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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 4146/24

In the matter between:

J[...] J[...] S[...]

Applicant

and

R[...] S[...]

Respondent

Coram: Acting Justice A Montzinger

Heard: 31 July 2024

Delivered electronically: 02 August 2024

REASONS FOR ORDER

Montzinger AJ

1. When estranged or divorced parents claim to act in the best interest of the child, yet engage in conflict, they inadvertently subject the child to emotional turmoil. Our courts have on numerous occasion¹ expressed views to the effect that such conflicts disrupt the child's stability and security, causing confusion, anxiety, and divided loyalties. True consideration for the child's best interests requires parents to collaborate and shield the child from their disputes, prioritising the child's emotional and psychological well-being above their own conflicts.

2. The matter came before me as a postponed urgent application seeking relief concerning the respective parties' parental rights and responsibilities regarding their minor child born of the failed marriage between them. Although the parties concluded a settlement agreement incorporating a parenting plan that regulates their parental responsibilities, rights, and access to the minor child, the applicant alleged that the respondent was unreasonable in withholding her consent when he wishes to exercise his right to take the minor child on overseas holidays.

3. Initially, when the matter came before Sidaki AJ on 5 March 2024, the applicant sought quite extensive relief. In the notice of motion, an order in more or less the following terms was sought:

3.1 Limiting alternatively suspending the respondent's parental rights and responsibilities as envisaged in sections 18 and 19 of the Children's Act² until the minor child reaches the age of majority.

3.2 Declaring the applicant the sole decisionmaker regarding holiday arrangements outside the Republic of South Africa for holiday purposes.

3.3 Authorising the applicant as the sole signatory in respect of any documentation or application submissions required for the minor child to leave the Republic for holiday purposes.

¹ See for similar sentiments: *F v F* 2006 (3) SA 42 (SCA)

² 38 of 2005

4. In the alternative the applicant sought the following relief:

4.1 The respondent's consent to the removal of the minor child as required by s 18(3)(c)(iii) read together with s 18(5) of the Children's Act be dispensed with.

4.2 The respondent's consent to travel in respect of the minor child in terms of Regulation 6(12B) of the Immigration Regulations issued in terms of section 7 of the Immigration Act, 13 of 2002 (the "Immigration Act") be dispensed with.

4.3 The respondent's consent and / or signature and / or presence be dispensed with if required, for the signing of:

(i) Any travel documents (including visas) or application submissions required for the minor child to leave from the Republic of South Africa for holiday.

(ii) Any documentation that may be required for the minor child to travel internationally for holiday.

(iii) All such necessary documentation as may be required by the minor child from time to time in relation to any travel visas and / or renewal of his passport to enable him to travel to other countries on holiday.

4.4 Authorising the applicant to be the sole signatory and applicant in respect of any documentation or application submitted in terms of Regulation 6(12B) of the Immigration Regulations issued under section 7 of the Immigration Act.

5. At the beginning of March 2024 the applicant envisaged the relief to be granted in respect of all future holidays he was entitled to under the agreed parenting plan until the minor reaches the age of majority.

6. I mentioned earlier, the matter came before Sidaki AJ on 5 March 2024, and he made the following order, which was by agreement between the parties. Duly paraphrased the order provided for the following:

6.1 Suspending the respondent's parental rights and responsibilities envisaged in s 18 and 19 of the Children's Act, 38 of 2005, solely for the purposes set out in the order, from 5 March 2024 until 3 April 2024 (the "March-April 2024 holiday").

6.2 Declaring the applicant the sole authorised caretaker and signatory solely for purpose of the holiday arrangements outside the Republic of South Africa for the scheduled March-April 2024 holiday in terms of the itinerary attached as annexure JS 5 to the founding affidavit.

6.3 Further authorising the applicant as sole signatory in respect of any documentation or application submissions required for the minor child to leave the Republic for the March-April 2024 holiday purposes and dispensing with the respondent's need to consent to travel in respect of the minor child in terms of Regulation 6(12B) of the Immigration Regulations issued in terms of section 7 of the Immigration Act³, for the March-April 2024 holiday.

6.4 The applicant was obliged to ensure the respondent has a direct line of communication with the minor child between 20 March 2024 and 2 April 2024.

7. The Sidaki AJ order also made provision for the filing of further papers and postponed the matter for hearing on the semi-urgent court roll for hearing on 12 June 2024.

8. According to the papers, and as informed from the bar, the March-April 2024 holiday occurred without incident.

³ 13 of 2002

9. Long after the March-April 2024 holiday had come and gone, the respondent filed an answering affidavit. As is common in these types of proceedings, where the resolution of the divorce was steeped in acrimony, every post-divorce engagement or court intervention by either of the parties to assert their rights is always seen by at least one of the parties as an opportunity to air every possible grievance he or she may have had with each other in the past. In this case, it was no different, with the respondent taking it upon herself to provide the court with a mountain of information that on the face of it was not pertinent to relief the applicant was seeking. Also, it was evidently an attempt to focus the court's attention on the historic issues, even prior to their acrimonious divorce, between her and the applicant.

10. The respondent's intention was demonstrated by the filing of an answering affidavit with annexures consisting of almost 200 pages on 12 June 2024. The applicant, on 15 May 2024, filed a terse replying affidavit in an attempt to focus on the issue he initially approached the court for, albeit with some variation.

11. Not being deterred, the respondent launched an application on 2 June 2024 to be allowed to file a further supplementary answering affidavit. This affidavit and annexures consist of 332 pages.

12. The respondent's answering affidavit and the intended supplementary affidavit made wide-ranging allegations regarding possible abuse by the applicant of the minor. A high-level overview of the respondent's answering and supplementary affidavits puts me at ease that most of the allegations are deductions and conclusions which the respondent hopes the court will see from her perspective. There is nothing, in my view, that raises immediate concern about the manner the applicant conducted himself in respect to the minor child. Criticism of how parents interact and manage their relationship with their children after a divorce, especially an acrimonious one, should be seen for what it is: an attempt at self-justification and vindication.

13. While a court cannot disregard the concerns raised by either parents, and while every case requires a consideration of its own context and facts, I am of the view that in this case the relief the applicant sought was fairly focussed. Considering,

the history between the parties, the age of the minor child and the existent parental arrangement between the parties in respect of the minor child, the court has to be cautious to simply adhere to a voluminous complaint where the respondent has not used her right to complain and approach a court earlier.

14. It is rather ironic, that the applicant is complaining that the respondent is being obstructive by not providing her consent, and instead of providing the consent the respondent reacted with a barrage of allegations against the applicant. This approach by the respondent is ironic as she has consented to at least three overseas holidays previously without raising the issues which she has now raised in the answering and supplementary affidavits.

15. The matter came before Acting Judge President Goliath on 12 June 2024. She decided to direct the office of the Family Advocate to do an investigation. It is implicit in the order that the AJP rather decided to act prudently, having regard to the allegations. An order was issued directing the Family Advocate to report to the court in respect of:

15.1 Alleged parental alienation or abuse in respect of the minor child by either of the parties.

15.2 The future implementation of the settlement agreement between the parties.

15.3 Whether the respondent's parental rights and responsibilities should be suspended insofar as they relate to the Respondent having to authorise the applicant's proposed travel (presumably meant to read 'with the minor child') outside of South Africa.

16. The Acting Judge President postponed the matter to 31 July 2024 for hearing and the Family Advocate was also required to file its report before the aforementioned date.

The proceedings on 31 July 2024

17. On this date I was informed by the legal representatives that the Family Advocate's report was not ready. Given this development, the parties took two diverse approaches regarding the further conduct of the matter. Mr. Pincus SC, who appeared for the respondent, impressed upon me that the matter should be postponed, while Ms. Van Zyl for the applicant insisted that the matter be heard.

18. I was tasked with having to decide the applicant's application as set out in the notice of motion. There was no counter-application before me that required me to first determine the eligibility of the parents to exercise their respective parental rights and obligations. The Acting Judge President's order also did not appear to me to limit me from continuing to consider the initial basis for the application.

19. It may be that the Family Advocate may make a finding that will have an impact on the applicant and respondent's ability to exercise their parental rights. While in normal circumstances the approach would be to simply roll the matter down the road and wait for the outcome of the Family Advocate's investigation, I do not believe that in this matter it would be rational for me to simply take the easy way out. So, while I seriously considered Mr. Pincus SC's submissions that a postponement would be the most prudent approach, I declined to do so.

20. One of the motivations for the applicant approaching the court is that the administrative requirement to travel is demanding and unpredictable, and it is for that reason that he rather wants certainty to make the necessary travel arrangements.

21. After hearing the parties legal representatives and having considered the papers filed, I decided to issue the order that was marked 'X'. In addition to the argument in court and prior to me issuing the order both counsel submitted additional notes on 1 August 2024.

22. I was of the view that it would be a good use of the court's resources to decide the issue that is before me. This will also provide a degree of certainty to the applicant, although there is the possibility that the court could at any time intervene if

subsequent investigations reveal serious concerns about the parties' conduct in respect of the minor child.

23. I first address the legal considerations that I took into account and then I address the facts in support of the application.

The legal considerations

24. As mentioned, the applicant approached this court in terms of sections 18, 19 and 28 of the Children's Act read with regulation 6(12B) of the Immigration Regulations issued in terms of s 7 of the Immigration Act.

25. Section 18 outlines the comprehensive parental responsibilities and rights that a person may have concerning a child. These include the responsibilities and rights to care for the child, maintain contact, act as guardian, and contribute to the child's maintenance. The section emphasises the independence of each guardian in exercising these rights, except where a competent court dictates otherwise, particularly in crucial decisions where all guardians' consent is necessary.

26. For present purposes the focus is on ss 18(5). The relevant subsection provides that:

“(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(c).”

27. The matters covered by subsection 3(c) includes at (iii) the consent to the child's departure or removal from the Republic.

28. Section 19 focuses on the parental responsibilities and rights of biological mothers, granting them full parental responsibilities and rights irrespective of marital status.

29. Regulation 6 of the Immigration Regulations provides detail for the admission and departure of children traveling into or out of the Republic of South Africa. Relevant for this matter the key points regarding traveling with children are as follows:

29.1 When parents are traveling with a child, they must produce an unabridged birth certificate that includes the particulars of the child's parents.

29.2 If only one parent is traveling with a child, the following documents are required:

- (i) An unabridged birth certificate.
- (ii) An affidavit from the other parent authorizing travel.
- (iii) A court order granting full parental responsibilities and rights or legal guardianship, if applicable.
- (iv) A death certificate if the other parent is deceased.

30. Regulation 6 mandates that a parent traveling alone with a child or a non-biological companion must provide affidavits of consent, court orders, or death certificates to establish their right to travel with the child. This regulatory framework ensures that no child can leave the country without the explicit and verified consent of their legal guardians, thereby safeguarding the child's interests and preventing unauthorised or potentially harmful travel.

31. However, what if one parent wants to travel with a minor child and the other parent is unreasonable in the manner in which he/she withhold its consent. In this case the applicant complies with two of the three requirements prescribed by regulation 6. He presumably has the unabridged certificate and has a court order granting him parental responsibilities. What he requires is the consent from the respondent to be able to allow him to travel with the minor child. That consent is not

only necessary when the applicant actually arrive at the immigration counters at an airport, but also when application is made for a visa to be able to travel.

32. The applicant alleged that the respondent is unreasonable in refusing her consent to allow him to travel with the minor child. He therefore requires the court to intervene and order as the upper guardian of all minors consent for the applicant to depart the Republic and travel with the minor child.

33. Subsection 28(1) of the Children's Act provides for certain interested persons⁴ to apply to the High Court for an order suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.

34. In a recent judgement⁵, Moshaoana J expressed the view that his understanding of the construction of s 18 of the Children's Act is that the notion of the best interest of the child does not feature so prominent in a s 18(5) decision. He held that the obligation to give or refuse consent lies solely with the parent or guardian. While this responsibility affects the minor child, the Children's Act does not mandate the application of the best interests standard in such decisions.

35. He went further and found that unlike ss 28(4) of the Children's Act, which explicitly requires the best interests of the child to be considered, ss 18(5) does not prescribe this standard. Subsection 29(1) of the Children's Act lists the statutory applications that require the court to be guided by the principles set out in Chapter 2 of the act, but a ss 18(5) application is notably absent from this list. This absence indicated to Moshaoana J that the best interests standard is not a requisite consideration in deciding whether to give or refuse consent under ss 18(3) of the Children's Act.

36. I do not believe that it is necessary for such a debate. Suffice to briefly express my view that while ss 18(3) of the Children's Act places the obligation on

⁴ Listed in ss 28(3)

⁵ *LA v EFV* (2024-017275) [2024] ZAGPPHC 213 (11 March 2024)

parents or guardians to give or refuse consent for significant decisions affecting the child, including the child's departure from the Republic, it is imperative to interpret these provisions in conjunction with ss 31(1) of the Children's Act.

37. Subsection 31(1) mandates that any person making a decision within the contemplation of ss 18(3) must give due consideration to the views and wishes expressed by the child, taking into account the child's age, maturity, and stage of development. It seems to me that this requirement inherently involves assessing what is in the best interests of the child.

38. Even though ss 18(5) does not explicitly prescribe the best interests standard, ss 31(1) ensures that the child's views are considered, which aligns with the broader principle that the best interests of the child always reign supreme. This principle is reinforced by ss 28(2) of the Constitution and embedded throughout the Children's Act, which unequivocally states that a child's best interests are of paramount importance in every matter concerning the child.

39. Thus, in my view any application under ss 18(5) must be interpreted in light of the overarching mandate to prioritise the child's best interests. The court, as the upper guardian of all minors, must ensure that the decision to give or refuse consent is not merely a procedural exercise of parental rights but a substantive evaluation of the child's welfare. This includes safeguarding against decisions motivated by spite or personal interest, as these could detrimentally impact the child's well-being.

40. In conclusion, while a ss 18(5) application will focus on the procedural aspect of obtaining consent from all guardians, the best interests of the child remain a crucial consideration. The court's intervention to override unreasonable refusal of consent should inherently involve an assessment of what serves the child's best interests, ensuring that this fundamental principle is upheld in all decisions affecting the child.

41. In light of the above considerations, I have reviewed the allegations, submissions, and evidence presented by both parties, as well as the preliminary report of the Family Advocate. Despite the respondent's extensive allegations, there

is nothing in the record that indicates any immediate risk or harm to the child from the proposed travel arrangements. The evidence does not suggest that the minor child's best interests would be diminished by granting the order requested by the applicant.

42. On the contrary, the order ensures that the child can enjoy overseas holidays without unnecessary administrative obstacles, while also maintaining a line of communication with the respondent during such trips. Therefore, I find that granting the order aligns with the child's best interests, ensuring stability and continuity in the child's life while respecting the parental rights and responsibilities of both parents.

The factual considerations

43. There is already an agreement embodied in a court order authorising the applicant to travel with the minor child outside the Republic. This is evident from paragraph 4.7.9 of the parenting plan the parties concluded when their final decree of divorce was granted on 4 March 2021. The parenting plan was incorporated into the settlement agreement and made an order of court. It was therefore not necessary for me to redetermine the issue of whether the applicant had the right to take the minor child on overseas holidays.

44. On this aspect, Mr. Pincus SC, in his further note, points out that subparagraph 4.7.10 of the settlement agreement, which was made an order of court, requires the applicant to provide the respondent with the necessary letter of consent for signature within 30 days prior to the departure date. Mr. Pincus further submits that since the aforementioned requirement is contained in a court order, I cannot circumvent the condition of the settlement agreement, which is an order of court, by granting a further order. I do not agree with the submission for at least the following factual and legal reasons:

44.1 Subsection 18(4) read with ss (5), allows a court to make an order regarding specific parental responsibilities and rights concerning a child. The applicant is simply doing that; instead of taking the law into his own hands, he approached the court to assist in the form of a court order.

44.2 The respondent has made pertinently clear that she does not want to assist the applicant with any of the travel arrangements required. In an e-mail by her dated 14 December 2022 and addressed to the applicant she said the following in response to the applicant's request to assist in arranging the necessary administrative requirements for the minor's child travel:

"...I do not want to be in personal contact or close proximity to you or your side kick in crime. Exchange of documents, signing of the affidavit together with the signing of the consent to travel form in front of a commissioner of oaths cannot take place as per your demand. These kind of encounters cannot happen at all, So, an alternative arrangement will have to be made."

44.3 It is pertinently stated in this communication that the respondent does not want any encounter with the applicant. Unfortunately, the applicant was unable to get the respondent to agree to the 'alternative arrangement' as suggested by the respondent.

44.4 The applicant then tried numerous attempts to get the respondent to agree. It was only when this application was launched during March 2024 that the respondent acceded to this request for the March-April 2024 holiday.

44.5 Furthermore, the relief is only in respect of a specific holiday.

45. In any event, ss 34(5) of the Children's Act provides that a parenting plan that was made an order of court may be amended or terminated only by an order of court on application by the co-holders of parental responsibilities and rights who are parties to the plan⁶. That is what the applicant is seeking to do with the application before me.

46. Continuing with the facts. The applicant has travelled with the minor child three times overseas since the divorce, the latest being the March-April 2024

⁶ See also *PF v MD* 2013 (1) SA 366 par 28

holiday. It strikes me that the respondent consented to that order and did not insist on an investigation into the abuse or alienation of the minor child.

47. Although the Family Advocate could not file a comprehensive report as ordered by AJP Goliath, it did file a preliminary report. The preliminary report indicated that there was consultation with the applicant, respondent, and the minor child. The following is evident from the report:.

47.1 The applicant and respondent should be ordered to attend mandatory Parenting Skills Classes for more effective co-parenting and communication pending the investigation. This puts me at ease as it does not appear that the immediate fear of the Family Advocate is that of monumental abuse of the minor child or of the parental responsibilities by either the applicant or the respondent. At this early stage, the Family Advocate is rather concerned that the applicant and respondent are not communicating effectively.

47.2 Recommendations are made regarding possible interim contact arrangements and reuniting the minor child with the mother, not the possibility of suspending the parental rights of either party.

47.3 Also, if there was the possibility that the respondent's allegations might have some persuasion, the minor child did not use the opportunity to impress upon the Family Advocate that he felt unsafe or abused by the applicant or that he is being denied seeing or spending time with the respondent.

48. It is apparent from the papers that the respondent has taken an approach of rather having limited contact with the minor child. The respondent's justification for doing so is not always clear but seems to be based on sweeping allegations and conduct by the applicant that is open to many interpretations.

49. There is nothing in the interim report that raises a concern why the applicant should not be able to travel with the minor child.

50. Moreover, the applicant has a court order that entitles him to travel overseas with the minor child. That settlement agreement was negotiated and concluded after 15 years of an ongoing divorce.

51. The respondent has agreed to a similar request in respect of the March-April 2024 holiday. If there was a real concern about the applicant's motives that would have been the time to rather raise suspicion and not consent to an order allowing the applicant exactly what he is asking for with this application.

52. The respondent has indicated that she wants nothing to do with the applicant and refuses to engage with him to make arrangements for traveling for the minor child.

53. There was also reference to a domestic violence interdict. However, it appears from the papers that it was a 2006 dormant interdict, which the respondents revived during February 2024, in response to the applicant's request for her consent to travel with the minor. It appears to me that the respondent only revived this process in an attempt to limit the applicant's to exercise his parental rights and responsibilities. Furthermore, no substantive information regarding this interdict was provided, so it is impossible for me to properly engage with as a basis to deny the applicant his relief.

54. It is better that the applicant rather has certainty regarding the status of his possible travelling arrangements for himself, his new family and the minor child.

55. These were the factual bases that warranted the issuance of the order in the terms provided.

The nature of the order to be issued

56. Mr. Pincus SC also alerted me to the fact that should I grant an order while there may be a future finding on the parental responsibilities and rights of the parties, the parties will not be able to circumvent the provisions of the order I will grant.

57. In my view the order is simply a temporary suspension and circumscribing of the respondent's rights in terms of the parental agreement as contemplated in section 28 of the Children's Act.

58. However, to cater for Mr. Pincus SC's concern I will make the order subject thereto that either of the parties as well as the Family Advocate can approach this court on supplementary papers, if there are change circumstances or new facts that would convince the judge hearing the matter on the postponed date to vary or even rescind the order I issued.

59. In any event, my approach seems to be consistent with the rights afforded to the parties in ss 35(5) of the Children's Act. If my order resulted in the amendment of the parenting plan nothing prohibits the court hearing the matter on the postponed date or on application by the respondent to amend terms of the parenting plan again in terms of ss 35(5) of the Children's Act.

60. In respect of costs it would be best if the issue stands over for later determination.

61. In the circumstances I issued the order marked "X", which is not published to protect the identity of the minor child.

A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicants' counsel: Adv N Van Zyl

Applicant's attorney: Chris Fick & Associates

Respondent's counsel: Adv B Pincus SC

Respondent's Attorney:

RM Brown Attorneys