

**IN THE HIGH COURT OF SOUTH AFRICA
(KWAZULU-NATAL DIVISION, PIETERMARITZBURG)**

In the matter between:-

Case No: AR 309/15

LAUREN HAZEL HINDS (nee SHINNS)

Appellant

(Applicant in the Court a quo)

and

ANTHONY IAN HINDS

Respondent

(Respondent in the Court a quo)

Coram: Koen, VAN ZÿL *et* Olsen JJ

Heard: 5 February 2016

Delivered: 14 October 2016

ORDER

On appeal from the High Court of South Africa, KwaZulu-Natal Local Division,
Durban (Gyanda J):

- (a) Save to the extent set out in paragraph (b) below, the appeal is dismissed and each party is ordered to pay her or his own costs.
- (b) The costs order of the Court *a quo* is set aside and replaced with an order that:

'Each party is ordered to pay her or his own costs.'

JUDGMENT

VAN ZÿL, J (KOEN J concurring):-

1. This appeal concerns the vexed issue of whether it is in the best interests of Ethan Hinds, a boy born on [...] 2009, to be permanently removed from South Africa in order to settle with his mother, the appellant, in Zimbabwe. The appellant and the respondent were married to each other at Ballito, KwaZulu-Natal on 3 June 2006. The only child born of their marriage was Ethan. The parties were divorced pursuant to the conclusion of an agreement of settlement on 18 July 2013.
2. The order of divorce by consent provided, maintenance apart, also for the care of and access to Ethan, as follows:-

[3] That the minor child's place of primary residence will be with the Plaintiff (the present appellant).

[4] That the Defendant (the present respondent) shall have the right of reasonable contact to (sic) the minor child by arrangements between the parties which will include:

[4.1] during the school term every Wednesday from after school until the Thursday morning when the Defendant will drop the minor child off at school;

[4.2] every alternate weekend from 15h00 on a Friday until 16h00 on a Sunday afternoon;

[4.3] the defendant will collect the minor child every morning from the Plaintiff's home and drop him at school every morning;

[4.4] all contact arrangements are subject to the minor child's extracurricular, social, educational and sporting requirements;

[4.5] school holidays by arrangement between the parties;

[4.6] reasonable telephonic contact."

3. The matrimonial discord resulted in the respondent moving out of the matrimonial residence and setting up independent accommodation for himself. Following the divorce, full effect was given to the access stipulations of the settlement agreement and as incorporated into the divorce order as set out above. In the result the respondent enjoyed very close and sustained contact with Ethan.

4. The present dispute arose when the appellant decided to relocate with Ethan to Zimbabwe and the respondent declined to consent to the move. As a result the applicant launched an application, brought as a matter of alleged urgency, for leave to remove Ethan and an order as to costs was sought only in the event of the relief being opposed. The respondent indeed opposed and an exchange of affidavits followed.

5. The record is not entirely clear but it appears that the parties recognised that the factual disputes which emerged from the affidavits needed to be resolved by way of calling witnesses to give evidence and to be subjected to cross examination. The minutes of a pre-trial conference held on 15 August 2014 indicate that the parties at that stage realised that the matter had been enrolled for trial without an appropriate order of court and agreed upon steps to remedy the oversight. In addition they agreed to seek an order requesting an investigation and report by the Family Advocate. In the record the parties are variously referred to as the applicant or plaintiff and the respondent or defendant. For ease of reference in this judgment they are called the appellant or the respondent.
6. Following the trial the application was dismissed on 18 September 2014. An application for leave to appeal was thereafter made and refused on 24 October 2014, but leave to appeal was granted to the Full Court of this division upon petition to the Supreme Court of Appeal on 18 February 2015. The appeal itself was heard on 5 February 2016.
7. At the trial the appellant gave evidence and in addition called Mr M C Clark (effectively her former employer), her father Mr J K Shinns and her fiancé Mr N W Stidolph. The respondent also gave evidence and in addition called Ms P I Styles, a practising clinical psychologist who had also sat in during the evidence of the preceding witnesses. Her report had been received as an annexure to the Reports of the Family Advocate and Family Counsellor. These three reports were received by consent during the evidence in chief of the appellant and combined to form exhibit “C” at the trial. Neither the family

advocate, nor the family counsellor were called as witnesses by either of the parties.

8. The background to the dispute is as follows. The appellant was born and raised in Zimbabwe where her father, an accountant by profession, operated a factory. The family unit relocated to South Africa during 2002 when the appellant was about 24 years of age. The appellant studied at the then University of Natal, both fulltime and part-time. She eventually obtained her Master's degree in Agricultural Management whilst employed as a Brand Manager by a firm called Imana Foods and by whom she was employed for about five years. During this period the parties were married at Ballito, KZN out of community of property on 3 June 2006.
9. The respondent is a businessman who operates a factory producing electrical equipment. During 2008 the appellant's family, through the medium of a close corporation called Brainwave Projects 1147 CC, purchased a farm in the Ballito area for about R10 million. The purchase was partly financed through capital provided by the appellant's father and partly through bond finance. The appellant and the respondent each acquired a ten percent member's interest, the balance being held by the appellant's parents and her elder sister. The intention was to embark upon an hydroponic farming venture where the appellant would manage production and her father the packing. The respondent was not involved in the farming operation. Ethan was born to the parties on [...] 2009.

10. During or about the middle of 2012 a 74% share in the farming operation was sold to Coalition Farming CC, trading as Romac Farming. The leading member thereof was the appellant's witness Mr M C Clark. The appellant's family, through Brainwave Projects, retained the farm land holding upon which the farming operation was conducted and entered into a lease with Coalition Farming. Both the appellant and her father stayed on in their respective roles in the farming operation, but as salaried employees of Coalition Farming.
11. The year 2013 was not a happy year for the parties. Matrimonial discord arose between them. It appears that early during that year the appellant met up again with Mr Neville Stidolph, with whom she originally became acquainted when they were fellow students at university. According to her evidence they formed a relationship shortly thereafter. During May of that year the respondent moved out of the matrimonial home and on 18 July 2013 the parties were divorced on terms contained in an agreement of settlement and which also contained the custodial arrangements with regard to Ethan as set out above. Towards end that year and on December 22nd, the appellant received notice through her father of the termination of their employment by Coalition Farming with effect from 31 March 2014.
12. It appears that Mr Clark of Coalition Farming had advised the appellant's father that the reasons why both his and the appellant's employment would be terminated were financial and in order to contain costs in view of the sustained losses suffered by Romac Farming. Subsequently the termination of the appellant's services were formally confirmed in a letter, a copy of which

forms annexure C to the appellant's founding affidavit. In evidence Mr Clark confirmed the position.

13. During this time Mr Stidolph was working on contract in an agricultural venture in Tanzania, but that contract was due to expire at the end of April 2014 and he was looking for a new opportunity. This presented itself in discussions he had with an old friend, one Steyn, a farmer from Zimbabwe. Steyn had an existing lease of a tobacco farm, but was keen to devote his time to other projects. The proposal evolved that Mr Stidolph, together with the appellant, would take over the management of the tobacco farm for the season commencing 1 May 2014 and that the profits from that seasonal crop would be shared between Mr Steyn on the one hand and Mr Stidolph and the appellant on the other. Thereafter Mr Stidolph and the appellant would have the option of taking over the lease and to conduct farming operations for their own account. In the result and on 4 February 2014, P L Steyn (Pvt) Ltd, Mr Stidolph and the Appellant concluded two written agreements, namely a partnership and corresponding management agreement, both to endure for the period 1 May 2014 to 30 April 2015.

14. From the evidence of the appellant's father Mr J K Shinns it appeared that following the termination of his employment by Romac Farming he had taken up employment with a firm in Harare, Zimbabwe and intended relocating to Harare at the end of December 2014. There he and Mrs Shinns would initially reside with the appellant's sister Ms D W Shinns on a property which he owns jointly with her. He also agreed that the farming operation at Ballito generally had been a failure. According to him, at the time of giving evidence during

August 2014, the appellant and Ethan were residing with him and his wife in leased property after she sold her property at Ballito Gardens.

15. The respondent said that the first intimation he had of the appellant's intended relocation to Zimbabwe with Ethan was during a meeting arranged with him by the appellant on 11 February 2014 at the Mugg & Bean, presumably in Ballito. On this occasion the appellant informed him of her engagement to Mr Stidolph, the agreements pertaining to the farming venture in Zimbabwe and her intended relocation to Zimbabwe with Ethan. This gave rise to an argument and the respondent stormed out of the restaurant.

16. It is against this background that the appellant then issued the application on 25 February 2014 for leave to remove Ethan to Zimbabwe and which ultimately gave rise to the present appeal. In the application papers, as well as in evidence, the applicant sought to demonstrate that the move to Zimbabwe was unavoidable. In this regard she claimed that she was unable to find suitable alternative employment within South Africa and in particular in the Durban/Ballito geographic area, that her family intended relocating to Zimbabwe where her sister was already resident and that her fiancé Mr Stidolph was unwilling to commit himself to marriage with her if she was unable to join him in Zimbabwe.

17. The appellant further contended that the residential, scholastic and care facilities for Ethan at Chegutu, where the appellant intended residing with Ethan in Zimbabwe, were adequate and that when he eventually needed to attend high school in Harare, she proposed commuting with him to and from Harare. She stated that she was aware of the detrimental effects of the

proposed move upon the access to Ethan which the respondent enjoyed, but suggested that this would be adequately catered for by affording him access to Ethan in Zimbabwe. In this regard the appellant emphasised the regular airline flights between Durban and Harare and suggested that transport between Harare and Chegutu was not problematic. According to her car hire facilities were available, the road was good and the distance between the two centres was about 100 kilometres.

18. The respondent resisted these proposals on the basis that he would thereby be alienated from Ethan and that he would in fact be relegated to the position of an occasional visitor. In the result the very close contact which he and Ethan enjoyed would be rendered impossible. He also expressed concern that his position as a father figure to Ethan would be lost and that the appellant might seek to replace him with Mr Stidolph as the father figure in Ethan's life. In addition he emphasised the close relationship also between Ethan and his paternal grandparents which he feared would be compromised by the proposed move.

19. It was common cause that both before and after the divorce, the respondent had exercised access to Ethan as formalised in terms of the order already set out earlier in this judgment. According to the respondent, as proprietor of his business, his working hours are flexible and he is able to arrange his schedule in such a way as to accommodate Ethan's needs and requirements. Neither the appellant, nor the respondent, criticised the other's parenting skills or devotion to Ethan.

20. What was also common cause, or at least was not disputed, was that Ethan is a particularly sensitive child. The respondent contended that even during the divorce proceedings he wanted to have Ethan psychologically assessed because of the impact of the separation of his parents upon him, but that the appellant did not share his concern in this regard. What is apparent from the formulation of the application as launched at the outset by the appellant, is that no attempt had at that stage been made to professionally assess the psychological impact upon Ethan of his proposed relocation to Zimbabwe and his resultant separation from the respondent. Instead the emphasis in the application papers was upon the motivation for the move, the adequacy of the facilities, accommodation, schooling and care for Ethan in Zimbabwe, together with the adequacy of access to him to be afforded to the respondent, once Ethan was settled in Zimbabwe.

21. At the trial the only expert evidence presented was the uncontested reports of the Family Advocate, together with the Family Counsellor and the testimony of Ms Styles in support of her earlier report. The report by Ms Styles was dated 28 July 2014. Prior to compiling her report the witness had interviewed the appellant on two separate occasions for a period of about three and a half hours in all. She also interviewed the respondent for a period of about three and three quarters of an hour, Ethan for an hour and a quarter when she also administered various psychological tests to him and the appellant's fiancé Mr Stidolph for about three quarters of an hour. She rendered a detailed report comprising some 17 typed pages and concluded that the preservation of the *status quo* would be in Ethan's best interests. She also recommended that

Ethan should be referred to a psychologist to help him deal with the stressful situation in which he found himself, to cope with life generally and in building up resistance by reason of his sensitive personality. She expressed concern that if he was not thus treated, that he might in the longer term become subject to depression.

22. In the course of motivating her assessment of Ethan's personality in her report

Ms Styles drew attention to features of separation anxiety, sleep difficulties, that he was very slow to warming to unfamiliar people, including other children, was easily emotionally overwhelmed, had difficulty in coping with unfamiliar or new environments, was a clingy child with a constant need to be close to his parents and that this behaviour became more marked during stressful periods, that he required frequent reassurance and had a prominent fear of dogs. He was also given to strong views about order and cleanliness and suffers food idiosyncrasies. By way of example of the latter it was mentioned that Ethan was unable to eat if two or more foods were touching, although this idiosyncrasy had shown some improvement.

23. Ms K J Reddy, the Family Counsellor also rendered a report extending to 19 typed pages and in which the Adv V N Reding, the Family Advocate concurred. Their reports were both dated 19 August 2014 and were compiled at the request of the Court. They jointly interviewed both parties on 18 August 2014. Ethan was also interviewed, but in the presence of his parents because he was unwilling to be interviewed separately. They also had access, *inter alia*, to the report of Ms Styles referred to above. Adv Reding in her report in addition drew attention to the specific provisions contained in sections 7(1)(d),

(e) and (h) of the Children's Act 38 of 2005 relating to the effects upon a child of a change of circumstances, separation from either parent, the detrimental effects which may result from logistical and financial hindrances to direct contact between child and parent, as well as the child's emotional security and development.

24. The Family advocate and counsellor both concluded that Ethan should not be moved to Zimbabwe. Ms Reddy, the Family Counsellor and a registered social worker concluded that it was highly probable that Ethan, if moved to Zimbabwe as proposed by the appellant, would become emotionally and psychologically affected by the separation from the respondent. She was also of the view that the appellant's primary motivation for relocating to Zimbabwe was to pursue her relationship with Mr Stidolph and that taking Ethan with her was the inevitable consequence. She reported that the appellant was unable to spontaneously furnish *"her reasons as to how the relocation would benefit ETHAN."* Adv Reding, in her report, echoed this view and reported that the appellant's *"focus appears to be on practical arrangements in regard to establishing a new life without full consideration being given on how to maintain the child's relationship with the Respondent on a regular basis to be consistent with his development."*

25. Both the Family Advocate and the Family Counsellor concluded that Ethan should not be permitted to relocate to Zimbabwe as sought by the appellant. Ms Styles in the course of her evidence adhered to the views and motivations expressed in her report against the removal of Ethan to Zimbabwe. Under cross examination she stressed that in arriving at her conclusion it did not sit

comfortably with her that in giving effect to the best interests of Ethan, this required of the appellant to sacrifice her own wishes for a new life in Zimbabwe. She was however of the view that Ethan's interests in maintaining the status quo were sufficiently compelling, so that these sacrifices by the appellant were justified. Also under cross examination Ms Styles reiterated her view that the appellant had been precipitous, but not underhand or malicious, in her decisions to relocate to Zimbabwe without first consulting with either the respondent or a psychologist with regard to the impact of the proposed move. In this regard she was supported by the facts and demonstrated a balanced approach to the conflicting interests and desires of the parties.

26. Gyanda, J. in the judgment of the Court a quo remarked on the fact that the appellant had unilaterally made the decision to relocate to Zimbabwe without adequate prior consideration of the needs of or impact of such a move upon Ethan, or the necessity to obtain expert advice in this regard. Nor did she give adequate thought to prior consultation with the respondent in order to determine his attitude to the proposed move.
27. As already indicated, the founding papers in the urgent application for leave to relocate also placed emphasis upon the alleged justification for the move, the adequacy of the Zimbabwean facilities and the logistics of the offered access to Ethan in Zimbabwe, but without devoting any significant attention to the possible impact of the proposed move upon either Ethan, or indeed upon the respondent. It is significant that at no stage did the appellant suggest that Ethan should be examined or counselled by an expert, whether in a discipline

such as psychology or indeed any other relevant field and no expert witness was called to give evidence on behalf of the appellant. The only expert evidence available to the Court a quo was that of the Ms Styles together with the reports by Adv Reding the Family Advocate and Ms Reddy the Family Counsellor. All three these experts were unanimous in their views that at that time the relocation of Ethan to Zimbabwe was not in his best interests and that the permission sought by the appellant should be refused. The Court a quo clearly relied upon their evidence in its consideration of the issues and ultimately in dismissing that application for such leave.

28. The question before us upon appeal is then whether the Court a quo has been shown to have been wrong in arriving at its decision. It goes without saying that the deciding factor in matters of this nature is primarily the best interests of the child involved. In Jackson v Jackson 2002 (2) SA 303 (SCA), Scott JA for the majority held in para 2 at page 318 E-I that:-

“[2] 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. In my judgment the present case is one of those in which in all the circumstances leave to take the children out of the country should have been refused.”

29. The Court a quo was faced with expert evidence which concluded that it was probable that Ethan would suffer psychological harm if, at that stage, he relocated to Zimbabwe with his mother the appellant. To have granted the relief sought by the appellant in the face of the expert and other evidence establishing the factual matrix, would have required of the Court to have ignored or discounted the impact of the expert evidence before it.

30. In Jackson v Jackson (supra) in para 17 at page 324 E-F Scott JA said that:-

“I can find nothing in her reasoning to suggest bias or lack of objectivity on her part. In my view, the trial Judge misdirected himself by simply disregarding the evidence of Mrs Killian. The evidence of Mrs Van Minnen and Mrs Scott was of lesser importance regarding the question of psychological harm as they were social workers and not psychologists.”

31. In the present appeal the Court a quo accepted the evidence of the expert witnesses and in my view it has not been shown that this approach was wrong. But the matter was not decided upon the views of the experts alone. The factual background also formed part of the equation. The Court a quo considered the facts, which included that the appellant made the decision to relocate in a short space of time, without prior consultation with the respondent to establish whether he would be agreeable thereto and most importantly without giving sufficient thought to the impact of the proposed move upon Ethan.

32. It is also apparent that the appellant viewed her prospects if she relocated to Zimbabwe as more favourable than remaining in South Africa. In this regard Ms Styles remarked that she was subjectively optimistic in her approach. But her relationship with Mr Stidolph which had blossomed, was by no means shown to be long established and inevitably secure. The partnership and management agreements hurriedly concluded with Mr Steyn's company were only to endure for a year and were based upon the belief that they would prove profitable. Assuming the farming venture was profitable, then the intention was for Mr Stidolph and the appellant to take over the lease on the farm. But it was not shown that this would be feasible, that the lessor would be agreeable, or even for how long the lease was set to endure, or on what terms. Like any commercial venture the farming partnership with Mr Stidolph was subject to uncertainty and undeniable risk. What would happen if, like at Ballito, the farming operation was unsuccessful, was not explored.
33. Likewise the personal relationship between Mr Stidolph and the appellant had not been shown to be secure. Mr Stidolph and the appellant said that unless the appellant were permitted to relocate to cohabit with Mr Stidolph in Zimbabwe, he was not prepared to enter into marriage with her. Mr Stidolph in evidence conceded that he had made no enquiries regarding employment prospects for himself in South Africa. This would suggest that he did not feel strongly enough about his relationship with the appellant to consider joining her in South Africa should she be unable to join him in Zimbabwe.
34. The appellant's case was also motivated by the claim that she was compelled to move to Zimbabwe, not only because her fiancé Mr Stidolph was there, but

also because she was unable to find suitable employment in South Africa and since her parents were relocating back to Zimbabwe, she would be left behind destitute in South Africa. Ms Styles was cross examined but declined to concede that the appellant would in such event be destitute. Her attitude was that the appellant had told her that should permission to relocate with Ethan be refused, then she would remain in South Africa. According to the witness there was no suggestion that the appellant would be destitute, with the result that the witness made no further enquiries in this regard. She had understood that the appellant had financial interests in the farm and also in other properties.

35. From the evidence of the appellant's father Mr Shinns it was established that after the appellant sold her property at Ballito Gardens she moved in with her parents. The evidence of the appellant also established that she owned a ten percent membership interest in Brainwave Projects 1147 CC which owned the farm which it had originally purchased for some R10 million. It was not established how much the appellant received from the sale of her residential unit at Ballito Gardens, nor what the value of her membership interest in Brainwave Projects was.

36. As to the appellant's claim that she was unable to find alternative employment in South Africa it is apparent that her search for employment extended over a limited period, from when her father notified her on or about 22 December 2013 that her employment at Romac Farm would terminate on 31 March 2014, until 4 February 2014 when the partnership and management agreements with Mr Stidolph and Mr Steyn were signed.

37. According to the evidence of the appellant she restricted her employment enquiries to agricultural positions in keeping with her Master's degree qualification. However, on her own evidence she had been employed as a brand manager for Imana Foods for a period of some five years. This was a position unrelated to her tertiary qualifications and which she only relinquished to go farming with her father at what later became Romac Farm. In the circumstances it was not shown that she was unable to obtain alternative employment in the Durban area which did not involve agricultural production. This consideration, taken with the fact that information on the appellant's assets and liabilities were sketchy at best, did not demonstrate that the appellant would necessarily be anything near destitute if leave to relocate were refused and her parents moved back to Zimbabwe.
38. The Court a quo emphasised in the course of its judgment that its decision related to conditions prevailing at that stage. The Court postulated that if Ethan were taken for counselling, as Ms Styles recommended in her earlier report and in her evidence then, after he had benefitted from the treatment and counselling, had built up resilience and had overcome his anxieties, that at an appropriate time the application for leave to relocate to Zimbabwe could be renewed. Differently put, at that time and upon the evidence placed before the Court a quo, it concluded that it was not then in Ethan's best interests to relocate to Zimbabwe. But given treatment and as Ethan improved and matured with the passage of time, the application could be renewed and leave to relocate could then conceivably be granted.

39. In F v F 2006 (3) SA 42 (SCA) ([2006] 1 All SA 571), Maya AJA said in para 23 at page 53 I-J

“[23] Furthermore, the Court’s refusal to grant the appellant leave to relocate with S now is not immutable and does not mean that she may not obtain leave to return home with her daughter in the not-too-distant future if circumstances so justify.”

40. In my respectful view it has not been shown that the Court a quo was wrong, or had materially misdirected itself in coming to the conclusion that leave for Ethan to relocate to Zimbabwe at that stage should be denied. In arriving at its decision the Court a quo exercised a discretion. In P v P 2007 (5) SA 94 (SCA) in para 14 at page 99 D-E Van Heerden JA held that:-

“[14] Determining what custody arrangement will serve the best interests of the children in any particular case involves the High Court making a value judgment, based on its findings of fact, in the exercise of its inherent jurisdiction as the upper guardian of minor children. This being so, an appeal Court will not easily second-guess those findings and conclusions.”

41. Sitting upon appeal as we do, we do not know how matters have developed during the intervening period after 18 September 2014 when the Court a quo made the order now subject to appeal. On the record before us we cannot assume changed circumstances which would justify us now upsetting the judgment of the Court a quo and permitting the relocation of Ethan to Zimbabwe at this stage.

42. Should the appellant wish to persist in her quest to relocate with Ethan then, at the appropriate time she will need to initiate further proceedings afresh, placing before the Court the then relevant facts and circumstances in support

of the relief sought. In that sense the refusal of leave to relocate was not immutable and when circumstances permit can be applied for once more.

43. In the result I would propose that the appeal against the dismissal of the appellant's application be dismissed.

44. The issue of costs is, however, another matter. The Court a quo dismissed the appellant's claim with costs. It did likewise with the appellant's application for leave to appeal. The Supreme Court of Appeal, upon granting the appellant's application for leave to appeal and directing that the appeal be heard by the Full Court of this Division, directed that the costs order by the Court a quo in dismissing the application for leave to appeal be set aside and that the costs of the applications for leave to appeal, both in the Court a quo as well as to the Supreme Court of Appeal, be costs in the appeal. The question now arising is what the most appropriate costs orders with regard to the appeal and in the Court a quo should be in the light of the failure of the appellants appeal on the merits.

45. F v F (supra) was also a matter where, following a divorce, the custodian parent sought leave for the permanent removal of a child from South Africa. At page 55D in para 27 Maya AJA stated that:-

"[27] The costs of the appeal do not pose a problem. It seems to be common cause that, in pursuing these proceedings, both parties acted bona fide in what each perceived to be their child's best interests. This being so, I am of the view that each party should bear his or her own costs of appeal."

46. With regard to the costs in the Court a quo (in that instance the appeal was from the Full Court to the Supreme Court of Appeal) Maya AJA held in paragraphs 27 to 28 at pages 55 G to 56 B that:-

“[27] ... This case hardly fits that mould and its facts do not warrant the infliction of adverse costs orders to penalise or discourage the parties, acting in good faith and out of concern for their minor child, from accessing the courts to protect and advance her interests.

[28] No doubt the approach of the Full Court was informed by its reasoning preceding as well as its conclusion that Courts 'cannot be held hostage to the feelings of aggrieved litigants'. That approach ignores the societal burdens that are visited on custodial parents. Custodial parents, unlike non-custodial parents, who are free to flit in and out of their children's lives at their convenience, must of necessity often subvert their own interests to those of their children. Life choices that they may wish to make are sometimes, as here, subject to the agreement of their former spouse. The appellant's motivation for initially moving to this country, namely to establish a family with the respondent, has now all but disappeared through no fault of her own. Little wonder then that she now feels the need to return to her 'home'. The solace that she feels can be derived from that move is not to be underestimated. In endeavouring to foster a relationship between her daughter and the appellant when that was in danger of faltering, her conduct has been nothing short of laudable. She can hardly be credited with any improper motive in approaching the Courts. She has throughout done what she thought was best for S. Her decision to relocate, although perhaps ill-advised and precipitate, was born in part out of a genuine belief that the move would also be best for the child. It must follow that the decision by the majority in the Court a quo to mulct her with costs of that appeal is far from fair and cannot be sustained.”

47. In my view materially similar considerations arise in the present matter.

Neither parent has suggested that the other is not a caring parent towards

Ethan. I would therefore propose that both with regard to the costs of the

appeal, as well as the costs in the Court a quo, each party be directed to pay

her and his own costs. The appeal therefore succeeds to the limited extent only that the costs order made by the Court *a quo* is set aside.

48. In the circumstances, the following order is made:

(a) Save to the extent set out in (b) herein below, the appeal is dismissed and each party is ordered to pay her or his own costs.

(b) The costs order of the Court *a quo* is set aside and replaced with an order that:

'Each party is ordered to pay her or his own costs.'

VAN ZÿL, J.

KOEN, J.

OLSEN J

[49] I agree with the order proposed by the majority judgment. As I reach the same conclusion by a different route, and because I take a different view as to the merits of the appeal, I should briefly state my views.

[50] I do not agree with the proposition implicit in paragraph 40 of the majority judgment, that upholding the appeal would in this case amount to second-guessing the findings of the court *a quo*. I do however share the concerns raised in paragraph 41 of the majority judgment.

[51] When the proceedings commenced with the launch of an application by the appellant, Ethan was 4 years and 9 months old. The matter was fast tracked. The trial commenced in August 2014 and judgment was delivered in September 2014. Leave to appeal was refused but subsequently granted by the Supreme Court of Appeal in February 2015. At that stage, for reasons which cannot be discerned, the matter no longer proceeded apace. The appeal was argued before us a year later, in February 2016.

[52] By this time Ethan was 6 years and 9 months old. No expert assistance is necessary for us to take cognisance of the rate of development of a child between the ages of 4 and 6. Counsel for the respondent argued that we could not in all conscience uphold the appeal, and thereby sanction Ethan's departure to Zimbabwe, basing that decision on information concerning, and considerations arising out of, a state of affairs which obtained two years earlier. It is with regret that I conclude that the submission is correct. I take the view, contrary to the one adopted by the Judge *a quo*, that the views expressed by Ms Styles concerning Ethan's sensitive personality, his predilection to anxiety and what she called his vulnerability to depression, did not justify the refusal of the relief sought by the appellant. But we cannot assume that the changes in Ethan's experience of life which must have occurred over the last two years have been changes for the better, and not for the worse. By the time this appeal was argued the assessments this court was required to make of factors such as those set out in sub-sections 7(1)(a), (c), (d), (g) and (h) of the Children's Act, 2005 had become too academic, based as they were on circumstances which had inevitably changed; to what degree, and in which direction, we do not know.

[53] The appeal ought to have been fast-tracked. There is nothing on record to show why it was not, or whether the parties made any attempt to seek any preference on terms which the state of our rolls could have accommodated. This delay has infringed the appellant's right to be heard on appeal. That is to be regretted. Nevertheless, this case is one in which the best interests of the child standard must be applied. In my view the application of that standard requires the appellant's right to be heard on appeal to yield to Ethan's interests.

[54] Given the order which we are to make, there is no reason for me to provide a fully reasoned account of why, in the absence of the difficulty dealt with above, I would have found for the appellant. It will suffice to mention two broad considerations which, in combination with other factors, have caused me to see this matter differently.

[55] The first involves the significance, and impact on a child, of a decision to restrict the freedom of the custodian parent, and especially of a custodian mother. What I have in mind can be conveyed simply by reproducing passages from paragraphs 11 and 12 of the judgment of Maya AJA (as she then was) in *F v F* 2006 (3) SA 42 (SCA) at 49.

“[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 immigrate 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 well-being. 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. ...

- [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 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.”

Bringing this perspective to bear on the evidence presented in the court *a quo* in my view generates a different view of the proper outcome to the litigation. (I say this disregarding the arguments of counsel for the appellant to the effect that the learned Judge *a quo* misdirected himself in a number of respects in considering the facts dealt with in evidence.)

- [56] The second matter which affects my approach to the appeal is what was in my view the excessive weight attached by the learned Judge *a quo* to what might be called the “outside assistance” with which he was furnished.

- [57] The one source of assistance was the report of the Family Advocate rendered in conjunction with one by the Family Counsellor. Such reports must be subject to

critical scrutiny, if for no other reason than to ensure that the reasoning employed is not contradicted by the evidence before the court. (The judgment in *JP v JC and Another* [2016] 1 All SA 794 (KZD) furnishes an example of a careful assessment of such reports.) In this case both of these reporters had been furnished with a copy of the report made by the psychologist, Ms Styles, in advance of making their own reports. Given the content of the report of Ms Styles, it seems unlikely that, untested, it would not induce a bias.

[58] With respect to both the Family Advocate and the Family Counsellor, both of their reports do not move to any measureable degree beyond observations and conclusions which the learned Judge himself was quite qualified, and indeed obliged, to make and draw himself, once he had heard the evidence. Their reports were rendered without the benefit of hearing the evidence, which should have attenuated their role and significance when making the final decision. Furthermore, whilst the parents were interviewed at some length, to use the words of the Family Counsellor, Ethan was only “briefly interviewed”.

[59] The other source of assistance was the evidence of Ms Styles. She made a thorough assessment of Ethan, bringing to bear on the enquiry her experience and expertise. I have no difficulty with the learned Judge’s acceptance of her findings concerning the personality and character of Ethan. The appellant did not seek to contradict those findings. But given what those findings were – involving no particular condition or affliction which rendered it mandatory for Ethan’s parents to seek treatment for him – in my respectful view it was inappropriate for the learned Judge to be as influenced as he clearly was by the conclusion drawn by Ms Styles that the case should be decided against the appellant. Much of what Ms Styles had to say in evidence was in effect a surrogate judgment which strayed well beyond the expertise which justified her being called to express opinions. And in considering her evidence the learned Judge *a quo* overlooked a comment the witness made which echoes the passages from the judgment in *F v F* quoted above.

“My Lord, I found this particular matter very upsetting, because as I think I had testified previously ... is that [the appellant] wants to be in Zimbabwe. She wants to be with Neville, she wants to be with her family. And it doesn't sit comfortably with me that I am saying that she needs to give up all those things in order to do what's in the best interest of the child, it doesn't sit comfortably with me at all.”

[60] I have mentioned these matters concerning the merits of the appeal because it does not sit comfortably with me that they should be left unsaid when it is clear that, unless the material circumstances of the parties have changed, and unless they have settled their differences, it is likely that there will be more litigation with regard to the appellant's intended move to Zimbabwe. Indeed, both the judgment of the court *a quo* and the majority judgment in this appeal anticipate as much.

OLSEN J

KOEN J (VAN ZYL, J concurring):-

[61] I have had the benefit of reading the judgments prepared by my brothers Van Zyl and Olsen.

[61] I agree with the judgment of Van Zyl J.

[62] I also agree in addition with the view expressed by Olsen J in paragraphs [51] to [53] of his judgment that the appeal should be dismissed due to the delay which followed after the judgment of the court a quo was delivered until this appeal was heard.

[63] I however respectfully disagree with Olsen J on the two broad considerations identified by him in paragraph [54] which cause him to differ from the majority judgment. The second of these, amplified in paragraph [56] *et sequi* of his judgment do not call for any comment, in the light of my concurrence with the judgment of Van Zyl J.

[64] I however feel constrained to comment on the first broad consideration referred to by him in paragraph [55], and his reliance on the dicta expressed in paragraphs [11] and [12] of the judgment in *F v F* 2006 (3) SA 42 (SCA) at 49, which I shall hereinafter refer to simply as 'F v F'.

[65] I do not understand the paragraphs in *F v F* to state a principle of universal application. I wish to caution against their unqualified acceptance and application in all matters which might restrict the freedom of custodian parents, or as accurately summarising the impact a refusal of the kind of order sought by the appellant might have, unless such a conclusion is clearly established on the facts.

[66] Specifically, in my view, on the facts of this appeal, reliance on the sentiments expressed in *F v F* would not be justified, and hence should not be a consideration influencing the outcome of the application.

[67] In what follows I shall apply the term 'custodian parent' to refer to any divorced parent to whom, post-divorce, custody, more correctly the 'care' or primary

residence of a minor child has been awarded, which has the effect that the child lives *de facto* with that particular parent from day to day.

[68] The primary consideration in cases of this nature always remains the best interests of the minor child. That much is a firmly established principle of our common law. It is also prescribed by section 28(2) of the Constitution which provides:

‘A child’s best interests are of paramount importance in every matter concerning the child’.

[69] Divorce tears families apart and the primary victims are the children. From being firmly cuddled in the security of an intact family relationship on one day, they are relegated to the cold and isolation of a separation the next day, where their future until they attain majority or become self-supporting, will normally entail being shuttled between the homes of their father and mother, and the love and comfort each respective parent might bring. This continuous shuttling between homes is inevitably disruptive and unsettling, and invariably requires that the home of the custodian parent becomes their primary residence, whilst the home of the non-custodian parent becomes an alternative weekend and part of holiday place to visit. Frequently, any more extensive contact with the non-custodian parent is not in the best interests of the children, not necessarily because of any negative attribute of the non-custodian parent, but simply because the reality of school commitments and extra-curricular activities do not permit more frequent contact.

[70] The non-custodian parent must conceal the terrible sadness he/she experiences from the void left and the loneliness experienced resulting from that situation. If the best interests of a child are to be served the non-custodian parent must make the best of the limited times they can spend with the child. It is an unfortunately unavoidable consequence of divorce. Feelings of frustration and

bitterness may be experienced but they cannot dictate what is in the best interests of the minor child.

[71] Often that non-custodian parent will be the father, because the division of parenting roles unfortunately still remains gender based notwithstanding the constitutional guarantee of equality. Fortunately, the slavish adherence to that kind of arrangement is fast being eroded and the shortcomings in its universal unqualified acceptance recognised by our courts. But the reality remains that the non-custodian parents predominantly are fathers and that the typical order awarding care to mothers thus has a potentially disproportionate impact on men. It would however, with respect, be an oversimplification and denial of the strong bonds often also between a father and child, to dismiss fathers as parents who have no reciprocal legal obligation to maintain contact with a child, and therefore assume that they can relocate at will. Caring non-custodian fathers (that quality should be assumed unless it is proved otherwise) suffer severe gender discrimination arising from being denied the regular contact they had with their children pre-divorce. But even leaving the gender discrimination against them aside, the children's rights of equal contact with their father are severely impaired. The notion that non-custodian fathers are able to relocate at will because they have no reciprocal legal obligation to maintain contact, is with respect a cynical approach unless the facts of a particular case justify such a conclusion. A caring non-custodian parent will want to maintain regular contact and the residence of the custodian parent will therefore invariably restrict the mobility and relocation of such a non-custodian parent. It might even, within reasonable bounds, result in the greater mobility of the custodian parent dictating the residence of the non-custodian parent as the latter follows any change of residence of the former to facilitate or maintain contact. The aspect of gender inequality is, with respect, of less if any significance.

[72] Where a non-custodian parent already has to suffer the loss of company and contact with a child, it is vital that his/her position not be made worse by any conduct on the part of the custodian parent to frustrate, whether deliberately or inadvertently, the rights of contact to a child, or the ease of maintaining regular contact with the

child in any way. Indeed everything should be done to facilitate such regular contact as the program of the child may allow. The inevitable disparity in equal contact to a child can only be justified on the basis that those rights need to be limited and necessarily have to yield to the greater right and best interests of the child.

[73] Just as non-custodian parents have to conceal their disappointment and negative feelings when they lose their daily contact with their child and the wonderful life enhancing opportunities arising therefrom, custodian parents should accept that what they believe to be supposed life enhancing opportunities arising from immigration (which might later turn out not to be so) should be lost to them, in the greater best interests of their minor child and that child retaining regular contact with his/her non-custodian parent. Stressing the denial of the life enhancing opportunity of immigration as inevitably resulting in negative feelings which necessarily will impact on the custodian parent's emotional and psychological well-being, resulting in frustration and bitterness which therefore will result in the child's welfare not being best served because the child will not be raised in a happy and secure atmosphere, will result in inadequate attention to those self-same or similar emotions and considerations which affect the non-custodial parent who simply has to get on with life and make the best of it post-divorce. Further, it would hold the non-custodial parent and our courts to ransom – in effect the custodial parent's attitude reduced to its essence is: 'grant me permission to immigrate otherwise I shall be unhappy and negative, and my unhappiness will affect the environment in which I raise my child, to his/her detriment'. Without ignoring that the denial of permission to immigrate might cause some temporary unhappiness, responsible custodian parents having only the best interests of their children at heart will snap out of any such unhappiness and get on with life. To suggest the contrary is to attribute a petulance to a custodian parent, which should not be tolerated.

[74] The best interests of the minor child, including that to regular contact with a non-custodian parent, which inevitably will be more difficult after immigration, remain paramount and should only be trumped by the impact a refusal of the permission might have on the custodian parent where that is established on the clearest of facts.

Indeed, the impact a grant or refusal of permission to immigrate might have on the parents, is of limited secondary importance.

[75] Ultimately, every case must depend on its own facts. There are no facts in the present case which would justify the application in this case of the principles stated in *F v F* to which Olsen has referred.

[76] The proper order to be granted is the one in paragraph [48] of the judgment of Van Zyl J.

KOEN, J

VAN ZYL, J

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