

SOUTH AFRICA / JUDGMENT

A.J v F.J (2024/001162) [2024] ZAGPJHC 997 (4 October 2024) [2024] ZAGPJHC 997

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mudau

CASE / FILE NUMBER

2024/001162

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2024-001162

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

4

October 2024

In

the matter between:

J[...],
O[...] A[...] (born K[...])
Identity
Number: 8[...]
Applicant
And
J[...],
J[...] F[...]
Identity
Number: 8[...]
Respondent
This
judgment was handed down electronically by circulation to the
parties' legal representatives by e-mail and released to
SAFLII. The date and time for hand-down is deemed to be 10h00 on 4
October 2024.
Key
words: Husband and wife -
Divorced - Custody of children - Variation of - Application by
custodian parent (mother) for leave to remove
minor children
permanently from South Africa - Interests of children first and
paramount consideration in relocation
application.

JUDGMENT

MUDAU, J:

- [1] On 10 January 2024, the applicant (mother) in the main application launched urgent application proceedings in terms of the provisions of Rule 6 (12) in this Court. The father is the respondent and applicant in the counter application. The applicant in the main application launched the application in Parts A and B. In Part A, she sought urgent appointment of the Offices of the Family Advocate to conduct an assessment pertaining to the applicant's relocation to Australia and other ancillary relief. On 23 January 2024, an order was granted by Senyatsi J in terms of Part A of the Applicant's Notice of Motion, by agreement between the parties.
- [2] Accordingly, Part A is no longer the subject of these proceedings but Part B. Senyatsi J granted an order, inter alia, that the Office of the Family Advocate urgently conduct an investigation and render a report and recommendation in relation to the best interests of the minor children in respect to their proposed relocation to Australia with the Applicant as a matter of urgency,

after the filing of all affidavits and by 30 April 2024 with costs reserved for later determination. In Part B, the Applicant (mother)

seeks the leave of this Court to permanently remove two minor children (J[...] R[...] J[...] and J[...] A[...])

J[...]) born of her former marriage to the Respondent, (father) from the Republic of South Africa to relocate with her to Melbourne, Australia ("Australia").

[3] The Respondent has not only opposed the Applicant's application but has counter applied for certain relief, inter alia that in the event of the Applicant relocating to Australia, the minor children, J[...] R J[...] and J[...] A[...] J[...] shall primarily reside with the Respondent in South Africa, and the Applicant shall be afforded certain contact rights, which include daily telephonic and skype contact which the applicant opposed. At the hearing of the main application, the counter application was abandoned. The respondent has since launched a rule 49 (1) application.

PART B — RELIEF SOUGHT BY THE APPLICANT

[4] On 10 September 2024, having heard counsel and having read the papers filed of record, I ordered consistent with the relief sought by the applicant in the main application as follows:

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1. That paragraphs 2.4 to 2.4.7 and paragraph 2.5 of the Settlement Agreement entered into between the parties on 14 March 2023 be deleted and replaced with the following.
2. Both parties shall retain full parental responsibilities and rights with regard to the care, contact, and maintenance of the minor children J[...] R[...] J[...] and J[...] A[...] J[...] ("the minor children") as contemplated in Section 18(2) (a), (b) and (d) of the Children's Act No. 38 of 2005.
3. The Applicant shall remain vested with the primary residence of the minor children.
4. The Respondent's consent to remove the minor children from the Republic of South Africa to reside permanently with the Applicant in Australia is dispensed with.
5. The Applicant is permitted to remove the minor children from the Republic of South Africa to reside permanently with her in Australia.
6. Both parties shall retain guardianship of the minor children as contemplated in Section 18(2) (c) and 18(3) of the Children's Act No. 38 of 2005 subject to the restriction of the Respondent's rights of guardianship in the following manner:-

6.1 The Respondent's consent shall be dispensed with in regard to matters under Section 18(3)(c) and (vi) of the Children's Act No. 38 of 2005 for the purposes of removal of the minor children from South Africa to Australia;

6.2 The Respondent's consent shall be dispensed with in relation to the application and/or renewal of the minor children's passports;

6.3 The minor children shall be allowed to travel outside Australia without the consent of the Respondent's permission for a period not exceeding 20 calendar days at a time subject to the following:

6.3.1 The Applicant shall furnish the Respondent with 14 days' notice of her intention to take the minor children outside Australia and shall, seven days prior departure, furnish the Respondent with the itinerary which will include the destination, accommodation details, particulars relating to flight details as well as details of any third party/parties in whose care the minor children may be caring that period.

6.4 The day-to-day decisions in relation to the minor children to be made solely by the Applicant including but not limited to:

6.4.1 The educational institution the minor children shall attend, and ancillary decisions related thereto;

6.4.2 All aspects regarding the minor children's participation in sport, social and extramural activities; and

6.4.3 Decisions pertaining to minor children's mental health care and medical care.

7. In the event that the minor children experience emotional difficulties, the Applicant shall communicate this to the Respondent immediately and enroll them in therapy in Australia.

8. The Respondent shall be entitled to exercise contact with the minor children as follows:

8.1 Christmas school holidays:

In year 1 (commencing January 2025):

8.1.1 For a period of 4 weeks during the December / January school holidays, when the minor children shall spend Christmas and New Year with the Respondent, in South Africa.

8.1.2 During this period, the children shall spend one night and one day each week that they are in South Africa with the Applicant's family.

8.1.3 The Applicant shall be obliged to bring the minor children to South Africa in December 2025/January 2026, and every alternate December/January thereafter, for the said 4-week period, with the return air tickets being for the Applicant's sole cost and expense;

In year 2 (commencing January 2026):

8.1.4 For a period of 3 weeks during the December 2026/ January 2027 school holidays, and every alternate December/January thereafter, when the minor children shall spend Christmas with the Applicant, and New Year with the Respondent (be it in South Africa, within Australia, or anywhere else in the world) provided that:

8.1.4.1 The Respondent makes his election in regard to exercising his rights for contact with the minor children in the said Christmas school holiday by no later than 6 months prior to the commencement of the said Christmas school holiday concerned; and

8.1.4.2 The Respondent being required to make payment of the return air tickets for the minor children to fly to South Africa, within Australia, or anywhere else in the world, when he exercises the aforesaid contact rights every alternate year for the said 3-week period of the said Christmas school holidays.

8.2 April, July and September school holidays:

8.2.1 For the entire school holiday periods, in the April, July and/or September school holidays, provided:

8.2.1.1 The Respondent shall make his election in regard to exercising his rights of contact with the minor children in the April, July and/or September school holidays, by no later than 6 months prior to the commencement of each of the school holidays concerned; and

8.2.1.2 The Applicant shall make payment of the return air tickets, in each alternate year, for the children to fly to South Africa, for one of the 3 said school holidays (April or July or September) in which the Respondent elects to exercise contact with the minor children in South Africa, for the minor children to fly to South Africa, and

8.2.1.3 the Respondent shall make payment of the return air tickets for the minor children to fly to South Africa, within Australia or anywhere else in the world, for any of the other of the said school holidays in which the Respondent elects to exercise contact with the minor children.

8.3 School term contact in Australia:

8.3.1 Such additional contact in Australia as the Respondent may request provided that the Respondent shall give the Applicant at least 4 weeks prior written notification and provided further that the Respondent shall secure accommodation in the Bayside area, in Australia, to enable him to ensure that the minor children attend school daily and complete all of their academic and extracurricular requirements.

8.4 Electronic contact

8.4.1 Electronic contact via MS Teams, Zoom, WhatsApp or any other suitable electronic platform to ensure that the Respondent can communicate with the minor children as often as he may wish to do so, at all reasonable times.

8.5 Accompanying the minor children on flights:

8.5.1 Until the minor children have reached an age when they are able to fly as unaccompanied minors, when the Respondent elects to exercise contact to the minor children in South Africa, within Australia or anywhere else in the world, and when same shall be for his sole cost and expense, the Respondent shall collect the minor children from Australia and accompany them to South Africa, within Australia or anywhere in the world, and the Respondent shall accompany them back to Australia.

8.5.2 Until the minor children have reached an age when they are able to fly as unaccompanied minors, when the Respondent elects to exercise contact to the minor children in South Africa, and when the return air tickets shall be for the Applicant's sole cost and expense, the Applicant shall accompany the minor children from Australia to South Africa, and the Applicant shall accompany them back to Australia.

9. Additional Contact between the date of this Order and the date of the Applicant's departure to Australia with the children:

9.2 The Respondent shall be entitled to exercise additional contact between the date of this Order and the date of the Applicant's departure to Australia with the minor children as follows:

9.1.1 On the weekends in which the Respondent does not exercise contact with the children until the December 2024 school holidays commence, the Respondent shall be entitled to exercise contact to the children on either the Saturday from 9h00 until 17h00, or the Sunday, from 9h00 until 16h00 on an alternating basis;

9.1.2 In the December 2024 school holidays:

9.1.2.1 From the 13th December 2024 until the 21st December 2024,

9.1.2.2 From 10h00 on Christmas day until 17h00 on the 29th December 2024;

9.1.2.3 From 10h00 on New Years Day until 17h00;

10. The Respondent shall contribute towards the minor children's maintenance from the date of the grant of this order until the 1st day of the month in which the minor children relocate to Australia with the Applicant as follows:

9.2 The Respondent shall affect maintenance payments of R12 500.00 (twelve thousand, five hundred rand) per month to the Applicant, with payment due on or before the 1st day of each month;

9.3 The maintenance payments shall be subject to an annual increase on 1 March 2026 to R15 000.00 (fifteen thousand rand) per month;

9.4 The maintenance payments shall continue up to and including the 1st day of the month in which the minor children relocate to Australia with the Applicant, whereafter the Respondent shall not be required to make payment of any contributions towards the minor children's monthly living expenses / maintenance requirements.

11. The Respondent's counter application is dismissed.

12. The Respondent is ordered to make payment of the costs of the main application and the counter application on the scale as between attorney and client on Scale C."

Accordingly, Part A is no longer the subject of these proceedings but Part B.

- [5] In issue is whether the Respondent's consent to the removal of the minor children, from the Republic of South Africa to reside permanently with the Applicant in Australia should be dispensed with. Equally, whether the Applicant should be permitted to remove the minor children, from the Republic of South Africa to reside permanently with her in Australia. Also, if leave to relocate is permitted, the nature and extent of the contact that the Respondent will exercise to the minor children whilst they live abroad. Also, the extent to which each party should be responsible for maintaining the children, and the allocation of the children's costs and the Respondent's travel costs.
- [6] At the hearing before me, the Respondent indicated that he abides by the recommendation of the Family Advocate. The Respondent contends that the Applicant's Draft Order is not in line with the recommendations of the Family Advocate. The Respondent contends further that each party should be ordered to pay their own costs as the opposition to both applications were bona fide.
- [7] The parties were married to one another on 1 November 2017. As traversed above, two minor children were born of the marriage, their daughters, namely, J[...] R[...] J[...] ("J[...]") (born on 8 December 2017, presently aged 6) and J[...] A[...] J[...] ("J[...]") (born on 11 May 2019) respectively, presently aged 5. However, by July 2020, the marriage had irretrievably broken down. The parties were divorced by order of this Court on 24 April 2023, which incorporated
- a settlement agreement between the parties.
- [8] The settlement agreement provided for primary residence of J[...] and J[...] to vest with the Applicant. The Applicant is and has always been the primary caregiver of the minor children. However, the Respondent was afforded reasonable rights of contact to the minor children on alternate weekends from Friday to Sunday afternoon and every Wednesday from after school until the following morning. In addition, the respondent was afforded contact to them on their respective birthdays, on his birthday, on Father's Day and half of religious holidays.
- [9] The Applicant is a quantity surveyor who holds a BSC Honours degree in Quantity Surveying ("QS"), a BCOM Accounts degree, a Post Graduate Diploma in Management Accounts and a Property Development Certificate. Judgment
- [10] Since October 2022, the Applicant communicated to the Respondent her desire to relocate with the minor children to Melbourne. In March 2023, the Applicant's erstwhile attorney of record addressed correspondence to the Respondent's attorney of record, requesting that the Respondent provide the necessary consent and sign the forms required by her to apply for a visa for herself and the minor children, but there was no response. The reasons for relocation, are inter alia, for socio-economic reasons.

[11] In July 2023, the Applicant obtained a job offer to commence employment in Melbourne in February 2024, thus escalating her relocation ambitions. She got the offer whilst still employed in South Africa at Enigma Group (Pty) Ltd ("Enigma"), a property development company where she had been employed as the development manager with effect from 2014, which she communicated to the respondent. In time Enigma commenced pay reduction, retrenchment process considering the declining economic circumstances. The Applicant received notification that with effect from 1 April 2024 she would be retrenched from her employment at Enigma. The Applicant

is currently unemployed and would have received her final salary in terms of the retrenchment package on 31 July 2024.

[12] However, the Applicant has an offer of employment from Switch Design Services Australia (Pty) Ltd ("Switch Design") in a position as a quantity surveyor. She will earn a gross income of 110 000 AUD per annum (based on a three- month performance and salary review in month four from start date, a salary increase can be offered coupled with other favourable benefits. Switch Design initially indicated that the Applicant would be required to commence her employment on 1 July 2024, however they have later indicated that the Applicant may commence her employment on 13 January 2025. She is required to obtain visa for the children which she cannot do without the consent of the Respondent, who has refused, or an order of court.

[13] The Applicant has established that she is recognised as a professional in Melbourne by the Australian QS Authority ("AIQS") and that she would immediately be able to commence employment. It is the applicant's case that, this employment offer is a better career development for her as it will also benefit the children. Furthermore, it will create financial stability for her to be able to provide better financial care for the children as compared to when she is in South Africa.

[14] The applicant explains that at the time that the divorce action was settled, the Respondent was in arrears with his maintenance obligations in terms of the Rule 43 order then extant, in the sum of R140 000.00 but negotiated down to R100 000.00 and to agree to the terms contained in paragraph 9 of the agreement of settlement.

[15] In Australia, she will be living in the suburb called B[...] R[...], Melbourne with her fiancé, B[...] F[...]. F[...] has been living in Austria for the past 11 years. He has a house in Australia. They have been in a relationship since 2022, though they have known each for years. The Applicant has investigated the best available schools for the minor children and has established that B[...] R[...] Primary School would be the most favourable option for J[...] and is 400 meters and a five-minute walk from F[...]’s residence. B[...] R[...] Pre School ideal for J[...] is located 650 meters

and a ten-minute walk from F[...]’s residence. It is the feeder school for B[...] R[...] Primary and similarly highly rated in the Bayside council area.

[16] The Respondent opposes the application on various grounds and claims that if the Applicant relocates, the children should reside primarily with him. He contends that what is most important for the children is to maintain their current arrangements with him and his extended family. The Respondent inter alia indicates that he envisions fostering the children's growth and development in

the crucial areas of physical and emotional security, intellectual development, emotional development, social development, cultural

development, the provision of unconditional love, supportive relationships, stability and consistency, emotional guidance, role

modelling, encouragement and empowerment. As the applicant points out, what is unambiguously absent from the Respondent's affidavits is evidence of his actual involvement in the children's daily lives or of his practical contributions towards their care particularly the relatively long separation of almost 3 years after the divorce. The Applicant is and always has been the children's primary attachment figure and financial provider, which is not contradicted.

[17] The parties were jointly interviewed by the Family Advocate, A. Magahle and the Family Counsellor, BQ. Mpogo on 18 July

2024. On 19 August 2024 the Family Advocate released a report consequent upon an investigation, in which it is recommended that the Applicant be permitted to relocate to Australia with the children, since she is their primary caregiver, attachment figure and also having regard to her bona fides and the reasonableness of her request for relocation. The Family Advocate recommends that the parties should exercise their parental responsibilities and rights outlined in paragraph 10 of "FA1" (the Family Counsellor's report).

[18] The Family Counsellor's report takes account of the provisions of Section 28(2) of the Constitution of the Republic South Africa[1], and section 9 of the Children's Act[2] which provides that "a child's best interests are of paramount importance in every matter concerning the child." The reports indicate further, that Section 10 of the Children's Act which provides that "the views and wishes of a child should be given due consideration if that child is of such an age, maturity and stage of development so as to be able to participate in any matter concerning him or her" was complied with. In this case both children expressed their wish to relocate.

[19] The Family Counsellor made recommendations, inter alia, "that both parties retain their full parental responsibilities and rights with regard to the care, contact, and maintenance of the children as contemplated in Section 18 (2) (a) (b) and (d) of The Children's Act. In addition that:

10.2 The Mother should retain the children's primary residence and she be allowed to remove the children from South Africa to Australia.

10.3 Both parties to retain guardianship of the minor children as contemplated in section 18(2)(c) and 18(3) of The Children's Act subject to the restriction of the Father's rights of guardianship in the following manner:

10.3.1 The Father's consent be dispensed with in regard to matters under section 18(3)(c)(iii) and (vi) of the Children's Act for the purposes of removal of the minor children from South Africa to the Australia.

10.3.2 The Father's consent be dispensed with in relation to the application and/or renewal of the minor children's passport...

10.4 The Father to exercise contact with the children at least twice a year (during the school holidays) for no less than 14 consecutive days at a time; the contact to be exercised in the Republic of South Africa at the Mother's cost."

[20] The Applicant takes no issue with the Family Counsellor and Family Advocate's recommendations save for the recommendation contained in paragraph 10.4 (above) of the Family Counsellor's report, which provides for the Applicant to make payment of the costs of two trips for the children to visit the Respondent in South Africa per annum.

[21] It is trite that, in relocation matters is to interrogate the bona fides and the reasonableness of an Applicant's decision to relocate.

However, the best interest of the child is still the determining factor. The appellate division in Jackson v Jackson[3] Scott JA stated the position at para 2 of the majority judgment as follows:

" It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken. Indeed, one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token care should be taken not to elevate to rules of law the dicta of Judges made in the context of the peculiar facts and circumstances with which they were concerned."

- [22] In this case, relocation has belatedly been conceded by the respondent father. This is one such case where the facts justify the relocation order. Opposition thereto, in my view was completely unjustified. Conversely, the withdrawal of the counterclaim was made informally from the bar and proposed in a draft order. In any event, the counterclaim is devoid of any merit and fell to be dismissed.
- [22] The applicant contends that the Family Advocate seemingly has fundamentally misunderstood the Applicant's tender which is a tender to pay the costs of the flights to bring the children to South Africa and return them to Australia and both children's return flights annually. Further, that, it is financially impossible for the Applicant to forego the maintenance and make payment for two trips per annum. It is the applicant's case that, the further visits are tendered by the Applicant but for the Respondent's account. This is so, against the background that the Applicant has agreed to forego the entirety of the amount of maintenance which the Respondent has been ordered to pay for the children, which amounts to R150 000.00 in 2024, escalating to R180 000.00 in 2025 and escalating annually thereafter.
- [23] The Respondent contends in addition, that the Applicant's Draft Order is not in line with the recommendations of the Family Advocate. The Respondent contends further that each party should be ordered to pay their own costs as the opposition to both applications were bona fide. The respondent contends further that, each party shall pay his or her own costs occasioned by the main application and the counter application. In my judgment, there is nothing to gainsay the contention made by the applicant mother regarding the tender for one annual return trip coupled with her agreement to forego the entirety of the amount of maintenance which the Respondent has been ordered to pay. In any event, the recommendation in that regard is nothing else but just that, which this court is entitled to accept, reject or amend.
- [24] As regards the question of costs, it is trite that, the general rule is that the successful party is entitled to his costs. In determining who is the successful party in this case, in favour of the applicant mother, the court looks to the substance of the judgment and not merely to its form.
- [25] The father's conduct regarding this matter, inter alia, by failing to file heads of argument consistent with the practice directives of this Division is reprehensible. The Respondent has not filed his heads of argument despite having been called upon

to do so by the applicant. The Respondent is accordingly in default of the requirements of the practice manual which require him to file his heads of argument 5 days after receipt of the Applicant's heads of argument. In so doing, the respondent clearly showed a contemptuous disregard for his opponent's rights in this regard. This court in the exercise of its discretion was at liberty, to show its disapproval of the respondent's conduct. It is for the above reasons that the order was made.

TP MUDAU

JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

Counsel for the Applicant: Instructed by: Adv. L Segal SC Chimes Law Attorneys Counsel for the Respondent: Instructed by: Adv. F Bezuidenhout Di Siena Attorneys Date of Hearing: Date of Judgment: 9 September 2024 4 October 2024

[1] Act 108 of 1996.

[2] Act 38 of 2005.

[3] 2002

(2) SA 303 (SCA) at 318.

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