

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

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

CASE NO: 7265/2024

Delivered on 18 July 2024

In the ex parte application:

N.S.

Applicant

In re: X.S (a minor child)

JUDGMENT

GAISA AJ:

INTRODUCTION

[1] This urgent application concerns a child's fundamental right to pursue enriching educational and cultural experiences in an unfortunate family situation. The applicant, N.S., seeks an order dispensing with the consent of the child's biological father, C.J.S., as required in terms of Section 18(2)(c) and 18(3) of the Children's Act, Act 38 of 2005, to allow their minor daughter, X.S. (born 14 July 2008), to travel to the United States of America for an educational tour.

[2] The application raises essential questions about balancing parental rights and responsibilities with the best interests of the child in circumstances where one parent is deceased or unavailable to provide consent. It also highlights families' challenges in an increasingly globalised world, where educational and cultural enrichment opportunities often necessitate international travel.

BACKGROUND

[3] C.J.S. reportedly passed away in Brazil in April 2024 under circumstances that the South African authorities have not fully verified.

[4] X.S. has been invited to participate in an Academic Achiever's Tour to the United States from 19 September 2024 to 30 September 2024. This tour offers a valuable opportunity for academically gifted students to visit renowned educational institutions and gain international exposure.

[5] The applicant requires either the consent of the child's father or a court order dispensing with such consent to apply for the necessary visa for X.S.'s travel. Due to C.J.S.'s reported death and the lack of an official South African death certificate, the applicant has approached this Court for relief.

LEGAL FRAMEWORK

[6] The paramount consideration in matters concerning children is the best interests of the child, as enshrined in section 28(2) of the Constitution and sections 7 and 9 of the Children's Act ("the Act").¹ This principle guides all decisions affecting children. It is the cornerstone upon which this judgment is built.

¹ Act 38 of 2005

[7] Section 18(2)(c) of the Act states that a person with parental responsibilities and rights concerning a child has the responsibility and right to act as guardian of the child. Section 18(3) further specifies that the guardianship of a child includes the right to give or refuse consent required by law in respect of the child, including consent to the child's departure or removal from the Republic of South Africa.

[8] These provisions are directly relevant to the present case, as they establish that N.S, as X.S.'s mother and guardian, would generally have the right to consent to her daughter's international travel.

[9] However, due to the reported death of X.S.'s father, C.J.S, obtaining his consent as the other guardian is impossible. This creates the need for the court to consider whether to dispense with the requirement for the father's consent, weighing the child's best interests and right to parental care against the legal requirement for consent from both guardians for international travel.

[10] Section 18(5) of the Act provides that a person may apply to the High Court for an order granting permission for a child to leave the Republic if the consent required in terms of subsection (3) cannot be obtained. This provision recognises that there may be circumstances where obtaining consent from both parents is impossible or impractical. It empowers the court to intervene in the best interests of the child.

[11] In evaluating what constitutes the child's best interests, the court is guided by the factors of the Act and the jurisprudence developed in cases such as those mentioned below. These cases emphasise the need to consider the child's physical and emotional security, intellectual stimulation, and maintaining relationships with both parents.

[12] The Act establishes comprehensive principles and procedures for protecting children's rights and best interests in South Africa.

[13] Section 7 of the Act outlines the "*best interest of the child*" standard, which must be applied whenever the Act requires it. This section provides a comprehensive list of facts that must be considered when determining what is in a child's best interests, including the nature of the child's relationship with parents and caregivers, the attitudes of the parents towards the child and their parental responsibilities, the capacity of parents or caregivers to provide for the child's needs, the likely effect of any changes in the child's circumstances, and the child's age, maturity and background.

[14] The section emphasises the need to consider the child's physical and emotional security, intellectual and social development, and any special needs arising from disability or chronic illness.

[15] The section also highlights the importance of protecting the child from physical or psychological harm and maintaining stability in the child's life. This standard aligns closely with the considerations in this matter, where the court had to weigh the potential benefits of international travel against the child's need for stability and relationship with both parents.

[16] Other key provisions of the Act which are relevant to this case include the paramountcy of the child's best interests in all matters (section 9), the right of children to participate in decisions affecting them (section 10), and the framework of parental responsibilities and rights (Chapter 3). The act also outlines decision-making processes about children's care, contact, and guardianship.

[17] In the present case, the court must apply these principles in deciding whether to allow X.S. to travel internationally without her father's consent.

[18] The Act requires considering factors like the child's age and maturity, her relationship with both parents and the potential impact on her well-being and development.

[19] The court should also consider X.S.'s views on the proposed trip, given that she is 16 and in grade ten.

[20] The Act's provisions on guardianship (sections 18 and 24) are particularly relevant, as the court is being asked to dispense with the consent typically required from both guardians for international travel. In making its decision, the court must balance X.S.'s right to pursue educational opportunities against the principle of joint decision-making by guardians.

[21] As the Act mandates, the overarching consideration must be determining what outcome best serves X.S.'s interests.

[22] Furthermore, South Africa's ratification of the United Nations Convention on the Rights of the Child (UNCRC) on 16 July 1995 underscores its commitment to promoting and protecting children's rights. Article 3 of the UNCRC emphasises that the child's best interests shall be a primary consideration in all actions concerning children.

[23] In **M v S**² the Constitutional Court extensively referenced the UNCRC in considering children's rights when sentencing a primary caregiver. The court emphasised that South Africa's ratification of the UNCRC in 1995 underscores the country's commitment to promoting and protecting children's rights.

²(CCT 53/06) [2007] ZACC 18

[24] Regarding the status of the UNCRC, the Constitutional Court held that:

“[16] Secondly, section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction, the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children’s rights,”

[25] **M v S** *supra* is just one example demonstrating how the Constitutional Court has incorporated UNCRC principles into its reasoning when dealing with cases involving children's rights, showing the convention's influence on South African jurisprudence in this area.

[26] This court has used the UNCRC to interpret and give content to children's constitutional rights, particularly in applying the "*best interests of the child*" principle.

[27] The African Charter on the Rights and Welfare of the Child (ACRWC or the Charter) provides an essential context for interpreting the best interests principle from an African perspective.

[28] In summary, Article 4 of the Charter states that in all actions concerning the child undertaken by any person or authority, the child's best interests shall be the primary consideration; in all judicial or administrative proceedings affecting a child who can communicate his/her views, an opportunity shall be provided for the child's views to be heard directly or through an impartial representative as a party to the proceedings. The relevant authority shall consider those views following the provisions of any appropriate law.

[29] The Constitutional Court in **M v S** *supra* said, "*South Africa's obligations under international law underscored the special requirement to protect the child's interests as far as possible*".³

[30] Notably, the Constitutional Court footnotes this statement, mentioning the Charter:

"Article 4 of the African Charter on the Rights and Welfare of the Child provides:

*"In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration."*⁴

³M v S *supra* at [31].

⁴M v S *supra* at footnote 31 of that case.

[31] In reaching its decision, the Constitutional Court in **C and Others v Department of Health and Social Development, Gauteng and Others**⁵ explicitly considered South Africa's obligations under international law, particularly the UNCRC and ACRWC.⁶ The Court's reasoning demonstrates a precise alignment with these international instruments, emphasising the importance of family care and the need for robust safeguards when interfering with this right.

[32] That judgment (**C and Others**) is a powerful example of the Constitutional Court's serious consideration of international children's rights conventions in interpreting and applying domestic law.

ANALYSIS

[33] In considering this application, I am mindful of the unique circumstances surrounding C.J.S.'s reported death and the challenges it presents for the applicant in obtaining official documentation. While the court would ordinarily require definitive proof of death before dispensing with parental consent, we must balance this requirement against the pressing timeframes and the potential loss of opportunity for the child.

⁵(CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) (11 January 2012),

⁶C and Others *supra* at [24].

[34] The following factors weigh heavily in the present case:

- 34.1 the educational value of the proposed tour, which aligns with X.S.'s academic achievements and aspirations;
- 34.2 the limited duration of the trip, which does not constitute a permanent relocation;
- 34.3 the applicant's demonstrated commitment to X.S.'s welfare and education;
- 34.4 the absence of any evidence suggesting that C.J.S, were he alive, would have opposed this opportunity;
- 34.5 the psychologist's report indicating X.S.'s enthusiasm for the trip and her ability to express her wishes;
- 34.6 the potential negative impact on X.S.'s academic and personal development if she is denied this opportunity due to administrative hurdles beyond her control.

[35] While the court recognises the importance of both parents' involvement in major decisions affecting a child's life, the reported death of C.J.S. creates an exceptional circumstance. As the upper guardian of all minor children, the court must step into this void to ensure that the child's best interests are served.

[36] The applicant has demonstrated diligence in attempting to secure official confirmation of C.J.S.'s death through appropriate channels. The documentation delays should not prejudice X.S.'s academic growth and development opportunities.

[37] The applicant's evidence suggests that she has been the primary caregiver and has borne most responsibility for X.S.'s upbringing.

[38] This court considered the confirmatory affidavit from I.C, who identifies herself as C.J.S.'s biological mother and X.S.'s paternal grandmother. She confirms that she has been informed of C.J.S.'s passing in April 2024 in Brazil. A friend advised her of her son in Brazil, who provided her with what purports to be a copy of the Brazilian Death Certificate.

[39] I.C. confirms her awareness that X.S. has been invited to participate in an Academic Achiever's Tour to visit academic institutions in the USA. The tour is scheduled from 19 September 2024 to 30 September 2024, after which X.S. will return to her mother's (the Applicant's) care in Polokwane.

[40] I.C. expresses that X.S. is very excited to attend the tour, and as her paternal grandmother, she is proud of X.S.'s achievements. This affidavit provides confirmation from a family member about C.J.S.'s reported death, supports the applicant's claim, and shows support from the paternal side of the family for X.S.'s participation in the Academic Achiever's Tour.

[41] This court considered the report, dated 6 May 2024, authored by A.E.P., the Principal Psychologist at the Pietersburg Hospital (Department of Health) in Polokwane.

[42] The report indicated that X.S. was enthusiastic about the proposed trip to the United States and demonstrated an ability to express her wishes. This is highly relevant to the case as it provides insight into the child's perspective and emotional readiness for the proposed travel, a critical consideration in determining the child's best interests.

[43] The report's findings are particularly significant because they help the court evaluate the potential impact of allowing X.S. to travel internationally without her father's consent.

[44] The psychologist's report highlights the child's enthusiasm and ability to articulate her desires, supporting the argument that the educational opportunity aligns with X.S.'s interests and developmental needs.

[45] This professional assessment serves as an essential and additional piece of evidence for the court in balancing the potential benefits of the trip against any risks associated with the separation from the father, who has recently been reported deceased in Brazil.

[46] This court took the vital step of inviting the applicant's legal representative to bring the minor, X.S., and the applicant to the judge's chambers for a direct meeting on 17 July 2024. This allowed this court to interact with X.S. and assess her views on the proposed trip to the United States. During this meeting, this court could observe and experience the enthusiasm described in the psychologist's report.

[47] The firsthand interaction provided valuable insight for this court beyond what was conveyed in the founding papers and the written reports.

[48] This court could gauge X.S.'s level of understanding about the trip, her emotional state, and her genuine interest in participating in the Academic Achiever's Tour. The minor indicated that if allowed to go on this trip, she would only miss two days of school since the tour takes place during the school holidays and that an arrangement was in place to help her catch up.

[49] By speaking with X.S. directly, this court fulfilled its obligation under section 10 of the Act (to allow appropriate child participation in matters concerning them). This court gave the views expressed by X.S. during this meeting due consideration in making its final determination about whether to grant permission for international travel.

[50] While valuable for gaining firsthand insight into her views and wishes, the court's decision to meet directly with X.S, in this case, should not be seen as setting a binding precedent for all future cases involving children. There are several important reasons why such a meeting may not always be feasible or appropriate, to name but a few:

- 50.1 Resource constraints: Courts often face heavy caseloads and time pressures, which may make it impractical to arrange personal meetings with children in every case;

50.2 Child's age and maturity: Not all children may be at a developmental level/stage where they can effectively express their views directly to a judge. The appropriateness of such meetings depends on the child's age, maturity and capacity to form and articulate their opinions;

50.3 Nature of the case: Some cases may involve issues or circumstances where direct interaction with a judge could be distressing or inappropriate for the child;

50.4 Alternative methods: In many cases, the child's views can be adequately represented through other means, such as reports from social workers, psychologists, or appointed legal representatives, a recorded interview with a person the child may be comfortable expressing themselves to,

50.5 Consistency and fairness: If such meetings were to become an expectation in all cases, it could potentially lead to inconsistencies in how children's views are considered across the different courts or judges;

50.6 Potential for undue influence: There may be concerns about the potential for a child to be unduly influenced by the formality of a meeting with a judge.

[51] While this court's decision to meet with X.S. demonstrates a commitment to hearing the child's voice and thoughts directly, it should be viewed as one possible approach among many for considering a child's best interests and wishes. The appropriateness of such meetings should be assessed on a case-by-case basis, considering the specific circumstances of each matter and the child's needs.

[52] In **Du Preez v Du Preez**⁷, Miller J said, among other things:

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

⁷1969(3) SA 529(D) at 532C-G

[53] What Miller J said above was approved by the majority of the then Appellate Division (now the Supreme Court of Appeal (SCA) Court in **Bailey v Bailey**.⁸

[54] In essence, the SCA in *Bailey supra* approached the issue of the child's best interests by giving substantial weight to the custodian parent's judgement while also considering the broader emotional and practical factors that could impact the children's well-being in the long term. The court emphasised that interfering with a custodian parent's reasonable decision should only be done when compelling reasons clearly show it would not be in the children's best interests.⁹

[55] In *Baily supra*, the court reaffirmed that the children's best interests are paramount in relocation cases. While the present case is not a relocation case, the principle directly applies to it, as the court must consider whether allowing X.S. to travel to the USA for the Academic Achiever's Tour within the mentioned period is in her best interests.

[56] As in *Baily supra*, the court gave significant weight to the custodian parent's view on what is best for X.S. As the applicant is now the sole surviving parent and guardian, her assessment of what is best for X.S. should be given considerable weight.

⁸1979(3) SA 128(A)

⁹*Bailey supra* at 135D-136D at 136 A-C

[57] In the present case, allowing X.S. to participate in the educational opportunity could positively impact the applicant's emotional well-being, which benefits the child.

[58] In **Jackson v Jackson**¹⁰, the SCA stated:

“[30] The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is still going to be responsible for the children, is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary, sensible human terms, the court should not do something which is, prima facie, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach.”

[59] Again, in **Jackson**, the SCA explained that:

“[34] The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decision is correct. The reason why a court is reluctant to interfere with the decisions of a custodian parent is not only because the custodian

¹⁰(18/2001) [2001] ZASCA 139 (29 November 2001)

parent may, as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interests of a child but, more importantly, because the parent who bears the primary responsibility of bringing up the child should as far as possible be left to do just that. It is, however, a constitutional imperative that the interests of children remain paramount. That is the 'central and constant consideration.'

[60] In **F v F**¹¹, the SCA highlighted the strong connection between the children's interests and those of their primary caregivers. The court noted that restricting the wishes of the custodian parent might often not serve the children's best interests. This principle is fundamental when supporting the custodian parent's choices, as it can enrich the children's experiences.

[61] The **F v F** case *supra* underscored that the primary caregiver's well-being and satisfaction directly affect the children's well-being in their care. While the court did not explicitly state this, it implied that courts should be cautious about making decisions that could significantly hinder the primary caregiver's wishes, decisions, or opportunities, as this could indirectly harm the children. Ultimately, while the best interests of the child remain paramount, the case gives considerable weight to the decisions and desires of the primary caregiver that benefit the child.

¹¹ 2006 (3) SA 42 (SCA),

[62] This principle is particularly relevant in the present case, where granting this application would support the applicant's efforts to provide enriching experiences for X.S.

[63] The authorities highlighted here suggest that courts should not lightly interfere with reasonable decisions made by custodian parents regarding their children's welfare unless there are compelling reasons to do so. In the present case, the applicant's desire to allow X.S. to participate in the Academic Achiever's Tour appears reasonable and in X.S.'s best interests.

[64] In those cases, the courts considered the long-term implications of allowing or denying the wishes of the caregiver parent rather than focusing solely on short-term disruptions. Similarly, in the present case, the court should consider the long-term benefits of this educational opportunity for X.S.

[65] In *Baily supra*, for example, the court took a comprehensive view of the children's circumstances, considering factors such as family relationships, emotional well-being and future prospects. The present case should similarly consider all aspects of X.S.'s well-being and development.

[66] The principles established by the authorities here strongly support granting this application. The court should give significant weight to the

applicant's assessment of what is best for X.S, consider the long-term benefits of the educational opportunity, and take a holistic approach to determining the child's best interests. Unless there are compelling reasons to deny the application, the court should not lightly interfere with the applicant's reasonable decision to allow X.S. to participate in this enriching experience.

[67] This court is satisfied that the proposed trip is well-structured and supervised, with appropriate measures to ensure X.S.'s safety and well-being. The tour's educational nature aligns with the constitutional right to education and the principle that children should be afforded opportunities to reach their full potential.

[68] While this court is mindful of the need to preserve the child's connection to both parents, the unfortunate circumstances of C.J.S.'s reported death necessitate a pragmatic approach. The limited duration of the proposed trip ensures that it will not unduly disrupt X.S.'s life or her connections to her home country.

[69] This court has also considered the potential benefits of international travel for children's development. These benefits include improved language skills, cultural awareness, adaptability, and problem-solving abilities. Exposure to different cultures can positively impact a child's personal growth, empathy, and global perspective.

[70] It is important to note that this judgment should not be interpreted as diminishing the importance of both parents' involvement in a child's life. Instead, it recognises that in exceptional circumstances, the court must act to protect and promote the child's best interests, even in the face of procedural challenges.

[71] This court is mindful of the potential concerns regarding international child abduction. However, given the applicant's strong ties to South Africa, her demonstrated commitment to X.S.'s welfare, and the structured nature of the proposed trip, the risk of non-return is considered minimal. Nonetheless, as a safeguard, this court will impose certain conditions below to ensure X.S.'s safe return to South Africa after the trip.

[72] This court notes that obtaining a certified Brazilian death certificate from the Brazilian authorities may be complex and time-consuming, especially for non-Brazilians. In light of this, this court finds it reasonable to grant the relief sought by the applicant.

CONCLUSION

[73] After carefully considering all relevant factors, I am satisfied that granting this application is in X.S.'s best interests. The educational and cultural benefits of the proposed tour outweigh the potential risks, and denying

this opportunity based on administrative or other hurdles would not serve the child's welfare.

[74] The order granted herein is specifically tailored to the unique circumstances of this case. It should not be seen as a general relaxation of the requirements for parental consent in matters of international travel. Each case must be evaluated on its own merits, with the best interests of the child remaining the paramount consideration.

[75] This judgment balances the need for parental consent and the child's right to educational and cultural opportunities. It emphasises the court's role as upper guardian of minor children and the importance of considering the child's views in matters affecting their lives.

ORDER

[76] In light of the above, I make the following order:

76.1 The application is granted.

76.2 The consent of the biological father, C.J.S, of the minor child, X.S, as required in terms of Section 18(2)(c) and 18(3) of the Children's Act, Act 38 of 2005, is hereby dispensed with.

76.3 The applicant is authorised to apply for the necessary visa(s) or permit(s) for the minor child to visit the United States of America or to depart or remove the aforementioned minor child from the Republic of South Africa or to consent/allow that the aforementioned minor child depart/is temporarily removed from the Republic of South Africa.

76.4 The minor child is permitted to depart from the Republic of South Africa, accompanied by the applicant or her appointed nominee, without requiring a parental consent affidavit from C.J.S. This is subject to compliance with the remaining provisions of regulation 6(12)(b) to the Immigration Act 13 of 2002.

76.5 For this educational tour, the applicant is declared to hold full parental responsibilities and rights regarding the minor child, as provided in section 18 of the Children's Act 38 of 2005.

76.6 The applicant is ordered to:

- 76.6.1 provide the court with a detailed itinerary of the trip, including accommodation details and contact information, at least seven days before departure;
- 76.6.2 ensure that X.S. has means of communication to maintain contact with family members in South Africa during the trip;
- 76.6.3 report to the court within seven days of returning to South Africa.
- 76.7 Based on this court order, the Department of Home Affairs is directed to issue the necessary travel documentation for X.S. for this trip.
- 76.8 The Department of International Relations and Cooperation is directed to assist the applicant in obtaining official confirmation of C.J.S.'s death from the Brazilian authorities, including a certified copy of the Brazilian death certificate if available.
- 76.9 The Registrar of this court is directed to furnish a copy of this order to the Department of Home Affairs, the Department of International Relations and Cooperation, and the United States

Embassy in South Africa to facilitate the processing of the necessary travel documents for the minor child.

76.10 The applicant has leave to approach this court on the same papers, duly supplemented if necessary, for further relief should circumstances require it.

76.11 No order as to costs.



GAISA AJ

ACTING JUDGE OF THE HIGH COURT

Heard on: 16 July 2024

Delivered on: 18 July 2024

Appearance:

For the applicant - Adv D Chuene (Limpopo Society of Advocates)