

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: B6773/23

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 4 January 2024

In the matter between:

DM

Applicant

and

CHP

Respondent

JUDGMENT

DE VOS AJ

- [1] The applicant sought urgent relief seeking to restore his contact rights with his 5-year-old daughter. The applicant had been exercising these rights in terms of an agreement entered into between the parties. The agreement provided a 50%/50% sharing of contract rights. The cause of the urgent application, is that the respondent informed the applicant that his contract rights, would now be whittled down to 4 hours of supervised contact 550 km away from his home every second week.
- [2] The case, stripped to its core, is a request to restore the status quo ante and for the parties to continue to exercise their parental rights and responsibilities in terms of their agreement, pending a determination in the ordinary course of what is in the best interests of the child – after an investigation by the Family Advocate.

[3] On 26 December 2023, I granted an order in the following terms –

- i) The Applicant and the Respondent [hereinafter collectively referred to as “*the parties*”] retain full parental responsibilities and rights in respect of the minor child, namely C[...] Z[...] M[...], born on 20 April 2018 [hereinafter referred to as “C[...]”], as provided for and envisaged in Sections 19(1) and 21(1) of the Children’s Act, No 38 of 2005, as amended [hereinafter referred to as “*the Act*”];
- ii) The Family Advocate is requested to conduct an investigation into C[...]’s best interests, with specific reference to her primary care, place of residence, the scope, ambit and extent in terms of which the Applicant should maintain contact with her, as provided for and envisaged in Section 18(2)(a) and (b) of the Act, and to provide this Court with a report and recommendation as soon as practical possible;
- iii) Pending the Family Advocate’s investigation and report, as provided for and envisaged in paragraph 2 *supra*:
 - (1) the *status quo* in respect of the Applicant’s parental responsibilities and rights to maintain contact with C[...] is restored *ante omnia* in accordance with the express agreement entered into and concluded (reached) between the parties on 24 January 2023 and
 - (2) to the extent the removal of C[...] from the Court’s jurisdiction interferences with the Applicant’s parental responsibilities and rights, the Respondent is ordered to return C[...] to this Court’s area of jurisdiction in order to ensure compliance with the express agreement of 24 January 2023.
- iv) The costs of this application are reserved for determination after receipt of the Family Advocate’s report and recommendation.

[4] These are the reasons for the order.

[5] The applicant and respondent have a five-year-old daughter. They were never married. When their relationship ended, they decided together how they would care for their daughter. They entered into an agreement on 24 January 2023 which regulated their relationship with their child. Both parties signed the agreement. The agreement provided that both parties have full parental rights and responsibilities, as provided for and envisaged in Section 19(1) and 21(1) of the Children's Act, 38 of 2005. The contact rights between the parties meant the applicant exercised the following contact rights:

- a) Week 1: Every Wednesday and Thursday, including sleepovers (2 nights); and
- b) Week 2: - Every Wednesday, Thursday, Friday, Saturday, and Sunday, including sleepovers (5 nights).

[6] The parties exercised these shared (50/50) contact rights on the advice of Mrs Hetzel, the parties' appointed family mediator. The agreement further provided that "both parties are expected to consider each other's voice and opinion in the decision-making involving major events of the child's life" and the "goal is to eventually have a co-living agreement with the child where she lives one week with the mother and the next week at the father's residence." The clear intention of this agreement is that the child would spend as much time as possible, equally, with both of her parents.

[7] The respondent has not disputed the agreement or that the parties exercised their rights in terms of this agreement. The agreement created the status quo.

[8] This was ruptured on 18 October 2023 when the respondent wrote to the applicant that she had moved the child from the court's jurisdiction and relocated together with the child to M[...] to be with her new partner. The letter further conveyed that the applicant would only be entitled to restricted and supervised contact with the child going forward. The respondent did not believe the agreement was working anymore and, therefore, decided to terminate the agreement.

- [9] The impact of the respondent's letter of 18 October 2023 is that the applicant has to travel 550kms to see his child for four hours on a supervised basis in public and then drive back 550kms, where, up to now, the applicant has exercised 50% of contact rights.
- [10] The applicant approached the Court on an urgent basis to essentially restore the status quo ante. The applicant argues that he is being effectively alienated from his child. This he contends, cannot be in her best interests. The applicant relied on the impact of this move and the lack of contact with her one parent as being enough to draw this Court's urgent attention.
- [11] The respondent provides no factual basis for stating that this matter is not urgent. The respondent provides no example of substantial redress in due course, that the applicant can obtain. In fact, the respondent criticises the applicant for not having launched the proceedings in the Polokwane High Court on an urgent basis. Inherent in this criticism is a dispute as to the forum, but an acceptance of the urgency of the matter.
- [12] The urgency arises as the best interest of the child is being invoked. Not only is a child being removed to another jurisdiction, but it is being done in circumstances where the life she has known to date, seeing both parents equally, is immediately altered. A child's contact with one parent, which was enjoyed untrammelled 50% of the time, will come to a halt if this relief is not granted. Relief at a later stage will not be substantial as the relationship will have been altered at that stage, and a new status quo would have been created. The Court also notes similar matters have been dealt with on an urgent basis.¹
- [13] The issue of urgency is not substantively opposed; the rights of a 5-year-old child are at the centre of the dispute and the child will be effectively deprived of the care of one of her parents. In these circumstances, the Court concluded that the matter is

¹ P.M.N v N.N (061732/2022) [2022] ZAGPJHC 1044 (29 December 2022)

urgent to the extent that there is an interference with the rights of the applicant, which he had exercised prior to 18 October 2023.

[14] The applicant, however, sought relief beyond that necessary to return to the status quo. The applicant sought relief relating to, for example, his financial contribution to maintenance. No basis has been provided as to why this ought to be decided in the urgent Court.

[15] The Court, therefore, concludes that the main relief sought – to restore a status quo ante – is urgent. However, the Court can find no basis to conclude that the remainder of the relief cannot be dealt with in the ordinary course. Particularly as the relief the applicant seeks is interim relief pending the outcome of a Family Advocate's investigation.

Change to contact regime

[16] The central controversy is whether the respondent can unilaterally change the contact regime which has been in place so far. The answer is no for several reasons.

[17] The parties have entered into an agreement as to their parental rights. The respondent has not disputed the agreement, her signature, its terms or that it was regulating the relationship prior to the decision to move to M[...]. In terms of the agreement, the applicant is entitled to 50% contact. The move to M[...] deprives the applicant of rights in terms of the agreement.

[18] Aside from the contractual regime at play, there is a statutory framework which regulates the situation. The framework within which this dispute is to be resolved is section 31(2) of the Children's Act. The section provides that before a person holding parental responsibilities and rights in respect of a child takes any decision which is likely to change significantly or have a significant adverse effect on the co-holder's exercise of parental responsibilities, they must give consideration to any views and wishes expressed by any co-holder of parental responsibilities.

- [19] There can be no debate that to move a child 550 km away and restrict access to supervised contact for 4 hours every second weekend in a public place, from a previous 50% contact regime, is a decision which significantly changes and adversely affects the applicant's exercise of parental responsibilities.
- [20] The respondent, at best, gave the applicant notice of her intention to relocate through correspondence of July 2023. The correspondence was sent to the mediator, not to the applicant. In any event, the correspondence only indicates an intention to relocate at some stage – possibly.² The decision has been presented as a *fait accompli*. This is the high-water mark of the respondent's compliance with section 31(2) of the Children's Act. It is no real compliance. The case law has indicated that a 50% holder of parental rights has the right to be consulted before the decision is taken.³ There was no such consultation. There was no consideration of the applicant's views. The applicant was presented with a letter informing him of the decision.
- [21] Not only is the respondent's intended conduct a breach of the agreement and section 31(2), but it is one which introduces instability and a massive change to the child's life. The Court, therefore, wishes to enforce the agreement, not purely for the sake of *pacta sunt servanda*, but also because stability and access to both parents is, in fact, in the best interest of the child at this stage. The best interest of the child, the legislative framework and the enforcement of the contract, in these circumstances, dovetail.
- [22] Our courts have expressed itself on the need for stability in children's lives. Our case law has recognised the importance of consistency in children's lives – particularly those as young as the parties' daughter.⁴ Children's existing environment should not readily be disturbed, and any unnecessary moves should be discouraged and avoided on the grounds of security and stability.⁵ A stable routine

² The specific allegation is: "Ek is van plan om moontlik soontoe te verhuis op i stadium en ek wil C[...] daar in die skool sit, dit is 550km vanaf Pretoria so sy gaan nie haar Pa dan kan sien elke 4de dag nie maar wel vakansies".

³ JKS v DS 2023 JOL 60859 (ML) per Bam AJ

⁴ AS v CHPS 2022 JDR 0623 (GJ)

⁵ Mekgwe v Letlatsa 2018 JDR 1959 (FB) p 30

is universally determined to be in the interests of children, especially those of a young age.⁶

[23] Of course, the status quo is not hallowed ground, and a Court can interfere on an urgent basis to change the status quo on proper grounds. The Court does not assume, automatically that the return to the status quo sought by the applicant is appropriate purely because it was the status quo. Each case falls to be decided on its own particular facts. In the context of relocation applications, the following penchant remarks are apposite:

‘...It would likewise be incorrect to categorically hold that because it is generally in the best interests of a child to form a physical bond with, and experience the love, affection and care of both parents, that a parent who intends to relocate with the children to a different town, or country, is precluded from relocating ...’⁷

[24] The respondent contends that the status quo, as provided for in the agreement, no longer works. The reason is that the respondent alleges that the applicant is aggressive, even towards the child’s teachers – to the extent that there have been express decisions by the School to bar him from entering the school. These allegations are alarming. The Court also spent time on the allegations that the child is not responding well to her interactions with the applicant.

[25] These are not issues that will be easily resolved; they, however, cannot be resolved by avoiding the agreement, the Children’s Act or an investigation by an independent person into the child’s best interest. There needs to be a proper assessment of what the child needs in these circumstances. That is what the applicant asks for – to return to the status quo pending an investigation to be done by the Family Advocate.

[26] The Court has not been provided with any assistance in understanding whether the change in contact regime has been considered through the lens of the child’s best interest. The respondent has not taken the court into her confidence and explained if

⁶ JO v AO 2017 JDR 1691 (GJ)

⁷ MK v MC (15986/2016) [2018] ZAGPJHC 9 (29 January 2018) para 37

there had been any previous discussions between the parties as to the proposed change; whether she understood what an impact such a huge life decision would have on the child; or that she had considered, let alone outlined, the advantages in general involved in the change. Our jurisprudence makes it clear that our courts are extremely reluctant to interfere with the wishes of a parent who bears the primary responsibility of a party's minor child. However, the facts presented to this Court show that the responsibilities are shared, and the Court has not, at this stage, been provided with the type of consideration that would precede such a change.

The respondent's case

[27] The respondent's case was that the situation cannot be that the respondent is not allowed to move. Of course, this is correct. The Court cannot restrict the respondent's freedom of movement. Satchwell J held in *LW v DB*⁸ -

"Regrettably that is the nature of divorce or separation of parenting co-habitation that does not endure throughout a child's life. That is the fate of a child whose parents do not live together.

"The solution of our courts can never be to order that separated parents must live at close proximity to each other in order that each parent lives in close proximity to a child. Our courts have not been appointed the guardians of adults and parents are not prisoners of our courts."

[28] However, this Court is not seized with a final relocation application. The Court is being asked, on an urgent basis, to consider whether the status quo ante should be restored.

[29] The respondent's case is that as the custodial parent, decisions can be made unilaterally. The respondent's counsel placed reliance on section 30(2) of the Children's Act –

⁸ 2015 JDR 2617 (GJ) paras 51 and 52

“30(2) When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co- holders may act without the consent of the other co-holder or holders when exercising those responsibilities and rights, except where this Act, and any other law or an order of court provides otherwise.”

[30] It is unclear on what basis reliance on this authority is made. The respondent concedes that an agreement regulated the relationship – and that agreement provided 50/50% contact and made no reference to primary care. The factual premise of the assertion is, therefore, absent.

[31] Premised on this assumption the respondent relied on the Full Bench decision in *J v J*⁹ where a non-custodial parent objected to the custodial parent's decision regarding which school their child was to attend. The Court held that in these circumstances, there was no need to consider the non-custodial parent's views on which school the child should attend.

[32] These are not the facts before this Court. In *J v J*, the issue at stake was which school the child was to attend, not an unilateral decision which would deprive one parent of 50% of contact rights exercised thus far. In any event, in *J v J* the parties had entered into a different agreement, one that provided that the custodial parent could decide which school the child attended if the non-custodial parent did not comply with a condition. The non-custodial parent did not comply with the condition and, therefore, in terms of the contract, had forfeited the right to have a say in which school the child attends.

[33] The parties' agreement, in this case, provided for a different relationship. On this basis alone, the case is distinguishable. Aside from the differing agreements, the rights at play are also vastly different. In *J v J* the issue was which school the child attended. In this case, the change involves being deprived of access to one of her parents on a regular basis.

⁹ 2008 (6) SA 30 (C)

[34] The respondent's concern is that she gets anxious when she has to see the applicant and that depriving the child of access to her father would be in her best interest. I have been presented with no objective facts that permit me to draw this conclusion. The best evidence presented by the respondent is a subjective conclusion drawn from her hearsay records of what her child has said to her. This is not without weight. However, before depriving a child of access to her father and bringing a large scale change to her life, the Court requires more. The solution is to get the Family Advocate to investigate the issue and report back on what is in the best interest of the child in these circumstances.

[35] If the outcome of that independent investigation is that the child should not be in contact with the applicant – then the agreement can be amended, and the respondent can take the necessary steps. However, the respondent cannot do what she has done here, which is to unilaterally decide to alter her child's access to her father in breach of an agreement and section 31(2) of the Children's Act.

Dispute of fact

[36] There is a dispute of fact on the papers regarding whether the respondent has, in fact, already moved to M[...]. The applicant alleges that the respondent has not moved to M[...]. The respondent's position is that she has already moved, and consequently, this Court has no jurisdiction. Whether that is legally correct is debatable, but I do not have to make that legal finding, as the facts do not support the respondent's assertion.

[37] The applicant presents objective evidence in the form of photos showing that the child's bedding and all her toys and clothes are still in the home in Pretoria, that the lease agreement for the home in Pretoria has been extended, that all the respondent's furniture, pot plants and electric appliances (such as the Defy fridge, KIC chest freezer, curtains, cutlery, crockery etc.) and that the respondent's car is still in Pretoria. The applicant has alleged that the respondent has employed a new domestic assistant after 18 October 2023 – the date she allegedly left the home. This allegation is not denied.

[38] The respondent has an explanation for the lease – that her partner's mother may use it; she also has an explanation for the car – that she lent the car to a neighbour. There, however, appears not to be only a thin explanation as to why the child's bedding and toys are still in the home in Pretoria. There is no dispute as to the appointment of a new housekeeper. And a meek statement that only some of the appliances have remained in Pretoria.

[39] The respondent contends that her say-so is sufficient on the Plascon-Evans rule for the Court to accept her version. That is not correct. In matters involving children, the Court is not to apply the Plascon-Evans rule without nuance. The Court would, in different circumstances accept the version of the respondent. However, as the rights of a child are involved, the best interests of the child require the Court to play a different role.

[40] In a case such as this, which is not an ordinarily adversarial matter, a different approach is to be followed. In the matter of *RC v HSC*¹⁰ the Court held that a court should, where a child's welfare is at stake, be very slow to determine facts by way of the usual opposed motion approach.¹¹ As in *RC v HSC*, the relief being sought here is interim. The best interests of the child principle is a flexible standard and should not be approached in a formalistic manner. In fact, the Supreme Court of Appeal has cautioned that this type of litigation is 'not of the ordinary civil kind. It is not adversarial.'¹² Howie JA in *B v S*¹³ held :

'In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially determined for the first time — in other words where there is no existing Court order in place — there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may

¹⁰ 2023 (4) SA 231 (GJ)

¹¹ *Id* at para 37

¹² *Id* at para 38

¹³ *B v S* 1995 (3) SA 571 at 584

well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation, and the Court can call evidence *mero motu*.”

[41] This is exactly such a case.

[42] In addition, as the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child. When a court sits as upper guardian in a custody matter, it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by “procedural strictures or by the limitations of the evidence presented”. In *AD and DD v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*¹⁴ the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be 'held to ransom for the sake of legal niceties' and held that in the case before it the best interests of the child 'should not be mechanically sacrificed on the altar of jurisdictional formalism'.

[43] I must, therefore, do more than accept the respondent's version on an application of the Plascon-Evans rule; as the interest of a child is at play, I must investigate the issue closer.

[44] I am not persuaded that the respondent has, in fact, moved to M[...]. Proof of this, in the form of invoices for the move, photos or toll money, would have been helpful. There is no objective contemporaneous proof of the move – save for the respondent's say so. On the other hand, we have the objective elements which constitute the respondent's life in Pretoria – her lease agreement, home, car and child's belongings – all still here. The affidavit from the caretaker of the building where they lived indicates that he has received no notice of moving out and a new housekeeper has been appointed by the respondent.

¹⁴ 2008 (6) SA 38 (CC)

[45] The Court takes an approach to the facts which the applicant has alleged, which are bolstered by objective evidence, considers the absence of objective evidence from the respondent and concludes that the respondent has, in fact, not moved to M[...] yet.

[46] It does appear on the respondent's version that she has, throughout the year, often taken the child to M[...] and then brought her back to respect the agreement. To the extent that this continues to happen, the Court does not see the harm in this, as long as the applicant's rights in the agreement and the status quo are not interfered with. It is with this in mind that the Court granted the limited order in para (iii)(2) of the order.

Costs

[47] As to the issue of costs, the general rule is that costs must follow the result. However, in this case, the parties are starting down a long path of litigation. In order to avoid adding unnecessary and additional acrimony to that path, the Court decided to reserve the costs of the application.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	FW Botes SC
Instructed by:	Schoemans Attorneys
Counsel for the respondent:	L van der Westhuizen
Instructed by:	STRYDOM BREDEKAMP ATTORNEYS

Date of the hearing:	14 December 2023
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Date of judgment:

4 January 2023