

[1] The applicant launched the main application on 1 August 2023 seeking to interdict the respondent and the two minor children, aged 8 years and 10 years from relocating to Cape Town, pending an investigation by the Family Advocate to assess whether a relocation to Cape Town would be in the best interests of the minor children. The application was launched on the understanding that the respondent was to relocate to Cape Town on 1 October 2023.

[2] The employment opportunity for the Respondent in Cape Town become available from 1 September 2023. The respondent then wished to expedite the move to Cape Town and wanted the minor children to complete the school year in Cape Town.

[3] The applicant then launched an application for an interim interdict, on supplementary papers, on an urgent basis. The matter was heard by me on a virtual platform on 31 August 2023. On 1 September 2023 I handed down my order which is the subject of this application for leave to appeal.

[4] The application for leave to appeal was granted on 23 February 2023. I provide these reasons because I had undertaken to amplify my judgment of 1 September 2023.

[5] At the outset I wish to apologise to the parties for the patchy management of this matter and delays in providing further reasons after 1 September 2023. I was abroad during October 2023 and not serving on the bench at the time. Unknown to me the respondent had attempted to enforce the order and the applicant had sought to appeal it. In my absence, and in accordance with the guidance provided by the DJP, the applicant sought to have my order declared having final effect and appealable. An order to that effect was granted by Mudau J on 6 October 2023. On my return to the bench during the fourth term, my secretary engaged with the parties to obtain a date for hearing this application. The advocates undertook to engage with each other to arrive at mutually agreed dates. None were forthcoming. Respondents' attorney indicated on 7 December 2023 that she would be on leave from 8

December to 15 January 2024 and her counsel would be unavailable as well. On 11 December 2023, my secretary again enquired whether the parties intended on bringing the application prior or after the family advocate's report had been finalised to which the respondent's attorney once more confirmed that they would only be available from 16 January 2024. In reply to the Respondents unavailability, the applicant's attorney then indicated replied "*In light of the unavailability of our counterpart we accept that the matter will only be capable of further discussion on the way forward after 16 January 2024*". On 2 February 2024 upon enquiry about dates for hearing, the parties undertook to revert, but no dates were forthcoming. I then directed that the application for leave be heard on 23 February 2024 at 9h00 on a virtual platform and the parties availed themselves.

BACKGROUND

[6] In order to understand the order granted by me and which is the subject of the appeal it is necessary to sketch out some essential background.

[7] The applicant initially sought to interdict the respondent from relocating but during the urgent proceedings conceded that the interdict was only sought against her relocating the minor children to Cape Town.

Procedural background

[8] After the hearing on 31 August 2023,¹ the respondent's attorneys sent an email to my registrar (copied to the other side) in which it was confirmed that the respondent had secured her accommodation that both Gene Louw and B[...] Primary had confirmed telephonically that the children will be accepted for the 4th term, that the children who are currently in aftercare will remain so in the new school and her salary with the new employer. Attached to this email was a copy of the lease agreement concluded by the respondent and a signed offer of employment. A second email was sent in a matter of a few minutes containing a written confirmation

¹ At 13h06

by B[...] Primary that both the children had been accepted for the 4th term.² I refer to these emails as “the documents”.

[9] Prior to sending these emails the respondent’s attorney had sought leave from me to provide the documents because they had only just come to hand. In that email they explained that they had discussed the handing up of these documents with the applicant’s legal representatives who had objected to it. The approach by the respondent’s attorney to me *via* my registrar was copied to the applicant’s legal representatives.

[10] Given that these were urgent proceedings, I elected to ask the parties to address me on the admissibility of the documents. A virtual hearing in this regard was held in the afternoon of 31 August 2023 I admitted the documents. My brief reasons for this are evident from my ruling of 1 September 2023. However, I deal with them further during the discussion on the merits of the matter.

Merits

[11] After hearing the parties, I was of the view there was some urgency in the matter given that the respondent was scheduled to start work on 1 September.

[12] In his founding affidavit, the applicant sets out the background to his relationship with the respondent. The parties were married in community of property. On his version the respondent sought a divorce because she wanted to start a business and was concerned that he would be at financial risk if anything went wrong. He agreed to the divorce, conceding that it was in *fraudem legis* because their intention was always to remarry under a different marital regime. The divorce settlement provides for their respective rights and responsibilities in relation to the minor children.³ They lived together as a married couple after the divorce. On 1 March 2021 respondent informed him that she was going to leave him. It was a huge shock for him and as a result he suffered a mental breakdown. He was admitted to Lynmed Hospital for depression and emotional breakdown. During his stay in the

² At 13h18

³ Annexure EVG 1 CL 01-20

hospital the respondent had an affair. They eventually separated. He is in a new relationship with his partner Sammy, and they live together.

[13] As far as the children are concerned, the settlement agreement provides for primary residency with the respondent. The applicant alleges that he had approached a friend to draft an addendum to the settlement agreement to provide for a shared residency, but the respondent refused to sign it. However, in practice for the last two years they have had a shared residency arrangement where the children alternate weekly between the parents. He always intended to apply for a variation of the court order but has to date not done so. He plays sports with the boys and board games in the evenings. His partner often fetches them from school, and they spend time doing things together. The children call Sammy 'mummy'.

[14] He alleges he is an engineer and earns R43 000 per month and can provide for the children. In terms of maintenance neither of the parents make cash contributions to the other. He pays 100% of the school fees, aftercare, extra-mural activities, has them on this medical aid and covers medical expenses not covered by the medical aid. The respondent on the other hand has not been very stable financially and currently pays nothing towards these costs.

[15] As far as the relocation of the children is concerned, he alleges that the older child is petrified and simply does not want to go. Respondent has not discussed it with him but just told him that he must go. Respondent did not discuss any of her plans with the applicant. In May 2023 the respondent informed him that she was relocating to Cape Town on 1 October 2023 and was taking the children with her. She told him that she has more rights than him as the mother of the children. He has tried to speak to the respondent about the children's emotional wellbeing, but she refuses to engage with him. In his view the children have just settled down after the divorce and they are happy. She has not shared details of her relocation such as letter of appointment, accommodation, schooling arrangements and the like.

[16] The children should be involved in the relocation should the Family Advocate recommend it because the move involves them and will have a huge impact on their

lives. Either way, whether they stay in Gauteng or move to the Western Cape it influences their current relationships.⁴

[17] The applicant then filed a supplementary affidavit⁵ without leave in support of urgency. He alleges that the respondent 's relocation is not *bona fide* because she has not told him what she will be earning, where they will reside, where she will work and where the children will attend school. In this affidavit he puts up hearsay evidence from a cousin and the cousin's wife (I return to this later). He admits however that the respondent had agreed that the Family Advocate should be involved and had requested that he agree to the children completing the school year and move to Cape Town thereafter. He refused to accede to the request. He is not willing to do so because he is of the view that it is not in the best interests of the children to relocate.

[18] Ms Swanepoel, applicant's attorney, filed a supplementary affidavit, without leave regarding the reasons why the cousin's wife was unwilling ultimately to provide a supporting affidavit. In this affidavit she puts up the evidence that the cousin's wife was supposed to provide but who then refused.⁶

[19] The respondent filed an answering affidavit in response to both the applicant's founding affidavit and supplementary affidavit. The respondent's version contradicts the applicant's in some material respects. She alleges that the applicant and her agreed to get divorced for the sole reason that their marriage was in shambles. The applicant had developed a gaming addiction and spent almost all his time playing online computer games and very little with her and the minor children. He was always depressed. They attempted to save the marriage by way of counselling with Pastor Basil Thirius. The counselling sessions were not fruitful, and they proceeded with the divorce. On her version the applicant did not support her ambition to open her own business and indicated to her that he would not suffer financial loss because of her pursuing her dreams. For her this was a final straw and one of the reasons why the marriage relationship came to an end. She disputes that they intended to

⁴ Founding Affidavit CL 01-6 – 01-19

⁵ CL 05-6. Dated 26 August 2023

⁶ CL 06-1

remarry, or that the divorce was for convenience. The applicant has since then not proposed to her so his assertions that he always wanted to remarry are not borne out by the facts. The applicant is delusional about their marriage. She could not have had an affair because by then she was no longer married to him or in a relationship with him. The applicant met Sammy and within one month she moved in with the applicant. She alleges that the applicant and Sammy have been attempting to convince the children to call her "Mom" and this is the kind of emotional pressure brought on the children that brings her to believe that the relationship with Sammy is not a natural one but a forced one. She has never seen the applicant play board games with the children. She believes that the applicant still has an addiction to online games, that this has not been addressed and that Sammy has also indicated to her that this portion of the applicant's life is also impacting on her. She alleges that applicant is attempting to stop her from moving on with her life while he has clearly moved on.

[20] As to the position of the children, the respondent confirms that the settlement agreement provides for primary residency of the children with her because she was concerned about the mental wellbeing of the applicant. Contrary to what the applicant alleges, the residency of the children was never negotiable, but she allows the children to spend as much time with the applicant as possible. The applicant plays a role in the "fun" part of their children's lives. He attends rugby games and rugby practices for the schooling portion, but as far as disciplining the children and routine or homework is concerned, this responsibility falls to her.

[21] The applicant has made it clear that he would not contribute to the maintenance of the minor children (I assume this refers to a cash contribution). She has been dealing with his approach for years and had become accustomed to fending financially for the minor children. The best that she could ever manage from the applicant was a 50/50 contribution. This does not mean that she makes no contribution.

[22] As to the relocation she says that the children are very excited to make the move to Cape Town. They are excited to reunite with their friend who relocated from Boksburg to Cape Town approximately 2 years ago and their cousins, who are the

same age and with whom they were previously in the same school. The cousins also relocated to Cape Town during December 2022. The children regard the move as an adventure. Her mother is planning to move to Cape Town as well. The applicant himself has in the past voiced interest in moving to Cape Town.

[23] On her version the only negativity experienced by the children emanates from the applicant. The applicant instils fear in the minor children by telling them that they will never see him again, or will see him only for a short while, and that they will lose their friends in Johannesburg. He even goes as far as to state that they will not be playing for a good rugby team as they currently do. The applicant has been sowing confusion and division between the children. He has been informing Luke that Luke should stay with him and that his brother should remain with her. This confuses Luke and he has addressed his confusion in an open discussion with her. She has informed Luke that he will never be separated from his brother. She alleges that Luke is fully invested in moving to Cape Town.

[24] She denies that she has not discussed her plans with the applicant. The applicant has known since May 2023 that she intended to move to Cape Town. She has repeatedly asked to discuss it with him, but he has stonewalled her. She had three meetings with the applicant and Sammy, the last one being at their house on 31 July 2023. She sent a WhatsApp message to communicate this decision again and alleges that in a further meeting on 13th August 2023⁷ this move was discussed.

[25] As to the living arrangements in Cape Town she has advised the applicant that she has made plans to live with her brother in the Northern suburbs of Cape Town in the Durbanville area. Her brother lives in a three-story house with a room available for the children as well as a room for her. This will be the first step as far as the relocation is concerned. She has been looking for a residence of her own since accepting the post in Cape Town. The moment she secures a residence for herself and the children, she will inform the applicant accordingly.

⁷ There was some unclarity about the date but it was in August.

[26] She states that she has already indicated, prior to the applicant proceeding with the application, that she is more than willing to agree to an investigation by the Family Advocate who will be able to consider the circumstances of the minor children in Cape Town and who can then inform the court as to whether or not the move stands to the benefit of the interest of the minor children. In her view it would be in the best interests of the children to move with her to Cape Town.

[27] The respondent also dealt with the applicant's supplementary affidavit in her answering affidavit. The material issue that arises from this is that she, on oath, tells the court that the children will attend either B[...] Primary ("B[...]"), Gene Louw or Vredeloof school. She has been waiting for approval from B[...]. This school informed her that Gene Louw and Vredeloof are schools closer to the address where she will reside initially. She was waiting for final approval from B[...] who indicated that they are considering the application.⁸

[28] The applicant then filed a replying affidavit on 30 August 2023, one day before the hearing, in which he denies and disputes the respondent's version. In this affidavit he attaches an affidavit by one Carike Jacobs ("Jacobs"), who is a teacher at C[...] School where the children attend.⁹

[29] The respondent of course did not have an opportunity to deal with this new evidence.

[30] Respondent's confirmation of employment was uploaded onto CaseLines on 30 August 2023.

[31] As indicated above, the respondent's version contradicted the applicant's in some material respects. Before dealing with the factors I had regard to in dismissing the application (which was the effect of my order), I set out here the concerns I had about the way in which the applicant conducted this litigation and the affidavit of Ms Swanepoel and Jacobs.

⁸Para 153 CL 08-36

⁹ CL 10-11

[32] The thrust of the applicant's case in his supplementary affidavit is that the respondent cannot look after the children. She has not advised him about her employment, the schooling and living arrangements for the children.¹⁰ However in the same affidavit he reveals that he knew by the time he deposed to the affidavit that the family will be living with the respondent's brother only to dismiss this as an option.¹¹ He was told on 25 August 2023 by the respondent's attorney that B[...] Primary School had confirmed that they will accept the children prior to him deposing to the supplementary affidavit.¹² (The applicant launched the urgent application a day after receiving this confirmation).

[33] Another concern that arose from this supplementary affidavit is that the applicant reveals personal details of the respondent's brother. In deposing to unnecessary details which in my view served no purpose other than to suggest some prejudice on his part, he demonstrated scant respect for the constitutional right of privacy of the respondent's brother.

[34] Likewise in the same affidavit the applicant drags his cousin and the cousin's wife into the litigation, against their express wishes. His cousin had told the applicant he doesn't want to be involved, yet he sets out what the cousin told him. His cousin's wife initially indicated that she might depose to an affidavit in support of him but later changed her mind. Yet he persisted in alleging what was said to him by her.

[35] Ms Swanepoel in her affidavit confirms that she tried to obtain an affidavit from the cousin's wife who then refused and yet she persisted in putting up what she alleges the cousin's wife told her. The applicant, and Ms Swanepoel, concede that the evidence amounts to hearsay evidence.

[36] The respondent objected to Ms Swanepoel's affidavit and the introduction of the cousin's wife's evidence through this method.¹³ In my view the objection was well placed because the evidence was included in the record in utter disregard for the rights and against the express wishes of the cousins. Ms Swanepoel as an

¹⁰ Para 19

¹¹ Para 17

¹² Annexure EVG3 attached to the same affidavit. CL 05-17

¹³ Para 124 08-30

officer of this Court should know better than to conduct herself in such an improper manner.

[37] Accordingly, I had no regard to the hearsay evidence of the cousin or the cousin's wife, nor do I grant leave for Ms Swanepoel's affidavit and the evidence in it to be admitted.

[38] Turning now to Jacobs' affidavit attached to the replying affidavit. The affidavit signed on 30 August 2023 appears to serve three purposes.

a. The first is that it puts forward a version that the younger son is unhappy about the move. His academic performance declined but improved when he learnt that his father is trying to keep them in Gauteng.

b. The second is to provide evidence that the applicant is a very hands-on father. She knows the applicant and Sammy very well. Both are extremely involved in J[...]s schooling and his sporting activities. She only realised recently that Sammy is not J[...]s real mother.

c. Three it insinuates that the respondent is a bad mother. On Jacobs' version the respondent clearly was not an involved mother because she has never met her, she is not involved in J[...]s school activities at all, and she has never been to a school rugby match. She has never contacted the teacher about J[...]s schoolwork, nor has she ever introduced herself to her.

[39] I have observed a trend in opposed family court matters for applicants to procure affidavits from teachers. After parents and primary caregivers, teachers are of course the most familiar with children but not necessarily so in all cases. Unlike family advocates who are experts in their field and who conduct a full investigation which could include interviews with the children, the relevant people in a child's life, and home visits, teachers see only one aspect of the child's life. In my view, as a matter of fairness, teachers should not be asked to take sides in parental disputes when they have no sight of the other side's version or do not know the home circumstances of the children. This does not mean of course that teachers should not be asked to provide affidavits in cases where the child is being seriously or irreparably harmed.

[40] On Jacobs' own version, she had never met the respondent and does not know her personal circumstances. She alleges that J[...]s academic performance was adversely affected but provides no proof to what extent or for how long. Despite her claim that she knows the child very well, she admits that she only found out recently that Sammy was not the child's mother.

[41] In any event her evidence that J[...] was upset about the prospect of moving to Cape Town to such an extent as to constitute serious or irreparable harm was contradicted by his mother, who has known him for his entire life, who lives with him and says the children are excited about the move.

[42] This does not mean of course that the child is not anxious about the possibility of the move, but the respondent has dealt with this in her affidavit.

[43] As to the documents sent on email, I have already provided brief reasons for admitting them. However, it must be noted that I had regard to the fact that the issue of the school was already dealt with by the respondent under oath in her answering affidavit. She stated that she was awaiting confirmation from B[...] Primary. The applicant was also aware of this. The applicant was also advised on 25 August 2023 by the respondent's attorney that B[...] had confirmed that they would accept the children. As to the living arrangements, she had - on affidavit- stated that she would be living with her brother for the interim and was in the process of looking for her own place. The applicant was aware of this. Hence the issue of the residential lease takes the matter no further except to suggest that she had found such a place. She had already advised the applicant that she would be earning more. The letter offering employment had already been uploaded on 30 August 2023 and all that was provided on 31 August was a signed copy thereof. Hence, the applicant could not have suffered any prejudice by me admitting the documents.

[44] I was mindful of the fact that the application was for an urgent interim interdict. The requirements for an interim interdict are well established. An applicant must establish a *prima facie* right, a well-grounded apprehension of irreparable harm if the relief is not granted, the balance of convenience favours the granting of an interim

interdict and the absence of another satisfactory remedy.¹⁴ (**Setlogelo v Setlogelo** 1914 AD 221)

[45] However, this was not an ordinary commercial dispute. This application was brought on an urgent basis and involved two minor children, and the rights of both children and parents.

[46] The applicant had a *prima facie* right but so did the respondent. The children had rights of access to both parents and a right to be heard.

[47] In considering whether there was a well-grounded apprehension of harm and the balance of convenience, I had regard to the following factors. The respondent was not emigrating but moving to Cape Town. The children would be moving to a big city which had all the conveniences they had become accustomed to. They would be enrolled in B[...] Primary, by all accounts a good school, would have access to aftercare and other amenities including rugby and other sports. The respondent had assured the court that she would drop the children at school and pick them up personally. The respondent had received a better job offer with improved prospects; she would be living with her brother initially but had also secured other accommodation at the last minute. The children would have a supportive environment. They had relatives in Cape Town, including their uncle and cousins. The respondent had indicated that she was more than willing to have the Family Advocate involved. The respondent was aware of her children's anxieties about the move and was in conversation with both. She was not trying to divide the children. There was some last minute planning on the part of the respondent, but this was understandable given that she was told that her job would start a month earlier

[48] The applicant on the other hand had known about the intended move since May 2023 but did very little to address the alleged harm. He could have brought in the Family Advocate early in the process, engaged with the respondent and discussed the way forward in a mature manner to manage the proposed move but failed or neglected to do so. The applicant demonstrated limited insight into the

¹⁴ Harms *Civil Procedure in the Superior Courts* A-44.

impact of the move on the children. He made bald allegations about the unhappiness about the older child which was refuted by the respondent. He could say nothing about the younger child's attitude to the move and had to rely on a teacher's views about his son's anxiety. The respondent had made at least two proposals to the applicant which he rejected out of hand. He admits he is steadfastly opposed to the move.

[49] After careful consideration of the facts, I concluded that the application should be dismissed because the applicant had not shown a well-grounded apprehension of harm to him, or the children and the balance of convenience did not favour the granting of the application. Were the respondent relocate with the children he could still have regular contact with them provided this was not hindered.

[50] It was in mulling over this issue that I became concerned that were the application dismissed without more, the children's contact with the applicant ought to be assured and exercised my discretion in the manner that I did, and regulated for a scenario that is not contemplated in the settlement agreement.

[51] My order does not state that I dismissed the application, but its effect is such. These were urgent proceedings, and a court is often called upon to make decisions under pressure, which was the case here.

[52] Turning to the test for leave to appeal, this is contained in section 17 of the Superior Courts Act of 2013 which provides that leave to appeal may only be given where the Judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some compelling reason why the appeal should be heard.

[53] In my view there are compelling reasons that the appeal should be heard because the matter concerns the welfare of the minor children and/or the appeal would have a reasonable prospect of success.

[54] In the circumstances, I made the following order:

- a. Leave to appeal is granted to the full court.

- b. Costs of this application to be costs in the appeal.

Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

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DATE OF JUDGMENT:	23 February 2024
DATE OF REASONS:	11 March 2024

