

SOUTH AFRICA / JUDGMENT

J.K.N v P.Z (012791/2022) [2023] ZAGPJHC 798 (15 June 2023)

[2023] ZAGPJHC 798**COURT**

South Gauteng High Court, Johannesburg

BEFORE

N. Mazibuko

CASE / FILE NUMBER

012791/2022

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Policy**FLYNOTES:**

FAMILY – Children –
Relocation
– Mother wishing to relocate
to Ireland with son aged 11 – Contention that relocation
will create better opportunities
for them and improved support,
housing and education – Mother always been the primary
caregiver – Parties never
married – Report on views of
the child – Mature and confident child who wants to relocate
to Ireland –
Relocation in the best interests of the minor
child – Applicant is permitted to remove child to
permanently reside
with her in Ireland.
REPUBLIC OF SOUTH
AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO.:012791/2022

NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
NOT
REVISED
15.06.23
In

the matter between:

N,J.K
Applicant
And
Z,
P
Respondent

JUDGMENT

MAZIBUKO AJ

Introduction

1. The applicant seeks an order to remove a minor child, T, from the Republic of South Africa to permanently reside in Ireland. The respondent to retain T on his medical aid, attend any interviews and sign all documentation necessary during the process of obtaining a visa. Also, the draft parenting plan annexed to the founding affidavit be made a court order.

Applicant's case

2. The applicant deposed to an affidavit stating that she worked together with the respondent and a love relationship developed. They terminated their love relationship after about two months of realizing they were incompatible. She later found she was pregnant with T. When she was eight months pregnant she met the respondent's parents informing them she was pregnant with the respondent's child. At the birth of T, in July 2011, the respondent bought him the essentials. The parties were never married to each other. When T was two years old, the applicant was granted a maintenance order for the respondent to pay a cash contribution and to retain T on his medical aid.
3. In 2018, she experienced financial difficulties after the company that had mandated her as a sales agent closed down. She had incurred marketing expenses in anticipation of the commission income. The respondent also fell into arrears by making short payments on his maintenance obligation in the amount of R14 233. They arranged that he makes up his arrears over a period of 4 months. She also stated that T's school fees were also not paid. She approached the school to make payment arrangements. The school required her and the respondent to provide certain documentation which the respondent did not provide. The issue remained unresolved. She then explored homeschooling as an alternative. The

respondent did not approve of it in that it was not in the best interest of T. T remains to be in homeschool to date.

4. T's residence has always been with her and his primary caregiver whilst the respondent exercises his rights of contact. If they relocate, he will not suffer trauma as he is used to her being his primary caregiver. She makes T's day-to-day parenting decisions and responsibilities, regarding his well-being, schooling, clothing, accommodation, extramural activities, holidays, attending functions, and sporting activities. He has a close and secure relationship with his paternal grandparents, who have been active and present throughout his upbringing. They fulfil the parental rights and responsibilities when in their care, including, making arrangements with the applicant, fetching and returning the minor child, feeding, bathing and attending school functions. There is a routine in place whereby the grandparents would fetch T on certain days in a week to spend time with him.
5. Where they currently live, they share a loft-style room which she states is not ideal as T is approaching puberty. In Ireland, they would be staying with her mother in her four-bedroom house. She and the minor child will not need to pay for accommodation. They would each have their own bedrooms and a motor vehicle to use. Her mother, aged 64 years would assist her with T whenever a need arises. In South Africa, she has no family support. She cannot afford medical aid which becomes a greater financial risk as she gets older. A lot of her work as an NLP practitioner is online since Covid-19, and she plans to continue this way even when she gets to Ireland. Unlike South Africa, Ireland is open to NLP being used in the workplace and counselling capacity.
6. Her financial position covers their day-to-day living costs, which does not allow for an adequate provision for retirement, which might place a potential financial burden on T. Daily her financial position deteriorates significantly. She is in arrears with her bond repayments and the municipal rates on her property exceed her monthly bond repayments. She also struggles with the basic running and maintenance of the property which will cause the value to depreciate due to lack of adequate maintenance. No energy crisis in Ireland whilst South Africa continues to experience the same. She does not own a motor vehicle and had to rearrange their day-to-day logistics to manage the change in her financial circumstances.
7. Due to the location of the property which is where the planned Gautrain route comes over or under her property. The cost of living in South Africa is increasing daily. She is concerned that she will not be able to offer T the same opportunity of obtaining a University degree she provided to her 23-year-old daughter. Her inability to provide T with the basic foundation of a University degree put him at a disadvantage that he already faces as a white male seeking gainful employment where his BEE status puts him at the back of the line. The respondent has on several occasions been requesting a reduction in maintenance, he, therefore, might not be able to offer T the tertiary education.

8. Her relocation with T to Ireland is to create better opportunities for them. T will receive free school education, subsidized tertiary education and medical health care. Whilst he remains a South African citizen, he would in 5 years be eligible to apply for Irish citizenship which will open many opportunities for him throughout Europe. In a worse scenario, If she had attained Irish citizenship, she would be eligible for their social grant support if she had not yet been financially able.
9. She avers she has pre-enrolled T at O'Growney National School, in Ireland and was accepted. The school is a walking distance from the home they will be living in. He will not need to repeat a grade because the Cambridge syllabus, in the homeschool, is aligned with that school curriculum. The number of children in the class is small unlike in South Africa. He will not be home-schooled like in South Africa.
10. She states that T will maintain his relationship with the respondent and grandparents during his visits when on school break as well as via telephone, WhatsApp and video conference calls. She would set up a wifi where the respondent and T would continue their shared passion for video games and other online gaming. Further, she would set up an account where part of the respondent's monthly maintenance contribution would be utilized to fund T's travel arrangements to and from South Africa.
11. It is not an option for T to remain in South Africa as the grandparents are in their late 60s and 70s, respectively. Lately, they find it difficult to drive at night. She has on numerous occasions asked T's grandmother who is Afrikaans speaking to read him in Afrikaans so that he catches up as he is home-schooling, however, she had received no response. The respondent works in IT, a field where many EU countries are in a skills shortage. Travelling within the EU will be accessible and affordable for the respondent, as he is eligible for the Hungarian passport which grants him EU status.
12. She referred to her September 2019 correspondence to the respondent where she engaged him in her consideration of relocating to Ireland. She stated that she needed to relocate to Ireland as she has been struggling to secure employment in South Africa as her profession is not in demand in the Republic of South Africa whilst it is in Ireland. They communicated on the subject matter until November 2019.
13. In December 2020, the respondent's attorneys proposed a parenting plan, which was attached to the applicant's founding affidavit. The applicant made some suggestions to which the respondent did not respond, until February
2021. He apologized for the delayed response and that he had been awaiting legal advice. He also proposed that the matter be mediated by a mediator in Pretoria. The applicant suggested a mediator in the Johannesburg area as they both reside in Johannesburg. The applicant undertook to revert with an alternative mediator, however, he did not.

14. T is about 11 years of age, the age at which he can express his views and participate in decisions regarding what he wants. He has a good relationship with his grandmother and is excited to stay with her in Ireland. T and the respondent had had a conversation about the relocation as at some stage, he came back from spending a weekend with his paternal family upset and concerned about the issue of relocation. T is comfortable relocating and visiting and communicating with his family via telephone and other cyber platforms.
15. In her replying affidavit the applicant averred that T is adventurous as he is involved in sports like skateboarding, cycling, ice skating and martial arts, which are considered to be extreme sports by travel insurance. She tried since 2019 to have a conversation and reach an understanding with the respondent with no success. In January 2022, the respondent was to provide the names of 3 psychologists to do an assessment to establish the voice of T and no response was received. The same goes for the proposed parenting plan. She indicated she had to approach the court for the said relief.

Respondent's case

16. The respondent deposed to an affidavit indicating that the applicant had hastened to approach the court as they were still discussing the issue. Further, his attorneys attempted to arrange a meeting with the applicant which was ignored, same with his attorneys' request for the applicant's attorneys to remove the matter from the roll in October 2022 to avoid costly high court litigation.
17. He states that there is no reason for him to pay the same amount towards maintenance and retaining T in his medical aid, since the reason to relocate is a better life, and to ease the applicant's financial burdens. Which will mean a reduction in her living expenses since Ireland provides, among others, free education and a subsidized health care system. He averred that he cannot afford to pay the maintenance as agreed in August 2013 as the applicant will not need same once they are in Ireland. The applicant had not substantiated why she would need T's maintenance unchanged. It would seem the applicant was coercing him into agreeing to an unreasonable maintenance amount, under the guise of the relocation application. He had previously requested the applicant's income and expenses. He is agreeable to R4000 maintenance towards T's travelling expenses when he resides in Ireland. He indicates that he has to build up a reserve from his income for the time when he is unemployed or retired.
18. The respondent further stated that the applicant made questionable commercial decisions, like purchasing a property and converting her home into a guesthouse, resulting in her sleeping in the same room with the child. The proposed parenting plan needed to be negotiated with him. He has accepted the applicant's personal decision to relocate to Ireland, however, he denies that it would be in Tyler's best interest to do so. She has not secured employment in Ireland but speculates that her prospects of applying her training as an NLP practitioner are better in Ireland than in South Africa and has failed to provide proof. He denies that T's relocation to Ireland will enable a better relationship for him and T.

Further, the applicant is not qualified to state T will not suffer trauma when he relocates. His parents stood in for him when his demanding work schedule made participation in T's activities impossible. T does speak Afrikaans with his family, friends and Afrikaans-speaking children.

19. He averred that the application is in bad faith as the applicant has wielded her own preferences to portray the respondent in an unfavourable light, also in an attempt to obfuscate the flaws in her own reasoning. It was incumbent upon the applicant to convince him as T's father, and the court in these proceedings, that reasonable and bona fide justification for the relocation exists. He fulfilled his parental responsibilities within his capability and gradually built a relationship with T which has naturally developed. He denied that he is an uninvolved father. It was presumptuous and malicious that his relationship with T is as an older sibling than a father.

Issue

20. The issues for determination are whether the respondent has shown good cause for the late filing of his opposing affidavit and, whether it is in T's best interest to emigrate.

Condonation application

21. The applicant filed his replying affidavit 12 days later than required in terms of the rules. His reason for the late filing is that he was communicating with the applicant's attorneys. He attached the said correspondence. He averred that the correspondence was to narrow issues of the dispute and mitigate costs by separating the parties' negotiations on maintenance and logistics from the relocation application. The applicant does not necessarily oppose the condonation application save to say that the respondent is continuously delaying the matter like he has been doing since 2019.
22. In exercising the court's discretion in respect of good cause for condonation, the following was stated in the matter of *United Plant Hire Pty Ltd v Hills*[1]:

"It is well settled that, in considering applications for condonation, the court has a discretion to be exercised judicially upon

consideration of all facts, and that, in essence, it is a question of fairness to both sides. In this inquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation, therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgement, the convenience to the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive."

23. In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*,[2] it was stated that:

“This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this inquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

24. Considering the effect of not granting the condonation as well as the importance of the matter to both parties, more particularly for the minor child, this court hereby grants a condonation application in the interest of justice. The condonation application is granted in the best interest of justice.

Discussion

25. It was argued, on behalf of the respondent that while the applicant's views may be subjectively valid, they are insufficient justification for a relocation order as they merely speak of the applicant's ill-considered decision-making. She has failed to demonstrate any thoroughly considered, specific, reasonable, and compelling reasons to uproot T from the life he has known since birth. Which will result in inevitable trauma, and disruption and deprive him of the secure emotional environment provided by his close relationship with his paternal grandparents and his father.
26. Further, it was submitted that the applicant has portrayed the respondent and the minor child's relationship as insignificant, and his role as a father as dispensable, which is misleading, inaccurate and mala fide. Her motivation for relocating is less convincing given the financial implications of the intended relocation as the application is based on personal opinions and speculation, with no objective factual basis.
27. In *H.M.F v M.G.W.F*,^[3] it was held: “[w]hile attaching appropriate weight to the custodian parent's interests, courts must, however, guard against ‘too ready an assumption that the [custodian's] proposals are necessarily compatible with the child's welfare’. The reasonableness

of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the extent to which the custodian has engaged with and properly thought through the real advantages and disadvantages to the child of the proposed move are all aspects that must be carefully scrutinised by the court in determining whether or not the proposed move is indeed in the best

interests of the child.”

28. In November 2022, a social worker and family mediator, Leicha Friedman (Friedman) prepared a report on T's views regarding the proposed relocation to Ireland. According to Friedman, the purpose of the report is to hear the voice of T, understand his world and all his role-playing systems, socio-emotional functioning and emotional experience concerning the relocation. In his report, he stated that he has had sessions with the parents individually as well as 4 with T.
29. He was impressed with T's level of maturity for his age. To solidify the assessment of his maturity, Friedman indicated that he linked the Gillick Competence, which is the UK competence. It is to measure T's maturity, intelligence, experience in similar situations and ability to consider influences that may be affecting his decisions, including peer or family pressure as well as the ability to understand and evaluate the risk and benefits of their decisions. The report reflects that T is a mature, happy, intelligent, confident and engaging child who wants to relocate to Ireland with his mother. He understands he has two homes, loved by his parents and family, and, he will visit South Africa twice a year to visit his father and the rest of the family. He requests that his father travels to Ireland. He is aware of the school he would attend in Ireland and wishes to be an engineer.
30. Friedman indicated that both the applicant and respondent acknowledged each other's care and parenting of T. Whilst they respect and recognise the differences, they ensure that their relationship with T is maintained as they are aware of the parenting attributes they offer to him.
31. I agree with the submissions made on behalf of the respondent that the relocating parent has to demonstrate that their decision to relocate is bona fide and reasonable as it was held in *Jackson v Jackson*.^[4]
32. What to consider in deciding this dispute is the minor child's interest. Other considerations, as per *LW v DB*^[5], 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 to 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; and (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 children remain a vexed question."
33. Applying the above-mentioned principles in casu, it is common cause between the parties that the applicant has always been the primary caregiver of T, who is 11 years old and has lived with his mother, the applicant, all of his life. The applicant has always been the main breadwinner in the family with the respondent's contribution towards T's maintenance. All arrangements are in place for T to be relocated to Ireland. T has made his research on Ireland, by looking at google maps as he was curious about where his grandmother was living.

34. The applicant has agreed that the respondent will have contact with T, whilst he is a resident in Ireland. The relocation will be beneficial to T in that he will go to school which is a walking distance from his grandmother's house. He will continue with his sports of skateboarding, marshall arts and others. The financial burden on the applicant will be lesser as education is free, and tertiary education and health care are subsidised. He will bond with both his maternal and paternal family.
35. I am of the view that the relocation will benefit the applicant together with T. T has already expressed his wishes when engaging with Friedman in that he would like to relocate to Ireland with his mother. The applicant will continue with her online business without an obligation to pay rentals at her mother's place in Ireland. She will not necessarily need a car as T will be walking to school. The parties would need to cater for his travelling between Ireland and South Africa which is proposed to be twice a year. They agree that there has to be an amount set aside for this travelling and the respondent's monthly contribution towards maintenance has been identified for such purpose. I agree with the parties that such an amount should be set aside and utilised for the travelling expenses of T between South Africa and Ireland.
36. The parties are in agreement that the best interest of T is of paramount importance and needs to be considered. The views of the respondent as the father to T must also be taken into account. He has raised his objection and his concerns in his opposing affidavit and with Friedman. I have considered Friedman's report, the respondent's views and that of T, and I could find no cogent reasons why the application for the applicant's relocation with T to Ireland should not succeed. I find that the reasons for the applicant's relocation to Ireland with T are bona fide and genuine. I appreciate that the relationship between the respondent and T would be prejudiced to a certain extent if the relocation order is granted. However, the advantages of the relocation far outweigh the disadvantages of the relocation. I failed to understand the respondent's motivation for opposing the relocation. The relocation is in the best interest of the minor child for the reasons I have already mentioned above.

Costs

37. In matters of costs the general rule is that the successful party should be given their costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See *Myers v Abramson*[6].
38. I find no reason why I should deviate from this general rule. The respondent stated that whilst they were still communicating with the applicant, she hastened to approach the court. I do not agree with the respondent's submission as the applicant approached him in September 2019 already. The respondent would respond and in the middle of the communication would abandon the communication or not revert.

39. Accordingly, I intend to award costs in favour of the applicant against the respondent on the ordinary High Court scale.
40. Consequently, the application succeeds, and the following order is granted.

Order:

1. The applicant is permitted to remove T (the minor child) from the Republic of South Africa to permanently reside with her in Ireland.
2. The parenting plan marked Annexure “FA1” is made an order of court, save for paragraphs 10.1, 10.2, 11.1, 11.2 and 11.7 which are removed in their entirety. The rest of the paragraphs remain. The following paragraphs are included in the parenting plan to read as follows:

10.1 Maintenance contribution towards T will be R5000.00 (five thousand rand) according to the existing order dated 20 August 2013 and such amount will be set aside for travelling expenses for T between the Republic of South Africa and Ireland.

11.1 The respondent will attend T’s medical check-ups and/or

appointments, dental, chiropractors, eye, surgery and/or any chronic medication treatments during T’s visits in South Africa, by either retaining T in his medical aid or directly paying cash for the envisaged services.

3. The respondent will attend any interviews and sign all documentation which may be necessary during the process of obtaining the visa.
4. The respondent will pay the costs of this application.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

Counsel for the applicant: Ms Howard Attorneys for the applicant: Warrender Attorneys Counsel
for the respondent: Ms Niekerk Attorneys for the respondent: Du Toit Attorneys

Day of hearing:

18 April 2023

Judgment delivered on: 15 June 2023

[1] 1976

(1) SA 717(A) at 720E-G:

[2]

[2007] ZACC 24; 2008

(2) SA 472 (CC) at 447A-B

[3] (52/2005)

[2005] ZASCA 123; [2006] 1 All SA 571 (SCA); 2006 (3) SA 42 (SCA) (1 December 2005),13

[4] (18/2001)

[2001] ZASCA 139 (29 November 2001) at para 7

[5] 2020

(1) SA 169 (GJ)

[6] 1951(3) SA 438 (C) at 455

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