

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 32377/12

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

[C.....] [L.....] [G.....]

Applicant

And

[N...] [J....] [G....]

Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application that came before this court by way of urgency in terms of Rule 6(12) of the Uniform Rules of this court. The Notice of Motion

reads as follows:

- “2. *That the Applicant be permitted to relocate to Cape Town with the minor children during December 2014.*
3. *That the Applicant be permitted to have minor child, [G.....], assessed at Bellavista Assessment Centre as a matter of urgency and that the Respondent be directed to make payment of the costs in respect thereof.*
4. *That the Respondent be directed to immediately sign all such forms, applications and/or documentation as is necessary to:-*
 - 4.1 *have[G.....] assessed at Bellavista; and*
 - 4.2 *enroll the minor children at their respective schools in Cape Town.*
5. *That the Respondent make immediate payment of the deposits in respect of the minor children’s enrolment at their respective schools in Cape Town.*
6. *That the order of His Lordship the Honourable Mr Justice Vally dated 19 April 2013 be varied as follows:-*
 - 6.1 *by the deletion of paragraph 1 thereof and the substitution therefore of the follows:-*
 - ‘1.1 *The Respondent shall sign a lease agreement in respect of the Applicant's rental accommodation of her choice in Cape Town (“the Cape Town residence”) in an amount of R40 000.00 per month for a period of 24 months from 1 December 2014.*
 - 1.2 *The Respondent shall make payment of the deposit required by the landlord in respect of the Applicant’s rental accommodation referred to in 1.1 above;’*
 - 6.2 *by the deletion of the words “former matrimonial home” from paragraph 2 and the substitution therefore of the words “the Applicant’s Cape Town residence”;*
 - 6.3 *by the deletion of paragraph 2.1 and the substitution therefore of the following:*

“2.1 The monthly rental payment in respect of the Cape Town residence.”

7. *That the remainder of the order of His Lordship the Honourable Mr Justice Vally remain in operation.*
8. *That the Applicant be permitted to remove the furniture at the former matrimonial home and have same delivered to her Cape Town residence.*
9. *That the Respondent make payment of the costs of this application on the scale as between attorney and client.”*

[2] The parties herein are involved in a discordant divorce punctuated by various applications including Rule 43 Applications beginning with one heard and granted by Vally J culminating in the most recent granted by Victor J in August 2014.

[3] The Applicant mainly seeks an order permitting her to relocate to Cape Town with the minor children. The other reliefs that she is seeking are ancillary to relocation or have been resolved. Accordingly, the central issue is whether the court should grant an order allowing her to move to Cape Town with the minor children.

[4] The Respondent has raised two points in limine and these are that the application is firstly, not urgent and secondly, it is a disguised Rule 43(6), which this court should not countenance as it does not comply with the uniform rules of this court.

[5] It is convenient to deal first with these two points and then turn to the

main thrust of the judgment. The Applicant avers that she first raised the subject of relocation to Cape Town with the minor children with the Respondent in late 2013. The parties have been discussing the subject of the Applicant's possible move to Cape Town with the children throughout the better part of 2014. During those discussions, the Respondent did not outrightly reject the idea of the move to Cape Town.

[6] It was only in September 2014 that the Respondent gave an unambiguous indication that he would not support the relocation. Following the Respondent's adoption of that stance and because the Applicant had already planned to move to Cape Town in December 2014 in preparation for the minor children to begin school in 2015 there, she launched these proceedings by way of urgency.

[7] This application could not have been brought in the normal course as it would have been too late to obtain a date of hearing in 2014. For that reason, the question whether the relocation would be sanctioned by the court or not would have remained unclear. The minor children's position on schooling matters would therefore have been precarious, a chance that she was not willing to take.

[8] The Respondent contends that this application is not urgent or if it is, it was self-manufactured because the Applicant has, in her own version, been aware since late 2013 that she wanted to relocate to Cape Town with the minor children yet she waited until November 2014 to launch this application.

The Respondent denies having been ambivalent about the Applicant's proposed move to Cape Town. However, he concedes that he did consider the matter previously without agreeing to it though. He later made a firm resolution that it would not be in the best interest of the minor children to move.

[9] I have considered the matter and to the extent that the Applicant was not certain whether or not the Respondent would agree to her relocation with the minor children at least until September 2014 and that she wanted to know so that she could secure schools for the enrollment of the minor children in Cape Town for 2015, this application was necessary and urgent.

[10] Turning to the question whether or not this application is a disguised Rule 43(6) whose objective is to vary the order of Victor J. The Respondent ardently argued that the Applicant should have complied with the provisions of Rule 43(6) because the essence of this application is to change the order of Victor J without showing any changed circumstances as is required in terms of the aforesaid rule.

[11] If this court were to grant the order as sought by the Applicant, the unintended outcome will be the setting aside or variation of the order of Victor J. This should under normal circumstances be achieved by a Rule 43(6) application. However, under these circumstances, it is imperative to go beyond the surface to establish what the application is really about. The Applicant believed, wrongly or correctly, that she is entitled to relocate to

Cape Town with the minor children. In that haste she obviously overlooked certain procedures and the effect they would have on the result.

[12] To say that her primary objective in launching the application was to alter the order without following the requirements of Rule 43(6) is too simplistic and ignores other possibilities. The approach that this court adopts is that she was within her right to bring the application in the manner she did. The second point in limine cannot therefore succeed. The disposal of those two points in limine prompts this court to address itself to what I referred to as the thrust of the judgment earlier – is the Applicaant entitled to move to Cape Town with the minor children?

[13] When the application came before this court on 4 November 2014, the main aim was to seek an order permitting the Applicant to move to Cape Town with the minor children. The sole reason why it could not be finalized on that day was that Victor J specifically ordered in August 2014 that the matter be referred to the Family Advocate for a report on the primary residence of the minor children. This court considered the matter and thought that it would be imprudent to make a decision about the Applicant's relocation to Cape Town with the minor children without having had the benefit of an expert's report, the Family Advocate.

[14] The court had to call the Family Advocate to come to court to explain why that office has not produced a report despite Victor J's order that it be compiled as a matter of urgency. The Family Advocate testified that while

there is such order, the Applicant had until that date not furnished his office with the relevant papers alternatively, if she had, his office were still processing them for administrative purposes. The court immediately urged the parties to make all the relevant documents available to the Family Advocate such that his office would be able to produce a report as urgently as the court had expected him to do.

[15] The Family Advocate promised that if he could have the documents almost immediately he would guarantee the production of a report within three weeks, a promise to which he adhered. His recommendations, supported by a report of a social worker also in the employ of the Department of Justice, reached the Registrar a week prior to the hearing hereof.

[16] When the matter came before this court on 5 December 2014, the primary purpose was to finalise the relocation question . To this court's total surprise, the Applicant instead proposed that the matter be postponed sine dies with costs reserved to enable her to challenge the report of the family advocate with which she was in disagreement.

[17] The Applicant contended that the postponement would not be prejudicial to the Respondent as she was undertaking not to move to Cape Town until receipt of her own private independent expert report. Her further motivation for the postponement was that the matter should be postponed as it touches on the lives of the minor children. To proceed with the application would mean that the case of the Applicant would be dismissed. I must add

that the Applicant argued all this without a proper substantive application for postponement.

[18] The Respondent, quite correctly in my opinion, opposed the application for postponement. The Applicant's attempt to have the matter postponed sine dies is tantamount to saying that now that the report of the family advocate is not in favour of the relocation of the minor children, the case must be postponed to afford her an opportunity to supplement her papers so that the court can ultimately agree with her.

[19] Parties come to court to have finality on their matters. It is only in those deserving instances where the court will consider a postponement favourably and this does not seem to be one of those. Firstly this matter was brought as a matter of urgency and secondly this court had to put pressure on the office of the family advocate to produce a report within three weeks so that the parties could have certainty.

[20] It is indubitably financially prejudicial to the Respondent to come to court expecting the matter to be resolved only to be confronted with a postponement. Moreover, the Applicant proposes that costs be reserved. What will stop the Applicant in the future not to set the matter down simply because the report of the independent expert does not accord with her expectations? It seems that there is nothing.

[21] It is also possible that having set the matter down, she may again

apply for a postponement so that she obtains another expert report that will satisfy her. This court is not well disposed to speculate on what the Applicant's next move could be in the future. It is only fair that this application be heard and finalized now once and for all. For that reason, the court turns down the application for a postponement.

[22] The ruling on the postponement leaves this court to deal with the only remaining issue between the parties and that is whether or not the Applicant should relocate to Cape Town with the minor children. The law on matters of relocation is clear. The relocation must be in the best interest of the minor children as is prescribed in the Children's Act No. 38 of 2005. In addition, an applicant in the position of the Applicant is at liberty to relocate with minor children provided his or her intention is bona fide and reasonable. The test applies to both relocation within the borders of South Africa and abroad. See *Jackson v Jackson* 2002 SA 303 (SCA) and *B v M* 2006(9)BCLR 1034 (W) to which Counsel for the Applicant referred this court.

[23] Accordingly, the following two questions arise:

23.1 Is the proposed relocation in the best interest of the minor children?

23.2 Is the Applicant's intended move bona fide and reasonable?

[24] Whether or not an applicant's proposed move is *bona fide* and

reasonable should be a factual enquiry. Needless to state therefore that each case must be assessed on its own merits. The Applicant has been living in Johannesburg, Linkxfield, while married to the Respondent and to date she continues to do so.

[25] Her relationship with the Respondent has become estranged a result of which she now holds the view that it will benefit her to be next to her family, mother, father brother and sister-in-law all of whom are in the area of Cape Town, Sea Point.

[26] Her family will give her the emotional support that she cannot get in Johannesburg. Furthermore, once the minor children are settled, her mother will give her support by fetching them from school such that she could start looking for employment.

[27] As the primary custodian parent of the minor children, her move to Cape Town will of necessity be in their best interest. She does not see herself being separated from them as that will prejudice her relationship with them. Her proposed move to Cape Town is supported by her psychologists, Ms Becker and, Ms Chelvers.

[28] The Applicant asserts further that the Respondent whom she describes as 'exceedingly wealthy' can still exercise his rights as per the orders of Van Oosten and Victor JJ. She does not foresee any problems whether financially or otherwise for The Respondent to fly to Cape Town to

see the children as he does presently in Johannesburg.

[29] In response to the Applicant's averments, the respondent alleges that it will not be possible for him to travel to Cape Town on a weekly or monthly basis as this will necessarily involve increased costs for him. Moreover, it will take him away from his only source of income, his work.

[30] The relocation of the minor children means that he will have to seek accommodation in Cape Town, transport and time off work in order to exercise his rights. His ability to generate income will be immensely impaired and that could have devastating repercussions for both the minor children and the Applicant especially as she is unemployed and fully dependent on the monthly maintenance that he pays.

[31] The Family Advocate unequivocally recommends that the status quo be maintained because to move the minor children to Cape Town will reverse the stability that has prevailed since the introduction of the increased access by their father. The Applicant herself has agreed that all three minor children like their father and that they cannot wait to visit him. The Family Advocate also alludes to the fact that Gabriel, the eldest of the minor children appears settled with her friends at school.

[32] Moving them to Cape Town under these circumstances could upset their routine and bring unnecessary shock to their lives at the time when they are beginning to settle. The Family Advocate is an expert in these kind of

matters and he undoubtedly compiled the report with the best interest of the minor children in mind. This court has no reason to doubt the outcome and accordingly adopts it.

[33] In the result, the following order is made:

1. The application is dismissed;
2. The Applicant is ordered to pay the costs as between attorney and client.

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 9 December 2014

Date of Judgment: 29 January 2015

Counsel For Plaintiff: Adv. L. Segal

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Counsel For The Defendant: Adv. I. Mouton

Instructed by: Michael Krawitz and Co