

SOUTH AFRICA / JUDGMENT

# L.S.M v T.C.T (3701/2021) [2024] ZAMPMHC 58 (8 November 2024)

**[2024] ZAMPMHC 58****COURT**

Middelburg High Court, Mpumalanga

**BEFORE**

MBG Langa

**CASE / FILE NUMBER**

3701/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

**Source record****SAFLII****Note: Certain**

**personal/private details of parties or witnesses have been  
redacted from this document in compliance with the law  
and SAFLII**

**Policy****FLYNOTES:**

FAMILY – Children – Relocation –  
Refusal  
to consent – Applicant relocated to Mauritius without child  
– Respondent's refusal caused separation  
between child  
and parent – Not in child's best interest –  
Recommendations that primary residence of child  
should be with  
relocated applicant – Respondent unable to raise any  
concerns of merit about child's wellbeing  
– Relocation  
is bona fide and reasonable – Reasons for refusal to consent  
are selfish – Application succeeds.  
IN  
THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA  
DIVISION (MIDDELBURG LOCAL SEAT)  
CASE  
NO:3701/2021  
(1)  
REPORTABLE: NO  
(2)  
OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

08/11/2024

SIGNATURE

In

the matter between:

L[...]

S[...]

M[...]

APPLICANT

AND

T[...]

C[...] T[...]

RESPONDENT

## JUDGMENT

LANGA J:

Introduction and concise facts

- [1] This is an application involving the relocation of a minor child O[...] M[...], to Mauritius with the Applicant who is her mother. Although the child was born out of their relationship, the Applicant and the Respondent are not married to each other. It is common cause that the minor child was born on 5 April 2012 out of a romantic relationship between the Applicant and the Respondent. The parties' relationship broke down after the child was born. When the minor child was 2-years old, the Applicant married her husband and together they have three children.
- [2] It is further common cause that in 2015 the Applicant and the Respondent entered into a parenting plan in terms of which the primary care and residence of the minor child was awarded to the Applicant subject to the Respondent's right of reasonable contact. In April 2021 the Applicant relocated to Mauritius to take up the position as Third Secretary Administration at the South African High Commission in Port Louis, Mauritius. The Respondent refused to grant the necessary parental consent for the minor child to relocate with the Applicant to Mauritius.
- [3] The Applicant nevertheless relocated to Mauritius without the child. Subsequent to that the Respondent enrolled the minor child at a boarding school in Groblersdal. It is common cause that in January 2023 the minor child went to live with the paternal grandparents (the Respondent's parents) in Mohlaletse village.
- [4] In the Notice of Motion the Applicant seeks, inter alia, the following relief:

*"1. That the Applicant be and is hereby granted leave to remove the minor child: O[...] M[...], a girl born on the 5th of April 2012 (hereinafter referred to as "the minor child") from the Republic of South Africa in order to relocate to Mauritius on a permanent basis.*

2. THAT the Applicant further be awarded the primary residency, sole care and custody in respect of the minor child for as long as she resides in Mauritius with it being understood that the respective positions would be revisited Upon the Applicant permanently returning to the Republic of South Africa,

3. THAT, in order to facilitate the aforesaid, the Respondent is ordered and directed to:

3.1 Sign all documentation required by the South

African and Mauritian authorities to remove the minor child from the Republic of South Africa to Mauritius;

4. That in the event of the Respondent failing to comply with the order in 3 above within five(5) days of this order, a duly authorised Immigration Officer/Official be and is hereby authorised and/or directed to sign any documentation on behalf of and/or in the stead of the Respondent;

5.THAT the Respondent be and is hereby directed to sign all documentation required by the South African and/or Mauritian authorities in order for the minor child to obtain/secure a passport for such entry purposes;

6. THAT the Respondent be and is hereby afforded contact with the minor child as follows:

6.1 daily Skype contact;

6.2 daily WhatsApp contact;

6.3 overnight contact when the Respondent is in Mauritius;

6.4 reasonable contact otherwise arranged after consultation between the parties,

7. Cost in the event of this application being opposed

8. Further and/or alternative relief. "

Facts and litigation history

[6] The report stated further that although the grandparents are trying to raise the child, they however indicated that they have realised that the child wants to live with her mother and siblings and do not have any objection to that. The Respondent on the other hand informed the Family Counsellor that the reason he has refused to consent to the minor child's removal from the Republic of South Africa was that he was not properly consulted in advance by the Applicant. The Family Counsellor concluded from this that the Respondent was selfish and not concerned about the well-being and the best interest of the minor child.

- [7] The Family Counsellor was of the view that the Respondent took a decision of separating the minor child from her mother, her siblings and the family environment that she has been accustomed to and placed her in an unfamiliar environment because of his personal motives. The Family Counsellor opined that while the grandparents can always assist, it is however the duty and responsibility of parents to raise their children.
- [8] Despite stating that the child desired to live with her mother and that the Respondent was selfish, the Family Counsellor nevertheless made recommendations that only until 30 June 2025, the primary care and residency of the child should be with the Respondent assisted by the grandparents. He was of the view that only from the 1 July 2025 could the child relocate and be in the primary care and residence of the Applicant. These recommendations were apparently based on the assumption that the Applicant would be returning to South Africa at the end of her contract abroad and that it will be at the end of the school term as well.
- [9] However, on 9 May 2024 the Applicant disputed and rejected the Family Advocate's recommendations and contended that same was not in the best interest of the child and were inconsistent with the Family Advocate's factual findings as well as the views and wishes of the minor child. In the light of the Applicant's dissatisfaction with the report, the court subsequently postponed the matter to 29 October 2024 for a report to be obtained from a psychologist regarding the possible emotional effects, if any, which the relocation at the end of the second school term as recommended by the Family Counsellor, may have on the child's school activities, routine and stability.
- [10] The report of the Clinical Psychologist Ms Madileng was indeed procured on 27 June 2024. In her report she recorded that she interviewed all the role players in the case including the Applicant, the Respondent as well as his parents. During the interviews, the grandmother confirmed that she is not against the child's relocation to Mauritius with the mother as long as she will as she will not lose her identity and will be cared for. Concerning the Respondent, the Psychologist mentioned that the reason for his dissatisfaction with the relocation is that the Applicant did not consult with him in time and further that he would like to have the visitation programme re-arranged as they had a shared custody prior to the child's leaving. He also wants more and frequent communication with the child. The Applicant on the other hand maintained that it will be to the advantage of the child to join her and her family especially in the light of the fact that she will be exposed to academic programmes of international standard.
- [11] Clinical Psychologist finally formed an opinion that considering all of the information at her disposal, the child will be better off with her biological mother for the development of the mother-daughter and siblings relationship. Developmentally the Clinical Psychologist was of the view that given the quality and standard of education in Mauritius, O[...] will educationally benefit from the relocation. After communications and consultations with all concerned, the Clinical Psychologist essentially recommended that the court consider

placing the minor child (O[...]) with her biological mother and siblings with immediate effect.

## Discussion

- [12] The issue for determination in this matter is clear. It is whether the Applicant should be granted the leave to remove their minor child O[...] M[...] from the Republic of South Africa for the purposes of relocation to Mauritius. It is clear from the reports placed before court that the golden thread in the recommendations is that the primary residence of the child should be with her mother.
- [13] The Family Counsellor's report is however ambivalent and confusing. Although the Family Counsellor recommends that the relocation be delayed until mid-2025, he however also recommends that the primary residence of the child be vested with the mother. While he states that the child should not relocate if the mother (Applicant) is returning to South Africa next year, at the same time he states that if her contract is extended beyond 2025 the relocation should be in the best interest of the child. It is inconceivable how the recommendation regarding the primary residence can be implemented if the child remains with the grandparents as he suggests.
- [14] However despite these confusing recommendations by the Family Counsellor, it is in essence clear that he and the Clinical Psychologists are *ad idem* that it will be in the best interest of the child for her to relocate with her mother and join her siblings and family that she has lived with from her time as a toddler.
- [15] It is further clear from the interviews conducted that the grandparents of the child, who are currently taking care of her, are also not against the idea of her proposed relocation. They have no fears about her well-being should she relocate with her mother. Equally it is clear that the Respondent does not in principle oppose the relocation. Although he is opposing it, the Respondent however was unable to raise any concerns of merit about the child's wellbeing. He instead appears to be in agreement that the Applicant is capable of bringing up and taking care of the child. He has not raised any concern about the Applicant's and her husband's family and their capacity to take care of the child.
- [16] In addition, and most importantly the child has also indicated what she would like to see happening. She is indeed at the age where she can be able to contribute to the discourse. According to the reports the child has stated that although she loves her father and grandparents who look well after her, she would be happier with her mother and siblings.

[17]

Section 10 of the Children's Act, Act 38 of 2005 provides that every child of an age, maturity and stage of development to be able to participate in any matter concerning that child has the right to participate in an appropriate way and that views expressed by the child must be given due consideration. In *McCall v McCall* 1994 (3) SA 201 (C) the court held that once the court is satisfied that the child has the necessary intellectual and emotional maturity to express his

preference and a genuine and accurate reflection of his feelings towards and relationship with each of his parents, weight should be given to his expressed preference. In the case of *Brossy v Brossy* (602/1 7) [20721 ZASCA 157 (28 September

2012) the Supreme Court of Appeal confirmed the principle held that a child's participation is primarily a matter of recognising that the child is an autonomous individual.

[18] In the light of the above, although O[...] is still a child, her voice is however still important in this determination and cannot be ignored. Her voice and preference is clear. She would prefer to be with her mother and family that she is used to. This is consistent with the child's history if it is remembered that until the Applicant's move to Mauritius and the Respondent's refusal to consent to the relocation, the child was staying full time with the Applicant and siblings from a young age. It is therefore not surprising that she prefers to be with the Applicant and her family.

[19] It is obvious that the relocation of the child to another country, whether permanent or temporary, will always have an impact of the other parent. In *LW v DB* 2020

(1) SA 169 (GJ) P176 at par 20 the court dealing with a similar application stated held that where a custodial parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodial parent is shown 'to be bona fide and reasonable. It held further that the 'best interests' of the children in the context of relocation of one parent with the child(ren) the courts are required to assess the role played by each family unit and each parent in the lives of these child(ren). (my emphasis).

[20] In the present case it cannot be said nor was it suggested that the Applicant's decision to relocate is not bona fide and reasonable. All that the Respondent seems to be raising is that it should not be granted on a permanent basis as alleged in the notice of motion. It is however clear from the papers that even though the Applicant is asking for leave to relocate permanently, the fact is that the Applicant's relocation is dependent on the extension of her contract overseas. She is in reality not seeking a permanent relocation in the real sense of the word. However, even if she was, that does not present a hurdle to the granting of such an application. What is important is whether the relocation is bona fide and reasonable.

[21] It is further trite that in making a determination on this matter, the court must, as enjoined by the Constitution, consider what is in the best interest of the child. In the case of *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) at 261 H, the court stated the following in respect of the best interests of the child in a matter concerning custody:

"The interests of the minor mean the welfare of the minor and the term 'welfare' must' be taken in its widest sense to include economic, social, moral and religious considerations, Emotional needs and the ties of affection must also be taken into account and in the case of older children, their wishes in the matter cannot be ignored. "

- [22] In the present case I am satisfied that the decision by the Applicant to relocate is bona fide and reasonable considering it was prompted by her getting deployed by her employer in another country. It was taken for the purposes of better employment and greener pastures. There are no mala fides as she clearly moved to Mauritius to pursue better employment opportunities and a career development.
- [23] On the other hand the Respondent's reasons for his refusal to consent to the relocation of the child are clearly selfish as the Family Counsellor correctly noted. In the main he is aggrieved that he was not properly consulted in advance by the Applicant. He does not argue that the interest of the minor child will be negatively impacted on by the move to Mauritius. It should also be noted that despite his refusal to consent to the relocation of the child, the Respondent is not physically staying with the child on a full-time basis. He has instead delegated the duty of bringing up and caring for the child to his aged parents while the Applicant is able and willing to provide for the child's emotional, educational, social, and economic needs amongst other things.
- [24] Considering that he has had no time for the child the Family Counsellor correctly concluded that the Respondent is not in a position to live with the child. From the report one cannot resist the conclusion that the Respondent's aim is just to frustrate the Applicant. His decision is the one which unfortunately negatively impacts the child. Apart from now keeping her away from the parents she has been staying with her whole life so far, she is also denied better education opportunities as a child.
- [25] Concerning the Family Advocate's recommendation that the minor child should continue to reside with her paternal grandparents until June 2025, it is clear that this recommendation is not consistent with the factual findings. The child's education and progress will not be hampered by her immediate relocation. The undisputed evidence placed before court is that the child's educational needs will be given preference as the children of diplomats are given preference in that country.
- [26] Furthermore, the Family Counsellor reported that child's grandfather indicated that although they are trying to assist in raising the minor child, there however are limitations. While they are clearly not reluctant to assist in caring for the child, it is nevertheless equally clear that the child would get better love and care from her mother.
- [27] In conclusion I am satisfied that having regard to the above stated, there is no factual or legal justification for withholding or delaying the leave to relocate the child with the Applicant. The evidence clearly demonstrates that it will be in the best interest of the child for the relief sought in the notice of motion to be granted.
- [28] Concerning the Respondents visitation rights, there is no question that he is entitled to have reasonable contact with the minor child. Although the relocation will obviously not make it easy for him to have frequent physical contact with the child as much as he would like, it will nevertheless still be possible for him to have alternative meaningful contact with the

child. Technology is so advanced today that there are alternative methods of communication such as inter alia video/WhatsApp calling and telephonic. There also appears to be no issue with physical contact which can be arranged by the parties whenever possible.

[29] In the light of the above, the application sought ought to be granted with costs. Based on the rule that costs follow the result, the Applicant is entitled to the costs of the application on party and party scale.

#### Order

[30] In the result I make the following order:

1. That the Applicant is hereby granted leave to remove the minor child O[...] M[...], (a girl born on the 5th of April 2012) from the Republic of South Africa in order to relocate to Mauritius on a permanent/temporary basis;
2. That the Applicant further be awarded the primary residency, sole care and custody in respect of the minor child for as long as she resides in Mauritius. The respective positions would be revisited upon the Applicant permanently returning to the Republic of South Africa;
3. That in order to facilitate the aforesaid, the Respondent is ordered and directed to:
  - 3.1. Sign all documentation required by the South African and Mauritian authorities to remove the minor child from the Republic of South Africa to Mauritius, such to include but not limited to;
  - 3.2. His consent in the form of an affidavit authorising the removal of the minor child and any other stipulated documentation required by the Immigration Act 13 of 2002 (as amended) together with the Regulations in respect thereof;
  - 3.3. All the documentation required by the South African and/or Mauritian authorities in order for the minor child to obtain/secure a passport for such entry purposes;
  - 3.4. Any other application form, including immigration consent forms required to authorise the minor child relocating with the Applicant to Mauritius;
4. That in the event of the Respondent failing to comply with the order in 3 above within five(5) days of this order, a duly authorised Immigration Officer/Official be and is hereby authorised and/or directed to sign any documentation on behalf of and/or in the stead of the Respondent;
5. That the Respondent be and is hereby afforded contact with the minor child as follows:
  - 5.1. Daily Skype contact;
  - 5.2. Daily WhatsApp contact;
  - 5.3. Overnight contact when the Respondent is in Mauritius;

- 5.4. Reasonable contact otherwise arranged after consultation between the parties.
6. The Respondent is ordered to pay the costs of the application on party and party scale.

MBG LANGA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Advocate M De Klerk For the Respondent: Advocate KK Kekana Date of hearing: 29 October 2024 Date delivered: 08 November 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be the 08 November 2024 at 14h00.

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMHC/2024/58.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/lsm-v-tct-unknown-topic-ampmhc-2024>

Prepared on 9 October 2026 · Esheria