

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 2003/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

SIGNATURE:

DATE: 06/07/2021

In the matter between:

F[...] W[...]

Applicant

and

S[...] W[...]

Respondent

JUDGMENT

MASHILE J:

- [1] On 30 June 2020, an urgent application between the parties herein served before this Court. The relief sought was formulated in two parts, Part A and B. Part A was sought on urgent basis and it reads:

1. "
2. That Respondent is temporary interdicted from relocating with the minor children, alternatively cause the minor children from relocating from the jurisdiction of Mbombela, Mpumalanga Province to Stellenbosch, Western Cape or any other Province, pending the adjudication of the best interests of the minor children; [SIC]
3. That clinical psychologist, Dr Robyn Fasser, be appointed to investigate the best interests of the minor children, and in doing so, recommending on the intended relocation to Stellenbosch, Western Cape, or any other province;
4. That the Applicant and the Respondent cooperate and participate in the assessment by Dr Fasser in order to give effect to prayer 3 supra;
5. That the Applicant and the Respondent are jointly responsible for the payment of the account of Dr Fasser, excluding individual consultations between Dr Fasser and the Applicant and the Respondent individually, the costs of the latter consultations, to be paid individually; [SIC]
6. That Part B is postponed sine die;
7. That the costs of Part A be paid by the Respondent on the punitive scale as between attorney and own client, in the event of opposition;
8. "

[2] Part B reads as follows:

- "1. That, in the event of the relocation not being in the best interests of the minor children, that the Respondent be interdicted from removing the minor children from the jurisdiction of Mbombela, Mpumalanga Province for relocation purposes;
2. That, in the event of 1, and the Respondent wishing to relocate from the jurisdiction of Mbombela, Mpumalanga Province, that the residency and care of the minor children be awarded to the Applicant;
3. That the costs of Part B be paid by the Respondent on the punitive scale as between attorney and own client, in the event of opposition;
4. "

[3] Negotiations that ensued on 30 June 2020 between the parties culminated in a settlement agreement, which was reduced to the following order:

- "1. Part B is postponed sine die;
2. The issue of urgency and costs of Part A are reserved for adjudication together with Part B of the application;
3. Dr Lynette Roux (should she for whatever reason become incapacitated, her nominee, the latter whom shall not be Dr Hatzemberg or Dr Fasser) is hereby appointed to investigate the best interest of the minor children, and in doing so, recommending on the intended relocation of the Respondent with the minor children to the Western Cape; [SIC]
5.

6.

7.

8.

9.”

- [4] Although the court order provided that Dr Lynette Roux ("Dr Roux") would furnish her report on 31 October 2020, she only did so on 23 November 2020 but this is of no moment as neither party made it an issue. Following the provision of Dr Roux's report to the parties, the Applicant agreed that her recommendation be incorporated into a court order in respect of Part B of the application. As a result, the Respondent together with the minor children, relocated to Stellenbosch, Western Cape Province in December 2020.
- [5] One would have thought that the settlement reached between the parties in respect of the recommendations of Dr Roux would have settled this entire matter. Ordinarily and objectively, the differences between the parties are so inconsequential vindicating anyone's belief that the distance between them should have been narrowed thereby allowing the possibility of an amicable settlement. Besides, on 27 May 2021, the date on which this application was heard, this Court, in line with the provisions of Section 6(a) of the Children's Act 38 of 2005 ("the Act"), afforded the parties time to reflect on their differences and to determine if the rift remained as huge. When they returned, the distance between them was still unchanged.
- [6] Tersely, now that the Respondent has relocated with the minor children, the financing of the contact rights of the Applicant have become an issue. In other words, who of the two parties should be liable for the costs of travel of the minor children whenever they visit their father, the Applicant, in Mbombela.

- [7] On the one hand, the Respondent is willing to pay for the minor children's visits to the Applicant as long as they do so via a flight to OR Tambo International Airport in Gauteng. The Respondent asserts that the route that she has chosen works out less prohibitive for her. If they are to fly directly between Cape Town and Mbombela, the Applicant must pay for their return tickets. Conversely, the Applicant insists that it is beside the point whether or not they fly via OR Tambo International Airport or directly to Mbombela, the Respondent must be liable to pay for their flight expenses.
- [8] The reasoning behind the Applicant's suggestion of flying directly to Mbombela from Cape Town is that he will be able to spend more time with the minor children whereas were they to fly via OR Tambo International, he will hardly spend a full day with them. Besides and most importantly, he argues, is that the trip via OR Tambo International will be arduous. The Applicant argues further that the spirit in which he concluded the settlement agreement permitting the minor children to relocate to Stellenbosch with the Respondent was that he would be afforded a chance to exercise his right of access to the minor children for purposes of developing their relationship with him and that the Respondent would be responsible for the costs of such contact.
- [9] It appears that the Applicant construed the recommendations of Dr Roux to mean that the minor children would fly directly from Cape Town to Mbombela. However, this is not the interpretation assigned to the recommendations of Dr Roux by the Respondent. In an attempt to reduce the exhaustion that might be experienced by the minor children travelling via OR Tambo International and possibly to curtail travelling expenses, the Applicant modified his visitation rights by reducing them to holiday contact instead of every alternate weekend. The slight shift in the Applicant's intransigence notwithstanding, the rift between the parties is difficult to eliminate. Thus, their respective positions on the subject remains unchanged requiring the intervention of this Court.

[10] When confronted with a matter that concerns minor children, a court is enjoined to have regard to the provisions of Section 28(2) of the Constitution of the Republic of South Africa, which stipulates that 'a child's best interests are of paramount importance in every matter concerning the child.' Section 28 of the Constitution finds expression in the Act. Section 9 is headed, Best interests of child paramount. The Section provides that:

"In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

[11] Section 2 of the Act lists objects and Subparagraph (i) provides that one of the objects is 'generally, to promote the protection, development and well-being of children.' Section 6 lays down that in any matter concerning a child:

- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
- (b) a delay in any action or decision to be taken must be avoided as far as possible."

[12] Section 7 deals with factors that must be considered whenever one of the provisions of the Act requires the application of best interest of child standard. Of particular interest in this Section are the provisions of Subparagraph (d)(i) and (ii), which provides that:

"(d) the likely effect on the child of any change 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;"

- [13] While the dispute is between the two parents, it manifestly concerns the minor children. As such, the parties' difference of opinion on who should pay for the travel costs of the children attracts the application of the Children's Act as one that gives life to Section 28 of the Constitution. The question is, which of the two routes between Cape Town and Mbombela resonates with the best interests of the minor children? Of course this question cannot be answered without regard to the costs attaching to each route. The recommendation that the children be flown every other weekend embodied in the report of Dr Roux would come at an immense cost, it being irrelevant which of the two routes the parties ultimately choose.
- [14] Before deciding on which route would be more expensive, it will be useful to first settle which of the two routes will be less exacting on the minor children. That the route going through OR Tambo International will be more demanding for the minor children should not be a contentious issue in my opinion. If the minor children take that route, they will not only add one stop to their journey but they will be extending the distance to be travelled by about 400 Kilometres. Additionally, the time of arrival at Mbombela will indubitably increase significantly. A flight from Cape Town to OR Tambo International is approximately 2 hours. A travel by vehicle from there to Mbombela will take between 3 and a half to 4 hours.
- [15] Contrast the above with flying straight from Cape Town to Mbombela. Firstly, the minor children will exclude OR Tambo International before arriving at Shandon Eco Reserve Estate where the Applicant lives in Mbombela. Secondly the travelling from Kruger International in Mbombela should not take them more than 30 minutes. It is immediately obvious that a direct flight will take away the stress of travelling through a busy airport, OR Tambo

International.

- [16] Furthermore, it will reduce travelling by road considerably, which is not only trying but will expose them to perils of the road. I do not think that it takes a lot to realise that travelling via OR Tambo International will certainly reduce the time the Applicant will firstly, spend with the minor children. Secondly, when he gets to see them, they will be drained from the road travel. Given the above, it is inevitable to conclude that a preferred route that will serve the best interest of the minor children is a direct flight.
- [17] Turning to the costs of the travel. If the recommendation of Dr Roux, assuming that she meant a return journey via OR Tambo International, the costs would be far higher per annum because they would be for three passengers plus a hired vehicle for the weekend. That recommendation is now off the table because the Applicant has agreed not to insist on contact every alternate weekend. Instead, he has opted to see the minor children every school holiday save that in December-January, he will see them for half the school holiday.
- [18] Paying for return tickets every second weekend between Cape Town and Mbombela plus a hired vehicle for the weekend must be expensive than direct return tickets between Cape Town and Mbombela four times per annum without the expense of a hired vehicle. To illustrate this point, it is necessary to reproduce what the Applicant put before this Court. I need to add that this Court did not have the benefit of flight costs from the Respondent in consequence of which I found myself bound to accept those that were supplied by the Applicant.
- [19] I am mindful that the relationship between the Applicant and the parties' eldest daughter is estranged, which will probably require an expert to restore it. For purposes of comparing the costs of the two routes, however, I shall assume that the disaffected relationship between father and daughter will soon be mended and that both minor children will visit the Applicant. I accept that

flying between Cape Town International and OR Tambo International will cost on average an amount of R2 000.00 per round trip for each child. On the scenario that the minor children will fly every second week, as recommended by Dr Roux, it means that there being 52 weeks in a year, the minor children would each visit the Applicant 26 times. The number of visits should, however, be reduced by approximately 5 as they do not take into consideration the school holidays, which are roughly 10 weeks in a year.

- [20] Given that background, I can accept that the visit per child will reduce to 21. The cost per annum for a trip via OR Tambo will therefore amount to R42 000.00 per child plus the cost of car hire. Contrast this with the same number of visits but flying directly between Cape Town and Mbombela, the amount distends to R128 100.00. Thus, by any standard, a direct flight would be too costly for either party. However, if the concession of the Applicant that the minor children will visit him four times per annum is taken into consideration, the costs of a direct flight per return trip shrinks significantly.
- [21] If a return trip is R6 100.00 for each child, then 4 visits per annum translate into R24 400.00 per annum. The concession has as such, made a direct flight the most attractive and the best route both in terms of costs and distance of travel. The minor children will not be as exhausted when they arrive in Mbombela as they would if they travel through OR Tambo International. Moreover, the amount of time that they will spend with the Applicant improves remarkably.
- [22] If the Respondent was prepared to spend about R42 000.00 plus the costs of car hire for each weekend that she accompanied the minor children to the Applicant, I fail to understand why she would not subsidise the costs of the Applicant for flying the minor children every school holiday directly to Mbombela. Accordingly, it will be appropriate to direct that the Respondent should pay over to the Applicant the amount that she would have spent for each child over to the Applicant. That amount must exclude her own costs of

flying and those of car hire. I must emphasise that the amount is not any amount that she would not have paid in any event.

[23] It is now opportune to address the question of urgency and the reserved costs. I find it bizarre and inexplicable that the parties deferred a decision on urgency and reserved costs for another court. These are issues that should have been properly dealt with by the previous court as they were fully canvassed before it. It is totally inappropriate that this Court is now burdened with determination of matters that were not raised before it.

[24] The above said, I turn to the urgency of the matter as argued last year. In short, the mere fact that the parties settled the matter brought urgently is an indication that both parties had accepted that it was indeed urgent. The matter could have been resisted but the parties saw wisdom in settling it, which must be commended because that is what the Act implores them to do in these situations. Thus, it is just and equitable that there be no cost order.

[25] Coming to the costs of the 27th of May 2021. The Applicant has been largely successful. For that reason, I see no need to depart from the established principle that costs must follow results. I note that the Applicant had asked for attorney own client costs. I do not think that costs at any punitive scale, attorney own client or attorney client, can be justified on the facts of this matter. In the circumstances, the Respondent will be liable for the costs of the Applicant as at the scale between party and party.

ORDER

[26] Given the above, I am constrained to direct as follows:

1. Part A of the notice of motion heard on 30 June 2020 is declared to have been urgent and each party is to bear his or her costs relating

thereto;

2. The Respondent is ordered to pay the cost of a direct flight flying between Cape Town and Mbombela for both minor children four times per annum;
3. The Respondent shall be liable for the costs of the Applicant on the scale as between party and party.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 06 July 2021 at 10:00.

APPEARANCES:

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Date of
Hearing: Date
of Judgment:

27 May 2021
06 July 2021