

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 914/2023

In the matter between:

D[...] J[...] H[...]

APPLICANT

and

A[...] H[...]

RESPONDENT

JUDGMENT

Rugunanan J

[1] At the conclusion of argument in this matter on 12 October 2023 the parties indicated that they required a judgment no later than December 2023. Time and other constraints preclude a detailed written judgment and what follows hereafter encapsulates the essential reasoning that informs the concluding order.

[2] In essence, the issue in this matter concerns the relocation of an 11 year old child, SH, from where she presently resides in Graaff-Reinet to Somerset West located in another province some seven hours away.

[3] The papers before Court are by no means insubstantial and are laden with a myriad of competing factors. There is also an extensive narrative of the parties' employment and personal circumstances – the latter providing ample information about the acrimony in their pending divorce proceedings. A compensating factor is that the heads of argument filed on behalf of their respective counsel are detailed and well-researched; they provide fair-minded guidance for the parties' submissions supported by precedent and proffer a dutiful rendition of the material contained in the parties' affidavits and supporting annexures. To repeat the material at length would be a supererogatory exercise given the imminent need for a speedy determination of the matter.

[4] In this judgment it is intended only to say what is considered absolutely necessary.

[5] In that regard it is apposite to point out that no judgment can ever be all embracing in its treatment of the facts and issues between the parties and it does not necessarily follow that because something has not been mentioned or given detail it has not been considered.¹

[6] In a judgment delivered on 4 April 2023 by Norman J, the Office of the Family Advocate was directed to compile a report detailing findings and recommendations as to whether it is in the best interests of SH to permanently relocate with the respondent to Somerset West. Costs were reserved.

[7] The order ensued from an application and a counter-application respectively by the applicant and the respondent. Each application comprised of two parts, A and B, with Part A brought on urgency. The order given by Norman J accorded with what both parties sought in Part A of their notices of motion, save

¹ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 678; *ICM v The State* [2022] ZASCA 108 para 40; *Van Heerden & Brummer Inc v Bath* [2021] ZASCA 80 para 23.

that the learned judge determined it unnecessary to grant the applicant additional relief for an order that the Family Advocate be directed to compile a report as to whether it is in the best interests of SH that he be appointed her primary caregiver. A reading of the judgment indicates that the Court accepted that SH should primarily reside with the respondent whose status as primary caregiver to the child should be preserved. The reasoning employed by the learned judge need not be repeated or commented upon save to state that I am in respectful agreement therewith.

[8] The report by the Family Advocate was compiled on 7 July 2023 and is supported by the findings and recommendations of a registered social worker.

[9] In short, the report favours the respondent's relocation with SH.

[10] Following receipt of the report and in contemplation of Part B of the parties' notices of motion being adjudicated, the applicant amended his notice of motion, essentially seeking relief interdicting the respondent from relocating SH. In keeping with the recommendation of the Family Advocate, the respondent amended her notice of motion and persisted with her counter-application for relief authorising the removal/relocation of SH together an order that the parties be declared to remain co-holders of full parental rights and responsibilities² relating to the minor child with provision for structured contact between the applicant and the child.

[11] Pending adjudication of the relocation issue, the respondent has undertaken not to remove SH from Graaff-Reinet.

[12] It would do well to state at the outset that this Court sits as the upper guardian of all minor children within its jurisdiction and on that basis it may make

² Section 18 of the Children's Act 38 of 2005.

orders it finds to be in the best interests of a child.³ When a decision pertaining to the best interests of a child is to be made a discretion comes into play. Its exercise is grounded in a judicial investigation of what is in a child's best interests with considerations bearing upon the physical, psychological and emotional well-being of the child given the specific circumstances.⁴ Section 7 of the Children's Act 38 of 2005 provides guidance in detailing the factors that a court must take into consideration where relevant. The section, read with section 9 of the Act emphasises that the best interests of a child are paramount.

[13] In the investigation the principles that should guide a court hearing a relocation matter involving a minor child are the following:⁵

- (a) Foremost, the best interests of the child is the 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 wishes the child to remain behind.

³ LAWSA volume 28(2) (third Ed) Par 128.

⁴ see generally *M v M* [2018] ZAGPJHC 4 para 24.

⁵ *ADB v BAK* [2023] ZAKZPHC 1 para 6.

[14] SH is Grade 5 learner. She attends school regularly and achieves the learning outcomes appropriate to her Grade, this with the support of both parties who are involved in her school progress and activities. She is also the adopted child of the parties who presently reside in Graaff-Reinet where they are in the service of the same employer. The applicant is employed as a yearling manager; the respondent, as a private chef and hospitality/housekeeping manager. SH lives with the respondent who is her primary caregiver. The parties are presently in the throes of an acrimonious divorce.

[15] While residing in Graaff-Reinet the respondent currently maintains contact with and has access to SH. This accords with recommendations following previous investigations by the Family Advocate.⁶ SH is reported to have an understanding of the divorce and has no difficulty moving between the parties in accordance with those recommendations.

[16] In February 2023, and at the instance of her employer, the respondent was offered a relocation opportunity to Somerset West with a more beneficial employment package. Her intention to relocate with SH on 31 March 2023 was conveyed to the applicant on 7 March 2023. Although she maintains that the offer presents a once in a lifetime prospect compared with Graaff-Reinet where employment opportunities and chances of advancement are limited, she has indicated that she will not relocate if it is found that it is not in the best interests of SH to do so. It bears mentioning that the employment position and responsibilities offered to the respondent in Somerset West appears to be identical in all respects to that which she holds in Graaff-Reinet.⁷ She is, however, of the opinion that the move would provide her with the personal space and privacy to

⁶ 10 June 2022 and 17 January 2023.

⁷ Heads of argument, applicant para 40.

perform her employment obligations without being stifled by the applicant's presence and his scrutiny of her movements.

[17] As for SH, the Family Advocate reports that she is agreeable to the intended relocation. She has expressed excitement to take on new challenges though she acknowledged that it would be difficult for her when she misses her father who is a given part of her life.⁸ It is noted that the Family Advocate gives no indication that SH fully understands that she will not be seeing the applicant at the frequency (as to which see below) at which she usually does, and perhaps for months on end other than for maintaining face-to-face contact by means of an iPad. There is merely a blanket refrain by the Family Advocate that the applicant's absence in her life will be 'overcome by regular visits'. No indication is given or information proffered as to how these visits are to take place across the seven-hour divide, let alone what is meant by 'regular'. No structured plan is in place for the applicant to maintain a relationship with SH with whom 'regular' contact is suggested. In this regard the applicant's complaint about the financial implications for him when required to undertake travel and seek accommodation are not unfounded, particularly where there is no indication that the respondent is prepared to meet him halfway with those expenses.

[18] Regarding the above the applicant has raised various concerns and issues about the respondent's relocation. His supplementary affidavit is revealing. Aspects relevant to section 7 of the Act are dealt with where they are apposite to the circumstances of the matter. Furthermore, the affidavit comprehensively encapsulates the reasons why the relocation is not *bona fide* and reasonable. The applicant laments that he will not be able to enjoy alternative short school holidays and long weekends and share long school holidays with SH, and the

⁸ Section 7(1)(d) of the Children's Act i.e. where reference is made to the likely effect on the child of any separation from both or either of the parents.

substantial contact he has with her (which presently amounts to six days every two weeks) will be drastically curtailed by the distance between the two localities. This contact arrangement is in keeping with the previous recommendations of the Family Advocate that more or less suggests that SH spends an almost equal amount of time with both parties. A curtailment of the status quo, aided by the respondent's preference to place distance between him and the child, he argues, cannot be allowed to take precedence over his active involvement in the child's life. He maintains, moreover, that the respondent has provided no information about the alleged 'lucrative salary package', 'opportunity for career advancement' and 'once in a lifetime opportunity'. The applicant criticises the Family Advocate for omitting to deal with important factual considerations which he accentuates in justifying that SH lives and enjoys her best life in Graaff-Reinet. These considerations have not been weighed by the Family Advocate for assisting this Court in determining what is in the child's best interests. In the main, the applicant is of the view that the respondent is influencing SH and that her wish to relocate with the respondent is attributed to the respondent's ability to influence her.⁹

[19] The applicant has furnished a number of pictures reflecting the carefree and happy life enjoyed by SH on the farm where the applicant resides. These are undisputed in their depiction that SH has a delightful and happy home on the farm. She rides a bicycle, rides ponies, plays and runs with her dogs, looks after tortoises and rabbits, and spends time in the garden. She sometimes swims in the river with her friends and is also a pigeon fancier – a hobby that she shares with the applicant. The farm presents as a secure environment. According to the

⁹ Compare *Roberts v Kearney* [2022] ZAFSHC 116 paras 36-39 where the concept of parental alienation is dealt with. The applicant, however, does not specifically assert this.

applicant there have been no incidents of crime on the farm since 2006. There are security fences and cameras and the occupants feel safe.

[20] It is clear from the Family Advocate's investigation that notwithstanding the parties' history of their inability to resolve conflict in a rational and constructive manner, the core relationship between each party and SH remains intact. In point, previous investigations¹⁰ undertaken by the Family Advocate have found that both parties have the parental capacity to take care of SH and that she has secure attachments to both of them and with whom she enjoys positive relationships.

[21] It is apparent therefore that the real motivation for the relocation (supported in the latest report) is because the respondent feels the need to create distance between herself and the applicant with SH having to simply go along with the respondent's plans. No consideration is given for the upheaval this will create in the child's life let alone the absence from the applicant.

[22] I can find nothing meaningful in the papers before me that indicates expressly (or even by implication) that the respondent has properly reasoned through the real advantages and disadvantages of the proposed move with SH. A child in the position of SH has the right to know and to be cared for by both parents on a regular basis¹¹ and if the child grows up without either parent, the child will, to some extent, be psychologically handicapped¹².

[23] In recommending relocation, the report by the Family Advocate conveys the wrong approach and fails to take cognisance of the fact that both parties are parents who have equal parenting responsibilities towards SH and yet the decision

¹⁰ 10 June 2022 and 17 January 2023.

¹¹ *Krugel v Krugel* 2003 (6) SA (T).

¹² *Dunsterville v Dunsterville* 1946 NPD 594 at 597

seems to be that because the respondent is the custodial parent and entitled to assert her freedom and career, it is in the best interests that SH moves along with her.

[24] At best, what the family Advocate's report demonstrates is merely an assumption that the respondent's proposals are necessarily compatible with the welfare and best interests of SH.

[25] I recognise that the refusal of a relocation application has a potentially disproportionate impact on the parent who wishes to relocate – that it restricts their mobility and subverts their personal choices and interests.¹³ On the particular facts of this matter there are perceptible indications that there is no genuine motivation for what is realistically in the best interests of the SH but rather for what suits the respondent.

[26] This does not sit well with this Court.

[27] There is furthermore, and as correctly contended by the applicant, no detailed information about the respondent's financial circumstances particularly with regard to the offer made to her. She has not taken advantage of the opportunity to inform this Court of what exactly are her expenses and to what extent expressed in monetary terms does the offer become attractive. These are the issues which are *inter alia* at the heart of the applicant's supplementary affidavit wherein reference is made to a series of correspondence in which this information was requested. In declining to proffer the information, the respondent has adopted an inflexible position to serve her own interests.

[28] I have given careful thought to the matter. Based on an overall impression and assessment of the facts, and having considered the arguments and the

¹³ *Roberts v Kearney supra* para 53.

applicable legal principles, the circumstances, the contents of the reports, the affidavits including annexed copies of correspondence exchanged between the parties' legal representatives – the conclusion arrived at is that the respondent's relocation is not *bona fide* and that it is in the best interests that SH remains in Graaff-Reinet where both parties – who have a joint responsibility for raising her – would play a meaningful role with their involvement in her life.

[29] A final word on the matter concerns costs.

[30] The parties advanced differing contentions.

[31] Although the applicant was not successful in obtaining additional relief for an investigation as to whether he should be appointed primary caregiver, he was successful however in so far as Norman J granted an order having found that the matter was urgent. The facts clearly indicate that the urgent circumstances that besieged the applicant were entirely of the respondent's making (i.e. three weeks' notice of the relocation with SH and an intransigent failure to meaningfully engage with the issues raised in correspondence from the applicant's attorneys). My view on the matter therefore is that the applicant is entitled to his costs in respect of the proceedings that served before Norman J. With regard to the final relief sought in Part B of the application as also the respondent's counter-application in which she sought leave to relocate SH, the usual rule that costs follows the result must apply.

[32] Accordingly, the order below speaks for itself.

[33] In the circumstances, I make the following order:

1. The respondent, A[...] H[...], be and is hereby interdicted from relocating with the minor child S[...] E[...] H[...] H[...], to Somerset

West, Western Cape Province and removing the minor child permanently from Graaff-Reinet, contrary to the best interests of the said minor child.

2. The respondent shall pay the costs of the application, such costs are to include the reserved costs of 4 April 2023.
3. The respondent's counter application is dismissed with costs.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *P V Terner*, Instructed by Kim Meikle Attorneys c/o De Jager & Lordan Attorneys, Makhanda (Ref: *S Tarr*)

For the Respondent: *K L Watt*, Instructed by Derek Light Attorneys c/o Dold & Stone Inc., Makhanda (Ref: *J van Rooyen*)

Date heard: 12 October 2023.

Date delivered: 12 December 2023.