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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 43927/2018

[1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED.

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Date: **WHG VAN DER LINDE**

In the matter between:

W J Applicant

and

S, C Respondent

J U D G M E N T

Van der Linde, J:

[1] In this application the 26 year old mother of a minor boy who turns 4 years old on 20 April 2019, applies for the consent of the respondent, who is the biological father of the boy, which consent is otherwise required in terms of section 18(3)(c)(iii) of the Children's Act, 38 of 2005, be dispensed with. The minor boy, S S, was born from a brief romantic relationship between the applicant and the respondent when she was 22 years old and the respondent

was 29 years old. Their relationship was not a serious one and they separated just after the boy was born.

[2] The applicant has since 2017 been living on a permanent basis with Mr J E, who has just obtained a job in New Zealand, and a 12-month Visa to relocate there. The applicant and Mr E are engaged to be married and they want to relocate to New Zealand taking the minor boy with them.

[3] The respondent opposes the relief sought. He does not put up a case that he is able himself properly to care for the minor boy, although in a single sentence he does say that if the applicant wishes to emigrate with Mr E to New Zealand, the minor boy could always stay with him. This is the way he puts it:

"*If the applicant wishes to emigrate I would happily look after our son for as long as it would be required.*"

[4] His real case however is that he does not believe that the relationship between the applicant and Mr E will see the distance, and in any event he believes that the application is lacking for want of proper expert opinions supporting the applicant's proposition that it is in the best interest of the minor child to accompany the applicant and her fiancé in their new life in New Zealand.

[5] Section 18(3)(c)(iii) of the Act provides that a parent of a child must give or refuse any consent required by law in respect of the child, including consent to the child's departure or removal from the Republic. In terms of section 18(4) of the Act, whenever more than one person has guardianship of a child, each of them is competent to exercise independently and without the consent of the other party, any right or responsibility arising from such guardianship.

[6] Finally, section 18(5) of the Act provides as follows:

"*Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).*"

[7] The application therefore comes under section 18(5) of the Act.

[8] In the LexisNexis publication, A Practical Approach to the Children's Act, 2nd edition by Bosman-Sadie and Corrie, the learned authors say that the motivation for wishing to leave the country must be clearly explained, as must the motivation for refusing to give consent, before the court will substitute its own consent. The authors suggest that it must be shown that the consent is being withheld wilfully, intentionally and *mala fide*, thus rendering the withholding thereof unreasonable.[1] Having regard to the judgment referred to below, I am not sure this is correct; the standard seems too high.

[9] Further, the authors suggest that the court must follow a neutral approach and formulate a structured value judgment about what it considers will be in the best interests of the child.[2] Some of the factors that the authors recommend should inform the exercise of the judicial discretion include "*the impact of refusing the relocation on the child and on the other parties, in the context of his/her extended family, education and social life*". I suggest that this proposition is unimpeachable.

[10] Both parties relied on the judgment of *LW v DB*, 2015 JR 2617 (GJ), a judgment by Satchwell, J in this Division delivered on 16 November 2015. In that matter a mother applied for permission to relocate her 4 year old child from Vanderbijlpark to Cape Town, where she had been offered a job with a better salary, and with hours that allowed her more time with her child.

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[1] See page 43

[2] See page 372

[11] In that matter too the parents were not married but had a boy. Stressing the requirement of the best interests of the child, the court underscored that it sits as the upper-guardian of minors; and that the discretion which is to be exercised is not circumscribed in the narrow or strict sense of word. No *onus*, in the conventional sense, needs to be satisfied when the court determines whether or not a child can accompany a parent who leaves the jurisdiction of the court.

[12] The learned judge underscored the requirement of section 28(2) of the Constitution which proclaims that a child's best interests are of paramount importance in every matter concerning the child. She stressed that the facts of each case are critically important, referring to *Jackson v Jackson*, 2002 (2) SA 303 (SCA), and said (at paragraph [19]):

"*The increasing numbers of relocation disputes referred to in psychological and legal literature as also in South African jurisprudence and that of other jurisdictions, is a reflection of the increasing trend of geographical mobility particularly in relation to work, coupled with a higher rate of separation or divorce after which former partners go their different ways.*"

[13] Listing "*Principles applicable to relocation of children",* the learned judge said (at paragraph [20]):

"*Where a custodial parent wishes to emigrate, a court will not likely 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.*"

The learned judge then went on to consider whether the decision of the applicant in that case to move to Cape Town from Vanderbijlpark was *bona fide* and reasonable. I propose to adopt that same approach in the present matter.

[14] The two parents of S were – as I have noted - very young when he was conceived in around the middle of 2014; the applicant was but 22 years old. Their relationship was a passing one; they separated just after the boy was born. S has resided with the applicant primarily and she is the primary care-giver of the boy, not in the sense as defined in the Act, but in

every other sense of the word. It is true that the respondent has exercised contact with S on a regular basis, but it is equally true that between the applicant's fiancé and S there has developed a very close and strong and loving bond. The fiancé loves S and treats him as if his own son.

[15] The founding affidavit records a discussion between the fiancé and the respondent via social media when the applicant and her fiancé began making plans to emigrate. That discussion includes the following text from the respondent to the fiancé:

"*Thanks bud agreed … look New Zealand is the way … I just need to make sure that I am protected as we're talking about my son … so just formalities.*"

[16] In judging whether the applicant's decision to emigrate to New Zealand is reasonable and *bona fide*, I must ask whether that decision is driven by a desire to exclude the respondent from access to S, or whether the applicant has taken that decision reasonably, having regard to her own future and the future of S.

[17] In her founding affidavit the applicant explains why she and her fiancé are keen to emigrate to New Zealand. It is to "*create a better life for both ourselves and S. I am of the real and genuine belief that our life will be far better in New Zealand*". She then sets out the reasons that have persuaded her and these include generally the quality of life that the two adults anticipate in New Zealand. She expects that her fiancé's career will grow at a much faster rate in New Zealand, and she explains that she stays at home and will continue to be a stay-at-home mother once they have emigrated.

[18] She expresses concern about the high crime rate in South Africa (in an affidavit deposed to before the shocking massacre recently in New Zealand) and apart from these considerations says the following:

"*27. Aside from the above, I want to live with my new husband and have a life with him. We cannot be expected to have a marriage and extend our family if we live in two different countries. It would be unjust in law if I could not do this because I was forced to stay behind as a result of the respondent's refusal to allow S to travel to New Zealand with me.*"

[19] In my view it cannot be said that the applicant's decision is unreasonable. She is young and has her life ahead of her. She is at an age when it is not uncommon for young people to wish to enter into a permanent life partner relationship, so as to secure stability for the future of their lives. My reading of the applicant's case is that she has been afforded an opportunity of the kind that do not present often in a young person's life; and that if she does not avail herself of this opportunity, for the benefit of both herself and her minor son, then she will have missed the chance to establish a solid future for her and her boy.

[20] So far as concerns the question whether she is acting *bona fide*, the applicant says that the respondent too intends to relocate to New Zealand in the near future and that his contact with S will only be affected for a brief period. In response to that assertion, all that the respondent says is "*I note the contents of this paragraph*".

[21] Apart from this assertion, the applicant also says that she would encourage daily telephonic or Skype contact between the respondent and S, and she says:

"*I give an express undertaking to promote and encourage the relationship between the respondent and S whilst we are waiting for him to reach New Zealand.*"

She says that as soon as the respondent arrives in New Zealand contact can occur on a more frequent and structured basis, and that the applicant and the respondent's respective families will come and visit them in New Zealand on a frequent basis; and that she will encourage this. She also says that she and her fiancé will return to South Africa from time to time to visit family at which time the respondent's family would be able to see S.

[22] In response to these assertions, the respondent says that he does not have enough money to enable him to visit New Zealand four times a year with annual leave of only 15 days a year. He then goes on to say:

> "*Should I travel to New Zealand to visit our son I would obviously be required to pay for airline flights and taxes, accommodation, food, travelling, entertainment etc. I dispute the fact that the applicant and my son would be able to travel back for a visit or holiday at all in the foreseeable future, my understanding of these regulations and citizenship requirements are that S S would not get a Visa under J's name.*"

[23] It is a matter of some concern that the respondent does not issuably challenge the assertion that he too has his eyes set on New Zealand.

[24] But, as I have said before, ultimately the opposition to the emigration is that expert evidence has not been put up by the applicant to explain how the emigration will affect the minor boy; and the issue as to the stability of the relationship of the applicant with her fiancé.

[25] In this regard it was submitted on behalf of the applicant that the respondent has not identified the particular feature which ought to be investigated by such experts; all he has done is to have asserted generally that the court is the upper guardian and in South Africa it relies heavily on experts such as the family advocate and other professionals to furnish it with, and to be guided by, their recommendations after they will have held inquiries and conducted assessments.

[26] Generally that proposition is no doubt sound. It does assist, sometimes immensely, to have an independent third party interview minor children and assess the circumstances and living arrangements of a minor child with both the guardians. But in this case the boy is barely 4 years old and it has not been proposed why, as a matter of some urgency, an assessment – if a need for one could be identified – could not already have been conducted at the instance

of the respondent. The respondent's point seems to be rather an obstacle put up as an afterthought, than a real concern.

[27] Further, it seems to me that the respondent's expressed concern is more focussed on whether the applicant's relationship with her fiancé is a steady one. That is of course a valid consideration; but two points are relevant. The first is that it is difficult if not impossible to tell whether a life partner relationship will stand the test of time. There is no suggestion that thus far the relationship concerned has been stormy in any way.

[28] The next point is that if it should turn out that the relationship between the applicant and her fiancé does not lead to a marriage and a steady one at that, then there is a real possibility that the applicant and the son will return to South Africa; and in that event contact between the son and the respondent will be more frequent than it is anticipated it will be having regard to the intended emigration.

[29] In my view, accordingly, absent it having been identified whether S has a particular concern or aspect that needs to be addressed by experts in view of the anticipated emigration of his mother, it seems to me to be unnecessary to endanger the practical arrangements that the applicant needs to take in order to emigrate. These are set out in the urgent application papers (as opposed to the main application papers).

[30] The applicant explains there that she and S are to arrive in New Zealand within a period of three months, or a maximum period of six months, after her fiance's arrival in New Zealand. And he has to arrive in New Zealand no later than 23 April 2019. The applicant explains that since both S and she only qualify to relocate to New Zealand under the auspices of her fiance's Visa, it is evident that neither S nor she will be able to relocate to New Zealand on their own volition. It follows that they have to arrive in New Zealand by latest on 20 October 2019 and a lot has to be done before that date.

[31] She sets this out in paragraph 10 of her founding affidavit in the urgent application. These include applying for S's passport which can take 12 weeks to process; a medical examination upon receipt of S's passport, to be submitted to the New Zealand authorities; and then the Visa for S and the applicant will take 6 weeks to be processed and issued.

[32] The applicant anticipates that barring any problems, that entire process would take approximately 5 months; and says that if she is not in New Zealand by 20 October 2019, S and she will no longer be able to travel to New Zealand as her fiance's dependants.

[33] These last-mentioned circumstances also persuaded me that the matter was urgent and that I should hear it out of term despite the respondent's opposition to it.

[34] In the result I am persuaded that the application must succeed, and I make an order in terms of the draft which I have marked "X", initialled and dated, and in which I have deleted the proposed paragraph 6 dealing with costs.

WHG van der Linde
Judge, High Court
Johannesburg

Date argued:	9 April 2019
Date judgment:	11 April 2019
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