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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

CASE NUMBER: 1747/2023

In the matter between:

L[...] E[...] V[...] A[...]

Applicant

and

J[...] P[...] V[...] A[...]

Respondent

CORAM: VAN RHYN J

HEARD ON: 14 APRIL 2023

DELIVERED: 28 APRIL 2023

[1] In this opposed urgent application the applicant, Mrs v[...] A[...] in essence seeks orders to enable her to relocate the parties' minor child, a girl aged 9

years, (the “child”) from Bloemfontein to Upington, Northern Cape Province and leave to enrol the child in a home schooling program.

[2] The respondent, Mr V[...] A[...] opposes the application and filed a counter application, on the basis that the relocation of the child will not be in her best interest, mainly on the grounds that she has been enrolled at Martie Du Plessis School for the past 2 years and it would be in her best interest to remain a pupil at the said school and a boarder at the Martie du Plessis School boarding house. Respondent therefore seeks an order that the applicant’s application be stayed pending an investigation by the Office of the Family Advocate and that the applicant be ordered to return the child to the said boarding house. The respondent further seeks an order that the existing contact arrangements between the applicant and the respondent in respect of the child continue to operate pending the finalisation of this application.

[3] The applicant has brought this urgent application in which she seeks the following relief:

- “1. That this application be heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court and that the Court condone the non-compliance with the Uniform Rules of Court, with specific reference to any time periods and/or the manner of service;
2. That a rule nisi be issued calling upon the Respondent or any other interested parties to show cause to this court on the 4th day May 2023 at 10h00 or so soon thereafter as counsel may be heard why an order in the following terms should not be granted:-
 - 2.1 That the Applicant is granted leave to re-locate with the minor child, outside of the Free State Province to Upington, Northern Cape Province.
 - 2.2 That the Applicant is granted leave to enroll the minor child in a home schooling program under Impaq, and facilitated by Edunique.
 - 2.3 The respondent shall be entitled to exercise contact with the minor child, while the Applicant and the minor child reside in Upington, subject to the minor child’s religious, educational, social, health and recreational activities, as per the deed of Settlement;
 - 2.4 That any party opposing the relief sought by the applicant, be directed to pay the costs of this application”.

- [4] The applicant furthermore seeks an order in terms whereof the orders in paragraph 2.1 and 2.3 shall operate as an interim interdict with immediate effect and that the Office of the Family Advocate be directed to convene an enquiry and report to this court regarding the best arrangements insofar as the care and contact of the child is concerned.
- [5] The applicant and the respondent were married on 5 November 2010. From the marriage between the parties their daughter was born on 29 December 2013. Subsequent to the marriage the parties and the child resided on a farm in the district of Dewetsdorp, Free State Province. During 2016 the marriage relationship deteriorated. The marriage between the parties was dissolved by this court on 12 December 2017.
- [6] In contemplation of their divorce the parties reached a settlement which was contained in a deed of settlement. The deed of settlement was made an order of court. In terms of the settlement agreement the primary residence and care of the child was awarded to the applicant subject to the respondent's right of contact. Pursuant to the divorce the applicant and the child resided in Bloemfontein and the child attended the Christelike Volkseie Onderwysskool Dankbaar ("CVO School")
- [7] While at school the child experienced learning difficulties and a speech deficiency. During her Grade R-year it was determined that the child suffers from Attention-deficit Disorder (ADD) and it was recommended that she might benefit from treatment by an occupational therapist as well as a speech therapist. She repeated Grade R where after she progressed to Grade 1.
- [8] The applicant had doubts whether her daughter will be able to function optimally in a mainstream school and sought the professional opinion of Mrs Corina Botha, an occupational therapist employed as such at the Free State Department of Education. It was recommended that the child be placed in Martie du Plessis School where she would receive high-level specialist support due to the difficulties and developmental delays already identified.

- [9] Initially the respondent did not agree with the recommendation to place the child in a special school, but the applicant proceeded to enroll the child at Martie du Plessis School. It is common cause that the child benefitted from the learning environment and special attention provided at Martie du Plessis School and she has progressed to Grade 3.
- [10] Since 2019 the applicant has been in a committed relationship with Mr Steenkamp, who resides at Upington, Northern Cape Province. During the end of 2022 the applicant decided to relocate to Upington to live with Mr Steenkamp. Further reasons for her relocation include financial difficulties experienced due being found medically unfit to continue with her occupation as a qualified theatre sister and the prospect of keeping horses on the farm where she now resides with Mr Steenkamp.
- [11] During December 2022 the applicant and respondent met and discussed the applicant's intended relocation to Upington. During the discussion, which the respondent decided to record without the knowledge of the applicant, the applicant explained that her "first option" would be to keep the child at Martie du Plessis School and enroll her as a boarder with the school's boarding house or hostel.
- [12] Both parties were *ad idem* that it would be in the best interest of the child to remain a pupil at the school and due to the difficulties to find a placement at the specific school, the applicant and the respondent, on advice of a teacher and the school's occupational therapist, decided that the child should forthwith reside in the school's boarding house. The applicant further more discussed the possibility of residency at the boarding house with the child. The child appeared interested and agreed to staying in the boarding house.
- [13] Since the beginning of the first term of 2023, the child resided at the boarding house at Martie du Plessis School. According to the applicant the child had difficulties to adapt with the environment at the boarding house and longed to be with her. The applicant came from Upington to Bloemfontein to

be with the child on every second weekend. The child visited her father, the respondent every alternative weekend.

- [14] According to the applicant, the child on several occasions expressed the desire to relocate to Upington and to stay with her and Mr Steenkamp. The applicant's mother, Mrs P[...] L[...] who deposed to a confirmatory affidavit, attended to the needs of her grandchild by visiting her at the boarding house every single day in an endeavour to calm her down and to adjust to life in a boarding house.
- [15] The child spent the school holiday during March – April 2023 with the applicant in Upington and has not returned to Bloemfontein. The applicant brought the application on an urgent basis due to the respondent's opposition to the relocation of the child to Upington and due to the fact that the child will lose her placement at the Martie du Plessis School should she not return within two weeks after the hearing of this application.
- [16] Mrs Koen, who appeared on behalf of the applicant, argued that it would be in the child's best interest if she remained with the applicant in Upington and attend a special school were the needs of the child will be addressed. As the custodian parent and in the absence of a court order to the contrary, the applicant is allowed to make the decision to relocate the child to Upington.
- [17] The respondent contends that, notwithstanding the joint decision taken during December 2022 to place the child in the boarding house at Martie du Plessis School, the applicant unilaterally decided to alter the *status quo* in relation to their child's education, residence, contact, social and religious interactions. The applicant's decision is in conflict with the expert advice obtained by the applicant and without any further investigation being done by the Office of the Family Advocate or any other experts.
- [18] Based on the principle that the *status quo* pertaining to, *inter alia*, the child's care, contact and education be maintained until such time as a proper investigation has been conducted regarding the best interest of the child, the

respondent seeks an order by way of a counter application that the child be returned to Bloemfontein and attend the Martie du Plessis School while residing at the school's boarding house, pending an investigation by the Family Advocate.

- [19] This application was brought on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court. The applicant sought condonation from this court for non-compliance with forms, service and the time period provided in the Uniform Rules of Court and implored this court to entertain this application urgently. The respondent filed his answering affidavit and a counter application in which he concedes that the matter is urgent as it relates to the best interest of the parties' child. I shall accordingly treat it as being urgent.
- [20] In matters involving a child, the best interests of the child is paramount¹. The Children's Act² (the "Act") was promulgated to give effect to this constitutional imperative. As the upper guardian of all dependant and minor children, the court has the duty and authority to establish the appropriate post-divorce residency, care, and contact regime in respect of the child. Even though the principle applicable seems easy, determining the post-divorce residency, care, and contact regime that would be in the child's best interests remains complicated and can hardly be described as an easy task.
- [21] Furthermore, no residency, care, and contact regime is permanent. The parties to this matter agreed upon the residency, care and contact regime to be implemented prior to the divorce order granted during 2017. Since then circumstances have changed and major decisions, brought about by the child's learning difficulties, had to be made regarding her tuition and future therapeutic needs.
- [22] When circumstances change, as in the matter at hand where the applicant has relocated from Bloemfontein to Upington, a prior decision can be revisited. Issues of residency, care, and contact need then to be

¹ Section 28 of the Constitution.

² Act No 38 of 2005.

reconsidered, taking into account the best interests of the child within the actual setting wherein the child and both parties find themselves.

[23] In **LW v DB**³ the court dealt with the issue of the best interest of minor children specifically in relocation matters, such as this one. Satchwell J held that the following guidelines may be distilled from the Constitution, the judgments of our courts, and the various conventions to which our country is a signatory. The guidelines⁴ that Satchwell J identified are as follows:

- (a) “The best interests of the child are the first and paramount consideration;
- (b) Each case must be decided on its own particular facts;
- (c) Both parents have a joint primary responsibility for raising the child and, where the parents are separated, the child has the right, and the parents [a corresponding] responsibility to ensure that contact is maintained;
- (d) Where a custodial parent wishes to relocate, a court will not lightly refuse leave for a child to be taken out of a province if the decision of the custodial parent is shown to be bona fide and reasonable; and
- (e) The courts have always been mindful of, and sensitive to the situation of the parent who is to remain behind.”

[24] The respondent holds the view that the minor child will not be afforded similar specialized schooling and attention to address the learning difficulties identified by experts while residing at Upington. Although he initially did not agree to the admission of the child to the Martie du Plessis School, he now does not want the child to lose her placement at the said school and in the school’s boarding house.

³ 2020 (1) SA 169 (GJ).

⁴ LW v DB (*supra*) at para 20.

- [25] The applicant investigated the different options available for registration of the child at a special school, not only in Upington but also at Kimberley. From the transcript of the recording of the conversation between the applicant and the respondent appended to the respondent's answering affidavit, it is evident that the applicant, with due consideration of the respondent's contact rights, the wishes of the child and the information available, which she obtained, regarding specialized schooling, decided to relocate to Upington and leave the child in Bloemfontein at Martie du Plessis School.
- [26] However, the child clearly struggled to adopt to life at the boarding house as is evident from the letters obtained by the applicant from Lizelle Brand and Nadia le Roux, both involved as caretakers at the said boarding house. It is common cause that the child has benefitted greatly from the multidisciplinary approach followed at the said school where her treatment by qualified professionals and remedial teaching are included in her everyday school activities. The applicant's concern presently is the fact that the child did not want to return to the boarding house after spending the school holiday with her at Upington and has expressed a greater need to be with her.
- [27] The age and gender of the child are significant factors that simply cannot be overlooked. She is 9 years old and has been residing with the applicant since the divorce in 2017. The only close relative in Bloemfontein is the child's maternal grandmother who spent many afternoons consoling the child during the first few months of the current year. It has to be kept in mind that the respondent is residing on a farm in the district of Dewetsdorp and sees the child every second weekend. Given this, it is entirely understandable that the child may presently be more reliant upon the applicant who, has been her primary care-giver, than upon the respondent. In *F v F*⁵ Maya AJA (as she then was) held as follows:

“Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who

⁵ 2006 (3) SA 42 (SCA)

care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses.”⁶ (Footnotes omitted.)

- [28] I am satisfied that the decision taken by the applicant and referred to as her “first option” namely to relocate to Upington and leave the child at the boarding house in Bloemfontein has proved to be undesirable and emotionally upsetting, not only to the child but also to the applicant who, as the custodian parent, has to endure the child’s unhappiness and longing for her while she is attempting to pursue her life with Mr Steenkamp in Upington.
- [29] I am of the view that the applicant has carefully considered the available options regarding specialised schooling, as she has done before, and has come up with the solution of enrolling the child at Edunique, a tutor centre registered with Impaq, South Africa’s largest home schooling provider. The tutor centre has 3 teachers and a maximum of 15 children, all of whom require extra attention to accomplish their maximum potential. The applicant is not working and will be able to provide further support and care to the child whenever the need arises.
- [30] The relocation of the applicant to Upington is *bona fide* and understandable. Her decision to relocate the child, after spending the first term at boarding house, is also reasonable and in the best interest of the child, subject to the respondent’s rights of access being preserved as best they can in the changed circumstances. The matter is referred to the Office of the Family Advocate to investigate the different options available regarding tuition, educational and therapeutic programs at Upington with specific reference to the needs of the child in comparison to the multidisciplinary approach followed at the Martie du Plessis School.
- [31] **Accordingly it is ordered that:**

⁶ F v F 2006 (3) SA 42 (SCA) at para 12.

1. Condonation is granted that this application is heard as urgent and condonation is granted in terms of rule 6(12)(a) for non-compliance with the rules relating to form, service and time periods.
2. As an interim measure pending the finalisation of the investigation by the Office of the Family Advocate, Bloemfontein, the following order is granted:
 - 2.1 The applicant is granted leave to relocate the minor child outside of the Free State Province to Upington, Northern Cape Province;
 - 2.2 The applicant is granted leave to enrol the minor child in a home schooling program under Impaq, facilitated by Edunique;
 - 2.3 The respondent shall be entitled to exercise contact with the minor child, while the applicant and the minor child reside in Upington, subject to the minor child's religious, educational, social, health and recreational activities as per the Deed of Settlement;
3. The Office of the Family Advocate, Bloemfontein is directed to conduct an investigation and submit a report to the Court in respect of the minor child's best interest with specific reference regarding her care, contact and educational needs.
4. Prayers 2.1, 2.2 and 2.3 above shall operate as interim orders pending the finalisation of this application.
5. The applicant and Respondent is granted leave to supplement their papers and to approach this Court on the same papers, duly amplified (if so advised), for an order which they may require regarding the care and contact of the minor child once the Family Advocate's report and recommendation has been received.

6. The costs hereof will stand over for later adjudication.

VAN RHYN, J

On behalf of the Applicant:

MRS. M KOEN

Instructed by:

H FOURIE ATTORNEYS
BLOEMFONTEIN

On behalf of the Respondent:

ADV. R VAN DER MERWE

Instructed by:

BOOYSEN ATTORNEYS
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