

SOUTH AFRICA / JUDGMENT

C.A v F.A (111694/2024) [2024] ZAGPPHC 1116 (25 October 2024)

[2024] ZAGPPHC 1116

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose J

CASE / FILE NUMBER

111694/2024

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FLYNOTES:

FAMILY – Children – Relocation –
To
United Kingdom with mother for job opportunity – Mother
responsible for child's needs in South Africa –
Primary caregiver since birth – Father engaged in farming in
another province – Financial and lifestyle benefits
in UK –
Family close on hand – Educational benefits – Dire
professional and personal consequences should
they not relocate –
In best interest of child that she relocates to UK with her mother
– Leave granted to relocate.
REPUBLIC
OF SOUTH
AFRICA
IN
THE HIGH
COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case Number:

2024-111694

In the matter between: AC
Applicant
and
AF
Respondent

JUDGMENT

MOKOSEJ

Introduction

- (1) Before this court is an urgent application for leave to relocate the minor child born of the relationship between the applicant and the respondent, O., to the United Kingdom ("UK"). The relief is opposed by the respondent on several grounds. The respondent seeks an order dismissing the application with costs, alternatively, that the application be postponed sine die pending an investigation to be conducted by the Family Advocate or an expert to be appointed by the Court.

Brief Facts

- [2] The applicant, a female business analyst is currently residing in Pretoria and was born and raised in the Republic of South Africa. She is in possession of a UK passport premised on the fact that her mother is a UK citizen, having been born in the UK. The respondent is a farmer and a South African citizen presently residing in the Free State. A child, O ..., was born of the relationship between the parties on 4 May 2022 and at Pretoria.
- [3] The applicant contends that after completing her studies at the University of Pretoria, she lived and worked in the UK for a period of two years before returning to South Africa to pursue her professional career.
- [4] The applicant further contends that she met the respondent online in June 2021 at which time the respondent was working as a pilot on contract in Iraq. He returned to South Africa in January
2022. The parties were engaged to one another at the end of January 2022. The respondent then decided to resign from his job as a pilot to start farming on his family farm in Senekal, Free State. The respondent moved permanently to Senekal in August 2022, after O...'s birth. The applicant rented a one-bedroom flat in Pretoria where she stayed.
- [5] The applicant avers further that the relationship with the respondent turned for the worse and the engagement and relationship were terminated in November 2022. She never went to reside permanently in the Free State with the respondent and that it was towards the end of February 2023 that an employment opportunity was received by her to work on contract in South Africa. This was when she commenced working after the birth of O....

- [6] The applicant further contends that the respondent had brought an application in the Children's Court Pretoria to be heard on 27 February 2023. At this hearing, it was held that the minor child was not in need of care and protection and a parenting plan was confirmed.
- [7] Since the birth of O...and since she commenced working full-time, the applicant contends that she has looked after O.... with the support of her family from time to time and has been responsible for all of O 's needs which include financial, physical, social and developmental needs.

However, she admits that both parties enjoy full parental rights and responsibilities, and that the respondent exercises contact with the minor child every alternative weekend and at Pretoria.

- [8] The applicant decided in or about February 2023 to emigrate to the UK. She applied for a position at the BCN Group and attended a final interview on 21 August
2024. She received an offer for employment from the BCN Group on 23 August 2024 which offer she accepted on 29 August 2024. The applicant informed the respondent of her intention to relocate to the UK with the minor child on 23 August 2024 but did not receive a response thereto. The applicant caused the application which now serves before this court.
- [9] The respondent opposes this application on the following basis: (1) That the application lacks the necessary urgency as the applicant has dragged her feet in instituting this application which is self- created urgency; (2) the applicant has strategically brought this application belatedly so as to deny the court the benefit of making use of the Family Advocate to investigate what would be in the best interest of the minor child. The respondent fails to furnish the court with reasons why if the order is granted it would not be in the child's best interests

Issues

- [10] Two issues are raised in this application, the first being whether the application is urgent. Secondly, whether the applicant has made out a case for the relief sought. In that regard, the question to be asked is whether the intended relocation to England will be in the best interest of the minor child.

Urgency

- [11] In addressing urgency, the applicant contends that as the sole provider of her family and having been offered a once in a lifetime job offer, she is unable to decline same. Such a move will result in increased financial resources for O....'s upbringing. Furthermore, she has siblings who reside in the UK and a sister with whom she will stay on arrival in the UK who resides close to her employment. She has researched private nursery schools around her employment where she has considered enrolling O....Furthermore, she has researched areas which she could relocate to in the UK.

- [12] The applicant contends that having accepted employment in the UK with the BCN Group it is expected of her to commence her employment no later than 18 November 2024. She will be unemployed and has also invested all her financial resources and savings so as to enable her and the minor child to relocate to the UK. Furthermore, her current lease terminates on 31 October 2024 and has not made any other arrangements to remain in Pretoria after that date. She contends that she will not be afforded substantial redress if this application is not heard on an urgent basis.
- [13] The respondent denies that the matter is urgent and avers that the applicant is abusing the processes of the court by dragging her feet to institute this application so late in the day and that the urgency is self-created. The respondent further contends that the applicant strategically brought this application belatedly so as to deny the court the benefit of making use of the Family Advocate to investigate what would be in the best interest of the minor child. The applicant had, at least from about February 2023 planned to relocate to the UK with the minor child and knew that he would refuse to consent to such removal. Hence, the application being made at this stage. The respondent contends further that the applicant was tardy in bringing this application and that bringing this application in such a hasty manner can never be in the best interests of O ...
- [14] The court is obliged in its determination of urgency to interrogate the allegations of the parties in the papers and decide whether the matter should be heard on an urgent basis. In terms of Rule 6(12)(b) of the Uniform Rules of Court a party seeking urgent relief must set out explicitly in his affidavit, the circumstances which render the matter urgent with full and proper particularity and must also set out the reason why he or she would not be afforded redress at a later date.
- [15] The applicant has explained that she is expected to commence employment on 18 November 2024 and would not get substantial redress in due course within this time. She also took the court into her confidence as to when she was made the offer of employment and when she accepted such offer and why the application was launched 'so late in the day'.
- [16] I disagree with the contentions of the respondent that the urgency is self-created, and that the application has been brought at this point so as to deny the court the benefit of making use of the Family Advocate to investigate the best interests of the minor child. The respondent further admits in his affidavit that he was aware of the fact that the applicant was considering relocating to the UK. In light of the explanation of the applicant having to commence work in the UK on 18 November 2024, I deem the application sufficiently urgent as to obtain a hearing on the urgent court roll.

Merits

- [17] In determining this matter, the most important consideration is the interest of the minor child. Bearing in mind that each case must be decided on its own particular facts, the other considerations as per LW v 08[1] are the following:

- (1) 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. (2) 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. (3) The courts have always been sensitive to the situation of the parent who is to remain behind. And the degree of such sensitivity and the role it plays in determining the best interests of the children remain a vexed question.

[18] Bezuidenhout AJ in the matter of RA v TA[2] held as follows:

"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 interest of the child which may or may not be irreconcilable conflict with those of one or both parents."

[19] I agree with this sentiment, moreover, the Constitution makes it clear that decisions pertaining to children are paramount and regard to their best interests must be considered at all times. Section 28 provides as follows:

"(2) The best interests of the child are of paramount importance in every matter concerning the child."

[20] The issue of relocation of minor children has been considered in many matters over the years. The principles have been set out in these cases and consideration has been given to them. In the matter of Jackson v Jackson[3] it was stated as follows:

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

[21] In deciding whether a relocation would be in the best interests of the minor child, the court must be careful to evaluate, weigh and balance a myriad of competing factors.[4] The rights of a custodian parent to pursue her own life and career involve the rights to dignity, privacy and freedom of movement.

Thwarting the custodian parent in the exercise of these rights may well have the effect of impacting the welfare of the very child

sought to be relocated. A refusal by the court to allow a relocation could well have the effect of forcing the custodian parent to relinquish what she views as an important life-changing and life enhancing opportunity. This could result in a bitter and frustrated parent who would then provide the child with feelings of resentment and bitterness which would not be in the child's best interests.

[22] Moreover, I am acutely aware of the fact that the non-custodian parent also has the right to maintain contact with the minor child. Section 18(4) of the Children's Act 38 of 2005 provides that whenever more than one person has guardianship of a child, each of them is competent, subject to any other law or order, to exercise independently and without consent of the other, any right or responsibility arising out of such guardianship. I am furthermore aware that should the relief sought be granted, it will affect the contact the respondent exercises presently.

[23] It has also been noted that the respondent referred a matter to the Children's Court sitting at Pretoria on 8 October 2024 wherein an order was granted inter alia, that both parents remain co- holders of parental rights and responsibilities of O... and that primary residence be with the mother in Faerie Glen and further provided for contact with the minor child. A parenting plan was confirmed.

[24] It is also noted that the applicant has tendered rights of access to the respondent in the UK and when she visits South Africa with the minor child.

[25] In considering the application in casu the Court is obliged to consider what is in the best interest of the minor child. It is common cause that the applicant has been the primary caregiver of the minor child since birth to date. The financial benefits to the applicant and the minor child should they emigrate will be many. This is inclusive of a secure and comfortable lifestyle with family close on hand; they will be residing in a country where the unemployment rates are far lower than in South Africa; there are educational benefits. I have no doubt that should the applicant and the minor child not relocate, there will be dire professional and personal consequences. The applicant has indicated that she will be earning far in excess of what she earns at present.

[26] I am also of the view that a refusal to grant the order will force the applicant to relinquish a life-enhancing opportunity and the welfare of the minor child is undoubtedly best served by her being in a happy and secure atmosphere in the primary care of the applicant, who to date, has been the primary caregiver of the minor child.

[27] Accordingly, I am of the view that it would undoubtedly be in the best interest of the minor child that she relocates to the UK with her mother.

Costs

[28] The general rule of costs is that the successful party should be awarded his or her costs. This rule should not be departed from except where there are good reasons for doing so such as misconduct on the part of the successful party or other exceptional circumstances. I can think of no reason why I should deviate from this rule as there are no exceptional circumstances.

Order

[29] Accordingly, the following order is granted:

1. This application is urgent.
2. Leave is granted to the applicant to relocate with the minor child, O... F..., born on ... from South Africa to the United Kingdom.
3. Permission is granted to the applicant to apply for a UK settlement visa, so as to enable O...to relocate to the UK with the applicant without obtaining the consent of the respondent in accordance with the provisions of Section 18(3)(c)(iii) and (iv) of the Children's Act 38 of 2005, as amended.
4. Insofar as the respondent's consent, signature or participation regarding any steps is required to enable the applicant to remove the minor child from South Africa to the United Kingdom, the respondent's consent is dispensed with.
5. The applicant shall be entitled to apply for any permits, licences, identity documents, passports, travel visas and the like for any international travel of O... from the UK without further written consent of the respondent. This includes documents pertaining to educational, health and welfare of O ...
6. That the respondent's rights to maintain contact with O... be exercised in the manner specified in Annexure "A" attached hereto.
7. The respondent's obligation to maintain O... as provided for in the Parenting Plan is suspended in toto on condition that the respondent is entitled to create a savings fund in South Africa of his own choice so as to enable him to maintain contact with O... as provided in Annexure "A".
8. The respondent and his family are entitled to contact with O for the purpose of saying their farewells on Sunday 3 November from 08H00 to 12H00.
9. The applicant is ordered to keep the respondent always informed of all serious aspects of O...s well-being and educational progress.

10. The respondent is ordered to pay the costs of this urgent application (Scale C).

Mokose J

Judge of the High Court

Of South Africa, Gauteng Division

For the Applicant: On instructions of: Adv FW Botes Schoemans Attorneys For the Respondent:
Adv K Fitzroy On instructions of: Coetzee Attorneys Date of hearing: Date of Judgement: 15
October 2024 25 October 2024

UNITED KINGDOM

ANNEXURE "X"

Whenever the Respondent is visiting in the UK, he will be entitled to the following contact rights with regards to the minor child, O[...]:

1. The visit and scheduling thereof, is subject to O[...]'s sleep schedule as well as her academic, scholastic, social, cultural, religious, sport and extramural obligations and responsibilities. All contact arrangements to be confirmed in writing at least 30 days in advance.
2. The following contact is to be phased in and age appropriate, using the Parenting Plan (dated 29 June 2023, marked Annexure "A" to the Founding Affidavit) as a basis and subject to O[...]'s psychological and emotional wellbeing and readiness as well as

referral to a Family Counsellor in the UK, if and when required:

2.1 Age 2 and a half to 3 years (November 2024 - May 2025) 08h00

- 17h00 daily for the duration of the Respondent's visit to the UK, under the supervision of the Applicant or someone appointed by the Applicant, whereof 3 hours would be unsupervised.

2.2 Age 3 to 5 (May 2025 - May 2027)

08h00 - 17h00 daily for the duration of the Respondent's visit to the UK, unsupervised.

2.3 Age 5 to 6 years (May 2027 - May 2028)

08h00 - 17h00 daily for the duration of the Respondent's visit to the UK, unsupervised with:

- (a) 1 night sleepover in the first week and 2 consecutive nights sleepover in the second week of his visit.

2.4 Age 6 onwards (May 2028 onwards)

08h00 - 17h00 daily for the duration of the Respondent's visit to the UK, unsupervised and provided that O[...]'s sleepovers have already been phased in, as follows:

- (a) 6 years:

2 consecutive nights sleepover in the first week and 3 consecutive nights in the second week of the visit.

(b) 7 years:

5 consecutive nights sleepover.

(c) 8 years onwards:

Sleepover for the duration of the visit.

3. Both Parties to have telephonic/video call contact with O[...] at all reasonable times when O[...] is with the other party.

SOUTH AFRICA

Whenever the Applicant and O[...] is visiting in South Africa, the Respondent will be entitled to one half of the time spent in South Africa with the following contact rights with regards to the minor child, O[...]:

4. The visit and scheduling thereof, is subject to O[...]’s sleep schedule as well as her academic, scholastic, social, cultural, religious, sport and extramural obligations and responsibilities. All contact arrangements to be confirmed in writing at least 30 days in advance.
5. The following contact is to be phased in and age appropriate, using the Parenting Plan (dated 29 June 2023, marked Annexure "A" to the Founding Affidavit) as a basis and subject to O[...]’s psychological and emotional wellbeing and readiness as well as

referral to a Family Counsellor in the UK, if and when required:

5.1 Age 2 and a half to 3 years (November 2024 - May 2025)

08h00 - 17h00 on the days agreed between the parties for the duration of the Applicant's visit to South Africa, under the supervision of the Applicant or someone appointed by the Applicant, whereof 3 hours would be unsupervised.

5.2 Age 3 to 5 (May 2025 - May 2027)

08h00 - 17h00 on the days agreed between the parties for the duration of the Applicant's visit to South Africa, unsupervised.

5.3 Age 5 to 6 years (May 2027 - May 2028)

08h00 - 17h00 on the days agreed between the parties for the duration of the Applicant's visit to South Africa, unsupervised with:

- (a) 1 night sleepover in the first week and 2 consecutive nights sleepover in the second week of his visit.

5.4 Age 6 onwards (May 2028 onwards)

08h00 - 17h00 on the days agreed between the parties for the duration of the Applicant's visit to South Africa, unsupervised and provided that O[...]s sleepovers have already been phased in with:

6 consecutive nights sleepover.

(c)8 years onwards:

Sleepover for one half of the duration of the visit.

6. Both Parties to have telephonic/video call contact with O[...] at all reasonable times when O[...] is with the other party.

[1] 2020

(1) SA 169 (GJ)

[2] 2023 JDR 1268 (GJ)

[3] 2002

(2) SA 303 at 318 E-I

[4] F v F 2006 (3) SA42 (SCA) at para [10]

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