IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 7722 / 2022

In the matter between:

MVZ Applicant

and

WGH Respondent

Coram: Wille, J
Heard: 25th of April 2022
Order: 29th April 2022
Reasons Requested: 13th May 2022
Reasons Delivered: 16th May 2022

REASONS

WILLE, J:

[1] This was an opposed relocation application. The applicant and the respondent are the biological parents of the minor child who is currently (14) months old. The applicant is the minor child's primary caregiver and the minor child's primary residence is also with the applicant. The applicant sought leave to relocate with the minor child to Bloemfontein.

[2] This matter came before me on the 25th of April 2022 for determination and after hearing extensive arguments (in view of the urgency of the matter), I issued an order on the 29th of April 2022. The order which I issued out was in the following terms;

1. That the applicant is granted leave to relocate with the minor child, [….], on a permanent basis to Bloemfontein, South Africa.

2. That Advocate Dorette van Zyl, a family parental co-ordinator of Bloemfontein, is appointed as parenting co-ordinator, with the powers stipulated in annexure "A" hereto, inter alia, to assist the applicant and the respondent in concluding a parenting plan to facilitate the respondent's contact with […] (the costs thereof to be paid by the parties jointly).

3. That commencing from the month of June 2022, the respondent will be entitled to contact to […] in Bloemfontein, on alternate weekends, such contact to take place from 10am to 5pm on a Saturday and 8am to 1pm on a Sunday, and which contact shall be supervised, as set out below.

4. That from the month of July 2022, and on a weekend when the respondent is not visiting Bloemfontein (and every alternative month thereafter), the applicant will bring […] to Cape Town, when the respondent will have contact to […] on a Saturday from 3.30pm to 7pm and on a Sunday from 8am to 10.30am, such contact to be supervised, as set out below.

5. That the applicant shall do all things necessary to facilitate virtual contact between the respondent and […], as follows:

5.1. Every Monday, Wednesday, and Friday, between 4pm – 5pm, such contact to commence on Wednesday, 4 May 2022.

5.2. Every second Saturday (when the respondent is not in Bloemfontein) at 10am, such weekend contact to commence on Saturday, 7 May 2022 and,

5.3. The duration of each contact session shall not exceed 20 minutes.

6. That the duration of every virtual contact session is subject to […]' ability and willingness to remain engaged in the virtual contact and […]'s child-minder, appointed as set out below, will take reasonable steps to ensure that the virtual contact session endures for the agreed duration.

7. That the applicant is to transmit two video clips and four photographs of […] to the respondent every seven days, along with a brief report on the general well-being of […], which transmission will take place through the applicant's and respondent's respective attorneys.

8. That when the respondent exercises contact to […] in Bloemfontein, the applicant will provide accommodation to the respondent, at the applicant's mother's guest house, on a Friday and a Saturday night.

9. That the applicant undertakes to spend one week (to be agreed between the parties) during each of the June/July and December school holiday period, in Cape Town, to enable the respondent to exercise contact with […] from 10am to 5pm every day, during that period, such contact to be supervised, as set out below.

10. That the applicant and respondent will be jointly liable for the applicant's reasonable costs of accommodation during such holiday visits.

11. That regarding the contact in Bloemfontein, the applicant will appoint an appropriate supervisor to supervise the respondent's contact to […], at the applicant's cost.

12. That regarding the contact to be exercised by the respondent to […] in Cape Town, the organisation, 'Child Assist', will be requested by the respondent to supervise his contact to […], at the respondent's cost.

13. That the respondent is ordered to pay the costs of the application (on an attorney and client scale), as taxed or agreed (such costs to include the costs occasioned by the employment of two counsel where so employed), together with the expenses of the expert social worker (Esme Bruwer).

[3] My order also referenced the role of a parenting coordinator and her authority, duties, and obligations were reduced to writing (this by agreement) and set out in in an annexure which was annexed to my order for the purposes of identification. The provisions set out in this annexure were the following;

1. The parenting coordinator ("PC") shall continue to act as such until she resigns, or both MVZ and WGH ("the parents") agree in writing that her appointment shall be terminated, or her appointment is terminated by an order of the High Court.

2. Neither parent may initiate Court proceedings for the removal of the PC or to bring to the Court's attention any grievances regarding the performance or actions of the PC without first meeting and conferring with the PC in an effort to resolve the grievance.

3. The PC is authorised to:

3.1 assist the parents in concluding a parenting plan;

3.2 assist the parents in implementing and complying with the provisions of the parenting plan;

3.3 mediate joint decisions in respect of […];

3.4 make recommendations in respect of any issue concerning the welfare and/or affecting the best interests […], which shall not be binding upon the parents unless they constitute directives made pursuant to the paragraphs pertaining to directives below;

3.5 engage the services of an expert professional to assist him/her to make recommendations that have a bearing on […], provided the parents have agreed on the costs of such expert;

3.6 make directives binding on the parents and […] until a Court of competent jurisdiction orders otherwise, limited to the following specific aspects:

3.6.1 the time, place and manner in which […] will be transported and exchanged between the parents during weekend and holiday contact periods;

3.6.2 the variation of weekend or holiday contact arrangements which do not substantially alter the basis provided for in the parenting plan;

3.6.3 child-minding arrangements during contact periods;

3.6.4 the manner and method of parental communications;

3.6.5 the time, manner and frequency of telephonic and video contact;

3.6.6 contact with third parties.

4. It is specifically recorded that the PC is not authorised to make binding directives regarding:

4.1 […]'s primary residence arrangement;

4.2 contact periods which substantially alter the basis of the time allocation in terms of the parenting plan;

4.3 guardianship of […];

4.4 […]'s relocation outside South Africa.

5. When making directives, the PC shall be mindful of […]'s best interests. The PC's directives shall always be subject to the oversight of a Court of competent jurisdiction and shall only be binding upon the parents and […] for as long as a Court of competent jurisdiction has not ordered otherwise.

6. The PC's services involve elements of mediation, expert opinion and counselling, but do not purely fall into any of these categories. The PC is not appointed as a psychotherapist, counsellor or attorney for […] or the parents. No psychotherapist/patient or attorney/client relationship is created by this appointment or otherwise exists between the PC and any of the parents or […].

[4] What follows are my reasons for the order which I granted in this very unfortunate matter. In terms of the then-existing care and contact regime, the respondent was entitled to exercise contact with the minor child, every day of the week, subject to certain strict conditions namely; (a) subject to intermittent supervision by a nominated social worker; (b) subject to unannounced random urine drug tests; (c) access at all times to be accompanied by the child-minder and, (d) contact was to be between the hours of 10h00 and 17h00.

[5] One of the issues for consideration was the issue of the permanent residence of the respondent. It was the respondent's case that he does indeed reside in Cape Town. This was disputed by the applicant. In this connection, it was advanced by the applicant that the respondent holds a foreign passport and historically resided abroad for a period of about (6) months during the course of last year. Further, it was alleged that the respondent is self-employed and resided in an apartment which was and is advertised as 'temporary' self-catering accommodation. The permanent residence position piloted by the respondent found no support from the court-appointed professionals.

[6] The applicant is employed as a medical sales representative and at the time that the application was presented, she resided in Cape Town. During the earlier part of this year, the applicant was informed by her employer that she would be required to travel for work purposes to the surrounding countryside for one week every month. Prior to the birth of her minor child, the applicant did so travel in order to realize her work commitments as a sales representative. This was historically the position and this remains undisputed.

[7] No doubt, this position changed after the birth of her minor child and the applicant desperately required a family support system. As a consequence, the applicant was offered an opportunity to relocate by her employer. She opted for a position based in Bloemfontein, *inter alia,* because she grew up in this area and her mother, brother, and brother's family reside in this area. This she did, to reap the obvious benefits of a family support system for her and the minor child.

[8] The respondent opposed this relocation option and accordingly the applicant sought an order granting her leave to relocate with her minor child. This was always subject to the respondent exercising contact with the minor child as determined by this court. The respondent argued that the relocation application fell to be postponed pending the final determination of his discrete contact application.

[9] This I rejected because our courts have held that it is not necessary for the issue of contact to be determined now or together with any issue of relocation. Simply put, nothing prevents the respondent from proceeding with his pending contact application even now after the determination of the relocation application.

[10] Most (if not all) of the arguments advanced by the respondent were technical arguments that did not deal with the real and core issue of relocation. By way of example, the respondent attempted to rely on the provisions of a previous interim court order in terms of which it was ordered that the applicant shall not relocate more than (1) hour's drive from the respondent's residence until the pending contact application was finalized.[1] I disagreed with this reasoning because it is trite that interim orders may be varied on good cause shown. I found good cause for varying this interim order because I was persuaded that the applicant's proposed relocation was *bona fide*, reasonable, and in the minor child's best interests.

[11] The applicant also requested the court to appoint a parenting coordinator and this portion of the relief was not opposed by the respondent. I held that the appropriate relief would be to grant the applicant the right to relocate and to appoint a parenting coordinator to assist the parties in agreeing to an appropriate mechanism for the regulation of the respondent's contact with the minor child following upon the applicant's relocation.

[12] A further issue which I was requested to consider was the respondent's alleged contempt of an extant court order. As a general proposition, a person that is in contempt of a court order will not be heard by that court until this contempt has been purged.[2] On the respondent's own papers he was in contempt of a court order

[1] I was left in the dark as to the precise status of this pending application.
[2] *Kotze v Kotze* 1953 (2) SA 184 (C).

granted on the 2nd of July 2021 as he was in arrears in the sum of approximately R40 000,00 in respect of the minor child's monthly maintenance.

[13] Significantly, the respondent made no attempt to purge this contempt, and absent the papers was any proper explanation for his contempt. Curiously, the respondent elected to rather make vague and unsubstantiated allegations about his financial position and, in turn, accused the applicant of being in contempt of court.

[14] This notwithstanding, I permitted the respondent to pursue his objection to the relocation application in view, *inter alia*, of his plea of poverty. In this connection, the respondent did not indicate any willingness to find additional employment to earn extra income to provide for the minor child. Yet, in the same breath, he sought to prevent the applicant from continuing her stable career with her present employer with the benefit of her family support structure. This is against the canvass of his allegation that he is self-employed whilst notably avoiding dealing with the critical issue of his income.

[15] I need to stress both the importance of a due recognition of the realities of any relocation and also the dangers of obstructing the reasonable proposals of the primary carer. What weighed heavily with me was that the applicant became somewhat isolated and she put the interests of her minor child first, this by seeking to return to relocate to maintain her stable employment and also in search of family and friends and all that is familiar.

[16] The applicant (as the primary caregiver) whose employment required her to live in another jurisdiction was one of the decisive factors in the determination of this relocation application. This exercise however did not entail putting the needs and interests of an adult before the welfare of the minor child. Rather the welfare of the minor child could not be achieved unless the applicant was given the ordinary opportunity to pursue her goals and to make her choices without unreasonable restriction.

[17] As a matter of common sense, interference with reasonable decisions, particularly of the primary caregiver, is something that should weigh heavily with the

court. It must be so that the welfare of this minor child is best served by bringing him up in a happy, secure family atmosphere. In the circumstances of this case, it seemed abundantly clear to me that upon relocation, the minor child would become a 'member' of a new extended family and it is the happiness and security of this new family, ultimately upon which his welfare would depend. However painful this may be for the respondent, the respondent has got to grasp and appreciate that fact.

[18] I fully appreciated that the respondent would be less than human if he did not feel a sense of frustration in view of the relocation order that was granted and this may well spill over into a sense of resentment against the applicant. If this has indeed happened, he ought to reflect upon the happiness and the stability of his minor child's new extended family. This is one of the core factors that had to be given great weight when weighing up the various factors that arose when this court had to decide whether or not to give leave to take the minor out of the jurisdiction. Put in another way, in the event that I refused the relocation order, undoubtedly I would have jeopardized the prospects of this new extended family's survival or put a blight on its potential for fulfilment and happiness of the minor child. This would have been manifestly contrary to the welfare of the minor child.

[19] That is a reality that a court determining an application for relocation simply has to recognize. It may be so that there will be a price to be paid in 'welfare terms' by the diminution of the minor child's contact with his father and his extended family. But the court's powers in this connection are as a matter of logic circumscribed. The court has the power to support the father who seeks to maintain or extend his relationship with his minor, through contact. This latter issue was not the subject of any serious dispute as provision was made for this by the appointment of the parenting coordinator.

[20] There also remained with me a serious query. It was undoubtedly the case that the respondent in character was mercurial. I took a slightly gloomier view about this than his counsel. I say this because the respondent's irresponsibleness and disregard for the safety and well-being of the minor child were illustrated in the papers*, inter alia*, as follows; (a) the respondent disregarded his responsibility to provide his minor child with suitable accommodation and proper nutrition while he

was in his care; (b) one of the court-appointed experts reported that she was unable to assess the respondent's 'home' as he withdrew from the investigation before she had this opportunity; (c) on occasion the child-minder who supervised the respondent's contact with the minor child earlier that day, reported that there was not sufficient food in the respondent's then place of residence; (d) despite alleging that he was unable to pay maintenance due to financial constraints, the respondent never indicated his willingness to find additional employment to earn an extra income and provide for his child and, (e) the respondent's parents have knowledge of and condone the respondent's regular drug use.

[21] The respondents levels of honesty also bear scrutiny in view, *inter alia*, of the following; (a) the respondent falsely informed one of the court-appointed experts that he was advised that the applicant was guilty of parental alienation; (b) he also falsely advised informed one of the court-appointed experts that he had been advised to withdraw his participation from her assessment; (d) the respondent impersonated and masqueraded as a member of the police (who was the investigating officer) in the contempt charges preferred by him against the applicant and, (e) the respondent sent an email to the applicant's mother stating that the applicant was going to be arrested and imprisoned without bail and that a bag should be packed for the minor child as the child would be residing with him going forward.

[22] A powerful point was made by the applicant's counsel to the effect that the respondent's regular use of dependence producing drugs poses serious concerns about his fitness to parent the minor child. Both the court-appointed experts were *ad idem* that the respondent's use of narcotics needed to be further assessed to establish to what extent this has on the parenting ability of the respondent. This is precisely why it was recommended that reasonable unsupervised contact should only be phased in once this had been adequately determined. By contrast, I found that the applicant was the sensible and responsible parent and should remain the minor child's primary caregiver.

[23] The issue of supervised contact remained an extremely important one as the respondent had recently tested positive for the use of cocaine. I determined the applicant to be the sensible and responsible person in caring for the minor child.

Also, she was the person who insisted on the respondent's contact being supervised by a suitable child-minder to prioritize the safety and well-being of the minor child.

[24] My primary focus was to determine what was in the best interests of the minor child. I decided that the applicant was overwhelmingly better able to promote and ensure the physical, moral, emotional, and spiritual welfare of the minor child.[3] I took into account, *inter alia*, the following factors; (a) the capability, character, and temperament of the applicant; (b) the impact thereof on the child's needs and desires; (c) the ability of the applicant to provide for the basic physical needs of the child; (d) the ability of the applicant to provide economic security; (e) the ability of the applicant to provide for the educational well-being and security of the minor child; (f) the ability of the applicant to provide for the minor child's emotional, psychological, cultural and environmental development and, (g) the mental and physical health and moral fitness of the applicant.[4]

[25] Significantly, no legitimate concerns were raised on the papers about the applicant's care of the minor child. The court-appointed experts reported not an iota of evidence that weighed in against the applicant as the mother of the minor child. Both these experts recommended that the minor child should reside primarily with the applicant and that the applicant should remain his primary caregiver, subject to the respondent's rights of contact to be exercised under the supervision of a child-minder.

[26] In view of all these factors, I formed the wholesale view that the applicant's decision to relocate was *bona fide*, reasonable and genuine. The applicant after all remained financially responsible for herself and the minor child. The respondent was somewhat hoisted by his own petard in this connection as he neglected to assist the applicant with maintenance and at the time of the hearing was in significant arrears of a not-insignificant amount of maintenance. *Simpliciter,* the applicant could not afford not to relocate. The applicant had no real choice as she battled to cope

[3] During the court proceedings the respondent behaved so poorly that I had to caution him about his behaviour.
[4] *McCall v McCall* 1994 (3) SA 201 (C).

financially, which was exacerbated by the respondent's failure to pay maintenance. The applicant has historically been relying on her mother for financial assistance.

[27] In assessing the issue of the *bona fides* of the applicant, I took into consideration her attempts to engage with the respondent before launching this application as well as her suggestion to appoint a parenting coordinator to assist the parties in agreeing to a parenting plan following upon any relocation order. The applicant offered, amongst a variety of other things, to provide accommodation to the respondent in her mother's guesthouse (at the applicant's cost), for a weekend every month to enable the respondent to exercise contact with the minor child.

[28] The applicant also tendered to forego some of her maintenance to assist the respondent in covering the cost of flight tickets to exercise weekend contact with the minor child. The respondent failed to engage with a number of very reasonable tenders made by the applicant and failed to make any tenders or suggestions of his own. Pursuant to the launching of this application at the instance of the applicant, the respondent retaliated by preferring further charges of contempt of court against the applicant and insisting that the senior prosecutor issue a warrant for the applicant's arrest.

[29] Finally, I concluded (upon careful consideration of all the material before me) that the applicant's decision to relocate was in the best interests of the minor child. In determining whether a proposed relocation was in the best interests of the minor child, I had to take into account that the applicant was the primary caregiver of the minor child and he has been in her primary care since birth. In addition, the minor child was of tender age, being only (14) months old.

[30] The court-appointed experts opined that the respondent's contact with the minor child should remain supervised pending further testing and evidence that the respondent has abstained from the use of dependence producing drugs. The respondent's contact will remain supervised for the foreseeable future. The respondent has not raised any legitimate concerns about the applicant's care of the minor child. Further, the respondent's contact had always been limited, supervised by the child-minder, and excluded any sleepover contact.

[31] I accepted that the relationship between the respondent and the minor child would be prejudiced if the relocation order was granted. However, I weighed this prejudice against the prejudice to the minor child's best interests if the relocation order was not granted. I determined that it would be far less detrimental to the minor child not to deprive the applicant of the opportunity to relocate with him. The advantages of the relocation far outweighed the disadvantages of the relocation.

[32] I also failed to understand the respondent's real complaint against the order of relocation. I say this because, after the argument, counsel for the respondent essentially agreed to the relocation, subject to the rider that this would be in the form of an interim measure and not as final relief. By agreement, a parenting coordinator was appointed to assist the parties in agreeing to an appropriate mechanism for the regulation of the respondent's contact with the minor child following the relocation. In addition, my order does not in any manner prevent the respondent from proceeding with his pending contact application.

[33] These are then my considered reasons for the granting of the relocation application as set out in my order.

E. D. WILLE
Judge of the High Court
Cape Town