

SOUTH AFRICA / JUDGMENT

A.R v A.T (2022/2513) [2023] ZAGPJHC 380 (25 April 2023)

[2023] ZAGPJHC 380

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Bezuidenhout

CASE / FILE NUMBER

2022/2513

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Policy

FLYNOTES:

FAMILY – Children – Relocation – Parents
divorced and remarried – Boy and girl aged 9 and
7 –
Mother having secured good employment opportunity in UK –
Report of clinical psychologist into parties,
their spouses and
the children – Evidence pointing to applicant being a
hands-on mother whose life revolves around
her children –
Court satisfied that a relocation of children applicant will
be in their best interests.
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBER: 2022/2513
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
24.04.23
In the matter between: -
A
R
Applicant
and
A
T
Respondent
NEUTRAL
CITATION: A R vs A T (Case
No: 2513/2022) [2023] ZAGP JHC 380 (25 April 2023)

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date and time for hand-down is deemed to be 11h30 on 25 April 2023.

F. BEZUIDENHOUT AJ:

INTRODUCTION

"Like Humpty Dumpty a family once broken by divorce, cannot be put back together in precisely the same way."^[1]

- [1] Relocation matters are probably one of the thorniest issues a family court is called upon to resolve. Often the interests of a resident parent who wishes to move away are pitted against those of a non-resident parent who has an unextinguishable desire to maintain frequent and regular contact with the child. To exacerbate matters further, the court must weigh the paramount interests of the child which may or may not be in irreconcilable conflict with those of one or both parents. This matter before me is no exception.
- [2] The applicant, the mother of a minor boy-child and girl-child aged 9 and 7 respectively, wishes to relocate with her children to the United Kingdom. The respondent, the father of these children, is opposing the application. While he is not adverse to the idea of relocation all together, the respondent holds the view that a relocation should only be considered at a later stage when the children are older. The respondent filed a counter-application for primary residence with him and defined contact between the children and the applicant.

- [3] This court is once again called upon to apply Solomonic wisdom and determine whether the children should stay or go. The counter-application is conditional and is accordingly also under consideration.
- [4] The main application was brought on urgency.

SALIENT BACKGROUND

FACTS

- [5] The parties were married to each other and divorced on 28 February 2020. The decree of divorce incorporated an agreement of settlement concluded by them. Primary residence was vested with the applicant, as is still the case, and the respondent was awarded reasonable rights of contact.
- [6] The divorce order was subsequently amended by the Children's Court on 16 August 2021 and the Maintenance Court on 18 October 2021.
- [7] On 23 July 2021 the family advocate rendered a report and recommended that residence of the children should remain with the applicant.
- [8] Both the applicant and the respondent remarried.
- [9] The relocation was initially brought on 24 January 2022 in the ordinary course. The application became opposed, and a counter-application was filed.
- [10] The applicant states that she has considered relocation with the children for quite some time. In fact, while still married to each other and during mid-2019, the applicant and the respondent explored the possibility of relocating abroad as a family. Amongst other countries, the United Kingdom was considered. The respondent went as far as approaching emigration consultants to guide the parties. The respondent argues that it was merely a contingency plan. However, in an email from the respondent dated 20 July 2021, he stated that he and his wife would also relocate to London to remain close to the children. This attitude appeared to have changed during the expert investigation referred to later.
- [11] The parties agreed to appoint an independent psychologist to investigate whether relocation was in the children's interests and the respondent's application for primary residence.

DR FASSER

- [12] Dr Robyn Fasser ("Fasser"), a clinical psychologist, was appointed. Fasser was nominated by the then chairperson of the Gauteng Family Law Forum after the parties were unable to agree on a suitable expert.
- [13] In her report Fasser described her mandate as an investigation into the best interests of the children with regard to residency, care and contact given that the applicant and her husband "would like to relocate to the United Kingdom" (emphasis added)

- [14] I pause to mention, that at the time of Fasser's investigation, the applicant was in the employ of KPMG as a chartered accountant with a fixed-term three-year contract that would expire in December 2023 with an expectation by the applicant to have it extended. Her position at the time was that she would have the ability to transfer to various locations around the world whilst remaining in the employ of KPMG internationally. Her visa would allow her to work in the United Kingdom and would allow the children to study there. After five years of residence in the United Kingdom, both the Applicant and the children would become eligible for permanent residency. The applicant's position with KPMG at the time of the investigation was therefore secure and her desire to relocate was a wish rather than a necessity. It is under these circumstances that the applicant indicated to Fasser that she would not relocate if Fasser recommended that it was not in the children's best interests to do so at the time.
- [15] At this juncture it is relevant to mention the criminal charges laid against the applicant by the respondent.
- [16] The applicant informed the respondent of her intention to relocate during December 2020. During January 2021 the respondent laid criminal charges of inter alia fraud against the applicant, claiming that she had provided him with a fake Covid test and had placed the children in danger. There was no merit in the complaint and the charges resulted in nolle prosequi being issued during January 2021.
- [17] This is how the charges arose. In January 2021 there was a Covid-19 incident when the applicant contracted Covid and the children were with the respondent. The respondent would not return the children until she had produced her negative test. For a variety of reasons when she had produced a negative test, the respondent accused her of faking the test results and even when she again tested negative, he still did not return the children. He kept the children for six weeks. The applicant successfully brought a High Court application, after which the children were returned to her.
- [18] On the 24th of May 2022 the respondent caused the same criminal case to be reopened by the South African police services against the applicant
- over 15 months after the respondent had initially laid the criminal charges against her. Again, these charges amounted to
- nothing and a nolle prosequi was issued in May 2022.
- [19] Two months later, during July 2022 and less than a month before the applicant's wedding to her husband, the respondent (represented by another firm of attorneys) for the third time caused a criminal case against the applicant to be reopened. The applicant was charged criminally. In response she made representations to the relevant prosecutor in consequence of which the matter was removed from the roll and the state proceeded to a diversion process. The applicant registered and attended the required diversion course, after which the respondent yet again sought to reopen the criminal case against her.

- [20] A complaint of fraud was laid against the applicant with her employer at the same time during January 2021. The applicant's immediate superior, Ms H D J was contacted by an anonymous person in January 2021 by email accusing the applicant of criminal behaviour. This occurred immediately after the applicant joined the firm. The issue was referred to the KPMG risk management and human resources partners and was investigated. Ms D J was made aware that no evidence was received to adequately support these allegations.
- [21] Therefore, at the time of Fasser's investigation, as far as the applicant was concerned, the issue was resolved and her employment secure.
- [22] Pursuant to her investigation, Fasser recommended that a relocation of the children would not be in their best interests at that stage. This was in September 2022.

A CHANGE OCCURRED

- [23] On the 14th of September 2022 the applicant was contacted by the KPMG head of human resources and department of risk management. She was informed that the respondent once again contacted KPMG while she was away on honeymoon and that he had transmitted emails to them alleging criminal conduct by her and accused her of fraud.
- [24] To exacerbate matters further, the respondent laid a formal complaint against the applicant with the South African Institute of Chartered Accountants during September 2022. The devastation that a formal complaint of dishonesty against a chartered accountant may have, is in my view unquestionable.
- [25] The applicant attached to her supplementary replying affidavit a letter from KPMG dated the 24th of March 2023 confirming that the applicant's employment with them would end on the 14th of April 2023.
- [26] Ms D J , the applicant's senior and reporting partner at KPMG addressed a letter on the 27th of March 2023 which is annexed as annexure "RA15" to the applicant's supplementary replying papers. This is a personal letter as it does not appear on a KPMG letterhead. The content of this letter is instructive in that it demonstrates the devastating consequence of the respondent's actions in reporting the applicant for criminal misconduct.
- [27] Ms D J confirms the events of January 2021. She states that the complaint caused great embarrassment for the applicant, in particular given that the senior partners of the firm were involved in these investigations and did not paint her in a good light when starting a new position.
- [28] Then again in September 2022 Ms D J was made aware that the respondent had contacted senior partners of the firm, alleging criminal conduct by the applicant and threatening to bring the firm into disrepute. Ms D J understood the reasons for this allegation to be the same as those provided to her anonymously in January 2021. Again, this caused the applicant great embarrassment and in particular the allegation of criminal conduct by a

professional accountant are very significant given the ethical codes that all chartered accountants ascribe to, with the result that a detailed and often very personal investigation is required.

- [29] Notably, the respondent was questioned by the appointed expert (Fasser) about his reasons for pursuing these charges. When asked whether his motivation to inform the applicant's workplace that she was under criminal investigation was a result of vindictiveness, the respondent said that his lawyers had advised him to do this and that it fell within his notion of accountability. He believes that the applicant never takes accountability for when she does something wrong and that she reframes it as the other person's fault. He believes that his children have to know the difference between right and wrong and that they have to be accountable, as does the applicant.
- [30] When asked again what function towards accountability telling her workplace would have achieved, he reiterated that it would have made her accountable.[2]
- [31] Ms D J observed the personal turmoil and impact on work commitments that these continued allegations and other matters in relation to the respondent had. In particular, the numerous court dates and legal consultations that the applicant had to attend often without much notice in relation to these matters had resulted in her having to shift the timing of her work hours, often resulting in her working late at night or over weekends to make up for lost time or having to reschedule work internally with her colleagues and with the teams that they support. This all resulted in the applicant not being able to excel to the degree she would have liked in her role and accordingly her performance ratings were not at the level which Ms D J believes, given the applicant's experience, the applicant would have liked to and is capable of achieving.
- [32] Subsequently, the applicant applied for other position in the United Kingdom and procured a permanent position. A redacted version of her offer of employment was provided for fear of reprisal from the respondent. The offer includes inter alia a relocation allowance, the flexibility to care for the family, global exposure within the profession, career growth opportunities as well as job security. The commencement date is 17 April 2023, but the applicant has arranged an extension and departed the Republic of South Africa on 22 April 2023.
- [33] The applicant does not reject Fasser's report and recommendation. Her case is rather that the circumstances which prevailed at the time of the investigation have significantly changed and therefore the recommendation not to relocate carries very little value given the recent events.

- [34] The respondent disagrees. It was argued on his behalf that the recommendation remains very relevant and that the decision to relocate and the taking up of alternative employment by the applicant in the United Kingdom is contrived and self-serving. The argument goes that because the applicant was not satisfied with the recommendation, she orchestrated her exit from South Africa to the United Kingdom.
- [35] Although a critique report by psychologist, Martin Yodakin was procured by the applicant, no reliance was placed on this report during argument. I debated with counsel the value, if any, of such critique report as it has become a regular occurrence in this court that a dissatisfaction with a recommendation, results in a critique report. It was argued that such a critique report is merely an opinion and that it is for the court to decide what weight, if any, to attach to it.

FASSER'S OBSERVATIONS AND FINDINGS

- [36] In *RAF v Kerridge*[3] Nicholls JA said the following on the role of the experts:

"The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information... The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility -the court should actively evaluate the evidence. Ideally, expert evidence should be independent and should be presented for the benefit of the court."

- [37] There is no reason why the same principle should not apply to experts in family law related matters. I found various observations and findings made by Fasser particularly insightful and useful and I shall deal with them.

- [38] Fasser made the following findings about the minor boychild: -

[38.1] He perceives and experiences his relationship with his father as slightly more involved, nurturing and connected than his relationship with his mother, although the difference between what he perceives and experiences with each parent is not highly significant;

[38.2] He still perceives and experiences his mother as involved, nurturing and connected;

[38.3] He feels safe in both relationships;

[38.4] From his drawings it appears that he perceives and experiences both his father and mother as nurturing, with his father perhaps more directly expressive of this nurturing;

[38.5] He sees his family unit as comprising himself, his sister and both his parents;

[38.6] When asked if he wanted to go to London, he said he did not want to because his father would not be coming with him. However, when asked if he would feel differently if his father was also moving to London, he said maybe it would be better, but he would still be leaving all his other family on his father's side of the family;

[38.7] He wished that his mother and father would get married again, that there would be no violence and that there could be world peace and he would like to be able to fly;

[38.8] He would take his sister to the moon with him as he could not choose between his mother and father;

[38.9] He said he loves both his parents and that neither parent ever pushes him to choose between them.

[39] At the second interview he told Fasser that he had forgotten to tell her something. He said that sometimes he becomes nervous to tell his mother about his preferences, such as wanting to go for a haircut with his father, because his mother may shout at him for saying this. He said he would like his mother to listen to him more and to consider what he wants.

[40] Asked what he enjoys doing with his mother, he said he enjoys doing homework with her. Asked how he would feel if his mother went to London without him, he said he would miss her too much and that he needs both his parents. He wishes they would not fight.

[41] Regarding the minor girlchild, Fasser made the following observations: -

[41.1] It was noticeable that while allocating her responses, when she allocated to her mother, she verbalised a strong affection for her mother;

[41.2] She perceives and experiences her parents as equally connected to her, nurturing and involved with her;

[41.3] Although she experiences and perceives her father as the person on whom she is slightly more dependent, this does not appear to be a significant difference;

[41.4] When asked if she knew why she was seeing Fasser, the child replied that it was because her mother wanted to move to London and her father did not want to come;

[41.5] Given three wishes, she wished for puppies, a happy life and a giant house;

[41.6] She would take her father to the moon with her, and he is braver than anyone else and she would leave behind her baby cousin who would not be allowed to go.

[42] Fasser conducted a home visit at the applicant's home and made the following observations:

-

[42.1] The children appeared quite relaxed and comfortable with their mother and appeared to look to her as a safe and wise adult;

[42.2] The children displayed warm affection towards the applicant's husband, as well as to their mother, receiving hugs from her at times;

[42.3] There was nothing that alerted to any tension between the children and the applicant's husband;

[42.4] There was nothing observed during the home visit that alerted to any concerns;

[42.5] The applicant and the children appeared to have an engaged, appropriate, secure and comfortable relationship.

[43] From a home visit conducted at the respondent's home, Fasser made the following observations: -

[43.1] The children appear quite relaxed and comfortable with their father and appeared to look to him as a safe and wise adult;

[43.2] The children displayed open affection with their father, with the boychild constantly touching him while the observation was ongoing;

[43.3] There was nothing that alerted to any tension between the children and the respondent's wife;

[43.4] The respondent and the children appeared to have an engaged, appropriate, secure and comfortable relationship.

The applicant

[44] Fasser reports that the applicant started her career at KPMG where she worked for 10 years before she joined another accounting company. She was then headhunted to return to KPMG International. This was in January 2021. At the time of the interview, the applicant was employed as a senior manager in audit quality and professional practice at KPMG Cayman Islands.

[45] The applicant reported that the idea of emigration was not a new concept and during her marriage to the respondent, they were both very focused on emigration. They both wanted a safe environment for their family than was available in South Africa. She reported that the respondent engaged an emigration consultant at one time, and he often encouraged her to apply for jobs overseas. She also reported that just prior to the dissolution of the marriage, the respondent encouraged her to apply for a job in Australia.

[46] The applicant reported that subsequent to the dissolution of their marriage, she continued to investigate the option of relocation and at one point in time she considered a relocation to Mauritius, as this was close to South Africa. This would have allowed the children to be closer to their father.

[47] After she accepted the job, she communicated to the respondent her desire to relocate, ultimately to London, which comports with the job specifications that she accepted. If she were to relocate, she would be based only in London and would not be seconded anywhere else overseas.

- [48] She and the respondent then followed a legal and mediation process to try to resolve the issue of relocation, but it ultimately resulted in the decision to have the current investigation. They could not agree on who would do the investigation and as a result, the investigator was appointed by an objective third party.
- [49] The applicant reported that one of the reasons why they could not agree, was that the respondent resisted any notion of an immediate relocation, saying that he would not mind the children relocating later when he felt it to be more appropriate. After she asked about the relocation, the respondent approached the office of the Family Advocate in order to vary the contact schedule to what the court ordered at the time of the divorce. He specifically wanted shared residency which, once the office of the Family Advocate had concluded their investigation, was not granted and the children remained primarily resident with the applicant.
- [50] Although the contact schedule was varied, the new schedule did not allocate the children any more days with their father that had previously been allocated, namely ten days per month.
- [51] The applicant had previously been concerned about the respondent not being involved in the afternoon activities as he works full day. In the report and recommendations of the Family Advocate the children begun to have contact with their father after their activities in the afternoon had concluded. As a result, once the recommendations were accepted, the applicant and the respondent negotiated that the respondent would try harder to be involved with the children's extramural activities and when he sees them on a Wednesday, he is responsible for the children attending Madrassah. However, the applicant reported that often on Wednesday afternoons, the children miss Madrassah for various

reasons.

- [52] When asked what the applicant believe would be in the best interests of the children, she replied that the best interests of the children would be to relocate with her to London. The reason she believes this is that the United Kingdom is a safer environment and that schooling and general education, including tertiary education, and subsequent job opportunities are far better. She believed it would be in their best interests that they remain primarily resident with her. In the event that there would be a recommendation that the children would not relocate, she would absolutely not relocate without her children and would rather negotiate with her company.[4]
- [53] When asked in the event of the children relocating with her, what contact she would offer to the respondent, the applicant indicated that the children would have video calls daily with their father and return to South Africa every school holiday, which would mean three times a year. She would bring them back herself as she would also like to visit her family in South Africa. She would be happy if they spent 60 % or 70 % of their time with their father and she would be prepared to fund such contact.[5]

- [54] When asked what her timeline would be for relocation, the applicant reported that she had negotiated a start date in London at the beginning of October 2022 but that regardless of having to do the investigation, she was not sure that she would select that as a start date. She reported ideally her best case scenario would be to relocate at the end of 2022, after the children completed the year at school in South Africa. The applicant indicated that she would not like the investigation process to be rushed, but to take the time that it needed, and her outside parameters would be that she would stay at KPMG in South Africa, which she was happy to do and leave some time in early 2023. The applicant has already sold her house and her car and is renting accommodation.
- [55] The applicant indicated that they would look for accommodation in Wimbledon as it would be close to her husband's family and there are good schools in the area and a mosque.
- [56] The applicant reported to Fasser that she believes that there is definite manipulation of the children when they are with the respondent. The children's therapist, according to the applicant, believes this as well. When the children are returned to her, they are unsettled, do not sleep and are fractious. They announced to her that they can never go to London as they will never see their father again.
- [57] She also reported that the children experienced their father's home as a fun house and there is therefore no resistance to go to their father.
- [58] When the applicant was asked what she would do if the court did not allow the children to relocate to London, she indicated that she would investigate any means at her disposal to still relocate with the children, but would not relocate without them.

The respondent

- [59] The respondent reported to Fasser that he was not adverse to talking about relocation, but that he was not comfortable with the children relocating now and would prefer that they wait until they are older.
- [60] When asked if the respondent would go to London if the court orders that the children should relocate, he said that this would not be an option as his preference is to live in South Africa where his income and family support structure is.
- [61] The respondent reported that the applicant's job, her proposed home in the United Kingdom and the proposed schools in the event that the relocation was to happen, appeared to be on par with South Africa and not that much better.[6]
- [62] He believes that his and the applicant's co-parenting relationship is not good in South Africa and he is concerned about how that will be further negatively impacted on if she does relocate with the children. He believes it is too early to relocate as the co parenting relationship has not been properly established and only once properly established, should the relocation occur.

[63] When asked what he would do if the court allowed his children to relocate to London with their mother, the respondent said he would certainly be very traumatised, but he would have to make peace with the notion and also because of the current level of acrimony between him and the applicant over so many small things, he would find a positive way to look at it. He would negotiate the best contact he could with his children.[7]

[64] When asked whether he genuinely thought that his new wife's email to the applicant's new husband of 29 July 2021,

ostensibly welcoming him into the family, but in essence pointing out her perspective of the applicant in a very negative and attacking

manner, was polite and non-aggressive as the respondent had claimed in his email of 14 June 2022, the respondent replied in an email dated 23 September 2022 that he still considered that his wife's email was not aggressive. He then proceeded to contextualise the reason why he felt it was not aggressive, citing the applicant's alleged nasty behaviour towards his wife prior to the email being sent to the applicant's husband.[8]

The respondent's wife

[65] She reported to Fasser that although she is not a replacement mother, she does take responsibility for arranging those maternal rules in their home. When asked if she disciplines the children, she indicated that she disciplines all the children together constructively. She also reported that the respondent sometimes finds it hard to set limits and would defer to her.

The applicant's husband

[66] He reported that he would like to relocate to London as the prospects within his area of experience are enormous. He reported that his older brother lives in the United Kingdom and he has already lived there in the past. He is familiar with life there and he believes there is a greater potential for the applicant's children in the United Kingdom, aside from his and the applicant's career advancement. He reports that if relocation has to occur at a later stage, then he still believes relocating to the United Kingdom is an option for him.

[67] Fasser communicated with both children's class teachers. The response of the minor girlchild's teacher deserves mentioning. She states that the girl child is "super aware of her parents' relationship and arguments from the past and it causes her anxiety". The teacher had a lot of contact with both parents, but the respondent "likes to be seen as more visible, often dropping in to drop off gifts for her or the class... during schooltime", whereas applicant "is more laidback but very approachable and involved, taking action on any issue that has come up.

- [68] The teacher mentioned sports day as an example - ". The applicant "was on time and ran in the parents' races and cheered" the minor girlchild on. The respondent "arrived after" the minor girlchild's races "(which she was very aware of) in a dinosaur dress up costume and had tea with the other parents".
- [69] The teacher "would notice after sleeping at" the respondent "that she [the girl child] was more tired/needy. When building up to a dad weekend... she can be overly emotional at school and needy of teacher interaction. She seems to be more settled and in routine with" the applicant.
- [70] Fasser communicated with the minor boychild's educational psychologist who stated that it appeared that although he is attached to both his parents, his mother was better able to contain his anxiety. She noticed that when he came to therapy directly from being with his father, he initially appeared more anxious than usual and took longer to settle. Furthermore, it appeared that he needed more one-on-one time with his father as the blended family at his father's home possibly left him feeling neglected at times. She opined that he requires ongoing psychotherapeutic support.
- [71] Notably, the psychologist observed that when therapy initially began, it appeared to her that the applicant and the respondent's co-parenting relationship was civil and constructive, that the respondent appeared to support the narrative that the applicant was a very good mother and had performed as the children's primary caregiver. She reported that over time, and specifically after the respondent remarried, the co-parenting relationship deteriorated with the respondent increasingly commenting negatively on the applicant's parenting. She stated that although she referred the couple for post divorce co parenting input, this was not successful and that the reduction in constructive co parenting increased anxiety in the minor boychild.
- [72] The minor girlchild's educational psychologist observed that she appears to be securely attached to her mother and feels very comfortable and safe with her. Although she is attached to her father, she appears to feel a need to protect him and keep him happy.

Expert findings regarding the minor boychild

- [73] Fasser found that the minor boychild's vulnerability appears to manifest as anxiety and that such anxiety is exacerbated by stress in his context such as his parents' acrimony and the prospect of relocating and not having his father readily available. She however also stated that his anxiety also appeared related to not having his father's full attention, perhaps being one of four children when he is with his father.
- [74] The applicant appears to be better able to contain his anxiety for when he is with her, he is the oldest and one of only two children. He is also less comfortable with change, notwithstanding that his teacher identifies him as quite adept and adaptable.

- [75] His assessment reveals that he is equally attached to both his parents, although on closer inspection and based on his narrative, it appears that he identifies strongly with his father. This, according to Fasser, is age and gender appropriate. He perceives and experiences nurturing and caregiving equally from both his parents.
- [76] Fasser stated that it cannot be discounted that the minor boychild is more demanding of his father's one-on-one input as he could fear that he could easily be replaced in his father's life by his stepsiblings and even more so if he were to relocate. This sentiment is often identified in blended families where children fear replacement of their position with their biological parent by stepsiblings.[9]
- [77] Fasser found that the boychild's reasoning for not relocating "sometimes appeared superficial, which may lead to the assumption that he was coached".[10] However, she states that this would also have applied equally if his responses were positive around relocating. He states that the boy is far too young to understand the implications of relocation and any wishes need to be seen in this light.

Expert findings regarding the minor girl-child

- [78] As far as the minor girl-child is concerned, Fasser found that her assessment reveals that her father is an important figure but her mother equally important. Although she considers both parents as equally important, she may be "marginally more attached to her mother".[11]
- [79] The minor girl-child's narrative about not wanting to relocate with her mother to London mirrors her brother's response "hinting at some influence and coaching".[12]

Fasser's findings of the parents

- [80] In her assessment of the respondent, Fasser observed that he was appropriately parental with his children, although it appears that

the children "do experience his home context as fun filled and that he engaged on a child level, given that there are four children in the home".[13]

- [81] The laissez-faire parenting spile adopted by the respondent, according to Fasser, "may not be as conducive as containing the children's levels of anxiety as a more authoritative style would do. It was reported that the children may reflect more anxiety after having been with their father than after being with their mother."[14]

Fasser's findings of the children's stepmother

- [82] Fasser raised an urgent concern. Given the co-parenting acrimony between the parties and the lack of boundaries in the co-parenting relationship with the respondent's new wife being elevated "to a de facto parent (albeit without any legal standing)" it is necessary to reflect on the following:[15] -

[82.1] The nature and quality of affection and discipline that emanates from the healthy parenting of a biological parent for his or her child has a quality of unconditionality that can never be replicated by a stepparent. Although a stepparent may well love a stepchild, this element of unconditionality will not be present and results in the development of a relationship that requires the child to perform in a specific way in order to be acceptable to the stepparent;

[82.2] In this matter it emerged that the respondent and his new wife, believing it will serve their family and the children's best

interests, are attempting to replicate a nuclear family with the stepmother acting and taking on the rights and responsibility of a de facto parent specifically in the coparenting relationship.[16]

[82.3] This, according to Fasser, manifests in some unboundaried engagements with the applicant, the stepmother and school and therapists that should be attended to by the respondent alone. This, according to Fasser, has exacerbated conflict and acrimony between the parents.

[83] Fasser quoted authority for her opinion that when children in stepfamilies are encouraged to bond with stepparents, the children experience loyalty conflicts and this can become very stressful for children who feel that they are caught in a no-win situation as they are bound to upset someone they care about.

[84] Notably, Fasser stated that both children have good fits with both their parents as would be expected from a gender point of view, but it will certainly change over time and as the children mature into adolescence this need may well dilute.[17]

The children's views

[85] Regarding a consideration of the children's views and wishes, Fasser reiterated that the children's wishes appeared immature and superficial and that in this "they may have been influenced".[18] She however hastens to state that it cannot be discounted that their less direct assessment results did reflect their need to have both parents proximal and available and revealed their equal attachment to both parents. She stated that any "gravitas given should be to the assessment results notwithstanding that this does appear to coincide with their stated wishes".[19]

[86] During the hearing of this matter, I requested to speak to the children in chambers in the presence of my registrar. I made it clear to the parties that I would not divulge any details of the discussion. I record that I did meet with the children and spoke to them. This approach was followed in the fulfilment of my duties as Upper Guardian and the children's codified[20] and constitutional right[21] to have their voices heard and to participate in an age-appropriate manner in all decisions concerning them.

RELOCATION

[87] It was submitted on behalf of the applicant that the offer is one which she cannot refuse.

- [88] There is absolutely nothing that these parties are able to agree on. The issue of maintenance is no exception. What is apparent though is that the applicant carries the lion's share of the children's expenses. She has exclusively paid for the children's private education in South Africa, their private medical aid, medical excesses and extramural activities. During May 2020 the respondent applied to the Maintenance Court to reduce his maintenance obligation from R24 000.00 per month to R6 000.00 per month for both children. The respondent did not pursue this application. It is alleged that he unilaterally reduced his maintenance payments to R4 000.00 per month per child from May 2020.
- [89] Again, in March 2021 the respondent approached the Maintenance Court to reduce his maintenance further to R3 000.00 per month per child. After various attendances at the Maintenance Court, the applicant agreed to settle the matter on an amount of R14 750.00 per month in total. This amount does not include any contribution towards any of the children's educational, medical, extracurricular activities or direct expenses.
- [90] On the 11th of February 2022 the respondent approached the Maintenance Court once again to request a further maintenance reduction. This application was dismissed by the maintenance officer as there was no basis on which to reduce the respondent's maintenance obligations further.
- [91] The applicant argues that the relocation will serve the best interests of the children. She thoroughly investigated and planned for the relocation and has ensured that the general wellbeing of the children is catered for. The applicant told the court that the family will reside in Wimbledon, which as a large Muslim community and is known for being a prime area for families and investors. There is a mosque within 8 km of the school. The children will attend respective same sex schools in Wimbledon, which schools are similar to the schools which the children currently attend. They will also be able to attend the same extramural activities.
- [92] After completing their school education, the children would be eligible to access any of the tertiary education institutions within the UK once they have attained their permanent residency after five years.
- [93] The children would have complete access to the national health system, subject to a nominal payment. The applicant and the children will have a support system and family available as the applicant's family often visits the United Kingdom. In addition, the applicant's mother and father have committed to help the applicant in settling the children for the first two weeks upon their relocation.
- [94] The applicant has tendered certain contact rights to the respondent.

- [95] In the meanwhile, the applicant's employer has secured immediate temporary accommodation for her and the children in Wandsworth and as soon as the children obtained their visas and are living in London, the applicant will be in a position to enrol the children at their schools.
- [96] The respondent's case is that the circumstances in the United Kingdom are on par and not better than in South Africa. It was argued on his behalf that the applicant, being a highly qualified individual, will quickly find alternative employment again and that the current job offer should certainly not be construed as a once in a lifetime offer. It was argued on his behalf that considering her income and expenses, she would not be able to maintain the children in the United Kingdom. The argument was refuted in reply and I do not see any need to delve into it any further.
- [97] The respondent placed heavy reliance on the close attachment between father and children as a reason for not allowing a relocation at this stage.

THE LAW RELATING TO RELOCATIONS

- [98] Matters in which a resident parent's desire to relocate conflicts with the desire of a non-resident parent to maximize visitation opportunity are simply too complex to be satisfactorily handled within any mechanical analysis or mathematical precision. Although our courts have recognized and continue to appreciate both the need of the child and the right of the non-resident parent to have regular and meaningful contact, no single factor can be treated as dispositive or given such disproportionate weight the consequence of which would be a predictable outcome.
- [99] The one irrefutable factor is, however, the imperative of the best interests principle as enshrined in the Constitution.[22]
- [100] Jackson[23] remains the locus classicus as far as relocations are concerned. The Supreme Court of Appeal ("SCA") stressed that each relocation case must be decided on its own particular facts and that no two cases are precisely the same, which implies that past decisions may be useful but are limited to guidelines only. Pertinently the SCA stated that generally speaking, following a marital breakdown, the parent, then referred to as the custodian parent, who wishes to emigrate would not be likely prevented from doing so if it is shown that her intentions are bona fide and reasonable.
- [101] This court, in particular, has on many occasions embarked upon an analysis of what factors are to be taken into consideration in a relocation application.
- [102] With the advent of the Children's Act, 38 of 2005 ("the Children's Act"), in Boehmke[24] this court, sitting as a court of appeal, was called upon to consider whether a relocation of the children to Cape Town would be in their best interests. The court a quo had dismissed the application for relocation and an appeal was noted. Incidentally, as is the case here, Dr Fasser was one of two experts who were called upon to make recommendations on the best interests of the children. Similarly, the reports made provision for many possible scenarios

in addition to relocation.

[103] In its judgment the court referred to Godbeer[25] where it was stated that: -

“...the applicant [cannot] be expected to tailor her life so as to ensure that the children and their father have ready access to one another. That would be quite unrealistic. The applicant must now fend for herself in the world and must per force have the freedom to make such choices as she considers best for her and her family.”[26]

[104] Significantly the court stated that the reasons for relocating are endless, but that in each case the parent who is to remain behind opposes the move by reason of distress at the impending departure of the beloved child and the consequent loss of contact. In some cases, the non-moving parent shared parenting on the basis of equal time and responsibility while in others the involvement was limited.[27]

[105] The court summarised the guidelines distilled from the Constitution, judgments of South African courts and conventions to which South Africa is a signatory as follows: -

[105.1] The interests of children are the first and paramount consideration;

[105.2] Each case is to be decided on its own particular facts;

[105.3] Both parents have a joint primary responsibility for raising the child and where the parents are separated, the child has the right and it is the parents' responsibility to ensure that contact is maintained;

[105.4] Where a custodial parent wishes to emigrate, a court will not likely refuse leave for the children to be taken out of the country if the decision of the custodial parent is shown to be bona fide and reasonable;

[105.5] The courts have always been sensitive to the situation of the parent who is to remain behind. The degree of such sensitivity and the role it plays in determining the best interests of children remain a vexed question.

[106] In Shawzin[28] the court acknowledged the fact that the children leaving the Republic would cause a break in the close contact which they had with their father who must remain behind. However, the court referred to the following compensation: -

“... The bond between them and their father will not be broken. He will have them every year for a long holiday of six weeks and he is in a position, financially, to see them in Canada at other times... To take them away from their mother who has looked after them since their birth, would obviously have serious psychological consequences. They are still of an age when they would call for their mother first if something were to happen to them. A stepmother, with her own children, even if willing and able to look after them, as is the case here, cannot, generally speaking, match the devotion of a natural mother.”[29]

[107] In *F v F*[30] the SCA found that in deciding whether or not relocation would be in a child's best interests, the court has to evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases.[31] The court went on to state that despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce. Therefore, the refusal of relocation applications has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses.[32]

[108] Foreign jurisprudence concerning the best interests of children within the context of relocations matters is always helpful. The SCA referred to the minority judgment in the Australian decision of *U v U*[33] where the court stated as follows: -

"[I]t must be accepted that, regrettably, stereotypical views as to the proper role of a mother are still pervasive and render the question whether a mother would prefer to move to another state or country or to maintain a close bond with her child one that will, almost inevitably, disadvantage her forensically, a mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of having her reasons for relocating not treated with the seriousness they deserve."

[109] In the article by Carol S Bruch and Janet M Bowermaster in the *American Family Law Quarterly* vol 30 November 2 Summer 1996 titled 'The Relocation of Children and Custodial Parents: Public Policy, Past and Present'[34], the authors reviewed the decisions in many states in America who had relocation statutes and also the decisions in those states without relocation statutes. The conclusion was that State Supreme Courts generally support the ability of custodial parents to relocate with their children. At 298 of the above article the authors refer to the remarks of the New York Court of Appeals in *Tropea v Tropea* 665 NE 2d 145 (NY 1996) and the impact of divorce:

"The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the non-custodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit."

DELIBERATION

[110] The increasing numbers of relocation disputes is demonstrative of the ever-rising trend of geographical mobility, particularly in relation to work, coupled with a higher rate of divorce after which former partners go their different ways.

[111] Fasser in my view correctly points out that relocation by its very nature implies a significant decrease in contact between the child and the non relocating parent.[35]

- [112] A relocation issue contrasts the relocating parent's reasonable wish to better their circumstances by moving against the non-relocating parent's reasonable desire to maintain frequent normal and essential contact with the children.[36]
- [113] Primary residence has always vested with the applicant. Both the family advocate and Fasser recommended that this should continue. It also appears that the applicant is the primary caregiver of both children, while the respondent assists at times.
- [114] All evidence points to the fact that the applicant is a hands-on mother whose life revolves around her children as they are the most important thing in her life. She makes decisions based only on what would be in their best interests. The length of the current litigation and its content attests to this dedication.
- [115] The applicant evidently supplies the children's core needs for love, nurturance, the running of their day-to-day lives, their educational needs and their secure parent. My finding in this regard is supported by Fasser's report that the children manifest as more emotionally contained after having spent time with their mother.
- [116] Fasser also stated that it did not emerge in her investigation that the applicant's desire to relocate to London was mala fide in any way. Her decision appears based on rational reasons to support what she believes would be a better context for her children.
- [117] According to Fasser, it did not emerge in her investigation that the respondent's resistance to his children relocating to London with their mother was mala fide in any way either.
- [118] What is of concern to this court however, is that the respondent at times appears to use the children as an emotional crutch. For the boy-child the suggestion of relocation has highlighted the potential loss of his father, increasing his need to protect his father as described by his former therapist. Fasser stated that this "is unfortunate as it inverts what should be a normal parent child relationship with the parent protecting the child".
- [119] Fasser found that it appears that the boychild is exposed perhaps inappropriately to the tension between his parents, especially around the decision of relocation and that he is then provoked to overcompensate in his rationalisation as to why he does not want to relocate. She motivates this by stating that this "emerged in his narrative that was at times rote and included negative descriptions of his mother that were not supported by his assessment results. Assessments, being less direct, are more likely to reflect a child's covert feelings without the contamination of external coaching or influence".[37]
- [120] The boy-child's anxiety is further exacerbated by the notion that his stepsiblings will replace him if he relocates and that his father's love for him will diminish. The fact that it emerged during the investigations that the children had disclosed to their mother, after a visit to their father, that their father would not visit them in London, indicates that that the respondent may very well have inappropriate conversations with his children regarding the relocation. What the respondent may perceive as an innocent means of explaining to the children how traumatising the relocation will be to him, may very well be perceived by the

children as the permanent and devastating severing of a very close relationship, which is a perception far removed from reality and extremely harmful to their well-being.

[121] Albeit far more emotionally resilient than her brother, the need to protect her father is also a theme prevalent in the narrative of the girl-child and cannot be ignored. No child should ever be placed in this position.

[122] Although it was argued on behalf of the respondent that he has effected a number of changes to his parenting of the children, with the result that he no longer abdicates these responsibilities to his wife, I am not persuaded by the evidence that this is the case. I mention one pertinent example in support.

[123] On the 9th of January 2023, four months after Fasser's report, the applicant writes to the respondent reminding him of Fasser's

concerns about abdicating his parental responsibilities and rights to his wife, which forces her to communicate with the new wife. The respondent brushed it off by stating that Fasser cited this concern as having a "potential impact" on the children. He also stated the following: -

"Just to reiterate, X has no interest or desire to engage or communicate with you nor does she ever communicate with you and when you call to speak to the kids. The reason for you calling the kids on her phone is not as a result of me delegating anything to her but rather because of your abusive behaviour which resulted in me having to block your number.

... I am extremely thankful and appreciate that I have a wife [who] loves and cares about my children and their physical and emotional

wellbeing. I am sorry that your husband has no real interest in getting to know our children or how they feel (which the kids have

told me), their exact words were 'Uncle Y never asks us anything. I don't even think he knows about all this court

stuff' and is happy to have a functional and superficial relationship with them rather than a truly deep and meaningful relationship as X has."

"I can easily go around referring to Y as a gold digger, pathetic weakling or Moffi when talking to the kids about him as they would

accurately reflect my perception of him but this would not be in the best interest of my children and I therefore refrain from doing so."

"I don't think nauseum is a word so assuming you mean ad nauseum (sic)? Instead of using big words to try and sound intelligent, perhaps first check if you understand the meaning of the

word."

“I’m not sure if you have selective memory or if you have an actual medical condition that causes you to not remember things that don’t suit you but I have always informed you of any medication I have purchased for the kids while in my care.”(emphasis added)

[124] The respondent is clearly oblivious of the extent of the delegation of his parental responsibilities to his wife and Fasser’s findings in this regard. On the 20th of November 2022 he writes to the applicant, stating that she should read the whole report and not just the summary for if she does, she would find that the report confirmed that his wife is a wonderful and kind individual with no alarming or concerning

personality traits and that the children have a great relationship with her, which is why despite the applicant being the primary

caregiver, the children consider the respondent and his wife as their primary family unit.

[125] He then goes on to state that Fasser’s report regarding his wife’s involvement centred around the children’s perception and specifically to certain items such as discipline. The respondent’s conclusionary request in this email is telling: -

“I once again politely ask you to refrain from contacting me directly unless it is in respect of an actual emergency with regards to my children. All matters such as scheduling etc. are to please be directed to your lawyer who will discuss this with Ayesha [the respondent’s attorney] directly.”

[126] I am satisfied that the applicant has been shown to be a caring, sensible and responsible person. She has carefully considered the ramifications of the move and has done everything possible to ensure that the move will not be contrary to the children’s interests and will not result in the relationship between father and children being negated. I agree that the applicant faces a once in a life-time opportunity. Evidently, her relationship with her former employer has been terminated. Given the recent events it is unlikely that the relationship would have continued if she remained and if it did, it would certainly have been a strained one. This would have caused anxiety to the applicant which would inevitably effect the children.

[127] I am of the view that the children considering their age and Fasser’s observations, are susceptible to parental influencing and it would therefore be unwise and irresponsible to have regard to any preferences they have expressed.

[128] Having considered all the facts and the useful insight provided by Fasser regarding the psychological dynamics of the parties and the children I am satisfied that a relocation of the children with the applicant will be in their best interests.

[129] Regarding the issue of maintenance, I do not intend to make any amendments to the existing court order. This can be agreed to be between the parties and dealt with in the relevant maintenance court forum.

URGENCY

[130] At the outset I indicated to the parties that I would still rule upon the issue of urgency, but that a combined argument on the merits would be in the best interest of the children.

[131] The fact remains that the applicant's employment terminated with her employer in South Africa and that she accepted another offer in the United Kingdom. Had she not taken it up, the applicant would have forfeited the opportunity. The evidence in my view does not support the respondent's allegation that urgency was self-created. In isolation it may have been perceived as such, but the timing of the complaint regarding the applicant's alleged criminal misconduct is particularly relevant and cannot be ignored.

[132] I therefore rule that the matter is urgent.

COUNTER-APPLICATION

[133] In view of my findings on the relocation, the counter-application must fail. Neither the family advocate nor Fasser, deemed it in the best interests of the children to change primary residence, and although the respondent supports Fasser's recommendation he remained steadfast in the prosecution of his counter-application. In exercising my discretion, I find that costs must therefore follow the result.

COSTS

[134] The applicant does not seek a punitive costs order, but she does seek costs occasioned by the employment of two counsel. Counsel for the applicant left this decision within the court's discretion.

[135] The respondent seeks an order that each party pays his/her own costs in the event that the applicant succeeds. He however, sought costs to be awarded to him in the event that that the main application failed.

[136] On the facts I do not find any justification to deviate from the trite principle that costs should follow the result. Having said that, I am disinclined to grant the costs occasioned by the employment of two counsel. Counsel for the respondent appeared without a leader and managed well in presenting her client's case competently.

[137] I am excluding all costs occasioned by the employment of psychologist Martin Yodakin. The critique report was of no use to this court and carried no evidentiary weight due to its intended purpose.

ORDER

In the circumstances I make the following order: -

"1. The applicant is granted leave to permanently remove the minor children, AZA and ZA, from the Republic of South Africa to London, the United Kingdom.

2. The respondent shall sign any and all documents and do all things necessary to assist the applicant in obtaining the minor child's passports as well as the required permits and visas for the minor children's departure from South Africa and her entry into the United Kingdom within three (3) days of being requested to do so.
3. In the event of the respondent failing to comply with all the necessary requirements set out in paragraph 2 of this order: -
 - 3.1. the respondent's signature shall be dispensed with and only the signature of the applicant shall be necessary on the applications for passports and/or visas and/or permits, as the case may be;
 - 3.2. the applicant is authorised to sign all necessary documentation required to enable the applicant to remove the minor children permanently from the Republic of South Africa and relocate to the United Kingdom, including the Parental Consent Letter otherwise required to remove the minor children from the Republic of South Africa.
4. For purposes of facilitating a seamless emigration to the United Kingdom and only to the extent required by the immigration laws of the United Kingdom, the applicant shall have full parental rights and responsibilities of the minor children, including but not limited to the responsibilities and rights of sole care, primary residence and sole guardianship.
5. The order provided for in paragraph 4 should not be construed as a termination of any of the respondent's parental responsibilities and rights of he exercised and enjoyed prior to this order, which include maintenance, contact and joint-decision making.
6. The respondent shall have contact with the minor children during their school holidays as follows: -
 - 6.1. For a period of at least one week during the December/January break;
 - 6.2. half of the July/September summer break;
 - 6.3. half of the March/April Easter break.
7. The parties shall, in writing, agree to a schedule of contact for the next period of 12 months, by no later than the 1st of February of each year. The applicant will send a copy of the next school year calendar to the respondent as soon as the calendar is available.
8. The respondent shall, in exercising contact with the children during school holidays, ensure that the children are returned to the applicant no later than 48 hours prior to the beginning of the children's next school term.
9. The applicant shall be liable for the travelling costs of the minor children occasioned by them having to travel to South Africa in order to exercise contact with the respondent.

10. Until the minor girl-child is 15 years old, both the minor children shall be accompanied on all international flights by either one or more of the following adults, namely the respondent, the applicant, the applicant's parents, or the children's maternal aunt or uncle. The respondent shall either travel himself with the minor children on the international flights, alternatively he will pay the costs of one of the aforesaid adults who accompany the children should he be unable to accompany them.
11. The applicant shall be liable to make payment, once a year, of only one economy class ticket for the respondent to enable him to travel to the United Kingdom to exercise contact with the minor children. The respondent shall be liable to pay for his own accommodation and the minor children, as well as all other expenses such as entertainment, travelling and food, incurred for himself and the minor children during his contact period with them.
12. The respondent shall in addition to the contact provided for in this order, be entitled to exercise additional contact with the children at reasonable times should he visit the United Kingdom or should the children be in South Africa at any other times outside of the holiday contact stipulated in paragraph 6 of this order, by agreement between the parties and subject to the children's scholastic and extracurricular routine.
13. The respondent shall have daily contact with the minor children using video calls, FaceTime, WhatsApp communication, Zoom, Skype and/or any other suitable electronic communication between 17:00 and 19:00 UK time. To enable the respondent to exercise this contact, the applicant shall: -
 - 13.1. ensure that the children have, at all reasonable times, a cell phone and/or computer at their disposal, which the respondent can use to contact the minor children on;
 - 13.2. ensure that at all reasonable times, there is a Wi-Fi and/or another data and/or any other internet facilities available to facilitate the contact;
 - 13.3. supply the contact numbers and/or any other contact details and/or connection links, which the respondent will require to exercise his contact with the children.
14. Upon the minor children's arrival in the United Kingdom, the applicant shall at her cost take whatever steps are necessary to provide counselling for the minor children by a suitably qualified counsellor or psychologist to assist the minor children with adapting to their new circumstances in the United Kingdom.
15. The applicant shall provide the respondent with any and all reports regarding the minor children's counselling. The respondent shall be entitled to contact the duly appointed counsellor in the United Kingdom directly and the applicant shall timeously provide all the necessary contact details to the respondent to enable him to do so.

16. The applicant shall keep the respondent advised of the minor children's academic progress at school and of their involvement in sporting, cultural or other extramural activities and shall furnish the respondent with copies of the reports in respect of their academic, cultural and sporting progress.
17. The applicant will have regard to the respondent's views and wishes and shall consult him in making any major decisions regarding the children's education. To the extent that the respondent would be able to attend the children's schooling, extracurricular, cultural or religious events during his contact visits or virtually, if such events are presented online, the applicant will ensure that the respondent is informed of such events timeously so that he may attend them.
18. The applicant shall keep the respondent advised of the minor children's physical and emotional wellbeing and shall inform the respondent as soon as is reasonable should the minor children fall ill or require major medical treatment and she shall furnish him with any report which she may receive from any treating practitioner. The applicant will have regard to the respondent's views and wishes and shall consult him in making any major decisions in regard to the children's major medical treatment, unless in the cases of emergency.
19. The applicant will inform the respondent of the following: -
 - 19.1. The address where the minor children will be residing and any changes thereto;
 - 19.2. The school and Madrassah the minor children will attend and any changes thereto.
20. The applicant shall furnish the respondent with names and telephone numbers or contact details of the school headmaster and teachers and Madrassah teachers.
21. The applicant shall carbon copy the respondent in all correspondence between her, the school and Madrassah.
22. The applicant shall remain liable for the minor children's educational costs, including their schooling fees.
23. The respondent shall continue to make maintenance payments to the applicant in favour of the minor children as provided for in the current prevailing maintenance court order.
24. Within 3 (three) months of relocating, the applicant shall at her cost, take all steps that may be necessary to obtain a mirror order of this order in the United Kingdom.
25. Should the applicant fail to comply with paragraph 23 within the prescribed period, the respondent shall be entitled to obtain a mirror court order of this order in the United Kingdom at the applicant's cost.
26. By agreement between the parties, Dr Lynette Roux ("the parenting coordinator"), is appointed as parenting coordinator.

27. The parenting coordinator shall function as a mediator and manager and as a monitor regarding any potential disputes that may arise between the parties or any occurrence of unhealthy parenting.
28. The parenting coordinator should also assist with any changes to the contact schedule to ensure that the changes serve the children's best interests.
29. The parenting coordinator will be responsible: -
 - 29.1. to ensure both children's best interests;
 - 29.2. to monitor their progress;
 - 29.3. to have contact with their teachers, if necessary;
 - 29.4. to recommend therapy or continue therapy for either child if indicated and to have contact with these therapists;
 - 29.5. to monitor the parents' continued healthy parenting;
 - 29.6. to mediate between the parents, where necessary;
 - 29.7. to assist the parents with decision-making with regard to education, extramural, major medical, religious issues and any deviation in regard to contact arrangements;
 - 29.8. to guide the parents;
 - 29.9. to refer either parent for appropriate therapeutic or medical interventions or parenting skills training if deemed necessary by the parenting coordinator;
 - 29.10. to refer both children for any appropriate medical interventions and to have contact with any medical professionals if indicated;
 - 29.11. to refer the parties to a mediation process in the event of a deadlock in the parenting coordination process;
 - 29.12. to instruct any further independent investigation/assessment to establish what will be in the children's ongoing best interests.
30. The parenting coordinator shall at her sole discretion determine which party should be liable for the costs and the apportionment, if any, of such costs occasioned by the parenting coordination process.
31. The deed of settlement made an order of court under case number 353/2020 and dated 28 February 2020, as amended by the Children's Court on 16 August 2021, is varied to the extent provided for in this order.
32. The counter-application is dismissed with costs.

33. The respondent shall pay the costs of the applicant's application, which costs shall include the employment of senior counsel only and which costs shall exclude in relation to the appointment of the psychologist Martin Yodakin."

F BEZUIDENHOUT ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

19 & 21 January 2023

DATE OF

JUDGMENT:

25 April 2023

APPEARANCES:

On behalf of applicant: Adv L Segal SC Adv L de We Instructed by: TWB

- Tugendhaft Wapnick Banchetti & Partners Attorneys russel@twb.co.za On behalf of respondent: Adv T Lipshitz Instructed by: Ayesha Karim Attorneys pa@ayeshakarimattorneys.co.za

[1] Quote from the New York Court of Appeals in *Tropea v Tropea* 665 NE 2d 145 (NY 1996) in *Van Schalkwyk* 2005 De Jure 344.

[2] Paragraph 4.5.5.46 of Fasser's report.

[3] 2019

(2) SA 233 (SCA) par [50].

[4] Paragraph 4.4.5.13 of Fasser's report.

[5] Paragraph 4.4.5.14 of Fasser's report.

[6] Paragraph 4.5.5.38 of Fasser's report.

[7] Paragraph 4.5.5.43 of Fasser's report.

[8] Paragraph 4.5.5.51 of Fasser's report.

[9] Paragraph 6.1.6.4 of Fasser's report.

[10] Paragraph 6.1.7.2 of Fasser's report.

[11] Paragraph 6.1.6.7 of Fasser's report.

[12] Paragraph 6.2.7.1 of Fasser's report.

[13] Paragraph 6.4.1.10 of Fasser's report.

- [14] Paragraph 6.4.1.11 of Fasser's report.
- [15] Paragraph 6.5.3 of Fasser's report.
- [16] Paragraph 6.5.3.3 of Fasser's report.
- [17] Paragraph 8.2.1.1 of Fasser's report.
- [18] Paragraph 8.2.1.2 of Fasser's report.
- [19] Paragraph 8.2.1.2 of Fasser's report.
- [20] Section 6(5) Children's Act, 38 of 2005.
- [21] Section 28 of the Constitution.
- [22] Section 28(2) of the Constitution.
- [23] Jackson v Jackson 2002 (2) SA 303 (SCA).
- [24] Boehmke (formerly McGregor, born Burns) v McGregor 2005 JDR 1267 (W).
- [25] Godbeer v Godbeer 2000 (3) SA 976 (WLD).
- [26] At 981J – 982C.
- [27] Boehmke paragraph [46].
- [28] Shawzin v Laufer 1968 (4) SA 657 (A).
- [29] At 669A – D.
- [30] 2006 (3) SA 42 (SCA).
- [31] Paragraph [10] at 48C.
- [32] Elsje Bonthuys, Clean Breaks: Custody, access and parents' rights to relocate (2000) 16 SAJHR 487.
- [33] [2002] HCA 36 at paragraph [36].
- [34] This article was also reference by the court in H v R2001 (3) SA 623 (C).
- [35] Paragraph 8.1.1 of Fasser's report.
- [36] Paragraph 8.1.2 of Fasser's report.
- [37] Paragraph 6.1.6.6 of Fasser's report.

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Prepared on 10 October 2026 · Esheria