

SOUTH AFRICA / JUDGMENT

A.G.E v R.A.J.E (3718/2013) [2014] ZAKZDHC 10 (26 March 2014)

[2014] ZAKZDHC 10

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Msani

CASE / FILE NUMBER

3718/2013

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IN THE HIGH COURT

OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION,

DURBAN

CASE

NO: 3718/2013

In

the matter between:

A[...]

G[...]

E[...]. Applicant

and

R[...]

A[...], J[...]

E[...]. Respondent

JUDGMENT

Heard on: 3 – 11 March 2014

Delivered on: 26 March 2014

MSANI AJ

- [1] The applicant in this matter is A[...] G[...] E[...] an adult female business analyst manager. She is now a resident of Luxemburg having emigrated from South Africa in May 2013. (Applicant)
- [2] The respondent is R[...] A[...] J[...] E [...], a male engineer who resides at Mtunzini, KwaZulu-Natal and is employed at Richards Bay. (Respondent)
- [3] The applicant is seeking leave to remove the minor child (J[...]) a girl born on 5 September 2001, from the Republic of South Africa for the purpose of relocating permanently with her to Luxemburg.
- [4] The application is opposed by the respondent.

Introduction

- [5] The parties were married to each other on 14 May 2007. They were divorced. There are two minor children born of the marriage namely:
- 1) A[...] J[...] R[...] E [...], a boy born on [...] (A[...]). A[...] is currently seventeen (17) years of age and attends school at H[...] C[...] where he is a boarder and is in grade eleven (11).
 - 2) J[...] L[...] E [...], a girl born on [...] (J[...]). J[...] is currently in grade seven (7) at G[...] P[...] School, a private school at the KwaZulu-Natal North Coast.
- [6] In terms of the divorce order, a settlement agreement between the parties signed in January 2007 was made an order of the court. The settlement agreement provides that it is in the best interest of the children that custody be awarded to the parties jointly. The children “primary residence” was to be with the applicant, while the respondent would have the “right of reasonable access to the children” the applicant and the respondent retained their rights of guardianship in respect of both children. The applicant and the respondent retained their rights of guardianship in respect of both children. The document is Exhibit E on page 42 of the applicants founding

affidavit.

Applicants Relocation

[7] On 13 May 2013 (subsequent to the divorce) the applicant left South Africa and relocated / emigrated to Luxemburg. The reasons for the emigration will be adverted to later herein. The applicant subsequently wanted to take the younger child (J[...]) to go and live with her in Luxemburg leaving South Africa permanently. The respondent as the guardian had to give or refuse consent to J[...]'s removal from the Republic of South Africa (Section 18 (3)(c) (iii) of the Childrens Act 38 of 2005). The respondent refused to give such consent. The applicant as a result thereof brought this application.

[8] The application was opposed and was ultimately referred for oral evidence.

As it will appear later herein the position (residence) of A[...] is not in contention. He is to reside with the respondent in South Africa when he is not at H[...] C[...].

[9] As from 13 May 2013 (the departure of the applicant), J[...] was left in the care of and residence of the respondent at the respondents home in Mtunzini, KwaZulu-Natal. She continued to go to school at G[...] P[...] School. This is the position up until now.

Professional Reports

[10] There have been professional reports filed herein with a view that to assist the court in determination of the dispute. These reports are as follows:

(a) The Family Advocate's report dated 11 June 2013, accompanied by the report of the Family Counsellor (appointed in terms of mediation in certain matters Act no 24 of

1987. Exhibit "B" pages 1 to 35)

(b) The report of the Clinical Psychologist Mr F De Marigny (Exhibit "B" pages 36 to 60 dated 5 August 2013.)

(c) Supplementary Psycho – Legal report of Mr F De Marigny dated 14 February 2014.

(d) Supplementary report of the Family Advocate dated 28 February 2014.

(e) Report by Dr Beverly Killian Clinical Psychologist dated 10 February 2014.

The Reports Individually

[11] The family Advocates Report and Supplementary Report.

The family advocate referring to the Childrens Act, Act 38 of 2005 draws attention to the following particular sections:

Section 9: "in all matters concerning the care, protection and well-being of the child of the standard that the child's best interest is of paramount importance, must be applied."

Section 7 (1) (b): "the attitude of the parents, or any specific parent towards

(i) the child; and

(ii) the exercise of parental responsibilities and rights in respect of the child."

Section 7(1)(d): “the likely effect on the child of any change in the child's circumstances including the likely effect on the child of any

separation from

- (i) both or either of the parents;
- (ii) any brother or sister of the child ...”

Section 7(1)(f): “the need for the child ...

- (ii) to maintain a connection until his or her family, extended family, culture or tradition;”

Section 7(1)(g): “the child :-

- (i) age
- (ii) gender
- (iii) background; and
- (iv) any of the relevant characteristics of the child

Section 7(1)(h): “the child's physical and emotional security and his or her intellectual, emotional, social and cultural development”

He recommends as follows in both his reports.

- a. The children to primarily reside with the respondent.

1.1 A[...] to continue his schooling at boarding school at H[...] C[...] and J[...] to continue to be allowed to remain at G[...].

- b. The applicant to be entitled to exercise contact with the children as follows:

1.2 Both short school vacations which apply to the children's school in South Africa. One short vacation to be exercised in South Africa and the other may be abroad;

1.3 Half of December/ January school vacations which apply to the children's schools in South Africa, with the halves to alternate annually between the parties may be abroad;

Vacation contact which may be at the prior election of the applicant, be exercised in Europe, in which regard the necessary consent is to be given for the children's passports and for them to travel out of South Africa for the purpose of the vacation.

1.4 Skype and telephonic contact at reasonable times.

1.5 Any further contact that the parties may agree upon, including reasonable contact in South Africa in the event that the applicant is available in South Africa, and prior arrangements have been made, subject thereto that it does not interfere with the children's

schooling/ extra-mural activities.

Mr F De Marigny's report

[12] After presenting details of the interviews with all involved or close to the dispute he comes to the same conclusion as the Family Advocate namely, that J[...] should remain in the primary care of her father, the respondent in South Africa. He consulted with Mr and Mrs E[...], both children, S[...] (respondent's girlfriend) as well as P[...] (Applicants fiancé). What is in the best interest of the child will depend on the facts of the particular case

(F v F 2006

(3) SA 42)

The content of the interviews in brief

[13] What emerges from the interviews with both Family Advocate and Mr De Marigny is that none of the parents is disqualified as a custodian parent. It also emerges that the applicant and respondent do not see eye to eye. This fact was reported by both children during their interviews they would fight about everything and anything. This was to an extent the motivation for A[...] wanting to go to boarding school. What appears now is a lot of distinguishing between the parties.

[14] Applicant believes that the respondent is withholding his consent only to get to her. Respondent on the other hand contends that the applicant wants to relocate with J[...] only to frustrate his access to her. The only report proposing otherwise is that of Dr Beverly Killian. Proposes that J[...] should be allowed to relocate with the applicant to Luxembourg. She was engaged and paid for by the applicant. This after it became obvious to the applicant that two experts were holding opinions against her. Unfortunately Dr Killian's report as well as the oral evidence showed clear signs of partiality.

[15] In Jackson v Jackson 2002 SA 303 SCA it was held that partiality inevitably detracts from the value of expert evidence.

[16] Citing Stock v Stock 1981 (3) SA 1980 at 1296 E to F the following was said in Jackson "an expert in the field of psychology or psychiatry who is asked to testify in a case of this nature (custody disputes), a case in which difficult emotional, intellectual and psychological problems arise within the family, must be made to understand that he is here to assist the court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he or she is partisan and consistently asserts the cause of the party who calls him."

[17] The above passage sums it all up about what is to be expected of an expert witness. I do not propose to add anything to this vital remark except to point out briefly why I did not think Dr Killian was impartial:

- a. She could not let herself to say/pronounce anything favourable to the respondent.
- b. She engaged in a lot of hair splitting to find fault with the respondent.

- c. She found fault with the respondent that he did not have tea in her waiting room with his son – a very minor issue.
 - d. She refers to an instance when J[...] had no bathing costume on a visit. We heard that J[...] in fact owned about five
 - (5) such costumes and had been promised a new one. It was not needed anyway as it was raining.
 - e. J[...]’s homework not being attended to at that time she puts up lame excuse for the applicant.
 - f. She says that J[...] feared reprisals from her father (respondent) if she spoke against him. This appears to be her (Dr Killian’s) imagination as it is not reported in any of the reports.
 - g. She says Mr De Marigny found that J[...] and her father don’t get on well. Mr De Marigny does not say this in his reports.
 - h. She criticises the respondent as strict and controlling, as if it is not the parent’s duty to do so.
- [18] It is telling to note that at the commencement of the interview with Dr Killian J[...] was clearly disinterested in the exercise. She appears to have given every indication that she had had enough of these endless interviews.
- [19] To say that J[...] felt that the previous experts had not correctly recorded her responses is yet another instance of Dr Killian’s imaginations. On the contrary what appears here is a child who had expressed herself and had been assessed, but was again being subjected to yet another test. That explained her scepticism about the Bene Anthony Test. She calls it the forced choices.
- [20] When it was suggested to Dr Killian that the child’s desire to go overseas was based on wrong information she says that suggestion is wrong. However there is abundant evidence that J[...] believed that she could come back to South Africa at any time she wanted.
- [21] J[...]’s reason for wanting to go were typical of a child e.g. as South Africa is not safe, they are cutting down trees, she likes ice.
- [22] When asked pointedly if J[...] “expressly” said she wanted to go Dr Killian beats about before eventually conceding that this was her own inference from a combination of facts. Dr Killian was referred to the Family Advocates report of 27 February 2014 where she (J[...]) said the following:

“I wish this case was over, I wish things stay the same...”

J[...] explained that she enjoyed her time in South Africa and would like to spend time with her friends. Again Dr Killian responds that she thinks J[...] is finding it hard to be choosing she is adapting.

[23] A[...] J[...]’s brother who appears to be quite mature believes that J[...] does not fully appreciate what is happening and should not be allowed to go.

Mr P[...] v[...] O[...] (Life in Luxemburg)

[24] He is the applicant’s fiancé. He lives with the applicant in Luxemburg. He gave a rosy picture of life in Luxemburg.

There may not be much argument about all of this, but the bottom line is the best interest of the child that I will revert to later in this

judgment.

J[...]’s view of the matter

[25] On 31 July 2013 applicant in a Skype interview with Mr De Marigny stated that were it not for J[...] wishing to come and live with her she would not be pursuing this application. J[...] has now expressly said that she enjoys her life in South Africa and would like to spend her time with her friends.

[26] J[...] had initially wished to be with her mother at Mtunzini, Northern KwaZulu-Natal. Her mother is no longer there but overseas.

[27] J[...] is reputed to be young and immature by the experts (Family Advocate and Mr De Marigny), as well as her brother A[...]. She is not able to make any properly reasonable and calculated choice. J[...] has expressed the desire to remain in South Africa to the Family Advocate on 28 February 2014. J[...] has been in the defector care of her father the respondent since 8 May 2013 to date.

[28] J[...] became emotional and was in tears when informed by the Family Advocate what the true position regarding her proposed

relocation was. It dawned for the first time upon her that she would not be able to return to South Africa every holiday to see her friends. It became clear that J[...]’s initial wishes had been based on immature considerations and a measure of

mis-information. She has friends, extended family, father, old school, brother A[...] in South Africa. Why uproot her?

The law

[29] In determining what is in the best interest of J[...] I am bound to take into account what has happened in the past and in fact right up till today.

FS v JJ 2011

(3) SA 126 par 44

- [30] The parents have divorced; the applicant emigrated to Luxemburg leaving J[...] with the respondent.
- [31] The applicant must have considered that J[...] would be well cared for in the care of the respondent. Nothing has been brought forward to show that this is not the case. On the contrary there is evidence that J[...] has improved remarkably in her school work and earned an academic merit award. She passed grade six (6) with an A aggregate. This did not happen while she was in the care of the applicant. She is flourishing intellectually, physically, emotionally and socially. A joint letter from her school teachers supports this. To uproot her from this set up would be moving her from the known into the unknown and clearly not in her best interests.

Best interests of the child (J[...])

- [32] It was not seriously suggested and I did not find that the applicants decision to emigrate to Luxemburg was unreasonable. But I also looked at the practical and considerations on which her decision was based and the extent to which one has engaged with and properly thought through the real advantages and disadvantages to the child. In this exercise I have concluded that it would not be in the best interests of the child for her to leave. The reasons for my thinking are as stated in the paragraph above.

F v F 2006 (3) SA 42 SCA (par 11-13)

Jackson v Jackson 2002 (2) SA 303 SCA para 2

- [33] So while the applicants decision to relocate is not unreasonable and could be bona fida it is not in the best interest of the child (J[...]). The applicant has already moved for nearly a year, so the restricting of her mobility and subverting her interests and personal choices spoken of in F v F (supra) would not apply to her situation.
- [34] It does appear that the strong motivation for the applicant to move to Luxemburg was to be with P[...] with whom they intend to get married. The marriage has not materialised for some time due to bureaucratic reasons I was told. To assume that J[...] can be left in the care of P[...] in Luxemburg should the applicant be away for whatever reason is being too optimistic. Her mother probably knows P[...] well but not J[...] the child who has her own father and is in his care.
- [35] In the final analysis I therefore make the following order.

Order

1. Both parties to remain co-holders of full parental responsibilities and rights in respect of the children.
2. The children to primarily reside with the respondent.

2.1 A[...] to continue his schooling at boarding school at H[...] C[...] and J[...] to be allowed to remain at G[...].

3. The applicant to be entitled to exercise contact with the children as follows:

3.1 Both short school vacations which apply to the children's schools in South Africa. One short vacation to be exercised in South Africa and the other may be abroad.

3.2 Half of the December/ January school vacations which apply to

the children's schools in South Africa with the halves to alternate annually between the parties may be exercised abroad. Vacation contact which may be exercised abroad, may be at the prior election of the applicant, be exercised in Europe in which regard the necessary consent is to be given for the children's passport and for them to travel out of South Africa for the purpose of the vacation.

3.3 Skype and telephonic contact at reasonable times;

3.4 Any further contact that the parties may agree upon, including reasonable contact in South Africa in the event that the applicant is available in South Africa and prior arrangements have been made, subject thereto that it does not interfere with the children schooling extra mural activities.

Msani AJ

Appearances//

Appearances

Counsel for the Applicant : J Marais SC

Instructed by : Ness-Harvey Attorneys

Suite 115, Musgrave Park

18 Musgrave Road Durban

Ref: A Ness-Harvey/aj

Tel:

(031) 201 42 82

Email:info@nhattorneys.co.za

Counsel for the Respondent : M.D Smithers SC

Instructed by : J H Nicholson Stiller & Geshen

2nd Floor Clifton Place

19 Hurts Grove

Musgrave, Durban

Ref: A Cohen/lk/E0410/0001

Tel:

(031) 202 97 51

Email:acohen@nsg.co.za

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