

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

REPORTABLE

Case No: 14057/2014

In the matter between:

[J.....] [P.....]

APPLICANT

Vs

[J.....] [M.....] [C.....]

FIRST RESPONDENT

DIRECTOR GENERAL: HOME AFFAIRS

SECOND RESPONDENT

JUDGMENT

MADONDO J

Introduction

[1] The applicant in terms of section 18(5) of the Children's Act 38 of 2005 (the Children's Act) seeks *inter alia*; an order authorising her to relocate with minor children; [J.....] [M.....] [C.....], a boy born on 11 October 2009 and [J.....] [J.....] [C.....], a girl born on 21 June 2012, to the United Kingdom (UK), on permanent basis, and leave to obtain South African passports on behalf of the said minor children.

Parties

[2] The applicant is Jennifer Paterson, a major female sale representative in the employ of Freightmore and residing at [2.....] [M.....] [C.....], [F.....] [H.....], KwaZulu-Natal.

[3] The first respondent is [J.....] [M.....] [C.....], a major male reptile breeder of 9[R.....] [R.....] [C.....], [B.....'s] [H.....], KwaZulu-Natal.

[4] The second respondent is the Director General: Home Affairs, who is cited herein as the official responsible for the issuing of South African passports and travel documentation in terms of the South African Passports and Travel Documents Act, no. 4 of 1994 and whose business address in 66 Commercial Road, Durban, KwaZulu-Natal.

Factual Background

[5] The aforesaid minor children were born out of love relationship between the applicant and first respondent (the parties). The parties are co-holders of full parental responsibilities and rights in respect of minor children, as contemplated by section 18(1) and (2) of the Children's Act. The children are primarily residing with the applicant subject to the first respondent's right to maintain contact with them on reasonable basis. The first respondent makes monthly contribution to the maintenance of the minor children in the amount of R2000 per child. The applicant has the intention to settle in UK for an indefinite period. In terms of section 18(3)(c)(iii) and (iv) of the Children's Act the consent of the non-custodian parent is required for the departure or removal of minor children from the Republic of South Africa and for the children's application for the passports.

[6] The first respondent refuses to grant the required consent and his refusal is mainly grounded on that the applicant has not properly investigated the practicalities of her decision as she *inter alia* has no structured plan for the proposed relocation. The first respondent avers that the entire relocation application is based on nothing more than speculation and uncertainty in the hope for a potentially better life in England, when

currently the applicant and minor children live a good stable life in South Africa. According to the first respondent, the application is neither *bona fide* nor reasonable. The first respondent has brought a counter-application for an order arranging his contact with minor children. However, it has been agreed between the parties that it was not necessary to deal with such counter -application since the relief sought therein by the first respondent is adequately covered in the applicant's Notice of Motion.

[7] As indicated above, the minor children are born out of a love relationship between the parties which was not legitimised by subsequent marriage. There is no parenting plan and nor is the court order setting out the respondent's specific rights of contact. However, the Family Advocate has been directed to hold an enquiry and submit a report pertaining to the best interests of the minor children in relation to the relocation application. The Family Counsellor has also submitted a report in this regard. Both the Family Advocate and the Family Counsellor in their reports state that it would not be in the best interest of the minor children to grant the applicant leave to immigrate with the minor children to UK.

[8] The applicant intends to relocate with the minor children from the Republic of South Africa to the UK, England, on permanent basis, before the commencement of the new school year which commences in September 2015. I deem it proper and appropriate to set out in great details the relevant facts as alleged by both parties in their affidavits lodged in respect of this application, counter application by the first respondent and as they are gleaned from the reports by the Family Advocate and the Family Counsellor.

[9] The love relationship between the parties developed some time before 2007. However, the parties engaged in December 2007 and according to the applicant such

relationship was due to the first respondent's alcohol abuse mendacity and infidelity terminated in June 2012. Hence, the parties officially separated in March 2013. As the first respondent was at the time the minor children were born living in a permanent life partnership with the applicant, he thereby acquired full parental responsibilities in respect of both minor children.

[10] Since March 2013 the minor children have been in the care of the applicant and primarily residing with her. However, the first respondent has maintained contact with the minor children since June 2013. After separation with the applicant, the first respondent moved in with one [V.....] [M.....] during March 2013 and they got married on 3 June 2013.

[11] Prior to her engagement to the first respondent the applicant had lived and worked in England for eight (8) years. However, since her return to South Africa from England the applicant has been retrenched twice, first, in May 2010 and she remained unemployed for nine (9) months, and, second, in June 2013, and she was out of employment for five (5) months. This was the position despite that she attended numerous employment interviews, all was in vain. For eight years that she resided in England, the applicant had never been out of employment.

[12] The applicant grew up in South Africa and her father has a British citizenship. The applicant started thinking of relocating in March 2013 since she was then a single mother. Pursuant thereto, in January 2014 the applicant started investigating employment opportunities in England and making school arrangements for the minor children. The applicant has approached various recruitment agencies in England with the intention to

ascertain whether with her qualifications and experience she would be able to secure employment. The applicant states that without having determined dates for her arrival in England, it is not possible for her to obtain offers of employment. However, she has allegedly been advised that there are vacancies in the area where she intends relocating to, and for which she will be suitable qualified.

[13] The applicant is currently employed by Freightmore as a sales executive (representative) earning R22 576 and she has been so employed since 2013. She does not have any tertiary qualifications. According to the applicant in her current position there is no room for further promotion or development. She has found it difficult, if not impossible, for her to find a higher income earning positions in South Africa and it is against this background she chose to investigate options in England. She thinks that relocating to England will help to improve her earning capacity which will, in turn, enable her to maintain and provide for the minor children.

[14] She intends relocating to Chorley area in England where her brother resides. The latter has offered to provide her with a support structure until such time she finds employment and accommodation. The first respondent refused to discuss with the applicant the reasons for the proposed relocation, and, as a consequence he refused to give his consent thereto. She finds it impossible to relocate alone leaving the minor children with the first respondent, as their primary care giver. She states that the first respondents though he loves the children he does not adequately fulfil his parental responsibilities and rights in respect of them. This, according to the applicant, is largely due to his sporadic contact with the minor children and his failure to spend quality time with the minor children while they are in his care. The first respondent consumes alcohol in excess, and he takes

the minor children to adult venues such as the pubs and bars. The applicant states that to be separated from the minor children indefinitely would have a severe negative impact on the emotional and psychological well – being of the minor children as well as of herself. Her children are her first priority and she does everything within her power to see to it that they are brought up in a safe, loving and stable home environment.

[15] The applicant states that it is in the best interests of the minor children that she remains their primary care giver and that their primary place of residence remains with her. For the children's upbringing the applicant heavily relies on the support and assistance of her parents, both financially and physically. Her parents assist with caregiving and transporting of the minor children to various activities. The minor children enjoy a close bond with their maternal grandparents and spend time with them three to four times a week. The applicant avers that should she not be allowed to relocate with the minor children to England, they, the children, will be deprived of the close relationship they enjoy with the grandparents and, the applicant will be deprived of a substantial support system. The children have no contact with their paternal grandparents.

[16] The first respondent alleges that the applicant's decision to relocate is not *bona fide*, reasonable and genuinely taken. His ability to spend time with the children will be severely curtailed and his rights in this regard will be virtually nullified. The first respondent claims to be a South Africa by heart and so as his children. He does not want them to be raised in England, in his absence. The first respondent avers that the applicant has a good life in South Africa. Her career has grown exponentially over the years and by no means is she struggling financially. She has a stable employment and earns a salary almost double to that of the first respondent though she possesses no tertiary education. This has not hampered

her in any way in her career. In England the applicant will share a house with someone though temporarily, whereas in South Africa she lives in a two bedroom house. According to the first respondent the applicant lives a better life in South Africa than she did in England before. In first respondent's submission the applicant's allegation that she will have a better life in England are simply unfounded and speculative at best. It is not certain that the applicant will find better suitable accommodation in England. As a consequence, the first respondent submits that it is therefore not in the best interests of the minor children to relocate to the UK.

Issues

[17] The issues for decision are whether;

1. The applicant's decision to relocate to England is *bona fide*, reasonable and genuinely taken;
2. It is in the best interests of the minor children to emigrate with the applicant to England.

Bona fide and reasonable

[18] In *Jackson v Jackson* 2002(2) SA 303 (SCA) at P318 Para 2 Scott JA said:

"...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 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 immigrate in pursuance of a decision reasonably and genuinely taken"

[19] Whether the proposed move is in the best interest of the child, the court has to consider the custodian parent's interests, the reasonableness of his or her decision to relocate, the practical and other considerations on which the decision is based, and the extent to which he or she had properly thought through the advantages and disadvantages to the children of the proposed move. See *F v F* 2006 (3) SA 42 (SCA) at p 50C-D.

In *Edge v Murray* 1962(3) SA 603 (WLD) at 605H- 606A Trollip J said:

"It is true that the custodian parent generally has the right to regulate the child's life and determine such matter as the place where it should live and the school which it should attend, and any changes that should from time to time be made in those respects, and the court will not interfere with the exercise of that discretion if the custodian parent acts bona fide in what he or she believes to be the best interest of the child."

[20] Following her separation with the first respondent in March 2013 the applicant had to raise the minor children single handily and to secure accommodation for herself and children. Since she could not afford a two- bedroomed house she moved in with her parents. She and her two minor presently occupy a bedroom at her parental homestead. In May 2013 she was retrenched from her employment and as a consequence she was out of employment for five (months). During the period of her unemployment she was supported by her parents, both financially and physically. Children have a very close bond with their maternal parents. These are the people who provide the applicant with support system. On the other hand, the first respondent had undertaken to pay for a caregiver, to look after children and he failed to honour such an undertaking. Further, there has been a short payment of maintenance by the first respondent and in which event the applicant's parents had to step in and assist her with the support of the children. As a result, the applicant relies on her parents for financial support. According to the applicant it had been agreed between the parties that the first respondent would pay R6, 448-50 towards maintenance. However,

during the applicant's period of unemployment the first respondent reduced the agreed maintenance to R3, 838 which put the applicant under severe financial strain. The first respondent is in terms of the agreement obliged to pay R6, 448-560 towards maintenance for the two minor children yet he only pays R4, 250 per month.

[21] The applicant is employed as sales representative (representative) and earns R22 576 plus R4000 contributed by the first respondent towards the maintenance of the minor children of the parties. However, the applicant states that with such amount of money, the maintenance amount inclusive, she is not managing to make the ends meet. Her monthly expenses are running at R31 245, leaving a shorty fall of R4669. This has raised fear in the applicant that as the years go by the expenses to maintain the minor children will increase to a level where she will not afford to provide for the children. She has therefore found herself being forced to consider and explore other opportunities in order to increase her earning capacity so to be able to sustain herself and minor children. In South Africa the applicant is unable to increase her earning capacity due to her limited educational qualifications. The applicant's parents are now retired and they wish to relocate to the UK and the direct consequence of the intended relocation is that the applicant will no longer have any support system.

[22] In the premises, I do not think that the decision made by the applicant to relocate can be faulted and that its *bona fides* can be doubted. Instead, in my view, it is a rational and well – balanced judgment as to what she considers to be best for her and children. She has also taken into the access the children will have to their father and is willing to have such contact continued. To this end, she even proposes that the first respondent should suspend his monthly contribution towards the maintenance of the children so to save for

the air tickets for the first respondent's and the minor children's visits. As the custodian of the minor children, the applicant has given mature and rational thought to the matter and has exercised a value judgment as to where their best interests are. See also *Godbeer v Godbeer* 200(3) SA 976(WLD) at p982 F-J.

Best interests of the minor children

[23] The over-riding considerations whether the children's interests will be best served by permitting their removal from the country. Section 28(2) of the Constitution of the Republic of South Africa 1996 enshrines the principle that:

“a child's best interests are of paramount importance in every matter concerning the child.”

See also *Minister of Welfare and Population Development v Fitzpatrick* 2000(3) SA422 (CC) at P428C.

Section 9 of the Children's act provides”

“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.”

[24] It is common cause that the applicant is the custodian parent in the present case. Myriad duties flow from custody, including the duty to provide the child with accommodation, food, clothing and medical care, the duty to educate and to train the child, the duty to maintain and support the child, and a duty to care for the child's physical and emotional well-being. As a consequence in *J v J* 2008(6) SA 30(C) at P42C it was held that the custodian parent generally has the right to have the child with him or her, to regulate its life and to decide all questions of education, training and religious upbringing. See also *Calitz v Calitz* 1939 AD 56 at P63; *Van Oubenhove V Gruber* 1981(4) SA 857 (A) at 867 F-G.

The courts have over the years demonstrated that custodian parent enjoys a broad discretion to act by their reluctance to displace his or her authority. *See Edwards 1960(2) SA 523(D); Edge v Murray 1962(3) SA 603(W); Meyer v Van Niekerk 1976(1) SA 252(T); Bestuursligaam Van Gene Loow Laerskool v Roodtman [2003] 2 All SA 87(c); J v J case, supra.*

[25] In deciding whether the applicant as the custodian parent in this case should be allowed to relocate with minor children to UK, the minor children's best interest must undoubtedly be the main consideration. What is actually in the child's or children's best interests depends on the facts of each particular case. *See Lubbe v Du Plessis 2001(4) SA 57(C); F v F 2006(3) SA 42 at D 166E SA42 (SCA) at P 47E-F.*

In deciding whether or not relocation would be in the child's best interests, the court has to evaluate, weigh and balance a myriad of competing factors including the child's wishes in appropriate cases. *See F v F, supra*, at P48c. In order to provide guidance in this regard the Legislature has incorporated in section 7 of the Children's Act a comprehensive check list of factors according to which the court can determine, on the facts of each individual case, what will best serve the interests of the child or children concerned:

"7. Best interests of child standard – (1) whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

- (a) The nature of the personal relationship between –
 - (i) The child and parents, or any specific parent; and
 - (ii) The child and any other care-giver or person relevant in those circumstances.
- (b) The attitude of the parents, or any specific parent towards -
 - (i) The child; and
 - (ii) The exercise of parental responsibilities and rights in respect of the child;

- (c) The capacity of the parent, or any specific parent, or of any other care-giver or person, to provide for the needs of the child including emotional and intellectual needs.
- (d) The likely effect on the child if 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 caregiver or person with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child –
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g)
- (h)
- (i)
- (j)
- (k) The need for a child to be brought up within a stable family environment and, where that is not possible, in an environment resembling as closely as possible a caring family environment,-
- (l) "

[26] The question which ultimately has to be decided is whether it is in the best interests of the minor children to emigrate with their mother to UK, leaving their father back in South Africa or whether their interests would be better served by the retention of the *status quo*, with the children spending more or less equal time with each parent. A child's future must be balanced against the great benefits to be obtained if the child does not emigrate with a custodian parent to foreign country. However, non-custodian parent does not lose the right to reasonable access simply because the children have been removed from the jurisdiction.

Accordingly, if this court finds that the interest of the children would be best served by allowing applicant to emigrate with them; it would be competent for this court to define the first respondent's rights of access before the removal of the children. See also *Botes v Daily and Another* 1976(2) SA 215(N) at p220H.

[27] In *Du Preez v Du Preez* 1969 (3) SA 529(D) at 534E-F, the court had the following to say:

“this 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 interest of his child and will only do so after the most careful consideration of all the circumstances, including the reason for the custodian parent's decision and the emotions or impulses which have contributed to it.”

See also *Baily v Bailey* 1979(3) SA 128(A).

(i) First respondent's refusal to give consent.

[28] The applicant's concern is that her lack of relevant educational qualifications will eventually render her unable to provide for her children, if she has to remain in South Africa. This concern arises from the fact that where she is currently employed there are no prospects of development and ultimately promotion. As a result her chances of improving her earning capacity are virtually nil, and so as the chances of finding an alternative employment due to her lack of relevant qualifications. Whereas in England she can qualify for various jobs. To the contrary, the first respondent submits that the applicant's intended relocation to England is based on hope and expectation of a potentially better life in England, with her minor children without their father, when they currently enjoy a good life with their father. Further, the first respondent expresses unhappiness about his children

living with Lain (the applicant's brother) until the applicant finds employment and accommodation and he states that that would extremely be disruptive to the minor children though he does not disclose what type of disruption is anticipated. Further, the first respondent states that his son is at a crucial stage as he is now five (5) years old and he needs his father. It would not be adequate for him (the first respondent) to visit his children on one occasion.

[29] The first respondent claims to have a very stable employment which allows him to provide for his children. Surprisingly, the first respondent is currently failing to make the contribution agreed upon between the parties towards maintenance in the amount of R 6 448.50. Nor does he state that he would increase his contribution towards the maintenance of the minor children. There is nothing to show that he has made any provision for the children. His statement that as a reptile breeder he is earning R12 000.00, and R4000 of which he pays towards the maintenance of the minor children. This, in my view, is indicative of the fact that the first respondent cannot increase his contribution towards the maintenance of the children. Nor can he make any provision for the care, wellbeing, welfare and the future of the children. Though the applicant avers that the first respondent generates a substantial amount from the sale of snakes, the first respondent concern is that that his children will essentially grow up without a stable father figure in their lives. He wants to see his children on continuous basis and watch them grow up in front of him.

[30] The first respondent further states that the applicant's parents are now retired and that there is no evidence to show what their financial condition is. According to the applicant both her parents have their pensions and are, therefore, in a financial position to

assist her should it become necessary. In the first respondent's submission the entire application is based purely on speculation and hope and she has not secured accommodation, employment, schooling and forensic psychologist report on the best interests of children.

[31] The applicant on the other hand, states that she is presently battling to find a good school for the children. The school fees for [J.....] are R2200 and R2375 for [J.....]. The first respondent has not paid towards school uniforms, stationery and extra medical bills over the past years. Her parents are continuously meeting her financial short falls. Children are not on a good medical aid – they are only on a plan which she is not able to afford. She cannot afford a two-bedroomed apartment for herself and children. As a result, she had to move in with her parents. She had to pay R6000 for a two-bedroomed apartment. She has reached her ceiling career wise in South Africa and it would be difficult to improve. In UK she will be financially better off than in South Africa. She will earn between 24 and 30, 000 pounds. She had worked in England for 8 years. All her family will relocate to England. One of her brothers has already been in England for 12 years. He is employed as the car sales manager. Her parent and the other brother will also soon relocate to England. The applicant does not have any tertiary education and this hampers her ability to obtain lucrative employment. Not having their grandparents within close vicinity would certainly not be in their best interests.

[32] In response to the first respondent's endeavour to exercise his rights of contact with the children the applicant states that in order for the first respondent to maintain regular "face to face" contact with the minor children he must Skype them, at least twice a week. However, the first respondent rejects this proposal and argues that he has a close

relationship with his son and he will not be able to maintain this relationship if the applicant takes the child out of the country. He would like to teach his son his ways and habits, such as hunting. The first respondent also rejects the applicants' proposal that in order to be able to purchase an international travel air tickets and accommodation for himself when visiting the children in England and the children visiting him in SA, he must suspend his monthly contributions towards the maintenance of the minor children. She also undertakes to pay her costs of her travel and accommodation when accompanying the children during their visit to SA, so to ensure the safety of the children.

(ii) Family Advocate's recommendation

[33] The Family Advocate recommends that the children should remain resident in the Republic of South Africa, and not relocate to the United Kingdom. The minor children should continue primarily residing with the applicant, on condition that the applicant remains resident in South Africa for so long as the children are residing with her. The Family Advocates recommendations are based on that the applicant has not yet secured any employment in England, and that she makes application on the assumption that she will easily find employment because of her qualifications. Although the applicant claims that both her parents and brother who live in South Africa will relocate to England, all these family members, according to the Family Advocate, will have to rely on her brother who is employed as a salesman in England for support, in addition to herself and children. None of these family members have settled there or secured employment. The Family Advocate goes on to say that although the applicant is of the opinion that younger children find it easier to adapt to new circumstances, the opposite can be said: children in the age group three to six years find it difficult to maintain a long distance relationship with a parent, especially Jocelyn who requires physical handling and care to form an attachment with

parent. Both children have become attached to the respondent, despite the fact that contact was previously sporadic. Children develop and assimilate their parents' heritage and culture, as well as traditions. [J.....] and [J.....] are both at the developmental stage, where they are still exploring their environment as points of reference. Granting consent for the applicant to relocate to England with the children will deprive them of this learning experience in their personal development because they will only have their mother's environment as point of reference on an on-going basis. There are other alternatives, for the applicant other than relocating to England. She is gainfully employed in South Africa and there may still be career opportunities for her ahead, as she has only been with the current company for a period of one and half years. There is therefore no real urgency for her to relocate to England.

[34] The Family Counsellor is also of the opinion that the applicant does not have sufficient reasons to deprive the children of their right to have an on-going relationship with the first respondent by means of regular and frequent physical contact. The Family Counsellor concludes by saying that it stands to reason that the relocation to England will therefore not be in the children's best interests. Accordingly, the Family Counsellor recommends that the applicant's application to relocate to England be dismissed. It has been argued on behalf of the first respondent that the Family Advocate is invariably a qualified lawyer with sufficient experience and expertise to enable him or her to give the court extremely valuable assistance in coming to a decision. The primary purpose in appointing the Family Advocate was to identify and establish what is in the best interests of the child or children concerned. Both the Family Advocate and Family Counsellor have allegedly weighted and evaluated all the relevant facts and circumstances pertaining to the

welfare and interest of the minor children. In support thereof, a reference has been made to the case of *Terblanche v Terblanche* 1992(1) SA 501(W).

[35] An expert witness is there to assist the court. If he or she is to be helpful he or she must be neutral. The evidence of such witness is of little value where he or she, is partisan and consistently asserts the cause of the party who calls her. However, in assessing the credibility of such witness, this court can test his reasoning. *See also Stock v Stock* 1981(3) SA 1280(A) at P1296E-F.

[36] Whether the Family Advocate and the Family Counsellor have, indeed, weighed and evaluated all the relevant facts and circumstances pertaining to the welfare and best interests of the minor children, and not biased, will become apparent in my discussion below: The first reason for the Family Advocate's recommendation is that the applicant has not secured employment in England. The evidence shows that the applicant has earlier on been employed in England for a substantial period of time (eight years). The agency also assures her employment opportunities in the area she intends relocating to and for which she will be suitable qualified. As a support thereto, the applicant has attached a copy of an email from Reed Peston Employment Agency, dated 26 September 2014. Further, her brother and her parents are prepared to provide a backup support system to her and children. The first respondent concedes that there is nothing to suspect that the applicant may not find suitable employment in England and be in much worse position than she currently is to the detriment of the children.

[37] Secondly, that all the applicant's family members intending to relocate to England (her brother and her parents) will all depend on her brother who resides and employed in

England as a car sale's manager is not supported by any evidence. Further, it is not true that none of the applicant's family members resides and employed in England. To the contrary, there is evidence by the applicant that her parents have their own pensions. There is absolutely nothing to suggest that her brother who also intends to relocate to England will depend on the other brother, who is already in England, for accommodation and support. Thirdly, with regard to the adaptability of the minor children to the new environment, no evidence has been tendered to show that the Family Advocate is qualified to make such an opinion without the assistance of an expert report in this regard. Lastly, the Family Advocate bases his conclusion on that there are other alternatives for the applicant other than relocating to England. However, he does not state what those alternatives are. The applicant has categorically stated that she has reached a ceiling in her career wise and there are no chances for her to increase her earning capacity due to her lack of relevant educational qualifications. All this, in my view, demonstrates quite clearly that both the Family Advocate and Family Counsellor did not approach this matter with an open mind, weigh and evaluate all the relevant facts and circumstances pertaining to the welfare and best interests of the children, let alone applying their minds to the issues raised in this matter.

[38] The court must carefully weigh and balance the reasonableness of the primary caregiver's decision to relocate, the practical and other considerations on which such decision is based, the competing advantages and disadvantages of relocation, and finally how relocation will affect the child's relationship with the non-primary giver. In essence, the court has to weigh and evaluate the circumstances impacting directly and immediately to the basic care, well-being and the education of the minor children. To this balancing exercise, fairly and correctly a court needs to be apprised of all the relevant information.

Equipped with this information, the court needs to balance the interest of the minor children remaining in South Africa, so that their father will have easy access to them, against the risks to the minor children of not getting appropriate care and adequate education in the country where they relocate to. In the exercise of her parental responsibilities and rights, the applicant, as a custodian parent, has a broad discretion to choose where to reside with the minor children. However, such discretion shall be exercised subject to the limitation that the responsibilities and rights in respect of the minor children must, at all times, be exercised and performed in the best interest of the children.

[39] In this regard the Supreme Court of Appeal in *F v F*, *supra*, at pp49B-E, 52A held:

“From a constitutional perspective, the rights of a 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 might 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 impotent life-enhancing opportunity. The negative feelings that such an order might 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.... Courts must properly consider the impact on the custodian parent of a refusal to remove a child insofar as such refusal may have an adverse effect on the custodian parent and in turn the child.”

In determining what is in the best interest of the child. The court must decide which of the parents is better able to promote and ensure their physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria set out in section 7 of the Children’s Act.

[40] The applicant has to demonstrate that the minor children's care, well-being and education will be better provided (better off) in UK as compared to South Africa: As a single woman with two minor children in South Africa the applicant has numerous safety concerns. Her safety and of her minor children is, obviously, her source of concern and anxiety in her life. The applicant states that in England she and her minor children will have safe environment.

[41] Secondly, on the applicant's submission should she be forced to remain in South Africa, she will not be in a position to continue maintaining the minor children. She will have no support base since her parents will have relocated to England. She has to downgrade her accommodation and the minor children's schooling down to make ends meet. The first respondent is not contributing towards school uniforms and stationery. In South Africa she is battling to afford a small two-bedroomed cottage for herself and her minor children, whereas in England she will easily be able to afford a three bedroom house. In England there is family support system and the minor children there will attend school at no costs at all. In England the minor children will received a good quality education which will provide them with better opportunities for the future. Also they will have a stable home environment. Conversely, the first respondent does not even have a home. He continues to reside with a friend at Botha's hill, he moved in with soon after the divorce with his wife. Thirdly, the first respondent has not paid extra medical bills over the past years and the applicant's parents are continuously meeting the financial short falls. Until the applicant is certain that she will be relocating it is impossible for her to receive concrete proof that children will be enrolled and that she will find employment.

[42] Fourthly, the applicant is currently experiencing a monthly shortfall of R4669, the contribution received from the first respondent having been added on; she states that due to her lack of relevant qualifications she is not in a position to increase her earning capacity or to be pointed to a higher level. It can, therefore, reasonably be inferred therefrom that the applicant will in the near future find herself not being able to honour her primary duty of meeting the minor children's socio-economic needs. See *Centre for Child Law and Another v Minister of Home Affairs* 2005(6) SA 50 (T) at 57C. It is therefore evident from the above that a refusal to allow the applicant as a custodian parent to emigrate with minor children to UK will impact negatively on her and in turn on the minor children. While it may be true that the first respondent has given some good reasons for refusing the applicant's relocation with minor children to England but, in my view, the best interests of the minor children outweigh all those.

CONCLUSION

[43] The applicant, in my view, has demonstrated capacity to provide for the needs of the children including securing a permanent residence for herself and children and has thereby created a sense of stability. On the other hand, the first respondent has no fixed abode he is moving from one place to the other and therefore he cannot be in a position to provide a stable family environment for the minor children, he has various commitments like hunting and others. Such commitments render him unable to spend quality time with the minor children. Further, the nature of his employment makes it impossible for him to get time off or leave during the festive season.

[44] Children have a very close bond with their maternal grandparents. These are the people who provide the applicant with support system. In turn, this puts her in a position to

raise children in a happy and secure atmosphere. I agree with Adv. Thobela-Mkhulisi for the applicant that the applicant has given careful thought to all practical considerations of a move to the UK and has weighed and balanced the real advantages and disadvantages to the children on the proposed move. The applicant wants the first respondent to keep regular contact with the children and she is prepared to do anything possible within her powers and means to ensure that such relationship is maintained. She even proposes the suspension of the monthly contribution by the first respondent towards the maintenance of the children so to be able to purchase international air tickets for himself and children when visiting one another. However, the first respondent refuses to stop payment of maintenance towards the minor children for that purpose. He insists that the applicant has stable employment and accommodation notwithstanding what the applicant has said in this regard respectively.

[45] The applicant avers that the employment opportunities available in England will give her greater financial security and such income will enable her to provide adequately for her children. The first respondent concedes that the standard of living of the applicant and children will not decrease in England if the applicant's able to find employment and accommodation. [M.....], the applicant's brother has offered to provide her and children with accommodation and to support her until she secures employment. According to the applicant her brother (who resides and works in England) has provided her with valuable information and resources about living in Chorley England. It is an ideal for the applicant and the minor children to reside there. It has all the amenities required for family suburban and it will provide safe and secure environment for her and children.

[46] In South Africa the applicant has indicated that there are no opportunities for promotion or development in her employment. Nor is she suitably qualified so to be able to find a lucrative job. The applicant has a monthly short fall in her salary in the amount of R4669 to cover her monthly expenses. Further, the respondent pays a lesser amount than the one agreed upon between the parties to pay as a contribution towards the maintenance of the children. In the circumstances, should she fail to provide for herself and children nobody will come to her rescue if her parents have relocated to England. She will all be by herself .[J.....], who is presently five years of age, has expressed his wish to relocate with his maternal grandparents though he wants to maintain contact with his father, the first respondent. However, because of his tender age his wish cannot be said to be an informed one.

[47] There are a number of social assistance benefits available in England which are not available in South Africa. The minor children will qualify for free schooling, as their mother will emigrate on an ancestral visa. This finds support in the letter (annexure "H") by Chloe Deane, the School Business Manager. The educational and extracurricular activity requirements of the minor children will be met at [B.....] Primary School. The minor children will also qualify for free health care on the English National Health Service. The expense of schooling and health care are extremely high in South Africa, and the educational career opportunities are minimal in South Africa as compared to UK. In the latter the tertiary education of the children will be subsidised.

[48] In 1998 to 2001, and during 2003 to 2008, for a period of eight (8) years the applicant lived and worked in England. Chorley area is familiar to the applicant and her brother also resides there. The minor children will also enjoy the benefit of being close to

their uncle and cousin as well as that they will be 30 minutes away from their paternal uncle and two cousins with whom they would enjoy a relationship. It cannot therefore be said that the minor children are completely lost in their paternal family. The applicant alleges that if the children relocate to England while they are still young, it will be easier for them to adapt. In her arrangements, the applicant has made provision as it is apparent from the Notice of Motion, for that the first respondent should continue to maintain contact with the children even if they are abroad. In the premises, I have no hesitation to conclude that, in my view, the interests of the minor children will be best served by allowing the applicant to relocate with her minor children to England where they will be able to have a safe home environment and to live a fulfilled life. In the case of this nature, I deem it not appropriate to make an order as to cost. Each party has been fighting for what he or she seems to be in the best interests for their minor children.

ORDER

[49] In the result it is ordered that:

1. The first respondent's counter-application is dismissed.
2. The applicant is authorised to remove the two minor children born of the love relationship between the parties, namely [.....] [M.....] [C.....] a boy born on 11 October 2009 and [J.....] [J.....] [C.....] a girl born on 21 June 2012, permanently from the jurisdiction of this court for permanent residence in the United Kingdom, England.
3. In so far as may be necessary, the first respondent is directed forthwith to sign all such documents and take all such steps as are necessary to enable the applicant lawfully to remove the children from the Republic of South Africa,

failing which the Sheriff of this court is authorised to take all such steps and sign all documents on his behalf.

4. The second respondent is hereby authorised and directed to accept and process the application for South African passports at the instance of the applicant for each of the minor children, subject to compliance with the remaining provisions of the South African Passports and travel Documents Act no. 4 of 1994 and the regulations thereto, without the signature in the certificate of consent of the first respondent.
5. On relocation of the applicant and the said minor children to England the first respondent be and is hereby entitled to maintain contact with the said minor children, as follows
 - (i) In South Africa, or England, for a period not less than three weeks during the minor children's England school summer holiday;
 - (ii) In England, wherever the first respondent is visiting that country at all reasonable times;
 - (iii) Telephonic and Skype contact at all reasonable times.
6. Each party is to pay its own costs of these proceedings.

DATE RESERVED: 5 AUGUST 2015

DATE DELIVERED: 18 SEPTEMBER 2015

COUNSEL FOR APPLICANT: ADV THOMAS

INSTRUCTED BY: LISTER & CO

REF: L M ANDERSON/tlb/02/P076/001

COUNSEL FOR RESPONDENT: ADV THOBELA-MKHULISI

INSTRUCTED BY: JOHNSTON & PARTNERS

REF: KS/sg/45 C087 001