

SOUTH AFRICA / JUDGMENT

H G v C G (1408/2009) [2009] ZAECPEHC 48;

2010 (3) SA 352 (ECP) (10 September 2009)

[2009] ZAECPEHC 48

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Chetty

CASE / FILE NUMBER

1408/2009

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CAPE LOCAL DIVISION JUDGMENT**

PARTIES:

Case
Number: 1408/2009
High
Court: Port Elizabeth
DATE
HEARD: 3 September 2009
DATE
DELIVERED: 10 September 2009

JUDGE(S):

Chetty J
LEGAL
REPRESENTATIVES –

Appearances:

for
the Applicant(s): Adv Schubart
for
the Respondent(s): Adv Goosen SC / Adv Gajjar
Instructing

attorneys:

Applicant(s):

Respondent(s):

CASE
INFORMATION -
Nature
of proceedings: Application

Topic:

Key
Words: Children
– Parenting plan sought to be varied – Applicant (mother) seeking order declaring her primary carer and order entitling her to relocate children to Dubai - Children's right to be heard recognised in sections 10 and 31 of Children's Act 38 of 2005 - Applicant's experts approaching matter on basis that children should be relieved of the responsibility of themselves deciding with which parent to live – Court determining matter enjoined by Act to hear the voice of the child – Best interest of

REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE, PORT ELIZABETH)
Case No: 1408/2009

In the matter between:

H M VAN C D G
.....Applicant
and
C E VAN C D G
.....Respondent

Coram: Chetty, J
Date
Heard: 3 September 2009
Date
Delivered: 10 September 2009
Summary: Children – Parenting plan sought to be varied – Applicant (mother) seeking order declaring her primary carer and order entitling her to relocate children to Dubai - Children's right to be heard recognised in sections 10 and 31 of Children's Act 38 of 2005 - Applicant's experts approaching matter on basis that children should be relieved of the responsibility of themselves deciding with which parent to live – Court determining matter enjoined by Act to hear the voice of the child – Best interest of child standard – Relocation not in their best interest – Application dismissed

JUDGMENT

CHETTY, J

[1] This matter concerns four children whose parents were divorced by order of this court on 23 May

2006. The eldest, a boy, M A was then aged eleven and his siblings, a set of eight year old triplets, comprising two boys R A and M N and a girl, K E. In terms of the settlement agreement the parents were awarded joint custody of the children, the intention being that the children would spend an equal amount of time with each parent. They agreed to sell two of the immovable properties jointly owned by them and divide the proceeds equally among themselves and further agreed that in order to facilitate the joint custody regime, they would each purchase a home in the Westview Village housing development on terms mutually agreed upon. These homes were duly acquired and the contemplated arrangement became a reality, the children spending alternate weeks with each parent. Three years have since elapsed and the children are now aged fourteen and eleven years respectively.

[2] On 25 May 2009, the mother (the applicant) sought relief on an urgent basis framed as follows, of relevance –

“Part A

1. That the ordinary Rules pertaining to forms and service be dispensed with and that this portion of the Application be heard as one of urgency in terms of the Provisions of Rule 6 (12) of the Uniform Rules of Court.
2. That the Family Advocate be directed to institute an enquiry forthwith as to whether it will be in the interests of M A, R A d, M N and K E:

For the Applicant be declared to be their primary carer;

To move to Dubai with the Applicant.

3. That the Family Advocate be directed to file with this Honourable Court a Report containing his/her recommendations.
4. That the costs of this portion of the Application be costs in the main Application, save in the event of the Respondent opposing this portion of the Application, in which event Respondent be ordered to pay the costs occasioned by such opposition.
5. That the further relief sought hereunder be postponed sine die.

Part B

6. The Applicant be declared the primary carer of the minor children, M A, R A, M N and K E.

7. That Applicant be granted the authority to remove the said children permanently from the Republic of South Africa, to Dubai, in the absence of the Respondent's consent for such removal.
 8. That Respondent be ordered to pay the costs occasioned by this Application, in the event of the Respondent opposing the relief sought by the Applicant.
 9. That such further and alternative relief be granted as this Honourable Court might deem fit."
- [3] The family advocate's report and an annexure thereto compiled by a family counsellor and clinical psychologist, Mr. G Goosen, was duly filed but their recommendations have not been welcomed, but strenuously resisted. I shall deal with this aspect in greater detail in due course.
- [4] The guiding principle in matters involving children is that the interests of the children are paramount. This is entrenched in the Constitution¹, section 28 of which provides that "a child's best interests are of paramount importance in every matter concerning a child". The Children's Act² (the Act) was promulgated to give effect to this constitutional imperative, section 9 of which echoes the constitutional injunction. Section 6 of the Act under the rubric, General principles, contains various guidelines and inter alia provides that –
- "(2) All proceedings, actions or decisions in a matter concerning a child must—*
- (a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;"
- [5] The best interests of the child standard referred to in the preceding paragraph is given content in section 7 of the Act which provides –
- "7. Best interests of child standard.—(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—*
- (a) the nature of the personal relationship between—
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
 - (b) the attitude of the parents, or any specific parent, towards—
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
 - (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child—
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's—
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
 - (i) any disability that a child may have;
 - (j) any chronic illness from which a child may suffer;
- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from any physical or psychological harm that may be caused by —
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
- (m) any family violence involving the child or a family member of the child; and

- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.”
- [6] The Act has brought about a fundamental shift in the parent/child relationship from that which prevailed in the pre-constitutional era and now not only vests a child with certain rights but moreover gives a child the opportunity to participate in any decision making affecting him or her. Thus section 10 of the Act explicitly recognizes a child’s inherent rights in any matter affecting him or her and provides that –

“10. Child participation.—Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

Similarly, section 31 of the Act provides that in major decisions involving a child –

“31. Major decisions involving child.—(1) (a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development.

- (b) A decision referred to in paragraph (a) is any decision—
 - (i) in connection with a matter listed in section 18 (3) (c);
 - (ii) affecting contact between the child and a co- holder of parental responsibilities and rights;
 - (iii) regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or
 - (iv) which is likely to significantly change, or to have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being.
- (2) (a) 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.
- (b) 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.”

The section is widely framed and there is no doubt that the relief sought by the applicant triggers the operation of the aforesaid section.

[7] Although the relief predicated in the notice of motion appears disparate the application is quintessentially, one of relocation. The applicant contends that it would be in the best interests of the children for them to relocate to Dubai with her and has advanced a number of reasons in support of her contentions. Before I however turn to consider the validity and cogency of these reasons it is apposite to repeat that when the settlement agreement was concluded, the parties each purchased a home in the same complex. The applicant financed her own home and in terms of the settlement agreed to pay fifty percent (50%) of the purchase price of the home occupied by the respondent. He financed his share in the jointly owned home utilising the proceeds generated from the sale of their immovable properties whilst the applicant obtained a bond to finance her share. She now contends that as a result of her

retrenchment she will no longer be in a position to service the bond and that should the respondent intend to continue living in the unit an agreement inter partes would have to be reached. Implicit herein is the suggestion that the respondent does not have the financial means to provide suitable accommodation for the children, hence their relocation to Dubai would be in their best interests.

[8] She alleges that in contrast she has the capacity to maintain the children in accommodation to which they have hitherto been accustomed. Her impending marriage would see her and the children ensconced in a four bedroomed villa, equipped with four bedrooms and an array of facilities, in short, a home superior to that which the children currently enjoy.

[9] She avers that as far as the children's educational needs are concerned, they have provisionally been accepted at the Dubai International Academy, approximately two kilometres away from the villa. She alleges that the school ranks among the best and would be ideally suited to nurture the children's academic potential.

[10] The principal reason for the relocation to Dubai is of course the proposed marriage between the applicant and Mr. Hendricks. In his supporting affidavit the latter provides details of his financial status and it is clear that he is possessed of sufficient means to maintain and support the applicant on the same if not better scale than that which they have hitherto been accustomed to. Mr. Hendricks is a chartered accountant and currently the chief operating officer of De Loitte Corporate Finance Limited in Dubai. He earns a base tax free income of \$ 850 000, 00 per annum. His remunerative package includes a fine home, motor vehicle, medical insurance, life insurance etc. In addition thereto he receives an annual performance bonus and there is no doubt that he is an affluent man who is willing and able to meet the financial demands of maintaining a wife and four children.

[11] In an attempt to show that Mr. Hendricks was ideally suited to fulfil the parenting role occasioned by his proposed marriage to the applicant and in anticipation of the court's consent for the relocation of the children to Dubai being granted Mr. Hendricks underwent psychological evaluation by Mr. D.J Stigant, a clinical psychologist. He consulted with Mr. Hendricks in April 2009 and in his report concluded that the latter was a person whose

functioning in a parental role was “positive and acceptable”. Mr. Stigant’s involvement in this matter was initiated by Dr Rauch and Mrs. Sally Wessels, an accredited social worker and clinical psychologist respectively. Rauch interviewed the applicant and the respondent prior to the finalisation of the divorce and was asked for her input into the custody and access arrangements post divorce. It appears that during the first half of 2007, the applicant unilaterally approached Rauch and requested her professional opinion. Towards the latter half of 2008 the applicant once again unilaterally enlisted the services of Wessels ostensibly to support her challenge to the existing parenting plan. Furthermore, it appears from their joint report dated 23 April 2009 that their joint services had once again unilaterally been solicited to now address the issue whether relocation to Dubai with the applicant would be in the children’s best interest. No doubt influenced by Dr Stigant’s conclusion that the MMPI test results conducted with Mr. Hendricks indicated a healthy, non-pathological personality functioning and that the prognosis for his functioning in a parenting role was positive and acceptable, Rauch and Wessels recommended that – the children be placed in the primary care of the applicant; that she be permitted to relocate with the children to Dubai; that the respondent have access to the children every school holiday when both his and the children’s schools were in recess; that the applicant finance the children’s travel to the Republic of South Africa at least twice a year and that in the event of the respondent travelling to Dubai, he be afforded “generous access to the children”.

- [12] It is evident from the joint report that Rauch and Wessels themselves consulted with Mr. Hendricks. They described him as being “relaxed, spontaneous and (one who) made good eye contact”. In the introductory paragraph of the report they urge that their reports be read conjunctly with the caveat that “the recommendation as documented in this report is our final recommendation in this matter”. The report documents Mr. Hendricks’ background, psycho-social circumstances, his relationship with the applicant and the children. As a prelude to their recommendation that relocation would be in the children’s best interests they state as follows –

“Mr. D G has documented his objections to the children leaving South Africa. These have been seriously considered. Whereas we are both

empathetic to his possible loss of the joint custody involvement with his children, we remain clear in our assessment that the present joint custody arrangement is not being practiced effectively or cooperatively. As this is the case it cannot be considered to be in the children’s best interests to continue with a joint custody arrangement.

As per our previous reports, we believe that Mrs. D G should be the primary carer of the children. We still consider it to be most in the children’s interests for Mrs. D G to remain in South Africa. We are not convinced that she has made a real effort to find suitable employment in the Port Elizabeth area. However should her financial circumstances necessitate a move to Dubai then only one parent will be in a position to care for the children on a full time basis. For the reasons given in this report and in our previous reports we conclude that Mrs. D G should be that parent.

It would be a loss to the children to be parted from the very involved contact with their father. It would be an even greater loss to these children should they be separated from Mrs. D G if it is financially necessary for her to remove to another place then she would have to do so. In the event of her relocating to Dubai the D G children will enjoy a stable, secure, loving and enriched lifestyle in their mother's care."

- [13] Their final recommendation must be contrasted with their earlier recommendation. Rauch produced two reports dated 28 May 2007 (the first report), and 12 November 2008 (the second report) respectively and minutes of a meeting which preceded the first report. The Wessels' report is dated 30 November 2008. Both experts were, as is evident from the content of the reports, engaged by the applicant for the purpose of reviewing the custody and access status quo. In the first report, Rauch made certain recommendations relating to custody and access which, if implemented, would have terminated the joint custody arrangement, custody now being awarded to the applicant. In the second report compiled almost eighteen months later she recommended that the children be placed in the primary care of the applicant, access was to be structured, and she concluded by stating –

"It is not recommended to be in the best interests of the children to live in another country away from their father."

- [14] Wessels was, as adumbrated hereinbefore engaged by the applicant for her to review the custody and access issue. The applicant contended that the existing regime was not in the best interests of the children; that the children were unhappy and unsettled by the constant change of home and that the children had conveyed to her on several occasions that they experienced enormous difficulty with the existing arrangements. Wessels interviewed each of the children separately and it is apparent from her report that far from being unhappy, each of them favoured the custody and access arrangements and required that it be maintained. They directly contradicted the applicant's version of events and it is apparent herefrom that the real reason for engaging Wessels was to solicit her support to amend the existing custody and access arrangements.

- [15] In her report Wessels categorised the main complaints the applicant had against the respondent, analysed them and found them to be completely lacking in substance. Notwithstanding the foregoing and her findings that –

"Mrs. D G can be manipulative and at times was not open or sincere in her dealings with the therapist. Initially she was not honest about her new relationship or its possible consequences (i.e. marriage and removal from the country). She was more honest later in the assessment process, when it was made clear that the writer had acquired more information than she anticipated from the children."

Initially, Mrs. D G gave the impression that her new relationship had come to an end once her friend moved to Dubai. However it became apparent from conversations with the children that this man is in fact very much in evidence and that he is a frequent visitor to the home. Mrs. D G and the children spent two weeks visiting him in Dubai during the Christmas holidays.

Mrs. D G's basic aim is to be able to make decisions regarding the children without having to consult their father. She does not believe that she and her ex-husband are able to make joint decisions as they often have opposing views. She also believes that he is deliberately oppositional in many situations and that this has a detrimental effect on the children.

Mrs. D G could be hostile and quietly aggressive when she felt that things were not going her way. The impression was created of someone who is quite sure of being "right" and who can become offended and divisive when thwarted. The examiner had the distinct impression that subtle pressure was applied to the children with regard to the issues at stake. This impression was created by the fact that two of the children (Katie and Richard) spoke about "not wanting to disappoint mum" when giving their opinions.

When Katie was interviewed on the day her father brought her she had completely different opinions from the first session. At this point she stated clearly that she would "miss him (her father) too much" if she stayed with her mother full time. She was worried about upsetting her mother by saying this. Subsequently Mrs. D G in interviews with writer asserted that Katie felt she had not been "heard", was tearful and upset after the second interview. This was in fact the direct opposite of the case. When Katie was later questioned about this she denied ever making such remarks to her mother and seemed mystified by the whole issue.

Mrs. D G was quite hostile during the second interview and was unwilling to accept that her interpretation of the meeting between Katie and writer was not accurate.

Mrs. D G presents as a dynamic person who is used to being successful and getting what she wants from life. She uses subtle methods to achieve her aims rather than confrontational ones. When she feels thwarted she responds with controlled aggression and portrays herself as a misunderstood victim rather than being overtly aggressive."

she recommended that the children be placed in the primary care of the applicant. That recommendation was primarily based on the fact that the applicant's work situation had changed and that that factor, in her opinion, increased the likelihood that she would have to relocate. She states that "(t)his being the case, the continuation of shared custody becomes more problematic and impractical. Mr. D G has been happy to allow Mrs. D G to make by far the major contribution to the family finances for many years. In the light of this new development both Dr Rauch and the writer believe that custody must be awarded to one parent." She then made the recommendations

–

"In the matter of primary care:

That all four minor children – M, R, M and Katherine be placed in the primary care of Mrs. D G. Although her behaviour has not always been admirable during this process there is little doubt that Mrs. D G is the stronger, more balanced and higher functioning parent. She is also happier, more optimistic and has a healthier outlook on life. She has a greater deal of energy and this is a positive influence on the children.

In the matter of access:

As a mental health professional it is imperative to look at the children as individuals when considering what is in their best interests. Katie is the only girl sibling and as such has needs that are different from the boys. In the same way one must consider the fraught emotional state of Richard and his extreme distress at the thought of being parted from his father.

Above all the children should be relieved of the responsibility of having to choose which parent they want to live with. This creates feelings of guilt and anxiety. They are all concerned about hurting either parent, and they are deeply attached to both. They are made more anxious by having the “case” for going to their mother put to them by various well meaning but misguided adults.

Access to Katie should be granted to Mrs. D G on a full time basis. Although Katie is open to outside influences and presented as quite confused it does seem that she is less happy than the boys in her father’s house. She feels isolated being the only girl and requires more time alone with her mother. She is more able to confide in her mother and needs her mother’s more constant presence. Mr. D G’s access to Katie would then revert to one night of every alternate week and every alternate weekend.

Regarding M, R and M – that they continue to stay with their father whilst both parents reside in Port Elizabeth. All three boys expressed an unequivocal desire to keep the living arrangements as they are. Although Michael in particular felt that the situation was not always ideal, all three boys expressed a strong desire to stay each alternate week with their father. They all demonstrated a close bond with their father and it was clear that he makes a strong effort to meet their individual needs.

R in particular would be adversely affected by being separated from his father for an extended period. He is very closely bonded with Mr. D G and was extremely distressed at the thought of leaving his father’s house for extended periods. He also revels in the special alone time he has with his father and looks forward to this with great anticipation.

Moreover the boys all expressed a desire to stay together. Whilst they would like Katie to stay with them they could all understand and accept a situation whereby she spent more time with her mother.

Regarding the change of household:

That the change over should take place on Friday afternoons as soon as possible after school.

Holidays:

That the existing holiday arrangements continue.

Should Mrs. D G have to leave Port Elizabeth then it is recommended that the children move with her.”

[16] She concluded her report by stating that –

“It would not be in the best interests of the D G children to live in another country away from their father with whom they have a very strong emotional bond.”

The report is not a model of clarity. It is contradictory and the recommendations made by her entirely inconsistent with her findings.

[17] It will be gleaned from the foregoing that Rauch and Wessels, contrary to the express provisions of sections 10 and 31 of the Act which recognises a child’s right to be heard in any major decisions involving him/her, advocate that their voices not be heard. I find this astonishing. By all accounts the children are of an age and maturity to fully comprehend the situation and their voices cannot be stifled but must be heard. The children’s point of view is in direct conflict with their recommendations and this no doubt actuated them to suggest that they be relieved of the responsibility of deciding with which parent to live.

[18] As adumbrated hereinbefore Wessels’ final recommendation favours relocating the children to Dubai. That recommendation is based solely on financial considerations. Although the best interest of the child standard recognises that the capacity of the parents to provide for the needs of children is an important consideration it is but one of a host of factors which together with others require evaluation. The assumption made by Rauch and Wessels that “In the event of her relocating to Dubai the D G children will enjoy a stable secure, loving and enriched lifestyle in their mother’s

care” is a fallacious one. Whilst it may be so that the applicant will enjoy an enriched lifestyle, the same does not necessarily bode true for the children. Their previous reports emphasize the deep bond between the children and the respondent and the resultant trauma to which they will be subjected to should they be separated from the respondent. The joint report entirely ignores this important factor.

[19] The detrimental effects of the children being separated from the respondent are fully documented in the report of Goosen, the family counsellor appointed by the family advocate. His report was criticised, inter alia, on the basis that he sourced a larger percentage of collateral information from persons associated with the respondent. Goosen was in possession of all the reports commissioned by the applicant and which favoured her and he cannot be faulted that he only consulted the applicant’s mother and sister. Goosen consulted fully with the children and their attitude both to relocating to Dubai and to a change in the custody regime was unequivocal. Goosen recorded their views which I have reproduced verbatim hereunder. To paraphrase or summarise what they spontaneously conveyed to Goosen would not accurately represent what needs to be heard, viz, their voices. The report reads as follows –

“3.3.3 The children took turns to talk, there was no spokesperson. Regarding the current arrangement, the children were unanimous in stating that they have adjusted to the divorce and the current living arrangements. They are happy and well settled. They were of the opinion that the arrangement was working well and that changing the changeover day to Fridays had made a big difference.

3.3.4 The children explained that they were seeing a lot of both parents, and have daily contact with both parents. The non-residential parent telephones them every evening, and the boys see their father at school daily. They stated that they are able to contact either parent freely and easily.

3.3.5 The children stated that they had pets at both homes, and enjoyed them. They are happy and comfortable with both parents. They do not want the current arrangement to change.

3.3.6 They stated that they get along very well with the Respondent that he never gets angry, and never shouts. He disciplines them by taking the child into his or her room, tells them that he loves them, and talks to the child. The children explained that they never misbehave. They are very attached to their father.

3.3.7 The children stated that their father does not discuss the proceedings with them, as he does not want to pressurise them. They added that they understand the process in which they are.

3.3.8 The children were asked to name their father's positive parental attributes. He was described as friendly, always there, he talks to them, he does Bible study with them, which they enjoy and would miss if they did not spend time with him. In answer to a question, Matthew stated that the Bible study does not confuse them; it clarifies things for them and makes them less confused. They can talk to both parents, and Mr. D G spends a lot of time with them. He treats them well, is calm and warm. They stated that each one has a chance to elect an activity for the family to do when they are with their father. This may be a game, an outing, or a tea party for Katie.

3.3.9 Turning to the Applicant, the children describes her as a good parent too, who never shouts, is good with discipline, and they feel comfortable with her.

3.3.10 When asked about negative parental attributes, the children stated that there were none. Michael stated that both parents tend to overprotect them. He does not see this as a negative.

3.3.11 The children indicated that they get along “OK” with Mr. Hendricks. Matthew stated that the latter was not used to having young children around him, he is stern and tells them to behave when they play around and joke at a restaurant. They stated that Mr. Hendricks is apparently often in confrontation with Richard.

3.3.12 They stated that the parents were communicating without conflict now. The domestic Eunice moves with them between homes. They confirmed that their father is a very good cook and that they are well nourished. Eunice cooks in both homes.

3.3.13 They also stated that the Respondent had told them that, should they relocate in South Africa, he would move with them.

3.3.14 The children were asked what they thought the effects of moving away from Port Elizabeth would be. They were unanimous that they did not want to move away. They mentioned the loss of schools, in which they are very involved, the loss of their friends, and the loss of their father. They said that they would not be able to see him, that they did not want this, and wanted to see him often. They felt settled in Port Elizabeth. They did not know what it would be like living in the Emirates, as they had only spent a short while there. They would have to attend new and different schools, have no friends, different subjects, sports and activities. They repeated that they did not want to leave their father. They wanted to see both parents as they currently do.

3.3.15 When asked what it would be like if they had to leave, they all said that they would miss their father, and did not know how they would cope.

3.3.16 The children stated that the Application puts pressure on them to go to Dubai by finding them schools there, taking them for entry tests, talking of buying school clothes, and talking about “when we are there”. The younger children stated that they are hesitant to say how they feel about the matter, as their mother would be disappointed if they went against her. They reiterated that they did not want to go to Dubai. The pressure that the Applicant applied makes it difficult for them to say what they want.”

[20] The children’s point of view has remained consistent. In the report prepared by Ms. Coertzen the children’s point of view is stated as follows –

“18. When I enquired from the children about the important aspects of possibly moving to the Emirates, they all understood the gravity of the situation and made it abundantly clear that they would prefer the situation to remain as it is at the moment. As stated above Michael took on a responsibility as the eldest and voiced his concern about whether the triplets would be able to cope without the Respondent. He stated he doubts they will survive without either parent. He indicated that he has thought about the situation and indicated that he would have to adjust if he had to go and he realises that the Emirates offer better opportunities for his future, but that it would be hard to leave school and his friends as he loves Port Elizabeth and feels settled here.

19. K too stated she has tried to think about it, but she truthfully indicated that she cannot answer me as she could not bear to leave either the Applicant or the Respondent.
20. R said he would really like to stay and that it is difficult to talk to the Applicant as she continually talks about Dubai. He too indicated that he likes Port Elizabeth and his school and friends and that it would be hard to have one parent in Dubai and one in South Africa.
21. M stated that he would prefer if the situation could remain as it currently stands. He likes school and his friends and he specifically mentioned that he loves bible study and would not be able to do it in Dubai. He stated that if the situation had to change his preference would be to stay in South Africa.”

- [21] The attitude of the children to the proposed relocation to Dubai, articulated in the foregoing reports of Messrs Goosen and Coertzen, was neither properly considered nor accorded due weight by the applicant's experts. Having been commissioned by the applicant, their loyalty to her cause appears to have influenced their final recommendations.
- [22] I am aware that a refusal to allow the applicant to relocate the children to Dubai may entail some financial hardships and possibly impact on their material needs. The applicant's experts share the view that she may not seriously have endeavoured to find suitable employment elsewhere in the Republic of South Africa. If she does, and there does not seem to be any reason why she could not, given her track record, then any difficulties which may arise would be of a temporary nature. If she does move elsewhere in the country, the respondent has indicated that he too would relocate.
- [23] I am enjoined by the Act to give due consideration to the views of the children. It appears from all the reports that they are of an age and level of maturity to make an informed decision. In my judgment I do not consider it to be in their best interests to order a change to the present parenting plan.
- [24] There remains the question of costs. Both counsel were unanimous that the parties bear their own costs. Such an order seems meet. In the result the following order will issue –

The application is dismissed.

Each party is liable to pay his/her own costs.

D.CHETTY

JUDGE OF THE HIGH COURT

Obo of the Applicant: Adv Schubart

Instructed by Pagdens Attorneys

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1The Constitution of the Republic of South Africa No 108 of 1996

2Act No 38 of 2005

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