



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

Reportable:

NO

Of Interest to other Judges:

NO

Circulate to Magistrates:

NO

Case No: A80/2022

In the matter between:

BSK

APPELLANT

VS

AR

RESPONDENT

HEARD ON: 30 NOVEMBER 2022

CORAM: MUSI JP, MBHELE, DJP et REINDERS J

JUDGMENT BY: MBHELE DJP

ORDER ON: 23 DECEMBER 2022

REASONS: 29 DECEMBER 2022

[1] This is an appeal against a judgment of a single Judge of this Division following a litany of applications brought by both parties concerning their 5-year-old minor child (IGK). The respondent approached the court *a quo* to obtain an order authorising her relocation to Ireland with IGK. On 18 March 2022 the court *a quo* granted the application in favour of the respondent on the following terms:

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.

[2] The germane facts are the following. The appellant (the father) and the respondent (the mother) are the unmarried biological parents of IGK, who was born on 30 June 2017. The appellant and the respondent were engaged to be married. Their engagement terminated in October 2017. IGK has been staying with the respondent since birth. After the parties separated they could not agree on the appellant's contact rights to IGK.

[3] During March 2018 the appellant approached the children's court for an order defining his contact rights. It made an interim order granting him contact rights with IGK and ordered the Family Advocate to prepare a report. The appellant stays in Johannesburg while the respondent in Bloemfontein.

[4] On 10 November 2020 the children's court granted an order awarding the appellant phased in contact with IGK. In addition, the parties were ordered to

refrain from having any conflicts in IGK's presence and to stop talking ill of each other in IGK's presence or when speaking to her.

- [5] During May 2020 the respondent informed the appellant that she has secured employment in Ireland and that she and her husband are considering to relocate to Ireland with their son and IGK. Subsequent to her appointment, the Irish Department of Trade and Employment issued her with a Critical Skill Employment permit. She requested the appellant to consent to IGK's relocation to Ireland. The appellant suggested that the respondent consider relocating to Australia instead as he is originally from Australia.

- [6] On 26 January 2021 the respondent's Attorneys wrote a letter to the appellant's Attorneys requesting the appellant's consent for IGK to relocate to Ireland with the respondent. The appellant declined the request. After the respondent's request was denied she successfully approached the court *a quo* for an order authorising her relocation to Ireland together with IGK. It is that order that is the subject of this appeal.

- [7] On 2 December 2021, while the main application was pending, the appellant approached the court *a quo* with a counter- application in which he, *inter alia*, sought an order allowing him to take IGK on holiday between 11 and 25 December 2021. Additionally, he applied that a psychologist be appointed to prepare a report with recommendations regarding IGK's best interests, including the exercise by the parties of their parental rights and responsibilities with regards to IGK and whether or not it is in IGK's best interests to be removed permanently from South Africa and the effect on IGK if she relocates to Ireland leaving the appellant behind.

- [8] The court *a quo* only granted an order allowing the appellant to take the minor child on holiday between 11 and 25 December 2021. The acrimonious relationship between the parties deteriorated further after IGK spent the two weeks with the appellant on holiday in Cape Town. The parties blame each other for IGK's hostile behaviour towards the appellant. Since the return of IGK

from holiday with the appellant it became difficult for the appellant to exercise overnight contact with her.

- [9] The appellant could not take IGK with him for a period of 11 weeks between January and 18 March 2022. IGK refused to accompany the appellant and would cry hysterically every time the appellant attempted to exercise his contact rights. This led to the appellant filing a supplementary affidavit in which he detailed incidences which he alleges constituted parental alienation. Around the weekend of 21 January 2022 when the appellant tried to take IGK away for a visit she cried hysterically to a point where she asked the respondent when will the appellant die and refused to leave with the appellant.
- [10] The appellant accuses the respondent of parental alienation based on IGK's constant reluctance to accompany him whenever he wanted to exercise contact. He alleges that the respondent and her husband monitor IGK's video calls with him and sometimes interfered during calls and distract her by putting toys in front of her while she was busy on a video call with him to divert her attention. The respondent disputes that putting a toy next to IGK was aimed at distracting her. She states that the toy was used to help her stay focused during video calls because her concentration span is too short, considering her age.
- [11] In another incident the appellant and respondent's husband had a disagreement which led to them manhandling each other when IGK was crying and refusing to leave with the appellant. While the respondent's husband was comforting IGK he remarked that it was not nice for IGK to be forced to leave with the appellant, creating an impression that he encourages IGK to be rude and dismissive towards the appellant.
- [12] The respondent denies that she is orchestrating parental alienation from the appellant. She amplified her version by attaching photos showing bruises on IGK's inner upper left arm which she alleges were sustained when the appellant pulled IGK out of her hands during one of their many confrontational

encounters. The respondent had to take IGK to the hospital for medical attention as a result thereof.

[13] The court *a quo* found that there is no evidence of parental alienation necessitating further psychological assessment of IGK as she had already been subjected to assessment and evaluation twice in preparation of the two Family Advocate's reports. The record is replete with stories of these parents who are at war with each other and nit-picking at every turn. They are suspicious of each other and view each other's actions through a magnifying glass. IGK is being followed with cameras and recording devices to capture her activities and conversations with either parent, with an intention to point out or cast a spotlight on even the most insignificant faults of the other parent. They are both on a fault-finding mission and judging each other on trivial issues.

[14] The respondent is the current primary caregiver. The investigations and evaluations done by the family Advocate, the social workers in the Family Advocate's office as well as H. Joubert, an independent social worker recommended that IGK's primary place of residence must be with the respondent. Primary residence of IGK was never an issue between the parties until the respondent communicated her intentions to relocate to Ireland with IGK. There is no evidence advanced that IGK's best interests are at jeopardy under the respondent's eye. What came out clearly from the appellant is his fear that the respondent may violate the court order and frustrate his right to access if she is allowed to relocate with IGK to Ireland.

[15] Parental alienation is defined as follows by **Richard Gardner**, a child psychiatrist:

'.... a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against the parent, a campaign that has no justification. The disorder results from the combination of indoctrinations by the

alienating parent and the child's own contributions to the vilification of the alienated parent¹

- [16] **Richard Gardner** opines that it occurs when, in the context of child custody disputes, one parent deliberately or unconsciously attempts to alienate a child from the other parent. In the current matter the child started displaying hostility towards her father after she had been away with him for the first time for an uninterrupted period of 14 days. The appellant fails to appreciate that although IGK was happy to spend time with him on holiday for 14 days, this was the first time she was separated from her mother for such a long period. The experience could have overwhelmed her.
- [17] IGK started displaying discomfort with accompanying the appellant on 7 January 2022 when he came to exercise his contact rights, just two weeks after they came back from holiday. There is no evidence suggesting that the respondent had indoctrinated IGK in any manner in the two weeks that she spent with the respondent and her family after the holiday. What the record shows is that she was happy in the appellant's company when they were in Cape Town. The fact that she was happy during the 14 days she spent with the appellant is not an indication that she adjusted with ease and did not miss her mother during that period. I am unable to find fault in the court *a quo*'s finding that there is no need to subject IGK to an assessment by a clinical psychologist. The appeal against the dismissal of the counter- application ought to fail.
- [18] The respondent and her husband contemplated relocating to Ireland when her husband was informed of possible retrenchment at his place of employment. Her decision to move was motivated by the prevailing crime rate and economic climate in South Africa. She believes that her economic prospects are better in Ireland. She resigned as a director of a software development company and sold her shares therein. She will be receiving a

¹ Gardner, RA (2001). "Parental Alienation Syndrome (PAS): Sixteen Years Later". Academy Forum. 45 (1): 10–12. Retrieved 2022-12-20.

better salary in Ireland. She believes that Ireland will provide a stable, safe and stimulating environment which will be conducive to their emotional and psychological wellbeing. IGK will receive free education which is ranked high in the world's educational systems. The cost of groceries in Ireland is more reasonable than in South Africa.

[19] She intends settling in Bray where her sister, who is her support structure, resides. She has already made arrangements for IGK to attend school at Little Eaton Montessori.

[20] The legal principles applicable in relocation cases were set out in the majority judgment of Scott JA in **Jackson v Jackson**² as follows:

"It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token, care should be taken not to elevate to rules of law the dicta of Judges made in the context of the peculiar facts and circumstances with which they were concerned."

[21] The above dictum finds relevance in the circumstances of the current matter. We need to balance the respondent's right to be economically active and the best interests of IGK when dealing with this matter. When parents of minor children separate, it is normal that they would move on and pursue different interests. The courts will not dictate to parents how to run their lives after separation in the spirit of maintaining the environment that children born out of relationships of estranged parents are familiar with. The mere fact that children have to adjust to parents living apart is an indication that none of the

² 2002 (2) SA 303 (SCA) para 2 at 318EI.

parents should be shackled to one place at all cost, especially when that parent's livelihood is at stake

[22] In *F v F*³ Maya AJA remarked as follows, when dealing with the rights of custodial parents to choose how they organise their lives after a divorce:

'[10] It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible. Our Courts have always recognised and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life. Thus, for example, in *Bailey v Bailey*, the Court, in dealing with an application by a custodian parent for leave to take her children with her to England on a permanent basis, quoted with approval the following extract from the judgment of Miller J in *Du Preez v Du Preez*:

'[T]his is not to say that the opinion and desires of the custodian parent are to be ignored or brushed aside; indeed, the Court takes upon itself a grave responsibility if it decides to override the custodian parent's decision as to what is best in the interests of his child and will only do so after the most careful consideration of all the circumstances, including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it.'

The reason for this deference is explained in the minority judgment of Cloete AJA in the *Jackson* case as follows:

'The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decision is correct. The reason why a Court is reluctant to interfere with the decisions of a custodian parent is not only because the custodian parent may, as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interests of a child but, more importantly, because the parent who bears the primary responsibility of bringing up the child should as far as possible be left to do just that. It is, however, a constitutional imperative that the interests of children remain paramount. That is the "central and constant consideration".'

[11] From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological wellbeing. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment. This being so, I cannot agree with the views expressed by the Full Court that 'the impact on S of the appellant's feelings of resentment and disappointment at being tied to South Africa, or the extent to which her own desires and wishes are intertwined with those of S' did not deserve 'any attention' and that '[i]n arriving at a just decision [a Court] cannot be held hostage to the feelings of aggrieved litigants'.

[12] It is also important that Courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts who have no reciprocal legal obligation to maintain contact with the child and may relocate at will may, and often does, indirectly constitute unfair gender discrimination. Despite

³ *F v F* 2006(3) SA 42 (SCA) par. 10, 11 & 12

the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses'

[23] In my view it cannot be said that the respondent's decision to relocate is unreasonable. She has already found employment in Ireland. She has made arrangements for IGK and her brother's schooling in case her request is upheld. She will be closer to her sister who will provide support. She is willing to bring IGK to South Africa once a year, at her expense, in case relocation is allowed. I am persuaded that the proposed relocation of IGK with her mother, with whom she is residing from birth, is in her best interest.

[24] The court *a quo* misdirected itself when it ordered the appellant to exercise physical contact only in Ireland. The order did not provide for instances when the child is on holiday in South Africa. The appeal ought to succeed on this basis only. The children's order of 10 November 2020 granting phased in contact to the appellant has not been challenged, the court *a quo* also did not deal with it. The understanding has always been that contact during the period before relocation, if granted, would be regulated in terms of the 10 November 2020 order. It is, therefore, unnecessary for this court to make any order in relation because the phase from November 2021⁴ remains in force until IGK relocates permanently to Ireland.

⁴ 3.5 FROM NOVEMBER 2021

- 3.5.1 Every alternative weekend from a Friday at 17h00 to Sunday 17h00;
- 3.5.2 One short school holiday to rotate between the parties and 50% of all long school holidays, Christmas, New year and Easter to rotate between the parties;
- 3.5.3 The biological father will be allowed to have contact with the minor child on her birthday for 4 hours up until Grade 00 where after it will become 2 hours;
- 3.5.4 The biological father will have contact with the minor child on his birthday from 09h00 to 17h00, both parties to have contact alternatively on Father's or Mother's day from 09h00 to 17h00;
- 3.5.5 Public holidays to rotate between the parties;
- 4. The biological father will have telephonic contact with the minor child on Monday, Tuesday, Wednesday and Thursday for 20 minutes which will include Skype and/or "WhatsApp" video call. The biological mother will facilitate the calls. The parties must both consider the age of the child and always act in the best interests of the child during these calls.
- 5. The biological father will on his cost visit the child or exercise his contact with the child.

[25] Attorneys for the appellant presented us with a draft order dealing with contact in case the relocation order is granted. Clause 10 of the draft order proposed that the respondent be directed to apply for a mirror order to the one that this court would grant in the event that IGK is removed permanently from Ireland to another country. There is no evidence that the respondent intends relocating permanently to any other country. It is therefore not necessary to deal with an eventuality of relocation to any other country. We also deemed it unnecessary to make an order that would micro manage relations between the parties by ordering the respondent to provide the appellant with her itinerary and prescribing how and when the appellant must see IGK before departure to Ireland.

[26] In the result, the following order is made:

1. The appeal succeeds.
2. The order of the court a quo is set aside and replaced with the following:
 - 2.1 The respondent is authorised to have contact with the child born between the parties, IGK, from 25 December 2022 to 10 January 2023;
 - 2.2 The respondent is authorised to collect IGK from the applicant at the applicant's residence in Bloemfontein on 25 December 2022

6. The parents are not allowed to have any conflict in the presence of the child.

7. The parents are not allowed to badmouth the other parent in the presence of, or while speaking with the child.

between 09h00 and 15h00;

2.3 The applicant is directed to:

2.3.1 on or before 25 December 2022, furnish to the respondent IGK's birth certificate to enable IGK to travel by air on a local flight with the Respondent;

2.3.2 hand over IGK and her possessions required by her for the duration of the contact referred to above, to the respondent on 25 December 2022 when he arrives to collect IGK;

2.3.3 abstain from encouraging IGK not to accompany the respondent or to enlist the help of Mr ER or any third party to do so on her behalf;

3 The Applicant is granted leave to remove the child born between the parties, ("IGK"), permanently from the Republic of South Africa to Ireland;

4 The Respondent is ordered to forthwith sign all documents pertaining to the relocation of the 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 **IGK**, it being directed that the signing and steps referred to herein are to take place in Gauteng;

- 5 Upon the relocation of the Applicant and IGK to Ireland the Respondent is awarded specific parental responsibilities and rights with regard to contact with IGK as follows:

5.1 telephonically, Skype, Zoom, WhatsApp, FaceTime or any other appropriate social-media platform which is accessible to the Respondent and compatible with such platforms which exist in South Africa:

5.1.1 every day between 17:00 and 19:00 local time in Ireland unless either party gives the other 24 hours' prior notice to of a change in time of a call for any specific day;

5.2 every July/August Irish school holiday for a period of 10 days when **IGK** will be in the Republic of South Africa;

5.2.1 the Applicant is directed to pay for IGK's travel costs to and from the Republic of South Africa to enable the Respondent to exercise contact with IGK in the Republic of South Africa during such school holidays;

5.2.2 bring or ensure that IGK is brought to the Republic of South Africa every July/August school holidays;

5.2.3 notify the Respondent at least one month in advance of the dates

on which IGK will be in the Republic of South Africa and furnish him with her itinerary and flight details together with documentary proof thereof;

5.3 for the duration of any period during which the Respondent is in Ireland, subject to the Respondent giving the Applicant or her spouse Mr ER not less than 3 days' notice telephonically or by text message or WhatsApp, or by e mail of the dates on which he will be in Ireland. The Applicant is directed to confirm receipt of such notice within not less than 12 hours after such notice having been sent to her;

5.4 in the February, October or any other Irish short school holiday(s), during which holiday(s) the Respondent is authorised to exercise contact in Ireland or to remove IGK from Ireland to any country of his choice and return her to Ireland to the Applicant at his expense;

5.5 every alternate Christmas and Easter Irish school holiday, during which holiday the Respondent is authorised to remove IGK from Ireland to any country of his choice and return her to Ireland to the Applicant;

6 Upon her relocation to Ireland the Applicant is directed to forthwith furnish

the Respondent with:

6.1 her residential address in Ireland and any change of address in Ireland should she relocate from one address to another;

6.2 her e-mail address(es) and those of her spouse, Mr ER;

6.3 her mobile phone number(s) and those of her spouse Mr ER;

7. The Applicant is directed to:

7.1 Ensure that IGK has a mobile phone and/or computer and/or laptop to enable the Respondent to have daily contact with her as set out in 4.1 above;

7.2 Ensure that there are Wi-fi and/or data and/or internet facilities available to enable the Respondent to have daily contact with IGK as set out in 4.1 above;

7.3 Supply the Respondent with the contact numbers and/or contact details and/or connection links to enable the Respondent to have daily contact with IGK as set out in 4.1 above;

8. The Applicant is interdicted from:

8.1 interfering with or monitoring IGK's calls with the Respondent, or

enlisting her spouse, Mr ER or any third party to do so on her behalf;

8.2 causing IGK to terminate a call with the Applicant or enlisting her spouse, Mr ER or any third party to do so on her behalf;

8.3 denigrating the Respondent to IGK, suggesting to IGK that the Respondent forces her to accompany him, encouraging IGK not to accompany the Respondent, preventing or obstructing the Respondent from having contact with IGK, discussing any dispute regarding the parties' parental responsibilities with IGK, or enlisting her spouse Mr ER or any third party to do so on her behalf;

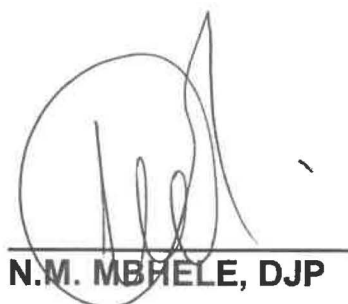
9. Upon the relocation of the Applicant and IGK to Ireland, the Respondent's consent shall be solicited to perform the following future acts as and when the need may arise:

9.1 To apply, as and when necessary, for the issuing of any citizen documents, identity documents, and/or passport and/or visas for IGK;

9.2 To consent to IGK's departure or removal from Ireland to any other country;

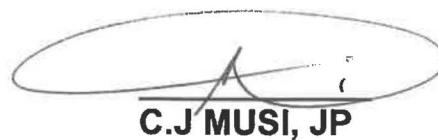
10. The Applicant is directed at her cost, to apply for a mirror order of this order within one month of her relocation with IGK to Ireland and to furnish a copy of such order to the Respondent within one week after it has been granted

11. The Respondent's Counter-Application is dismissed.
12. Each party is to bear his/her own costs."



N.M. MBHELE, DJP

I concur



C.J MUSI, JP

I concur



C. REINDERS, J

On behalf of the Appellant:

Adv Giorgio
Instructed by:
Sheryl Michelow Attorneys
C/O : Bezuindehouts Inc.
BLOEMFONTEIN

On behalf of the Respondent:

Adv. Coetzer
Instructed by:
Honey Attorneys
BLOEMFONTEIN