



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 no: 3451/2021

In the matter between:

ANGELA ROBERTS

APPLICANT

and

BRENDAN SCOTT KEARNEY

RESPONDENT

CORAM: CHESIWE, J

HEARD ON: 2 DECEMBER 2021

**SUPPLEMENTARY HEADS RECEIVED ON 11 FEBRUARY
2022 AND 18 FEBRUARY 2022 RESPECTIVELY**

DELIVERED ON: 18 MARCH 2022

- [1] “A child can never be regarded as an object up for auction whereby his or her custody is to be awarded to the bidder who can provide the most favourable circumstances for the upbringing of that child, regardless of whether that bidder is a parent, a grandparent, a family member of a third party. I regard the biological bond between a child and his or her parents as

one of the most important factors still to be considered when the issue of what is in the best interest of the child is under consideration.”¹

- [2] The application before this court, the Applicant and the Respondent are the biological parents of the minor child, **IGK**. The Applicant approached court for an order in terms of Section 18 (5) of the **Children’s Act 38 of 2005**, primarily to obtain a court order for relocation to Ireland with the minor child, **IGK**. The Respondent opposed the application.
- [3] This matter has a long-protracted litigation history between the parties and it seems to continue unabated, as the papers are quite voluminous. The Applicant seeks relief for various prayers in the Notice of Motion. The relocation being the main issue and the issue in dispute.
- [4] The matter was before me on 28 October 2021. I granted an order for an urgent investigation by the Office of the Family Advocate into the minor child’s best interests specifically on the issue of relocation to Ireland. Pursuant to the investigation it was postponed to 2 December 2021, and that the parties were granted leave to supplement their papers on receipt of the Family Advocate’s report.
- [5] The Respondent filed a Notice of Counter-Application in respect of the December holidays. On 2 December 2021, I granted an interim order to allow the Respondent visitation rights during the December 2021 holidays. The order is as follows:

¹ Tyler v Tyler [2004] 4 All SA 115 (NC) at 125 -126.

- “1. The Respondent is allowed to take the minor child on holiday on 11 December 2021 and return the minor child on 25 December 2021;
2. The Applicant to furnish the Respondent with the necessary papers for the travelling of the minor child to Cape Town;
3. The Applicant is allowed telephonic calls and video calls while the minor child is on holiday with the Respondent.”

[6] On 19 January 2022, the Respondent filed a Notice for Counter-Application, as well as a supplementary affidavit and attached to it was a memory stick, which I had to watch. The Applicant proceeded to file a supplement answering affidavit to the memory stick filed by the Respondent, which affidavit also had attached a memory stick. I directed that the parties file Heads of Argument in respect of the new dispute that allegedly happened while **IGK** was on holiday with the Respondent. The Applicant filed her Heads of Argument on 22 February 2022 and the Respondent filed his Heads of Argument on 4 March 2022. As the matter involved a minor child’s best interest, I saw it fit to accommodate the parties and accept all papers filed.²

[7] The background briefly is as follows: The parties met each other during December 2015 and got involved in a romantic relationship during February 2016. **IGK** was born on 30 June 2017. Their engagement ended in October 2021. **IGK** resided with the Applicant since birth, and continues to reside with the Applicant to date. Since the relationship was terminated, the parties could not agree on how the Respondent should exercise his contact rights with **IGK**. The Respondent approached the Children’s Court

² Godbeer v Godbeer 1999 (4) SA 435 (C) 439G-H, the court emphasized the powers the court has in what is in the best interest of a minor child and is not necessarily bound by the procedural strictures or limitations of the evidence presented.

during March 2018 for an interim order defining his contacts rights. The Children's Court requested an investigation from the Family Advocate's Offices.³ The Children's Court granted an order on 10 August 2018, that the Respondent be allowed contact on alternative Saturdays and Sundays from 08h00 to 12h30, as well as visitations at the residence of the Applicant, including regular telephone contact.⁴ On 10 November 2020, the Children's Court granted a final court order with increased contact rights as well as sleepover visits. According to the Respondent, the Applicant continued to frustrate contact between **IGK** and himself, in spite of the existing Children's Court order.

- [8] On 11 December 2020, the Applicant received a letter from a company in Ireland, that confirmed a three-month contract starting 1 February 2021. On 6 April 2021 the company offered the Applicant a fulltime position as a Service Division Manager at the Dublin branch in Ireland. On 22 April 2021, the Applicant submitted an application to the Irish Department of Enterprise, Trade and Employment for a critical skills employment permit. During May 2021, the Applicant's Attorneys wrote a letter attached as "FA4" to the Founding Affidavit, informing the Respondent about the possible relocation of **IGK** to Ireland as the Respondent's consent was needed for the paperwork. The parties were unable to resolve the issue amicably, nor could they mediate on the issue of relocation. It is mainly for this reason that the Applicant had to approach the court as the upper guardian of all minor children for the relief sought in the Notice of Motion.

³ Report attached as "BK4" to the answering affidavit of the Respondent page 171 to 191.

⁴ Annexure "BK3" page 169 of the answering affidavit.

- [9] The issues for determination by this court is whether the Applicant complied with section 31 of the Children's Act 38 of 2005; whether the Applicant should have entered into a parenting plan with the Respondent before approaching the court and if the Applicant should be granted a court order that allows her to leave with **IGK** to Ireland.
- [10] Adv. Coetzer, Counsel on behalf of the Applicant submitted in oral argument that the Applicant wishes to move on with her life as she found employment in Ireland. He mentioned that the Applicant was brutally assaulted and stabbed in her house. He indicated that the Applicant has a genuine concern of her safety and the safety of the minor child. Counsel submitted that the court is to take judicial notice that South Africa is a violent country when compared to Ireland, which has a better education system, employment opportunities, as well as being safer than South Africa. He submitted that the Applicant will not frustrate the Respondent's contact rights as she will ensure that contact between the Respondent and the minor child is maintained by video calls, Skype or telephone calls.
- [11] Adv. Georgiou, on behalf of the Respondent in oral argument submitted that, the Applicant made a decision to relocate, without taking into consideration the Respondent's rights and views as a father. She said the Applicant while in South Africa frustrates the Respondent's contact rights and it may become worse if she is allowed to relocate with the minor child. She indicated that the Respondent had to approach the Children's Court in order to exercise his contact rights. Counsel further mentioned that the Applicant refused to attend mediation with the Respondent in

order for the parties to resolve their dispute without approaching court. She submitted that the Respondent has a genuine fear on how he will exercise his contact rights if the minor child is allowed to relocate to Ireland.

[12] Section 7 of the Children's Act deals in detail, on the best interests of a minor child, that there are factors to be considered when dealing with the principle of best interest of a minor child, read with section 9 which emphasis that the best interests of a child are paramount. And section 10 deals with the expressed views and participation of the child in any matter concerning the child depending on the child's age, maturity, and stage of development.

[13] The first issue of dispute is whether the Applicant failed to comply with Section 31 of the **Children's Act 38 of 2005** (the Act). Which provides as follows:

“(1) (a) Before a person holding parental responsibilities and rights in respect of a child take any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

- (b) A decision referred to in paragraph (a) is any decision-
- (i) in connection with a matter listed in section 18 (3) (c);
 - (ii) affecting contact between the child and a co-holder of parental responsibilities and rights;
 - (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
 - (iv) which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education,

health, personal relations with a parent or family member or, generally, the child's well-being.

(2) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

(b) A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and parental responsibilities and rights in respect of the child."

[14] In terms of the Children's Court order dated 10 November 2020 the Respondent acquired parental responsibilities and rights as contemplated in Section 18 (2) (b) read with Section 21 and Section 23 (1) of the Act.

[15] The Respondent having acquired these parental responsibilities and rights, is therefore entitled to participate in all matters that involved the minor child. Though Section 31 requires a person holding parental responsibilities and rights must give due consideration to the person who is a co-holder, in this instance the Respondent. The Applicant in attempting to comply with Section 31 instructed her attorneys to write a letter, requesting the Respondent to give consent for the minor child's relocation. This is noted in paragraph 22 of the Founding Affidavit as follows:

"As such and despite my various request and attempts to resolve the dispute in a non-confrontational manner, the Respondent has outright refused to grant me the necessary permission to remove the minor child from the Republic of South Africa. As such this Application is issued as a

last attempt after my previous attempts to resolve the dispute in an amicable manner were unsuccessful.”

- [16] Various correspondences were also sent to the Respondent by the legal representative of the Applicant and this is noted in annexures “FA5” on page 41 and “FA4” on page 43. Annexure “FA4” reads as follows:

“Kindly indicate whether your client will be willing to give his consent for the minor child to move with our client to Ireland if her employment contract is confirmed.”

- [17] And Annexure FA5 reads as follows:

“... we have send to your attorney on 27 January 2021. After receiving the email from your attorneys that they have withdrawn and no longer act on your behalf, we send you the letter directly.”

- [18] The Respondent replied to the correspondence annexed “FA5” on page 44, in a one liner as follows:

“Noted. I am opposed to making variations to the current contact scheduled.”

- [19] The Applicant in my view has involved the Respondent in respect of the provisions of Section 31. The Respondent refused to cooperate and gave the Applicant no option, but to approach the court as the Upper Guardian of minor children. Unfortunately, Section 31 does not give the person holding parental responsibilities and rights an alternative as to how to handle a situation where the co-holder refuses to express his/her views, except than to approach the court. In **J v J**,⁵ the court noted that

⁵ 2008 (6) SA 30 (C).

even if there is a duty to consult, the mother would not have been bound to give effect to the father's views and wishes, "once she has given such considerations, she may act independently." ⁶

[20] The Respondent in his opposing affidavit contends that on numerous occasions, he had requested that the parties should enter into a Parenting Plan in terms of Section 33 of the Act and such request was rejected by the Applicant. The Applicant on the other hand contends that the proposed mediation for a parenting plan would not have worked, as the Applicant wishes to relocate and the Respondent is refusing to grant consent for such relocation. As a result of that, the parties have deadlocked and mediation was therefore not an option.

[21] Section 33 (1) provides that "co- holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the minor child." Sub-section (5) (a) provides that:

"(5) The parties must seek-

- (a) the assistance of the family advocate, social worker or psychologists; or
- (b) mediation through a social worker or other suitably qualified person."

[22] Section 21 (3) (a) provides that:

⁶ J v J para [35]

“If there is a dispute between the biological father referred to in subsection (1) the matter must be referred for mediation to a Family Advocate, Social worker, social services or other suitably qualified person.”

- [23] The parties were assisted by the Family Advocate in 2018 to conduct an investigation into the best interests of the minor child as well as the parenting plan. The Family Advocate made recommendations whereby the Respondent's contact rights were increased and he no longer had to exercise the contact rights under supervision. The Family Advocate further recommended that the parties are to attend a Parenting Skill's Program. For parents to have a successful parenting plan and for that plan to be workable, they as parents have to get along. In this instance the parties have been litigating since the minor child was born. For mediation to be successful the parents must be willing to submit to mediation and be prepared to cooperate with each other as well as with the mediator. The parties in this case are unable to agree on any issue.
- [24] The Children's Act refers to mediation with the expectation that the parents will cooperate with each other in the best interests of the minor child. It is clear from Section 21 and 23 that parties may not approach court without resolving their issues through mediation. However, in this instance the party's relationship as parents has been acrimonious since they separated. The issue that they seem not be able to resolve, is the relocation of the minor child, as a result they have reached a deadlock. It appears that none of them is prepared to compromise on the issues.
- [25] In my view mediation under these circumstances would not be successful, as the Family Advocate was involved the first time

based on the Children's Court order. There was also a social worker appointed by the Applicant, Ms Heidi Joubert in June 2019 to conduct an assessment. The parties have already gone through two professionals to resolve their dispute in respect of the minor child. It is also not in the child's best interest to be constantly assessed due to the parents' conflict. The Respondent requested further assessment by Ms Giada del Fabbro or Ms Ronel Duchen, both being Clinical Psychologists. The parents can go for further assessment as they need it more than the minor child. **IGK** has been assessed since she was two years of age. In **J v J**,⁷ the child was repeatedly subjected to psychological assessment. The child eventually complained that: "He was not a lab rat to be subjected to continuous testing."

[26] The court in **J v J** *supra*, ordered that the child be allowed to settle down without any further litigation, assessment and investigation. The Respondent's counter-application would do exactly what the court **J v J** said should not be done, that is an over assessment of minor child. **IGK** cannot be referred for further assessment, when the parent themselves are unable to agree on anything. It would therefore not be in **IGK's** best interests to go for further assessment. The Respondent's counter-application in this instance ought to be dismissed.

[27] The issue of relocation remained the main dispute between the parties. I had to order the Family Advocate to investigate the matter, in terms of their mandate, with regard to minor children. It was another opportunity for the parties to mediate their dispute in

⁷ 2008 (6) SA 30

order to settle the matter and cease on litigation. However, that was unsuccessful nor did it assist the parties in mediating their dispute. The Family Advocate had to write a full report with recommendations. Whereas, had they agreed on mediation at the Family Advocate, it would have been their arrangement in respect of the minor child.

- [28] During December 2021 till January 2022 holiday, the parties continued unabated with their dispute. New papers were filed by both parties, that is, Supplementary Affidavits and Supplementary Heads of Arguments as per the court's requests.

RESPONDENT'S SUPPLEMENTARY AFFIDAVIT AND THE MEMORY STICK

- [29] Respondent filed a Notice of Motion with a Supplementary Affidavit as well as the memory stick, which details the events from the time he took **IGK** on holiday in terms of the court order that was issued. As already mentioned above, the said application is accepted as it involves the interest of the minor child. I watched the video clip on the memory stick. It simply shows a father who is happy to be with his daughter. Except on the 22 January 2022 outside the residence of the Applicant, conflict between the parties resurfaced. And I must say Mr Robert seemed to not be calming down the situation. Mr Robert ought to have actually played the mediator between the two parents. In my view, he actually seemed to have fuelled the fire between the two parties. Their conduct in the presence of the child, as parents, is questionable. The Applicant is supposed to make things easy for the minor child, **IGK** and not play an emotional separation anxiety

game with the child. Her conduct gives the child the impression that she does not approve of the visitation of the child with the Respondent. There is nothing in the clips that show that the Respondent means any harm to the minor child, **IGK** or that the minor child was not happy to be with the Respondent.

- [30] The Applicant must by all means try to allow the Respondent and the minor child **IGK**, time to be with each other, be it on video call or whatever means of contact and must not interfere/disturb nor ask the minor child questions while she is interacting with the Respondent.

APPLICANT'S SUPPLEMENTARY ANSWERING AFFIDAVIT AND MEMORY STICK

- [31] The Applicant also filed her Supplementary affidavit and a memory stick, which I allowed as I did with the Respondent's papers. And all this being in the interest of the minor child. The Applicant's video clip and recording are of **IGK** crying and refusing to go with the Respondent. The child is seen being hysterical and hitting and shouting at the Applicant, the kind of behaviour which I deem is the behaviour which the child sees with her parents, in her presence. Their behaviour reflects out in the minor child, as she constantly has to be in the presence of conflicting parents. The report of the Family Advocate, Annexure "**KK1**" the following is noted:

"... At this stage the child wants to begin and complete their own actions for a purpose. Guilt is a confusing new emotion. They may feel guilty over things that logically should not cause guilt."

- [32] The Applicant in her supplementary answering affidavit stated that the Respondent had on one occasion pulled the child out of her hands, which caused the child to sustained bruises on her inner upper left arm. She had to take the child to Medi-Clinic for medical attention. The parents should desist from this kind of behaviour. They will in the end, be the cause of whatever emotional scars **IGK** will experience or suffer. However, both video clips show **IGK** to be happy with both the Applicant and Respondent. They as parents, even if they failed to mediate, they must find a common ground on how to co-parent **IGK**. The Applicant agreed in the supplementary answering affidavit that the Respondent should have a relationship with the child, but she does not make it easy for the Respondent, not even mentioning the conduct of Mr Roberts on the recording and the mentioning of the police by the Respondent. The presence of the police would have worsened the situation for the minor child.
- [33] The parents must attempt to be civil in the presence of the minor child. There is no doubt that they both love **IGK**. They have to realise that it is in **IGK**'s best interest that they cooperate with each other. In **F v B**,⁸ Kriek J, acknowledged that the animosity between the parents may to some extent be one-sided in the sense that the mother's feelings against the father appear to be more intense than his towards her. In the end it is more about the parents having to deal with their own emotions to minimise or even avoid any conflict between them. From the video clips provided, especially of the Respondent, shows a child who is very happy to be with her father. On the other hand, the Applicant's

⁸ 1988 (3) SA 948 (D).

video clip shows an aggressive screaming child, refusing to visit the same the Respondent that she exhibited to be happy with during her visits. The current litigation between the parents is therefore not helping the minor child. Indeed, protracted litigation often has an adverse effect on the child's wellbeing. More than two years have passed since the last Children's Court order and the parents are still litigating unabated.⁹

[34] The report of the Family Advocate in respect of the parent's communication, remarked that as a matter of urgency they have to communicate with each other and that the Applicant must keep the Respondent up to date on the activities of **IGK**, including his involvement in the minor child's upbringing. They both have to realise that the minor child is only four years and still has a long way to go before she turns eighteen years. They are therefore obliged to have proper communication mechanisms to avoid any further conflict between them.

[35] Section 6(4)(a) provides that:

“In any matter concerning a child – an approach which is conducive and problem-solving should be followed and a confrontational approach should be avoided.”

In this instance the parties have been confrontational for the past four years. It has become difficult for them as parents to avoid the conflict. They are blinded by their wrong believe that everything

⁹ Soller NO v G and another 2003 (5) SA 430 (W), the court was confronted with a dispute that involved a minor child and the matter had at least twelve Judges over that period.

they do is in the minor child's best interests. In **Odendaal v Battiss**,¹⁰ Mageza AJ, remarked as follows:

“...[sic] parent, should be to adopt a less belligerent and rigid stance and to explore as far as feasible, alternative means of resolving disputes and difficulties involving children.”

PARENTAL ALIENATION

[36] The Respondent alleges that the Applicant is gradually causing parental alienation between him and **IGK**. The Respondent in the supplementary Heads of Argument, contends that the Family Advocate does not have the expertise to deal with parental alienation, as it is a matter for a psychologist. The Respondent in the counter-application requested that both parties attend sessions with a psychologist, including **IGK**. The Applicant denied the allegation, and explained that the conduct between the parties does not amount to parental alienation, but rather the acrimonious relationship between the parties.

[37] Parental Alienation Syndrome (PAS) is a process by which one parent seeks, consciously or unconsciously, to alienate their children from the other parent.¹¹ It is difficult to recognise PAS in most cases and by the time it is detected the damage is already done. In **T v M**,¹² the Appellate Division acknowledged the dangers of parental alienation and said the following:

“Parental Alienation Syndrome' relates to a situation in which one parent is so 'victimized' by the other that the child will go along with whatever is expected of it by the accusing parent.”

¹⁰ ECD 201/2009 (Unreported matter) para 33.

¹¹ Tony Hobbs – Parental Alienation Syndrome and UK Family Courts, Part 1 [2002] 32 Family Law 182.

¹² 1997 (1) SA 54 (A).

In most instances the primary care giver will offer no apparent opposition or even appear to support the child or encourage the child to visit the other parents.

- [38] Even if parental alienation has to be investigated, the minor child is four years old and it will be difficult to determine if the child's views have been influenced by the Applicant. The video clips I watched showed that the child was happy to be with the Respondent. Indeed, had there been parental alienation, the Applicant would not have allowed the minor child to visit or go on holiday with the Respondent. This is a situation of both parents finding it difficult to reconcile with the fact that their acrimonious relationship is not in the minor child's best interests. The parties are failing to see what effect their conduct has on the minor child. The video clip submitted by the Applicant, showed a hysterical four-year-old, who does not know how to handle the situation between the parents. Even if the child is hysterical, the Applicant attempted to calm her down, whereupon went with the Respondent for a visit.
- [39] The parents may be using a wrong approach in dealing with how they communicate with each other, as well as the continued high conflict between them, which does not resolve the situation, but at this stage, one cannot say its parental alienation. There are severe cases of parental alienation, whereby the child would without any legitimate justification reject the other parent. The minor child in this case is only four years. With persuasion from the Respondent's side and cooperation of the Applicant, the child eventually goes for visitations with the Respondent. In my view there is no bases for the alleged parental alienation.

RELOCATION TO IRELAND

[40] Now I turn to deal with the main issue in dispute, relocation. The aspect of relocation falls squarely within the jurisdiction of the High Court. Section 22(7), 24 read with section 45 (3)(a) of the Children's Act provides as follows:

“(3) ...the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:

- (a) the guardianship of a child;
- (b) the assignment, exercise, extension, restriction, suspension or termination of guardianship in respect of a child;
- (c) artificial fertilisation;
- (d) the departure, removal or abduction of a child from the Republic;
- (e) applications requiring the return of a child to the Republic from abroad;
- (f) the age of majority or the contractual or legal capacity of a child;
- (g) the safeguarding of a child's interest in property; and
- (h) surrogate motherhood.

(4) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children.”

[41] The Family Advocate was then mandate to investigate the minor child's best interests, specifically with reference to the minor child's relocation. The report was compiled, annexed “**KK1**”. Paragraph 3.5 of the Family Advocate's report reads as follows:

“The aspect of relocation falls within the exclusive jurisdiction of the High Court. The Children's Act is clear on this aspect. Section 22(7), 24 and 45 (3)(a) and (d) of the Children's Act confirm this view. If the Children's Act is clear that matters relating to relocation falls within the exclusive jurisdiction of the High Court, does failure to refer such matters for mediation in order to seek joint decision making render an application premature as argued on behalf of the respondent?”

As already alluded above, the parties are unable to mediate on the issue of relocation and thus the matter has to be dealt with by the Court as the upper guardian of minor children and in terms of the Children's Act.

[42] The Applicant in her founding affidavit explained that the move to Ireland was for purposes of a better employment opportunity as unemployment in South Africa is so high. She has already been appointed as a Services Division Manager at a company in Dublin. She further mentioned that the decision to relocate to Ireland was not taken in haste, nor was it taken to frustrate the Respondent's contact rights. She lists in her founding affidavit several grounds for the relocation; namely better employment, education, safe environment for herself and her children; reduce the risk of violence and a better quality of life. She mentioned that she can obviously not leave **IGK** behind as she wants to relocate with her whole family.

[43] The Respondent in the answering affidavit raised a concern that the relocation of **IGK** will affect his contact rights, as the Applicant was already frustrating his contact rights with the minor child. He further mentioned that the Applicant's relocation with the minor child is not *bona fide* nor reasonable. The Respondent explained that he was able to travel every third weekend from Johannesburg to Bloemfontein, to spend time with **IGK**. As result thereof, the relocation would make contact between him and the minor child to be quite difficult. The Respondent in his supplementary answering affidavit stated as follows:

"7.2.7.2 I am opposed to IGK relocating as I too have opportunities in Australia. I have an Australian passport and enquired whether

the Applicant and Eben would not rather consider Australia as a possibility. (My reason for this suggestion is that *inter alia* I would be able to obtain employment in Australia and I too would emigrate to Australia in order to maintain regular face to face physical and video contact with **IGK**...”

- [44] According to the Family Advocate’s report, annexure “**KK1**” the minor child was not assessed, nor her views expressed with regard to the relocation, given her age. Annexure “**KK1**” mentions the good relationship **IGK** has with both parents, however the child’s emotional security was identified to be with the Applicant as she has been the primary care-giver since the birth of the child. Indeed, the concerns of the Respondent are genuine. The Respondent has been exercising contact for one weekend a month and had video calls, WhatsApp and telephone calls with the minor child. The Applicants resides in Bloemfontein and the Respondent in Johannesburg. It cannot be denied that the Respondent did indeed exercise physical contact with the child due to the close proximity of the two cities, as it is four hours away between Johannesburg and Bloemfontein. However, the overriding test for relocation was set out in **Jackson v Jackson**,¹³ by Scott JA as follows:

“Generally speaking, where, the following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the minor children to be removed from the country if the decision of the custodian parent has shown to be *bona fide* and reasonable. This is not because of the so-called rights of the custodian parent but because, in most cases, even if the access by the non-custodian parent would materially be affected, it would be in the best interests of the children that the custodian

¹³ 2002 (2) SA 303 (SCA).

parent not be thwarted in his or her endeavour to emigrate in pursuant to a decision rationally and genuinely taken.”

[45] In **LW v DB**¹⁴, Satchwell, J said the following:

“...although the best interests of the child are to be treated as paramount, ‘They are not to be elevated to this sole factor for consideration. The economic, cultural and physiological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child. The general quality of life of both parents and the child is relevant.”

[46] The court in **LW v DB** *supra* went further and stated as follows:

“I do not think that I can, or should, consider weighing the relative merits of living in this country or living in the United Kingdom. Matters like the quality of their schooling, the relative standard of living and so forth are, in my view, quite peripheral in the present case. Whether they live in this country or in the United Kingdom, they will be properly provided for as far as housing, sustenance and education [are] concerned.”

[47] I doubt that the Applicant or any parent for that matter, would relocate to a country that would be worse off than her country. A parent would for good reasons relocate for better opportunities, for himself/herself and/or their children. The Applicant should not be penalised for wanting to have a better life for herself and her family, including the minor child.

[48] **KM V CM**,¹⁵ the court confirmed that in relocation matters, the factors as envisaged in Section 7 of the Children’s Act must be considered. In considering Section 7 (1)(a) which refers to the nature of the personal relationship between the child and the

¹⁴ 2020 (1) SA 169 (GJ)

¹⁵ 2018 JDR 0093 (GJ) (unreported: Paragraph 42)

parents, as well as section 7 (1)(a)(ii) which refers to the nature of the personal relationship between the child and any care-giver or person relevant in those circumstances. The Family Counsellor in her assessment confirmed that the parents and the minor child have a secure and stable relationship. However, there is a stronger emotional bond between **IGK** and the Applicant. That cannot be disputed as the child has been in the primary care of the Applicant.

[49] It cannot be in the child's best interests that the parent in whose care she has been since birth, be separated from the specific them, in this instance the Applicant (mother). Section 7 (1)(d) refers to "the likely effect on a child of any changes in the child's circumstances, including the likely effect on the child of any separation from –

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living..."

[50] The Applicant has shown that the relocation is *bona fide* and has no motives. Indeed, it cannot be denied that the move is perceived to be a better country with better advantages by the Applicant. The Applicant attached to the application annexure "FA13", which is the day-care for **IGK**, the details of her employment, the details of where she is going to stay, namely Bray, a coastal town and it's the same town where the Applicant's sister resides. The Applicant in the founding affidavit paragraph 75.1, further stated that:

“A lot of the interaction between the Respondent and the minor child already occurs via the phone and they communicate with one another with the aid of video calls. I confirm that the Respondent can still exercise his regular telephone contact rights with the minor child via video call, WhatsApp, Zoom, Skype and so forth. In fact, I will ensure that we will have access to uncapped data at the immovable property in Ireland and that the necessary infrastructure (including a computer and/or a cell phone) is available...”

The proposed arrangements for the ongoing contact to maintain the relationship between the Respondent and **IGK** is reasonable, including that the Applicant’s visits to South Africa once every second year and whereupon the Respondent may visit the minor child twice a year in Ireland. Obviously, this kind of arrangements will have financial implications. The parents should at least meet each other halfway in respect of the travelling expenses.¹⁶

- [51] The Respondent on the other hand, is prepared for the child to relocate, but only if it is to Australia. Australia being the Respondent’s country of birth, he indicates that his roots in Australia will make it possible for him to be able to find employment easily. The Respondent also has family in Ireland, that is his maternal aunts, though he indicated that the last time he had contact with the maternal aunts was fourteen years ago. The Applicant indicated that her sister resides in Ireland for the past fifteen (15) years and she has previously visited Ireland. The Respondent in this instance cannot say he will allow the child to relocate only if it is to Australia. The Respondent appears to want to hold the Applicant at ransom that relocation will only be

¹⁶ *Shawzin v Laufer* 1968 (4) SA 657 (A) The non-custodian’s financial position is also relevant, the father had the means to visit his children in Canada and for the them to visit in South Africa.

consented to, if it his country of choice. That cannot be allowed. The Applicant has her own life and has a right to choose the country of her choice, as long as there is an arrangement for contact between the Respondent and **IGK**.

- [52] Various court judgments have concentrated on whether the relocation is in the best interests of the minor child, especially if this will affect the relationship of the child and the parent who is staying behind. However, relocation may not be in the minor child's best interest, but the life of one parent must continue, so shouldn't his/her rights to freedom of movement be protected, including relocation? This right of freedom is guaranteed in section 21 of the Constitution of South Africa Act, 108 of 1996, which provides that:

“ (1) Everyone has the right to freedom of movement;
 (2) Everyone has the right to leave the Republic.”

- [53] The refusal of relocation application has a potentially disproportionate impact on a parent who wishes to relocate and restricting his/her mobility as well as subverting his/her interests and personal choice that he/she wishes to make when relocating.¹⁷

- [54] The report of the Family Advocate listed a few recommendations including the relocation of the minor child. The Family Advocate deals on daily bases with such matters and are in a better position to give such recommendations, though the court is not bound by the recommendations. It is indeed in the minor child's best interest

¹⁷ Ford v Ford 52/05 SCA (unreportable 1 December 2005)

that the court allows and accepts such recommendations. As already stated above, **IGK** has been in the primary care of the Applicant since birth. The court take cognisance of the fact that it would be unrealistic and impossible to micro-manage the contact arrangements,¹⁸ provided in the court order, but this can be cured with a mirror court order.

[55] In **Van Rooyen v Van Rooyen**,¹⁹ the mother was granted permission to relocate to Australia, subject to the condition that she will take all the necessary steps to ensure that the court order is made an order of the Family Court of Western Australia. This was confirmed in **Latouf v Latouf**,²⁰ the mother was granted permission to move to Australia and the minor child's adjustments was to be monitored for one year by the International Social Services,²¹ and provide the father with a progress report and facilitate contact between the child and the father. The Applicant's undertaking to ensure that the order of this court is complied with, and that court order need not be elaborate or complicated, in order to avoid further court applications. To alleviate the Respondents fears that his contact will be frustrated, the Applicant is to ensure that such a mirror order is obtain on her arrival in Ireland. Counsel on behalf of the Applicant submitted same that a mirror order will remedy the situation when the Applicant is allowed to relocate. It would be therefore advisable

¹⁸ KM v CM 20128 JDR 0093 (GJ) Unreported.

¹⁹ 1999 (4) SA 435 (C)

²⁰ [2001] 2 ALL SA 377 (T)

²¹ (ISS) Global Report 2019-2020, NGO founded in 1924 and assist children and families confronted with complex social problems as a result of migration.

that the Applicant and her Legal Counsel ensure that a mirror order is obtained.²²

[56] Ireland is party to the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996.²³ One of the objectives of the Hague Convention is ensure the rights of contact and access between a parent and the child is maintained and respected. Article 5 provides as follows:

- “(a) rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence;
- (b) rights of access shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”

[57] The Respondent has the Central Authority in South Africa at his disposal to approach it at any time if the Applicant does frustrate his contact rights or is in breach with Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. In **Chief Family Advocate and Another v G**,²⁴ the court found that the concepts of parental responsibilities and rights, as opposed to “custody and access”, the Hague Convention is flexible enough to accommodate these new concepts as stated in the Children’s Act. There is no doubt that there are international instruments at the disposal of the Respondent and he will be able to exercise contact with the minor child.

²² Van Rooyen v Van Rooyen 1999 (4) SA 435 (C), see Brown v Abrahams [2004] 1 ALL SA 401 (C).

²³ Article 6 of the Hague Convention requires member states to designate a Central Authority to discharge the duties imposed by the Hague convention. The Central Authority is obliged to cooperate with each other to secure the prompt return of a child.

²⁴ 2003 (2) SA 599 (W) 606I- 608B.

[58] The Applicant in the Notice of Motion seeks an order that she be the sole guardian of the minor child. Section 24 (3) of the Children Act provides as follows:

“In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child’s existing guardian is not suitable to have guardianship in respect of the child.”

[59] The Respondent has acquired full parental responsibilities and rights towards the minor child. The Applicant in terms of Section 24 (3) has to give reasons and satisfy the court that the Respondent is unfit to be the minor child’s guardian. The reasons advanced by the Applicant are not exceptional. There is nothing in the papers convincing this court that the Respondent should not be the minor’s child guardian, nor is he not unfit to be stripped of the child’s guardianship. It’s in the Respondent’s interests as well as the minor child that he remains **IGK**’s guardian in that way he remains involved in the minor child’s upbringing. It will also guard against the Applicant making major decisions without involving the Respondent. Therefore, the Applicant cannot be granted sole guardianship of **IGK**.

COSTS

[60] The Applicant seeks costs in the event the matter is opposed, so does the Respondent seek costs in his Counter-Application. The general rule is that costs follow the successful party. The purpose of costs being to indemnify the successful party for having been put through having to oppose/defend himself/herself. However, this being a family dispute, the

Applicant cannot be faulted for having approached court to protect the minor child's best interests. Nor can the Respondent be faulted for having opposed the application. Exercising my judicial discretion, and upon consideration of the family dispute, it is in my view that each party pays their own costs.

[61] I accordingly order as follows:

1. The Applicant is granted leave to remove the minor child, **IGK**, permanently from the Republic of South Africa to Ireland.
2. The Respondent is ordered to forthwith sign all documents pertaining to the relocation of the minor child, **IGK** and to take all such steps that may be necessary to enable the Applicant to apply for the issuing of passports and/or for the issuing of visas for the minor child, failing which the Sheriff of the Honourable Court is authorised and directed to take all such steps and to sign all such documents on the Respondent's behalf.
3. The Respondent is ordered to forthwith sign all such documents and to take all such steps that may be necessary to enable the Applicant to lawfully remove the minor child from the Republic of South Africa, failing which the Sheriff of the Honourable Court is authorised to take all such steps and to sign all such documents on the Respondent's behalf.
4. Upon the relocation of the Applicant and the minor child to Ireland, the Respondent will be entitled to maintain contact with the minor child as follows:

- 4.1 The Respondent shall be entitled to continue contact as set out in the Children's Court Order dated 10 November 2020, subject to the condition that such contact rights must be exercised within Ireland.
- 4.2 Telephonic, Skype, Zoom, and WhatsApp contact at all reasonable times. To enable the Respondent to exercise these contact rights, the Applicant must:
 - 4.2.1 Ensure that the minor child has, at all reasonable times, a cell phone and/or a computer at her disposal through which the Respondent can contact the minor child;
 - 4.2.2 Ensure that at all reasonable times there is Wi-Fi and/or any other data and/or any other internet facilities available at the Applicant's home in Ireland to facilitate the aforementioned contact right;
 - 4.2.3 Supply the contact numbers and/or any other contact details and/or connection links, which will be required by the Respondent to exercise his contact rights with the minor child.
5. Upon the relocation of the Applicant and the minor child to Ireland, the Respondent's assistance shall be solicited to perform the following future acts as and when the need may arise:
 - 5.1 To administer and to safeguard the minor child's property and/or any other interest which the minor child may acquire;
 - 5.2 To apply, as and when necessary, for the issuing of any citizen documents, identity documents and/or

any passport and/or any visas in respect of the minor child from the relevant authorities with the Respondent consenting thereto and/or with the need of the Respondent signing any documents in respects of such an application;

- 5.3 To take and/or to make any decisions involving the minor child;
 - 5.4 To assist the minor child in any administrative, contractual and/or any other legal matter;
 - 5.5 To give consent required by law in respect of the minor child;
 - 5.6 To consent to the minor child's departure and/or removal from Ireland to any other country.
- 6. The Respondent's Counter-Application is dismissed with no order as to costs.
 - 7. Each party their own costs.
 - 8. Upon relocation to Ireland, the Applicant is to obtain a mirror Court Order of this Court's Order.

CHESIWE, J

On behalf of the applicant: Adv. J C Coetzer

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On behalf of the respondent: Adv. S Georgiou
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