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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 109765/2023

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED.	

.....

Date

.....

T ENGELBRECHT

In the matter between:

M[...], L[...] M[...]

APPLICANT

And

A[...], J[...] C[...] M[...]

RESPONDENT

JUDGMENT

ENGELBRECHT, AJ

Introduction

[1] The Applicant applied for:

1. “Leave to be granted to the Applicant to remove the minor children. E[...] L[...] A[...] A[...], born on 14 January 2011 and A[...] S[...] A[...] born on 14 June 2012 (“the minor children”) from the Republic of South Africa to permanently reside in France.

2. *That insofar as it may be necessary, the respondent is ordered to sign all documentation necessary and required to give effect to the above order failing which the Sheriff for the area where the minor children are, is authorized to sign such documentation on the respondent's behalf.*

3. *That the respondent is awarded the following rights of contact to the minor children, once the minor children are in France:*

3.1 *Daily communication either telephonically or by way of Video call at all reasonable times. The applicant shall ensure that the minor children contact the respondent and shall actively encourage the minor children to communicate regularly with the respondent.*

3.2 *The respondent shall, at his election, be entitled to exercise holiday contact during the July/August school holidays either in South Africa, France or any other destination as agreed between the parties. The respondent shall exercise his election in writing by no later than 30 calendar days prior to such holiday contact to be exercised.*

3.3 *The parties shall be equally liable for the costs of flights to south Africa incurred in respect of the minor children for the purpose of such contact visit as provided for in paragraph 3.2 above. Save for the aforesaid flight expenses, the respondent shall be liable for all other costs whilst the minor children are having contact with him.*

3.4 *In addition to the contact detailed above, the respondent shall have reasonable rights of access to the minor children whenever the respondent happens to be in the place where the minor children reside, subject to the minor children's school, routines.*

3.5 *The applicant shall provide full particulars to the respondent regarding the minor children's residential addresses and contact details from the schools they will be attending within 15 calendar days from arrival in France.*

4. *The applicant undertakes further:*

4.1 To keep the respondent advised regarding all aspects of the minor children's physical and emotional well-being and shall inform the respondent immediately should the minor children become ill or require medical treatments.

4.2 To advise the respondent of the minor children's progress at school and of their involvement in all academic, sporting, and cultural extra-mural activities.

4.3 To furnish the respondent with copies of the minor children's school reports, school photographs and certificates and

4.4 To consult with the respondent in advance of enrolling the minor children in any educational institution and shall provide the respondent with documentation relevant to the various institutions which she considers to be appropriate for the minor children's education to enable the respondent to give his input in this regard.

5. The parties remain equally liable for the children's financial needs.

6. The applicant is directed upon her arrival in France at her costs, to take all steps necessary to cause this order to be made an order of the Family Court having jurisdiction in France and/or such steps as may be necessary to ensure that this order is enforceable in France and such steps are to be taken within 60 court days from arrival in France. The applicant shall provide the respondent with a certified copy of the order within 10 calendar days from the order being granted.

7. That the respondent be liable for the costs of the application, if opposed".

[2] Applicant also filed a supplementary affidavit indicating that she has now obtained employment on 4 April 2024 from AFD French Development Agency. From the employment contract it is clear that she has to take up the employment within three months and therefore on or before 4 July 2024. It was also indicated in argument that there is an agreement with the employer of the Applicant that she will be able to work remotely from Marseilles where she plans to relocate to, and it was confirmed that there is an office in Marseille which she will have to attend to and that she also will have to attend to Paris for meetings on the odd occasion.

[3] The Respondent opposed the application and ask for the application to be dismissed with costs.

[4] In terms of the joint practise note filed by the representatives of the parties the main issue in dispute in this matter is the date upon which relocation of the minor children to France should take place as the Applicant wishes to leave immediately, the Respondent argues that the relocation should only be at the end of 2026 beginning of 2027 and a jointly appointed social worker, Adell Mari Wolmarans recommended that the minor children should only relocate in September 2025.

[5] In **LW v DB**¹, at par 19 it was held by Judge Satchwell that.

“The increasing numbers of relocation disputes referred to in psychological and legal literature, as also in South African jurisprudence and that of other jurisdictions, is a reflection of the increasing trend of geographical mobility, particularly in relation to work, coupled with a higher rate of separation or divorce after which former partners go their different ways..... The reasons for relocating within and out of South Africa are endless undertaking new employment opportunities, following a new spouse or partner, educational ambitions, desire to re-join family. In each case, the parent who is to remain behind opposes the move by reason of distress at the impending departure of the beloved child and the consequent loss of contact and the diminution of the parent-child relationship. In some cases, the non-moving parent has shared parenting because of equal time and responsibility while in others the involvement has been limited. Sometimes the relationship between the divorced spouses is amicable and supportive while, in other cases, the relationship is acrimonious and hostile.”

[6] As this court sits as upper guardian of minor children the discretion to be exercised is not circumscribed in the narrow sense or strict sense of the word but it must be guided by the principle of the best interest of the minor child as required by the

¹ 2020 (1) SA 169 (GJ)

Constitution of South Africa and therefore Section 7 of the Children's Act² must be taken into consideration.

Background

[7] The parties were never married, and their relationship broke down in 2013. From their relationship two minor children were born, A[...] S[...] A[...] presently 11 (turning 12 on 14 June 2024) and E[...] L[...] A[...] A[...], 13 years of age.

[8] Since 2015 the parties equally shared the primary residency of the minor children on a week on week off basis although there is no court order stipulating such arrangement. Prior to that, the Applicant was the primary caregiver, and the parties are not in agreement on whether this arrangement is strictly followed.

[9] The parties and the minor children are French citizens where the Applicant now resides in South Africa under a Critical Skills Visa attached to the private company of the Respondent since 2021 which lapses in 2026. The difference in the trajectory of the parties' employment is the main issue in this matter resulting in this application where the Applicant wishes to relocate to France now and the Respondent wishes to remain in South Africa until end of 2026 beginning of 2027.

[10] The minor children are both enrolled in the French International School which follows the same curriculum as the French educational system in France and therefore any relocation will not have an impact on their education.

[11] It is clear from the papers and admitted during argument that it was always the intention of the parties to relocate back to France with the minor children but there is and was always a dispute on the timing of such relocation. The Respondent also has the intention to return to France although only at the end of 2026 beginning of 2027 based on his present employment obligations in South Africa.

² 38 of 2005.

[12] It is also common cause that there is no application before me for primary residency with the Respondent and he even indicated to the social worker that he has no intention to apply for primary residency. During argument, it was stated that I can make any order in the best interest of the minor children and does not need such application to grant an order that the minor children are to remain in the care of the Respondent at least to September 2025. The Applicant denied that such an order would be competent in the light of the lack of a counter application for primary residency before this court. The Applicant indicated that she will not relocate without the minor children. This then leaves me with two options; to allow the Applicant to leave with the minor children immediately or force her to stay in South Africa to be with the minor children and continue with the shared residency arrangement.

Social Worker's report

[13] As the parties could not reach consensus about the timing of the relocation of the Applicant with the minor children, Adell-Mari Wolmarans was appointed jointly, to do an investigation and provide a report including the voice of the child with recommendations on what would be in the best interest of the minor children.

[14] The investigation then commenced in March 2023 and a report was provided on 18 September 2023 in which Adell-Mari Wolmarans provided three different scenarios and made the following recommendations:

“21.1 Considering the investigation findings and the content of this report, it is the undersigned opinion that the minor children's interest will be best served by having both parents remain in South Africa with Master E[...] and Master A[...]. Ms M[...] to move to France with master E[...] and Master A[...] for the children to commence their school year in France in September 2025.

21.2 The children to be adequately and proactively prepared and supported before moving back to France.

21.3 Mr. A[...] to receive parental guidance regarding the perceived challenges of the minor children regarding certain aspects of Mr. A[...]’s parenting style as identified by this investigation”.

[15] The Respondent accepts the recommendations pertaining to the timing for the Applicant to leave with the minor children and conceded that the Applicant may leave on or before September 2025. Interestingly, the Respondent does not address the recommendation on him having to attend parental guidance to address the issues pertaining to his parental style so mentioned by the minor children. The reasoning behind it was just brushed over during argument. The Applicant disputes the mandate of the social worker to determine a date and her reasoning for delaying it with a year. The social worker did provide three alternative scenarios and her professional view is that the longer time spend in South Africa to be in the best interest of the minor children as it will allow them more time with family and friends.

“to fulfil the minor children’s needs to remain connected with their friends, school, and their stepfamily members.....An opportunity to establish a relationship with their adopted sister..... “

[16] It is also common cause that there were no follow up sessions with Wolmarans since March 2023 prior to the report becoming available and neither party requested such follow up sessions. It is also clear that the sessions with the minor children happened 14 months ago.

[17] In the report Me Wolmarans referred to the minor children stating that:

[17.1] *“A[...] does not want to relocate to France and will feel safer if it happens when he is a bit older.*

[17.2] *E[...] stated that he wants to relocate soonest as it will be more difficult later because he may feel more integrated in South Africa.*

[17.3] *Both children love their parents equally and does not want to lose either of them. Me Wolmarans then stated that both minor children have a close, loving, balanced and devoted relationship with their mother. They view Ms. M[...] as the parent they can easily talk to and who understands them best. Master A[...] is willing to compromise on his own needs and wishes his mother to be happy and content.*

[17.4] *Me Wolmarans then refers to the fact that both minor children shared perceived challenges regarding certain aspect of Mr. A[...]’s parenting style, but even*

within these challenges, they do not want to lose the day-to-day parenting provided by Mr A[...].”

Applicant's case

[18] It is the Applicant's case that she is and has always been the primary caregiver of the minor children despite the shared residency arrangement as the Respondent works long hours, leaves children with their stepmother and have drivers to drive them around. This is disputed by the Respondent.

[19] That she does not earn a salary from the Respondent's business, has sold a property for R 2,7 million from which she is supporting herself although it is unclear from the papers what her income is from her own consultancy business. The Applicant argues that she has the right to pursue her own career and seek employment in France where she can build her career as she is now restricted based on the specific terms of the critical skills visa as an employee of the Respondent's business although she is not so employed. On a question on whether she would be able to remain in South Africa but be employed in France and work remotely, it was indicated that her employer needed her in France and the Applicant will have a problem obtaining a working VISA to remain in South Africa as her previous application was declined and she could only remain as an employee of the Respondent's business.

[20] The Applicant has now obtained employment in France which changes the situation as she must commence with such employment within three months from date of the letter being 4 April 2024.

[21] It was also confirmed by the Applicant that since the interview with Me. Wolmarans, the minor children and the Respondent have been to France for a month during which she only had telephonic contact with them. Therefore, the minor children know how it would be without their mother in France, have been to the area where they intend to reside, and the Respondent owns a property about two and a half hours from Marseilles.

[21.1] It is further the Applicant's case that after their visit to France the relocation was discussed with both of them, and that E[...] said he is ready to return to France and wants to do so as soon as possible to start his school career there and wants to see his father during holidays. After the trip even A[...] indicated that he is no longer afraid to relocate and is excited about returning to France and wants to visit the Respondent during holidays. A[...] was afraid of losing contact with his friends, but he has also seen that he can maintain contact with his friends when a friend moved to Kenya.

[22] From the letter of employment it is evident that the Applicant will earn a substantial income with a bonus which will enable her to take care of her share of the costs of the minor children in France. It should also be noted that the fact that she did not have any employment in France was one of the issues advanced by the Respondent for not allowing her to relocate with the minor children.

[23] The Applicant also argued that the allegation by Me. Wolmarans, that the minor children should remain in South Africa for another year to strengthen their relationship with the Respondent and their stepfamily, just does not make sense seeing that the Respondent alleges that he is also their primary caregiver and that they have implemented this shared arrangement since 2015.

[24] The Applicant indicated that she will not relocate without the minor children as that scenario was never investigated by Me. Wolmarans, neither proposed and such scenario will not be in the best interest of the minor children.

[25] During argument it was then proposed that the minor children could remain in the care of the Respondent for two months in July and August as long as they are back with the Applicant at least one week prior to the school commencing in September in France. Respondent's counsel indicated that this tender was never tendered before. During such holiday time the minor children can then also spend time with their adopted sister. The court then requested the dates for the school terms of France which were provided and I was also provided with the school terms in South Africa.

[26] The parties were also referred to Advocate Green for mediation which was also unsuccessful.

Respondent's case

[27] The Respondent indicated that this relocation immediately by the Applicant only resolves around her work and has nothing to do with whether it is in the best interest of the minor child.

[28] The Respondent is adamant that the Applicant and himself raised the minor children equally and is not sure about the reasoning for the parental guidance in the recommendations of Me. Wolmarans. Since 2015 the Applicant never raised any serious concerns concerning his manner of raising the minor children, but the minor children raised certain concerns as noted in the report of Me Wolmarans.

[29] The Respondent indicated that since 2019, the Applicant started indicating that she wishes to relocate earlier than what he anticipated, and he indicated that he will not agree. However, despite the Respondent indicating that he can only relocate at the end of 2026 beginning of 2027 he will accept the experts' recommendation for relocation in 2025 as he sees this as a middle ground which he believes will be in the best interest of the minor children.

[30] The Respondent referred to the fact that there is no primary caregiver and that the parties equally raised the minor children, do have a practical implication that the minor children need both parties to remain involved in their lives. The Respondent's counsel argued that he did not bring a counter application as he is of the opinion that there is no need to relocate although the filing of the supplementary now affects the circumstances of the Applicant.

[31] The Respondent further alleges that if the Applicant leaves now in 2024, she can have holiday contact until 2025 when the minor children can then be allowed to relocate with her. It is therefore clear that the parties are arguing about a period of 12 months as the Respondent conceded to relocation in 2025 and not about the principle of relocation.

[32] It was also argued that the court should take cognisance of the minor child adopted in August 2023 presently 15 months old, by the Respondent and the fact that in allowing the minor children to remain with the Respondent, they will be able to build a stronger relationship with their adopted sister. The Respondent's Counsel also indicated to me that the Respondent and his family will have a problem travelling as they are still in the process of adopting their 15 month old daughter although I have no further information pertaining to the process before me or how they were able to spend a month in France since the report of Me. Wolmarans.

[33] It is also the Respondent's case that the Applicant is receiving an income as consultant from her own business and that the Applicant does not address this issue adequately in her application to enable this court to decide on whether she can maintain herself in South Africa for the next 12 months. Counsel also referred me to paragraph 19.3 in Me. Wolmarans's report where the Applicant provided information to Me. Wolmarans about her income from her business, Maryll Consulting, which was not addressed by the Applicant in her affidavit. In this paragraph it is stated that

“... has built a sturdy reputation in its seven years of existence and hired a full-time employee in 2022, her business interest and growth will significantly increase if she can return to France as most of her clients are based in Europe and France.”

[34] Counsel for the Respondent then indicated that most of the caselaw on relocation refers to the primary caregiver and that it is in the best interest of the minor children to relocate with such primary caregiver, which is not the case in the subject matter. Counsel also argued that there is no reference made to any prejudice suffered by the minor children if they are to remain with the Respondent on the papers before this court. However, there are also no prejudice shown if they are to relocate with the Applicant.

[35] It was also argued that the relocation will result in numerous changes to be made by the minor children and therefore it was argued that the middle ground is to allow such relocation in 2025 will be in the minor children's best interest as they will then have time to only get used to not having their mother with them. The Respondent is against an all change taking place all at once such as a new house, school and friends.

[36] During argument, it was then proposed that if they remain in South Africa the minor children can receive therapy to assist them and prepare them for the relocation in 2025.

EMPLOYMENT AND VISA HISTORY OF THE PARTIES

[37] The parties came to South Africa in 2010 based on the Applicant's opportunity to work in South Africa on a contract for a period of 4 years as an investment officer in the banking and municipal portfolio. The Applicant was then granted a 4-year diplomatic passport and temporary work visa where the Respondent and Eloi were granted temporary visas.

[38] At the end of 2015, the Applicant's employment came to an end and her employer wished to transfer her back to France, but she declined that offer as the Respondent wanted to stay as he started a guest house business and a new business L[...] L[...]. The Respondent denies this and alleges that the Applicant elected to remain in South Africa in 2018. At that stage the Applicant alleges that they agreed to return to France when the minor children needed to go to middle school in September 2022 and September 2023. The Respondent alleges that they both considered relocating in 2023 but same will have to be reconsidered based on his work commitments. Both parties then applied for temporary critical skill visas which were granted in 2015 for a period of 5 years.

[39] The Applicant then started her own consultancy firm M[...] C[...] in 2016 and she alleged she had to give up a lucrative career in France at that stage already, to remain in South Africa. In 2019 the Applicant indicated to the Respondent that she does not want to extend her stay in South Africa further than 2023 which the Respondent admits although he states that he did not necessarily agreed thereto. In 2019/2020 the Applicant had problems to renew her working Visa and the Respondent offered her the opportunity to apply for a critical skill working visa as an employee of his business L[...] L[...] which was then granted in 2021. The Respondent does not elaborate upon the fact that the Applicant's critical skills Visa specifies that it is to take up employment at L[...] L[...] as a Business Analyst.

[40] The Applicant also alleges that she is financially prejudiced as her scope of development in her career and her earning capacity is very limited as a result of her being linked to the Respondent's business as she is actually providing consulting services on her own under the auspices of M[...] C[...].

ANALYSIS

[41] The biggest issue in this matter is that here we are not dealing with one primary caregiver to which most of the list of caselaw so provided by both representatives of the parties refers, but two equally involved parents where the minor children indicated that they love them equally despite some specific problems with the Respondent's parenting style mentioned by the minor children. However, what is not in dispute, is the fact that a shared residence regime was followed since 2015 and that there has not been an effort by either party to change that agreement between the parties.

[42] What is also common cause is that the Respondent accepts that the parties are to relocate and that he agrees to allow the Applicant to relocate in 2025.

[43] In deciding on relocation matters Murphy J in *Cunningham v Pretorius*³ at par [9] it is stated that.

“What is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be accessed in a balanced fashion and the court must render a finding of mixed fact and opinion, in the final analysis a structured value judgement about what it considers will be in the best interests of the child.”

[44] I accept that in this matter both the minor children have a loving relationship with both parties although Me, Wolmarans recommended that the Respondent is to undergo parental guidance to address certain issues raised by the minor children with regard to his parenting style and that the Applicant is the parent with whom the minor children indicated they can talk to.

³ 31178/08 2008 ZAGPHC 258 21 August 2008.

[45] In F v F⁴ Maya AJA (as she then was) explained that:

“From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy, and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably invoke 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.”

[46] Maya AJA also stated in F v F, para 13C-D that

“The reasonableness of the custodian’s decision to relocate, the practical and other considerations on which such a decision is based, the extent to which the custodian has engaged with and properly thought through the real advantages and disadvantages to the child of the proposed move are all aspects that must carefully be scrutinized by the court in determining whether or not the proposed move is indeed in the best interest of the child.”

[47] I accept that ideally the Applicant and Respondent would remain in South Africa and the existing shared residency regime would continue. However, the parties have decided not to continue with their relationship already in 2013 and therefore must have accepted that their respective lives will at some stage take different routes. Both parties have made the decision to return to France at some stage and the Applicant indicated in 2019, again in 2020 and then in 2022 that she wishes to return to France which was halted by the Respondent as he only wanted to leave at the end of 2026 beginning of 2027. The question is, what if he does not relocate? Does that mean the Applicant

⁴ 2006(3) SA 42 (SCA), [2005] ZASCA 123.

should remain in South Africa when her heart is in France just to ensure that the shared residency regime continues? That would be an unrealistic expectation.

[48] As stated in *Godbeer v Godbeer*⁵ the

“Applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family.”

[49] After separation each party has to fend for him and herself and cannot be expected to be restricted to reside in the same area as the other. Despite the fact that the Applicant failed to provide information about her alleged income from her consulting business, I take cognisance of the fact that her critical skills visa is directly connected to the Respondent’s business where she is not employed and from which she does not receive an income. I accept that this restricts her ability to grow her business or apply for other employment in South Africa.

[50] The Respondent alleged in his answering affidavit that the Applicant cannot be allowed to leave without employment which she has now obtained. I accept that in allowing the Applicant to leave with the minor children, that she will deprive the minor children of the Respondent’s ready daily presence except for telephonic and holiday contact but the same will happen if I allow the Applicant to leave but force the minor children to remain in the care of the Respondent.

[51] In *Boehmke v McGregor*⁶ referred to by the Respondent (where the parties had shared residency) Judge Satchwell referred to *Van Rooyen v van Rooyen*⁷ where it is stated that.

“apply individual justice in the sense that all relevant factors, even the mother’s fundamental right to freedom of movement, will be assessed in the context of these children’s best interest.”

⁵ 2000(3) SA 976 W at 982.

⁶ [2006] JOL 17154 (W)

⁷ 1999 (4) SA 435 (C) at 437H.

and then states at par 158 that:

“Where this is not done, a message could possibly be sent that primary caregivers or custodian parents are shackled to the other parent. Such message suggests that primary caregivers or custodian caregivers lose an independent right to “freedom of movement” and accordingly a vast conspectus of the attributes of “dignity” are denied them as well, South African judgments have explicitly accepted that formerly married persons are and should be free to create their own lives post divorce untrammelled by the needs or demands of the former spouse”.

And at par 160 she states that she agrees with Judge Kriegler when he said in *President of the Republic of South Africa & another v Hugo*⁸ that

“One of the ways in which one accords equal dignity and respect to persons is by seeking to respect the basic choices they make about their own identities “

[52] I cannot find any reason on why these parties are to be “shackled together” as it is clear that the parties will relocate, why the Applicant should not be allowed to have freedom of movement and protect her own dignity when the Respondent is allowed to conduct his business and be employed as he desires.

[53] In determining what is in the best interest of the minor children this court must consider section 7 of the Children’s Act and consider how the balance between being with the Applicant and seeing the Respondent or visa versa is to be obtained.

[54] In the matter of ***U.R. v S.B. and others***⁹ with regard to the schooling of a minor child Judge Senyatsi stated in paragraph [18] that:

“When dealing with the best interest of child principle, the Court is required to assess the overall impression and bring a fair mind to the facts set out by the parties. The relevant facts, opinion and circumstances must be assessed in a balanced fashion and the court, must render a finding of mixed facts and opinion,

⁸ 1997(6) BCLR 708 (CC) at 743F.

⁹ (2024- 001357) [2024] ZAGPJHC 55 (25 January 2024)

in the final analysis, structured value judgement about what it considers will be in the best interest of the minor child.”

[55] The importance of the best interests of the child in all matters concerning children was articulated by Sachs J in **S v M**¹⁰ as follows:

“A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.

[56] Furthermore, to determine what would be in the best interest of the minor child is sometimes a very difficult task for the Honourable Court. In **SvM** supra the Honourable Judge Sachs further stated in paragraph 17 regarding the discussion on what is in the best interest of any child that:

“What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care.

And in paragraph 18

“Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of Section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.”

[57] In this matter both parents have an established relationship with the minor children, have exercised parental responsibilities and rights over the years since separation and wish to remain involved in the minor children’s lives. Therefore, wherever the minor

¹⁰ 2007 (2) SACR 539 (CC) para 24 B-C, [2007] ZACC 18 2007 (12) BCLR 1312 (CC).

children reside the other party must have elaborate contact and be allowed to be involved in their lives to ensure that the relationship is maintained.

[58] The costs of maintaining contact with both parents will have to be considered regardless of whether the minor children remain in South Africa or relocate to France. The Respondent indicated that his business will sponsor two trips per year for his family and the Applicant tendered to share the costs of one trip per year for such contact.

[59] The need of the minor children to remain in the care of a party must also be taken into consideration. From Me. Wolmarans' report it shows that the minor children both believe the Applicant is the party that understands them the best and to whom they can talk to about everything. Both of them mentioned having a problem with the Respondent's parenting style and a recommendation was made for the Respondent to attend to parenting guidance. I was not made aware whether he has commenced with such parenting guidance or not.

[60] Despite the reservations so mentioned by the minor children in that report, I accept that that report is now more than a year old and does not address the minor children's voices after the month they spend with the Respondent in France or now that they are a bit older. The minor children are by now acutely aware of the possibility of this relocation and a further concern is that neither party, full knowing that the parties are to relocate whether in 2024 or 2025 provided information on whether these minor children have been sent for therapy.

[61] It is also clear from the history of this matter that the Applicant indicated since 2019 that she wishes to return to her home country and the relocation has been accepted by the Respondent, although his view is now that it should happen only in 2025. The movement from one country to another can be riddled with numerous adjustments for the minor children, whether it happens this year or next year. My view is that it must be done sooner rather than later, to allow the minor children to commence with their adjustment and start to make friends and provide stability in their lives.

[62] From the facts before me it is also clear that the parties prepared for the eventual relocation by placing the minor children in the French International school which follows

the same curriculum as in France and they are fluent in French. Therefore, they will have no problem to adjust in the school environment in France.

[63] I cannot find any reason why the Applicant cannot be allowed to relocate with the minor children in 2024 to ensure that they commence with their new school year in September 2024. This must however be subject to an order providing elaborate contact between the Respondent and the minor children in South Africa or in France depending on the parties' arrangements especially during the remainder of 2024 to 2025 when she would in any case have relocated as recommended by Me. Wolmarans and accepted by the Respondent.

[64] I also cannot find any reason that the Applicant will not ensure sufficient and elaborate contact especially if so ordered during such school holidays between the Respondent and the minor children. The Applicant also tendered during argument that the minor children could remain in the care of the Respondent during July and August 2024. The Applicant need to start working in France on 4 July 2024 in terms of her employment letter where the minor children may then remain with the Respondent as it seems the South African schools will close either 4 July 2024 or 5 July 2024 as long as they are sent back to the Applicant one week prior to school commencing on 2 September 2024 in France.

[65] I then requested to be provided with the dates of the school holidays in France which was then duly provided to me by the Applicant's legal representatives. According to these dates school holidays will then be as stated hereunder which shows that if possible, the minor children may have contact with the Respondent and his family every second month for a period of at least 10 days:

In 2024 the school starts on 2 September 2024

19 October to 4 November 2024 = 15 days

21 December to 6 January 2025 = 15 days

8 February 2025 to 24 February 2025 = 15 days

5 April to 22 April 2025 = 15 days

5 July to 1 September 2025 =

In 2025 the school starts on 1 September 2025.

18 October 2025 to 3 November 2025
20 December 2025 to 5 January 2026
14 February 2026 to 2 March 2026
11 April 2026 to 27 April 2026
4 July 2026 to September 2026 when school starts.

[66] From this, it is clear that the minor children would be able to have contact with the Respondent every second month for at least 10 days as they have at least 16 weeks of holiday in one school year which includes an 8-week holiday during July/August.

[67] I take the view that, in the weighing up of all the facts, the totality of the minor children's lives, the decisions so made over the years by their parents and the eventual relocation which will be done within the next two years by the Respondent as well, that their "best interest" would be best served in an order that they will be allowed to relocate with the Applicant in 2024 and be granted elaborate contact with the Respondent over the remainder of 2024 to allow them to start their new school year in 2024 in France.

Costs

[68] I accept that this order will reduce the Respondent's time with the minor children but intend to make an order for proper elaborate contact during holiday periods and any other contact so desired by the Respondent.

[69] The Applicant requested costs of the application if opposed and the Respondent requested the matter to be dismissed with costs. I take the view that it cannot be said that the Respondent opposed the matter for anything but what is regarded by both parties, to be in the best interest of the minor children.

[70] Therefore, as I grant the order in the favour of the Applicant I do not believe that the Respondent should be penalised for his commitment to the minor children. Costs will have to be incurred to pay towards ensuring contact between the Respondent and the minor children in the future.

[71] Therefore, the following order is made.

[71.1] Leave is granted to the Applicant to remove the minor children. E[...] L[...] A[...] A[...], born on 14 January 2011 and A[...] S[...] A[...] born on 14 June 2012 (“the minor children”) from the Republic of South Africa to permanently reside in France.

[71.2] That insofar as it may be necessary, the Respondent is ordered to sign all documentation necessary and required to give effect to the above order failing which the Sheriff for the area where the minor children are, is ordered and authorized to sign such documentation on the Respondent’s behalf.

[71.3] That the Applicant and Respondent continue with the shared residency regime on a week on week off basis until such time as the Applicant leaves for France in July 2024.

[71.3.1] that the minor children remain in the care of the Respondent until Sunday 25 August 2024 when the minor children are to return to the care of the Applicant in France at times to be arranged between the parties after purchasing of the airplane tickets by the Respondent which costs are to be shared between the parties.

[71.3.2] in the event that arrangements are to be made for the minor children to fly as unaccompanied minors, that the Respondent be ordered to make the necessary arrangements in South Africa and ensure that the minor children are placed in the care of the applicable persons at the airport for such flight.

[71.3.3] the Applicant is allowed to have daily telephone contact via Face Time or Video call during the period from when she leaves to France in July 2024 to commence with her employment until the minor children are to return to her care on 25 August 2024 in France subject to their scholastic, extra mural activities. The Respondent is ordered to ensure that the minor children contact the Applicant and shall actively encourage the minor children to communicate regularly with the Applicant.

[71.3.4] That the minor children be referred to a mutually agreed therapist for such number of sessions as such therapist deems necessary within 14 days from date of this order to 25 August 2024 when they remain

with the Respondent where any costs not paid by the medical aid be shared between the parties.

[71.3.4.1] In the event that such therapist do believe that such therapy is to continue after the minor children leaves South Africa that she is to provide a report to the parties to be provided to a further therapist in France alternatively that such therapy continues virtually and that all costs not paid by the medical aid in South Africa or medical services in France be shared between the parties.

[71.4] That the Respondent is awarded the following rights of contact to the minor children once the minor children are in France:

[71.4.1] Every short school holiday in October 2024, December 2024, February 2025, and April 2025 at dates to be arranged between the parties either in South Africa or in France on the election of the Respondent for at least 10 days of such holiday period.

[71.4.2] the Respondent is ordered to cover the costs of two of these flights to and from France for the 2024/2025 school term and that the parties share the costs of the other flights for the minor children equally. Save for the aforesaid flight expenses, the Respondent shall be liable for all other costs whilst the minor children are having contact with him.

[71.4.3] the July/August 2025 holiday is to be shared equally between the parties at dates to be arranged between the parties where the Respondent may elect to exercise such holiday in France or South Africa on 14-day notice to the Applicant as and when dates are to be arranged between the parties.

[71.4.4] the costs of the flights of the minor children for the long summer school holiday in 2025 are to be shared equally. Save for the aforesaid flight expenses, the Respondent shall be liable for all other costs whilst the minor children are having contact with him.

[71.4.5] thereafter, the short school holidays from October 2025 to alternate between the parties on dates to be arranged between the parties. The Respondent may elect to exercise such holiday in France or South Africa on 14-day notice to the Applicant as and when dates are to be arranged between the parties.

[71.4.6] costs of the flights for the minor children for the short school holidays to be shared between the parties. Save for the aforesaid flight expenses, the Respondent shall be liable for all other costs whilst the minor children are having contact with him.

[71.4.7] Daily communication either telephonically or by way of Video call at all reasonable times as arranged between the parties subject to the minor children and the Applicant's daily school and work schedules. The Applicant is ordered to ensure that the minor children contact the Respondent and shall actively encourage the minor children to communicate regularly with the Respondent.

[71.4.8] In addition to the contact detailed above, the Respondent shall have reasonable rights of contact with the minor children whenever the Respondent happens to be in France and/or the place where the minor children reside, subject to the minor children's school, routines, and extra mural activities.

[71.5] The Applicant is ordered to provide full particulars to the Respondent regarding the minor children's residential addresses, telephone numbers including cell-phone numbers and contact details from the schools they will be attending within fifteen calendar days from arrival in France.

[71.6] The Applicant is ordered to:

[71.6.1] keep the Respondent advised regarding all aspects of the minor children's physical and emotional well-being and shall inform the Respondent immediately should the minor children become ill or require medical treatments.

[71.6.2] advise the Respondent of the minor children's progress at school and of their involvement in all academic, sporting, and cultural extra-mural activities.

[71.6.3] furnish the Respondent with copies of the minor children's school reports, school photographs and certificates and

[71.6.4] consult with the Respondent in advance of enrolling the minor children in any educational institution and shall provide the Respondent with documentation relevant to the various institutions which

she considers to be appropriate for the minor children's education to enable the Respondent to give his input in this regard.

[71.7] The parties remain equally liable for the children's financial needs.

[71.8] The Applicant is ordered upon her arrival in France at her costs, to take all steps necessary to cause this order to be made an order of the Family Court having jurisdiction in France and/or such steps as may be necessary to ensure that this order is enforceable in France and such steps are to be taken within 60 court days from arrival in France. The Applicant shall provide the Respondent with a certified copy of the order within ten calendar days from the order being granted.

[71.9] Each party shall pay their own costs.

ENGELBRECHT T
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 7 May 2024.

Appearances:

For the Applicant:	Advocate Gigi Olwagen-Meyer
For the Respondent:	Advocate Linda de Wet
Date of Hearing:	24 April 2024
Date of Judgment:	7 May 2024