

SOUTH AFRICA / JUDGMENT

D v D (14582/2022) [2022]

ZAGPJHC 1034 (19 December 2022)

[2022] ZAGPJHC 1034

COURT

South Gauteng High Court, Johannesburg

BEFORE

MIA

CASE / FILE NUMBER

14582/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,
LOCAL
GAUTENG DIVISION, JOHANNESBURG
CASE
NO: 14582/2022

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
19
December 2022
In

the matter between:

D[...],
D[...]²
Applicant
and
D[...],
H[...] E[...]
Respondent

JUDGMENT

MIA, J

INTRODUCTION

[1] The applicant and first respondent are married. The applicant has issued a summons for divorce. The applicant approached this court on an urgent basis seeking an order:

“1. the matter is heard as one of urgency:

2. that the Applicant be permitted to remove I D (“the minor child”) from the Republic of South Africa to permanently reside with him in Croatia;
3. the parenting plan attached as Annexure “FA1” is made an order of court;
4. the Respondent is to sign all documentation which may be necessary in the process of relocation;
5. should the Respondent refuse to provide the passport of the minor child to the Applicant or the Applicant’s

representative then the Sheriff of the High Court is authorised to obtain the passport from the Respondent and provide it to the Applicant.

6. The Respondent is ordered to pay the costs of the application. entertaining this application as a matter of urgency and dispensing with the necessity for the Applicant to adhere strictly to the rules of the above Honourable Court and in regard to form, notice, service and time periods and condoning the Applicant’s failure to adhere strictly to such rules of the above Honourable Court;

[2] The first respondent opposed the application disputing the urgency and the relief on the merits.

ISSUES**FOR DETERMINATION**

[3] The issues for determination in the matter are as follows:

3.1 Urgency in respect of the main and counter application;

3.2 whether it is in the best interests of the child for the applicant to relocate the child to Croatia;

FACTUAL

BACKGROUND

- [4] Some background to the matter is appropriate prior to dealing with the matter. The applicant and respondent met whilst the applicant worked on humanitarian and relief projects in the Southern African region. The parties got married and a child was born during the marriage. The minor child is thirteen years old. She has a good relationship with the applicant. The first respondent stated in her opposing affidavit that her relationship with the minor child is strained. She noted however there were efforts to improve this relationship.
- [5] The first respondent opposed the applicant's relocation of the minor child to Croatia on the basis that the child had been misled to believe the first respondent would join them in Croatia once they had relocated. She also stated that the applicant previously expressed his intention to hurt her by relocating the child. She believes that the applicant intends delaying the divorce proceedings by relocating to Croatia to delay the consequences of the division of the community

of property regime.

URGENCY

- [6] Both parties raise urgency in their respective applications for different reasons. I deal with the urgency first.
- [7] When the matter appeared before me on 28 November 2022 the applicant asserted the matter was urgent as he has secured a contract which required him to take up a position in Europe assisting Ukrainian refugees in Croatia from 12 December 2022. When he appeared again on 13 December 2022 this court was informed that he had arranged with his employer to commence work after 25 December 2022. He wished to return to Croatia where his family resides and where his support

system is based in the form of family and friends. He envisaged that their daughter will be enrolled in an International School. The school term commences on 12 January 2023. Having secured employment and accommodation he is ready to depart. He awaits the first respondent's consent.

- [8] The first respondent asserts the application is not urgent and it is in any event self-created urgency as the applicant was aware that he wanted to leave. She asserts that the applicant can find alternative employment opportunities in the region whilst she does not have an EU passport and cannot relocate to Croatia and cannot find employment there. She referred the matter for investigation to the Office of the Family Advocate.
- [9] The Constitution is clear that decisions relating to children are paramount and must be taken having regard to their best interests. The factors relating to the child's stability regarding schooling indicate that the matter be determined with the necessary speed. Where the child's interests and an adult's interests are not congruent the adult's interests must yield to what will promote the child's best interests. It is thus necessary to consider the

application and I will consider both applications on an urgent basis on the facts before me, to the extent that they are related and flow from the main application.

[10] On 28 November 2022, the Office of the Family Advocate was ordered to furnish a report by 1 December

2022. The report was completed by 1 December 2022 and the parties had insight into the recommendations made therein when the matter came before me on 13 December 2022.

LAW

[12] The best interests of the child informs all matters relating to children. Section 28 of the Constitution provides:

“(2) A child's best interests are of paramount importance in every matter concerning the child.”

[13] In *Ford v Ford*[1], the Court considered the issue of relocation and referred to the principle applicable to relocation set out by the Court in *Jackson v Jackson*[2] which stated as follows:

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

RELOCATION TO CROATIA

[14] The voice of the child report and the Family Advocate who have consulted with the child indicate the child wishes to accompany the applicant to Croatia. The first respondent requests that the voice of the child report be disregarded. Her reasons are that the minor child was influenced by the applicant. She expressed the view that the applicant undermines her authority. She also held the view that the child being female required a parent of the same gender to guide her as she grows older. She pointed out that the applicant is more permissive and mentioned an occasion when in her absence the applicant permitted the child to control her intake of Schedule 5 anxiety medication without supervision.

- [15] The Family Advocate notes in her report that both the applicant and respondent accept the voice of the child report except that the first respondent disputed that the applicant and child resolve disputes when they fight. The report confirmed the child's report that she had a better relationship with the applicant than with the first respondent. The child reports that the separation from the applicant will be more difficult for her than being separated from the first respondent. She also expressed an affinity for Croatia and the applicant's family. This appears to be based on her positive experience of the applicant's family and her visits to Croatia and the manner in which the traditional celebrations occurred. In contrast she has not had much contact with the first respondent's family. The first respondent has attempted to address this void however it has does not compare with the child's experiences in Croatia.
- [16] The parties have not finalised their divorce and a decision has not been made regarding primary residence as yet. In the interim however the well-being of the child is in issue and a determination is to be made regarding her interest at present. For the present moment it appears from the papers as well as the voice of the child report and the Family Advocate's recommendations that the child has a secure emotional attachment with the applicant. She experiences stability with the applicant. Having regard to the decision in *F v F*[3] it is apparent that the applicant has considered the advantages of remaining in South Africa as opposed to moving to Croatia. The applicant has made appropriate arrangements for the child's well-being in Croatia. It was argued that the child could enrol in the British International School and transfer when the term commenced in 2023. This submission does take cognisance of the condition of the admission in Croatia or that the child will be assessed in January 2023 to be placed in the appropriate class having regard to the change in schooling systems and terms.
- [17] Both the applicant and the first respondent are the primary caregivers of the minor child at present. The first respondent indicated in her answering affidavit that her relationship with the minor child has been strained. It appears from the evidence on the papers as well as the voice of the child report that the child is comfortable with the applicant. They have a better relationship. The first respondent's concern that the child is requires her presence upon entering her teenage years is addressed in the Family Advocate's report. The Family Advocate indicates the first respondent will have contact regularly via WhatsApp and zoom calls. The first respondent will be able to maintain her relationship with the child and to advise her and counsel her on any issue required through these contact periods.
- [18] The stability of the minor child is important at present and remaining with the parent with whom she is maintains a more secure relationship during the parties' separation and the applicant's relocation will serve her best interests. The first respondent's concern about the child being in an area close to the war in Ukraine is countered by the applicant pointing out that they are providing relief to Ukrainian refugees and she is able to call to check on the child's well-being. The work the applicant is engaged in is not dissimilar from the work he engaged in when he arrived in Southern Africa. The reality of the applicant's work, in the humanitarian field, is that it will always take him to where the need arises. The applicant

appears to have more experience in adapting to changing contexts and addressing the child's needs such as change and challenges emerge. He may thus be better able to support the child through the change in the parties' status as a couple

as they continue to co-parent and as changes emerge during the relocation and school transition.

- [19] In contrast the first respondent's concern is that her interests will be compromised. Whilst she informed the Family Advocate that she accepts the voice of the child report she expresses reservations. The child evidently has little contact with the maternal family and this support base is not well established. Whilst the first respondent has attempted to forge a relationship with her family, the child is aware of the first respondent's difficult relationship with her own family.
- [20] As indicated in the cases of Jackson and Ford above, each case must be determined on its own merits. The facts of the present matter illustrate this aptly. The Family Advocate expresses the advantages of applicant's decision to relocate, having regard to the child's expressed view to relocate with the applicant.
- [21] The child is at an age where her view should be taken into account. The suggestion that the child has been manipulated is contradicted by the voice of the child report which is accepted by both applicant and the first respondent. The child's view appears to be informed by her experience of Croatia, the schools she will attend, the life she has lived in Croatia and her experience in South Africa as well as her relationship with her parents and extended family. The first respondent's concern about a war being waged in parts of Europe, can be assuaged by her regular contact to check in with the child. The parties have the option of returning the child to South Africa should they feel she is in danger at any point. The recommendation by the Family Advocate makes provision for contact with the child. The first respondent will be able to have regular contact with the child and to assess whether the child is well and safe. She will also be able to build her relationship with the child. I am of the view that it is in the best interests of the minor child to relocate with the applicant.

COSTS

- [22] In family matters the usual order in this division is an order that each party pay its own costs. From time to time, the facts may indicate that a different order is required depending on the conduct of the parties. In the present circumstances the opposition appears to disregard the interests of the minor child. Whilst parties may have different views regarding matters, however it becomes necessary to remain cognisant of their responsibilities toward the goal of co-parenting. The opposition appears to have been directed at the first respondent's interest rather than the minor child's best interest. In view of the order that follows the first respondent should pay the costs.
- [23] In view of the above, I grant the following order:

ORDER:

1. The applicant is granted leave to remove the minor child, namely, I[....] D[....] ("I[....]"), permanently from the Republic of South Africa to Croatia.
2. The respondent is ordered to sign all documents pertaining to the relocation of I[....] and to take all such steps as may be necessary to enable the applicant to apply for the issuing of passports and/or for the issuing of visa for I[....], failing which the Sheriff of his Honourable Court is authorised and directed to take such steps and to sign all such documents on the respondent's behalf.
3. The respondent is ordered to sign all such documents and to take all such steps that may be necessary to enable the applicant to lawfully remove the I[....] from the Republic of South Africa, failing which the Sheriff of his Honourable Court is authorised and directed to take such steps and to sign all such documents on the respondent's behalf.
4. Both parties are to retain full parental responsibilities and rights with regard to I[....], as contemplated

in Section 18(2) of the Children's Act.

5. I[....] will primarily reside with the applicant in the Croatia and the applicant is awarded the right to be I[....]'s primary care giver.
6. In the event that I[....] expresses a desire to return to South Africa the parties agree that they will appoint an appropriate professional to consult with I[....] and determine the way forward for her return to South Africa.
7. Upon the relocation of the applicant and I[....] to Croatia, the respondent will be entitled to maintain

contact with the I[....] as follows: -

7.1 I[....] will annually spend the entire duration of the June/July school holiday (Croatian School holiday) with the respondent. The respondent may exercise her contact either in the Republic of South Africa or Croatia or another location upon prior agreement between the parties. Should the holiday contact take place outside Croatia then: -

7.1.1 I[....] is to travel as soon as possible after the school terms has concluded;

7.1.2 I[....] is to return at least 2 days prior to the commencement of a new school term and/or year.

7.2 I[....] will spend 15 days with the applicant every alternate Christmas/New year's. The respondent may exercise her contact

either in the Republic of South Africa or Croatia or another location upon prior agreement between the parties.

7.3 In the year where the respondent does not exercise contact with I[...] over Christmas, the respondent is to exercise contact with I[...] over the Easter Period for approximately 10 -15 days (dependant on the duration of the school holidays). The respondent

may exercise her contact either in the Republic of South Africa or Croatia or another location upon prior agreement between the parties.

7.4 The respondent is to provide the applicant with notice of at least 2 weeks prior to the implementation of additional contact.

7.5 In the event that the contact is exercised outside the Croatia, I[...], will fly to the destination, as an unaccompanied minor.

7.6 The applicant shall pay for all the travel costs associated with the travel undertaken by the I[...] for visitation to the Republic of South Africa or the travel costs (inclusive of visa costs, accommodation, and a travel allowance) by the applicant to visit I[...] in Croatia.

7.7 The respondent shall have the right to contact with I[...] during the school term or short school holidays in the Croatia upon

agreement between the parties, and in the event that the respondent decides to exercise contact with I[...] in Croatia. 7.8 I[...] will spend Christmas 2022 with the respondent in South Africa and only travel to Croatia on 26 December 2022 or as soon thereafter as a flight can be booked.

7.9 In the event that the respondent is unable to effect the contact as per 7.1. and 7.2 above, the parties are to forthwith implement

suitable alternative contact arrangements,

7.10 The respondent shall have daily contact with the I[...] using Video Calls, Face Time, WhatsApp Communication, Zoom, Skype, and/or any other suitable electronic communication. To enable the respondent to exercise these contact rights, the applicant must: -

7.10.1 Ensure that I[...] has, at all reasonable times, a cell phone and/or computer at her disposal which the respondent can use to contact I[...];

7.10.2 Ensure that at all reasonable times there is Wi-Fi and/or another data and/or any other internet facilities available at the applicant's home in the Croatia to facilitate the aforementioned contact right; and

7.10.3 Supply the contact numbers and/or any other contact details and/or connection links, which will be required by the respondent to exercise his contact rights with Croatia.

8. The applicant shall solely maintain I[...].

9. The applicant is hereby irrevocably authorised to sign any and all documentation to facilitate this Court Order.

10. The applicant will inform the respondent of the following: -

- 10.1 The address where the I[....] will be residing and any changes thereto;
- 10.2 The school which I[....] will be attending and any changes thereto;
- 10.3 Provide her with her school reports and keep her apprised of her educational development;
- 10.4 Should I[....] be leaving the Croatia for any reason, he shall provide the respondent with an itinerary detailing, flight details, accommodation details and dates of the trip;z
- 10.5 All information relating to her medical needs and wellbeing.
- 10.6 The respondent to be furnished with the names and telephone numbers or contact details of the school headmaster and teachers; and
- 10.7 The respondent is entitled to contact the schoolteachers and headmaster to discuss I[....]'s progress and well-being.
11. The respondent and I[....] shall attend 2 bonding and integration therapy sessions prior to I[....]'s emigration with a Psychologist or Social Worker appointed by the respondent. These sessions are to continue online once I[....] relocates with the applicant.
12. In the event of any disputes arising over the exercise of their parental rights and responsibilities, including the dates for the respondent's contact and any issues arising thereof (excluding maintenance), which they are unable to resolve themselves, then the parties will appoint a Clinical Psychologist to act as a mediator to assist the parties to resolve the dispute and in this regard the mediator's decisions will be binding on the parties pending a decision to the contrary by a court with competent jurisdiction.
13. Upon relocation to Croatia, the applicant is to obtain a mirror Court Order of this Court Order within three months after relocating.
14. Should the applicant fail to comply with order 13 within the prescribed period then the respondent shall be entitled to obtain a mirror Court Order of this Court order in Croatia.
- 14.1 The applicant will be required to comply with whatever is required of her to give effect to this order.
15. The respondent is ordered to pay the costs of the application.

S C MIA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant: Adv. K Howard

Instructed by: Spellas

Lengert Kuebler Braun Inc

On behalf of the respondent: Adv. T Lipschitz

Instructed by: Van

Rooyen Attorneys

Date of hearing:

13 December 2022

Date of judgment: 19 December 2022

[1]

[2006] 1 All SA 571 SCA at para [9]

[2] 2002

(2) SA 303 (SCA) para 2 at 318E-I

[3] 2006

(3) SA 42 SCA at [11] and [13]

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