

SOUTH AFRICA / JUDGMENT

J.K.R.S v D.S (3095/2023) [2023] ZAMPMHC 28 (30 August 2023)

[2023] ZAMPMHC 28

COURT

Middelburg High Court, Mpumalanga

BEFORE

L J N Bam

CASE / FILE NUMBER

3095/2023

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FLYNOTES:

FAMILY – Children – Relocation –
Mother
contending that as custodial parent she can move children anywhere
within the country – She is free to move and
start a new
life, but children's rights are paramount – Decision
made on short notice – Completed arrangements
without
informing father – Conduct is not indicative of a parent who
properly considered effects of their decision
on children –
Concerns regarding disruption of children's schooling
reasonable – Order aimed at providing
temporary relief –
Children's Act 38 of 2005, s 7.
IN
THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA
DIVISION, MIDDELBURG (LOCAL SEAT)
CASE
NO. 3095/2023
(1)
REPORTABLE: NO

(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED

DATE: 30/08/2023

.

SIGNATURE

In

the matter between: J[...]
K[...] R[...]
S[...]
APPLICANT
ID
NUMBER 9[...]
And
D[...]
S[...]
RESPONDENT

JUDGEMENT

Bam AJ

- [1] This case is about the best interest of the child.
- [2] The Applicant approached this court on an urgent basis seeking an order in the following terms:
1. “That the noncompliance with the forms and service provided for in terms of the Uniform Rules of the above Honourable Court be condoned and allowing the matter to proceed as one of urgency in terms of the provisions of Uniform Rule 6(12);
 2. That the Respondent be interdicted and restrained from relocating the minor children R[...] S[...] (7), I[...] -A[...] S[...] (6), and I[...] S[...] (5) to Johannesburg, Gauteng Province or any other city, town, or province, until such time that a full assessment has been conducted by the office of the Family Advocate, alternatively an independent suitably qualified person, to ascertain the best interests of the minor children concerned.
 3. That the minor children be placed in the primary care of the Applicant pending such assessment and recommendation, and that the Respondent be entitled to exercise reasonable and regular contact with the minor children three weekends per month and for half of every school holiday or any reasonable contact in terms of section 18 (2)(b) of the Children's Act No. 38 of 2005 (“the Act”).

4. That the Family Advocate and/or a suitably qualified person be appointed to investigate the best interest of the minor children and be ordered to provide the Honourable Court with a report and recommendation of their findings within a period of 90 days.

5. Costs of the application

6. Further and/or alternative relief”.

[3] It is common cause that the Respondent has secured employment in the province of Gauteng. It is also common cause that she has informed the Applicant that she is taking the children with her and to this end she has already made preparations to enroll them in a new school in Benoni, where she will be working. The Applicant says that news of this impending relocation was communicated to him via a WhatsApp message on Friday the 4th of August 2023. The Respondent had already spoken to her attorney who had advised her that nothing is going to prevent her from taking the children with her as she is the custodian

parent. It appears that she had also already resigned from her job in preparation for moving. This court, having read the papers, agreed that the application indeed complied with the requirements of urgency.

[4] It is also common cause that the parties have just gone through a divorce which, judging from the current situation, was not a very cordial experience, and furthermore that since their separation in 2019 they have had issues in so far as the exercise of their respective rights and responsibilities towards their children is concerned. In the Applicant’s own words:

“The Respondent and I were embroiled in divorce proceedings since early 2020 when I issued summons following the irretrievable breakdown of the marriage relationship. The matter was highly contentious as both me and the Respondent were seeking the primary care of the minor children”.

It was only in September 2022 that the parties finally reached a settlement agreement, and after same was duly endorsed by the Family Advocate, that the divorce could finally be concluded.

[5] The Applicant says that after their separation, he and the Respondent had some arrangement in place whereby the children rotated between them, and this lasted until the Family Advocate and Family Counsellor’s reports recommended that residency be awarded to the Respondent.

[6] A closer look at the Settlement Agreement reveals a document involving a lot of give and take which was guided mostly by the Family Advocate’s report. Under paragraph 4 titled “Parental Rights And Responsibilities”, the agreement states the following:

“4.1 It is in the best interests of the minor children that:

4.1.1 The parties act as co-guardians of the minor children as provided for in section 18 (2)(c), 18(3), 18(4) and 18(5) of the Children's Act number 38 of 2005.

4.1.2 The parties remain co-holders of parental responsibilities and rights in respect of the minor children as referred to in section 18 (2)(a) and 18 (2)(b) of the Children's Act subject to the following:

4.1.2.1 the minor children's primary residence shall be with the DEFENDANT.

4.1.2.2 the PLAINTIFF shall have reasonable rights of contact as is per the recommendations of the Family Advocate.

4.1.2.3 the parties to have joint decision-making powers in terms of section 31 and section 18 (3) of the Children's Act 38 of 2005

4.1.2.4 decisions affecting the children's everyday care and routine shall be made by the party in whose care the children are at the relevant time;

4.2 The DEFENDANT shall use her best endeavours to furnish the PLAINTIFF with copies of all medical reports, school reports, and or any other documentation necessary to keep him informed of the welfare of the minor children. The PLAINTIFF will have full access to the school and teachers and is entitled to obtain information relating to the children.

4.3 The PLAINTIFF and DEFENDANT agree that reasonable rights of contact to the minor children shall be exercised as follows:

4.3.1 The PLAINTIFF shall exercise reasonable rights of access to the minor children according to the recommendations of the Family Advocate:

4.3.1.1 Every alternative week from a Wednesday after school until Sunday at 17h00.

4.3.1.2 Further contact once a week, without sleep over, preferably on a Wednesday from 16h00 till 18h00.

4.3.1.3 The PLAINTIFF will be responsible for picking up the minor children from the DEFENDANT'S place of residence and dropping the children off at the DEFENDANT'S place of residence after visitations.

4.3.1.4 Long school holidays to be shared equally and short school holidays to alternate between the parties;

4.3.1.5 The parties to alternate special days such as Easter, Christmas and New Year's Day;

4.3.1.6 The minor children's birthdays to alternate between the parties, alternatively the PLAINTIFF to take the minor children from 15h00 to 18h00 on the minor children's birthdays if the minor children are at school or if the birthday does not fall on a contact day. The exercise of this contact to take place at a minimum disturbance of the minor children's scholastic, social, or religious activities.

4.3.1.7 Telephonic contact to be maintained daily before 20h00, this contact may be by means of webcam, skype, SMS, e-mail or any like suitable method of communication to allow video calls as well. The DEFENDANT must ensure that she has sufficient data to enable the PLAINTIFF to have contact with the minor children.

4.3.1.8 The parties to communicate a month in advance with regard to the celebrations of the parties' birthday, Father's Day Mother's Day and any other public holidays taking into account that the celebrations of these days do not disrupt the minor children's scholastic and social activities;

4.3.1.9 The parties to improve their communication.

4.3.1.10 On Mother's Day and the DEFENDANT'S birthday she shall be entitled to take the children with her from 9h00 to 16h00.

4.3.1.11 The parties agree that both parties are not limited to the arrangements as set out above and may by prior arrangement with each other have contact and visitation of the minor children at all reasonable times.

4.3.1.12 When either parent is not able to personally collect the minor children be it from school or activities, the other parent will be informed and given the opportunity to collect them.

4.3.1.13 Both parties will ensure that the respective grandparents also spent

time with the children. Should one of the parties become deceased the other party will ensure that the grandparents still maintain contact with the minor children.

4.4 In terms of Section 6(5) both parents / parties agree to keep each other, and the minor children informed of any action or decision taken in a matter concerning the minor children and affecting the minor children."

[7] Before the divorce was finalised, the Respondent, who is a professional nurse, handed temporary residency of the children over to the Applicant in a bid to avoid infecting them with Covid-19. This was an unselfish act on her part considering the tumultuous divorce process the parties were involved in. The last physical contact that the Respondent had with the children was on 1 June 2020. In 2021, the Applicant proceeded to apply for and was granted primary residency of the minor children pendente lite in the Regional Magistrate's Court.

[8] According to her Answering Affidavit, the Applicant made it very difficult for her to maintain meaningful contact with the children during this time. She even offered to buy data for the Applicant so that she could have video calls with them, but the Applicant refused.

[9] When one has regards to the report of the Family Counselor, it becomes clear that the acrimony between the parties had begun to affect the children negatively. The Counselor believed that the conduct of the Applicant would eventually alienate the children from the Respondent after observing that the children did not interact with their mother while they

all waited for their assessment interviews. The Family Advocate in her report noted that both parties were able to look after the children each adequately and they had the benefit of extended family support on either side. Unfortunately, it was not possible to hear the children's voices at that time because they are still very young. But she also recognised that the shared residency arrangement was not suitable for the children which fact was also accepted by the parties. At the end of the process, she felt that the children would be better off living with the Respondent with both parties entitled to exercise their parental rights equally and sharing the associated responsibilities as well.

The Interdict

[10] In support of the relief claimed, counsel for the Applicant brought the following to the attention of the court:

10.1 The Respondent had known for a considerable amount of time that she intended leaving her job and should have informed the Applicant accordingly considering the fact that this decision would affect the arrangement they have in place regarding the children.

10.2 Upon hearing of this decision the Applicant attempted to set up a meeting with the Respondent which would be facilitated by their respective attorneys so that they could discuss the issue of what happens to the children in light of the new developments, but his attempts were rebuffed. He had no choice but to approach the court.

10.3 The Applicant says that as a 50 percent holder of parental rights and responsibilities he has the right to be consulted when major decisions such as the one that Respondent had already made are contemplated. In failing to inform him timeously of her intentions to move from Witbank, the Respondent not only violated his rights as a parent but also those of the children. At paragraph 46 of his Founding Affidavit, the Applicant says:

“As a coholder of parental responsibilities and rights as well as being a guardian to the minor children I have the right to be involved in major decision making involving the children and aspects that will affect their education, their emotional and psychological well-being, as well as their contact with me. I am not of the view that their relocation to an area where they have no support systems in place is in their best interest ...”

10.4 He further indicated that the older boy Reyneke was already displaying behavioral problems, and this is why he would prefer for the children not to be uprooted so suddenly, and should instead be properly prepared for the relocation, especially Reyneke.

10.5 His proposal is that the children be allowed to finish their school year and the Respondent exercise her contact rights during the weekends; meaning she can drive from Johannesburg and collect the children and bring them back on a Sunday. He feels that a change in the children's routine especially the disruption of their schooling in the middle of the academic year will affect them negatively and especially Reyneke who has already shown signs of struggling to cope previously. He ends up by saying he does not believe that mere financial benefit to the Respondent is sufficient to justify her relocating with the children.

- [11] The Respondent on the other hand says that she has the right as the custodian parent to relocate with the children and she has demonstrated in her Answering Affidavit that the terms of the Settlement Agreement will remain largely undisturbed except for just two clauses which will have to change due to the relocation. In addition, she has obtained suitable accommodation for which she will go for a second viewing before she can sign the lease. She adds further that there is no necessity to institute any investigation into the children's best interests due to the relocation because nothing has changed substantially to the extent that her rights as the primary caregiver should be disturbed. Her intentions to move are bona fide. She is getting a new job with an increased salary, and which will also allow her to spend extra time with their children since she will not be working during the weekends as opposed to the present job which she is leaving.
- [12] To the Applicant's complaint that the decision to move was rash and did not give them time to engage properly, she says in paragraph 10.7 that she must still serve notice and will be available in Witbank for another month during which they can both try and reach an amicable arrangement which will suit the new situation that they find themselves in with regards to the children. She has family and friends as well in Johannesburg, so the children will still manage to see members of the extended family and definitely make friends at the new school. Her boyfriend will also move with her to the new place. Thus, there will be sufficient support even in Johannesburg.
- [13] The Respondent further tells the court that she is being prevented from finalising the children's enrollment at the new school because of the Applicant's refusal to hand over the children's immunization certificates which the school requires for purposes of registration. She is of the view that the Applicant can afford to travel 103 to 105 kilometres to where the children's school is in order to collect them for visitation rights and another to drop them off. She herself has been travelling 112 kilometres to and from work daily so it should not be a big issue that the Applicant has to spend a few hours on the road for purposes of exercising his parental rights. On average, he would travel a lot less than she is currently doing. She also tenders to meet him halfway sometimes if he wishes to see the children when he passes through Johannesburg for work-related travel as he often does. The Respondent should have engaged with the Applicant regarding these proposals and not wait until he has approached court.

The best interest of the child.

- [14] The office of the Family Advocate was established to assist parents and the courts faced with deciding matters involving the rights of minor children during mostly divorce proceedings. It is not for the court to substitute its opinion for that of the Family Advocate who is better qualified in terms of the considerations and analysis of situations involving children especially in cases where parents cannot agree on what is in the best interest of their children. However, at the end of the day, the court has the unenviable task of deciding in favour of or against one of the parents or interested parties.

[15] Section 7 of the Children's Act number 38 of 2005 sets out factors to be considered in determining what is in the best interest of the child and amongst those is the nature of the personal relationship between the child and the parent or any specific parent. Interpretation of the factors provided by Section 7 must be considered against the backdrop of the specific circumstances of the case and then weighed against all other relevant factors to be considered in determining what would be in the best interest of the child. This demands a balancing act as opposed to just ticking boxes. In exercising its discretion and inherent jurisdiction as upper guardian of the minor children, the court has to make a value judgment on its finding of facts and to this end, the courts have always cautioned that the best interest of the child should not be sacrificed for jurisdictional formalism.

[16] In the case of *F v F* 2006 (3) SA 42 (SCA), the court held that:

‘[11] From a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involve fundamental rights to dignity, privacy and freedom of movement. Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent’s emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment. This being so, I cannot agree with the views expressed by the Full Court about the impact on S of the appellant’s feelings of resentment and disappointment at being tied to South Africa, or the extent to which her own desires and wishes were intertwined with those of S ‘did not deserve any attention’ and that ‘in arriving at a just decision a Court cannot be held hostage to the feelings of aggrieved litigants’.

At paragraph [13] the Court however says the following:

“While 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.

[17] It appears to the court that the parties have been able to manage and adapt their lives and those of the children mostly around the terms of the Settlement Agreement. The document seems to have been crafted to satisfy the needs and/or desires of the parents as opposed to advancing the best interests of their children. They have also continued their fight by using the children and tried at every opportunity to spite one another. It is strange that the

Settlement Agreement as well as the Family Advocate's report contain statements to the effect that the parties must learn to communicate with each other. This should come naturally to people who profess to have the best interests of their children at heart. They should be able, without being reminded by outsiders, to put aside their differences as well as their egos when it comes to matters relating to the welfare of their own children. The Family Advocate has cited case law in her report which the court thinks needs to be repeated, to the effect that "access is to be regarded as a basic right of the child than a basic right of a parent". (per M v M [1973] 2 All ER 81)

- [18] It does not help the situation when legal representatives give improper advice that parties can do as they please without regard to the others' rights. At the hearing of this matter, counsel for the Respondent seemed to endorse this view, adding that her client has the right to move the children anywhere within the country in her capacity as the custodial parent. She was adamant that the Applicant was trying to block her client's initiatives to better her life and move on after the divorce. He wants to control her. They ignored the Applicant's explanation of the purpose of this application

and the relief sought as stated in paragraphs 13 and 14 of his Founding Affidavit namely, to prevent the Respondent from relocating "the minor children" to Gauteng pending an investigation by a qualified expert into the impact of the move on the children, and on the enforcement of the terms of the settlement agreement relating to parental rights and responsibilities.

- [19] The court agrees with the Respondent that it is not necessary to embark on any new investigation into how the interests of the children would best be served under these circumstances. She is definitely free to move and start a new life – even if this entails just being in a different space from the environment that continues to cause her discomfort, perhaps through a transfer, or even to nurture a new relationship – it is well within her rights as a human being. The Applicant can never claim to have a say in this regard. Unfortunately, there are children involved, and their rights are paramount. There is however a nagging feeling that if the Applicant had initially acted fair and reasonably in his treatment of the Respondent when it comes to the children, she probably would have played straight cards with him from the onset regarding this relocation. Both parties are not without blame for the situation they now find themselves in.
- [20] In terms of the Settlement Agreement which was duly endorsed by the Family Advocate both parties were to be awarded full rights as guardians of their minor children. The last paragraph under the heading concerning parental rights and responsibilities says:

This means that when it comes to decisions that affect the lives of the children, especially in a material way, both parents must participate. Failure by the custodian parent to consult or inform the other rights-holder of such decisions or plans is tantamount to a violation of the recognised rights of both the parent and the children concerned. The Applicant's submissions in this regard are correct.

[21] The Respondent, for reasons best known to her decided to relocate with the children on short notice, having already completed arrangements behind the Applicant's back pending confirmation of her new employment. That conduct is not indicative of a parent who "properly thought through" the effects of their decision on the children.

Uprooting a child from a stable, familiar, supportive environment, whether within a province or to another province or even country, is a major decision even when one is a single parent. The Respondent has already somehow prepared the children, whom she says have seen the new house and are excited about the move. She has however not yet enrolled the children in any school thus far. Disturbingly she proceeds to record and file a transcript of a conversation she had with her children wherein she solicits information about the Applicant's reaction to news of the impending relocation hoping it will bolster her case in court. That is an indication that she was aware of the possible reaction of the Applicant, and now the tug-of-war and counter-accusations begin all over.

[22] In light of the above, the court views the Applicant's concerns about the disruption of the children's schooling as being reasonable. Ordinarily, the court would be indulgent towards the Respondent with regard to the two minor children who are still in pre-school, but as it was stated in PA v AS (14812/2020) [2022] ZAAGPPHC 389 (3 June

2022) at paragraph 10:

"It cannot be disputed that parents' divorce is a traumatic experience for minor children. The children often have to turn to each other as a stabilising factor in turbulent circumstances. Courts are therefore reluctant to grant orders that will result in the separation of siblings".

This sentiment is applicable to the current situation before the court, and it will therefore not be in these children's best interests to break them apart. They have already suffered through the first separation of their parents.

The court is satisfied that the Applicant has made out a case for the granting of an interim interdict.

[23] The court is mindful of the fact that both parties are equally capable of looking after the children and is also appreciative of the reasoning behind awarding residency of the children to the Respondent. The order that the court intends to make will be reflective of this recognition. This is done in order to safeguard the interests of the children and to avoid a situation whereby another application finds its way to court over ancillary issues. This order in no way replaces the terms of the Settlement Agreement but is aimed at providing temporary relief while the parties work out the intricacies of enforcement going forward. They must accept that they are bound together for life through their precious children and will have a lot more dealings about them in future. Putting their bitter history behind will help make this a tolerable exercise at the least. The Court is thankful to both counsel for their arguments and case law.

ORDER

1. The Respondent is interdicted from relocating the minor children; R[...] S[...] (7), I[...] -A[...] S[...] (6) and I[...] S[...]
- (5) from Witbank to Johannesburg or any other city, town, or province until the end of the school term for 2023.
2. In the event that the Respondent decides to relocate to Johannesburg or any other place before the end of the school term for 2023, the minor children's temporary residency shall be with the Applicant from the date of the Respondent's relocation until the end of the school term.
3. The Respondent shall exercise her full contact rights with regard to the children pending their relocation to Johannesburg or any place where the Respondent has chosen to live within the country, these to include physical visitations during weekends or leave days, phone and video contact after school hours on a daily basis or as she deems necessary.
4. The Applicant shall ensure that there is sufficient airtime and data to facilitate the above contact, failing which the Respondent shall have the right to purchase same for whatever device the children may need to use for this purpose.
5. The Applicant is directed to do all that is required to facilitate the registration of the children at a new school in Johannesburg for next year, including, but not limited to, signing forms and furnishing any documents required by the school for purposes of such registration.
6. The Respondent is ordered to pay the costs of this application.

L J N BAM

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA (MIDDELBURG LOCAL SEAT)

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ADV. J J VENTER

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