

SOUTH AFRICA / JUDGMENT

C.R v S.R (11646/2022) [2023] ZAWCHC 224 (28 August 2023) [2023] ZAWCHC 224

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

11646/2022

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FLYNOTES:.

FAMILY

– Children – Relocation –

Voice

of the child – Considered in context with children's

best interest – Mother is primary caregiver –

Children

have a fantasised idea about life in UK, based solely on a

two-week fun holiday – Long term viability of permanent

relocation raises concerns – No guarantee of regular contact

mother – Risk to children's psychological

and

emotional wellbeing – Application dismissed.

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 11646/2022

In

the matter between:

CR Applicant

and

SR

Respondent

Coram:

Justice J Cloete

Heard: 18 August 2023
Delivered
electronically: 28 August 2023

JUDGMENT

CLOETE J:

- [1] This is an opposed application in which the applicant (“the father”) seeks leave of the court for the two minor children of his erstwhile marriage to the respondent (“the mother”) to relocate permanently from South Africa to reside with him (and his fiancée) in the United Kingdom (“UK”). The children, a girl (“Y”) and a boy (“T”) are 10 year old twins who were born on 31 August 2012.
- [2] The following relevant facts are common cause. The father is a British, and the mother a Zimbabwean, national. They, together with the children, have permanent residence in South Africa. The children
- were born in Cape Town, South Africa, and have lived here all their lives save for a period of about 10 months from June 2016 until March/April 2017 in Australia, when the mother returned here with the children and the father stayed on in Australia until December 2018.
- [3] During the period December 2018 until August 2022 (when the father left for the UK and has resided in Manchester ever since) the parties had shared residency of the children, initially on a two week rotational basis and later, on a week on, week off one. The children adapted to the arrangement and became comfortable and settled over time. The parties, who had married on 10 June 2006, divorced during this period on 15 March 2019.
- [4] The father launched the current application on 11 July 2022, shortly prior to his departure for the UK. The grounds advanced in his founding affidavit were summed up in the following paragraph:
- ‘...Not just due to the schools and medical facilities, but because the mother neglects them and... they would be best cared for by me.’
- [5] The father describes himself as a senior software engineer. In his founding affidavit he alleged that his primary reason for moving back to the UK was ‘better employment and subsequent income’. On 28 June 2022 he accepted a position in this capacity with a company in Manchester with a commencement date of 1 September
- 2022 subject to a 3 month initial probationary period, at a salary of £120 000 per annum excluding bonuses. This, he alleged, would significantly improve his financial position.

[6] He asserted that the benefits for the children if they were permitted to relocate were automatic access to free education and healthcare, since at the time he was unable to afford to keep them on a medical aid scheme and pay any additional medical expenses as well as their educational costs as agreed in the Consent Paper incorporated in the parties' Decree of Divorce. He did not explain why he would not be able to resume these payments given the substantial increase he would be receiving in his income.

[7] Subsequently the applicant appointed Dr Joan Campbell ("Campbell"), a forensic and clinical social worker in private practice to conduct an assessment regarding the children's proposed relocation, and the Family Advocate was also authorised to conduct a parallel investigation. It would seem that both parties co-operated in these processes and ensured that the children were also made available to the experts concerned.

[8] There are material disputes of fact in the parties' respective affidavits about the mother's ability to care for the children. This issue was extensively investigated by Campbell (attempts by Ms Mabaso, the appointed counsellor in the office of the Family Advocate, to contact certain independent collaterals were fruitless).

At the end of the day, and after the experts obtained valuable input from two schools attended by the children, it is evident that the father's claims are exaggerated and without substantial merit.

[9] The picture that rather emerges from the reports of Campbell and Mabaso is that the mother has at times struggled to cope because of financial constraints, difficult working hours (as a contracted online English tutor for students in China earning about R20 000 per month), and the special needs of T who has been diagnosed with

Attention Deficit Hyperactivity Disorder (ADHD). This was exacerbated by the father claiming he was unable to pay for the children's

continued private schooling at a certain college, where they had settled and T was receiving the special attention he needed, as well as terminating their medical aid cover, while at the same time accusing the mother of neglecting the children's medical care because she was forced as a consequence to take them to a government clinic.

[10] Campbell's assessment led her to conclude the following:

10.1 The children have 'primary attachments with both parents' which I understand to mean they are equally securely attached to both of them;

10.2 Both parents have demonstrated an inability or lack of insight into the academic struggles T is experiencing, and the negative consequences of 'their' decision to remove the children from the college and place them in a school in which they share the same class and which has no separate remedial facility, despite T expressing to her that he wanted to return to the college;

10.3 Both parents have 'adequate' parenting capacity and the mother's parenting style is 'good enough' although the father provides the children 'with more opportunities for stimulating activities and engages in more quality time with them';

10.4 Both parents have not provided adequate support to the children concerning their homework and have allowed T to fall behind academically;

10.5 The mother has played a significant role in the children's upbringing and she should continue to play an important role in their lives. However preventing the children from living with the father 'who is more than capable of caring for them and with whom they have a very secure attachment, will only contribute to emotional distress and a longing to be in their father's care';

10.6 It is however important to note that the mother's parenting can be improved with professional intervention and there is no guarantee that the father will be able to provide better parenting in the long run compared to the mother; and

10.7 Considering the children's expressed desire to Campbell to relocate to the UK and live with the father (an aspect to which I return below), not allowing them to do so would carry 'a higher risk of negative psychological and educational outcomes'.

[11] On the issue of the mother's contact with the children post-relocation Campbell – incorrectly – stated that if she wishes to have more contact there is little that would prohibit her from relocating to 'another EU country'. Apart from the fact that England is no longer part of the European Union, the father himself was categoric in his replying affidavit that the mother would not qualify to reside in Portugal – one of the options previously mooted by the parties – because she will not meet the required financial threshold. In addition Campbell provided no evidence to back up her opinion on this score, and seems to have merely proceeded from the premise that as an online tutor the mother 'can teach from anywhere in the world'.

[12] Campbell did however emphasise that it is crucial the children are ensured regular contact with the mother if a relocation is granted. Herein lies one of the fundamental difficulties. The mother lacks the financial resources to travel to the UK on a regular basis and no-one involved has seriously suggested otherwise. In his founding affidavit the father stated:

'Once the minor children relocate to the United Kingdom, I would ensure that they visit the Respondent in South Africa should she still be living here. It would, however, depend on school holidays, the cost of flights and so on. Depending on affordability and where the Respondent is residing at the relevant time, I would want the minor children to spend at least one-half long school holiday with the Respondent each year.

The Respondent can have contact with the minor children anytime while we are living in the United Kingdom...'

[13] Self-evidently this is hardly a tender which (a) addresses regular contact; and (b) provides any comfort to the court. It is made worse by the applicant's disclosure in his supplementary affidavit filed on 28 July 2023, after delivery of both expert reports, that he had been retrenched on 13 January 2023, about 6 weeks after his probationary period expired. This was divulged to Campbell (whose report is dated 12 May 2023) but not to Mabaso (whose report is dated 19 June 2023).

[14] The applicant alleged in his supplementary affidavit that:

'5. ...I now work part time as a consultant and no longer generate the income I did at the time of this application being launched. I currently earn about £3 300.00 per month (£39 600.00 per annum) and given that I am a consultant, I am not assured of a regular or stable income, nor do I receive any perks or benefits. I also do not earn income for any days I do not work...

7. Due to my retrenchment... the maintenance that I am currently paying to respondent for the children is no longer affordable. After the issue of the children's relocation is determined, if they are not permitted to relocate... I will have to approach the appropriate court to vary the maintenance... this will affect

the respondent's financial situation as she will have less at her disposal to pay her and the children's living expenses.

25. I will receive a monthly stipend of £172 (R3 942.00) for the children while I remain working as a consultant earning under £50 000 per annum which will also assist me in caring for the children.

26. Without paying cash maintenance for the children, I will be able to save for the costs of them travelling to South Africa once per annum to visit the respondent and am also able to tender a return economy flight for the respondent to travel to the UK to visit the children a second time each year. Without any costs needed by the respondent to care for the children during the year, she can also save money to be able to care for them while they are in her care twice per year on holiday.'

[15] The applicant also alleged that he has liabilities of almost R900 000. His fiancée earns a limited income (he did not disclose how much) and is only able to contribute towards groceries, pet food and other ad hoc household expenses. Applying the exchange rate adopted by the applicant of 22.8 rands to pounds sterling, his current monthly income of £3 300 translates into R75 240 per month. He annexed a schedule of his monthly costs totalling £3 597 or R82 000 per month. This includes cash maintenance currently paid to the mother for the children of R9 120, and school fees of R6 042 per month.

- [16] The payments that he currently makes in respect of the children thus total £665 per month or roughly 20% of his current reduced monthly income. If T were to return to the college (Y is by all accounts adjusting well at her current school) the applicant would, on the available information from the college website, have to pay somewhere between R97 000 and R120 000 per annum.
- [17] Assuming the higher figure of R120 000 per annum, this would be R10 000 per month for T, i.e. an additional R7 000 per month ($R6\ 042 \div 2 = R3\ 021$ increasing to R10 000 per month). Applying the same exchange rate this translates to an additional £131 per month, and the applicant's adjusted total contribution for the children would thus be £796 per month or approximately 24% of his current income.
- [18] What is noteworthy is that the applicant is paying £1 350 per month for rental alone, which equates to roughly 41% of his current monthly income. He does not explain why he cannot secure cheaper accommodation to pay for his children's maintenance and in particular T's return to the college where he will receive the assistance he so desperately needs. It is also noted that despite his claim to have accumulated R900 000 debt this is not dealt with at all in the applicant's monthly costs schedule. All the applicant states is that no provision has been made for travel to
- exercise contact with the children, or for clothing, entertainment, annual car service or homeowners and household contents insurance. In any event he should not have homeowners insurance as an expense since according to him the residence he currently occupies is rented.
- [19] In her report Campbell stated that she was in possession of confirmation of placement for the children at Weaverham High School in Manchester. This has however not been placed by the applicant before the court. The applicant did annex to his supplementary affidavit a document detailing the additional support provided by this school, which includes literacy and numeracy as well as specific dyslexia support. I have not been able to find any reference therein to support for children with ADHD, nor has the applicant disclosed how many children there are per class at this specific school, which is obliged by government policy to accept all children in its catchment area. The court is thus left with inadequate information to make a proper assessment about whether it will be suitable for the children's needs, and in particular those of T.
- [20] The father alleged that if he is relieved of his obligations to pay maintenance and school fees for the children he will be able to fund the cost of them travelling to South Africa once per annum as well as an annual return economy flight to the UK for the mother. However on his own version this seems unlikely since he has made no provision in his schedule of monthly costs for repayment of his substantial debt, and there is thus a real risk that he will not be able to comply with his tender in future.
- [21] Turning now to the voices of the children. Mabaso interviewed them on 9 November and 2 December 2022. Y reported that she is happy at her current school and has made friends there. She loves both parents and would not like to be forced to choose between them.

Although she would like to move to the UK to stay with her father she was unsure and confused about the relocation as she does not wish to be separated from either parent. She likes it when the father plays with her, makes her laugh and jokes with her. She loves that the mother plays with her outside, helps with school projects, paints with her and teaches her to ride a bicycle.

- [22] Y reported to Mabaso that she has never lived without her mother for more than two weeks at a time. She does not know what it will be like to live without her mother who has always been present in her life. She indicated that she has become accustomed to not seeing her father regularly since he worked overseas for over a year before her parents separated.
- [23] She has a good relationship with the mother's extended family and some of her aunts and cousins reside in Cape Town (this accords with the mother's evidence despite the father's allegation in his founding affidavit that 'other than the respondent, the minor children have no family in South Africa'). She described her relationship with the extended paternal family, who reside in the UK, as good, although on the undisputed evidence she has spent only two weeks in the UK since her birth – in December 2018 to January 2019 – and this is the sum total of her contact with them since infancy, as is also the case with T. Mabaso expressed the view that Y is torn between her parents.
- [24] T reported to Mabaso he is afraid of being separated from his mother. He was happy with the previous plan to relocate to Portugal because he understood that the whole family would be doing so together. When he visited the paternal family for two weeks in the UK he enjoyed himself as they went to ski on fake snow, he spent more time with his father, and saw the paternal family as well. However he missed the mother dearly and does not want to experience that again.
- [25] He reported to Mabaso that he has mixed feelings about relocating with the father and leaving the mother in South Africa. Leaving her will make him sad and in addition most of his friends and the mother's family are here. He talks to the father daily, adding that he misses not spending physical time with him but would miss his mother if he had to relocate. His ideal would be for them to live in the same city. T was unable to express his views about future contact should he relocate with the father because he does not want to be without his mother.
- [26] Campbell interviewed the children on 26 January, 2 February, 16 February and 23 March 2023. T 'clarified' to her that his father had not influenced him but only informed him of the option to relocate to the UK. Although T asserted the

responsibility to speak truthfully, he said he had not disclosed his preferred living arrangement (with the father) to Mabaso because he did not want to upset his mother. It is unclear however from Campbell's report why T had no difficulty in disclosing this to her.

- [27] When asked his opinion of the UK he replied that it is '10 out of 10'. He likes the snow and 'the places there are fun' reiterating that he has 'always wanted to live there' since it is his 'favourite country'. When employing one of her testing techniques, T said that, if his parents lived in the same city, his mother could take him and Y to school, the doctor and a restaurant, while his father could take them on outings, fun experiences and holidays.
- [28] In Campbell's interaction with Y, she 'emphasised' to Campbell that the father did not exert any influence or pressure upon her but merely told her of the possibility of relocating and living with him in the UK. She too expressed the desire to do so. Whilst also being aware of the importance of telling the truth she had similarly not disclosed her preference to Mabaso as she claimed her mother instructed her and T not to express any preference of where they want to live.
- [29] Y told Campbell she likes the UK more than South Africa and Australia. She likes snow and it snows in the UK. If she were to live there with the father she and her brother would argue less, it will be nicer there and the family cats live there too. Being with their father is more fun: 'Dad gives us tons of toys. Mom doesn't buy toys, only on birthdays and Christmas.' There is more to do at her father's home than her mother's. Although Y told Campbell earlier that the mother instructed her and T not to voice their preferred living arrangement, she later told Campbell her mother said it was for the children to decide.
- [30] Campbell referred to the children's school reports which indicate that between 2022 and the first term of 2023 T's marks dropped significantly. During the hearing the mother handed in the children's reports for the second term 2023 which demonstrate that Y's aggregate increased from 62% to 64% and, despite his challenges, T's improved from 41% to 46%. It would be unrealistic to conclude that the mother had no hand in this improvement given the father's absence in the UK and the lack of specialised support at the children's current school.
- [31] According to Campbell 'the current maternal home environment, characterised by frequent moves and inadequate support for the children, raises concerns if it is not addressed properly. The children have expressed a strong desire to live with their father to escape the ongoing conflict in the mother's home and her financial constraints'. It is correct that the mother has moved, but only within the same complex, and only due to financial constraints. She currently has more spacious accommodation. Much of the conflict appears to be rooted in Y's frustration with T's behaviour (which is not likely to change significantly in the UK) and the factors to which I have earlier referred. As far as financial constraints are concerned Campbell herself fairly acknowledged that, even with his now reduced income, the father 'can provide a more than adequate standard of living for the family, including T and Y'. This accords with the view I have expressed above, and it does not mean that the only solution lies in the children relocating.

[32] It is clear that the children miss the physical presence of their father dearly. However what is equally clear is that the mother has been their primary caregiver for most of their lives, and it is of concern that the views they expressed to Mabaso in December 2022 were so different a month later and seemingly became more fixed over time. I find it difficult to accept they would have deliberately lied to Mabaso, particularly when what they conveyed to her, as 10 year old

children, makes objective sense.

[33] Influence or pressure by the father, even possibly unwittingly, cannot be ruled out. That the children have a fantasised idea about life in the UK, based solely on a two week fun holiday, is evident from their communications to Campbell. Children's voices must of course be heard, but they must equally be considered in context when evaluating the weight to be attached to them.

[34] It is apparent that neither of these children have the slightest comprehension of what it will be like to live permanently in a strange country thousands of kilometres away from their mother with extremely limited contact at best. It is also of concern that the father appears to lack insight into the effect this is likely to have on them, both in the short and long term. Even Campbell appears to have concern about the long term viability of a relocation, since one

of her recommendations was:

'If T and/or Y express their desire to return to South Africa to reside with their mother, such a wish shall be granted after one year of residing with their father in the UK, unless there is a significant risk to their mental health. In such a case, they shall be returned to their mother's primary care as soon as reasonably practicable, subject to an assessment by a social worker or psychologist who shall recommend whether returning to [the mother] would be in their best interests...

If one of the siblings wishes to return to their mother's primary care while the other sibling wishes to continue residing with their father, an assessment by a social worker or psychologist shall be conducted to determine whether it would be in the best interests of the twins to separate or remain together with their father, or relocate to South Africa to be in the care of their mother.'

[35] Other relevant factors are the following. The father's hope for a considerably larger income was dashed after a matter of a few months. It is common cause that it was at his instance the family moved to Australia in 2016; it was because he did not wish to live there permanently after arrival that the mother and children returned to South Africa in 2017; despite his belatedly professed misgivings about the mother's ability to care for the children he was content to leave them in her primary care until December 2018, share rotational residency of the children with her until August 2022; and

move to the UK for better employment while again leaving them behind in her primary care, albeit having launched the current application.

[36] Herein lies another fundamental difficulty. There is simply no assurance that the father will not up and move again. If a relocation is permitted this will have the potential consequence that the children will be uprooted elsewhere with absolutely no guarantee of regular contact with the left behind mother. As I have attempted to demonstrate in this judgment there are just too many risks for the children at this stage.

[37] It is also of some concern that Campbell voiced the opinion the UK presents ‘a safer option to raise a child’ based on what she states to be the high crime rates, risk of attack or abduction and the ‘political situation’ in this country ‘such as rolling blackouts, corruption,... unsafe communities, high unemployment... and ailing public services’. Equally, and as is evident from a simple Google search[1] at August 2023 crime in Manchester stood at 63.41% with a steadily increasing rate over the previous three years, and with drug

addiction and related issues standing at 71.48%. It is not that these statistics are necessarily factually accurate but when a forensic social worker makes claims of this nature it is of little, if any assistance, to a court in having to determine whether a relocation is in the children’s best interests. What is however relevant is the father’s singular failure to place this type of factual information before the court.

[38] In her report Mabaso referred to the Attachment Project (2023) which recognises ‘a connection between ADHD and attachment theory based on ADHD’s links to hyper excitability, difficulty focusing and impulsivity’. It states that ‘all these traits which can be challenging for a caregiver to manage in every day scenarios... could potentially interrupt the quality of the bond that the caregiver and child form... Caregiver’s sensitivity regarding how they manage their children’s

behaviours forms the basis of secure attachment bonds and the needs of the children with ADHD are greater than those without...’. Mabaso also referred to research which indicates that moving to a new environment is more difficult for children with special needs such as ADHD, since attachment and a familiar environment are paramount.[2]

[39] To me this indicates two things: (a) despite the criticisms levelled by the father against the mother T nonetheless has a secure attachment with her; and (b) T in particular is likely to struggle to adjust to an entirely new environment and in particular a scholastic one. The father (and Campbell) appear to be of the view that the school in the UK will be able to address this but as previously stated there is simply insufficient information before the court to assess whether this will be so.

[40] This is also not one of those matters where it is a primary caregiver who wishes to relocate with the children. While I acknowledge that the parties are co-holders of parental responsibilities and rights, on a de facto level the father is viewed by the children as the “fun” parent and it cannot be gainsaid that he has spent substantial

amounts of time physically absent from their day-to-day lives. It may be so that the father subjectively believes that his decision to seek leave of the court for the children to relocate is bona fide. However I am unable to find on a conspectus of the evidence as a whole that his decision is reasonable. Adopting the established

neutral approach I am unpersuaded that, given the practical and other considerations on which the father's decision is based, he has properly engaged or thought through the real advantages and disadvantages to the children of the proposed move.[3] Moreover in P v P[4] it was held that:

'...In determining what custody arrangement will best serve the children's interests in a case such as the present, a Court is not looking for the "perfect parent" – doubtless there is no such being. The Court's quest is to find what has been called "the least detrimental available alternative for safeguarding the child's growth and development"'.

[41] In all the circumstances I agree with Mabaso that, on balance, the risk to the children's psychological and emotional wellbeing (particularly that of T) is greater were the children be permitted to relocate at this stage than if they are to remain here. The situation might change as they mature and if the father sees his way clear to providing the children with proper financial support and demonstrates a track record of sticking to it. The children may of course be disappointed by this decision, particularly given their fantasised view of life in the UK, but I am persuaded that, as difficult as this is, it is the correct one to make.

[42] The following order is made:

'The application is dismissed.'

J I CLOETE

For applicant: Adv T Dicker SC

Instructed by: Catto Neethling Wiid Inc (Ms A Bath)

For the Office of the Family Advocate: Adv J Hofmeester

For respondent: In person

[1] Numbeo Safety Index, <https://www.numbeo.com>.

[2] R L Coley and M Kull: 'Cumulative, Timing Specific, and Interactive Models of Residential Mobility and Children's Cognitive and Psychosocial Skills' Child Development (2016): 1-17.

[3] See inter alia F v F 2006 (3) SA 42 (SCA) at para [13].

[4] 2007 (5) SA 94 (SCA) at para [24].

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