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

Case No. 035901/2023

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED:

Date: 17/01/2024

Signature:

In the matter between

T[...] R[...]

Applicant

and

S[...] M[...]

Respondent

JUDGMENT

MAHOMED AJ

1. During 2009 to 2012 the parties were in a relationship however they never married. They had a daughter together; she is now 12 years old. The minor child attends a private school in Johannesburg and is a top performer¹ at school. It is common cause that the applicant, her mother, has been solely responsible for her care. The respondent has exercised contact with the minor child “whenever he could.”² The minor child lives with the applicant, her husband, and their child, her 4 year old half-sister.

¹ Caselines 02-35

² Caselines 03-10 para 27.2

The applicant has secured an executive position in an international organisation for global change, she will be based in Nairobi, Kenya.³ She and her husband have decided to relocate, with their family for that purpose. The applicant requires the respondent's consent⁴ to relocate with their minor child, he has withheld the consent and opposes this application. The applicant has approached the court for an order dispensing with his consent to relocation whilst still preserving some of his parental rights and duties.

THE APPLICANT'S SUBMISSIONS

2. Advocate Van der Walt appeared for the applicant and submitted that the respondent's opposition to the application is not bona fide. She argued that the respondent has failed to demonstrate with any substantiation, the reasons he withholds consent to the minor child's relocation to Kenya. The Constitution provides that the interest of the minor child is paramount.⁵ The respondent fails to set out why it is not in her interest to relocate to Kenya. He makes a bald allegation that he fears for her safety, according to him the region is known for terrorist activity, nothing more is before the court in support of this concern.
3. Counsel proffered that in March 2023, during discussions with the applicant the respondent agreed to her relocating on condition that the applicant, changed the minor child's surname to his, (she bears her mother's surname), also on condition that when the child is in high school that she relocate to Dubai to live with him when he is granted a residence permit, that she spends her school holidays with him, at his cost and that a parenting plan be in place and made an order of court,⁶ before she leaves.

³ Caselines 02-20

⁴ S18(3) Act 38 of 2005

⁵ Section XXX Act 108 of 1966

⁶ Caselines 02-28

4. It was argued that the conditions are impractical and that the respondent is simply placing obstacles in the applicant's path. The respondent fails to provide any explanations for the conditions as being in the best interest of the child. The respondent has never been an active parent in his child's life, his contact with her has been sporadic often he needed to be reminded of his duty as a parent.⁷ The evidence is that in the recent past the respondent exercised contact on only five occasions in 2022 and once only in the 2023.
5. The demand that the minor is to join him in Dubai in the future, is unreasonable as the minor child has lived only with the applicant all her life, she has never been invited to the usual sleepover and visits, she does not know his family. The respondent fails to lay a basis for this disruption in the future. Counsel argued further that a change in name is entirely disruptive of the minor child's life, at twelve years old and all her official documentation bears her current surname which she shares with her mother. Counsel reiterated that this is the first time in the minor child's 12 years that the respondent demands a change in her name.
6. The applicant since 2021 has had to carry the full financial responsibility for the minor child, as the respondent ceased to pay any maintenance for the child.⁸ He alleged that his business has not been performing since the pandemic, however in September 2023, as the litigation was in progress, he paid over a sum of R16 000 toward her school fees.
7. Ms van der Walt argued that the applicant has supported her minor child in every way since birth and that the respondent has never been involved in the minor child's school or social life. The respondent has been at the minor child's school only when she was in grade R and has never been actively involved in her growth and development, in her academic life or her extra-curricular activities. The minor child participates in five

⁷ **Reminder of parenting role**

⁸ Caselines 04-12, 04-24 to 026

different sports, as well as the choir and she plays the piano, the respondent has never attended at any of the minor child's events. He has not spent a school holiday or Christmas with her.⁹ In July 2023, he requested to take her on holiday with his family and the applicant sent her to her father. It is not unusual for the respondent to be absent from her life for months on end, by his choice.

8. It was contended that the respondent's complaint that the applicant seeks to replace him as the minor child's father with her husband is without foundation, it is the respondent who has failed to assume his role as her father. The applicant's husband has been a stable figure in the minor child's life over the past eight years and together with their child, the minor child's half-sister, they are a well-established and well-adjusted family unit. There is every good reason for her to continue to live with her mother and the family in Kenya. Counsel argued that respondent complains but offers no practical alternatives.
9. Counsel proffered that the minor child will be enrolled at an international school in Nairobi, and her registration is pending the determination of this matter as the school requires the consent of both parents. She will receive a similar standard of education to her current school. The applicant will be working a hybrid schedule in terms of which she is expected to be at her workplace for only 60% of her time and therefor she will be available to the child. The minor child has known her stepfather for over eight years and her half-sister is four years old. They share a special bond between them. Her husband works from home so the minor child will always have an adult available to support her needs. The family will live in an apartment which has been leased¹⁰ and has 24 hour security services.

⁹ Caselines 04-9 and -43

¹⁰ Caselines 04-31

10. The applicant discussed her plans to relocate with the respondent early in March 2023 and after several attempts at mediation initially on her own and thereafter with the assistance of his legal representative, she was unsuccessful and she was therefore forced to launch this application, to ensure that the minor child is duly enrolled at her school for the next academic year.
11. Ms van der Walt submitted that his demands for a Family advocate report and the court to hear the voice of the child are an example of the obstructive and delaying tactics he adopts. The respondent failed to raise those issues in the answering papers, so that the applicant could have considered them before setting this matter down. It was submitted that the respondent fails to lay any basis for the new disputes raised and it is not a statutory requirement to file a report by the family advocate, the application has been served on the Family Advocate and no response was received.
12. Counsel proffered that the minor child has never refused to relocate with the family and as upper guardian of all minors this court is empowered to grant the order sought, it is not bound by an expert report, the court is enjoined to bring its own mind to bear on the matter.
13. Counsel submitted that a punitive cost order is appropriate in that the respondent has no bona fide, genuine dispute and this was raised with him early on when the matter commenced. He ignored the applicant's attorneys attempts to mediate this matter and was warned of the instructions to apply for a punitive costs order. Counsel reiterated that the respondent failed to inform this court as to why it is not in the best interest of the minor child to relocate with her family to Kenya. He presents arguments that pertain to himself only, which are themselves without basis.

RESPONDENT'S SUBMISSIONS

14. Advocate Mlilo appeared for the respondent and submitted on points of procedures; the applicant failed to make out her case in her founding papers. Details of the relocation to Kenya were apparent only in her replying affidavit. It was further contended that the matter is not ripe for hearing since the applicant failed to file a report of the family advocate and without this the court cannot determine if the relocation is in the child's best interest. Furthermore, the parties ought to have resolved the dispute at a mediation rather than have approached this court.
15. Counsel submitted that the applicant is incorrect when she states that the respondent has never been active in the minor child's life, when on her version she confirmed that he contributed to her maintenance before 2019, the respondent is self-employed, he owned an events business which suffered losses due to the Covid pandemic. He always intended to pay for her maintenance and has called upon the applicant to render an account for the amount he owes her. The applicant projects an image of a delinquent father, which is denied. He will pay over the monies as soon as she retracts her statements and it is denied that he neglects his parental duties.
16. It was proffered he is active in her life, in July 2023, he paid over R16 000 toward the minor's school fees and soon after he had taken her on a holiday to Dubai with his family, when she travelled in business class, and she stayed at an expensive hotel. He paid for all her expenses.
17. Counsel submitted that given the parties' opposing views about his involvement in the minor child's life, the court ought to hear her voice, she is best placed to resolve the dispute, mindful of the fact that this application is about her. A report from the Family Advocate would have assisted the court, without it this court cannot determine if the relocation is in her best interest. It was further submitted that the matter is not ripe

for hearing, the applicant side steps a very important procedure for the determination of the best interests of the minor child and the respondent denies making demands, he merely sought to negotiate the change of name and the minor to join him in Dubai when she is older and at a secondary school.

18. Counsel argued that if the child were to relocate, there is no plan in place about the respondent's access to his minor child. The respondent fears that the applicant is using her husband to replace him as a parent and has in the past denied the respondent opportunities to bond with his daughter. Furthermore, he is concerned for the minor child's safety as he understands that the female child is at greater risk in Kenya to acts of terrorism.
19. The respondent denied that his contact with his daughter is sporadic, he contends that they share a close bond, and according to him she is well integrated into his own family.¹¹
20. In response to the courts question, counsel argued that the family advocate's report is necessary because, *"what would happen to the respondent when the child is residing in Kenya , given that he has a relationship with the minor child."* In closing, counsel submitted if the child is to move, there must be agreement between the parties as to how the respondent would exercise his rights of contact with her.
21. In reply Ms Van der Walt submitted the respondent has failed to demonstrate to this court any regular contact with the minor child and conflates the aspect of his contact with the payment of maintenance, two different considerations, she proffered that he has failed in both duties toward the minor child.

¹¹ Caselines 03-5 par 19.4

22. It was argued the arguments regarding hearing the voice of the child and the filing of a report by a Family Advocate, stand to be struck as they appear for the first time in the heads and besides no genuine basis has been laid for them. It was submitted that the application was served on the family advocate¹², in early November 2023 and in the absence of any reasons as to why it is not in the best interest of the minor child for her to relocate to Kenya and to live with the only family she knows, there is no real or genuine dispute presented. Moreover, nothing prevented the respondent from obtaining a report, he fails to because there is no dispute he can substantiate. Counsel submitted that it is common cause that the applicant is bona fides in relocating to Kenya and also common cause that she is the minor child's sole carer, it cannot be unreasonable if she is seeking to relocate to improve her earnings to meet those obligations and that her child move with her.
23. Counsel submitted his inquiry on her terms and conditions of employment is another obstructive and delay tactic he has known of the relocation to pursue better opportunities for several months when he could have raised his concerns about her terms of employment. She has been a single parent and has excelled at it, there are no facts on his bond with his child nor why it is not in her best interest to relocate with her family to Kenya.

JUDGMENT

The Law

24. In terms of section 18(1) of the Children's Act,¹³

"a person may have either full or specific parental responsibilities and rights in respect of a child."

25. Section 18(3) provides:

¹² Caselines 08-1

¹³ 38 of 2005

“Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must:-

(a) Administer and safeguard the child’s property ...

(b) Give or refuse any consent required by law in respect of the child, including-

(i) Consent to the child’s marriage.

(ii) ...

(iii) Consent to the child’s departure or removal from the Republic.

(iv) ...

(v) ... “

26. Having regard to the correspondences between the parties¹⁴ and Advocate Mlilo’s submissions in closing, he is concerned for, *“what will happen to the respondent, when the minor child relocates to Kenya.”* His counsel submitted *“a proper plan must be in place.”*

27. The respondent conceded that the applicant is bona fide in wanting to relocate to Kenya, but failed in his papers or before this court to present any evidence as to why it is not in the best interest of the minor child to relocate to Kenya and why the respondent withholds his consent. It is fair to state that the respondent does not have a problem with the minor

¹⁴ Caseines 02-28

child's relocating to Kenya¹⁵. It is not disputed that the applicant has been the sole carer of the minor child for most of her life.¹⁶

28. The respondent chose to exercise his contact in his way, "when he could." There is no evidence before me, except for a bald allegation, that the applicant does not allow the child an opportunity to bond with him. On the contrary, the evidence is that the applicant has on several occasions attempted to get the respondent involved in the child's life and has failed. There is no evidence that he even attempted to be involved in her academic and sporting life. It is fair to conclude that he determined the frequency and nature of his contact with his minor child and that it was limited.
29. I agree with Advocate van der Walt; the respondent conflates the aspect of maintenance for the minor child with the aspect of contact with her. The court as upper guardian must consider, based on the evidence, whether her relocation is in her best interest. In doing so, the court may consider, the child's best interest, the impact of the relocation on the relocating parent, the impact on the non-relocating parent and the relationship between the parties and the child.
30. Section 28(2) of the Constitution Act¹⁷ provides:
- "A child's best interests are of paramount importance in every matter concerning the child."*
31. It is not disputed that the minor child and her father interact occasionally and the respondent pleads without details on their relationship. It is not disputed that the respondent would disappear for lengthy periods without contacting the minor child.

¹⁵ See note 14

¹⁶ Caselines 02-22

¹⁷ 108 of 1996

32. There is no evidence before me that the minor child is unhappy or unwilling to move to Kenya with her family, except when at the end of the proceedings, when invited to suggest suitable contact, it was proffered that the minor does not want to go, there is no explanation why he failed to approach the Family Advocate to investigate this and recommend suitable contact with her. Having regard to her performance at school and her participation in a variety of sporting and social activities, she is a well-adjusted young lady securely on her way to adulthood. The evidence is that she attends a private school, is a high achiever, she must be well supported by her family. There is no reason to doubt that the support and love will continue when she moves to Kenya. The evidence is that she will enjoy a similar level of education, her home is in a secured apartment block, her mother will be working in a hybrid arrangement, when she will spend 40% of her time at home and will be available to her. Her step father, whom she has lived with for over 8 years works from home, she will always have an adult person about her home. She and her half-sister, share a special bond, and her immediate environment will remain the same. The minor child enjoys good health and good relations with her step father and sister. It is fair to conclude that both adults provide her with a home that supports her overall wellbeing.
33. The respondent's insistence on the report from a family advocate is noted, on his version the office would have determined his rights of access when the minor child is in Kenya, however he could have obtained the report himself and confirmed his contact rights. In my view, having regard to the relief sought and the evidence before me, the only logical recommendation, could be that the respondent exercise his contact rights during the minor child's school holidays. It is noteworthy

that in correspondence with the applicant he suggested the same arrangement, he offered to pay for her travel costs.¹⁸

34. In the correspondences between the parties, the objective evidence, it is clear he failed to exercise regular contact with the minor child, by his choice. I am of the view that her moving away will not materially impact on both their lives. The digital age offers several opportunities for him to continue to be her parent even from a distance.
35. The respondent conceded that he was unable to pay even his half share of maintenance for his child because his business has struggled since the pandemic. The applicant was forced to bear the full financial obligations over the past 5 years. He cannot dispute that the applicant has carried the entire duty to care for their child.
36. In Jackson v Jackson¹⁹ the SCA, stated

“generally, the court will not likely refuse leave to remove a minor child if the custodian parent’s decision to emigrate is shown to be bona fide and reasonable. In most cases even if the non-custodial parent’s rights are materially affected, the best interests of children are served if custodian parents are not thwarted in his or her endeavour to emigrate pursuant to a decision rationally and genuinely taken.”

37. The applicant cannot be faulted for seeking to improve her career and earnings, she has a life to pursue and there is nothing to suggest that she will not continue her commitment to the minor child. She has secured employment and has in the past managed to support her minor child’s needs. There is very scant evidence before this court on the

¹⁸ Caselines 04-22

¹⁹ 2002 (2) SA 303 SCA 318 D-I

respondent's reliability or commitment to the minor child, he is unlikely to suffer any material loss, if she emigrated to Kenya. The court notes the respondent's good intentions, to pay maintenance, however on the facts before me, the applicant has never been able to rely on him. It appears he has his priorities mixed up, he fails to pay maintenance because he cannot afford it, but he manages to take the minor child and his family on a luxury holiday to Dubai, on business class travel. He also refers to "foreign investments" in his correspondences to the applicant. It is noteworthy that he has applied for permanent residency in Dubai, which must itself cost a princely sum. It is noteworthy that in June 2023 he paid only R16 000 toward her school fees, toward an annual cost of R150 000.

38. I am not persuaded that the respondent has any good reason to refuse to grant the permission for the minor child to relocate, it is common cause that the applicant is bona fide in her decision to relocate. She must be supported to meet all her financial responsibilities in respect of her minor child and in advancing her career.

39. Section 38(5) of the Children's Act provides:

"unless a competent court orders, otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3) (c).

40. I am of the view that the respondent has no reason to withhold his consent and that the law must assist her in that regard, he appears to want to place obstacles in the path of the progress of his former partner ignoring the interest of the minor child.

41. In *J v J*,²⁰ the court held that the law permits parents acting independently in certain instances for as long as there is consideration for the other party's view, their "agreement" is not necessary. In *Godbeer v*

²⁰ 2008 (6) SA 20 C headnote

Godbeer²¹ the court stated *“if a party has carefully considered relocation, then the court is not to interfere with the decision especially by a primary caregiver.”*

42. The applicant is the primary caregiver, she has secured an executive position in an international corporation, where she has negotiated practical working conditions that supports her continued care for the minor child, she has leased an apartment in a secure block, has identified and negotiated placement at a suitable school for the minor child, has obtained a travel pass within Kenya and having commenced work there she is familiar with the lifestyle in Kenya. The evidence is that she is awaiting the issue of visas for her family. I am persuaded that she has sufficiently researched her relocation with her minor child in mind. I satisfied that the minor child will excel at her new life in Kenya, her stepfather has decided to relocate with her stepsister and so the family is together. The minor child's family unit remains intact, and her mother continues to develop her career, which can only benefit the minor child as they navigate life together.

43. In F v F²² the court held,

“from a constitutional perspective the rights of the custodian parent to pursue his or her own life or career involved fundamental rights to dignity privacy and freedom of movement. Thwarting a custodian parent in the exercise of those rights may well have a severe impact on the welfare of the child involved, so a refusal to allow a custodian parent to emigrate the child might impact adversely on the custodian parent and in turn on the child. For that reason, the court had properly to consider the impact of a refusal of an application for leave to emigrate with the child on the custodian parent insofar as it

²¹ 2000 (3) SA 976 (W)

²² Insert citation F v F

might have an adverse effect on him or her, and in turn, on the child”

44. The minor child on objective facts appears to be a stable well-rounded and happy young girl, who is on the cusp of adolescence. There is nothing to suggest she would not adapt to her new home together with the rest of her family.
45. The respondents must take responsibility for the limited time he spent with his child “payment of maintenance does not secure his role in her life. More is required, he must keep contact with her and share his time with her to nurture a meaningful life. In any event he has not paid any significant amounts to date. I noted that only after the application was launched and the litigation progressed, he paid over R16 000 toward her annual school fees of R150 000 per annum, less than half the annual cost. If he is unable to meet her financial needs, which is a reality in every child’s life, and her mother has managed, naturally it is in her best interest to be with her mother and their family in Kenya, so that her needs can be met. It is noteworthy that he was able to afford a luxury holiday but not reasonable maintenance, the minor child is not his priority or perhaps it suits him that the applicant carries the full burden.

COSTS

46. Ms van der Walt referred the court to correspondences between the party’s representatives, wherein the respondent was urged to settle the matter, as no genuine disputes were raised between them, when the dispute arose. After he ignored the requests he was alerted to risking punitive costs ²³however the respondent has simply ignored many of the applicant’s attorney’s correspondences, which forced her to make this application.

²³ Caselines 02-30

47. The respondent argued that the applicant made her case out in the replying affidavit. I noted that the material facts appeared in the founding papers, and therefor the respondent knew the case he was to meet. The replying affidavit comprised the details which ordinarily ought to be in the founding papers, however I am of the view that the respondent was not prejudiced in the preparation of his opposition, and the litigation was preceded by several discussions between the parties themselves. I noted that the applicant's counsel was compelled to object to submissions made from the bar, viz, the family advocate's report, on hearing the voice of the child, on the applicant's conditions of employment all of which could have been included in his answering papers. Counsel was not fully instructed about attempts at mediation, the correspondences support the applicant's submissions in that regard.
48. I am of the view that the respondent, although Mr Mlilo argued to the contrary, raised defences as the matter progressed.
49. Having regard to the conspectus of the evidence I am of the view that the respondent's only genuine concern could have been the contact arrangements to be made an order of court. This court granted him an opportunity to address the court in that regard, however he declined to cooperate with the court.
50. The manner in which the litigation was conducted, was wasteful of costs as well as this court's time on a very busy court roll, however the court is mindful that counsel is on instruction.
51. I am satisfied that costs on a punitive scale is appropriate in casu.

Accordingly, I make the following order:

1. **THAT** the applicant is granted leave to remove the minor child, P[...] R[...], a female, born on 29 March 2011, (herein after referred to as "the

minor child”), permanently from the Republic of South Africa, to relocate to Kenya.

2. **THAT** the applicant is granted leave to remove the minor child, from the Republic of South Africa, to reside with her in Kenya.
3. **THAT** the respondent’s consent for the departure of the minor child from the Republic of South Africa, to travel with the applicant, to Kenya, in terms of section 18 (3) (c) (iii) is hereby dispensed with.
4. **THAT** the minor child is permitted to depart from the Republic of South Africa, accompanied by the applicant or her appointed nominee, without the requirement of a parental consent affidavit from the respondent, as required in terms of regulation 6 (12) (b) (i) to the Immigration Act 13 of 2022, subject to compliance with the remaining provisions of regulation 6 (12) (b) to the Act 13 of 2022.
5. **THAT** the applicant is a holder of full parental responsibilities and rights in respect of the minor child, as provided for in section 18 of the Children’s Act 38 of 2005.
6. **THAT** the respondent’s parental responsibilities and rights are limited to those provided for in section 18(2)(d) of the Children’s Act, namely, to maintain contact with the minor child and to contribute to her maintenance needs.
7. **THAT** on relocation to Kenya, the respondent is entitled to exercise contact with the minor child, on every alternate long school vacation, at the respondent’s cost. The respondent is permitted telephonic or video contact with the minor child three times per week, according to the minor child’s school schedule.

8. The respondent shall pay the applicant's costs on an attorney client scale.

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17 January 2024.

Date of Hearing: 29 November 2023

Date of Judgment: 17 January 2024

Appearances

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