

SOUTH AFRICA / JUDGMENT

B.M.S v J.N.W (2024/110526) [2025]
ZAGPJHC 112 (10 February 2025)
[2025] ZAGPJHC 112

COURT

South Gauteng High Court, Johannesburg

BEFORE

M Abro

CASE / FILE NUMBER

2024/110526

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FLYNOTES:

FAMILY

– Children – Relocation

–

Applicant

secured employment and a stable living environment –

Respondent works in Abu Dhabi on a 28-day cycle –

Detrimental effects of ongoing conflict on children –

Respondent’s opposition primarily about maintaining control

rather than children’s welfare – Applicant’s

decision to relocate is reasonable and bona fide – In

best

the interests of children – Confirmed and recommended by

experts – Request to relocate granted.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 2024-110526

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In

the matter between: B
 M
 S
 Applicant
 and
 J
 N
 W
 Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for hand down is deemed to be 10 February 2025.

ABRO AJ:

Introduction

- [1] This application came before me on 22 January 2025 in the urgent family court. The applicant sought leave to relocate from Johannesburg to Cape Town with two minor children currently 11 and 6 years old. The application was initially brought on an urgent basis at the end of September 2024 but was struck for lack of urgency during October 2024.
- [2] When the application came before me on 22 January 2025, the applicant and the minor children had already left Johannesburg and relocated to Cape Town. The children were not yet enrolled in a school as the respondent refused to consent thereto. The children had thus already missed the first week of the first term of the 2025 school year. The applicant thus sought to amend the relief sought by her in order to confirm the relocation and ensure the children's enrolment and attendance at school.
- [3] This judgment provides reasons for the interim order handed down on Monday morning 27 January 2025 wherein I inter alia ordered that the children were to remain primarily resident with the applicant in Cape Town and were to be enrolled in school in Cape Town for the 2025 academic year.
- [4] Later that day a notice of withdrawal as attorney of record was received from the respondent's attorney, Alice Swanepoel.

Background

- [5] The parties are parents to the two minor children B and M. The applicant is the children's mother. The respondent is their biological father. Whilst the parties were never married to one another, they are co-holders of full parental responsibilities and rights in respect of the children as provided for in sections 18(2)(a) – (d) of the Children's Act 38 of 2005.

The children's primary place of residence is with the applicant.[1]

- [6] The respondent currently works in the desert in Abu Dhabi (he has previously worked in Saudi Arabia and Qatar). He works on a 28-day cycle in Abu Dhabi whereafter he returns to South Africa for a period of 28 days before returning to Abu Dhabi. He is thus factually not physically present for the children in South Africa every second month.
- [7] The respondent exercises contact with the children when he is in South Africa in accordance with the order of Mahomed AJ of 17 May 2024 (fn 1).
- [8] Notably, the respondent did not personally depose to any of the affidavits filed on his behalf. The affidavits were deposed to by his attorney, Alice Elizabeth Swanepoel, who alleged that she deposed to the affidavits as her client was currently working in the desert in Abu Dhabi and was thus unable to depose to an affidavit. She also confirmed that she was unable to consult with her client as he is restricted from having Teams meetings. It was clear from the affidavits deposed to by the respondent's attorney that it was difficult for her to consult and obtain instructions from the respondent. The following is recorded in an answering affidavit dated 17 January 2025 deposed to by the respondent's attorney –

“The applicant knows that I am unable to freely consult with my client as he is precluded for large periods of time from having virtual

meetings due to the stringent security measures which comes with his employment.”

- [9] This is concerning and does not bode well for constructive co-parenting particularly in emergency situations.
- [10] It is common cause that the parties' relationship came to an end on or about 31 March 2019.
- [11] There has been a litany of litigation between the parties in respect of various issues relating to the exercise by them of their respective parental responsibilities and rights which litigation includes applications for protection orders. The applicant obtained a final protection order as against the respondent during or about 2016. It would appear from the papers that such order remains in force.
- [12] Other than to point out the obvious, being that the continuous acrimony and litigation between the parties is contrary to and severely harmful of the children's best interests, it serves no purpose to record herein the details of the past litigation between the parties. Suffice it to say there have been various experts appointed in various roles over the years who have similarly commented on this destructive conduct.
- [13] The parties' relationship is described by Professor Gertie Pretorius (“Professor Pretorius”), in a psycho-legal report dated 17 May 2024 as being ‘tempestuous and turbulent’.
- [14] Professor Pretorius interpreted the respondent's conduct as ‘over controlling’ and an attempt to ‘scare the household into submission’. Further conduct of the respondent was interpreted as ‘patriarchal violence and/or intimate

terrorism' coupled with 'psychological and emotional abuse'.

[15] The children have unfortunately been exposed to domestic strife/violence between their parents during the relationship

[16] The report further records that the parties 'both have an incapacity to handle conflict in a constructive way.' Further, that the parties 'do not only differ about most issues pertaining to the children's upbringing, but they make these differences personal and often attack each other's personalities, philosophies of life and parenting styles' and are 'equally responsible for the destruction between them.' [2]

[17] Professor Pretorius referred to the ongoing litigation between the parties thus -

"The ongoing litigation between Mr W and Ms S is evidence that they are emotionally still attached to each other. When couples cannot find closure after break-ups, and continue to litigate, the attachment is often seen as a co-dependent relationship. From a psychological point of view, the plethora of cases against each other confirms the co-dependency between Ms S and Mr W. It, moreover, indicates the "relationship addiction between them as described in the literature (Mental Health America, MHA). Most important to note is that, from a systems theoretical point of view, co-dependence is never linear and caused by one person in the relationship. It is however a circular process that is maintained by both individuals in a relationship and entrenched in co-dependent family dynamics (Scaturo, Hayes, Sagula & Walter, 2000.) ... both parties are equally responsible for the dynamics between them and affecting the minor children in the family, rather than putting the blame for everything on either party ..."

[18] Professor Pretorius warned that –

"... it will be safe to say that they (B and M) have been immeasurably harmed by the acrimony between their parents, the litany of accusations and court cases between their parents and the way in which their parents include them into the warfare between them and triangulate them."

[19] It is clear to this court that the relationship between the parties is indeed tempestuous and toxic, which has left, in its wake, a trail of devastation and destruction in the children's lives. They have been moved from pillar to post during 2024 and as a consequence have been immeasurably harmed by the conflict (described as 'warfare' by Pretorius) and acrimony between their parents. In the result, the children's best interests, their emotional health and even their physical

well-being have been seriously compromised.

The present application

[20] The trigger for this application would appear to be the order of De Souza-Spagnoletti of 19 June 2024. The order was obtained by the respondent on an urgent basis when he established that the applicant had relocated to Cape Town with the children on 17 June. The order provided inter alia that the children were not to relocate to Cape Town or elsewhere. [3] The children were returned to the respondent in Johannesburg, after being in Cape Town with the applicant for only a day, albeit he was in Abu Dhabi at the time. The order did not

contain any provisions or variations to the previous order of Mahomed AJ of 17 May 2024 which provided for primary residence to be with the applicant, and which further provided for contact between the respondent and the children when the respondent present in South Africa.

- [21] It would appear however that respondent then kept the children notionally ‘with him’ subsequent to this order and the return of the children to Johannesburg. The children in fact found themselves resident with the respondent’s mother for a period. The respondent was not present as he was in Abu Dhabi. During this period, the children were prevented from having

any contact with the applicant which caused severe harm and disruption to their already turbulent existence.

- [22] The respondent’s mother is 74 years of age. She has been diagnosed with stage four spinal cancer and is unable to care for the children when in her care without the assistance of the respondent. In an affidavit deposed to in domestic violence proceedings brought against the applicant she herself confirmed that she is frail and sick.

- [23] As a consequence, Professor Pretorius assessed the children again and in an addendum to her May 2024 report dated 5 August 2024 recorded that when she saw the children on 1 August 2024, she “met two highly traumatised and confused children who are at the centre of their parents ongoing battle against each other.”

- [24] Hence the present application.

Inter Provincial Relocations

- [25] Whilst the respondent’s consent for a relocation within the borders of the Republic is not strictly necessary or required by the Children’s Act[4] which does not expressly regulate inter provincial relocation[5], the applicant approached the court during October 2024 as the respondent opposed the children’s relocation to Cape Town with her.

- [26] Section 31 of the Act does not require the consent of a co-holder of parental responsibilities and rights for such a relocation. What is required in terms of sections 31(2)(a) and

- (b) is that –

“Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.

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

Urgency

- [27] The application concerned the best interests of two minor children who have been exposed to severe acrimony and much litigation and who desperately require stability going forward. The application was thus indeed urgent. The applicant and the children had already relocated to Cape Town in accordance with a directive made by a jointly appointed parenting coordinator, Dr Lynette Roux (“Dr Roux”)[6] and the children required finality and certainty.
- [28] As above, the application came before me in the urgent family court on Tuesday 22 January 2025. In the face of the history of the matter (briefly alluded to above) and in the children’s best interests I informed counsel for both parties that I intended to deal with the matter and did not wish to hear argument on urgency as the children clearly required the court’s intervention.
- [29] The respondent contended that the matter was not urgent. I disagree.
- [30] The respondent, in response to the applicant’s amended notice of motion and supplementary founding affidavit dated 6 January 2025, launched a counter application wherein he sought inter alia to have the applicant declared to be in contempt of the 19 June court order together with the return of the children to Gauteng. He contended that the order was ‘was a final order on the issue of relocation.’ I was informed during the proceedings by Ms Grobler who appeared for the respondent, that the respondent would not be pursuing his counter application, and as such whilst Ms Grobler was vociferous in her submissions as to the applicant’s conduct and her alleged contempt of the 19 June order, no substantive submissions were made in respect of the counter application.
- [31] As the minor children’s upper guardian, this court was entitled and indeed enjoined to ‘revisit’ the relocation issue which had in any event not been adjudicated upon by the court in June 2024.
- [32] Each of the parties disputes the version of the other in material respects in relation to the abuse and the papers are replete with factual disputes, many of which are irresolvable on the papers. What is common cause on the papers is that the relationship between the parties is tempestuous and toxic and that their respective conduct is not in their children’s best interests and has in fact caused much harm and distress to the children.

The applicant’s reasons for the relocation

- [33] The applicant became unemployed from 31 January 2024 after losing her job. This was as a result of poor work performance as a consequence of the psychological and emotional strain she has faced both during and subsequent to her relationship with the respondent. The applicant was absent from her employment on a regular basis as a consequence of the ongoing litigation which placed her employment in jeopardy.
- [34] She was thereafter unable to secure further employment in Johannesburg and found herself in a precarious financial position including an inability to secure a permanent place of residence for herself and the children. Whilst maintenance for the minor children is court

ordered[7]; the respondent approached the maintenance court for the district of Boksburg in order to set aside his maintenance obligations[8]. This enquiry appears to be pending. According to the applicant, the respondent's compliance with the maintenance order is erratic.

- [35] Notably, the applicant and the children have been assisted financially by a friend of the applicant who has generously provided loans and made payment of the rental for a home for the applicant and the children in Cape Town for a period of 12 months. She appears to have similarly assisted the applicant with the payment of legal costs. The applicant has incurred substantial debt in this regard which without any form of employment she will be unable to even begin to settle.
- [36] The applicant finally secured full time employment in Cape Town during or about June 2024. This led to the applicant moving to Cape Town with the children without the respondent's knowledge which resulted in the order of 19 June and the return of the children to Johannesburg. The applicant returned to Johannesburg and to the children a couple of months later.
- [37] The applicant's desire to take up the employment in Cape Town led to her bringing the urgent application during or about September 2024.
- [38] The applicant has secured employment in Cape Town which position she took up on 13 January 2025. She has secured a 3 bedroom home for herself and the children and places for the children at a private school.
- [39] The applicant has family and a support system in Cape Town including her sister and mother who both reside in the same area as the applicant and the children as well as an aunt. The applicant provided information as to the schools together with a sixteen page document titled 'BS (applicant's research: Cape Town vs Johannesburg Scenario' wherein she provided detailed information as to her family members (including a large extended family) living in Cape Town, the respondent's family members living in Johannesburg, her home in Cape Town, the practicality of the relocation and the effect it would have on the respondent's contact with the children, the schools in Cape Town and Johannesburg, the opportunities in Cape Town for the children in respect of their extra mural and sporting activities and the advantages and disadvantages of relocation.
- [40] The applicant included the views of the children and referenced the addendum of Professor Pretorius dated 5 August 2024.
- [41] The applicant contends that with secure employment, which she now has in Cape Town, she will be in a position to provide the children with a loving, stable home and environment with her in Cape Town. The children will not cope in Johannesburg without her. This much is clear from Professor Pretorius' addendum to her report.

- [42] As above, the respondent is not in the country for at least six months of the year. He spends his 'down time' in Johannesburg in a rented property in which his mother resides and rents a vehicle when he is in the country.
- [43] The applicant was further guided by the assessments and directives of the jointly appointed parenting coordinator, Dr Roux, who gave a directive on 7 December 2024 that the children were to relocate with the applicant to Cape Town. Dr Roux made this directive in the children's best interests after consultations with the parties and obtaining the opinions and views of the children. She obtained collateral information from the children's then therapist, Dr Greg Pienaar and Professor Pretorius. I deal hereunder with Dr Roux.
- [44] In the premises and having regard to the facts and circumstances of the parties and the children, there is nothing to gainsay the reasonableness or bona fides in respect of her desire and decision to move to Cape Town with the children.

The respondent's grounds of opposition to the relocation

- [45] The respondent strenuously opposed the relocation to Cape Town.
- [46] He relied heavily on his belief that the 19 June order was the final word on relocation and that the applicant was in the circumstances to be found in contempt thereof.
- [47] On the papers, the respondent criticised and refused to accept the veracity of the applicant's employment in Cape Town, her home there and the loan and financial assistance she has received from her friend in order to not only survive but to secure a home for herself and the children in Cape Town.
- [48] It is difficult to comprehend the respondent's objection to the children residing with their mother in Cape Town in circumstances where he works in Abu Dhabi on 28-day cycles. His proposal that the children could stay in Johannesburg with his mother and an au pair whilst he is not present in the country, fall to be rejected. It was indeed rejected by Dr Roux. His proposals in

any event fail to take into account the children's best interests, their attachment to their mother and the reports and findings of Professor Pretorius and Dr Roux.

- [49] It appeared that the respondent's objections to the relocation are nothing short of a mechanism by which he can retain some measure of control over the applicant and the children who are to continue to reside in Johannesburg for his own convenience when he is present and in the country.
- [50] Ms Grobler for the respondent submitted that Dr Roux's directives did not override the 19 June order. She further submitted that whilst the respondent is indeed not present in the country for 28 days of every other month, when in country, he is a very involved father who solely maintains the children.

- [51] Ms Grobler argued that the applicant's move with the children to Cape Town was 'a final act of parental alienation which will sever the bond between him and his children ... he will not see his children again.' According to Ms Grobler the relocation is contrived for this very purpose. This of course makes no sense as the applicant can just as easily alienate the children in Gauteng as she can in the Western Cape.
- [52] Notably and whilst the applicant was persistently accused of alienating the children, Professor Pretorius found that both parties were found to have engaged in harmful parenting practices including but not limited to general badmouthing of each other, name calling, making the target parent appear dangerous or sick, defaming each other, restricting or withholding contact and exposing the children to their conflict. She concluded that both parents employ alienating strategies and that the children demonstrated symptoms of Parental Alienation Syndrome. It was recorded that both parents have thus inflicted harm on the children.
- [53] It was further submitted that the respondent objects to the relocation as it will interfere with and prevent the respondent's objective of a shared residency regime being implemented. A shared residency regime, which has not been found to be in the children's best interests by any of the appointed experts, is not something that was before me and again makes no sense in light of the respondent's lengthy monthly absences from the country.
- [54] Professor Pretorius addressed shared residency in her report of 17 May 2024. She concluded that neither child can be without the applicant for twenty-eight days at a time and thus recommended that the children reside permanently with the applicant. On a reading of the addendum to the report of 5 August 2024 it is clear that the children were severely traumatised and harmed psychologically when removed from their mother which resulted in the deterioration of the children's relationship with the respondent and intensified psychological splitting in both children.
- [55] It was further submitted on behalf of the respondent that his home and family are in Johannesburg and that he could not move to Cape Town whilst his mother is in Johannesburg. As above, the respondent rents a home for his mother and himself in Johannesburg and rents a vehicle when he is in country. He can similarly rent accommodation and a vehicle in Cape town when he visits his children in Cape Town. Ms Grobler submitted that this was not an option as the respondent would have to incur these costs to exercise contact with his children.
- [56] The respondent's opposition to the move from Johannesburg to Cape Town fails to appreciate and to take into account the fact that the respondent is absent from the children's lives for at least a month at a time every second month. The respondent appears to want to prioritise his own interests when he is in country over those of the applicant and the children, who are in her primary care.

[57] Instead, he demands that all are to be present and waiting for him in Johannesburg. The applicant's rights to freedom of movement, dignity and her socio-economic rights appear to be lost on the respondent.

[58] Ms Grobler appreciated the urgent need for the children to attend school and the need for an urgent decision in order for this to occur. It was for this reason that I handed down the interim order of 27 January confirming the children's relocation to Cape Town with the applicant.

The directives of the jointly appointed parenting coordinator

[59] The parties jointly agreed to the appointment of Dr Roux as parenting coordinator ("PC") during October of

2024. Dr Roux was mandated to resolve the issue of the applicant's proposed relocation. Dr Roux consulted with the parties on 20 and 21 November and assessed the minor children on 26 November and 4 December. Her powers were those as contained in the 17 May order and included the power to make binding directives on the parties which directives were to be complied with unless varied or set aside by a court.

[60] Dr Roux provided the parties with her first report and directives on 7 December. The report is comprehensive. Dr Roux personally confirmed the existence of the applicant's lease and accommodation in Cape Town as well as her employment in Cape Town.

Her directives included the following –

- B and M should relocate to Cape Town with their mother and continue to reside primarily with her in accordance with paragraph 3.1 of the court order of 17 May 2024;
- The respondent should continue to exercise contact with the children in accordance with the aforesaid order;
- During term the contact to be exercised in Cape Town, weekend contact could be exercised in either Cape Town or Johannesburg;
- The same for holiday contact;
- The children are to continue to receive psychotherapy in order to allow them to sufficiently work through the trauma they have experienced, thereafter, the possibility of increasing the respondent's contact must be considered;
- The current maintenance regime with regard to the children's educational needs remains in force;
- The parties are to provide each other with details including addresses, details of all travel arrangements, including flight details and all relevant contact details;

- The respondent's telephonic contact with the children shall be exercised on Mondays, Wednesdays, Fridays and Sundays by the parent who has not had contact with the children on that day;
 - B and M are to be afforded unrestricted telephonic contact with either parent.
- [61] As is evident from the order hereunder, it is not practical for the respondent to exercise contact with the children as per the 17 May 2024 order as the children are no longer in Johannesburg.
- [62] The respondent, dissatisfied with the aforesaid directives, refused to agree to the children moving to Cape Town. Dr Roux provided a further report on 19 December 2024 wherein she confirmed her directives and her role as parenting coordinator and her authority to issue directives in accordance with the court order of 17 May. The respondent made it clear to Dr Roux that he would be bringing an application to this court in January 2025 to review her directives regarding the relocation. No such application was launched. The report recorded a proposal made by the respondent that he would make payment of all of the applicant's costs incurred in respect of her move to Cape Town, make payment of the deposit in respect of a home for her and the children in Boksburg and make payment of the premiums in order to retain the children as dependents on his medical aid policy held with Discovery.
- [63] The applicant remained steadfast in her desire to relocate to Cape Town with the children in accordance with Dr Roux's directive. On 19 December, the respondent was provided with all relevant and requested information thereon and invited to participate in the choice of a therapist for the children in Cape Town.
- [64] On 23 December, the respondent's attorney on behalf of the respondent persisted with their rejection of Dr Roux's directives stating that 'there is currently a final court order prohibiting your client to relocate to Cape Town. The directive of Dr Roux does not take precedence over the order. Your client will have to bring an application for the verification of the order allowing her to relocate...'. The threat of contempt proceedings, coupled with incarceration was made.
- [65] Further correspondence was addressed by the applicant's attorneys to the respondent and his attorneys wherein various details were provided in respect of inter alia the applicant and the children's circumstances in Cape Town including the provision of the applicant's employment contract.
- [66] Needless to say, the respondent refuses to retain Dr Roux as PC.
- [67] As indicated, the applicant and the children moved to Cape Town during or about the second week of January and subsequent to the respondent's departure to Abu Dhabi.
- [68] The applicant thus filed a supplementary affidavit dated 6 January 2025 together with an amended notice of motion in order to provide the court with updated information relating to the relocation and more specifically, the involvement of Dr Roux.

[69] This prompted the respondent to deliver his counter application.

[70] The respondent advised on 4 January that he rejected the children's enrolment in the suggested school in Cape Town and the appointment of a play therapist there.

Principle considerations in relocation matters

[71] Courts in deciding a relocation must carefully evaluate, weigh and balance a myriad of competing factors.

[72] Cloete AJA in *Jackson v Jackson*[9] pointed out that such litigation amounts to a 'judicial investigation' of what was in the best interests of the children. *Scot Ja* in the minority judgment stressed that 'what must be stressed is that each case must be decided on its own particular facts.'[10]

[73] The respondent's presence in the country only every alternate month coupled with the emotional and psychological trauma suffered by the children, and the applicant, are facts specific to this matter and which weighed heavily on my decision.

The decision to relocate must be reasonable and bona fide

[74] Keeping in mind that this is not an international relocation I have had regard to the following decisions which have provided guidance in this matter.

[75] In *Cunningham v Pretorius*[11] Murphy J made reference to the balancing act that a court adjudicating a relocation faces. He stated the following in this regard -

"Generally speaking, before substituting consent or refusing leave to a custodian parent to take a child out of the country, the court must carefully weigh and balance the reasonableness of the custodian's decision to relocate, the practical and other considerations on which the decision is based, the competing advantages and disadvantages of relocation, and how relocation will affect the child's relationship with the non-custodian."

[76] Nugent J in *Godbeer v Godbeer*[12] whilst recognising that the children's relocation with their mother to the United Kingdom would obviously have an effect on their contact with their father recognised the following -

"The applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family."

[77] Having had regard to the facts of the matter and more particularly the acrimony between the parties which contributed to the circumstances surrounding the applicant's desire to move to Cape Town with the children, I am satisfied that the applicant's decision to relocate is genuine and rational and as such bona fide and reasonable. I am satisfied that the relocation in the circumstances is in the children's best interests. I am further satisfied that the respondent's contact with the children need not be affected by their relocation to Cape Town.

Paramourncy of the best interests of the minor children

[78] The ‘central and constant consideration’[13] in determining a relocation application is whether the child/children’s best interests will be served by permitting their removal from the country to another country, or as in this matter, from one province to another.

[79] It is trite that in all matters concerning the care, protection and well-being of a child, the standard of the child’s best

interests is of paramount importance and must be applied.[14]

[80] In *F v F*[15] Maya AJA held that ‘in such matters, the courts consistently applied the criterion that the children’s best interests were paramount. What was in the child’s best interests, however, depended on the facts of the particular case.’

[81] Satchwell J in *LW v DB*[16] provided principles and guidelines applicable to the relocation of children which may be distilled from the Constitution, the judgments of numerous courts on the subject and conventions to which the Republic is a signatory. The guidelines provide that a court may take into account the following –

“1. The interests of the children are the first and paramount consideration.

2. Each case is to be decided on its own particular facts.
3. Both parents have a joint primary responsibility for raising the child and where the parents are separated, the child has the right and the parents the responsibility to ensure that contact is maintained.
4. Where a custodial 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 custodial parent is shown to be bona fide and reasonable.
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.”

[82] B expressed to Professor Pretorius during the assessment of August 2024 and at a time when they were residing with their paternal grandmother and being afforded no contact with the applicant, that he ‘missed his mommy and just wanted to go back to her.’ He presented with emotional dysregulation, confusion and trauma and wept throughout the entire psychological evaluation at times ‘gasping, sniffing and sobbing so severely that it was difficult to hear him.’ This he verbalised was as a consequence of the fact that “we were taken away from mommy again.” He could not comprehend why he and his sister had to go back to living in the respondent’s home. He presented to Professor

Pretorius as a ‘broken child’.

- [83] M, who is six, expressed “we never had a turn with my mommy”, “I want to go to my mommy”, “I am very sad because I can’t see my mommy” and “I want mommy to let us come home.” She recalled and repeated incidents in which she and her brother had received hidings from their father. Professor Pretorius recorded that this must have had a big impact on her for her six year old memory to persistently remember and recall these incidents. M had brought this up during her previous assessment. M was confused and dejected. She could not understand the position she and her brother found themselves in.
- [84] Dr Greg Pienaar, the children’s therapist at the time, confirmed to Professor Pretorius that it would be better for M to reside with the applicant than with her grandmother.
- [85] Professor Pretorius found both children to have markedly deteriorated since her May report and as a consequence of the applicant’s move to Cape Town, the concomitant urgent application and the children’s forced return to Johannesburg during July 2024 whereafter they were moved to their grandmother whilst contact with the applicant was prohibited by the respondent and his mother. and their removal from their mother and placement with their grandmother. She thus included in her recommendations that in the event of the children being moved again they were to be prepared for such transition with the necessary support and containment.
- [86] On Professor Pretorius’ recommendation and prior to finalisation of the addendum the children were immediately reunited with the applicant and returned to her care on 1 August 2024. It is not in these children’s best interests to be separated from the applicant for extended periods of time and as such it is in their best interests to remain primarily resident with the applicant. This will now be in Cape Town.
- [87] A court adjudicating an application to relocate with children must also take into account the rights of the parent who is seeking leave to relocate.

Rights to freedom of movement, dignity and socio-economic rights

- [88] Maya AJA in F v F[17] addressed these rights which are enshrined in our Constitution as follows –

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

intertwined with those of S' did not deserve 'any attention' and that '[i]n arriving at a just decision [a Court] cannot be held hostage to the feelings of aggrieved litigants'.

- [89] The court further pointed out that it is predominantly woman who care for children and as such concluded that –

“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 their former spouses.”[18]

- [90] It is apposite to refer to what was stated by Satchwell J in *LW v DB*[19] -

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

- [91] This is always a vexed question which courts in other jurisdictions have had to adjudicate on. The Australian High Court in *U v U* [2002] HCA 36[20] pointed out that ‘although the best interests of the child are to be treated as paramount’, “They are not to be elevated to the sole factor for consideration. The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child. The general quality of life of both parents and the child is relevant” (at para 159).

- [92] The Australian High Court in *AMS v AIF* restated that the statutory instruction to treat the welfare or best interests of the child as paramount does not mean that the legitimate interests or desires of the parents ought to be ignored.[21]

- [93] Maya AJA further recognised the invariable consequences of divorce / separation of parents when she said the following:

“It is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible.”[22]

- [94] A parent’s rights to freedom of movement, dignity and socio-economic rights also play a role in determining the best interests of children in such circumstances. In *Jackson*[23] Scott JA found that:

“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 endeavor 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 guideline, 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."

[95] As such, and in deciding whether or not relocation will indeed be in a child's best interests, a court has to evaluate and balance a myriad of competing factors, including the child's wishes in appropriate cases.

[96] Significantly also, the Supreme Court of Appeal restated the position that a court sits as an upper guardian of minors and that its discretion which is exercised is not circumscribed in the narrow or strict sense of the word.[24] It requires no onus, in the conventional sense, to be satisfied when it is called upon to determine whether or not a child can accompany a parent who leaves the jurisdiction of that court.

[97] The increasing numbers of relocation disputes referred to in psychological and legal literature, in South African jurisprudence

and that of other jurisdictions, is a reflection of the increasing trend of geographical mobility, particularly in relation to work, coupled with a higher rate of separation or divorce after which former partners go their different ways. The reasons for relocating both within and outside of the borders of the Republic are endless: undertaking new employment opportunities (as is the case in this instance), crime and safety, following a new spouse or partner, educational ambitions or and the desire to return home or to rejoin family.[25]

[98] 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/children and the consequent loss of contact and the diminution of the parent/child relationship. In some cases, the left behind parent has shared parenting on the basis of equal time and responsibility, whilst in others the involvement has been limited. Sometimes the relationship between the divorced spouses is amicable and supportive while in other cases, the relationship is acrimonious and hostile. In many cases the bond between the parent to remain behind and the child has been found to be loving. In each case courts have acknowledged the hurt and desperation of the parent who does not plan to relocate.[26]

[99] In this regard the court in LW stated as follows:

"What must be understood is that we no longer live in a mindset where birth, life and death are all played out in one geographic situation surrounded by those same people who were present at each of those important milestones. People move to go to school, to study, to find a job, to follow jobs, to earn something or to earn more, to improve oneself, and to see the wider world. There is nothing unusual or sinister in such mobility."[27]

[100] The applicant's decision to relocate to Cape Town with the children for better employment opportunities and to be closer to her family and support system is reasonable and bona fide. It is in the children's best interests that they remain primarily in her care. This is confirmed by both Dr Pretorius and Dr Roux. The applicant's rights to freedom of movement, dignity and autonomy cannot be limited in order to ensure that the respondent is not inconvenienced when he spends his 28 days in South Africa every second month. The respondent's regular contact with the children when he is in South Africa can and must be sustained.

Conclusion

[101] I requested the parties' respective counsel, Ms Strydom and Ms Grobler to provide me with the identity of a psychologist/s to be appointed to provide therapy for the children in the event that I confirmed their relocation. They were also requested to provide me with the identity of a psychologist/social worker/counsel to be appointed as the new PC. I was hopeful that agreement could be reached on these aspects which I intended to include in the order. Neither counsel reverted. As such I have included in the order, a therapist based in Cape Town whose practice is in close proximity to the area in which the children now

reside and provided a mechanism for the appointment of a PC.

[102] Ms Grobler sought an opportunity for her attorney to consult with the respondent in order for him to make submissions as to what contact he would wish to exercise with the children should they remain in Cape Town. I agreed to this as the respondent had sought the dismissal of the application and had thus not sought any relief in the alternative. No submissions were received and as above, the respondent's attorney delivered a notice of withdrawal.

An order is made as follows:

1 The provisions of this order, read with the interim order of 27 January 2025, shall substitute all previous court orders relating to the parties' respective parental responsibilities and rights in respect of the minor children BJW and MBW.

2 The parties shall remain co-holders of full parental responsibilities and rights in respect of the minor children in terms of sections 18(2)(a) – (d) of the Children's Act 28 of 2005.

3 The minor children's primary residence shall be with the applicant in Cape Town and the children shall attend school in Cape Town.

4 The respondent shall exercise contact with the minor children when he is in South Africa as follows:

4.1 During term:

4.1.1 every alternate weekend in Cape Town from a Thursday after school until the Monday morning when he shall take the children to school;

4.1.2 in the alternative to 4.1.1 above for a week in Cape Town from the Friday after school until the Friday morning when he shall take the children to school (in other words for a week during each 28 day period that the respondent is in South Africa);

4.2 During school holidays:

4.2.1 half of the holiday period time which contact may be exercised in Cape Town or Johannesburg or any other venue in South Africa;

4.2.2 the respondent shall provide the applicant with details of any and all travel arrangements for the children including flight details, address/s of where the children will be staying with him and all relevant contact details.

4.3 On the children's respective birthdays to be arranged between the ` parties with the assistance of the parenting coordinator to be appointed;

4.4 On his birthday and on Father's Day to be arranged between the parties with the assistance of the parenting coordinator to be appointed;

4.5 Electronic (telephone or WhatsApp) contact on Mondays, Wednesdays, Fridays and Sundays between 17h00 and 19h00 South African time (the applicant shall be afforded the same electronic contact when the children are in the respondent's care).

5 The minor children shall be afforded unrestricted electronic contact with either parent should they request such contact when in the care of the other parent.

6 The applicant shall provide the respondent with all information and contact details of the children's school and ensure that he is provided with updates on their progress in their new school, any happenings or events that he may be able to attend, their term reports and any and all other information relating to their education, participation in sports and extracurricular activities. The same to apply in respect of their health and any medical concerns.

7 The parties shall, within 10 (ten) days of this order, approach the Chairperson of the Gauteng Family Law Forum who shall identify and appoint a parenting coordinator ("PC") in order to facilitate healthy and constructive co-parenting. The parties shall do all things necessary and required of them in order to secure the appointment of the PC and shall without delay sign the required documentation and any mandate required therefore.

8 The PC's powers and authority shall include:

8.1 the power and authority to monitor and vary the respondent's contact with the children;

8.2 the power to monitor the potential of parental alienation by either party;

8.3 the power and authority to issue directives to the parties as and when necessary, in order to ensure the paramountcy and protection of the children's best interests and wellbeing, which directives shall be binding on the parties until they are varied or set aside by a competent court;

8.4 to provide for a method of constructive communication between the parties;

8.5 to provide for a dispute resolution procedure in the event that the parties are unable to resolve any issue that may arise in respect of the exercise by them of their respective parental responsibilities and rights;

8.6 the authority to contact the children's play therapist and the parties' respective therapists in order to receive regular feedback on their respective progress;

8.7 the power and authority to refer the children and the parties for any required and necessary therapies.

9 The parties shall be liable for the costs associated with the PC or any professional appointed by the PC, as may be necessary from time to time, on a 70/30 split, the respondent to pay 70% and the applicant to pay 30% unless as otherwise determined or directed by the PC.

10 The PC's appointment shall only be terminated by the parties jointly in writing, by the resignation of the PC or by an order of court. In this eventuality the parties shall approach the Gauteng Family Law Forum as above for the appointment of a new PC with the same powers and authority.

11 The minor children shall each be afforded therapy with Esna Bruwer ("Bruwer") in order to address their overall psychological wellbeing and to assist them to deal with the damage incurred due to their lived experiences. The applicant and the respondent shall do all things necessary and required in order to ensure her appointment forthwith and within 10 (ten) days of this order.

11 The respondent is to source a specialist ophthalmologist in Cape Town in order to assess BJW's condition and BJW is to be afforded the required treatment forthwith.

12 The applicant and the respondent are to each appoint a therapist of their choice who is to be a clinical psychologist registered with the HPCSA in order to assist them to deal with inter alia the aftermath of the relationship, the continuing acrimony between them and their respective parenting skills. The respondent should partake in an anger management programme/course.

13 The parties shall provide the PC with the details of their respective therapists in order that the PC may receive regular feedback on their progress and the progress of the minor children.

14 Dr Lynette Roux is removed as PC.

15 The current maintenance order handed down in the Maintenance Court for the district of Boksburg on 3 September 2022 shall remain in place until varied by a competent court.

16 Each party shall pay their own costs.

M ABRO

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

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[1] Order of Mohomed AJ 17 May 2024 annexure “BMS6” to the applicant’s founding affidavit. This order appears to be preceded by an order of the Children’s Court also awarding primary residence to the applicant on 18 May 2019.

[2][2] Note: the report of Professor Pretorius was undertaken to do a full assessment of parental responsibilities and rights on care, contact and guardianship at a time when the children were removed from the applicant’s residence and placed in the residence of their father largely under the care of his mother, their paternal grandmother. The paternal grandmother is unable on her own and without the assistance of an au pair to care for the children. The assessment was not a relocation investigation and assessment.

[3] The 19 June 2024 order was attached to the founding affidavit marked “BMS5”

- [4] Section 18(3)(c)(iii) of the Children's Act 38 of 2006 provides that a parent or other person who acts as guardian of a child must give or refuse and consent required by law in respect of the child, including consent to the child's departure or removal from the Republic. Under section 6 of the Act, a person having parental responsibilities and rights in respect of a child must be informed of any action or decision concerning the child which significantly affects the child.
- [5] TLK v EEEB (2024-149673) Gauteng Division, Johannesburg, 10 January 2025
- [6] Dr Roux was jointly appointed as PC during October 2024. She was, by agreement, vested with the powers contained in the 17 May 2024 order of Mahomed AJ which included the power to issue directives which directives were to be complied with by the parties until such time as they were varied or set aside by a High Court. Dr Roux issued a number of directives including two directives on 9 and 19 December 2024 wherein she authorised the children's relocation with the applicant to Cape Town and confirmed said directive.
- [7] A maintenance order was granted on 3 September 2022 in the Maintenance Court for the district of Boksburg, in terms of which the respondent makes payment of maintenance to the applicant for the minor children which includes a cash amount of R35 000.00 per month for both children and the payment of their school fees directly to the schools.
- [8] It would appear that this was done when the children were residing with the respondent's mother in the respondent's home in Johannesburg. No order had been granted for a variation in the provisions relating to primary residence and contact as ordered on 17 May 2024.
- [9] 2002
- (2) SA 303 (SCA) para [5] at 307
- [10] Jackson supra para
- [2] at 318
- [11] 2008 JDR 1022 (T) para [5]
- [12] 2000 (3) SA 976 WLD at 981 to 982
- [13] Jackson supra para
- [34] at 317
- [14] Section 9 of the Children's Act 38 of 2005
- [15] 2006
- (3) SA 42 (SCA) para [8] at 47E-F
- [16] 2020

(1) SA 169 (GJ) para [20] at 176

[17] 2006

(3) SA 42 (SCA) para [11]

[18] Supra para [21]

[19] Supra para [52]

[20] Referred to by Satchwell J in LW v DB supra para [63]

[21]

[1999] HCA 26; (1999) 199 CLR 160 referred to by Satchwell J in LW v DB supra at para [73]

[22] F v F supra para [10], p 48

[23] 2002

(3) SA 303 (SCA) at p318

[24] Bezuidenhout v Bezuidenhout 2005

(2) SA 187 (SCA) para [17]

[25] Numerous reasons for relocations are dealt with in M Gindes in “The Psychological Effects of Relocation of Divorce”, vol 15, 1998, American Academy of Matrimonial Lawyers at pp 128 – 131; Bruch and Bouwermeister “The Relocation of Children and Custodial Parents: Public Policy, past and present” (1996) 30 Family Law Quarterly at 248/9; Braver & Elman “Relocation of Children after Divorce and Children’s Best Interests: New Evidence and Legal Considerations” Journal of Family Psychology, 2003 M, vol 17, no 2, at pp 207 - 208

[26] LW v DB supra para [19]

[27] supra para [27]

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