

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-149673

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

10 JANUARY 2025


Judge Dippenaar

In the matter between:

TLK

APPLICANT

and

EEEEB

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 10th of January 2025.

DIPPENAAR J:

[1] In this urgent application, the applicant sought the following relief:

'1. The normal forms and procedures relating to service and the applicable practice directives of this Court are dispensed with and this application is heard as one of urgency in terms of Rule 6(12).

2. That full parental responsibilities and rights in respect of the minor child, JMK ("the minor child"), are awarded to the applicant.

3. The removal of the minor child from the Gauteng Province without the consent of the applicant is declared unlawful and the respondent is directed to return the minor child immediately into the care of the applicant in Johannesburg, Gauteng

4. In giving effect to the order in paragraph 3 above, the South African Police Service, wherever the minor child may be located, is authorized to remove the minor child from the respondent alternatively with any other party in which the respondent might have placed the minor child and to place the minor child into the care of the applicant.

5. The respondent is interdicted from removing the minor child from the borders of Gauteng, alternatively from Parys in the Free State, pending the finalization of the divorce proceedings to be instituted, alternatively a subsequent court order.

6. The minor child shall be placed in the primary care of the applicant prior to such relocation, subject to the respondent's rights of holiday and telephonic / electronic contact as referred to below;

7. The holiday contact with the minor child for the parties shall be as follows:

7.1 The respondent's contact shall occur in either the Gauteng Province, or in Parys pending the finalization of the divorce proceedings to be instituted, alternatively upon a recommendation by the office of the Family Advocate, Johannesburg, alternatively a subsequent court order being issued in this regard;

7.2 The respondent shall notify the applicant two weeks prior to the holiday contact as to where this contact will be exercised and provide the applicant with an address and contact details as to where the minor child will be staying during the contact period;

7.3 The April school vacations shall be shared equally between the parties, with the Easter weekend alternating between the parties as follows: 7.3.1 In odd years (such as 2025), the applicant shall have the Easter weekend; and 7.3.2 In even years (such as 2026), the respondent shall have the Easter weekend;

7.4 The December school vacation shall be divided into two parts, the first part to commence on the day the school breaks up until 17h00 on 27 December and the second part commencing at 17h00 on 27 December until 17h00 on the day but one before the first day of school. 7.4.1 In even years, the minor child shall spend the first part of the December vacation with the applicant and the second part with the respondent. 7.4.2 In odd years, the minor child shall spend the first part of the December vacation with the respondent and the second part with the applicant.

7.5 The June/July school vacation shall be divided into two equal parts where the first part to commence on the day the school breaks up and the second part shall end on the day but one before the first day of school. 7.5.1 In even years, the minor child shall spend the first part of the winter vacation with the respondent and the second part with the applicant. 7.5.2 In odd years, the minor child shall spend the first part of the winter vacation with the applicant and the second part with the respondent.

7.6 The September / October holiday shall alternate between the parties as follows: 7.6.1 In even years, the minor child shall spend the September / October vacation with the respondent; 7.6.2 In odd years, the minor child shall spend the September / October vacation with the applicant.

7.7 Reasonable daily telephonic contact between 18h00 – 18h30, when the minor child is in the care of the applicant and mutatis mutandis when the minor child is in the care of the respondent.

8 The Office of the Family Advocate is ordered to conduct an urgent investigation and make recommendations into the best interests of the minor child in specific relation to the primary residence and contact of the minor child should same be at variance with the above, within 30 days of this Order, and report back to this Court on the return date to be provided by the Registrar of the above Honourable Court.

9 Costs of the application to be paid by the respondent.'

[2] The parties are parents to a little girl, JK, who is presently some twenty-four months old. The applicant is JK's father. Her mother, the respondent, also has a son, JC from a previous marriage, who is some eight years old. The application only relates to JK. The parties met during 2019 and during February 2020, the respondent moved to the family farm on which the applicant works and resides. The respondent is a self-employed dress maker. They were married on 13 November 2021, although the respondent questions the validity of the marriage. That issue is irrelevant to the current application. During June 2023, when JK was some 5 months old, the respondent left the matrimonial home and the parties separated. She rented a property in Parys, some 100kms from the farm on which the matrimonial home was situated.

[3] During December 2024, the respondent relocated with the minor child to an upmarket estate in Stellenbosch, Western Cape, where they are residing with her mother and stepfather. That event triggered the urgent application, which was served on the respondent personally at her new address on 23 December 2024.

[4] Earlier in December, the applicant had prepared an urgent application to interdict the respondent from leaving Gauteng with the minor child, which was abandoned once the applicant realised that the respondent had already relocated. No divorce proceedings have yet been instituted by either party.

[5] The applicant's case in sum was that the respondent unlawfully and without his knowledge or consent relocated to the Western Cape with the minor child on 14 December 2024, without advising where they would be staying or how the respondent would support herself. The respondent was responsible for their separation and she acted deceitfully throughout the relocation. The applicant was notified of her intended relocation by way of email on 8 December 2024, which contained false allegations against him, including allegations of alcohol and physical abuse. After dispatching the email, the respondent stopped all contact between the applicant and the minor child and was deceitful in relation to the date of her departure. According to the applicant, the parties had during August 2023 verbally agreed on a shared residency arrangement in terms of

which residency of the minor child was shared on a weekly rotational basis and the parties shared joint parental rights and responsibilities. JK was enrolled in a pre-school in November 2023, which she attended during the weeks she resided with the applicant. He accuses the respondent of devising and executing a deceitful stratagem with the assistance of her legal representatives to deprive him of his rights and contact to the minor child.

[6] The respondent paints a very different picture. According to her, the relationship between the parties was characterised by the applicant's physical abuse and alcohol abuse. She contended that the applicant physically abused her on various occasions and subjected JC to corporeal punishment. The applicant refused to recognise or acknowledge his alcohol problem. In corroboration of her averments, she attached affidavits from the applicant's former wife and her former husband, Mr B and recounted various incidents which occurred both during their relationship and after their separation. According to the respondent, she fled the common home as a result of the long history of abuse she suffered at the hands of the applicant. She contends that the minor child is not safe with the applicant as a result of his alcohol abuse in her presence, which ultimately motivated her relocation in the best interests of the minor child. In her view, the application was designed to exercise control over her and continue the applicant's abuse.

[7] The respondent opposed the application on the grounds that the application lacked urgency and the applicant was not entitled to any of the substantive relief sought. She did not launch a counter application but did not oppose the referral of the matter to the Family Advocate.

[8] It was submitted that the applicant did not muster the basic requirements of urgency. On the merits, it was submitted that the respondent was the primary caregiver of the minor child at the time of her relocation, and after having had due consideration for the views of the applicant, and considering the best interest of the minor child, she relocated to Stellenbosch to the safety of her family, pending resolution of the disputes between the parties. It was submitted that her actions were *bona fide* and in the best

interest of the minor child. The respondent argued that none of the requirements for interim interdictory relief were met. It was contended that it was not in the best interest of the minor child to be placed in the primary care of the applicant, given his well-documented history of violence, abuse and alcohol abuse.

[9] There is merit in the respondent's contentions that the applicant did not meet the well-established requirements for urgency set out in r 6(12) and the relevant case law¹. The application was launched with extremely attenuated time periods over the Festive Season. Had the matter not concerned the best interests of a minor child, it would have been struck off the roll. I was however persuaded that the application should be entertained on the urgent court roll, given that investigation by the Family Advocate's office is crucial to properly determining the minor child's best interests.

[10] Each of the parties disputes the version of the other in material respects in relation to the abuse and the papers are replete with factual disputes, many of which are irresolvable on the papers. What is common cause on the papers is that the respondent continually complained about the applicant's use of alcohol. The respondent's version is not far-fetched, palpably false or clearly untenable and cannot be rejected.²

[11] The majority of the substantive relief sought by the applicant was predicated on the contention that the applicant unlawfully relocated with the minor child without his knowledge and consent.

[12] Under s 6 of the Children's Act³ ('the Act'), a person having parental responsibilities in respect of a child must be informed of any action or decision concerning the child which could significantly affect the child.

¹ For example *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd* [2011] ZAGPJHC 196.

² *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 12.

³ 38 of 2005, as amended.

[13] Section 31 of the Children's Act⁴ ('the Act') provides:

'Before a person holding parental responsibilities and rights in respect of a child takes any decision affecting contact between the child and a co-holder of parental responsibilities and rights, or which is likely to significantly change or have an adverse effect to the child's living conditions, education, health, personal relations with a parent or family member or generally the child's wellbeing, that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.'

[14] The Act does not expressly regulate inter provincial relocation. Section 31 does not expressly require the consent of the other party. The applicant's complaint that he did not consent to the relocation as a basis for the substantive relief sought, thus lacks merit.

[15] The true question to consider is whether the proposed relocation is in the best interests of the minor child. It must further be considered whether the respondent gave due consideration to the views expressed by the applicant and whether the relocation was *bona fide* and reasonable.

[16] From the documentation evidencing the communications between the parties and specifically the respondent's letter of 8 December 2024, it is clear the applicant was fully aware of the respondent's reasons for relocating and that she was going to live with her parents for emotional and other support. The respondent in the letter tendered contact to the minor child and made proposals in relation thereto. At the centre of the respondent's reasons, was the applicant's abuse and the impact thereof on the minor child. However, other than in terms of broad denials of either physical or alcohol abuse, the applicant did not meaningfully engage with those averments, specifically his alcohol abuse.

[17] It cannot be concluded on the papers that the respondent was not *bona fide* or that the relocation was unreasonable. It can further not be concluded that the relocation under the circumstances was not in the minor child's best interests. I conclude the converse. It

⁴ 38 of 2005, as amended.

was in my view in the minor child's best interests to have been removed from her erstwhile environment pending a formal comprehensive investigation into her best interests which would consider all the relevant circumstances. I am satisfied that the respondent gave due consideration to the applicant's views as required by s 31 of the Act.

[18] It follows that the applicant has not made out a proper case for the declaratory order and the relief sought ancillary thereto.

[19] The requirements to establish interim interdictory relief are trite.⁵ An applicant must establish: (i) a *prima facie* right, although open to some doubt; (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted; (iii) a favourable balance of convenience; and (iv) the absence of an alternative suitable remedy.

[20] In my view, the applicant falls far short of the mark. His failure to establish any *prima facie* right, coupled with his failure to establish any of the other requirements, is fatal to the interdictory relief sought.

[21] It is apposite to refer to what was stated by Satchwell J in *LW v DB*.⁶

'The solution of our courts can never be to order that separated parents must live at close proximity to each other in order that each parent lives in close proximity to a child. Our courts have not been appointed the guardians of adults and parents are not the prisoners of our courts'.

[22] The applicant has further not established that full parental rights and responsibilities should be awarded to him. It is further entirely premature at this stage to make any such determination or to consider the minor child's primary residence and the contact arrangement proposed by the applicant. The existence of any shared residence

⁵ Setlogelo v Setlogelo 1914 AD 221.

⁶ 2020 (1) SA 169 GJ para 152.

arrangement is hotly contested by the respondent, who maintains that she was at all times the primary caregiver of the minor child. Such issues can only be considered and determined once the Family Advocate has fully investigated the matter. Considering the current circumstances, I am not persuaded that it would be in the minor child's best interests to simply be placed in the care of the applicant at this time.

[23] The applicant's insistence on the relief sought gives credence to the respondent's stance that the applicant is controlling and is seeking to obtain an advantage in the divorce proceedings which must inevitably follow. It further smacks of a lack of appreciation for the minor child's needs and best interests, given that the applicant seeks to deprive the respondent of any primary care rights. It should be borne in mind that it is the minor child's right to have contact or be spared contact to a parent, rather than the right of the parent.⁷

[24] It follows that the applicant is not entitled to the majority of the substantive relief sought in the application.

[25] In my view, it would however be in the best interests of the minor child that a proper investigation be conducted into her primary residence, care and contact so that appropriate arrangements or orders may be made in due course to regulate the position going forward. For that reason, I did not strike the application from the roll for lack of urgency. The respondent consented to such relief and agreed that an investigation would be necessary. The applicant has indicated that he intends launching r 43 proceedings. It would be beneficial to a court dealing with such application or any other legal proceedings, to have the investigation reports available.

[26] I am mindful of the need of the minor child to maintain contact with her father pending the provision of the reports, to ameliorate the hardship on all involved, especially on JK. Both parties addressed me on what contact they considered appropriate. The

⁷ B v S 1995 (3) SA 571 (A) at 581I- 582A/B

applicant urged me to follow the approach adopted in *TLS v VML*⁸. In essence that would entail a shared residency arrangement without any supervision.

[27] Conversely, the respondent sought supervised access every alternative weekend for a period of four hours per day, motivated by the allegations of alcohol abuse on the part of the applicant. Her contentions were that such abuse also took place in the presence of the minor child on numerous occasions. Those averments were, *inter alia*, supported by a recent photograph of the minor child on the applicant's Facebook page with two tins of what appears to be beer, resting on the pram in which she was in.

[28] On a conspectus of all the relevant facts, I am persuaded that the cautious approach suggested by the respondent would be an appropriate interim arrangement that would best serve the minor child's interests. The respondent's concerns and allegations of abuse cannot be brushed off as a recent fabrication, as the applicant suggests.

[29] The interim regime will only be in place pending the Family Advocate's recommendations. Whilst the proposed order will curtail the contact the applicant hitherto enjoyed with the minor child, it is in my view necessary to protect her best interests. It is always open to the parties to agree to additional or less restricted contact or for either to approach a court for the variation of the current contact arrangement, if appropriate.

[30] There is no reason to deviate from the normal principle that costs follow the result. The applicant submitted that he acted in good faith and in the best interests of his minor child, and thus that if he were to be unsuccessful, each party should be directed to pay their own costs. Considering the facts, I am not persuaded that the respondent, as successful litigant, should be deprived of her costs.

⁸ [2016] ZAGPPHC 929 (30 September 2016).

[31] In the result, I grant the following order:

[1] The Office of the Family Advocate Johannesburg in conjunction with the office of the Family Advocate Cape Town is hereby ordered to conduct an urgent investigation into the best interest of the minor child (JK) specifically in relation to primary residency, care, and contact and to deliver its respective reports within three months of date of this order;

[2] Pending the finalisation of the reports from the Family Advocate's Office, the applicant is awarded contact with the minor child as follows:

- a. Physical contact, under the supervision of the maternal grandmother, or a registered social worker of the applicant's choice, every alternative Saturday and Sunday for a period of 4 (four) hours each day, the times to be arranged between the parties. The applicant is to pay the costs of such appointed social worker, if he elects to use such services;
- b. Daily electronic contact by way of WhatsApp video call between 17h00 and 18h00;

[3] The applicant is ordered to pay the costs of the application on a party and party scale, to be taxed on scale B.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

HEARING

DATE OF HEARING : 07 JANUARY 2025

DATE OF JUDGMENT : 10 JANUARY 2025

APPEARANCES

APPLICANT'S COUNSEL : Adv. G. Benson

APPLICANT'S ATTORNEYS : Goodes & Co Attorneys

RESPONDENT'S COUNSEL : Adv. N. Erasmus

RESPONDENT'S ATTORNEYS : DP du Plessis Incorporated