

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. D7960/2019

In the matter between:

S[....]

APPLICANT

and

S[....]

RESPONDENT

ORDER

The following order shall issue:

Main application

1. The application is dismissed with costs, such costs to include costs of senior counsel.

Counter-application

1. Pending the final determination of divorce proceedings to be instituted by the mother against the father in this Honourable Court:
 - (a) The minor child, Z, a boy, born on 5 August 2017, shall reside with the mother in South Africa.
 - (b) The father shall be entitled to have contact with Z whenever he is in South Africa, but not for more than four consecutive days and nights at a time, and if he is in South Africa for more than four days and nights at

any given time, then there shall be a break of two days and two nights which Z shall spend with the mother, and thereafter repeated four days and four nights with the father until his departure from the Republic of South Africa.

2. Costs of the counter-application are reserved for the court hearing the divorce action.

JUDGMENT

Steyn J:

[1] This application concerns the return of a four-year-old boy who was brought to South Africa from the United Kingdom (UK) by the respondent in August 2019. The applicant is a UK citizen and the respondent a South African citizen. At present he is residing with the respondent. It is averred by the applicant that the respondent is acting in violation of a court order issued by this court on 29 May 2019. For ease of reference I shall refer to the parties as the father (the applicant) and the mother (the respondent).

[2] It is necessary to state the relief sought by the father in more detail. The father seeks:

- (a) That the mother be directed to immediately and forthwith hand over the minor child, Z, a boy, born on 5 August 2017, to the father, and for the father to return Z to the UK as per the terms of the mirror order issued on 29 May 2019.
- (b) Failing such immediate and forthwith compliance, the father will be entitled and/or permitted to collect Z from the mother, and/or her family, or wherever else he may be found, and remove him to the UK himself.
- (c) Absent compliance with the prayers above, the father will be permitted and is herewith granted leave to launch contempt proceedings for the mother's urgent and immediate committal on the same papers, duly supplemented insofar as may be necessary.
- (d) In the event of the mother refusing to comply, the father shall be authorised and directed to do all things necessary, within legal means, to secure Z's immediate return to him, including the soliciting of the help of any SAPS member.

- (e) An order directing the mother to pay costs of the application, such costs to be paid on an attorney and client scale.

[3] The mother has launched a counter-application seeking:

- (a) That pending the final determination of divorce proceedings to be instituted by the mother against the father in this Honourable Court:
 - (i) The minor child, Z, a boy, born on 5 August 2017, shall reside with the mother in South Africa.
 - (ii) The father shall be entitled to have contact with Z whenever he is in South Africa, but not for more than four consecutive days and nights at a time, and if he is in South Africa for more than four days and nights at any given time, then there shall be a break of two days and two nights which Z shall spend with the mother, and thereafter repeated four days and four nights with the father until his departure from the Republic of South Africa.
- (b) That the father is directed to pay the costs of the counter-application.

The issue

[4] The issue to be decided is whether the enforcement of the mirror order issued on 29 May 2019 would be in the best interests¹ of Z or whether the enforcement of the order would be unfair, given the fact that the mother has been denied entry into the UK.

Common cause facts

- [5] The following facts are not in dispute:
- (a) The mother has been in South Africa with Z for the last thirty months.
 - (b) The father has had little contact with Z in the last thirty months.

Background facts

[6] The parties married on 8 October 2016 in terms of Islamic Rites, and their marriage was registered in terms of the Marriage Act 25 of 1961. Out of the marriage

¹ See s 28(2) of the Constitution of the Republic of South Africa, 1996. Also see *PD v MD* 2013 (1) SA 366 (ECP) para 49; *Minister of Welfare and Population Development v Fitzpatrick & others* 2000 (3) SA 422 (CC) para 18; *Central Authority v MV (LS Intervening)* 2011 (2) SA 428 (GNP) paras 13 and 28.

the minor child, a boy, Z, was born in Wales, UK on 5 August 2017. Z is presently four years old. The parties experienced marital problems shortly after the birth of Z, and have since then been embroiled in litigation regarding Z at the Swansea Family Court. The court issued an order that the parties will have shared custody, with Z primarily living with both parties, but with the proviso that Z would not return to South Africa. At the time of the order being made the mother's immigration status in the UK was unknown, and it resulted in the order stipulating that Z should live with the father and spend periods of time with the mother. The final child arrangement order was issued in the Swansea Family Court on 25 September 2018. Subsequent to the order of 2018, appeal proceedings were instituted and the mother was in part successful.²

[7] In terms of the final child arrangement order a mirror order was applied for in this division and issued on 29 May 2019 by Balton J.

[8] On 14 August 2019, the mother travelled to South Africa from the UK for the purpose of obtaining a work visa. She brought Z with her to South Africa. She was, however, informed by her prospective employer on 22 August 2019 that the job in the UK was no longer available. The mother applied for a visit visa to return to the UK. She was informed on 10 September 2019 by the Home Office that her visa was refused, and was informed that she had no right to appeal the decision.

[9] I consider it necessary for purposes of this judgment to quote the entire decision of the Home Office made on 10 September 2019:

'I have refused your application for a visit visa because I am not satisfied that you meet the requirements of paragraph 4.2 of Appendix V:

- You have applied to visit the UK for 6 months and one day. You have applied for a standard six-month visit visa. The maximum amount of time permitted to stay in the UK on this type of visa is six months. I am therefore not satisfied that you will comply with the immigration rules associated with this type of visa.

² See the Appeal Court judgment *infra*.

- I note from your immigration history that you were issued with a two-year visa on 29 September 2016. In your application at that time, you stated that you wished to visit the UK for one month, however you stayed for 28 months. This was in breach of the immigration rules, something you have admitted on your application form.
- You state that you are unemployed and do not have any other income or savings; that you spend ZAR 500 (£26.56) on your living costs and plan to spend ZAR 500 (£26.56) on your trip to the UK. You have stated that you plan to spend over six months in the UK. I am not satisfied that you have sufficient funds to travel.
- When asked on the application where you plan to stay in the UK, you stated “I have to get support from abused organisations and womens aid”. This would indicate that you have no plans on where you will stay or that you have sufficient funds to enable you to support yourself.
- Overall I am not satisfied that you have provided an accurate representation of your personal and financial circumstances in South Africa which leads me to doubt your intentions for your trip to the UK. You have not demonstrated any economic or family ties in South Africa. Your overall account of your personal circumstances leads me to doubt that you will leave the UK at the end of your trip.
- Taking all of the above into account, I am not satisfied that you are a genuine visitor who will leave the UK at the end of your visit or have sufficient funds to cover all reasonable costs in relation to your visit without working or accessing public funds and therefore your application is refused under Appendix V4.2 (a), (c) and (e) of the immigration rules.’ (My emphasis.)

[10] The father was informed of the aforesaid decision by the mother’s attorney, Mr Mohamed Hassim, on 16 September 2019, as well as the circumstances surrounding the non-compliance with the order dated 29 May 2019. On 30 September 2019, the father elected to institute these proceedings.

[11] Important to this application is the order of the Appeal Court, more specifically para 46 where it is held:

‘However, the same process was not gone through by His Honour Judge Sharpe in this eventuality. There is no analysis of the impact on the child of being separated from his mother. There is no analysis of the viability of the spending time with arrangements whether from a cost or entry to the UK perspective. There is no analysis of the risk that the father might undermine the relationship between the child and the mother. This was a central component of the refusal of the mother’s application. Ms Crowley QC is right to point out that the judge’s findings in relation to the father were less harsh than in relation to the mother but at no stage does he undertake the assessment of the likelihood of the father promoting the relationship were the mother to be deported. Given he had found that the father was highly critical of the mother (albeit not of her parenting of the child) and had lost no opportunity to criticise her (including suggesting that she might have him murdered) this was plainly something that needed to be factored into a holistic analysis of the options. Ms Crowley QC is right to say that the distinction between the judge’s findings in respect of the mother and the father are such that it is probable that he would have concluded had he undertaken the analysis that the father was more likely to promote contact than the mother albeit there would have been risks but this is only part of the holistic analysis. What if the evidence had established that the mother was unable to travel to the UK for immigration related reasons? What if the evidence that established that the finances were not available on the mother’s side to make the spending time with arrangements realistic? What was the evidence of the impact on this very young child of being separated from his mother to whom he almost certainly had his primary attachment at that stage? When all of the relevant welfare checklist factors were weighed in favour of the two options in this scenario where did the balance fall? The exercise was not undertaken and was probably incapable of being undertaken in the way required to reach a properly founded welfare determination.’ (My emphasis.)

[12] The Appeal Court then concludes in para 50(iv) as follows:

‘The orders made in respect of the mother being unable to remain in the jurisdiction of England and Wales are discharged....’ (My emphasis.)

And para 53:

‘Plainly it would be better for all concerned if the mother’s immigration status were clarified. The clear conclusion of His Honour Judge Sharpe was that this child

needed both of his parents in his life. Equally it is clear (albeit the magnitude has not been finally determined) that there would be a risk to the maintenance of the mother/child relationship were she to be deported. That clearly would have article 8 implications for the child. How the parties choose to deal with the issue in terms of seeking a court order will have an interface with the progress made on clarification of the mother's immigration position. However, I cannot determine that within the confines of this appeal. At the moment, I'm not sure it could be dealt with at first instance. Further clarity probably needs to be achieved in a number of areas in order to properly determine that issue.' (My emphasis.)

[13] The Appeal Court in the UK specifically held that it was necessary to determine the immigration status of the mother before any order could be made as to where Z should reside pending a final decision by the appropriate court. In my view, it was wise to order that the immigration status of the mother be determined since she is not a UK citizen and cannot exercise any rights to her child unless she is legally allowed to be in the UK.

[14] The father is misdirected in his contention that in the event that the mother is unable to return to the UK, for whatever reason, that Z would be immediately returned to his parental care.

[15] When the current application was heard, Ms *Lennard*, counsel for the father, confirmed that the father had elected not to bring this application in terms of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (the Hague Convention). The father was invited to confirm the aforesaid since the annexures attached to the founding affidavit, in particular annexure OS7,³ reveal that he considers the present instance as child abduction and claims that the Hague Convention is applicable. Moreover, in the replying affidavit,⁴ the father places reliance on the Hague Convention. The Convention, in my view, is aimed at protecting children internationally from the harmful effects of a wrongful removal from the country of their habitual residence to another country, and establishes a procedure to ensure the prompt return of the child to the country of habitual

³ See at 116 of the International Child Abduction Application.

⁴ See para 15 at 490 of the International Child Abduction Application.

residence.⁵ I agree with counsel for the mother, Mr *Skinner* SC's submission that the founding affidavit is cursory and not at all clear on the application of the Hague Convention.

[16] It was confirmed by Ms *Lennard* that no reliance is placed on the Hague Convention. It needs to be added there has been no compliance with s 279 of the Children's Act 38 of 2005, and no curator ad litem has been appointed for Z. This minor child's interests would have been best served, in my view, if the father followed the route of the Hague Convention. The father, however, elected to apply for the enforcement of the mirror order without relying on the Hague Convention and, accordingly this is what will be decided. In any event, even if the application was brought in terms of the Hague Convention, the approach of the SCA as set out in *LD v Central Authority (RSA) & another*⁶ ought to apply. This is stated without deciding the success of an application in terms of the Convention since the application is not in terms of the Convention.

Best interests of the minor

[17] The mother is presently unable to return to the UK as her application for a visa has been refused twice. Z is still of a tender age, and any enforcement of the mirror order will result in him being separated from his primary care giver after having been in her care and in South Africa for more than 30 months. Mr *Skinner* has argued that if Z is compelled to return to the UK without his mother, that such an order would cause an enormous shock to his system. He will have to adapt to other people fulfilling the maternal role, and being without his mother cannot, in all probability, be in the best interests of this young child.

[18] The father submitted that there are no facts that militate against the relief sought. In my view, this contention is without a factual foundation for the following reasons:

⁵ See *Smith v Smith* [2001] 3 All SA 146 (A) paras 6-10 for a discussion on the Convention.

⁶ *LD v Central Authority (RSA) & another* (Case no 803/2020 and 812/2020) [2022] ZASCA 6 (18 January 2022).

- (a) The mother applied for a visa to enter the UK twice, and in both instances was refused entry.
- (b) The mother is legally unable to return to the UK.
- (c) The mother was successful, in part, appealing against the order that became the mirror order in South Africa insofar as the Swansea Family Court provided that if she was denied the right to reside in the UK, that Z would be required to live with the father in the UK and that she would be entitled to visit her child. The appeal court overturned this part of the order and ruled that the issue of her immigration status be determined first before any decision could be made about Z's medium to long term care.
- (d) Given the fact that Z has been in her primary care, if he is sent back to the UK, he would in all likelihood be exposed to psychological harm and be placed in an intolerable situation.
- (e) She has instructed her attorney to institute divorce proceedings against the father, and seeks an order that Z has his primary place of residence with her, subject to the father's reasonable right of contact with him.

[19] Mr *Skinner* has asked this court to consider *State Central Authority v Ardito*,⁷ where it was held:

'50. In my view, the fact that the respondent is unable to gain entry into the United States for the purpose of appearing in these proceedings, amounts to what can only be described as a serious denial of natural justice. The right to be heard is a fundamental requirement of natural justice. Even if the U.S. Central Authority was able to procure *pro bono* representation for the wife, such representation would avail her little if she is unable to be present and participate in the proceedings. In any event, there is no guarantee that such representation will eventuate. This is no criticism of the United States system of justice, but rather the trite finding that no system of justice is satisfactory where one side is denied the right of appearance. Accordingly, I am of the opinion that the fact that the respondent is denied entry into the United States constitutes a grave, or in this case an almost certain risk, that the child Y will be placed in an intolerable situation.

⁷ *State Central Authority of Victoria v. Ardito*, 29 October 1997, Family Court of Australia (Melbourne) [1997] FamCA 61.

. . .

52. Once it has been established that there is a grave risk of the child being placed in an intolerable situation I have a discretion to refuse to make an order returning the child to the United States. In the circumstances of this case, there is nothing to indicate that the requesting parent would be denied entry into Australia. So far as funds are concerned, he has offered to fly to Australia to pick up the child Y and take her back to the United States.’ (My emphasis.)

[20] In *Ardito* supra the court found it probable that the return of the minor child to the United States should not be permitted based on Australia’s commitment to the protection of human rights and fundamental freedoms. It found that it was contrary to all concepts of fairness that the question of the custody of the child should be conducted in circumstances where the mother was denied the right to appear.

[21] Turning to the protection afforded to children in South Africa, s 28⁸ of the Constitution, and s 28(2) in particular, can be seen as a mini-charter of rights for children in South Africa. So on a constitutional level, the best interests of this minor child are of paramount importance.

⁸ Section 28 of the Constitution provides as follows:

- (1) Every child has the right-
 - (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that—
 - (i) are inappropriate for a person of that child’s age; or
 - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child’s best interests are of paramount importance in every matter concerning the child.
- (3) In this section “**child**” means a person under the age of 18 years.

[22] The SCA, in *Centre for Child Law v Höerskool Fochville & another*,⁹ emphasised the importance of s 28(2) of the Constitution in all matters that involve children as follows:

‘In terms of s 28(2) of the Constitution, in all matters concerning children – including any litigation concerning them – their best interests are of paramount importance. Section 28(2) must be interpreted so as to promote the foundational values of human dignity, equality and freedom. The reach of s 28(2) extends beyond those rights enumerated in s 28(1): it creates a right that is independent of the other rights specified in s 28(1). Section 28(2), read with s 28(1), establishes a set of rights that courts are obliged to enforce. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC). . .the Constitutional Court observed in para 15:

“The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of s 28 indicates that just as law enforcement - must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights. As Sloth-Nielsen pointed out :

‘(T)he inclusion of a general standard (“the best interests of a child”) for the protection of children’s rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children’s lives.’

Thus, in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) para 115, the Constitutional Court pointed out:

“In *S v F*, for example, the court equated an enquiry into the desirability of appointing an intermediary with a trial in which the State bears the burden of proof to establish the need for the appointment of an intermediary on a balance of probabilities. I am unable to agree with this view. This approach to the enquiry overlooks the objectives of the enquiry. The overriding consideration at that enquiry is to prevent the child from exposure to undue stress that may arise from testifying in court. What is

⁹ *Centre for Child Law v Höerskool Fochville & another* 2016 (2) SA 121 (SCA).

required of the judicial officer is to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the Constitution and the subsection, it is in the best interests of the child that an intermediary be appointed.”¹⁰ (Footnotes omitted, my emphasis.)

[23] At the onset I asked both parties to file further submissions in light of the recent SCA judgment *LD* above where the majority held:

[32] The mother has always been E’s primary caregiver. As a result, not surprisingly, there is a strong bond between them. There is also a strong bond between E and S; between E and the husband, who she referred to when interviewed by Ms De Vos as her father; and, it would appear, between E and the husband’s daughter, R.

[33] Given E’s close bonds with the mother, as primary caregiver, it would, according to Professor Spies, cause E “extreme trauma” if E was returned to Luxembourg without her mother. Professor Spies was also of the view that if E had to return to Luxembourg, the family unit would disintegrate, with traumatising consequences for E.

. . .

[35] Ms De Vos was of the view that in the light of these circumstances, if E was to be returned to Luxembourg, this **“could potentially lead to an intolerable situation”**; and that would have been caused by “having [E] uprooted again after she has now been settled at school and socially”. In respect of E’s relationship with S, Ms De Vos was of the opinion that “the possibility of her being returned with him staying behind in South Africa could also possibly become an intolerable situation”.’ (My emphasis.)

[24] In *Pennello v Pennello & another*¹¹ the SCA held that the child’s best interests are decisive in every matter concerning the child.

¹⁰ Ibid para 24.

¹¹ *Pennello v Pennello & another* 2004 (1) All SA 32 (SCA).

[25] The SCA dealt with the issue of harm in *LD* and referred to *Pennello* as follows:

‘Also in the context of the question of harm, in *Pennello*, this court cited with apparent approval a dictum of Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)*:

“There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.”¹² (Footnotes omitted, my emphasis.)

[26] Goldstone J in *Sonderup v Tondelli & another*¹³ summarised the interests at play in a matrimonial dispute most eloquently:

‘A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a Court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in art 13 for exceptional cases where this will not be the case.’¹⁴ (My emphasis.)

[27] In my view the father’s reliance on the Family Advocate’s report is misplaced. Not only is the report outdated, it is also evident from the report that the office of the Family Advocate did not seriously consider the appeal judgment and the impact of

¹² *LD* para 27.

¹³ *Sonderup v Tondelli & another* 2001 (1) SA 1171 (CC).

¹⁴ *Ibid* para 43.

the judgment on the return of Z in circumstances where his mother is refused entry into the UK. In view of Z's young age, it is overwhelmingly probable that he will have no recollection of life in the UK.

[28] Since the father elected to request an enforcement of the order, the onus was on him to show on a balance of probabilities that the enforcement serves the best interests of Z. He has failed to do so.

[29] In *S v M (Centre for Child Law as Amicus Curiae)*¹⁵ Sachs J pointed out the following in relation to the best interests of a child:

'These problems cannot be denied. Yet this court has recognised that it is precisely the contextual nature and inherent flexibility of s 28 that constitutes the source of its strength. Thus, in *Fitzpatrick* this court held that the best-interests principle has "never been given exhaustive content", but that "(i)t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child". Furthermore "(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation". Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.'¹⁶ (Footnotes omitted, my emphasis.)

[30] In my view, the only decisive factor in this application is what is in the best interests of Z. And deciding on what is in a child's best interests, is a factual question, and accordingly the outcome is dependent on the facts of each case. I have not been persuaded on the papers that Z's return to the UK without his mother having a right to enter the country with him would be in his best interests. It is difficult to resist the conclusion that Z has at least settled in the short-term and that he is doing well in his current environment.

¹⁵ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

¹⁶ *Ibid* para 24.

[31] Given all of the aforesaid facts I am of the view that it would be in the best interests of Z to remain with his mother in South Africa. It is also necessary that the Family Advocate should be directed to conduct an enquiry into the most appropriate method of ensuring that he maintains contact with his father.

[32] It follows from what is set out hereinabove that the father's application cannot succeed.

Costs

[33] The issue of costs of the application remains to be decided. This is a difficult task since the matter was not dealt with expeditiously. The delay of hearing the application so inevitably caused prejudice to the parties including Z. In my view this matter should have been dealt with on a preferential basis since it involved the interests of a young child. The father is, however, not without blame since the record became prolix, and various annexures have been duplicated.¹⁷ Most disturbing is that the father did not direct this court to the exclusion of these duplicated pages as per the practice note filed by his counsel. Instead, it was stated that all the papers in the seven bundles should be read for the determination of the matter. The aforesaid unhelpful conduct of the father has put not only the mother, but also this court to considerable effort and expense in reading all of the papers. In my view, costs should follow the result given all of the circumstances of this case.

Counter-application

[34] This brings me to the counter-application. There has been no serious opposition to the mother's counter-application. No reasons have been placed before me why the father cannot visit Z in South Africa and exercise contact with him as proposed. Accordingly, it succeeds. Regarding the costs, I am not persuaded on the facts that the father should be penalised by an immediate costs order. Costs regarding the counter-application should be reserved for the court hearing the divorce action.

¹⁷ See the repetition of the replying affidavit at 362-399 as well as the reply filed at 523-560 of the International Child Abduction Application. See the Cafcass report that has been duplicated. Also see at 641-676 which are duplications of the Family Advocate's report.

Order

[35] The following order shall issue:

Main application

1. The application is dismissed with costs, such costs to include costs of senior counsel.

Counter-application

1. Pending the final determination of divorce proceedings to be instituted by the mother against the father in this Honourable Court:
 - (a) The minor child, Z, a boy, born on 5 August 2017, shall reside with the mother in South Africa.
 - (b) The father shall be entitled to have contact with Z whenever he is in South Africa, but not for more than four consecutive days and nights at a time, and if he is in South Africa for more than four days and nights at any given time, then there shall be a break of two days and two nights which Z shall spend with the mother, and thereafter repeated four days and four nights with the father until his departure from the Republic of South Africa.
2. Costs of the counter-application are reserved for the court hearing the divorce action.

Steyn J

APPEARANCES

Counsel for the applicant	:	Ms U Lennard
Instructed by	:	The Law Offices of Karen Olivier Hampden House 3 Hamoden Road Morningside
Counsel for the respondent	:	Mr B Skinner SC
Instructed by	:	Mahamed Hassim Attorney 134 Silverton Road Musgrave Durban

Ref: Mr Hassim/dr/S120/18

Date of Hearing : 02 February 2022

Date of Judgment : 18 February 2022