

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 4243/2025

In the matter between:

A[...] M[...] M[...]

APPLICANT

(Identity number: 86[...])

And

J[...] B[...]

RESPONDENT

(Identity number: 87[...])

Neutral citation: *M[...] v B[...]* (4243.2025) [2025] ZAFSHC 262 (27 August 2025)

Coram: Daffue J

Heard: 15 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 27 August 2025.

Summary: Best interests of child – interprovincial relocation of mother and primary care giver of child – co-holder of parental responsibilities and rights submitted that his consent to relocation was required – urgent application by co-holder to prohibit relocation and to award primary care to him pending investigations by Family Advocate. – application dismissed.

ORDER

1 The relief claimed in paragraphs 5, 6 and 7 of the notice of motion is dismissed.

2 Paragraph 1.3 of the *inter partes* agreement between the parties pertaining to *inter alia* rights of contact is amended by deleting the sub-paragraphs and substituting same with the following:

‘1.3.1 the father shall have contact rights in respect of M[...] every alternative weekend from Friday, 14h00 until Sunday, 18h00;

1.3.2 from the 2026 school year the father and mother shall equally share the long school holidays, Christmas to alternate between them, whilst the short school holidays shall alternate between them, the father having the right to have M[...] with him for the September/October 2026 holiday;

1.3.3 the father shall ensure that the periods mentioned in paragraph 1.3.2 above shall correspond with his annual or unpaid leave;

1.3.4 the father shall be responsible for his own travelling and/or accommodation costs in order to exercise his rights contained in paragraphs 1.3.1 and 1.3.2 above;

1.3.5 the father shall have three hours contact with M[...] on her birthday and Father’s Day if these do not coincide with a normal contact weekend or school holiday;

1.3.6 the father shall have regular telephonic/video call contact with M[...] on Mondays, Wednesdays, Fridays and Sundays between 16h00 and 19h00 during the time that she is not staying with him.

3 Leave is granted to the respondent to enrol M[...] at O[...] N[...] Primary School in Upington.

4 The applicant shall pay the respondent’s costs of opposition of the application, inclusive of the fees of counsel on scale B.

JUDGMENT

Daffue J

Introduction

[1] “n Haastige hond verbrand sy mond’. This Afrikaans proverb is an appropriate warning to the applicant who is Afrikaans speaking. The English counterpart is: ‘haste makes waste’. Having known from 31 July 2025 that the respondent intended to relocate

to Upington in the Northern Cape during the middle of August 2025, the applicant waited until 14 August 2025 to issue his urgent application in terms whereof he required the respondent to file her answering affidavit on/or before 17h00 on that same day. She was afforded less than 6 hours' notice. He intended to apply for relief the next day at 10h00. More about this later.

The parties

[2] The applicant is A[...] M[...] M[...], a distribution manager employed by Clover in Bloemfontein. The respondent is J[...] B[...], employed at the time of the institution of the application as a regional manager of a car wash company in Bloemfontein. The parties were never married to each other, but a child, M[...] S[...] M[...] (M[...]), was born on 28 November 2019 out of their romantic relationship. Therefore, she is five years old, turning six in two months' time. She is presently in grade R and will start her formal schooling next year.

The relief claimed

[3] The applicant sought the following orders:

'1 The non-compliance with the prescribed forms, service, and time periods set out in the Rules is condoned, and this matter is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court;

2 The Respondent is not to relocate the minor child M[...] S[...] M[...] from Bloemfontein pending the finalisation of the Family Advocate's Investigation regarding M[...] S[...] M[...]’s best interest and primary custody;

3 The minor child, M[...] S[...] M[...], will be in the care of the Applicant during such time subject to the following:

3.1 The Respondent will have the following contact with M[...] S[...] M[...] unless otherwise agreed:

3.1.1 Every alternative weekend in Bloemfontein at the Respondent's expense;

3.1.2 One short school holiday a year;

3.1.3 Shared long holidays between the parties equally, with Christmas to alternate between the

parties;

3.1.4 Reasonable telephonic or video contact.

3.2 The maintenance order dated 01 February 2021 will remain in place;

4 In the event of non-compliance with prayer 2 *supra*, the Family Advocate and/or any appropriate social worker or person is to remove the minor child M[...] S[...] M[...] from the Respondent's care, wherever she may be found, and place her in the Applicant's care;

5 The Family Advocate is ordered to urgently investigate the aspects of M[...] S[...] M[...]’s relocation as well as her best interest and primary residency and to provide the Honourable Court with an urgent report in that regard;

6 The Parties are granted leave to supplement their papers and to re-enrol the matter once the Family Advocate's report has been filed;

7 The Respondent to pay the Applicant's costs of the Application on attorney and client scale, Scale B, if opposed; and/or

8 Further and/or alternative relief.’

The proceedings of 14 and 15 August 2025

[4] As said, the applicant issued his application on 14 August 2025. The respondent served her notice of opposition late afternoon on 14 August 2025 and filed her answering affidavit soon after 08h00 on 15 August 2025.

[5] This court was involved with two opposed bail appeals which were set down for 09h30 and 10h00 on Friday, 15 August 2025, as well as two other opposed urgent applications. When this matter was called, Mr Lubbe who appeared for the applicant, was specifically asked whether his client intended to file a replying affidavit, or whether he would be forfeiting the right to do so. After obtaining instructions, Mr Lubbe indicated that a replying affidavit would be filed and sought leave until 14h00 the same day. If the issue was not about the best interests of the child and the respondent's imminent relocation to Upington, I would have struck the application from the roll. However, in order to be fair and ensure that the parties have sufficient opportunity to deal with the issue, I granted the request and adjourned the matter until 14h30.

[6] The replying affidavit was duly filed. Having heard oral submissions by the parties, the relief claimed in paragraphs 2, 3 (with the exclusion of paragraph 3.2) and 4 of the notice of motion was dismissed. My order read as follows:

‘1. The relief claimed in paragraphs 2, 3 (with the exclusion of paragraph 3.2) and 4 is dismissed.

2. Judgment is reserved in respect of the remainder of the relief sought.’

Consequently, the respondent was entitled to relocate to Upington with M[...] and the applicant was not awarded primary care of M[...] as sought pending the finalisation of an investigation by the Family Advocate that might be ordered.

Evaluation of the evidence and submissions by the parties

[7] The application is considered based on the *Plascon-Evans* test. I was and still am satisfied that the respondent’s version cannot be described as far-fetched and/or untenable. There is no reason for such a finding. I am satisfied that, already on 31 July 2025, she tried to have a proper conversation with the applicant pertaining to her decision to relocate to Upington. This is evident from the WhatsApp messages attached to the affidavits. Instead of having a meaningful conversation, the applicant threatened the respondent, saying that he hoped that she was ready for a fight and that his attorney was fully aware of her history. He even told her that they would see who would win this round and added ‘game on’. It is just unbelievable that the applicant acted with so much aggression and arrogance, trying to equate proceedings in respect of the best interests of his child with a fight and/or a game. I got the impression that he regarded M[...] as the ‘trophy’ which he would hold above his shoulders if the ‘fight’ is awarded to him.

[8] I am satisfied that the applicant knew, already on 31 July 2025, that the respondent intended to relocate. At best for him, he knew by Friday afternoon, 8 August 2025 that the respondent intended to relocate the next weekend, ie the weekend of 15 to 17 August 2025. He responded at 15h13 that afternoon by informing the respondent that he did not consent to M[...]’s relocation from Bloemfontein. Yet, he waited until Thursday, 14 August 2025, nearly a week later, to issue his application.

[9] The respondent was at all relevant times the primary caregiver of M[...], ie for the nearly six years of her life. The relationship between the parties broke down prior to the respondent giving birth to M[...]. On 1 February 2021 a maintenance order in respect of M[...]'s maintenance was issued against the applicant. In October 2021 the parties entered into an *inter partes* agreement in terms whereof they agreed to be co-holders of parental responsibilities and rights in respect of M[...] and that she would reside with the respondent, subject to certain contact rights granted to the applicant. These included the right to fetch M[...] after school on Tuesdays and Thursdays until 20h15 on those evenings and the right to have sleepover contact every alternative weekend.

[10] On the applicant's version he always wanted M[...] to be in his primary care, but had been advised by his attorney to first of all build a relationship with M[...] in order to pursue his quest to achieve his goal. This version must be seen in light of the fact that it is not his case that he has made a request in the past to be clothed with M[...]'s primary residency. Only now that the relocation has become a reality, the applicant seeks urgent and immediate primary residence of M[...] pending finalisation of a report by the Family Advocate. It cannot be in M[...]'s best interests to grant the applicant such drastic relief, even on an *interim* basis. There is not a shred of evidence that M[...] suffered any harm while in the respondent's care. There is no indication on the papers that the applicant has had M[...] in his care for longer than a weekend at a time.

[11] Notwithstanding the applicant's allegations about the respondent's relationships with other men, I accept that she has been in a stable relationship with her fiancé, N[...] V[...] d[...] B[...]. She is also nine weeks pregnant with her fiancé's child and they desire to build a life together. Both the respondent and her fiancé have obtained business opportunities in Upington and there is no reason to believe that these would not bear any fruit in the future.

[12] The applicant has no support system in Bloemfontein. He did not explain how he would be able to cope if M[...] is placed in his primary care. The papers reveal that he is a distribution manager who is required to work out of Bloemfontein for a couple of days per month.

[13] M[...] suffers from extreme allergies and severe asthma to such an extent that she

has been hospitalised recently. The applicant's attitude pertaining to who should remain in hospital with M[...] during her stay is an eye-opener. He insisted that she should be the one because 'that is what other mothers do'. If he really believed that the respondent was not a good mother who did not care for her child, he might have offered to sleep over in the hospital for one or two or more nights during M[...]’s hospitalisation. Clearly, he did not accept that he as the father has obligations in this regard as well.

[14] I accept that society's belief that maternal preference should be given to primary care of children in their tender years has changed over the last three decades. Several courts have emphasised that parenting is a gender-neutral function and that fathers are often in as good a position than mothers, and even better, to be awarded primary care of young children.¹

[15] Section 6 of the Children's Act 38 of 2005 (the Children's Act) provides that the co-holder of parental responsibilities and rights must be informed of any action or decision concerning the child that could significantly affect the child. Although this would include relocation of the child, it is emphasised that the Children's Act does not expressly regulate interprovincial relocation. No express consent is required. More about this later. Section 28(2) of the Constitution stipulates that the best interests are of paramount importance in every matter concerning a child. Section 7 of the Children's Act tabulates the factors to be considered in order to establish the best interests of a child. In view of the decision arrived at herein, I do not intend to deal with the fourteen factors contained in s 7(1), but confirm that I have taken them into consideration.

[16] This is not a case where the respondent wants to emigrate to another country. In such a case, s 18(3)(c)(iii), read with s 18(5) of the Children's Act is applicable. I quote:

'(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must-

(a) . . .

(b) . . .

(c) give or refuse any consent required by law in respect of the child, including-

(i) . . .

¹ *Van der Linde v Van der Linde* 1996 (3) SA 509 (O) 515A-516A, recently referred to with approval in *Potgieter v Potgieter* [2007] ZASCA 47; [2007] 3 All SA 9 (SCA); 2007 (5) SA 94 (SCA) para 26.

- (ii) . . .
- (iii) consent to the child's departure or removal from the Republic;
- (iv) . . .
- (v) . . .
- (4) . . .
- (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).'

[17] It is a useful exercise to consider the authorities dealing with a party's intention to emigrate and to take the minor children with them. The Supreme Court of Appeal dealt in *F v F*² with the best interests of the children in a case of emigration. I quote:

'[10] In deciding whether or not relocation will be in the child's best interests the Court must carefully evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases. It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible. Our Courts have always recognised and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life. . .

[11] From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment. . .'

[18] No doubt, as the court held in *F v F*, in such matters the criteria to be applied is

² *F v F* [2005] ZASCA 123; [2006] 1 All SA 571 (SCA); 2006 (3) 42 (SCA) paras 10 and 11.

always the best interests of the children which are paramount. However, such best interests always depend on the facts of the particular case.

[19] I accept that the respondent has made a major decision involving M[...] as this will affect contact between M[...] and the applicant as co-holder of parental responsibilities and the rights. As stated above, the applicant's consent is not required for the respondent to relocate. Section 31(2) of the Children's Act reads as follows:

'(2)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), 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.

(b) A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.' (Emphasis added.)

Clearly and contrary to s 18(3), s 31(2) does not require the applicant's consent for the respondent and M[...]’s interprovincial relocation, as would be the case in the event of emigration from South Africa.

[20] The evidence placed before the court is not to the effect that the respondent's relocation is unreasonable or *mala fide*. I am satisfied that the respondent wanted to discuss the matter in a reasonable manner, but the applicant was not prepared to consider her circumstances in a positive light. The applicant has his misgivings about the business opportunities provided to the respondent, trying to say that she did not have any capital to buy shares in a new enterprise. However, this is not the issue. The respondent has accepted an employment offer allowing her to work half-day at a net salary of R25 000 per month. She is to receive a company vehicle and free accommodation. She has already enrolled M[...] in the O[...] N[...] Primary School. Although she has not filed an application to the court for consent to relocation and to enrol M[...] in this particular school, the logical consequence of the dismissal of the applicant's application is that she as primary caregiver was entitled to enrol M[...] at that school. In the interests of certainty, I shall grant consent to M[...]’s enrolment at the aforesaid school. Let it be clear: the applicant did not express any negative thoughts in this regard in his replying affidavit.

[21] The applicant tried to hold the respondent captive in Bloemfontein insofar as he insisted that M[...] should remain behind with him. This was a *mala fide* attempt to prevent the respondent to undertake new employment opportunities and to follow her fiancé. He cannot insist that they live at close proximity to him. Satchwell J stated the following in *LW v DB*³ with which I fully agree:

‘Our courts have not been appointed the guardians of adults and parents are not the prisoners of our courts.’

The respondent’s relocation is in line with the increasing trend of people’s geographical mobility. It is not strange for people not to stay in their town of birth for the remainder of their lives.

[22] The Office of the Family Advocate is inundated with requests and orders for reports pertaining to the best interests of children. This is clearly not a matter to be dealt with by the Family Advocate. The respondent has always been the primary caregiver of M[...] and no issues have been raised by the applicant to indicate that the best interests of M[...] would be negatively affected as a result of the relocation. The only concern is that the applicant might not be able to have contact with M[...] as regularly as in the past. Therefore, I decided, after indicating my intention to the legal representatives during oral argument, to amend the contact rights in line with those normally recommended by the Office of the Family Advocate. My order is an attempt to ensure that the relationship between the applicant and M[...] is not prejudiced as a result of the relocation.

[23] The respondent offered in the email correspondence between the parties prior to launch of these proceedings that she would be prepared to make a contribution towards the applicant’s travelling costs in order to exercise his contract rights after relocation. This offer was not accepted. During argument her counsel made it clear that such offer would not be repeated. In my view, the respondent’s offer is further proof of her *bona fides*. The applicant should blame himself and his legal representatives for rejecting it.

[24] I decided to hear the matter as an urgent application for the sole reason that I

³ *LW v DB* 2020 (1) SA 169 (GJ) para 52.

wanted to ensure that the best interests of M[...] could be properly considered. As mentioned, if the application was not about her best interests, I would have struck the application from the roll due to lack of urgency. The applicant has not achieved any success, save insofar as I decided to increase his contact rights in order to be fair to both parties and in the best interests of M[...]. The applicant, being the unsuccessful party, should therefore be liable for the respondent's costs of opposing the application, such costs to include counsel's fees taxed on scale B.

Order

1 The relief claimed in paragraphs 5, 6 and 7 of the notice of motion is dismissed.

2 Paragraph 1.3 of the *inter partes* agreement between the parties pertaining to *inter alia* rights of contact is amended by deleting the sub-paragraphs and substituting same with the following:

‘1.3.1 the father shall have contact rights in respect of M[...] every alternative weekend from Friday, 14h00 until Sunday, 18h00;

1.3.2 from the 2026 school year the father and mother shall equally share the long school holidays, Christmas to alternate between them, whilst the short school holidays shall alternate between them, the father having the right to have M[...] with him for the September/October 2026 holiday;

1.3.3 the father shall ensure that the periods mentioned in paragraph 1.3.2 above shall correspond with his annual or unpaid leave;

1.3.4 the father shall be responsible for his own travelling and/or accommodation costs in order to exercise his rights contained in paragraphs 1.3.1 and 1.3.2 above;

1.3.5 the father shall have three hours contact with M[...] on her birthday and Father's Day if these do not coincide with a normal contact weekend or school holiday;

1.3.6 the father shall have regular telephonic/video call contact with M[...] on Mondays, Wednesdays, Fridays and Sundays between 16h00 and 19h00 during the time that she is not staying with him.

3 Leave is granted to the respondent to enrol M[...] at O[...] N[...] Primary School in Upington.

4 The applicant shall pay the respondent's costs of opposition of the application, inclusive of the fees of counsel on scale B.

J P DAFFUE J

Appearances

For the applicant:	E Lubbe
Instructed by:	McIntyre Van Der Post, Bloemfontein.

For the respondent:	M Froneman
Instructed by:	Peyper-Botha Attorneys, Bloemfontein.