

SOUTH AFRICA / JUDGMENT

K v O and Others (26412/20222) [2022] ZAGPJHC 704 (19 September 2022) [2022] ZAGPJHC 704

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mahomed

CASE / FILE NUMBER

26412/20222

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

No. 26412/20222

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

19/09/2022

In

the matter between:

K
[....] 1, G [....]
Applicant
and
O
[....] , J [....] M [....] C [....]
1
First Respondent
ADVOCATE
E NIEUWOUDT N.
O
Second Respondent
THE
MINISTER OF HOME
AFFAIRS
Third Respondent
DIRECTOR
GENERAL OF THE DEPARTMENT OF
HOME
AFFAIRS
Fourth Respondent

JUDGMENT

MAHOMED, AJ

INTRODUCTION

1. In this matter the applicant seeks an order, that the first respondent, inter alia, hand over the children's passports to the applicant, to allow them to travel with him to Israel, on a holiday over the period 21 September 2022 until 30 September 2022. They plan to partake in religious celebrations together with their elderly and ailing grandparents, and other relatives who live in Israel.
2. The first respondent opposes the application, in that she fears that he will not return to South Africa with their children. The first respondent fears that the applicant intends to relocate to Israel with their three minor children. Counsel for the first respondent informed the court that currently there is litigation pending against the applicant, for a claim in terms of a universal partnership and a claim for maintenance. Counsel proffered that the time was "ripe" for the applicant to relocate. The first respondent's counsel submits they can travel there on another occasion, when the full report of their clinical psychologist is available. She submitted that her executive summary is insufficient to assist this court.

BACKGROUND

3. The applicant is a citizen of Israel, and has been living in this country since 2006, on a renewable visa. He is a businessman, a director of a company.
4. The parties were in a relationship from 2008 until January 2019, and they had three children together, he provided for most of their living expenses. In 2019 the parties separated.
5. In March 2019, the High Court Pretoria, ordered that the children be removed from the first respondent's care and that they live with the applicant, after the first respondent had removed them from the family home for 35 days, without the applicant's knowledge and consent.
6. The first respondent's contact with the children was supervised, through the years since the order and in June 2022, the parties concluded a parenting plan. This plan provided, inter alia, that both parties would do the necessary to obtain the passports of the minor children, and once issued they would be kept by a third party, currently the minor children's legal representative, one Advocate Niewoudt. In the event the parties required to use the passports the party wishing to do so would on written request, two weeks prior to the planned travel, obtain the passports, from her.
7. Clause 7.5 thereof provides that neither party shall take the children out of South Africa, without the consent of the other party, which consent must not be unreasonably withheld.
8. The evidence is that pursuant to this plan, the parties obtained passports for each of their children when the applicant retained one and the first respondent held the other two passports.
9. The applicant prays for an order authorising him to remove his three sons E [...], R [...], and I [...] 11("the minor children") from South Africa for a holiday during the period 21 September 2022 to 30 September 2022 and for the first respondent to hand over the two passports to him.

URGENCY

10. This matter was allocated to my roll on an urgent basis, on Wednesday for the Thursday. The directives in this Division, dated 4 October 2021, cautions legal representatives to ensure that the matter is "genuinely urgent" to deviate from the usual practise of enrolling a matter on a Thursday for hearing on the following Tuesday.
 - 10.1. This is to ensure that the judge hearing the matter has sufficient time to read the papers and the opposing party has sufficient time to respond in the matter. The papers comprised 110 pages and 55 annexures, which were to be fully considered in less than 24 hours, to make a finding in "the best interests of minor children."

10.2. The directive also aims to avoid jumping the queue when more urgent matters could be attended to.

10.3. The matter was not “genuinely urgent”, the applicant could have followed the normal course and still be heard before he was due to depart for Israel on 21 September 2022. Genuinely urgent is where a party would suffer irreparable harm if an order were not granted in the week.

11. I heard counsels’ submissions on this point and decided to hear the matter in that it was relevant to the constitutional rights of the children^[1] and the court being the upper guardian is enjoined to protect those rights and grant an order “in the best interest of the children.”
12. The evidence is that the second respondent, Advocate Niewoudt, is the legal representative for the children and in correspondences dated 14 September 2022,^[2] she states in relation to “urgent application”

“I have perused the papers and have nothing to add as far as the factual allegations made by the parties.”

13. The further evidence is that a clinical psychologist Dr Roux has been investigating the case of the minor children and the parties’ rights to care and contact. She released an executive summary; her detailed report is outstanding.
14. In her executive summary,^[3] Dr Roux highlights the characteristics of each of the parties, wherein the applicant was found to have a controlling personality and narcissistic. In her report she stated:

“however overall, it cannot be said that he is psychologically unhealthy, but rather that he will experience episodes of mild to moderate functional problems. Most relevant to this matter is Mr K [...] 1’s tendency to disregard authority and he is not particularly rule bound in his functioning.”

Regarding the first respondent, she states:

“the psychometric profiles indicate that Ms O [...] can be temperamentally fickle and display rapidly shifting and shallow emotions, she can be hot headed while on other occasions she can be quite passive and submissive when faced with hostility.... found to have a generalised fear and apprehension existent in her. ... she is learning to cope with these fears. She has good coping skills. ... Ms O [...] is not impulsive; she is not aggressive, and she does not present as being a threat to others or herself.

Regarding the children, she states:

“the children were all found to be struggling psychologically with the separation of their parents, and in particular with the very limited contact they were having with Ms O’Neill. ... it is evident that they love both their mother and their father, and they also have a good relationship with each other.”

15. She recommends:

“E [....], R [....], and I [....] 11 should be facilitated to obtain passports for international travel. ... Mr K [....] 1 should be permitted to take the children on trips out of South Africa, including Israel. As Mr K [....] 1’s family the children’s grandparents reside in Israel it is important that the children are facilitated to remain connected to their paternal family.

The Applicant’s Case

16. Advocate Strathern appeared for the applicant and submitted that her client has no plans to relocate to Israel, he has businesses in this country. She referred the court to documents, his auditors report on his business, his company’s ownership of immovable property that is of substantial value, his lease agreement for his home which he renewed to expire in September 2023, proof that he has secured renovation projects which are to be completed in 2023.
17. Counsel argued that the above is evidence of his commitment to this country and submitted that he is only seeking to visit his family with his children so that they may integrate and establish familial bonds. The children have cousins of their age in Israel and his youngest child has not met his parents.
18. His parents are elderly and ailing, they are unable to travel.
19. Counsel proffered that her client has communicated his intentions to take the children on holiday to Israel since April 2021 however the pandemic interrupted plans. She submitted that in June 2022, when the parties applied for passports, the first respondent knew that the applicant intended to take the children to Israel.
20. She submitted on 23 June 2022 the recordal in the parenting plan, for consent required for travel and withholding of passports, was specifically included to avoid the problem her client is faced with in this matter.
21. She submitted the applicant had informed her on that day of his plans and she knew that he had plans to take the children “on holiday to Israel.”
22. The evidence is that the applicant has contacted the first respondent on several occasions during August 2022 for her consent and completion of the forms with consent of the parent.
23. The first respondent, on occasion ignored the inquiry, or replied that she would revert to him.
24. In reply to his inquiry on 16 August 2022 to him, she reminded him that he has not provided her, in terms of the parenting plan, the places, and dates he will travel and the details of hotels. She undertook to revert to him but fails to take a position on the consent.

25. There was a flow of correspondences, through the month of August 2022, with requests for her consent, at no time did she convey her discomfort with the granting of consent for her children to travel to Israel.
26. On 7 September 2022, in correspondence from the respondent's attorney,[4] the applicant learnt for the first time, that the respondent refused to consent to their travel.
27. Ms Strathern submitted that the first respondent was dilatory, and it took her 23 days to communicate her response the applicant was forced to approach this court at this late stage for an order.
28. Her inquiry for travel details, must demonstrate that she was at the least considering consent to travel, but later refuses only on 7 September 2022.
29. Counsel submitted that the respondent should be ordered to pay the cost as she is unreasonably withholding consent, when only a few months prior she had signed a parenting plan which was drafted to prevent such behaviour and obviate the need for any litigation.
30. The applicant annexed various documents, which served to prove his citizenship status, his application for renewal of his visa, his directorship in his company, his ownership of property and tax returns amongst others, to prove that he considers South Africa as his home and that he had no intention to relocate to Israel.

The Respondent's case

31. Advocate Howard appeared for the first respondent and argued that the application ought to be dismissed with costs on a punitive scale, in that the matter is not urgent, she referred the court to the tests set out in the practise directives of this division, the children are to travel only on 21 September 2022 and they would not have suffered

any irreparable harm, if the order were not granted in the week that matter was heard.

32. The urgency was self-created in that the applicant purchased travel tickets without her consent at his risk and the other expenses that he lists are yet to be incurred. She argued that the children would

not suffer and harm if they did not travel at this time.

33. Ms Howard proffered that the issue of passports and her consent to travel has been a contested issue between the parties since 2019, when she left the common home with the children's passports.
34. She has always been concerned that he would take them to Israel and never return.

In this regard counsel referred me to supporting photographs of packed bags, correspondences with friends that the applicant did not want the children to know their mother, proof of deposits of monies into off shore accounts, which demonstrated the applicant's intentions to leave permanently with the children.

35. She submitted that the clinical psychologist Ms Roux, has not had an opportunity to read the papers and complete her report. Counsel submitted that this expert's input is critical to the determination of the dispute between the parties.
36. Counsel conceded that the applicant is lawfully in SA, and that his application for renewal of his visa is pending. Although this was no longer a concern for the respondent, she pointed out that the applicant has no regard for the law or authority as identified by the psychologist.

She submitted that he used multiple identity numbers on various important documents which would pose a problem if the authorities would have to trace him, or it may pose a problem if he were not allowed back into the country and the children will suffer the same challenge on entry/return to South Africa.

36.1. She proffered that the applicant relies on documents to prove he is a director of a company, however his identity number differs from other official documents.

36.2. Counsel furthermore questioned, his payment of UIF on behalf of his employees, his delay in payment of taxes, his alleged misrepresentation of the value of the property his company owns, his bank statements which reflect a negative balance, except for a trust account balance that reflects a sizeable figure.

36.3. In the main counsel argued that his businesses are not viable, he is in financial trouble and his supporting documents cannot be relied upon.

36.4. She argued that his lease agreement for his and the children's home will before this court, will expire at the end of September 2022 and he has not renewed it. If he were to return the children will have no place to live.

37. It was proffered that he was also misleading court when he relies on medical reports of his parent's condition that are over a year old and the itinerary suggests that these frail parents will be travelling to a place called Eilat, which is a long way off from their home and where they plan to spend 90% of their time. Counsel submitted that the applicant's version does not appear reasonably possible true when parents are so unwell that they choose to take a holiday so far off from their home.
38. Counsel implored the Court to also note that September/October is the commencement of the academic year in Israel for the children to be admitted into a school there.
39. The further evidence is that there is litigation pending, there is a maintenance application and a claim arising from a universal partnership litigation, which the applicant must answer to.

40. She submitted that this is the best time for this applicant to leave and never return.
41. Ms Howard submitted the applicant does not unreasonably withhold consent, and the Court must see her version against the conspectus of the evidence that the first respondent presents.
42. Ms Howard submitted that the Court should not lose sight of fact that the expert was so concerned herself for the applicant's character, that she recommended that he pay over R300 000 to the first respondent to be held in trust should she have to litigate to bring the children back into the country.

It is noteworthy the applicant tendered R100 000, however it is argued that he can pay more given the healthy state of his trust account.

43. In reply Advocate Strathern submitted that the respondent's attack is based on their interpretation of documents and not on objective evidence.
44. The company certificates annexed must be sufficient proof, but rather they create an image that is opinion based and feeds into Roux's opinion of the applicant's character.
45. This court must focus on whether it is in the best interest of the minor children to take this holiday to see their ailing grandparents and participate in celebrations over an auspicious time of Rosh Hashnah, to enhance the children's religious and cultural life.
46. She argued there is no reason for him not to return to South Africa and she directed the court to a lease agreement which was renewed on the day of the hearing.
47. There is no evidence from the children that their father is relocating them, there no evidence that the children have even expressed any view on their holidays.
48. Counsel for the applicant argued the first respondent sues in universal partnership, she must have an idea as to the value of his businesses and their partnership. Ms Strathern submitted the first respondent, is being obstructive and belligerent.
49. This matter could have been brought on the normal roll with enrolment on the Thursday for the matter to have been heard on the Tuesday. No leave was sought from this court to hear the matter as one of extreme urgency, as it was enrolled on the Wednesday, for hearing on the next day.
50. I noted the first respondent's submissions and agree that both the respondent's legal team and this court were placed under severe pressure to afford this matter a fair ventilation of the dispute.
51. The court is enjoined to decide on "what is in the best interests of the children", regrettably their parents could not decide together.

52. The first respondent raises certain valid concerns when one considers the conspectus of the evidence before this court.
53. However, the question then is what about the children's rights to freedom of movement, as enshrined in our bill of rights.
54. The Children's Act provides for the development of their religious and cultural rights.
55. It is reasonable to state that the children are in their formative years in their religious and cultural development.
56. They will benefit from their visit to Israel, a land of multiple religions and rich history.
57. The disputes raised are not "their" disputes. Ms Roux identified that the children love both their parents and are themselves psychologically challenged by their parent's disputes and behaviour.
58. It is for this court to balance their interests against those of both their parents, who appear to dislike one another, despite their several years of living together and sharing their three children.
59. This court is guided by the expert evidence against the facts in this matter.
60. The applicant is described as having a controlling personality, with no regard for authority, by an independent expert, who provided her professional opinion.
61. The respondent is described as a fickle and hot headed, personality but who is working on her coping skills.
62. The expert recommended that the applicant be permitted to travel with the children to Israel and I am not persuaded that a more detailed report from her would change her recommendations as argued by Ms Howard. She submitted an executive summary, details outstanding would flesh out that summary.
63. This court is also cognisant that an expert opinion must serve as only a guide and the court must apply its mind based on the evidence before it in arriving at a finding.
64. It may well be that the parties' personalities may endure for a long while yet and the children cannot wait around until they resolve themselves.
65. I am of the view that their Constitutional rights to freedom of movement must prevail and that they must be assisted to travel to Israel on the identified dates for "the period" as set out in the papers.
66. I noted that the applicant has tendered R100 000 for any litigation which might ensue arising from his failure to return the children to South Africa.

67. I am of the view, given the rate of exchange and the costs of litigation this amount must be R300 000, which is to be retained in the trust account of the first respondent's attorney and returned, with interest earned within 3 days of the children's return.

68. I noted that the third and fourth respondents have filed a notice to abide.[5]

Accordingly, I make the following order:

1. The first respondent is to immediately deliver or cause to be delivered the minor children's passports to the offices of the Applicant's attorneys of record by no later than 15h00 on Monday 19 September 2022.
2. The minor children R [...] I [...] 2 K [...] 1, E [...] A [...] K [...] 1 and I [...] 1 C [...] 2 K [...] 1, are permitted to travel to Israel for the period 21 September 2022 until 30 September 2022, together with the applicant.
3. The consent required from the first respondent in terms of paragraph 7.5 of the parenting plan signed between the Applicant and the first respondent dated 23 June 2022 and made an order of court on 23 June 2022 is dispensed with.
4. The first respondent is directed to make the minor children available to be collected from her home by 12h00 on 20 September 2022, should they be in her care.
5. In the event of the first respondent failing to comply with the orders within an hour of the date and time directed, the Sheriff of this Honourable Court is ordered to collect the passports and remove the children, with the assistance of a social worker, from the first respondent's control, or any other persons in whose control they may be and deliver them to the Applicant.
6. The applicant may return to this Honourable Court on the same papers, duly supplemented, in the event of the first respondent failing to comply with the provisions of this order.
7. The applicant is ordered to pay over a sum of R300 000 into the trust account of the respondent's attorneys of record, prior to departure to Israel on 21 September 2022.

COSTS

8. I make no order as to costs.

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 19 September 2022.

Date of Hearing: 15 September 2022

Date Delivered: 19 September 2022

Appearances

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Ref. GL Rachbuch/HEM1/0001

[1] Section 21 Constitution of the Republic of South Africa Act 108 of 1996

[2] Caselines 009-1

[3] Caselines 001-113

[4] Caselines 001-81

[5] Caselines 0012-1

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