

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 9985/2022

DATE: 6th April 2022

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
REVISED: **Yes**

In the matter between:

F[....], L[....] A[....]

Applicant

and

F[....], R[....] M[....]

Respondent

Heard: 5 April 2022 – The ‘virtual hearing’ of this opposed application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 6 April 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 6 April 2022.

Summary: Urgent application – parents – relocation – mother, who is the primary caregiver, seeking court's permission to relocate with two daughters – factors bearing on court's discretion – the principal question to be asked is whether the

intended relocation of the children would be in their best interest – mother granted leave to relocate with children.

ORDER

- (1) The applicant's application is urgent.
- (2) The respondent's parental responsibilities and rights as provided for in sections 18(3)(c)(iii) and (iv) of the Children's Act 38 of 2005 ('the Act'), in respect of the minor children namely, V[....] L[....] F[....] (Identity number: [....]) and T[....] M[....] F[....] (Identity number: [....]) as contemplated in Section 28 read with section 18(5) of the Act, be and are hereby terminated.
- (3) The respondent's consent is dispensed with in respect of the minor children's:
 - 3.1 VISA applications for the United Kingdom;
 - 3.2 removal from the Republic of South Africa to the United Kingdom.
- (4) Insofar as the respondent's consent, signature or participation in regard to any steps is required to enable the applicant to remove the minor children from the Republic of South Africa to the United Kingdom forthwith, the respondent's consent, signature or participation is dispensed with.
- (5) The applicant is granted leave to relocate the minor children outside of the Republic of South Africa to the United Kingdom.
- (6) The respondent shall be entitled to exercise contact with the minor children, while the applicant and the minor children reside in the United Kingdom, subject to the minor children's religious, educational, social, health and recreational activities, as follows:
 - 6.1 Reasonable, unfettered and private daily telephonic / video call / zoom / email contact with the minor children;
 - 6.2 In the United Kingdom subject, to an agreed visitation plan and reasonable notice of travel arrangements for up to 50% of the minor children's allocated school holiday periods;
 - 6.3 In the event that the applicant and the minor children traveling to South Africa during their school holidays, the applicant shall afford respondent the opportunity to have contact with the minor children for 50% of the duration of their stay in South Africa;

6.4 Contact with minor children for Christmas which shall alternate annually.

(7) The respondent shall pay the applicant's costs of this urgent application.

JUDGMENT

Adams J:

[1]. This opposed urgent application concerns the parental rights, responsibilities and duties of the mother (the applicant) and the father (the respondent) in respect of their two minor daughters, presently aged nine years old and six years old respectively. At present, there is in place an order *pendente lite* in terms of Uniform Rule of Court 43 by this Court (per Clark AJ), issued on 16 November 2021 in terms of which the applicant and the respondent have full parental rights and responsibilities in respect of the two minor children, with the applicant having primary care of them and their primary residence being with the applicant. The order also specifically and in detail defines the respondent's contact rights, which are made subject to certain conditions, notably that the applicant is not to consume any alcohol while he has the children in his care. The respondent was also ordered to pay maintenance to the respondent in respect of the minor children of R3500 per month per child.

[2]. In this urgent application the applicant in essence seeks orders to enable her to procure visas for the two minor children and to permanently remove them from South Africa to the United Kingdom, without having to obtain the respondent's consent, signature or participation before doing so, whilst tendering respondent contact as set out in the application. Importantly, the applicant asks for an order terminating certain of the respondent's parental responsibilities and rights in respect of the minor children.

[3]. The respondent opposes the urgent application on the following bases: (1) The applicant's application lacks the necessary urgency and the applicant should not be allowed to 'jump the que'; (2) His rights to have contact with the minor children as defined in the existing rule 43 court order would be adversely affected if

the relief prayed for by the applicant is granted; (3) His financial ability to continue paying maintenance would be negatively affected by the fact that he would be required to make provision to travel abroad in order to exercise his contact rights.

[4]. The respondent has also raised, in the correspondence exchanged between the parties, the issue of a criminal charge of assault which the applicant has laid against him arising from an incident which occurred during 2017. This point was not pursued, with any vigour by Mr Wessels, Counsel for the respondent, during the hearing of the application, and, in my view, rightly so. It is inconceivable that the respondent can insist on the charges against him being dropped, before he would be prepared to consent to the relocation of the children to the United Kingdom. There exists no basis – either in law or in fact – for such a stance. This point can and therefore will be rejected without more.

[5]. The issues to be decided in this urgent application are therefore, firstly, whether the application is urgent and, secondly, whether the applicant has made out a case for the relief claimed. In that regard, the principal question to be asked is whether the intended relocation of the children would be in their best interest. As was held by this Court (per Satchwell J) in *LW v DB*¹, as regards the principles applicable to relocation of children as distilled from the Constitution, judgments of South African courts, and conventions to which South Africa is a signatory, the interests of children are the first and paramount consideration.

[6]. Insofar as the issue of urgency is concerned, it is the case of the applicant that she is required to relocate to the United Kingdom as she has taken up employment in that country. She received her final appointment letter on 18 October 2021, and she has since that date been engaging the respondent with a view to obtaining his consent for her relocation with the minor children. During December 2021, the respondent advised the applicant that he was in agreement with the minor children relocating to the United Kingdom. He had also agreed to assist the applicant with the visa applications and to sign and/or complete any documentation in that regard thereto. So, for example, the respondent, during early December 2021, signed the necessary acceptance letters for the minor children to attend St

¹ *LW v DB* 2020 (1) SA 169 (GJ).

Catherine's School in the UK. And as late as 9 February 2022, he completed and signed a copy of the data collections sheets, as required by St Catherine's.

[7]. This was until 18 February 2022, when, out of the blue, the respondent withdrew his consent for the relocation of the children ostensibly because there were a number of unresolved disputes between the parties. It was at this stage that the respondent advised the applicant that he would not be consenting to the relocation before the applicant withdraws the criminal charge that she had laid against him in 2020.

[8]. The applicant contends that this unreasonable stance by the respondent necessitated the urgent application. I find myself in agreement with this contention. The point is that the delay in the respondent providing the necessary signed documentation for the minor children's visa applications may have dire consequences on the applicant's appointment and she runs the real risk of losing the opportunity afforded to her by her new employer, who has stressed the urgency and the need for her to be in the United Kingdom as soon as possible. The belated withdrawal by the respondent also negatively impacted on the education of the minor children and is most unsettling for them too.

[9]. Despite subsequent demands addressed to the respondent and his legal representatives, he has not complied with the applicant's request to sign the documentation necessary to obtain the children's visas. The applicant was therefore left with no alternative but to launch this urgent application. And the respondent's objection to the application on the basis that it lacks urgency is without merit.

[10]. As for the merits of the application, as indicated above, the most important consideration in deciding this dispute is the interest of the minor children. Bearing in mind that each case is to be decided on its own particular facts, the other considerations, as per *LW v DB* (supra), are the following: (1) Both parents have a joint primary responsibility for raising the child and, where the parents are separated, the child has the right and the parents the responsibility to ensure that contact is maintained; (2) Where a custodial parent wishes to emigrate, a court will not lightly to 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; and (3) The courts have always been sensitive to the situation of the parent who is to remain behind. And the degree of such sensitivity and the role it plays in determining the best interests of children remain a vexed question.

[11]. Applying these principles *in casu*, the following facts require consideration. It is common cause between the parties that the applicant has always been the primary caregiver of the children, who, it should be borne in mind, are two little girls aged nine years old and six years old respectively, and who have lived with their mother, the applicant, all of their lives. The applicant has always been the main breadwinner in the family and has made by far the greater financial contribution to the upbringing. All of the arrangements are in place for the children to be relocated to the UK.

[12]. The applicant is also agreeable for the respondent to have contact with the minor children while the minor children are resident in the United Kingdom. In addition, thereto, the respondent will be able to have whatever contact with the minor children that can be reasonably arranged beforehand and which will be subject to schedules of the minor children's education, extra-mural activities, etc.

[13]. The financial benefits for the minor children and the applicant, should they emigrate to the UK, will be many. They will have a secure and comfortable lifestyle where the applicant's employment and career opportunities are not constrained. The minor children will enjoy social benefits in the United Kingdom, such as safety and a carefree life. They will be in a country where there are lower unemployment rates. And they will have numerous tertiary educational and career benefits.

[14]. I also have very little doubt that, in the event that the minor children and the applicant do not relocate to the United Kingdom, there will be dire and devastating financial, professional and personal consequences for the applicant and the minor children. The simple fact of the matter is that the applicant, and by extension the minor children, will be worse off by staying in South Africa – just from a financial point of view, she will be earning double what she is presently earning. I am therefore

of the view that, all things considered, the applicant has no choice, but to relocate to the UK.

[15]. As correctly contended by the applicant, a refusal of her application will effectively force her to relinquish an important life-enhancing opportunity. The welfare of the minor children is undoubtedly best served by them being raised in a happy and secure atmosphere and in the primary care of their mother, with whom they clearly have a loving bond.

[16]. In summary, I am of the view that it would undoubtedly be in the best interest of the minor children that they relocate to the UK with their mother. The two alternatives are: (1) that the applicant remains in South Africa, which, as I have already indicated, is just not an option, and (2) the children remain in South Africa in the care of the respondent. How, I ask rhetorically, would that be in the interest of the minor children, who both have indicated their agreement, *nay* their excitement, at the prospect of emigrating to England.

[17]. For all of these reasons, I am of the view that the applicant is entitled to the relief claimed by her in this urgent application.

Costs

[18]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*².

[19]. I can think of no reason why I should deviate from this general rule.

[20]. Ms Rosenberg SC, who appeared on behalf of the applicant, also urged me to grant a punitive costs order against the respondent to show the court's displeasure with the way in which he conducted himself prior the launch of this application by the applicant. In particular, the fact that he withdrew his consent at the eleventh hour

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

after 'stringing the applicant along' for a couple of months. I am not persuaded that a case has been made out for the exceptional circumstances required for a punitive costs order.

[21]. Accordingly, I intend awarding costs in favour of the applicant against the respondent on the ordinary High Court scale

Order

[22]. Accordingly, I make the following order: -

(1) The applicant's application is urgent.

(2) The respondent's parental responsibilities and rights as provided for in sections 18(3)(c)(iii) and (iv) of the Children's Act 38 of 2005 ('the Act'), in respect of the minor children namely, V[....] L[....] F[....] (Identity number: [....]) and T[....] M[....] F[....] (Identity number: [....]) as contemplated in Section 28 read with section 18(5) of the Act, be and are hereby terminated.

(3) The respondent's consent is dispensed with in respect of the minor children's:

3.1 VISA applications for the United Kingdom;

3.2 removal from the Republic of South Africa to the United Kingdom.

(4) Insofar as the respondent's consent, signature or participation in regard to any steps is required to enable the applicant to remove the minor children from the Republic of South Africa to the United Kingdom forthwith, the respondent's consent, signature or participation is dispensed with.

(5) The applicant is granted leave to relocate the minor children outside of the Republic of South Africa to the United Kingdom.

(6) The respondent shall be entitled to exercise contact with the minor children, while the applicant and the minor children reside in the United Kingdom, subject to

the minor children's religious, educational, social, health and recreational activities, as follows:

6.5 Reasonable, unfettered and private daily telephonic / video call / zoom / email contact with the minor children;

6.6 In the United Kingdom subject, to an agreed visitation plan and reasonable notice of travel arrangements for up to 50% of the minor children's allocated school holiday periods;

6.7 In the event that the applicant and the minor children traveling to South Africa during their school holidays, the applicant shall afford respondent the opportunity to have contact with the minor children for 50% of the duration of their stay in South Africa;

6.8 Contact with minor children for Christmas which shall alternate annually.

(7) The respondent shall pay the applicant's costs of this urgent application.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	5 th April 2022 as a videoconference on <i>Microsoft Teams</i>
JUDGMENT DATE:	6 th April 2022
FOR THE APPLICANT:	Advocate R R Rosenberg SC
INSTRUCTED BY:	Ian Levitt Attorneys Incorporated, Sandton.
FOR THE RESPONDENT:	Advocate H H Wessels
INSTRUCTED BY:	Van der Merwe Attorneys Incorporated, Waterkloof, Pretoria