

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-017275

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>11/3/24</u>	
DATE	SIGNATURE

In the matter between:

L A

Applicant

and

E F V

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be ____ March 2024.

Summary: Application in terms of section 18(5) of the Children's Act 38 of 2005. The applicant, as the mother of the minor child, sought consent from the father of the minor child for the departure of the minor child from the Republic for a specific period. The father is authorised by the law, to refuse to give consent as required by the law. The applicant and her husband have arranged to leave with

the minor child for the USA. The departure is to take place on 18 March 2024. Owing to the refusal to consent and the need to travel in a matter of days or weeks, the applicant approached this Court on an urgent basis for an appropriate relief. The father opposed the application on, amongst others, the basis that the urgent relief sought is not urgent. In the exercise of its discretion, this Court agreed to hear the application as an urgent one. The default legal position is that the consent of all persons that have guardianship of a child is necessary in respect of matters legislated in subsection 18(3)(c) of the Children's Act. Only a competent Court can order otherwise in relation to the default legal position.

There is no statutory provision requiring the competent Court, when considering an application in terms of section 18(5) of the Children's Act, to do so by taking into account the best interests of the minor child. The duty of the Court is to alter the default position of requiring consent of all persons. Taking into account all the circumstances, a Court may alter the default position or refuse to alter the default position. In the event the default position is not altered, then the consent of all is necessary. The applicant mother has demonstrated that in the circumstances, the consent of all is not necessary for the departure of the child from the Republic given the unreasonable withholding of the consent by the father. Held: (1) The application is granted in terms of section 18(5) of the Children's Act and the draft order uploaded by the applicant marked X is made an order of Court. Held: (2) The respondent to pay the costs of this application.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an application brought on an urgent basis by the applicant, L A. L A is the biological mother of the minor child, E V, a female born on 14 February 2011. At

the time of the present application, she was 13 years of age. The respondent, E F V, is the biological father of E V. The present application is brought in terms of the provisions of section 18(5) of the Children's Act (CA).¹ The application is fully opposed by E V. After hearing argument, this Court retired in order to consider its judgment.

Pertinent background facts

- [2] For the purposes of this judgment, it must be recorded that the pertinent facts to the present application are largely common cause. The affidavits filed by the respective parties are replete with criticism of each other's view point on the pertinent facts. Thus, it is obsolete for this judgment to punctiliously regurgitate all the facts of the present application. Briefly, the salient facts are that both L A and E F V were married to each other. During the subsistence of their marriage, E V was born. Sadly, when E V was only 3 years old and working towards turning 4, L A and E F V ended their marriage on 9 September 2014. L A and E F V concluded a settlement agreement, which agreement accompanied a decree of divorce and was made an order of Court.
- [3] It was agreed in the settlement agreement that E V's primary residence be with L A, subject to E F V having specific contact rights. Since the divorce, E V has been residing with L A. On 29 September 2018, L A married one Mr. J A. E V continued to live with L A and her husband. Although the relationship between E F V and L A remains acrimonious, they continued to co-parent E V. During December 2023, L A and her husband firmed up an idea to travel to the United States of America (USA) for a holiday. Since they live together with E V, they wished to travel as a family with E V to the USA from 18 March 2024 until 7 April 2024. Given the age and maturity of E V, she was directly involved in the planning of the trip to the USA. She independently decided to be part of the trip even though she will miss about 5 school days, a school netball tournament and the

¹ Act 38 of 2005 as amended.

North Gauteng netball trials. In addition, she will miss some extra-mural activities like netball, tennis and horse-riding lessons whilst away in the USA.

- [4] During December 2023, bookings for the international flights were made, which bookings included E V. L A did not anticipate that E F V will refuse to give consent within the contemplation of section 18(3) of the CA, hence the inclusion of E V in the travel arrangements. In preparation for the travel, L A met with school officials to make the necessary arrangements. On the week of 19 January 2024, E V had, as agreed, contact with E F V. L A prepared a consent form and enclosed it in an envelope so that E V should request E F V to sign it. When E V was fetched from E F V's residence, it was discovered that the consent form was not signed. E F V placed various conditions upon which he may consider giving the necessary consent. A barrage of correspondence was exchanged in the course in an attempt to resolve the impasse over the giving of consent. It is unnecessary for the purposes of this judgment to narrate each of those exchanges. Nevertheless, L A met and discussed with school officials to deal with what E V would miss during the trip to the USA. She obtained assurances from those officials to the effect that E V shall not be jeopardised. Ultimately, after a toing and froing, it became clear that E F V was refusing to give the necessary consent. Such prompted L A to launch the present application.

Analysis

- [5] Before the merits of the present application are discussed, this Court must briefly deal with the preliminary objections raised by E F V in opposition to the present application.

The urgency issue

- [6] L A contended that the application is urgent and cannot be determined in the normal Court roll owing to the fact that in a matter of days, the planned trip is to happen. In resisting the hearing of the application on an urgent basis, E F V contended that L A had an alternative option, which included making him part of the decision making in December 2023, appointing a parent coordinator to

resolve the impasse, and that L A and her husband could travel alone without E V as they had previously done. After hearing oral submissions and in the exercise of its discretion, this Court concluded that the present application will be heard as one of urgency. This Court was satisfied that an urgent relief is necessary before 18 March 2024 and that L A had no other substantial redress in due course. Accordingly, the preliminary objection of E F V was not upheld.

The merits of the present application

- [7] Before this Court can deal with the merits, it is important to discuss some of the pertinent legal principles that obtain in applications of this nature, particularly the issue of the applicability of the standard of the best interests of the minor child in considering the present application.

The notion of the best interests of the minor child

- [8] It was vehemently contended by E F V that in refusing to give consent, he is acting in the best interests of E V. It bears emphasis that there is a marked difference between the best interests of the minor child and the interests of the parents. This concept of the best interests of the child, as a guiding principle, was first adopted in custody decisions and was endorsed for the first time in *Fletcher v Fletcher*.² In *Fletcher*, the Appellate Division, as it then was, confirmed that the most important factor to be considered in issues such as custody and access is the best interests of the children and not the rights of parents. Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. This section was given content and meaning by the Constitutional Court in the matter of *Minister of Welfare and Population Development v Fitzpatrick and Others (Fitzpatrick)*.³ Goldstone J, writing for the majority, had the following to say:⁴

“... the “best interests” standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law. It is

² [1948] 1 All SA 218 (A); 1948 (1) SA 130 (A).

³ [2000] ZACC 6; 2000 (7) BCLR 713; 2000 (3) SA 422 (CC).

⁴ Id at para 18.

necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.” (footnotes omitted)

- [9] What arises from the above sentiments is that the ‘best interests’ standard is not an inflexible rule, and it must be applied to the specific facts relating to the particular child whose best interests are under consideration. The CA was enacted to give effect to certain rights of children as contained in the Constitution.⁵ Owing to the flexibility of the standard, as confirmed in *Fitzpatrick* and emboldened in *B v M*,⁶ section 7(1) of the CA provides that whenever a provision of the CA requires the best interests of the child standard to be applied, certain listed factors must be taken into account. From the provisions of section 7(1) of the CA, it is perspicuous that the standard must be applied whenever a provision of the Act requires its application. Section 9 specifically provides that in all matters concerning the care, protection and well-being of a child, the standard that the child’s best interests are of paramount importance, must be applied. The question to be asked is, is the present application concerning the care, protection and well-being of E V? Since the present application concerns the exercise of parental responsibilities and rights, it must follow that it does not concern the care, protection and well-being of E V. As to what care means, section 1 of the CA provides an extensive technical definition. It is unnecessary for the purposes of this judgment to quote that extensive definition. A protection must be one involving a harm to a child. Grammatically, the word protection means an act of keeping someone or something safe from injury, damage, or loss, or the state of being protected. As to well-being, it must relate to that of E V and not of the responsibilities and rights of the parents. Generally, well-being is the state of being comfortable, healthy, or happy. It is not at all about the well-being of the parents of E V.

- [10] The key section in the present application is section 18(3) of the CA, which provides that a parent or guardian is obligated to give or refuse any consent

⁵ The Preamble of the CA.

⁶ 2006 (9) BCLR 1034 (W).

required by law in respect of the child. For the purposes of the present application, the giving or refusal of consent involves a consent for the child's departure from the Republic. It is clear from these provisions that the obligation to give or refuse any consent is that of a parent or a guardian. Whilst the exercise of the responsibility or right ultimately affects the minor child, the CA did not find it necessary to prescribe the application of the standard of the best interests. Unlike in section 28(4) of the CA, the Act does not prescribe that when a Court is considering a section 18(5) application, it ought to be guided by the best interests standard. Section 29(1) of the CA lists the statutory applications which will require the Court, in considering them, to be guided by the principles set out in Chapter 2, to the extent that those principles are applicable. Conspicuously absent from section 29(1) is the mention of the section 18(5) application. Clearly, it is not required that before deciding to refuse or give consent, the standard of the best interests must be applied. Section 31(1) simply provides that the person who decides within the contemplation of section 18(3)⁷ is obligated to give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage development.

- [11] Accordingly, this Court must take a firm view that in giving or refusing consent, no best interests of the minor child is involved. What is involved is the exercise of parental responsibilities and rights. A parent may, in an attempt to spite the other parent, refuse to give consent for very flimsy reasons and in advancement of self-interest. The legislature was, in my view, acutely aware of such a possibility, hence the enactment of section 18(5) of the CA. The ideal position or default position contemplated by the legislature is that the consent of all persons is necessary. However, if one of the parties refuses to give consent as fortified to do so by section 18(3), the Court may intervene and order that the consent of the one who unreasonably refuses is not necessary. The Court, in my view, as the upper guardian of all minors, is there to unlock the legal impediment of consent by all in a situation where only one guardian has consented instead of all. The legal impediment is such that if consent of all is not available, a child cannot depart the Republic unless a competent Court orders otherwise. The

⁷ Section 31(1)(b)(i) of the CA.

otherwise is not that the child is permitted to travel, but the otherwise is that the consent of the other guardian is not necessary for the sake of the departure.

The unlocking mechanism and the requirements

[12] Given the view taken by this Court above, the unlocking mechanism is not always the application of the best interests standard but, in my view, a Court must, taking into account all the circumstances of the particular case, consider whether the necessary consent was unreasonably withheld by the other parent. Thus, the mechanism to be employed before a Court orders that a consent is no longer necessary, is that of reasonableness of the conduct of the other refusing guardian. All things being equal, if both parents consent, without being guided by the best interests standard, a Court's intervention is unnecessary. A Court's intervention is only required where the default position does not arise. That being the case, it must follow that the focal point of a Court is the need for the consent of all or no need of consent of the other. Applying the principle that the High Court is the upper guardian of all minor children, a Court should engage in an assessment of the reasonableness of the withholding of the necessary consent. It may well be so that factors to be taken into consideration when applying the best interests standard finds application when judging the reasonableness of the withholding of the consent. For instance, the child's age, maturity and stage development is a factor to be taken into account when dealing with the standard.⁸ There can be no doubt that the refusal to give consent is a major decision involving a child. Nowhere in his papers does E F V mention that when he took the decision to refuse consent, he sourced the views of E V and gave them any consideration as compelled by section 31(1)(b)(i) of the CA.

[13] Both counsel passionately argued that when faced with an application in terms of section 18(5) of the CA, the only applicable standard is that of the best interests of the child. In other words, for L A's case, this Court must be satisfied that her consent was given in the best interests of E V and for E F V's case, this Court must also be satisfied that the refusal was in the best interests of E V. This Court enquired from both counsel as to whether a section 18(5) application

⁸ See section 7(1)(g) of the CA.

requires a different standard when it is considered. Both, particularly counsel for E F V, were emphatic that the only standard to apply is that of the best interests of the child. With the limited time at its disposal, this Court was unable to find any direct authority as to what standard to apply specifically in a section 18(5) application, nor did both counsel provide this Court with any authority in support of their argument. A view was expressed by the authors C J Davel and A M Skelton in *Commentary on the Children's Act*,⁹ that section 18(3)(c) of the CA contains a non-exhaustive list of juristic acts. Thus juristic acts are those acts prescribed by the law. When the law, authorises a guardian to refuse to consent to a juristic act, in my view, it sought to protect the rights of such a guardian. In other words, when a guardian refuses to give consent, such a guardian is not acting unlawfully. He or she is simply exercising available rights. Importantly, when a guardian exercises the available rights, he or she is not obligated to consider the best interests of the minor child. The legislature deemed it fit to consider the exercise of juristic acts to be major decisions, which, given the age, maturity and stage development of the child, only requires sourcing of views. In *LW v DB*,¹⁰ the learned Satchwell J stated the following:

"The 'best interest' principle is used to provide a framework for addressing the entire range of major issues affecting children. The principle may be invoked in relation to and in the context of the separation of the child from the family setting, adoption and comparable practices, parental responsibility for the upbringing and development of the child, the child's involvement with the police and the justice system, the provision of housing and social services, access to schooling and so on." (footnotes omitted)

[14] The learned Satchwell J continued and stated the following:¹¹

"A child's best interest is the pre-eminent consideration amongst all other considerations. However, the Legislature did not intend the "best interest" of a child to be the sole or exclusive aspect to be considered because it did not prescribe that the child's "best interests" are the only factors to be considered or the sole determinant of the exercise of the court's discretion. The 'best interests' is the paramount

⁹ Davel, CJ and Skelton, A (eds) *Commentary on the Children's Act* (Loose-leaf, 2007) at 3-6.

¹⁰ 2020 (1) SA 169 (GJ) at para 13.

¹¹ *Id* at para 61.

consideration within the hierarchy or concatenation of factors but it is not always the only factor receiving consideration in matters concerning children.” (footnotes omitted)

- [15] There is no doubt in my mind that when a Court considers an application in terms of section 18(5) of the CA, it is required to exercise discretion, in relation to whether a consent of the other person must be dispensed with or not. It must be pointed out that such an application is not designed to compel the refusing party to consent. Once the refusing party exercised that right,¹² such a right, although not ideal, is to be respected. Thus, the exercise of discretion is one dimensional – the consent of all is no longer a legal requirement. Regarding the exercise of discretion, Satchwell J aptly stated the position thus:¹³

“This Court sits as the upper guardian of minors. The discretion which we exercise is not circumscribed in the narrow or strict sense of the word. It requires no onus. In the conventional sense, to be satisfied when we determine whether or not a child can accompany a parent who leaves the jurisdiction of this Court.”

- [16] This Court, must, when considering an application in terms of section 18(5), bear in mind that in terms of section 18(4) of the CA, each one of the guardians is competent to exercise, independently and without the consent of the other, any right or responsibility arising from such guardianship. It is common cause that L A independently gave her consent for E V’s departure. She had that competency and did not necessarily require to consider the best interests of E V before she could do so. Equally, E F V has the competency to independently refuse to give consent. Unlike L A, there is no evidence that E F V exercised the refusal after having taken into account the views of E V. To my mind, such evinces unreasonable withholding of a consent. On the other hand, it remains undisputed that L A sourced and obtained the views of E V before giving her own consent.

- [17] E F V only broadcasted to the Court his own beliefs. He testified that he reasonably believes that E V does not want to miss the Menlo Netball

¹² The right is guaranteed in section 18(3) of the CA.

¹³ *LW v DB* above n 10 at para 5.

Tournament. At the very least, that belief is not predicated on any of E V's views, however menial they may be considered to be. That, notwithstanding, E F V admitted in the papers the stage development, maturity and the age of E V. Undoubtedly, in this day and age, a 113-year-old can independently express his or her views on a matter that interests him or her. Generally, children enjoy travelling to places they have never been, and if the places are overseas, the enjoyment is accelerated. Accordingly, applying the reasonableness mechanism as suggested by this Court, it must be concluded that the decision to withhold the consent is not an informed one and it is an unreasonable one. The conclusion to reach is that the consent of E F V is not necessary in relation to the departure of E V from the Republic.

Conclusions

[18] In light of all the above, the conclusion to reach is that E F V withheld the necessary consent unreasonably, and as a result, there exists a sufficient legal basis for this Court to direct that his consent is not necessary for the departure of E V to the USA. The remaining issue is that of costs. Inasmuch as Courts are loath to make cost orders in matters involving children, this Court takes a fervent view that E F V, having unreasonably withheld his necessary consent, unreasonably opposed this application. His opposition was not successful, thus, there is no reason why the costs must not follow the results in this instance.

[19] For all the above reasons, the following order is made:

Order

1. The draft order uploaded by the applicant and marked X is hereby made an order of this Court.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:

Instructed by:

For the Respondent:

Instructed by:

Ms S Kroep

Erasmus Scheepers Attorneys Pretoria

Ms Y Van Der Laarse

VFV Attorneys, Pretoria

Date of the hearing:

05 March 2024

Date of judgment:

11 March 2024