

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

...
F. MARCANDONATOS

26 September 2024

CASE NUMBER: 2024/103863

In the matter between:

H

Applicant

and

H

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 26 September 2024

JUDGMENT

MARCANDONATOS AJ:

INTRODUCTION

- [1] This is a matter in terms of which there is a Main Application and Counter Application, both of which, are launched on an urgent basis and are opposed.
- [2] In terms of the Main Application, the Applicant approaches this Court for an Order as set out in Part A of the Notice of Motion¹, seeking the immediate return of a minor child, Z, to this Court's jurisdiction within 48 hours of the granting of an Order, that the minor child is placed in the Applicant's interim primary care pending the finalisation of the legal proceedings launched in the Randburg Children's Court, and the Family Advocate's investigation pursuant thereto, under case number 318/2024, which proceedings have been set down for hearing again on *29 November 2024*.
- [3] In terms of the Counter Application, Respondent approaches this Court for Orders as set out in the Notice of Motion², in Parts A, B and C thereof, seeking, *inter alia*:-
- 3.1. in terms of Part A - a declaration that the Respondent therein (*being the Applicant in the Main Application*), has not complied with the Order of Court granted by this Court dated *17 March 2023*, under case number: 2022/007445, which Order was an Order for a Final Decree of Divorce incorporating a Deed of Settlement entered into by and between the Applicant and Respondent, Respondent having failed to comply with clauses 7.1, 7.4 and 7.7.12 thereof and thus directing Respondent to be in wilful default and/or non-compliant with and/or having totally disregarded the Orders as set out in prayer 2 of the Notice of Motion and thus declaring the Respondent as being in contempt of Court and seeking a Warrant of Arrest to be authorised and issued against the Respondent in the Counter Application, committing the Respondent to prison for a period of 6 (*six*) months, alternatively, that the committal be suspended provided that Respondent in the Counter Application

¹ Notice of Motion in Counter Application: CaseLines 05-428 to 05-432

² Notice of Motion – Counter Application: CaseLines 06-3

complies with prayer 2.2 of the Notice of Motion in relation to future disputes in regard to the minor child;

- 3.2. in terms of Part B – a declaration that Respondent has not complied with the Order of Court dated *17 March 2023*, under case number: 2022/007445, which Order was an Order for a Final Decree of Divorce incorporating a Deed of Settlement entered into by and between the Applicant and Respondent, that the Respondent failed to comply with clauses 9.1, 9.2, 9.3 and 9.4 of the Settlement Agreement made an Order, declaring that Respondent is in wilful default and/or non-compliant with and/or has totally disregarded the Orders as set out in prayer 8 of the Notice of Motion, declaring the Respondent in contempt of Court, that Respondent is to pay the Applicant the arrear maintenance and related expenses totalling the sum of R337 500.00 within 48 hours of granting of the Order, a warrant of arrest to be authorised and issued for the arrest of the Respondent and committed to prison for a period of 6 (*six*) months, alternatively, that the committal be suspended provided that Respondent in the Counter Application complies with prayer 8.2 and 11 of the Notice of Motion; and
- 3.3. in terms of Part C – that Respondent or anyone directed by him including his wife, Mrs Aisha Wazar Hassam, be interdicted and restrained from instituting any further legal criminal proceedings or continuing with existing criminal proceedings in cases open against the Applicant and her husband, Mr Faizaan Amod, until Andrew Chauke, Director of Public Prosecutions South African Region, Johannesburg or his successors or assigns has considered both the alleged complaint statements together with the Applicant and her husband, Mr Faizaan Amod's statement and is of the view that the criminal cases are legitimate and he is satisfied that the proceedings to be instituted ought to be continued, do not constitute an abuse of process and that there are *prima facie* grounds for the proceedings.

BACKGROUND

- [4] For convenience and notwithstanding the reference to the parties in the Main Application and Counter Application, the parties hereinafter shall be referred to as the Applicant (*being the father*) and the Respondent (*being the mother*) and who shall further be referred to collectively, as “*the parties*”.
- [5] *The parties* were married to each other on **28 December 2001**. They were divorced on **17 March 2023** in terms of an Order of Divorce granted by this Court³, incorporating a Settlement Agreement, (*hereinafter referred to as the “Divorce Order”*), referred to and annexed as annexure “S1” to the Founding Affidavit of the Main Application⁴.
- [6] *The parties* are parents to three children, two of whom are majors⁵. The subject matter before this Court concerns *the parties’* youngest child, Z, born on **25 March 2014**, who is currently 10 years of age⁶.
- [7] After *the parties* divorced, Z’s primary residence was with Respondent and Applicant exercised specified defined rights of contact to Z, including every Wednesday, on alternate weekends, school holidays, special holidays, public holidays and the right of first refusal to care for Z during Respondent’s absence⁷.
- [8] Since Grade 1⁸ (**2019**) Z attended school at Crawford College in Sandton and has also attended at Madrassah, at Sandton Islamic Association⁹.
- [9] *The parties* have respectively remarried¹⁰.

³ Founding Affidavit in Main Application: par 25, CaseLines 01-15

⁴ Founding Affidavit in Main Application: par 6, CaseLines 01-11 and 01-37 to 01-79

⁵ Founding Affidavit in Main Application: par 26, CaseLines 01-16

⁶ Notice of Motion in Main Application (*supra*), par 26.3, CaseLines 01-16

⁷ Founding Affidavit in Main Application: annexure “S1”, par 5, CaseLines 01-44 to 01-48

⁸ Founding Affidavit in Main Application: par 26.3, CaseLines 01-16

⁹ Founding Affidavit in Main Application: par 39, CaseLines 01-18

¹⁰ Founding Affidavit in Main Application: par 33, CaseLines 01-18

CONSIDERATION AND DETERMINATION OF POINTS IN LIMINE RAISED BY RESPONDENT IN TERMS OF MAIN APPLICATION¹¹

[10] The Respondent raised seven points *in limine*, summarised as follows:-

- 10.1. first point *in limine* – lack of jurisdiction;
- 10.2. second point *in limine* – Part A of the Notice of Motion is *lis pendens*, premature Application, wrong basis, failure to follow the dispute mechanisms in the Final Decree of Divorce and Settlement Agreement;
- 10.3. third point *in limine* – Section (*sic!*) Part A of the Notice of Motion is moot;
- 10.4. fourth point *in limine* – Part A of the Notice of Motion, failure to comply with Uniform Rule 41A;
- 10.5. fifth point *in limine* – Part A - failure to comply with revised Consolidated Practice Directive 1 of 2024, Court operations in the Gauteng Division with effect from 26 February 2024 (*amended on 12 June 2024*) paragraph 28.10;
- 10.6. sixth point *in limine* – Part A, failure to comply with annexure “A” 13.24 of the Practice Manual of the Gauteng Division (*effective from 25 July 2012*);
- 10.7. seventh point *in limine* – Part A, lack of urgency.

First point in limine - lack of jurisdiction

[11] From the papers filed of record, Respondent submitted that this Court does not have jurisdiction to hear this matter in the Main Application, as the minor child,

¹¹ Respondent’s Heads of Argument: CaseLines 13-2 to 13-20 and Answering Affidavit in Main Application: CaseLines 05-3 to 05-19

Z, who forms the basis of Part A in relation the relief sought in the Notice of Motion in the Main Application, is not resident within this Court's geographical jurisdiction, Z being ordinarily resident in Durban, KwaZulu-Natal at 106 Dunnottar Avenue, Sydenham and that the KwaZulu-Natal local division of the High Court in Durban would have jurisdiction to hear the matter¹².

- [12] In support of this argument, Respondent's legal representative handed up at the hearing of the matter, the judgement of **B v K**, 441/2020, High Court of South Africa, Free State Division, Bloemfontein, delivered by Van Zyl J on *13 May 2024*. He, however, failed to provide a summary in respect of the matter and/or background and instead referred this Court to paragraphs 23, 24, 25, 26 and 27 of the Judgment.
- [13] The Applicant opposes the Respondent's point *in limine* of lack of jurisdiction. Counsel for the Applicant argues that there can be no doubt that this Court is vested with the requisite jurisdiction to hear this matter and refers to the case of **Mathews v Mathews, 1984 (4) SA 136 (SE)**¹³ wherein Van Rensburg J, considered the question of whether the Court had the power to implement its own Order as opposed to merely a declaratory Order, with specific reference to the unlawful removal of minor children from its jurisdiction. Van Rensburg J, concluded that: "*There can be no doubt that any Order made by this Court for the handing over of the two children in question will be effective, notwithstanding the fact that the two children are within the area of jurisdiction within another division of the Supreme Court.*"¹⁴
- [14] I adjourned the argument to give consideration to the judgment of **B v K** handed to me during argument by the Respondent's legal representative. The Applicant therein is a citizen of the United Kingdom but remained in South Africa with her mother. During *2020*, she decided to move back to the United Kingdom with the minor child, whilst the Respondent (*father*) remained in South Africa. They got divorced in South Africa on *09 March 2022* incorporating a Deed of

¹² Answering Affidavit in the Main Application: par 3.1, CaseLines 05-3

¹³ Applicant's list of authorities: CaseLines 12-28

¹⁴ Page 138, paragraph h

Settlement. Given the very acrimonious relationship between the Applicant and Respondent, Applicant thereafter and whilst residing permanently with the minor child in the United Kingdom, approached the Court (*in South Africa*) to seek a variation of the Deed of Settlement made an Order of Court in respect of Respondent's contact to be suspended, pending finalisation of an Application to be instituted in an appropriate Court, the Applicant being concerned that should the Respondent be allowed to take the minor child with him when exercising contact to her, either in the United Kingdom or in South Africa, that he would not return the child. The Court found that it does not have jurisdiction to grant an Order in respect of care of contact rights relating to a child and only the Court currently having jurisdiction, being the Court in the *United Kingdom* where the child resides, the United Kingdom having already granted an interim Court Order.

- [15] It is undisputed that this Court granted the *Divorce Order* on *17 March 2023* and that the minor child, Z, resided within the jurisdiction of this Court until *06 September 2024*, when Respondent in the Main Application removed her to KwaZulu-Natal without Applicant's knowledge and/or consent.

- [16] The matter of **B v K** is distinguishable from the facts herein, in that the Applicant and the minor child (*in the B v K matter*) were at the time that the Application was launched, residing permanently in the United Kingdom and which residency was not in dispute. The issue was whether the Applicant could, notwithstanding the child's residency in the United Kingdom, seek an Order in South Africa, so as to provide the Applicant with peace of mind, should the father have elected not to return the child to the Applicant (*in the United Kingdom*) when exercising contact to her either in South Africa or in the United Kingdom. The Court in my view, correctly found that it did not have jurisdiction in the circumstances.

- [17] In the premise, I dismissed the Respondent's first point *in limine* relating to lack of jurisdiction.

Second point *in limine* - lack of urgency dealt with as part of Fifth and Sixth points *in limine* referred to at paragraph 10.5 and 10.6 above

[18] Applicant alleges that the matter is urgent for a number of reasons, including as summarised hereunder¹⁵:-

- 18.1. Z had been secretly removed from Johannesburg;
- 18.2. Z had been wrenched out of her only environment, overnight;
- 18.3. Z had been removed from school in term 3 of her grade 4 school year and is currently not attending school;
- 18.4. Z had not been afforded any time to prepare for such a big change in her life;
- 18.5. no proper arrangements had been made for Z;
- 18.6. the Respondent continues to ignore the Applicant and continues to dictate decisions about Z in Durban, more particularly her schooling albeit that Z has not been enrolled in any school;
- 18.7. the Respondent has taken the law into her own hands in the face of a pending Children's Court enquiry, Court Orders and recommendations from experts and Respondent's conduct should not, and cannot, be condoned by this Court;
- 18.8. the Respondent has completely ignored the Applicant's involvement in Z's life where the *Divorce Order* provides for joint decision making;
- 18.9. whilst Respondent recognised that due process had to followed regarding any relocation and why she then launched a Counter Application, in the Children's Court, which proceedings are pending, she ignore her concession to due process being followed;

¹⁵ Founding Affidavit in the Main Application: par 77, CaseLines 01-30 to 01-33 and Applicant's Heads of Argument, par 8, CaseLines 03-6 to 03-9

- 18.10. Respondent's version as to her sudden relocation to Durban is contradictory and she has blatantly lied to Applicant in an attempt to justify the sudden move and breach of due process;
- 18.11. Respondent's conduct demonstrates sheer lawlessness and Z's well being has been prejudiced and compromised in these circumstances;
- 18.12. Respondent's conduct demonstrates an abuse of process;
- 18.13. Applicant only became aware of Respondent's relocation with Z to Durban on Tuesday, *10 September 2024*, after same having been confirmed by Respondent's attorney, whereupon Counsel was secured and a further consultation with Counsel was held on Wednesday, *11 September 2024* when Z was not returned notwithstanding demand, whereafter Counsel drafted overnight on *11 September 2024* to enable the urgent Application to be launched on *12 September 2024*.

- [19] Respondent raises the lack of urgency dealt with as part of the fifth and sixth points *in limine* described above. In a nutshell, it was averred that Applicant has not complied with the practice of the above Honourable Court in relation to urgent Applications as announced by Justice Willem Van Der Merwe in his Practice Directive Manual of the Gauteng Division, Pretoria (*effective date 25 July 2012*), as well as the revised Consolidated Practice Directive 1 of *2024*, at no point in the Founding Affidavit does Applicant mention the best interests of the minor child thus rendering the Application fatally defective and that he could have had substantial redress in the normal course by enrolling the matter on the next available normal urgent Court date being Tuesday, *24 September 2024*¹⁶.
- [20] There is a plethora of authorities, which state that in matters involving the best interests of a child, said matters are inherently urgent and in the nature of Rule

¹⁶ Respondent's Answering Affidavit in the Main Application: CaseLines 05-15 to 05-17 and Respondent's Heads of Argument: CaseLines 13-2 to 13-14

6(12) of the Uniform Rules of Court, it permits me to disregard, notice, forms and service as I deem fit.

- [21] It is clear from the papers filed of record, as amplified during argument, that an issue in the Main Application, revolves around the best interests of a minor child, Z, albeit that *the parties* are at odds as to what in the circumstances would best serve Z's said interests.
- [22] I was persuaded that the matter is urgent and that there will be no value in "*kicking the can down the road*" and therefore I directed that the merits be argued.
- [23] In the premise, I accept that the Main Application is urgent, and in my discretion, I have elected for the matter to be heard as such, in accordance with the provisions of Uniform Rule 6(12)(a).
- [24] I further condone the non-compliance of the usual forms, time limits, notice and procedures, as envisaged in terms of Uniform Rule 6(5) in respect of the Main Application.

Second, Third and Fourth points *in limine* – referred to at paragraphs 10.2, 10.3 and 10.4 above

- [25] Following upon this Court's dismissal of the First and Second points *in limine* raised by the Respondent, the Respondent's legal representative abandoned the aforesaid remaining points *in limine*.

CONSIDERATION AND DETERMINATION OF THE ISSUES PERTAINING TO THE MERITS IN THE MAIN APPLICATION

- [26] The crux of Part A in the Main Application¹⁷ and in which Applicant seeks the immediate return of Z to this Court's jurisdiction, is that Respondent's conduct flies into the face of:-

¹⁷ Applicant's Heads of Argument: par 5, CaseLines 12-3 to 12-4 and Replying Affidavit in Main Application: par 20, CaseLines 09-8

- 26.1. the *Divorce Order*, which provides that neither party may make any unilateral decisions when the decision is likely to impact on the party's rights of contact with the children and which is likely to significantly change, or have an adverse effect on, the minor children's lives;
 - 26.2. the pending Randburg Children's Court enquiry, which has been set down again for hearing on *29 November 2024*;
 - 26.3. the Randburg Children's Court Orders dated *18 June 2024* and *19 August 2024*;
 - 26.4. the recommendations of the parenting co-ordinators dated *24 May 2024* that the relocation be delayed until *December 2024*;
 - 26.5. Respondent's own correspondence and her undertaking of *31 May 2024*;
 - 26.6. Respondent's pending Counter Application in the Randburg Children's Court seeking an order to permit her to relocate to Durban with Z; and
 - 26.7. the pending and incomplete Family Advocate investigation.
- [27] The crux of Respondent's opposition in respect of Part A of the Notice of Motion in the Main Application:-
- 27.1. pertains to the seven points *in limine* raised by the Respondent and as referred to hereinabove, points *in limine* one and seven (*read with points in limine five and six*) were dismissed and points *in limine* two, three and four having been abandoned during argument; and
 - 27.2. in respect of the merits, Respondent averred that her decision to relocate with Z and her husband to Durban came about by a change in circumstances for the following two main reasons¹⁸:-

¹⁸ Answering Affidavit in the Main Application: par 8.7 (*including its sub-paragraphs incorrectly numbered 8.8.1 to 8.8.2*), CaseLines 05-8 to 05-9

- 27.2.1. after she laid criminal charges against Applicant at Bramley Police Station under case number: 251/08/2024, for theft of R4 000 000.00 worth of stock from her business, she noticed Applicant's wife continually videoing and photographing her husband and herself and also became aware that they were being followed by motor vehicles of Applicant's security company as well as one of his patrol vehicles being stationed outside her complex and feared for her safety and that of Z; and
- 27.2.2. Respondent's husband as the household breadwinner, whose company is based in Durban, required him to be on-site full time and they could no longer live in Johannesburg and commute to Durban every week.

COMMON CAUSE AND UNDISPUTED ISSUES

[28] The Settlement Agreement concluded between the Applicant and Respondent made an Order of Court annexed to the Founding Affidavit in the Main Application as annexure "S1" (*supra*) provides, *inter alia*, that:-

- 28.1. primary residence of Z shall be with Respondent and the Applicant having the right of specific and defined rights of contact to Z;
- 28.2. major decisions involving the children (*including Z*) shall be made jointly by Applicant and Respondent including in respect of the following:-
 - 28.2.1. medical and dental healthcare;
 - 28.2.2. their choice of educational institutions;
 - 28.2.3. their cultural and religious activities and upbringing;

- 28.2.4. contact arrangements on their birthdays and those of *the parties*;
 - 28.2.5. any other decision, which is likely to impact on *the parties'* rights of contact with the minor children;
 - 28.2.6. variation on the terms of contact and care;
 - 28.2.7. any decision, which is likely to significantly change or have an adverse effect on the minor children's living conditions, health, personal relations with a parent or family member or generally in regard to his/her well-being; and
- 28.3. if Applicant and Respondent are unable to resolve disputes between them relating to the children, their care and contact or otherwise, prior to launching any Court proceedings (*save in the case of an emergency*) either party shall be entitled to refer the dispute for resolution to a parenting co-ordinator agreed to between *the parties* who has the necessary expertise, having regard to the nature of the dispute and *save in the case of an emergency the parties* shall first approach the parenting co-ordinator to assist in the resolution of the dispute before approaching Court.

[29] On *05 February 2024*, Respondent informed Applicant that she is considering relocating with Z to Dubai in *April 2024* in response to his request for more contact with Z. Applicant did not agree to the relocation¹⁹.

[30] On *23 February 2024*, Respondent changed her mind and informed Applicant that she would be relocating to Durban approximately on *01 April 2024*. Applicant did not agree to the relocation²⁰.

[31] On *02 April 2024*, after no agreement was reached, *the parties* jointly appointed Professor L De Jong and Mrs L Nell as parenting co-ordinators for a period of

¹⁹ Founding Affidavit in the Main Application: paras 42 and 43, CaseLines 01-19

²⁰ Founding Affidavit in the Main Application: paras 44 and 45, CaseLines 01-19

3 months to make a recommendation regarding the proposed relocation to Durban²¹.

[32] A further expert was appointed to assist in the consideration of the child's views and wishes (*Dr Duchon*)²².

[33] In terms of the recommendation of the parenting co-ordinators, Professor Leentjie De Jong and Ms L Nell, it is recommended that:

Respondent: "... should be allowed to relocate to Durban with Z, but not before the end of the year, so that Z can be properly prepared for this big change in her life. It is clear that Z has not yet given much thought to the relocation – she would like the arrangements concerning her care to stay as they are and is convinced that her mother would never to Durban without her. Z, therefore, needs to be given enough time to properly prepared for the relocation by both her parents."

Respondent: "...should reassure Z that she (Respondent) will never allow Z to lose contact with her father and that she will make an effort to ensure that Z will still have regular contact with him. Postponing the relocation until the end of the year would also mean that Z will be a bit older and will be able to fly between Durban and Johannesburg on her own as an unaccompanied minor."

"... Z should preferably be enrolled in another Crawford school in Durban or in a more secular private school."²³

[34] On **26 May 2024**, and upon receipt of the recommendations from the parenting co-ordinators, the Respondent informed the Applicant that she would relocate to Durban whether he liked it or not. She informed the Applicant that she intended to relocate to Durban on **01 June 2024**, notwithstanding the recommendation that any relocation be delayed until **December 2024**²⁴.

²¹ Annexure "S5" to the Founding Affidavit in the Main Application: unnumbered paragraph 1, CaseLines 01-106

²² Founding Affidavit in the Main Application: par 46, CaseLines 01-20

²³ Annexure "S5" to the Founding Affidavit in the Main Application: CaseLines 01-108 to 01-109

²⁴ Founding Affidavit in the Main Application: par 47, CaseLines 01-20

- [35] Therefore, on *27 May 2024*, in a letter addressed by the Applicant's attorney to the Respondent's attorney, he sought an undertaking from the Respondent to be provided by *28 May 2024*, that she would not disregard the recommendations of the parenting co-ordinators and that she will not relocate to Durban with Z, without Applicant's consent²⁵.
- [36] When the Respondent refused to provide a meaningful response to the Applicant's attorney's letter of *27 May 2024*, he launched proceedings in the Randburg Children's Court on *31 May 2024* in which he sought, *inter alia*, the Court's intervention to interdict the Respondent from relocating with Z and also to apply for primary residence of Z²⁶.
- [37] On *31 May 2024*, and on the same day that Applicant launched the above Randburg Children's Court proceedings, Respondent in a letter from her erstwhile attorney, sought Applicant's permission to relocate with Z at the end of *2024* and advising that in the absence of his written consent to such relocation within 7 (*seven*) days of receipt of the said letter, that she would proceed with an Application to ensure that she be allowed to relocate and confirmed therein that she would, however, *not* relocate immediately to Durban with Z²⁷.
- [38] Given the absence of agreement in respect of the proposed relocation and the content of Respondent's erstwhile attorney's letter referenced above, dated *31 May 2024*, Respondent launched a Counter Application in the Randburg Children's Court for permission to relocate with Z to Durban and which proceedings are pending²⁸.
- [39] Arising from the above matters in the Randburg Children's Court and which are pending, on *19 August 2024* an Interim Order was granted therein for the Family Advocate to investigate and report on their findings²⁹.

²⁵ Annexure "S8" to the Founding Affidavit in the Main Application: CaseLines 01-115 to 01-116

²⁶ Founding Affidavit to the Main Application: par 48, CaseLines 01-20 and Annexure "S2" to the Founding Affidavit in the Main Application: CaseLines 01-81 to 01-94

²⁷ Annexure "S4" to the Founding Affidavit in the Main Application: CaseLines 01-100 to 01-104 and par 9, CaseLines 01-103

²⁸ Founding Affidavit to the Main Application: par 16, CaseLines 01-14

²⁹ Annexure "9A" to the Answering Affidavit in the Main Application: CaseLines 05-216

- [40] The respective enquiries in the Randburg Children's Court are set down for hearing on *29 November 2024*³⁰. I put to the Applicant's Counsel why it is that Applicant did not proceed with the relief sought herein, in terms of the pending Application launched by him in the Randburg Children's Court, to which she informed me that the Applicant had indeed approached the Randburg Children's Court but was informed that being a creature of statue, it could not deal with the removal of Z in the circumstances she was and that he should approach the High Court for direction and intervention. No objection was received from the Respondent's legal representative in respect of these submissions.
- [41] The Domestic Violence Application, which was launched by the Respondent out of the Randburg Magistrate's Court, was set down for hearing on *10 September 2024*. On said date, the Respondent instructed her attorney to withdraw the said Application³¹.

DETERMINATION

- [42] The best interests of a child is the scale upon which I, in my role as the upper guardian of the child and in the performance of my common law duties as such, must weigh the respective relief sought and the submissions made in support thereof. I am further compelled to do so by virtue of the provisions of Section 28(2) of the Constitution, read together with Sections 7 and 9 of the Children's Act, 38 of 2005.
- [43] There is a plethora of case authorities which expounds upon the role of a Judge as the upper guardian of all minors in determining the best interests of minor children and the orders which can be made pursuant thereto.
- [44] In **Girdwood v Girdwood**³², Van Zyl J stated the following:

³⁰ Annexure "9A" to the Answering Affidavit in the Main Application: CaseLines 05-216

³¹ Founding Affidavit to the Main Application: par 56.2, CaseLines 01-22

³² 1995 (4) SA 698 C 708 J to 709 A

“as upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding Orders to ensure that such interests are effectively served and safeguarded”.

- [45] In **J v J**³³, Erasmus J, held that the Court, as upper guardian, is empowered and under a duty to consider and evaluate all relevant facts placed before it when deciding the issue, which is of paramount importance, being the best interests of children³⁴. The Court referred to the matter of **Terblanche v Terblanche**³⁵ where it was stated that, when a Court sits as upper guardian in a custody matter:-

*“... it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by a procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.”*³⁶

- [46] In the **J v J** matter, the Court also referred to the decision of **AD and DD v DW and others** (*Centre for Child Law as Amicus Curiae, Department of Social Development as Intervening Party*)³⁷, where the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be “held to ransom for the sake of legal niceties” and determined that in the case before it, the best interests of the child “should not be mechanically sacrificed on the alter for jurisdictional formalisation”³⁸.

- [47] In following the reasoning of the above authorities, I simply cannot ignore any facts and circumstances, be they past, recent or present, when considering

³³ 2008 (6) SA 30(c)

³⁴ Ibid par 20

³⁵ 1992 (1) SA 501 (W)

³⁶ Ibid page 504 (c)

³⁷ 2008 (3) SA 183 (CC)

³⁸ J v J 2008 (6) SA 30 (C) at par 20

what is in the best interests of the minor child herein, Z, and I must furthermore take into account the possibility of what might happen in the future if I make any specific Order.

[48] In my view an analysis of the communications and timeline referred to hereunder, is relevant:-

ITEM	DATE	NARRATIVE
48.1.	02.09.2024	@ 11h03, Respondent addresses an e-mail to Ombedzi of the Family Advocate: <i>"Good day</i> <i>Please can I humbly be assisted. My matter is before the honourable family advocate's office for interview on 24 October 2024. I have delayed my relocation for the Family Advocate's interview however due to delays from the Applicant I am faced with relocating with this month. My husband's job is moved to Kwa Zulu Natal. He is the breadwinner at home who supports my child and myself. We cannot lose this opportunity as this will be detrimental for myself and my child. Please do allow this, I am open to an interview within the Kwa Zulu Natal area with your office's guidance to allocate a family Advocate in Kwa Zulu Natal who can assist with mine and myself child's interview there. Your assistance will be appreciated."</i>³⁹[my emphasis]
48.2.	06.09.2024	Respondent relocates with Z and her husband to Durban, KwaZulu-Natal – albeit without Applicant's consent and/or knowledge.
48.3.	09.09.2024	@ 08h22 Respondent's attorney addresses a letter to Applicant's attorney copying in the two parenting co-ordinators, Professor De Jong and Mrs Nell,

³⁹ Annexure "18" to the Answering Affidavit in the Main Application: CaseLines 05-269

ITEM	DATE	NARRATIVE
		advising, <i>inter alia</i>, that due to the volatile situation <i>the parties</i> are finding themselves as a result of Applicant's conduct, Respondent "<i>will move</i>" with Z and Respondent's husband to Durban and "<i>will be</i>" residing at 106 Dunnottar Avenue, Sydenham, Durban and Z will be enrolled in school in Durban, which will be in her best interests for the following reasons:- 1. Z will be removed from the toxic situation created by the Applicant; 2. the parenting co-ordinator will still be involved and the Family Advocate as per the Children's Court matter; 3. the Applicant can exercise his rights of contact in terms of the Court Order and Settlement Agreement and cannot be prejudiced. The letter further indicates that the move is necessitated by the fact that the Respondent's husband is the sole breadwinner for both the Respondent and Z and is required to relocate to Durban for work and that Respondent and Z fear for their life due to the Applicant's security following them⁴⁰.
48.4.	10.09.2024	Respondent instructs her attorney to withdraw the Domestic Violence proceedings initiated by her.
48.5.	10.09.2024	@ 23h59 a letter is addressed by Respondent's attorney to Applicant's attorney enclosing

⁴⁰ Annexure "10" to the Answering Affidavit in the Main Application: CaseLines 05-217 to 05-220, par 3 at CaseLines 05-220

ITEM	DATE	NARRATIVE
		Respondent's Replying Affidavit in the Counter Application in the pending Randburg Children's Court matter in which she confirms therein that she <i>had relocated</i> to Durban with Z on 06 September 2024 , together with her husband and advises the Applicant that he "...will be well-advised to not approach any court in relation to the relocation of our clients and the minor child on 06 September 2024 to Durban considering the reasons therefore in the Replying Affidavit to the Counter Application" ⁴¹ .

CONCLUSION

[49] The relief, which I intend to grant, arises out of my view that:-

- 49.1. Respondent has opposed the Main Application by raising meritless technical points and thereby wanting this Court to be "*held to ransom for the sake of legal niceties*" (See ***AD and DD v DW & Others*** (*supra*)) placing heavy emphasis thereon, evidenced by the fact that whilst Respondent's Answering Affidavit consists of 29 pages, 19 of those pages were dedicated to the points *in limine*/technicities raised therein;
- 49.2. Respondent removed Z from Johannesburg in highly questionable circumstances and notwithstanding the pending proceedings in the Randburg Children's Court (*both in respect of the Applicant's Application as well as the Respondent's Counter Application*) and/or the terms of the **Divorce Order**, and/or the incomplete Family Advocate's investigation and/or her undertaking that she would not remove Z to Durban until **December 2024** and/or her knowledge and appreciation that she could not relocate with Z in the absence of agreement and/or a Court Order

⁴¹ Annexure "11" to the Answering Affidavit in the Main Application: CaseLines 05-228 to 05-229, par 5 at 05-228

and thereby acted in a manner in which she creates the distinct impression that she is above the law, not having to follow due process;

49.3. if one has regard to the timeline and content thereof as stated in paragraph 48 above:-

49.3.1. despite the Respondent having had the opportunity prior to her relocation (*on 06 September 2024*) to approach the very Court in respect of which there is pending litigation i.e. the pending matters in the Randburg Children's Court, about the very issue of relocation of Z to Durban, she instead chose (*unwisely so*) to simply relocate; and

49.3.2. nothing is said about her alleged fears of the Applicant, prior to her relocation with Z on *06 September 2024*, even when she communicates with the Family Advocate on *02 September 2024* wherein she solely highlights her husband's job in KwaZulu-Natal, which has always been on the cards, so to speak, and the first time she raises her alleged fear of the Applicant and which allegedly caused the sudden relocation, is made by her on *09 September 2024* i.e. three days *after* the relocation;

49.4. Respondent furthermore misleads the parenting co-ordinators as well as the Applicant when stating in her attorney's letter dated *09 September 2024* (*see paragraph 48.3 above*) that she "*will move*" and "*will be*" residing at 106 Dunnottar Avenue, Sydenham, Durban, when in fact, she had already relocated with Z to Durban on *06 September 2024*;

49.5. the impression is therefore created that Respondent's relocation with Z on *06 September 2024* was indeed orchestrated and thereby flies into the face of the *Divorce Order*, the recommendations of the parenting co-ordinators and her own undertaking and pending Counter Application;

49.6. whilst Respondent endeavours to justify her sudden relocation to Durban because of circumstances having changed, the difficulty is that:-

49.6.1. there were pending proceedings in the Randburg Children's Court as well as Domestic Violence proceedings, providing the Respondent with ample opportunity and mechanisms with which to deal with the alleged circumstances having changed, yet Respondent failed and neglected to follow through therewith and instead simply left Johannesburg knowing that her leaving/relocating with Z is in dispute and is the core issue pending in both of the Randburg Children's Court proceedings;

49.6.2. to make matters worse, Respondent raises several technical points *in limine*, in an attempt to justify her conduct, of which she abandoned three;

49.7. put another way, Respondent cannot be permitted to conduct herself in the manner described above with impunity and in a reprehensible manner.

COSTS

[50] It is trite that awarding costs is a matter which falls within the domain of the Court's discretion, which discretion should be exercised judicially. Generally, costs should be awarded to the successful litigant. These principles have been confirmed time and time again by our Courts.

[51] It seems to me that the Respondent is attempting to litigate herein with impunity. The question is, however, whether I should, in the exercise of my discretion insofar as the ordering of costs is concerned, order that Respondent pay the costs of this Application on a punitive scale as opposed to the ordinary party

and party scale. In the matter of **Multi-Links Telecommunications Limited v Africa Prepaid Services Nigeria Limited**⁴², Fabricius J stated the following in regard to costs Orders: *"Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs of a punitive scale."*

- [52] In the Constitutional Court matter of **Mkhatshwa & Others v Mkhatshwa & Another**⁴³ Khampet J delivered the concurring Judgment of the Full Court, stated the following in regard to punitive costs on the attorney and client scale: *"generally speaking, punitive cost orders are not frequently made, and exceptional circumstances must exist before they are warranted. In SARB (being a reference to the matter of Public Prosecutor v South African Reserve Bank [2019] ZACC 29; 2019 (6) SA 253 (CC))*, this Court affirmed the following guiding principles in relation to punitive costs elucidated by the Labour Appeal Court in Plastic Converters Association of South Africa: *"the scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably, vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."*⁴⁴
- [53] Given the manner in which Respondent has dealt with and opposed this matter, I am persuaded that there are exceptional circumstances warranting a punitive cost Order against the Respondent.
- [54] It is common cause that I held the matter to be urgent and further that I did not uphold the point of *limine* raised by Respondent pertaining to jurisdiction and that the Respondent abandoned the remaining points in *limine* raised by her. Accordingly, in my mind, there is no reason why the costs should not follow the result.
- [55] In the premise, I find that the Respondent is liable for the costs of this Application in respect of Part A on Scale C of the attorney and client tariff, the

⁴² 2014 (3) SA 265 (GP)

⁴³ 2021 (5) SA 447 (CC) and 2020 (10) BCLR 1182 (CC)

⁴⁴ Ibid .. par 21, page 9 & footnote 16 and 17; Plastic Converters Association of South Africa on behalf of Members v National Union of Metal Workers of South Africa [2016] SALAC 39; (2016) 37 ILJ 2815 (LAC)

said costs to include the costs occasioned by the employment of Senior and Junior Counsel on behalf of Applicant.

COUNTER APPLICATION

- [56] Insofar as Respondent's Counter Application is concerned, Respondent's legal representative argued during the Main Application, at the end, that his instructions were to withdraw the Counter Application and tendered to pay Applicant's costs pursuant thereto on a party and party scale.
- [57] Counsel for Applicant argued that a punitive cost Order be granted pursuant to the withdrawal of the Counter Application and the untimeliness thereof, it being argued that Counsels (*Senior and Junior*) for Applicant had prepared for the day in argument opposing the Counter Application and therefore sought punitive costs on Scale C, to include the costs of Senior and Junior Counsel.
- [58] As in the case with the Main Application, I find that the manner in which Respondent has dealt with the Counter Application and the withdrawal thereof in the circumstances it came about, warrants exceptional circumstances for a punitive cost Order. In addition, notwithstanding the withdrawal of the Counter Application, it is noted that whilst the Respondent made much of the Applicant's alleged non-compliance with the various Practice Directives, the Respondent herself failed to comply therewith in terms of the Counter Application launched on an urgent basis. In the premise, I find that Respondent is liable for the costs of the Counter Application on the attorney and client, Scale C, the said costs to include the costs occasioned by the employment of Senior and Junior Counsel on behalf of the Applicant herein.

ORDER

- [1] In respect of Part A in the Main Application, it is accordingly ordered that:-
- 1.1. in accordance with prayer 1 of the Notice of Motion, the non-compliance with the provisions of the Rules of Court with regard to the

time periods, forms and service is condoned as provided for in Uniform Rule of Court 6(12)(a) and Part A in the Main Application is heard as one of urgency;

1.2. the Respondent is hereby ordered and directed to:-

1.2.1. return the minor child, Z, to Gauteng within 48 (*forty-eight*) hours of the granting of this Order;

1.2.2. forthwith disclose to Applicant the precise whereabouts of Z;

1.3. in the event of Respondent failing to return Z as Ordered, that the Applicant or anyone duly appointed by him, is authorised to forthwith collect Z from Respondent, alternatively any other person in whose care Z may be, wherever she may be found, duly assisted by the South African Police Services, whereby Z's primary residence shall be placed in Applicant's interim care and residency, pending the finalisation of the legal proceedings before the Children's Court under case number: 14/1/4/2-318/2024, and the finalisation of the Family Advocate's investigation, which proceedings have been set down for again for hearing on *29 November 2024*;

1.4. it is directed that the proceedings pending in the Randburg Children's Court under case number: 14/1/4/2-318/2024 as well as Respondent's Counter Application shall continue and be completed;

1.5. the Respondent is to pay the costs of Part A of this Application on the attorney/client Scale C, including the costs of Senior and Junior Counsel.

[2] In respect of the Counter Application, it is ordered that Applicant therein, pay the costs thereof on the attorney/client Scale C, including the costs of Senior and Junior Counsel employed by Respondent therein.



F. MARCANDANATOS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:
Judgment:

19 September 2024
26 September 2024

Appearances

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