

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, POR ELIZABETH
JUDGMENT

PARTIES:

Registrar: **CASE NO: 978/2009**

13. Magistrate:

14. High Court: **EASTERN CAPE HIGH COURT, PORT ELIZABTH**

DATE HEARD: 16 & 17 April 2009

DATE DELIVERED: 21 April 2009

JUDGE(S): **DAMBUZA J**

LEGAL REPRESENTATIVES –

Appearances:

for the Appellant(s): **Adv Dyke**

for the Respondent(s): **Adv Goosen SC**

Instructing attorneys:

Appellant(s): **Goldberg & De Villiers Inc**

Respondent(s): **Anthony Delpport & Unwin Inc**

CASE INFORMATION -

7. *Nature of proceedings:* Application

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, PE)**

CASE NO: 978/2009

In the matter between:

ROSEMARY ASSUNTA CAMPHER

APPLICANT

and

RICHARD DAVID CUSHING

RESPONDENT

JUDGMENT

DAMBUZA J:

1. The applicant seeks an order dispensing with the respondent's consent to the parties' child traveling with the applicant from South Africa to London where the applicant will undergo medical treatment.
2. The parties are married and have a three year eight month old son named "L" (the minor child). There are pending divorce proceedings between

them. From 28 December 2009 they have been living apart; the applicant lives in St Francis Bay whilst the respondent commutes between St Francis Bay and Johannesburg where he is employed. The respondent lives in hotels in Johannesburg during the week and spends week-ends in St Francis Bay. The minor child lives with his mother in St Francis Bay. During week-ends the respondent exercises his rights of access to the minor child. This, it appears, is by arrangement between the parties. When the respondent visits the minor child, they spend time at or in the vicinity of the applicant's place of residence or at a nearby beach in St Francis Bay.

3. It is common cause that during 2007, when the parties were living in London, the applicant was diagnosed with cancer. As a result thereof she underwent a total abdominal hysterectomy, a bilateral salpingo-oophorectomy, an omentectomy, a splenectomy and a course of chemotherapy. She was under the care of Dr Maurice Slevin, a consulting physician and medical oncologist at the London Oncology Clinic (LOC). Following the medical treatment that the applicant received at LOC she recovered fully and the cancer went into full remission. In April 2008 the parties relocated to South Africa and established a home at St Francis Bay.
4. About 16 months of the cancer having gone into remission, recurrence thereof was detected during a routine check-up. Dr Keith Maart, a clinical

and radiation oncologist in Port Elizabeth, under whose care the applicant has been from July 2008, testified during the hearing that the applicant's CA-125 markers have progressively increased in the recent past and that results of a PET scan done "a few weeks ago" confirmed the presence of a tumor. According to Dr Maart one of the treatment options mooted following the results of the PET scan is chemotherapy aimed at reducing the tumor followed by surgical removal thereof once it has shrunk to the desired size. Further chemotherapy may follow the surgery. Dr Maart's further evidence was that he has been advised by Dr Danie Botha, a Gynaecologist practicing in Cape Town with whom the applicant has consulted, that surgical oncologists in South Africa are unwilling or unable to perform the surgery. In a letter dated 1 April 2009 which forms part of the founding papers Dr Maart states that the applicant requires specialized surgery and the expertise to perform such surgery is not available in this country.

5. It is in these circumstances that the applicant intends to travel to London to consult with Dr Slevin and to undergo such medical treatment at LOC as Dr Slevin might recommend. When the application was launched on 9 April 2009 the applicant had an appointment to consult with Dr Slevin on Friday 17 April 2009 at 12h20. This date was later changed to Friday 24 April 2009 as it became clear that the matter could only be heard on 16 April 2009.

6. According to the founding papers the applicant anticipates that she will remain in London for a period of 18 to 20 weeks whilst she receives treatment at LOC. She anticipates that during the consultation with Dr Slevin on Friday, 24 April 2009 certain tests will be done from which Dr Slevin will determine the chemotherapy protocol that she will undergo. She intends to travel with the minor child to London where they will remain for such duration as she may be required to undergo treatment. This was later altered in a proposed amendment to the Notice of Motion moved by Mr Dyke on behalf of the applicant. The proposed amendment is the effect, amongst others, that the minor child will remain in London for a maximum period of six months. On 30 March 2009 the applicant, through her attorneys sought the respondent's consent for the minor child to travel with her as set out above. On 1 April 2009, the respondent, through his attorneys, refused to give the required consent.
7. The applicant's case is that it would be in the interests of the minor child for him to travel with her and remain with her in London for the duration of the treatment (or for a period of six months). This so because, amongst others, the applicant and the minor child share a very close relationship such that any separation would traumatize the minor child. If the minor child were to remain in South Africa, so the applicant contends, he would experience a drastic and sudden change in his life. The applicant's concerns about separation of the minor child from her are that there is no

established routine and relationship between the minor child and the respondent, the respondent has no permanent residential address, he works long hours, there are allegations of sexual abuse on the minor child by the respondent, the respondent has alcoholic tendencies and has no experience and ability to attend to the daily needs of the minor child.

8. The application is opposed, mainly, on the basis that no proper case has been made out that the minor child's interests would be best served by him accompanying the applicant to London as proposed. During argument Mr Goosen who appeared for the respondent submitted that in the light of the absence of information or the uncertainty as to what is likely to happen to the applicant in London, particularly as to Dr Slevin's view after consulting with the applicant, the treatment that might be prescribed, the effect of the treatment on the applicant, the length of the proposed treatment and general prognosis on the applicant's health, it cannot be in the best interests of the minor child that he accompanies the applicant to London.
9. It was common cause during the argument that the applicant needs to receive treatment for the cancer without any delay. Dr Maart's evidence was that the cancerous tumor was growing at an aggressive pace and that it had more than quadrupled within a short period. It is therefore imperative that the applicant receives treatment without delay. The

respondent has no objection to the applicant seeking the best available treatment. It is not necessary, in my view, in this application, to determine whether the treatment is available within this country. The issue in these proceedings is not the *bona fides* of the applicant's reason for the trip to London; it is whether it is in the minor child's best interest for him to accompany his mother to London as proposed.

10. The cases to which both counsel have referred me to do not deal specifically with the issue of consent as required in section 18 of the Children's Act, Act 38 of 2005 (the Children's Act).¹ However, "In all matters concerning children, the principle 'which runs like a golden thread through the fabric of our whole law relating to children'...[is] that the interests of the children are paramount"². Section 7 of the Children's Act sets out a checklist of factors to be taken into account where relevant when applying the best interests standard. They include the nature of the relationship between the child and the parents and the child and any other relevant care-giver, the capacity of the parents or any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs, the likely effect on the child of any change in the child's circumstances, the need for the child to remain in the care of his or her parent, family or extended family, culture and tradition, the child's age, maturity and stage of development, his or her physical and emotional security, his or her intellectual emotional, social and cultural development, the need for the child to be brought up in

¹ J v J 2008 (6) 37 D; F v F 2006 (3) SA 42 SCA; Latouf v Latouf 2001 (1) All SA 377 T

² Segal v Segal 1971 (4) SA 317 (C) 317 (C) at 321 and 324 J

a stable family environment and the need to protect the child from any harm that may be caused by subjecting him or her to maltreatment, abuse, degradation, neglect, exploitation or exposing the child to violence and exploitation or other harmful behaviour.

11. It is my view is that the period for which the consent is sought for the minor child's absence from the country constitutes temporary relocation of the child from the country. It has been said that permanent or even temporary removal of a child to a foreign country almost inevitably has a grave impact on the capacity of a child to maintain a relationship with the non-custodial parent and anyone else in whose favour an access order has been made.³ In this case, as it was submitted on behalf of the respondent, the issue of primary care and residence of the minor child has not been determined. It is one of the issues to be determined in the divorce proceedings between the parties. Consequently the respondent retains his full parental rights and responsibilities in respect of the minor child.⁴

12. Disruption of the life of the minor child in this case, cannot be avoided; whether he travels with the applicant to London or remains in South Africa with the respondent. The applicant sets out arrangements that she has put in place to ensure that the minor child is well cared for during his stay in London. E-mails bearing offers of assistance by various friends form part of the

³ Lawrence Schafer; The Law of Access to Children at 153

⁴ See section 20 of the Childrens Act 38 of 2005.

applicant's papers. Sarah offers to help with the minor child if something goes wrong during the applicant's surgery. Carla Lamkin an Osteopathologist who has treated the applicant in the past offers her house keeper to look after the minor child for a few evenings in a week. She also offers to personally stand in for emergencies and take care of the minor child. Ben Galewsky offers to travel from America to London to be with applicant and the minor child for the week that the applicant is scheduled for her surgery. Dr Stamatia Sottrilli offers to visit the applicant twice a week for the three months that she will be undergoing chemotherapy to help her and support both her and the minor child. Offers of assistance from Catarina Siqueira and Tina and Bruce McKenzie also form part of the applicant's papers. Further arrangements made by the applicant for the minor child include, visits to a nearby zoo and a local library, art classes, boat rides, soccer classes and enrollment at a Montessori nursery school.

13. The fundamental difficulty with this application is the absence of evidence or the uncertainty of what will happen to the applicant in London. As it was submitted on behalf of the respondent, the applicant will be going to London to receive treatment for an unknown period. The anticipated treatment is based on the assessment or opinion of the South African doctors who, as alleged, do not have the required expertise to administer the treatment required by the applicant. Everything depends on Dr Slevin's assessment and views once he has consulted the applicant. Even then it would appear, it is

not possible to predict with reasonable certainty the period for which the applicant will remain in London for treatment. Much depends on the applicant's response to the treatment. The uncertainty is evident from the applicant's own papers. She states in the replying affidavit that "surgery is mooted but is not an absolute." Dr Maart evidence was that after a period of chemotherapy treatment an assessment will be made on whether the tumor has shrunk to an acceptable size; depending on the results thereof, surgery may or may not be performed. According to Dr Maart, there is a 30 to 40% chance that the tumor will shrink; there is also a 30% chance that it might remain the same size and there is 30% chance that it may continue to grow, in which case alternative treatment would be tried.

14. Throughout this period the minor child will be in the care of the applicant together with the friends that the minor child last saw when he was about 18 months old. My view is that these persons will be strangers in his eyes. He will have to start establishing a relationship with them in circumstances where he is already stressed. If one takes into account that the offers of assistance are subject to the assistants' own existing commitments the minor child might have to be cared for different persons in one week or in one day. Even though the applicant will be in close proximity, there can be no certainty as to the state she will be in. Dr Maart's evidence was that the side effects of chemotherapy include fatigue, nausea and risk to infection. I can therefore not

attach much weight to his assurances that generally “having cancer does not impair patients ability to perform as parents”.

15. After six months such relationship as the minor child will have formed with his carers will be abandoned as the minor child will return to South Africa where presumably he will re-establish a relationship with his father and other care givers in his South African life. I am not persuaded that the best interests of the minor child would be served by him accompanying the applicant in such uncertain circumstances.

16. Lyn Foster, a clinical psychologist, states in a report filed with the applicant's replying papers that the applicant and the minor child would be psychologically traumatized if separated from each other for any length of time and that to remove the minor child from the applicant for any length of time would constitute emotional abuse given the high levels of anxiety experienced by the minor child. According to the respondent, Ms Foster has not consulted with him and there is, indeed, no mention of the respondent in Ms Foster's report. Neither Ms Foster nor Ms Mandy Daniels, a social worker who has also filed a report, refers to the fact that the applicant will be traveling with the minor child to a foreign country in uncertain circumstances when the applicant's own emotional state would, in all probabilities, be compromised.

17. The applicant contends that the treatment is not likely to incapacitate her to the extent that he will not be able to take care of the minor child. According to her those who have offered assistance will only look after the minor child for limited periods of five hours for one day in a two week period when she will be receiving chemotherapy treatment. Her contention on the likely effect of the treatment on her is based on her previous experience with chemotherapy treatment. She states that as a result of the “wholesome treatment” which she received at LOC, chemotherapy had little or no effect on her. The respondent, however, disputes that the previous chemotherapy treatment had as minimal an effect as the applicant contends and states that the applicant had to sleep for long periods during which the respondent would be looking after both the applicant and the minor child. The issue of the effect of the previous chemotherapy treatment on the applicant is therefore in dispute. In any event as details of the treatment that the applicant is will receive are not known, an attempt at assessing the effect of such treatment makes no sense.
18. The allegations of sexual abuse emanate from a statement made by the minor child during a visit by the respondent, that the respondent had hit his “pee-pee”. It is this utterance by the minor child that led to arrangement by the respondent of supervised access by a social worker, according to him, to protect himself. The respondent disputes that he assaulted the minor child. A report by a social worker reveals that the minor child has, in the presence of the respondent and the social worker falsely accused another child of hitting

or touching his “pee-pee” in circumstances where it was clear that this was not true. The social worker has recommended that this issue be investigated. Again, there is, in my view a real dispute of fact regarding the allegations of sexual abuse. Mr Dyke submitted that in considering what is in the best interest of the minor child, I am enjoined to take into account all available evidence, including such disputed evidence. There can be no merit in this submission. A court’s duty to consider all available evidence in cases such as this can only relate to undisputed “evidence” or facts that have been properly proved.⁵ There is no established fact on the papers, of sexual abuse or absence thereof that I can take into account in determining what would be in the best interests of the minor child.

19. The respondent has undertaken to secure a home for the minor child and himself. He explains that the fact that he has in the past three and a half months been staying in hotels is a result of his weekly travels between Johannesburg and St Francis Bay.

20. I take into account the negative impact the refusal of the consent is likely to have on both the applicant and the minor child. It is my view however, that with proper management and co-operation between the parties, in the interests of the minor child the potential trauma on the child can be minimized. In the end, I am not satisfied that a proper case has been made

⁵ Plascon- Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

that it would be in the interests of the minor child to travel to London with the applicant.

21. URGENCY

It was submitted on behalf of the respondent that there are no allegations in the applicant's papers suggesting an urgent need for the child to relocate. Further, so it was submitted, the applicant was, as far back as February 2009, even prior to detection of the tumor, determined to go to London for treatment. She, however, failed to address the issue of consent at that stage. In this regard the respondent relies on a letter written by the applicant to the respondent's sister alluding to the fact that she needed the respondent's consent to take the minor child to London for treatment.

22. I am, however, prepared to find, in the applicant's favour, that the matter is urgent. For even if the applicant, as early as 2 February 2009, contemplated traveling to London, the urgency arose with the diagnosis of the aggressively growing tumor. If the applicant's contention that the best interests of the minor child would best be served by the child traveling with her was to be accepted, the urgency relating to the child's travel would be inextricably interwoven with the urgency relating to the applicant's own need to travel to London.

23. COSTS

Mr Dyke submitted that even if the applicant is not successful in this application, this is a case in which departure from the usual order that each party pays its own costs would be justified. I am not able to find a basis for such an order. Both parties approached the court for a determination of what would be in the best interests of the minor child.

Consequently:

1. The application is dismissed; and
2. Each party is ordered to pay his or her own costs.

N DAMBUZA**JUDGE OF THE HIGH COURT**

Applicant's Counsel: Adv Dyke

Applicant's Attorneys: Goldberg & De Villiers Inc
Pembroke House
13 Bird Street, Central
PORT ELIZABETH
Ref: John Karantges

Respondent's Counsel: Adv Goosen SC

Respondent's Attorneys: Anthony Delport & Unwin Inc
216 Cape Road
PORT ELIZABETH
Ref: Joanne Anthony

Heard on: 16 & 17 April 2009

Delivered on: 21 April 2009