

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 32022/19

(1)	<u>REPORTABLE: YES</u> <u>/ NO</u>
(2)	<u>OF INTEREST TO</u>

In the matter between:

E V

Applicant

and

S V

Respondent

JUDGMENT

MAKUME, J:

[1] In this matter the Applicant launched an urgent application in this court on the 17th September 2019 seeking an order that the Respondent be

ordered to restore the status quo ante prior to the 1st September 2019 and to return the minor child D V to Johannesburg.

- [2] The Applicant and the Respondent married each other in community of property at Kempton Park on the 11th November 2011. Out of this marriage the minor child D was born on the 25th June 2012. The child is presently 7 years old.
- [3] The parties lived together as a family in Kempton Park until about February 2017 when the Respondent and the minor child D left common and have since been living by themselves at a rented place in Glen Marais, Kempton Park. The Applicant agreed to sign a 2 years lease and paid monthly rental in the sum of R8 500 per month for the Respondent and the minor child.
- [4] The parties concluded an informal agreement in terms of which the minor child D alternated weekly between his parents. It was also agreed that Applicant pay school fees for D. Further that each parent would maintain D during the week or time he resides with each party.
- [5] On the 1st July 2019 the Applicant sent an email to the Respondent informing her that when the lease in respect of the premises they were occupying expires at the end of September 2019 he intends not to renew it and further that if the Respondent still wished to live there she should enter into her own lease agreement for which he the Applicant

will contribute only R4500 per month and still pay school fees for December.

[6] I must mention that at that stage the Respondent had already issued and served summons for a divorce as far back as 2017 the action had been instituted in this court under case no 33961/17

[7] When the Respondent received the email from the Applicant she without informing the Applicant started making arrangements to relocate to Bellville together with the minor child to that extent she applied to a school in Bellville and also requested her employer Cipla to relocate her to their head office in Cape Town which request was successful.

[8] On the 1st September 2019 the Respondent left for Cape Town with the minor child and sent an email to the Applicant informing him that:

- i) She has decided to relocate to Bellville to live with her sister since she would not be able to afford to pay accommodation for her and the child in Kempton Park now that the Applicant had decided to not renew the lease.
- ii) That she has already enrolled D at a school in the area.

- [9] The Applicant launched this application seeking that this court order the Respondent to return the minor child to Kempton Park. He maintain that his rights to access to the minor child have been violated by the Respondent who clandestinely and surreptitiously “Abducted” the minor child. He maintains that it is not in the interest of D that he be removed from Kempton Park where he grew up and be relocated to a strange place.
- [10] On the other hand the Respondent maintain that as a result of the abusive behaviour by the Applicant she decided to institute a divorce and that she relocated because not only was she going to have difficulty to provide for accommodation for the child also that according to her what she did is to act in the best interest of the minor child.
- [11] It is against this back ground that I now have to decide whether this court must accede to the request of the Applicant or not.
- [12] As it was said by the Supreme Court of Appeal in Jackson v Jackson case Np 18/2001 judgment delivered on the 29th November 2001 the guiding principles in matter such as the present is that the interests of the child are paramount. This approach is now entrenched in **Section 28 (2) of the Constitution of SA Act 108 of 1996** which reads as follows:

“A child’s best interest are of paramount importune in every matter concerning the child.”

[13] The Respondent says that all she did is in the best interest of the minor child because of the following reasons:

- i) That she was devastated by the fact that the Applicant decided to only contribute R4 500 towards her accommodation with the minor child.
- ii) She would not be able with her income to afford suitable accommodation for her and the child as well as to maintain herself and the child.
- iii) The R4 500 that the Applicant offered could only pay for a single room and for her it will not be in the best interest of D.
- iv) Prior to that she had gained the impression that in fact Applicant is not interested in keeping the child. She says that on the 11 July 2019 the Applicant chased the child away from him and told him to go its mother and since that incident she noticed that the relationship between D and the Applicant had deteriorated to the extent that D was now reluctant to visit his father the Applicant.

v) That due to her precarious financial situation she could only think of one place at which she will be able to live comfortably with the child that is her sister's place in Bellville.

vi) She had also prior to that informed D's teacher at Kruinsig Primary School in Kempton Park that she will be relocating to Bellville with the child and that the teacher had no problem.

vii) She also says that shortly before and after their marriage the Applicant had indicated to her that they will relocate to Western Cape that never happened.

[14] It is common cause that the minor child has now been attending school in Bellville since the 2nd September 2019. His registration at Kruinisig has been cancelled. According to the Respondent D goes to the same school as her two cousins K (Grade 3) and M (Grade R). D and his cousins are dropped off at school by the Respondent's brother in law G B and they all attend after care at the same school.

[15] Applicant says she is satisfied that the security at the after care is sufficient. D has already made friends one is D and the other is E.

[16] I have no doubt that both the Applicant and the Respondent have as individuals showed love for the minor child. However seeing that the parties are in the process of a divorce a time will come when another court will have to decide on an appropriate primary residence for the minor child. In my view

whilst it was convenient to share residence whilst the parties all lived Kempton Park, it is so that it will now not now be possible to achieve that because of the distance. Mrs Van Staden the Respondent has relocated permanently to Cape Town where she is employed and says that as soon as she is financially stable she intends to get her own place to live with her child.

[17] In my view it will not be in the best interest of the minor child to be shunted on a weekly basis between Cape Town and Kempton Park. It will interfere with his schooling. An English Judge once remarked that:

“When a marriage breaks up, then a situation normally arises when the child of that marriage instead of being in the joint custody of both parents must, of necessity become one who is in the custody of a single parent.”

[17] Having considered all the facts I am not persuaded that it will be in the best interest of D to order that he be returned to Kempton Park at this stage. I say so because this matter will still enjoy the attention of social workers and the family advocate. In the result I make the following order:

ORDER

1. The application is dismissed.
2. I make no order as to costs.

DATED at JOHANNESBURG on this the day of OCTOBER 2019.

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING	:	16 OCTOBER 2019
DATE OF DELIVERY	:	08 OCTOBER 2019
FOR APPLICANT	:	Adv SJ Martin
INSTRUCTING	:	Messrs Gittins Attorneys Johannesburg
FOR FIRST RESPONDENT	:	Adv Bosman Sc
INSTRUCTING	:	Messrs Nielen Marais Inc Johannesburg