating through the divorce settlement. He also raised what he thought

was a concern that she unilaterally elected to engage the educational psychologist to evaluate the children without the appellant's knowledge, despite provision having been made therefore in the parenting plan for them to do so together. She had explained though, he noted, that she believed that the appellant would not have cooperated in having the evaluation done and would have stopped her. Mr Yodaiken appeared to be sceptical of her reasoning. In his consideration as to whether the relocation was reasonable, he noted that the respondent had been a musician and a music teacher, who had played in an orchestra and had taught at various schools in Cape Town. He also noted that she owned a house in Noordhoek, which was rented, and would provide accommodation if she and the children were to relocate. She also claimed that she was strongly motivated to work and that her having registered for her Master's degree in music was an indication of her interest and commitment to her career in music. Inasmuch as the respondent had not secured alternative work in the music field in Cape Town, Mr Yodaiken was of the view that her seeking to further her career was not a reason for the relocation to Cape Town. He also noted that the respondent had a good support system in Cape Town, where her parents lived, as well as the children's other relatives, including their half-brother, Jason. He noted that she had a limited support system of only a few friends in Plettenberg Bay. He noted though that since the relocation to Plettenberg Bay the respondent had made an effort to teach music, either at schools in Plettenberg Bay or privately, but that had not been successful. The population in Plettenberg Bay was relatively poor and the residents did not have sufficient disposable income for music lessons. He noted that a relocation to Cape Town could provide the respondent with better opportunities than that which existed in Plettenberg Bay, but he thought that she could explore the opportunities of teaching in Knysna at the Oakhill School. He was therefore of the opinion that the respondent's envisaged relocation to Cape Town was not reasonable and considered, and on that basis he sought to question her bona fides with regard to her relocation to Cape Town based on the children's educational needs. The respondent, however, had made it clear that she had not secured a teaching position in Cape Town, nor could she accept any offers given the uncertainty of the relocation. She was nonetheless confident that she would be able to secure a teaching position in Cape Town if allowed to relocate.

[25] Mr Yodaiken also conducted an extensive evaluation of both of the children, and noted in particular the concerns raised about the relationship between the elder boy TJ and the appellant. He fully accepted the psychometric assessments conducted by Dr Van Niekerk and accepted her assessment that the children's educational needs exceeded the educational offering that they were able to obtain at the GBC. In his psychometric assessment of the parties he found that neither of them suffered from any psychological disturbance or personality disorder, other than to remark on a condition of anxiety prevalent in the respondent, and no more than traits of turbulent, histrionic and compulsive personality features. These traits made her prone to being 'scattered, overestimated and demonstrates an inability to maintain balance within her environment' which could adversely affect her relationships with other people. Mr Yodaiken remarked that these personality traits were likely to be exacerbated during times of stress, but were offset by a warm and vivacious personality, described by collaterals as a good friend who was always present for them and as someone who could be trusted and would go the extra mile for the people she cares about. She was known to be focussed on the interests of the children and to appropriately cater for their needs. In respect of the appellant, Mr Yodaiken noted that the psychometric tests revealed evidence of an unspecified personality disorder, also characterised as turbulent. There was evidence of histrionic personality traits as well as a narcissistic and an anti-social personality style. He appeared to be extremely driven, enjoyed challenges and to be goal driven. He was acknowledged by collaterals for his contribution to conservation and community care. The clinical information, as well as the test results, suggested that he lacked flexibility and tended to want people to conform to his view of how things should be done. Mr Yodaiken himself experienced and recorded the appellant's tendency to control, and pointed out that the appellant had taken control of the organisation of the evaluation and insisted that all consultations take place in Plettenberg Bay, when it was possible and convenient to have had some done in Cape Town during the school holidays with the children. He also experienced the appellant's temperament at control when, with the initial presentation of the recommendations to the parties, Mr Yodaiken was of the view that the attorneys should be present. The appellant, however, insisted that the recommendations be given to the

parties prior to the inclusion of attorneys and, to Mr Yodaiken's dismay, the concerns he had about that methodology materialised following the meeting. Mr Yodaiken also noted the anger and impatience which the appellant expressed towards the respondent, and the extent to which he was dismissive of her views. These observations by Mr Yodaiken undermined the appellant's criticism of Dr. Van Niekerk's assessment of him, even though it was based largely on the information obtained from the respondent. In Mr Yodaiken's assessment of the respondent, he further noted her vulnerabilities in the relationship with the appellant and the regret she expressed about how she should have done things differently, and that she should have 'stood up for myself more often. She claimed in Plettenberg she gave up everything.'

[26] In summary, Mr Yodaiken recommended as follows:

i. That there should be no further evaluations of the children in respect of a relocation. A further evaluation should only occur if the children do not want to attend Oakhill School for their high school years;
ii. The children should attend Oakhill School in Knysna and they should be transported to and from by a parent who has contact with them on that day;
iii. That the children remain at the Oakhill School for their high school years, unless one or both of them indicate they wish to move to another school;
iv. That a male parental co-ordinator be appointed to deal with any disputes that arise;
v. That the parties also consult a post-divorce counsellor to deal with conflict in their relationship;
vi. That the respondent receive therapy for her anxiety;
vii. That the appellant receive parental counselling with regard to his relationship with TJ, and that the appellant also receives psychotherapy on a minimum basis and should report to the parental co-ordinator regarding the regularity of the appellant's attendance;
viii. That the professionals should form a panel of experts who will meet once every six months, or sooner if the need arises.

[27] Mr Yodaiken did not make any specific recommendations in the event of the court ordering a relocation of the respondent with the minor children to Cape Town. In his further answering affidavit, the appellant embraced the recommendations by Mr Yodaiken, in particular that of the boys been enrolled at the Oakhill School in Knysna.

The Law

[28] The court a quo recognised the centrality of Section 28(2)[2] of the Constitution of the Republic of South Africa Act 108 of 1996, that enjoined the court to consider the best interests of minor children in all matters concerning them. Section 9[3] of the Children's Act 38 of 2005 ("the Children's Act") also affirms the paramountcy of the interests of children. Section 7[4] of the Children's Act extensively sets out the relevant

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[2] 28 (2): 'A child's best interests are of paramount importance in every matter concerning the child.'

[3] 'Best interests of child paramount – 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.'

[4] '7 Best interests of child standard

(1) Whenever a provision of this Act requires the best interests 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 parents, or any specific parent; and
  (ii) the child and any other care-giver or person relevant in those circumstances;
(b) the attitude of the parents, or any specific parent, 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 of 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 of the parents; or
  (ii) any brother or sister or other child, or any other 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 or her parent, family and extended family; and
  (ii) to maintain a 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;

factors that the court should take into account in considering the best interests of children.

[29] While the central consideration is that the best interests of the minor child are of paramount importance in matters such as a relocation, the views and interests of the custodial parent seeking relocation must also be accorded due weight, and so too where the children are of a sufficiently mature age their views must also be taken into account. Needless to say, the views and the competing interests of the remaining parent must also be considered within the myriad of considerations. In the oft quoted decision of *Jackson v Jackson* 2002 (2) SA 303 (SCA), in matters dealing with relocations, Scott JA, on behalf of the majority, stated as follows:

'[2] 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 interests of the children that the custodian parent be thwarted in his or her endeavour 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 would 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.'

(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 behaviour; or
  (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

[30] Maya AJA in the matter of *F v F* 2006 (3) SA 42 (SCA), makes a pertinent observation with regard to the interests of the custodial parent:

'[11] From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment.' (Internal footnote omitted.)

She continues as follows:

'[12] It is also important that Courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts – who have no reciprocal legal obligation to maintain contact with the child and may relocate at will – may, and often does, indirectly constitute unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses. As was pointed out by Gaudron J in a minority judgment in *U v U*, the leading Australian case on relocation:

> "[I]t must be accepted that, regrettably, stereotypical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically. A mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child

runs the risk of having her reasons for relocating not treated with the seriousness they deserve.'" (Internal footnotes omitted.)

[31] She also goes on to caution that, while attaching appropriate weight to the custodian parent's interests, the courts have to guard against 'too ready an assumption that the [custodian's] proposals are necessarily compatible with the child's welfare'. She points out that the reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, and the extent to which the custodian parent has engaged with and properly thought through the real advantages and disadvantages of the proposed move, are all aspects that must be carefully scrutinised by a court in determining whether or not the proposed move is indeed in the best interests of the child.

[32] In *LW v DB* 2020 (1) SA 169 (GJ), Satchwell J, in a helpful summary, at paragraph 20, restated as follows the principles that must guide a court when faced with a relocation application:

'(a) The interests of the children are the first and paramount consideration.
(b) Each case is to be decided on its own particular facts.
(c) Both parents have a joint primary responsibility for raising a child and, where the parents are separated, the child has the right and the parents the responsibility to ensure that contact is maintained.
(d) Where a custodial 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 custodial parent is shown to be bona fide and reasonable.
(e) The courts have always been sensitive to the situation of the parent who is to remain behind. The degree of such sensitivity and the role it plays in determining the best interests of the children remain a vexed question.' (Internal footnotes omitted.)

[33] In consideration of the 'best interests of the children' in a wider social and constitutional context, Satchwell J in *B v M* [2006] (3) ALL SA 109 (W), paragraphs 155-156, states that the formulation of the best interests of children standard must also have regard to the best interests of family relationships in a particular, society in general and constitutional principles. She remarked that, to simply formulate the best interests of

the child in such a way that it has the effect that the primary caregiver or custodian parent would also be obliged to live in close proximity to the other parent from whom they are divorced, may have certain undesirable consequences for both individuals and wider society. In this regard, her views accord with that expressed by Maya AJA in *F v F* (above) regarding the signal that is sent to parents and children about the constitutional values of human dignity, freedom and equality. In similar vein, she also referred to the matter of *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C), where the court sought to:

'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 interests'.

She continues that, where this is not done, a message could possibly be sent that primary caregivers or custodial parents are 'shackled' to the other parent. The message may be that primary caregivers or custodial caregivers lose an independent right to 'freedom of movement' and accordingly a vast conspectus of the attributes of dignity are denied them as well. She points out that South African judgments have explicitly accepted that 'formerly married persons are and should be free to create their own lives post-divorce untrammelled by the needs or demands of the former spouse'.

[34] Satchwell J also points out that one should not lose sight of the fact that the primary caregivers or custodial parents are mostly frequently the mother and notes as a notorious fact that:

'. . . mothers, as matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement is, of course, a generalisation. There will, doubtless be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a natural mother is not the primary care giver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned (per Goldstone J in *Hugo (supra)* at 727G).'

[35] She points out that the aforesaid restriction on mobility and abrogation of 'freedom of movement' would impact more inequitably upon women than men. While she points out though that that might not be the intention behind the approach that

requires primary caregivers or custodian parents to remain resident where the other parent chooses to be resident, she correctly points out that discrimination which is unintended or unforeseen or even made in good faith is still not necessarily fair. She suggests, and correctly so in my view, that 'careful consideration need be given to applying the "best interests" principle in a manner that does not create adverse effects on a discriminatory basis – in this case gender discrimination.' In my view, the caution averted to by Satchwell J applies with equal force in this matter, especially where the relationship between the parties has been fraught with conflict and what appears to be the dominance of one of the parties. That, of course, does not displace the primary consideration of the best interests of the minor children.

Evaluation

[36] The appellant raised a number of grounds of appeal, some of which related to specific findings and conclusions of the court a quo. As indicted, the overall challenge to the order of relocation falls under the rubric of the bona fides of the respondent, the reasonableness of the relief she sought, and whether the court a quo was correct in finding that the relocation was in the best interests of the minor children. Those are the central issues for determination in the appeal, and encompass most of the individual grounds of appeal. As indicated earlier, I revert to the report of Ms Deetlefs which she had made to Ndita J in the court a quo, and as contained in her affidavit filed with this court on 2 November 2021[5].

[37] In respecting the wishes of the children for their views not to be made known, the report was provided confidentially to Ndita J. Those wishes were set out in the affidavit presented to this court, and for the very same reason of respecting the wishes of the two minor children it is not disclosed in this judgment. During the course of argument on appeal the court had also raised with the respective counsel whether consideration should be given to Ms Deetlefs conducting an updated interview with the children. Neither counsel had any objection thereto. However, the court, upon careful reflection,

[5]The affidavit is marked 'Sealed and Confidential' and will be deposited with the Chief Registrar of the Western Cape High Court, to be stored in the court safe.

considered it inappropriate for Ms Deetlefs to conduct a further consultation with the children for the purpose of the appeal, and confined itself to the disclosure made by her to Ndita J at the time.

In her affidavit to the court, besides setting out very clearly the views of the children, Ms Deetlefs recorded that the wishes of the children were:

i. Very clear and expressed in a prompt fashion without reservation;
ii. Remained the same in both sessions in which she had consulted with them;
iii. Did not appear to be influenced by their parents and;
iv. Were the result of their own research and information on the topic.

She also stated that it was clear that the children had an aptitude and a desire to partake in academic and extramural activities. It gave them a great sense of accomplishment when they performed well in such activities within a challenging environment.

The respondent's bona fides

[38] Counsel for the appellant, as in the court a quo, contended that the respondent merely wished to relocate to Cape Town because she was 'discontent and lonely in Plettenberg Bay', but that there was no guarantee that she would be any less lonely or discontent in Cape Town. She contended that the relocation was not sought because she had made 'choices with respect to [her] own aspirations, social and career aspects' and submitted that the respondent had not sought to relocate to further her career or employment prospects. She simply dismissed the respondent's wishes as wanting to remove herself from being controlled and being at the mercy of the appellant. Such general dissatisfaction with her life, counsel for the appellant added, was not a factor to be considered by a court in determining the best interests of a child, nor was it a factor that outweighed the children's best interests. Despite the claim by the appellant that these issues about her personal wishes and interest to relocate to Cape Town were only raised by the respondent in her replying papers, the court a quo noted that this was not so. The respondent had stated in her founding papers that she was lonely in

Plettenberg Bay, where she had no support and was entirely at the appellant's mercy. She had also, at that stage, indicated the challenges that related to her pursuing her Master's degree, which she has since obtained[6]. The respondent, in her replying affidavit, expanded on her personal interests in seeking to relocate with the children to Cape Town. She stated 'I feel very isolated and unfulfilled in Plettenberg Bay where I have no prospects of performing with an orchestra or teaching music at times that fit with the children's schedules. I also hope to start a student orchestra, choir or music school which I cannot do in Plettenberg Bay'. The respondent was also criticised by counsel for the appellant that she only sought to obtain a job that would enable her to be free in the afternoons, to attend to the needs of her children, if she was to relocate to Cape Town. In my view, she could hardly be criticised for seeking such an employment arrangement, especially with the children at their present ages. She has prioritised them and has stated very specifically that her academic and career prospects should fit in with that of her children's schedules. If anything, her position accorded with what would be in the best interests of the minor children over that of her own. In my view, the court a quo correctly found that the respondent had established that her reasons for wanting to relocate to Cape Town were both *bona fide* and reasonable. Moreover, in considering the authorities referred to earlier, in particular the views expressed by Maya AJA in the matter of *F v F* and those of Satchwell J*,* I am more than satisfied that it was appropriate for the court a quo to have given proper and due consideration to the wishes and interests of the respondent in seeking to relocate to Cape Town with the two minor children. These considerations, as correctly pointed out by the court a quo, had still to be considered in the context of what was in the best interests of the minor children.

[39] On the basis of the children's educational needs and aspirations, both parties and the experts agreed that Oakhill School and Reddam House offered far better alternatives than the GBC. The Oakhill school is situated approximately 30 kilometres away from their home in Plettenberg Bay, and although the respondent lamented the fact that the children would then have to travel a long, and at times treacherous, road,

[6] The court was informed that the respondent had at the time of the hearing of the appeal successfully completed her Master's degree in music .

the court a quo found no merit in that complaint. In my view, however, the concern raised by the respondent was not entirely without merit, given that the minor children would have to make that journey every school day and that it would inevitably impact on their ability to participate in extramural activities and their social relationships with other children at the school in Knysna. More importantly, though, as the court a quo correctly pointed out, as too did Dr Van Niekerk, Reddam House would provide a better quality of education for the children, and meet their sporting talents and their extramural interests, such as chess and music competitions, including that of the annual Eisteddfod. The children would also have access to their half- brother Jason[7] and also to their other family living in the Cape Town area, and would hopefully be able to re-establish their relationships with their friends, some of who had maintained contact with them despite their move to Plettenberg Bay. Mr Yodaiken, on the other hand, was of the view that it was necessary for the older child TJ to remain in Plettenberg Bay, so as to provide him and the appellant the opportunity of building their relationship. He was also concerned that a relocation of the children with the respondent would entrench her relationship with the boys. Mr Yodaiken was also of the view that a relocation would 'deprive him (TJ) of the opportunity of dealing with his reserve and learning how to engage with the other children and form meaningful relationships. Moving him at this point would possibly indicate to TJ the solution to a problem is not to work through it but to move to a place where the problem potentially does not exist'. This proposition by Mr Yodaiken was not borne out by any evidence that the child TJ had adopted a pattern of behaviour, or a history, where he was simply moved from a place where he experienced problems rather than having to deal with it. Both Mr Yodaiken and Dr Van Niekerk dealt extensively with the difficulties faced by TJ in Plettenberg Bay, and his lack of any meaningful relationships with other children, and the challenges that he faced at the GBC. It did not appear to be simply a matter that TJ wished to run away from his problems rather than confront them, where the very problem was the schooling environment at the GBC, which both parents and the experts accepted was seriously lacking compared to the other schools proposed.

[7] At the hearing of the appeal counsel for the appellant informed the court that Jason had since agreed to relocate to Plettenberg Bay to live with the appellant, his father.

[40] The appellant, moreover, conceded that 'I have no doubt as they get older we may have to make further adjustments and changes which may involve a change when they go to high school.' While Mr Yodaiken stated that because the children had been subjected to a number of changes in their lifetime, their movement needed to be minimised, although he accepted that a further evaluation of the children may be needed if they did not wish to attend the Oakhill School for their secondary schooling. The court a quo, in my view, correctly pointed out that the children's enrolment at Reddam House would provide a seamless entry into their secondary schooling.

[41] In respect of the impact of a relocation on the appellant, Mr Yodaiken was of the view that he was possessed of sufficient financial resources to mitigate against the distance he would have to travel to maintain and exercise his contact with both of the children. The appellant also has property in Cape Town, and his travels would not impact on his time, given that he has entered into semi-retirement, and there was also the possibility that he could spend time in Cape Town in order to be closer to the boys and have more frequent contact with them. In addition, Mr Yodaiken pointed out that there were facilities such as Whatsapp, Zoom and telephonic contact for the appellant to maintain regular contact with the boys. Mr Yodaiken also noted, and as alluded to earlier, that there was nothing to suggest that in the event of a relocation the respondent would not continue to facilitate contact between the children and the appellant. She recognised the importance of the appellant's parental identity with the children and she had not at all negatively influenced them against the appellant.

[42] The appellant also challenged the order made by Ndita J with regard to him having to seek psychological counselling. It appears that this was done in the context where the respondent's attorneys had written to the appellant's attorneys enquiring as to whether he had complied with Mr Yodaiken's recommendation that he receive counselling, albeit at a minimum level. His response at that stage was that he would not do so, as the respondent had not accepted Mr Yodaiken's recommendations. At the hearing of the appeal we were informed that the appellant has since commenced with counselling sessions. Although I appreciate that it was in the context of Mr Yodaiken`s consideration of what was in the best interests of not only the children but that of the

respondent himself that he receive counselling, it was in the circumstances not entirely necessary for the court a quo to have made such an order.

[43] The appellant also challenged the order by the court a quo in not making a costs award in his favour in respect of the initial postponement. In my view the court a quo had properly considered the circumstances in which the matter had been brought, the conduct of the parties and the immediate needs of the minor children that precipitated the application. I find that there is no basis to interfere with the costs order made by the court a quo.

[44] In conclusion, this court wishes to express its appreciation to Ms Deetlefs for the very professional and considered assistance provided to it, and the promptness in which she attended to the request for the affidavit. In the result, I am satisfied that the court a quo correctly found in favour of the respondent in authorising her relocation with the minor children to Cape Town, the minor children's enrolment at Reddam House, and in respect of the costs orders made. However, as already indicated, the order with regard to the appellant having to comply with his own expert's recommendation was not necessary. That notwithstanding, the respondent having been substantially successful in the appeal, is entitled to the costs of the appeal, including the costs of the application for leave to appeal.

[45] In the result, the following order is made ;

i) The appeal, save for the order made under paragraph 35.6 by the court a quo, is dismissed.

ii) The appellant is ordered to pay the costs of the appeal as well as the application for leave to appeal.

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V C Saldanha

Judge of the High Court

I agree.

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L G Nuku

Judge of the High Court

I agree.

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M Francis

Judge of the High Court