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

CASE NO: 16886 / 2022

In the matter between:

W R T Applicant

And

M C T Respondent

Coram: Wille, J
Heard: 21 February 2023
Delivered: 3 March 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This matter initially involved an application by the applicant for an order for the respondent to return the party's minor child to his place of habitual residence.[1] Further, upon such return, the minor child was to remain in the respondent's care, alternatively be placed in the applicant's care pending further directions. An order was also sought to reinstate the applicant's contact with the minor child immediately and for him to be reinstated to his school and extra-mural activities historically attended by him. The applicant also sought further alternative relief as may be recommended by a nominated clinical psychologist.[2]

[2] The parties are involved in divorce proceedings. One child is born of the marriage and is currently three years and six months old. The minor child has special needs as he was born with a rare genetic disorder characterized by skeletal

[1] In Cape Town.
[2] Ms. Toni Raphael.

abnormalities, dysmorphic facial features, growth retardation and developmental delay.

[3] After a regrettable domestic violence incident, the parties separated over a year ago. The respondent and the minor child left the former matrimonial home and subsequently obtained an interim protection order against the applicant. Since the separation, the minor child has remained in the respondent's primary care and has had supervised contact visits with the applicant. Initially, the respondent instituted an application for interim relief in which she sought an order regulating the interim care and contact arrangements in respect of their minor child. Further she sought an order for maintenance *pendente lite* for their minor child.

Context:

[4] Upon the hearing of the interim relief application by agreement, an order was granted providing for the following: (a) the appointment of a clinical psychologist to conduct a care and contact assessment and make recommendations as to the care and contact arrangements that would be in the minor child's best interests; (b) the applicant would continue exercising supervised contact with the minor child at specified agreed times; (c) the applicant would undergo random drug and alcohol screening; (d) the applicant was required to pay for the minor child's school fees, medical aid premium and quarterly cancer screening and blood tests to the extent not covered by the respondent's medical aid scheme and; (e) the applicant was also required to pay a small once-off amount as a contribution to the minor child's past maintenance needs in respect of which he did not contribute for a period of about five months.

[5] Accordingly, the respondent remained responsible for most of their child's financial maintenance needs. Historically, the applicant's only contribution to their minor child's maintenance was paying a portion of his medical aid premiums. Further, the applicant does not contribute to the respondent's maintenance. A few months after this order was granted, the respondent experienced difficulties with her erstwhile employer because she missed more than a month's work due to their minor child's medical condition.

[6] The then medical condition of their minor child placed severe strain on and complicated the respondent's working relationship with her erstwhile employer. This situation was exacerbated because the respondent had to facilitate supervised access by the applicant to their minor child. This is by transporting him to and from his contact sessions with the applicant. The respondent had to leave work early in the afternoons to ensure she could drop off their minor child for his contact sessions with the applicant.

[7] The respondent's continued absence from work affected her ability to keep up with her duties at work and allegedly harmed the company culture. Her colleagues could not be afforded the same indulgences, creating difficulties in her workplace.

[8] The respondent's former employer was unwilling to allow her to leave work early and ultimately informed her that they could no longer accommodate her requests for indulgences to attend to her minor child's medical issues, coupled with her involvement in arranging the supervised access to their minor child by the applicant.

[9] The respondent was presented with an ultimatum by her erstwhile employer to strictly adhere to her employment terms which meant that she would no longer have any flexibility in her working hours. Further, she would be obliged to take unpaid leave to care for her minor child. Alternatively, she was offered a severance package.

[10] Faced with the possibility of being unable to meet her monthly financial obligations and having no funds to care for her minor child, she relocated with her minor child.[3] She had an employment opportunity available to her upon her relocation. She also had a family support system available to her upon her relocation. The applicant launched an urgent application in which he sought to compel his minor child to return with or without the respondent. This is how this application found me.

[3] To Johannesburg at the end of September 2022.

[11] The respondent opposed the application because, amongst other things, she would lose her current employment, had no prospects of immediately securing new employment and no longer had any accommodation for herself and their minor son should she be ordered to return. She did not want her minor child to return without her bearing in mind the supervised access regime.

[12] After some consideration, I granted an order in the following terms: (a) the respondent was ordered to institute a counter application for relocation within ten days from the date of the order; (b) the applicant would enjoy liberal contact with his minor son via the medium of a virtual platform daily, at mutually convenient times; (c) the mandate of the clinical phycologist was extended to continue with her assessment of the minor child, and she was required to deliver a comprehensive report dealing with the issue of the minor child's relocation and if this relocation was in the best interests of the minor child; (d) the costs of this further assessment would be paid by the respondent; (e) the interim financial relief application was postponed to be heard and determined after or together with the relocation application; (f) pending the determination of the relocation application and the interim financial relief application the applicant would not be required to make payment of the minor child's medical aid contribution or his quarterly cancer screening and blood tests and; (g) the respondent was required to pay for the applicant to exercise in person contact with his minor son which contact was required to be supervised at the respondent's expense.

Consideration:

[13] At the outset, I must emphasize that I do not find favour in how the respondent re-located with the minor child. That being said, the core issue for determination is what is in the minor child's best interests. In addition, the views and interests of the custodial parent seeking relocation must also be accorded the appropriate weight. Finally, the remaining parent's views and competing interests must also be considered, among other concerns.

[14] Ultimately, the test for allowing relocation is an enquiry as to whether; (a) the decision to relocate was *bona fide* and reasonable and; (b) in the best interests of the minor child. Thus, I must consider the reasonableness of the custodian parent's

decision to relocate coupled with the practical and other considerations on which such a decision was based.

[15] I also have to consider the extent to which the custodian parent has adequately considered the advantages and disadvantages of the proposed relocation. Once I have considered these issues, I need to embark on the most challenging journey regarding what is in the minor child's best interests and whether the relocation will serve the child's best interests. It is alleged that the minor child has been in the respondent's primary care since birth. The applicant disputes this. What is not disputed is that the minor child has been in the respondent's primary care since the parties separated more than a year ago. The respondent was historically the breadwinner in the family and was required to pay most of the parties' household expenses. In addition, the respondent continues to be responsible for most of the minor child's maintenance requirements.

[16] The applicant enjoys no formal stable employment and receives a monthly stipend from his parents.[4] This stipend emanated from a property that his parents had sold and were receiving the purchase price by way of monthly instalments. This property has now been paid for and he will no longer receive this amount from his parents. In addition, the applicant earns an undisclosed income from brewing artisanal beers at home. Upon separation, the applicant did not contribute towards maintaining the respondent or his minor child, hence the application for interim financial relief. Only when the interim financial relief application was enrolled for hearing did the applicant agree to an interim order in which he would contribute to the maintenance of his minor child. The applicant for reasons left unexplained to this court has elected not to seek remunerative employment, which would enable him to contribute towards the maintenance of his minor son meaningfully. The financial responsibility of maintaining the party's minor child falls almost exclusively on the respondent. This is exacerbated by the demands on the respondent for the medical requirements of the minor child.

[17] The respondent says she was desperate, and that is why she relocated. The

---

[4] In the sum of R10 000, 00 per month.

respondent says she needed secure permanent employment to care for herself and her minor son. The respondent took up a regional managerial position with her new employer and is required to oversee and manage the opening of new retail stores in the province to which she relocated. Her employment package was secure, and her earning prospects were good. The respondent avers that faced with the possibility of earning no income at all, the offer received from her current employer was generous in the circumstances.

[18] The respondent's case is that she will also not incur the same level of expenses that she had to foot before her relocation. By elaboration, she alleges that she does not have to pay rent for six months, and after that, her sister has agreed to pay her monthly rental for another six months. The respondent and her minor son reside in a spacious three-bedroomed, secure lifestyle estate with many amenities. On the contrary, the applicant's case is that his ability to contribute towards maintaining his minor son largely depends on his parents continued financial support. This is temporary in nature. The applicant seems unable to maintain his minor son without his parents' financial assistance and has offered the respondent no interim maintenance. This does not sit well with the court.

[19] Moreover, the respondent contends that the flexibility offered in her new position has allowed her to take her minor child to all his medical appointments and to take time off to care for him if he is ill. Although the respondent has specified fixed working hours, she is not required to remain at her place of work for the entire period of her specified working hours. She can perform certain functions remotely and makes up additional work hours in the evenings at home. When it has been necessary for her to attend any appointments with her minor son, she has been able to do so freely and without any concerns being raised by her new employer. Simply put, her new employer has allowed her the flexibility to care for her minor son.

[20] In addition, the respondent avers that her current position offers her the opportunity for further career advancement as her current employer is actively expanding the business, and she is responsible for this. The argument is that the respondent is entitled to pursue her career to the full extent available to her. By elaboration, she avers that her current role offers the opportunity for professional

growth and more beneficial employment terms than those offered by her erstwhile employer. Thus, it is argued that the respondent's reasons for wanting to remain in her current role are *bona fide* and reasonable. On this, I agree.

[21] The respondent contends that her relocation offers the added benefit of receiving support from her mother and sister, who all reside close to her. The respondent's mother regularly spends time with her and her minor son and can readily assist her if necessary. The respondent and her minor son can spend time with their extended family regularly. Her minor son has a close bond with the respondent's mother and sister.

[22] The applicant complains that his minor son's relationship with his maternal grandmother is being prioritized above his relationship with his minor son. As a matter of pure logic, it must be in his minor son's best interests that the respondent can receive emotional and physical support from her family members. Further, there is no evidence that the respondent has sought to replace the applicant with her mother.

[23] The minor child has been enrolled in a school near the respondent's rented accommodation. All indications are that the minor child has adjusted well to his new school. His class teacher has confirmed that he has settled and is comfortable and happy in his new surroundings. The respondent's case is that her minor child's medical care, education and day-to-day routine are currently such that they will not harm his standard of living or general well-being. The expert in her extensive reports supports this view.

[24] The applicant's core complaint is that the respondent allegedly excludes him from his minor child's life and has sought relocation to further this ulterior motive. This bears scrutiny having regard to the facts of this case.

[25] The respondent amended her relief in her application for the protection order insofar as it related to the minor child and the applicant. Further, the respondent sends the applicant updates regarding their minor child's progress and medical treatments. The applicant has been given the contact details of their minor child's doctors and teachers. Most importantly, the applicant's consent was sought for a tonsillectomy

which the minor child urgently required. Despite being afforded ample opportunity to engage with the relevant professionals, the applicant historically refused to grant this consent. Belatedly, this consent was provided on the day of the hearing.

[26] The respondent facilitates daily video calls between the applicant and their minor child. The applicant was invited to arrange a visit to see his minor son and view his new school, meet his teachers, and attend his school concert towards the end of last year. The respondent offered to arrange for the applicant to exercise holiday contact over the festive period. Most significantly, the respondent has indicated that she is amenable to following the expert's recommendations regarding the applicant's future contact if the relocation is allowed. Finally, the respondent offered to forego any maintenance payments so that the applicant may utilize these funds for travel to exercise contact with his minor son. It is hard to discern how the respondent is excluding the applicant from his minor child's life, given the abovementioned efforts by the respondent.

[27] To a certain extent, I must be guided by the expert's recommendations. The expert submitted two reports. In her first report, she recommended that the minor child should remain in the respondent's primary care and that he should primarily reside with her, subject to the applicant's right to have unsupervised contact with his son for a period of three hours twice per week and a further period of five hours every weekend.

[28] After extending her mandate, she wrote a report on the proposed relocation. Her second report confirms that the minor child should remain in the respondent's primary care. Most significantly, she opined that the proposed relocation would benefit the respondent as she will undoubtedly benefit from the social capital, social support, employment, and career opportunities presented at the relocation destination. Further, she indicates that the respondent undertook the necessary due diligence regarding the minor child's educational, medical, and alternative childcare needs. The respondent secured accommodation and employment, allowing her flexibility to respond to her minor child's medical and developmental needs.

[29] Although it may have been better for the minor child if the relocation was delayed until he reached the age of four, he was nevertheless found to be positively and securely attached to the applicant. She does not believe that the proposed relocation would necessarily result in long-term damage to the minor child's developmental and psychological functioning. Furthermore, it would be unnecessarily disruptive for the minor child if he was ordered to return, only to relocate once more in the foreseeable future. Significantly, she expresses that the respondent cannot reasonably be prevented from relocating 'inter-provincially' indefinitely. Finally, she made various recommendations regarding the applicant's future contact with his son if the respondent's relocation was permitted.

[30] It is significant to record that the respondent pays for all the financial needs of the minor child with little or no contribution by the applicant. It was against this background that it was difficult to discern why the applicant had overly concerned himself with the extent of the respondent's financial position concerning her relocation.

[31] Nevertheless, my core focus was to determine what was in the minor child's best interests. That having been said, our apex court has confirmed that a child's best interests do not always outweigh or trump other competing rights.

[32] However, what is in the best interests of a minor child is also subject to limitations and cannot automatically assume dominance over other constitutional rights or considerations.[5] Each case falls to be decided on its particular facts. In the context of relocation applications, the following penchant remarks are apposite:

> '…*It would likewise be incorrect to categorically hold that because it is generally in the best interests of a child to form a physical bond with, and experience the love, affection and care of both parents, that a parent who intends to relocate with the children to a different town, or country, is precluded from relocating …*'[6]

---

[5] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at paras [12] to [26].
[6] *MK v MC (*15986/2016) [2018] ZAGPJHC 9 (29 January 2018) at para [37].

[33] A court will not lightly refuse to grant an order for a child to relocate if the decision of the 'custodian' parent is shown to be *bona fide* and reasonable.[7] It is so that relocations have been refused for lack of planning of practicalities. This was not the case in this matter. I say this because the respondent's plans were settled. The respondent enjoyed the financial backing, social support and social capital to implement her plans. Most (if not all) of the arguments advanced by the applicant were technical arguments that did not deal with the core issues of the proposed relocation.

[34] Accordingly, I was persuaded that the respondent's proposed relocation was *bona fide* and reasonable. This was also in the minor child's best interests. I need to stress the importance of due recognition of the realities of any relocation and the dangers of obstructing the reasonable proposals of the primary caregiver. In this case, it seemed abundantly clear to me that the relocation at this stage would be in the minor child's best interests. However painful this may be, the applicant has got to grasp and appreciate this fact.

[35] I thoroughly appreciated that the applicant would be less than human if he felt aggrieved given the relocation order being granted. This may well spill over into a sense of resentment against the respondent. If this has happened, he should reflect upon his minor child's happiness and stability. This is one of the core factors that had to be given great weight when assessing the various factors that arose when this court decided whether or not to grant the relocation order.

[36] Put in another way, if I do not grant the relocation order, I would undoubtedly put a blight on the potential for the serenity and happiness of the minor child. This would have been manifestly contrary to the welfare of the minor child. This is a reality that a court determining an application for relocation must consider. Besides, the appointed expert reported and recommended the broad terms of the court order to be granted upon relocation.

---

[7] *F v F* 2006 (3) SA 42 (SCA) at para [9].

[37] Given all these factors, in my view, the applicant's decision to relocate was *bona fide* and genuine. I appreciated that the relationship between the applicant and the minor child would be prejudiced if the relocation order was granted. However, the advantages of the relocation far outweighed the disadvantages of the relocation. I also failed to understand the applicant's prime motivation for opposing the relocation.

[38] The applicant made a tender prior to the hearing essentially in the form of short-term financial relief to the respondent should she return with the minor child. This tender was in real terms short-term financial assistance to the respondent by the parents of the applicant. This tender, in my view, had no significant influence on the core issue for my determination namely if the respondent's relocation was in the best interests of the minor child. I am also guided by the expert who opined that if I were to order the return of the respondent with the minor child at this stage it would undoubtedly have a disruptive effect on the well-being of the child, and this would not be in the interests of the minor child.

Order:

[39] In all the circumstances, the following order is granted.

1. The applicant's application for the return of the minor child is dismissed.

2. The respondent shall be liable for the applicant's costs of and incidental to the 'return application' on the scale between party and party as taxed or agreed.

3. The respondent's counter application to relocate with the minor child is granted.

4. The applicant shall be liable for the respondent's costs of and incidental to the relocation application on the scale between party and party as taxed or agreed.

5. The relocation of the minor child is subject to the following terms and conditions:

(a) The minor child, accompanied by the respondent, is to spend at least two weeks annually, in Cape Town for unsupervised contact with the applicant and his paternal family, which should include the Christmas period of 2023 and every second Christmas after that.

(b) All supervision requirements and other contact restrictions between the applicant and his minor child are suspended.

(c) In 2023, the minor child should have contact with the applicant during these trips for at least six consecutive hours per day on at least five days per week, with at least one sleepover per week with the applicant. This should include Christmas eve and Christmas day every second year.

(d) In 2024, the minor child should spend at least two consecutive nights per week with the applicant, and from 2025, at least two consecutive nights twice a week, with the applicant while in Cape Town.

(e) The applicant should have contact with his minor son at least four times a year in Gauteng, for a minimum period of three days and a maximum period of two weeks each time, depending on the applicant's availability. The minor child should have contact with the applicant for at least six hours per day, on at least five days per week, with at least one sleepover per visit.

(f) From 2024, the minor child should spend two consecutive nights with the applicant per visit. Suppose the minor child has school or any other therapy or medical appointment during these visits, the applicant should have the opportunity, and be encouraged, to accompany his minor son and meet his teachers, doctors and therapists.

(g) At any other time that the applicant can travel to Gauteng, he should be given reasonable unsupervised access to his minor son, considering his school, therapy, and other commitments and routines.

(h) The applicant must be directly included in all emails and WhatsApp communications between the respondent and the minor child's school, doctors, and therapists. The applicant should similarly make direct contact with all professionals involved in his minor son's life, establishing a collaborative and positive relationship with them, and opening appropriate communication. Direct email communication between the applicant and the respondent should be enabled, with the assistance of a parenting co-ordinator.

(i) The applicant must have access to Face Time contact with his minor son four days a week, for at least fifteen minutes, at a specified time. This should not require the presence of a third party, and the respondent need not interact directly with the respondent during these calls. These calls should occur wherever the minor child is at that time even if he is not home. If load shedding makes this contact impossible, the contact should be rescheduled as soon as possible, considering the minor child's regular bedtime. The respondent must specify a thirty-minute period, during which the applicant may contact his minor son via Face Time for up to fifteen minutes four days a week.

(j) In addition to the four days a week, the applicant and his minor son should have Face Time contact for at least fifteen minutes on his minor son's birthday, the applicant's birthday, Father's Day and Christmas day.

(k) The costs of travel and accommodation for the contact between the applicant and his minor son are to be included in updated maintenance calculations wherein the applicant and the respondent share all expenses of their minor son on a reasonably equitable basis, with verification that both are employed or self-employed permanently with a fixed and predictable minimum monthly income.

(l) An appropriately qualified and experienced medical professional should be identified and appointed in Gauteng, by agreement between the parties, as the minor child's primary healthcare practitioner. In cases where the applicant and the respondent dispute any medical test, referral, prescription, or procedure about their minor son, this doctor is authorized to make the final decision to avoid further disputes.

(m) A parenting co-ordinator should be appointed, to whom all disputes should be directed for mediation and recommendation. The parenting co-ordinator may also facilitate optimal and regular communication between the parties and ensure that critical decisions about the minor child are not unnecessarily delayed.

(n) If either party has a concern regarding alcohol or other substance use by the other party while caring for their minor son or driving with him, they should report it to the parenting co-ordinator, who is authorized to insist on random and immediate appropriate tests and screening.

6. The balance of the interim financial relief application is postponed to a date to be arranged between the parties for a further hearing before *Justice Wille*.

7. Both the applicant and the respondent are authorized to file supplementary papers in the interim financial relief application (as may be necessary) to reflect, among other things, their respective current financial position, employment status and the costs associated with implementing the terms and conditions of this relocation order.

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